

Mountains, Telescopes, and Broken Promises: The Dignity Taking of Hawaii’s Ceded Lands

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DOI: <https://doi.org/10.15779/Z38CC0TV0T>

[†] J.D., University of Southern California Gould School of Law, 2020. Thank you to Professor Jonathan Barnett for guidance on initial drafts, and to the staff of the AALJ for their wonderful edits and feedback.

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INTRODUCTION

The morning of July 15, 2019, thirty five Native Hawaiian *kupuna* (elders) lined up across the access road to Mauna Kea to protest the construction of the Thirty Meter Telescope (TMT) on the mountain's summit.¹ While these protests focused on Native Hawaiians' long-standing opposition to the TMT,² they also symbolized a much larger conflict dating back to the overthrow of the Hawaiian Kingdom in 1893.³ Mauna Kea is part of approximately 1.8 million acres of "ceded land" taken from the Hawaiian Kingdom when it was annexed by the United States—a taking still heavily contested by Native Hawaiians today as not only illegal, but also severely detrimental to their culture, beliefs, and livelihood.⁴ Accordingly, the TMT protests are about much more than just the right to build on a mountain. They are a conflict over how to respect the dignity of Native Hawaiians and their cultural beliefs, while acknowledging the developmental interests of the state, who still owns most of these lands. Is it possible to balance these interests, or are they inherently at odds? What constitutes an adequate solution?

To consider these questions, this Article will use Professor Bernadette Atuahene's "dignity takings" framework as a basis to analyze the historic

1. Trisha Kehaulani Watson-Sproat, *Why Native Hawaiians Are Fighting to Protect Maunakea From a Telescope*, VOX, (July 24, 2019, 12:30 PM), <https://www.vox.com/identities/2019/7/24/20706930/mauna-kea-hawaii> [<https://perma.cc/SZV6-TB2K>].

2. *Id.*

3. Kristen Lam, *Why are Jason Momoa and Other Native Hawaiians Protesting a Telescope on Mauna Kea? What's At Stake?*, USA TODAY (Aug. 21, 2019, 8:55 PM), <https://www.usatoday.com/story/news/nation/2019/08/21/mauna-kea-tmt-protests-hawaii-native-rights-telescope/1993037001> [<https://perma.cc/QZ7H-KSX5>]; see also *In re Conservation Dist. Use Application (CDUA) HA-3568 for the Thirty Meter Telescope at the Mauna Kea Sci. Reserve*, 431 P.3d 752, 773 n.21 (Haw. 2018).

4. Lam, *supra* note 3.

and current issues surrounding Hawaii's ceded lands and argue that (1) the ceding and subsequent use of these lands constitutes a dignity taking, (2) dignity is central to understanding and advancing Native Hawaiian⁵ interests, and (3) two potential remedies—compensation and legal personhood—may help restore dignity.

Part I of this Article will explain why dignity restoration matters for the Native Hawaiian community. Part II will discuss the history of Hawaii's annexation, the formation of the ceded lands, and why some argue that Hawaii's annexation and the taking of the ceded lands are illegal. Part III will introduce the dignity takings framework and apply it to Hawaii's ceded lands. Part IV will consider the importance of dignity restoration, first through an analysis of several "incomplete" forms of restoration, and then through a consideration of sovereignty and self-determination. Part V will introduce Mauna Kea and the TMT dispute, discuss the underlying conflicts between Western science and indigenous culture, and explain their relationship to dignity. Finally, Part VI will consider two potential dignity-restoring remedies: compensation and legal personhood.

I. WHY NATIVE HAWAIIAN DIGNITY RESTORATION MATTERS TODAY

Dignity restoration matters for Native Hawaiians because "dignity, or rather the stripping away of dignity, has been at the heart of the Hawaiian experience for nearly 200 years."⁶ This dispossession of dignity, as well as its impacts on the social, economic, and health-related trajectories of Native Hawaiians since the first Western contact, creates a complex mix of detrimental forces that continue to impact the Native Hawaiian people today.⁷

A. *Bettering Native Hawaiian Health*

Native Hawaiians have some of the poorest health outcomes of any group in the U.S.⁸ They suffer disproportionate rates of cardiovascular and

5. HAW. REV. STAT. § 10-2 (1993) (explaining that "native Hawaiians" are "descendants of not less than one-half part of the races inhabiting the Hawaiian Islands prior to 1778," and "Hawaiians" are anyone who is a descendant of the people who inhabited the Hawaiian Islands prior to 1778). While this Article recognizes the legal difference between "native Hawaiian" and "Hawaiian," the term "Native Hawaiian" will be used here for analytical simplicity to refer collectively to the community and individuals who are descendants of the original Hawaiian people, unless otherwise specified. Additionally, terms such as "Native," "indigenous," and "indigenous people" will refer generally to aboriginal groups (including Native Hawaiians) who are considered the first or original inhabitants of an area.

6. Robert J. Morris, *An Eight-Strand Braided Cable: Hawaiian Tradition, Obergefell, and the Constitution Itself as "Dignity Clause"*, 40 U. HAW. L. REV. 1, 27 (2017).

7. David M. K. I. Liu & Christian K. Alameda, *Social Determinants of Health for Native Hawaiian Children and Adolescents*, 70 HAW. MED. J. 9 (2011).

8. David P. Yamane, Steffen P. Oeser & Jill Omori, *Health Disparities in the Native Hawaiian Homeless*, 69 HAW. MED. J. 35, 36 (2010).

cerebrovascular disease, cancer, diabetes, kidney disease, lung disease, and obesity; increased behavioral risk factors for diseases; and higher rates of tobacco, methamphetamine, and alcohol use.⁹ They also have the lowest life expectancy and the highest infant mortality rate of all groups in Hawaii.¹⁰ These disparities extend to other areas as well. In education, Native Hawaiians score below national norms on standardized achievement tests, and almost a third do not complete high school.¹¹ Native Hawaiians also make up a disproportionate number of the homeless and incarcerated populations in Hawaii.¹² Furthermore, Native Hawaiians have higher risks of suicide than other ethnic groups, are more likely to be diagnosed with disorders such as over-anxiousness and obsessive compulsiveness, and have lower self-perception.¹³

These disparities have been seen as symptomatic of a larger root issue—the multigenerational historical trauma from the original destruction of Native Hawaiian beliefs and way of life.¹⁴ Under the theory of multigenerational trauma, significant negative life events can be transmitted from generation to generation, resulting in negative effects that can linger and affect future generations decades or even centuries after the original trauma.¹⁵ Historical traumas may also persist because they are still continuing in the present.¹⁶ This notion fits squarely with the conception of an ongoing dignity taking from Native Hawaiians. Removed from their traditional lands and continuously dehumanized and infantilized since the first Western contact, Native Hawaiians still struggle to maintain their language, cultural practices, and respect for traditional beliefs, contributing to an ongoing cycle of historical trauma that negatively affects all aspects of the Native Hawaiian community today. These effects may also manifest in disparate economic outcomes and political treatment that reinforce the idea of Hawaiians as second-class citizens, as well as negative self-perception among Native Hawaiian children and youth that stems from the impacts of culture loss.¹⁷ Lastly, such trauma may also manifest in the form of community-wide “depression” that leads members to engage in risky or

9. *Id.*

10. Mililani B. Trask, *Historical and Contemporary Hawaiian Self-Determination: A Native Hawaiian Perspective*, 8 ARIZ. J. INT'L & COMP. L. 77, 82 (1991); Kristen Corey et al., *Housing Needs of Native Hawaiians: A Report From the Assessment of American Indian, Alaska Native, and Native Hawaiian Housing Needs*, PDR EDGE (May 2017) (noting that 39% of Hawaii's homeless population identifies as Native Hawaiian/Pacific Islander. However, administrative data does not fully disaggregate Native Hawaiians from those who identify as “Other Pacific Islander”).

11. *Id.*

12. *Id.*

13. Liu & Alameda, *supra* note 7, at 10.

14. *Id.* at 12.

15. *Id.*

16. *Id.*

17. *Id.* at 10, 12.

unhealthy behaviors, directly influencing larger community health outcomes over time.¹⁸ Thus, it is clear that the Native Hawaiian people suffer disproportionately, and the root of this harm is directly tied to their historical traumas of loss, which necessarily includes the dispossession of the ceded lands. Therefore, dignity restoration is about more than just land, culture, or money—it is about the very health of the Native Hawaiian people.

B. Re-Righting Hawaiian History

Native Hawaiian dignity restoration also matters because, in both historical accounts and the legal landscape of Hawaiian rights, a Western-centric viewpoint has continuously undermined the history and suffering of the Native Hawaiian people.¹⁹ Some argue²⁰ that the Supreme Court engaged in a patronizing and simplistic view of Native Hawaiians in *Rice v. Cayetano*²¹ by omitting their traditional creation story in favor of a Westernized viewpoint,²² painting Christian missionaries in an unfairly positive light,²³ and making a linguistic distinction of labeling groups such as the Chinese, Japanese, and Portuguese as “immigrants,” but failing to ever label Americans or Westerners as such.²⁴ This form of historical misrepresentation was also perpetuated in *Office of Hawaiian Affairs*,²⁵ in which the Court glossed over the violence of America’s overthrow of Hawaii and omitted the Hawaiian peoples’ arguments on the illegality of annexation by the Newlands Resolution.²⁶ Some have also argued that the tourist image that the United States created of Hawaii further undermines Native Hawaiian activism. As Lisa Kahaleole Hall states, “a culture without dignity cannot be conceived of as having sovereign rights, and the repeated marketing of kitsch Hawaiian-ness leads to non-Hawaiians’ misunderstanding and degradation of Hawaiian culture and history.”²⁷ Thus, dignity restoration is also important because of the demonstrated need to correct long-standing viewpoints that privilege Western interpretations and obscure the extent to

18. *Id.* at 12.

19. See generally Troy J. H. Andrade, *(Re)Righting History: Deconstructing the Court’s Narrative of Hawaii’s Past*, 39 U. HAW. L. REV. 631 (2017) (criticizing the Supreme Court’s handling of Hawaii’s history, and explaining how such skewed views are then perpetuated through the legal system).

20. *Id.* at 648–54.

21. See *Rice v. Cayetano*, 528 U.S. 495 (2000).

22. Andrade, *supra* note 19, at 649.

23. *Id.*

24. Chris K. Iijima, *Race over Rice: Binary Analytical Boxes and a Twenty-First Century Endorsement of Nineteenth Century Imperialism in Rice v. Cayetano*, 53 RUTGERS L. REV. 91, 103 (2000).

25. See *Haw. v. Off. of Hawaiian Affs.*, 556 U.S. 163, 166–67 (2009) (noting how the Hawaiian Kingdom was “replaced,” not overthrown) (quoting *Rice*, 528 U. S. at 504–505).

26. Andrade, *supra* note 19, at 663.

27. Lisa Kahaleole Hall, “*Hawaiian at Heart*” and *Other Fictions*, 17 CONTEMP. PAC. 404, 409 (2005).

which Native Hawaiians have suffered and continue to suffer because of the injustices done to their culture, lands, and communities.

II. HAWAII'S ANNEXATION AND FORMATION OF THE CEDED LANDS

A. Overthrow and Annexation

The ancestors of Native Hawaiians migrated from Polynesia to the Hawaiian islands somewhere between the fifth and ninth century A.D.,²⁸ where they developed an independent Kingdom with its own language, school system, government, and culture.²⁹ By the late 1800s, the Hawaiian Kingdom was recognized in international law by all major world powers, was a member of the Universal Postal Union, and had a number of legations and consulates around the world.³⁰ In fact, the Anglo-Franco Declaration of 1843 explicitly recognized the independence of the Hawaiian Islands under international law.³¹

The first Western contact with the Islands was made by Captain Cook in 1778.³² This contact then brought a steady increase in Western influence and migration to the Islands over the following decades, as well as diseases, Christianity, and sugar plantations, which fundamentally changed Hawaiian society by decimating the Native Hawaiian population and placing Americans and Europeans in positions of increasing power and influence.³³

In spite of international recognition of the Hawaiian Kingdom's sovereignty, the United States by 1897 had made two significant attempts to annex the Hawaiian Islands. The first annexation attempt occurred in 1893 when a group of thirteen American-led, pro-annexation conspirators, frustrated by Queen Lili'uokalani's attempts to adopt a new Hawaiian constitution, used military force to stage a coup and assume control of the

28. KERI E. IYALL SMITH, THE STATE AND INDIGENOUS MOVEMENTS 45–46 (2006).

29. Noelani Goodyear-Ka'opua, *Hawai'i: An Occupied Country*, 35 HARV. INT'L REV. 58, 58–59 (2014).

30. *Id.* at 58.

31. Kuhio Vogeler, *Outside Shangri La: Colonization and the U.S. Occupation of Hawai'i*, in *A NATION RISING: HAWAIIAN MOVEMENTS FOR LIFE, LAND, AND SOVEREIGNTY* 252–53 (Noelani Goodyear-Ka'opua, Ikaika Hussey, & Erin Kahunawaika'ala eds., 2014); see also RALPH S. KUYKENDALL, THE HAWAIIAN KINGDOM, VOL. 1, 1778–1854, FOUNDATION AND TRANSFORMATION 203 (1965) (noting that although France and Great Britain acknowledged Hawaii's independence, the U.S. declined to join the declaration because it was not a treaty, so it would not be binding on the U.S.).

32. *Contact to Mahele (1778-1848)*, HAWAIIHISTORY, <http://www.hawaiihistory.org/index.cfm?fuseaction=ig.page&PageID=358> [https://perma.cc/R4FB-RGW4] (last visited Feb. 17, 2021).

33. *Id.*; *The Mahele to the Overthrow (1848-1893)*, HAWAIIHISTORY, <http://www.hawaiihistory.org/index.cfm?fuseaction=ig.page&PageID=359> (last visited Nov. 27, 2019) [https://perma.cc/99FG-B8TJ].

government.³⁴ However, this did not result in immediate annexation, and another attempt was made in 1897 to further U.S. goals of imperialist expansion into the Pacific.³⁵ Neither of these attempts were successful though, due in part to significant protests from the Native Hawaiian people.³⁶

However, in 1898 a joint resolution (the Newlands Resolution) was pushed through Congress as a unilateral move to acquire the Islands.³⁷ The resolution allowed the United States to annex “the Hawaiian Islands and their dependencies” as a territory, thereby transferring “all public, Government, or Crown lands . . . and all other public property of every kind and description belonging to the Government of the Hawaiian Islands, together with every right and appurtenance thereunto appertaining” to the United States.³⁸ Unlike a treaty of annexation, which requires ratification by two-thirds of the Senate, a joint resolution only requires a simple majority from the Senate and the House.³⁹ In this way, the Newlands Resolution was passed and signed by President William McKinley on July 7, though Hawaii remained a territory for another sixty one years, officially becoming a state in 1959.⁴⁰

B. Formation of Hawaii’s Ceded Lands

Against the backdrop of this larger history of annexation, it is important to remember that the ceded lands, and the lands of Hawaii as a whole, were not idle plots. Prior to foreign influence, the Native Hawaiian people did not have a Westernized system of private property ownership. Instead, they utilized a system of communal living on land divisions known as *ahupua’a* (wedge shaped sections of land running from the mountains to the sea).⁴¹ Each *ahupua’a* operated as a self-sustaining unit for its community, containing areas for fishing, agriculture, foraging, and dwelling.⁴² Each was also ruled by an *ali’i* (Hawaiian noble), who then delegated responsibilities

34. TOM COFFMAN, NATION WITHIN: THE HISTORY OF THE AMERICAN OCCUPATION OF HAWAII 119–26 (2009); *Monarchy Overthrown*, HAWAIIHISTORY, <http://www.hawaiihistory.org/index.cfm?fuseaction=ig.page&PageID=312> [https://perma.cc/7ZNS-2V2J] (last visited Nov. 27, 2019).

35. See Vogeler, *supra* note 31, at 253; see also THOMAS J. OSBORNE, “EMPIRE CAN WAIT”: AMERICAN OPPOSITION TO HAWAIIAN ANNEXATION, 1893–1898 122 (1981) (explaining that the United States was motivated to annex Hawaii in order to expand trade and defend the west coast from Spain).

36. Vogeler, *supra* note 31, at 253.

37. *Id.*

38. Joint Resolution to Provide for Annexing the Hawaiian Islands to the United States of July 7, 1898, 30 Stat. 750 (1898).

39. Williamson Chang, *Darkness Over Hawaii: The Annexation Myth is the Greatest Obstacle to Progress*, 16 ASIAN-PAC. L. & POL’Y J. 81–82 (2015) [hereinafter Chang, *Darkness Over Hawaii*].

40. *Id.* at 73 n.7, 92.

41. *Ahupua’a*, HAWAIIHISTORY, <http://www.hawaiihistory.org/index.cfm?fuseaction=ig.page&CategoryID=299> [https://perma.cc/6CQB-VYXP] (last visited Nov. 6, 2019); see also KAMEHAMEHA SCHOOLS, LIFE IN EARLY HAWAII: THE AHUPUA’A vi–vii (3d ed. 1994).

42. *Id.*

to various *konoiki* (chiefs).⁴³ These leaders stewarded the *ahupua'a*'s resources and governed the population to ensure the community's sustainability by managing the land in trust for the benefit of the *maka'ainana* (common people), who in turn farmed the land and paid taxes and offerings.⁴⁴

However, in 1848 King Kamehameha III formally ended this system of living by enacting the *Great Mahele* (“*Mahele*”), which divided up the Hawaiian Kingdom's land under Western conceptions of private ownership.⁴⁵ The impetus for this division was Kamehameha III's concerns over the ability of Native Hawaiians to maintain control of their lands, due in part to the continued decline of the Native Hawaiian population from epidemics, increasing debts owed by the *ali'i*, and numerous requests for land ownership by foreign powers and immigrants.⁴⁶ Motivated as well to provide for his people in an uncertain era of U.S. and European economic and military expansion, Kamehameha III wanted to ensure that the Kingdom's lands would not be considered public domain, and therefore at risk of confiscation in the event of conquest by a foreign power.⁴⁷ Following the recommendations put forth by the Land Commission, the terms of the *Mahele* allowed Kamehameha III to set aside his private lands (the future “Crown lands”) as personal property, with the Kingdom's remaining land to be divided in thirds between the government, the *ali'i*, and the *maka'ainana*.⁴⁸

However, the actual results of the *Mahele* did not meet this ideal. Most *ali'i* ended up retaining only one-third of the land they had controlled prior to the *Mahele*,⁴⁹ and many of the *maka'ainana* were unable to hold onto any traditional lands.⁵⁰ One reason for this was that most *maka'ainana* operated like tenants on land managed by the *ali'i*, and after the *Mahele*, when many *ali'i* sold their lands to pay off debts, the new landowners refused to let the *maka'ainana* stay.⁵¹ Furthermore, even though the Hawaiian legislature passed the Kuleana Act of 1850,⁵² which was designed to give the

43. *Id.*

44. *Id.*

45. JON M. VAN DYKE, WHO OWNS THE CROWN LANDS OF HAWAII? 30–53 (2008).

46. *Id.* at 30–31.

47. *Id.* at 30.

48. *Id.* at 32–45. The Land Commission, created by Kamehameha III on the suggestion of his Minister of the Interior Dr. Gerrit P. Judd, was a group of Native Hawaiian and foreign members whose role was to determine the outcome and scope of all land claims.

49. *Id.* at 42–44.

50. *Id.* at 45.

51. *Id.*

52. See *The Kuleana Act of 1850*, HOAKALEI CULTURAL FOUND. (last visited Nov. 27, 2019), <http://www.hoakaleifoundation.org/documents/kuleana-act-1850> [<https://perma.cc/RED4-DVDT>] (the Kuleana Act allowed Native Hawaiian people to obtain fee simple ownership of traditional land plots ranging in size from one to fifty acres).

maka 'ainana a process to file claims for land, few land awards were actually made. This was due to a combination of factors, including a lack of familiarity with conceptions of private property, lack of knowledge of the land claiming process, difficulty in filing and proving claims, administrative delays, and personal interferences.⁵³ In total, of the approximately 1,523,000 acres of land set aside by Kamehameha III for the Hawaiian people, only 28,658 acres were actually given to the *maka 'ainana*.⁵⁴ Further exacerbating this disparity was the fact that, of the land that was granted to the *maka 'ainana*, many plots were often of insufficient size to meet their basic needs, causing them to abandon their newly assigned properties.⁵⁵ Furthermore, only a month before they passed the Kuleana Act, the Hawaiian legislature had passed the 1850 Alien Land Ownership Act, which granted foreigners the right to own land.⁵⁶ This allowed foreigners to compete directly with Native Hawaiians for land, and the foreigners' greater wealth and familiarity with property often allowed them to take title over Native Hawaiians.⁵⁷

Despite these losses, Kamehameha III still retained approximately 2.5 million acres of land as his personal property.⁵⁸ Of these lands, he kept roughly 1 million acres for himself (the "Crown lands") and commuted the remaining 1.5 million acres to the Hawaiian government as land "to have and to hold to my chiefs and people forever."⁵⁹ However, a substantial amount of this land soon ended up under foreign control. By 1873, a mere twenty five years after the *Mahele*, more than 590,000 acres of government land had been sold as a result of numerous personal debts, inexperienced land management, and intestate alienation.⁶⁰

Upon Hawaii's annexation in 1898, what remained of the Crown and government lands—in total, about 1.8 million acres—was considered public domain and therefore ceded to the United States at no cost through the Newlands Resolution, becoming the "ceded lands" known today.⁶¹

53. VAN DYKE, *supra* note 45, at 46–47.

54. *Id.* at 48.

55. C. J. Lyons, *Land Matters in Hawaii—No. 5*, 23 ISLANDER 143 (1875) (stating that when surveyors assessed plots of land for Kuleana assignment, they neglected to take into consideration the agricultural limitations of growing traditional crops such as *kalo*, thus rendering the assigned plots of land insufficient for sustaining traditional Hawaiian families).

56. VAN DYKE, *supra* note 45, at 50.

57. *Id.* at 50–51.

58. *Id.* at 51, 54.

59. *Id.* at 42, 55; *In re Estate of His Majesty Kamehameha IV*, 2 Haw. 715, 716–17 (1864).

60. See VAN DYKE, *supra* note 45, at 56–57 (inferring these reasons from actions such as Native Hawaiians mortgaging their estates to whites to pay off debts, or dying without heirs and intestate).

61. *Id.* at 212–13; Cheryl Miyahara, *Hawaii's Ceded Lands*, 3 U. HAW. L. REV. 101, 115–16 (1981).

C. *The Ceded Lands Dispute*

Not all accept the Newlands Resolution as a valid means of annexation, and significant arguments have been made that Native Hawaiians still retain a rightful claim to these lands.⁶² According to Professor Williamson Chang, although there is a widespread “myth” that the Newlands Resolution legally annexed Hawaii, this Resolution was both incapable of doing so and also unconstitutional.⁶³

According to Professor Chang, there are three methods under international law by which a State can acquire territory: (1) by discovery, (2) by conquest, and (3) by treaty.⁶⁴ Under the doctrine of discovery, a State could claim a territory if it was not the territory of any other sovereign State; however, the United States has never claimed to “discover” Hawaii under this doctrine.⁶⁵ Additionally, under the concept of the equality of sovereign States, all States’ sovereignties are absolute within their territorial boundaries. This means that the Kingdom of Hawaii, as an internationally recognized sovereign State,⁶⁶ should not have been able to be legally annexed by the United States.⁶⁷

Under a claim of acquisition by conquest, one State would be required to take another through force.⁶⁸ Again though, the United States has never claimed to have acquired Hawaii through conquest, nor did its annexation suggest so, as it did not “result from the absolute destruction of the civic structure of the Hawaiian government.”⁶⁹

Therefore, this leaves only annexation by treaty as a possible legal method. Historically, there were three attempted treaties: in 1854, 1893, and 1897.⁷⁰ However, the 1854 treaty never made it past the drafting stage, the 1893 treaty was withdrawn from the Senate by President Cleveland due to concerns that the overthrow of Hawaii violated international law, and the 1897 treaty—vigorously opposed by petitions and objections from Native Hawaiians—failed to receive the required two-thirds Senate vote to pass.⁷¹ The Newlands Resolution, a joint resolution, eventually annexed Hawaii, but under both international law and U.S. domestic law, a joint resolution is not

62. *See generally* Williamson B. C. Chang, Professor of L., Univ. Haw. William S. Richardson Sch. of L., Hawaii’s “Ceded Lands” and the Ongoing Quest for Justice in Hawaii (2014) [hereinafter Chang, Ongoing Quest for Justice] (arguing that the U.S. does not have legal title to Hawaii’s “ceded lands” because the Joint Resolution did not enact a valid transfer of property).

63. Chang, *Darkness Over Hawaii*, *supra* note 39 at 71, 74–76.

64. Chang, Ongoing Quest for Justice, *supra* note 62, at 16.

65. *Id.* at 15–16, 18.

66. *See discussion supra* Section II.A.

67. Chang, Ongoing Quest for Justice, *supra* note 62, at 15.

68. *Id.* at 16.

69. *Id.*

70. *Id.* at 18.

71. *Id.* at 18–19.

a legal way to acquire territory because a resolution by definition is not a treaty.⁷² The question then is how the United States legally annexed Hawaii if all three treaties failed and the document that did annex Hawaii was only a joint resolution? The answer, according to Professor Chang, is that since a resolution is not a treaty, and international law requires a treaty in order for annexation to be legal, the Newlands Resolution was invalid, and both the annexation of Hawaii and the ceding of its land were therefore illegal.⁷³

The rationale for annexation and the validity of the Newlands Resolution were also questioned at the time of the resolution's conception. In 1893, Judge Thomas M. Cooley expressed concern over Hawaii's proposed annexation. He stated that under international law, Hawaii, as a sovereign nation, could be annexed only if it consented.⁷⁴ Judge Cooley also noted that the United States seemed to be acting only in self-interest, having made no effort to ascertain the wishes or perspectives of the Native Hawaiian people.⁷⁵ Members of the 1898 Senate also advanced arguments against the legality of the Newlands Resolution. For example, Senator Augustus O. Bacon cited directly to the international law of sovereignty, stating that Congress did not have power to acquire another sovereign State by its own act.⁷⁶ Additionally, anti-expansionists argued that annexation was "contrary to foreign policy guidelines" and past precedent, and that it would be inconsistent with other policies recognizing Hawaii's independence.⁷⁷ Anti-imperialists also cited fears of opening the door to the creation of a militant American empire built on policies of "territorial aggrandizement."⁷⁸

More recent political actions also indicate support for the argument of a wrongful annexation. On November 23, 1993, President Bill Clinton signed the Apology Resolution ("Resolution"), which recognized the central role the United States played in "the illegal overthrow of the Hawaiian Kingdom."⁷⁹ The Resolution also acknowledged that the ceding of "1,800,000 acres of crown, government, and public land [was done] without the consent of or compensation to the Native Hawaiian people . . . or their sovereign government,"⁸⁰ and stated that "Congress . . . apologizes to Native Hawaiians on behalf of the people of the United States for . . . the deprivation

72. Vogeler, *supra* note 31, at 253.

73. Chang, *Darkness Over Hawaii*, *supra* note 39, at 76.

74. Thomas M. Cooley, *Grave Obstacles to Hawaiian Annexation*, FORUM, June 1893, at 389.

75. *Id.*

76. Chang, *Darkness Over Hawaii*, *supra* note 39, at 80.

77. OSBORNE, *supra* note 35, at 29.

78. *Id.*

79. Overthrow of Hawaii, Pub. L. No. 103-150, 107 Stat. 1510, 1512 (1993). See Vogeler, *supra* note 31, 258-59 (the "Apology Resolution" is an unofficial name; the Resolution is known officially as Public Law 103-150).

80. 107 Stat. at 1512.

of the right of Native Hawaiians to self-determination.”⁸¹ Though the Resolution did not directly state that Hawaii’s annexation was illegal, its acknowledgement of the illegality of the Kingdom’s overthrow and recognition that the ceded lands were essentially taken without permission or compensation provide support for its illegality.

The arguments advanced by Professor Chang and others thus provide a substantial basis for the illegality of Hawaii’s annexation and U.S. ownership of the ceded lands. However, the United States has not presently taken any action legally acknowledging this argument, fueling the continued conflict over these lands.

D. *The Ceded Lands Today*

When Hawaii transitioned from a territory to a state in 1959, section 5(f) of the 1959 Admission Act stated that the ceded lands were to be held in trust for five purposes: (1) public schools, (2) education, (3) “the betterment of conditions of native Hawaiians,” (4) development of farm and home ownership, and (5) public use.⁸² Following a Constitutional Convention in 1978, Hawaii made provisions in its constitution to form the Office of Hawaiian Affairs (OHA) as the governing unit to manage all ceded land proceeds meant to benefit Native Hawaiians.⁸³ The OHA was to be run by a board of Hawaiian trustees, elected by qualified Hawaiian voters.⁸⁴ Additionally, the powers and duties of the OHA’s trustees included: (1) “to manage and administer the proceeds from the sale or other disposition of the lands, natural resources, minerals and income derived from whatever sources for native Hawaiians and Hawaiians . . . ,” (2) “formulate policy relating to the affairs of native Hawaiians and Hawaiians,” and (3) “exercise control over real and personal property set aside by state, federal or private sources transferred to the board for native Hawaiians and Hawaiians.”⁸⁵ In 1980, Hawaii’s legislature added Hawaiian Revised Statutes (HRS) section 10-13.5, which clarified that the OHA would receive a 20% share of revenue from ceded land to use for the benefit of Native Hawaiians.⁸⁶

81. *Id.* at 1513.

82. Admission Act of March 18, 1959, Pub. L. No. 86-3, § 5, 73 Stat. 4, reprinted in 1 HRS 90, 91–92 (1993).

83. Haw. Const. art. XII § 5.

84. *Id.* The OHA is to be governed by no less than nine trustees who are Hawaiian, with at least one representative from Oahu, Maui, Molokai, Hawaii, and Kauai. *Id.* These trustees are elected by qualified Hawaiian voters and select their own chairperson from among their members. *Id.* The “Hawaiian” trustees and voters for the OHA were originally defined by statute as only those who are descendants of the peoples inhabiting the Hawaiian Islands before 1778. *See* HAW. REV. STAT. § 10-2. However, *Rice v. Cayetano* struck down the “Hawaiian” voting requirement as an impermissible race-based voting restriction, thus allowing any eligible individual in the state to vote on the OHA’s trustees. *See* 528 U.S. 495 (2000).

85. Haw. Const. art. XII § 6.

86. 1980 Haw. Sess. Laws 525 § 1.

Notwithstanding these policies, the ceded lands continue to be a point of contention for Native Hawaiians today, and with few exceptions, nearly all ceded lands still remain under U.S. government control.⁸⁷

III. CEDED LANDS AS DIGNITY TAKING

A. *The Dignity Takings Framework*

Given the contested history of Hawaii's ceded lands, this Article argues that the taking of those lands qualifies as a dignity taking. A "dignity taking," as conceptualized by Professor Bernadette Atuahene, is a theory that expands the idea of constitutional property takings to situations where a State directly or indirectly takes property without permission, and where such deprivation also involves a loss of dignity.⁸⁸ Under the Fifth Amendment to the U.S. Constitution, the government has a right to take private property for a public purpose, provided it pays just compensation to the property owner.⁸⁹ A public purpose, though broad in scope,⁹⁰ generally refers to situations where a taking would increase general public welfare, and just compensation is the value of the seized property according to a fair market value appraisal.⁹¹ However, Professor Atuahene notes that at times, the government's taking goes beyond mere property and extends to a "taking" of the property owner's dignity as well.⁹² This concept is based on the recognition that the wrongful taking of property "subordinates the dispossessed and prevents them from being full and equal members of the polity."⁹³ Thus, a dignity taking occurs when a State (1) destroys or confiscates property rights from individuals without just compensation or cause, and in the process, (2) dehumanizes or infantilizes those individuals.⁹⁴ Dehumanization is "the failure to recognize

87. See generally Melody Kapililoha MacKenzie et al., *Environmental Justice for Indigenous Hawaiians: Reclaiming Land and Resources*, 21 NAT. RES. & ENV'T 37, 38–40 (2007) (noting that the transfer of Wao Kele o Puna to the OHA in 2006 was the first return of any ceded land to Hawaiian control). There have since been other reclamation victories such as the island of Kaho'olawe, but the majority of ceded land remains under state control. *Id.*

88. Bernadette Atuahene, *Dignity Takings and Dignity Restoration: Creating a New Theoretical Framework for Understanding Involuntary Property Loss and the Remedies Required*, 41 L. & SOC. INQUIRY 796, 798–99 (2016).

89. U.S. Const. amend. V.

90. See *Kelo v. City of New London*, 545 U.S. 469, 480 (2005) (noting that "public purpose" is defined broadly, and that the Court is deferential to legislative judgments in this area).

91. See, e.g., *United States v. Miller*, 317 U.S. 369, 374 (1943) (noting that a fair market value is "what 'it fairly may be believed that a purchaser in fair market conditions would have given,' or, more concisely, 'market value fairly determined.'").

92. BERNADETTE ATUAHENE, *WE WANT WHAT'S OURS: LEARNING FROM SOUTH AFRICA'S LAND RESTITUTION PROGRAM* 3 (2014) ("When a state takes an individual or community's property, the appropriate remedy is to return the property or to provide just compensation But, under certain circumstances, the state has done more than confiscate property—it has also denied the dispossessed their dignity.").

93. Atuahene, *supra* note 88, at 799.

94. *Id.* at 800.

an individual's or group's humanity," and infantilization is "a restriction of an individual's or group's autonomy based on the failure to recognize and respect their full capacity to reason."⁹⁵ Dehumanization and infantilization can also produce "community destruction," where individuals are involuntarily uprooted and separated from their cultural and community anchors, depriving them of the social and emotional ties that provide autonomy and independence.⁹⁶

The required remedy for a dignity taking is "dignity restoration," which provides the dispossessed with adequate material compensation through a process that affirms their dignity and agency.⁹⁷ This remedy, based on ideas of reparation (the right to have either the dispossessed property or its equivalent compensatory amount restored) and restorative justice (restoring a sense of dignity, empowerment, and social support), emphasizes the *process* of restoration, not just the final outcome.⁹⁸ Many scholars have applied Professor Atuahene's dignity takings framework to diverse situations, including the taking of Jewish property in France and the Netherlands, forced evictions in China, and the desecration of Hopi traditional lands, to illustrate the significant and lasting consequences of such dispossessions across societies.⁹⁹ Building on this scholarship, this Article contextualizes the dispossession of Hawaii's ceded lands within this framework to illustrate the ways it unjustly affects Native Hawaiians today and how a recognition of dignity can inform more appropriate and just solutions.

B. Application to Hawaii's Ceded Lands

1. Dispossession

The first requirement for classifying an act as a dignity taking is a wrongful dispossession of property. For Native Hawaiians, the United States' taking of 1.8 million acres of ceded land in 1898 constitutes this wrongful dispossession. As a recognized sovereignty¹⁰⁰ before annexation, Hawaii's land belonged to the Hawaiian Kingdom and could not simply be taken. Nevertheless, and in spite of the strong opposition from Native

95. *Id.* at 801.

96. *Id.*

97. *Id.* at 818.

98. *Id.* at 802.

99. *Id.* at 797; see generally Wouter Veraart, *Two Rounds of Postwar Restitution and Dignity Restoration in the Netherlands and France*, 41 L. & SOC. INQUIRY 956 (2016) (analyzing the taking of property from Jewish in France and the Netherlands during WWII); Eva Pils, *Resisting Dignity Takings in China*, 41 L. & SOC. INQUIRY 888 (2016) (examining the forced evictions of Chinese peasants); Justin B. Richland, *Dignity as (Self-)Determination: Hopi Sovereignty in the Face of US Dispossessions*, 41 L. & SOC. INQUIRY 917 (2016) (examining the separation of the Hopi from their traditional lands).

100. See discussion *supra* Section I.A.

Hawaiians,¹⁰¹ the United States overthrew and annexed the Hawaiian Kingdom. This suggests that rather than being a mutual transfer between two consenting, sovereign nations, the taking of Hawaii's land was a wrongful and illegal act. The 1993 Apology Resolution acknowledged this sentiment, stating that this land transfer was done "without the consent of or compensation to the Native Hawaiian people."¹⁰² Thus, the taking of Hawaii's ceded lands fits the dignity takings framework's definition of a wrongful dispossession.

2. *Dehumanization and Infantilization*

The second component of a dignity taking is the dehumanization or infantilization of the dispossessed people. The record of American encroachment on Hawaii points to a long history of both. In 1820, "extremist" American missionaries arrived to convert Native Hawaiians—whom the missionaries called "heathen[s] in need of a 'salvation'"—to Christianity.¹⁰³ These missionaries introduced a dehumanizing "rhetoric of revulsion" that painted all Native Hawaiians as "bestly," "depraved," and "uncivilized," and all missionaries as "courageous" and "righteous" saviors.¹⁰⁴ Such rhetoric illustrates how the United States infantilized Native Hawaiians from the start by treating them not as equally competent humans, but as wayward children in need of benevolent help. American rhetoric throughout the mid-nineteenth century continued to further Native Hawaiian dehumanization along racial and sexual lines as well. White Americans began borrowing the negative, racialized language used towards Black Americans and applied it to Native Hawaiians.¹⁰⁵ Additionally, American film and media portrayed Native Hawaiian women in particular as having an uncivilized and unrestrained sexuality, reducing them to primitive, sexualized tropes of exoticism.¹⁰⁶ The Western-as-better and White-as-superior perspective that permeated American opinions of and interactions with the Native Hawaiian people strengthened the justifications for the eventual annexation and ceding of Hawaii's land. In fact, many American military and plantation owners who lobbied for annexation emphasized the need for American control over the "uncivilized" and "childlike"

101. See discussion *supra* Section I.A.

102. Overthrow of Hawaii, Pub. L. No. 103-150, 107 Stat. 1510, 1512 (1993).

103. HOUSTON WOOD, *DISPLACING NATIVES: THE RHETORICAL PRODUCTION OF HAWAII* 37 (1999).

104. *Id.* at 37–39.

105. *Id.* at 86–87 (the characterizations of Native Hawaiians referenced the negative perception of Blacks in White American society to fuel the idea that Native Hawaiians were an inferior, childish, and cruel race that was unfit to rule, thus providing justification for the overthrow of the Hawaiian government).

106. *Id.* at 104–05.

Hawaiians.¹⁰⁷ Such examples illustrate how Hawaii's annexation also dehumanized and infantilized the Native Hawaiian people.

IV. NATIVE HAWAIIAN DIGNITY RESTORATION?

The required remedy to a dignity taking is dignity restoration. Dignity restoration can take many forms and depends, to a large extent, on the specifics of the dispossession. To properly address dignity restoration in the context of Hawaii's ceded lands, it is helpful to first consider previous instances in which the possibility of dignity restoration fell short.

A. *Incomplete Restorations*

To date, there have been little to no efforts that would qualify as full dignity restorations. But there have been several examples of "incomplete" restoration efforts that, while making an appearance of or taking some positive steps towards restoration, failed to fully achieve such a purpose. They are the United States' 1993 Apology Resolution, the "return" of ceded lands such as Wao Kele o Puna and Kaho'olawe, and the 1999 offer by Hawaii's former Governor Ben Cayetano to permanently settle the OHA's ceded lands claims.

1. *The 1993 Apology Resolution*

Though the Apology Resolution was meant to apologize to the Native Hawaiian people for the United States' role in the overthrow of their Kingdom, it failed to adequately restore dignity. This is because the Resolution had no actual legal force; while it urged the United States and the President to "support reconciliation efforts,"¹⁰⁸ it did not mandate that any party take concrete steps to repair the harm done. As the Supreme Court noted in *Hawaii v. Office of Hawaiian Affairs*, the Apology Resolution did not create any enforceable, substantive rights.¹⁰⁹ Rather, the Resolution merely recognized and made observations about Hawaii's history.¹¹⁰ Without a concrete offer or mandate to repair even some of the recognized harm, this "apology" failed to even be a successful apology.¹¹¹ An apology,

107. Susan K. Serrano et al., *Restorative Justice for Hawai'i's First People: Selected Amicus Curiae Briefs in Doe v. Kamehameha Schools*, 14 ASIAN AM. L. J. 205, 208 (2007).

108. Overthrow of Hawaii, Pub. L. No. 103-150, § 1, 107 Stat. 1510, 1512 (1993).

109. *Haw. v. Off. of Hawaiian Aff.*, 556 U.S. 163, 173-74 (2009) (comparing the Resolution to other apologies that were specifically intended to provide tangible effects such as the Civil Liberties Act of 1988, which served as an apology to Japanese Americans for their internment and provided \$20,000 in restitution to eligible individuals).

110. *Id.* at 169.

111. See generally Erin A. O'Hara & Douglas Yarn, *On Apology and Consilience*, 77 WASH. L. REV. 1121, 1133-36 (2002) (noting that apology theorists have generally identified four basic elements that constitute a "full" apology: identifying the wrongful act, remorse, promise of forbearance, and offer to repair).

when done correctly, can be a powerful tool for de-escalating conflict and facilitating forgiveness and reconciliation.¹¹² For an apology to be seen as “full” or “real,” it generally must meet four elements: (1) specifically articulate the transgression that caused the harm, (2) express responsibility and remorse for the wrongful act, (3) include a promise of forbearance, and (4) make an offer of repair.¹¹³ An apology that lacks one or more of these elements not only fails to be a meaningful apology, but also risks actually exacerbating the situation and deepening the disappointment of the intended recipient.¹¹⁴ In the Apology Resolution, the missing element was the offer to repair. For dignity restoration, this means that the Resolution lacked both any form of adequate compensation and any process that might restore dignity and agency. In many ways, it was just empty words and therefore, failed to restore dignity.

2. *Wao Kele o Puna and Kaho’olawe*

Another example of incomplete restoration is the “return” of Wao Kele o Puna and Kaho’olawe to Native Hawaiian control. Wao Kele o Puna is a 25,856-acre rain forest on Kilauea Volcano that holds special significance as the home of the fire goddess Pele and as a place for cultural and religious practices. It was the first of any ceded land to return to Native Hawaiian control.¹¹⁵ The events precipitating its return began in the early 1980s when the Campbell Estate, a large landowner in Hawaii, planned to develop geothermal energy on Kahauale’a, a parcel of conservation land adjacent to Wao Kele o Puna.¹¹⁶ Because lava flows rendered Kahauale’a unusable, the state proposed a land swap with Wao Kele o Puna.¹¹⁷ Some Native Hawaiians contested the land swap in court, arguing that geothermal drilling on Wao Kele o Puna infringed on their religious, cultural, and subsistence practices.¹¹⁸ Native Hawaiians with ties to Pele also argued that such drilling would desecrate Pele’s body, and removing geothermal steam would take away her energy and lifeblood.¹¹⁹ Nevertheless, the land exchange was

112. *Id.* at 1132.

113. *Id.* at 1133–37.

114. *Id.*; Susan Alter, L. COMM’N. OF CAN., *Apologising for Serious Wrongdoing: Social, Psychological, and Legal Considerations* 15 (1999), <https://dalspace.library.dal.ca/bitstream/handle/10222/10273/Alter%20Research%20Apology%20EN.pdf> [<https://perma.cc/LJW7-4VWQ>].

115. MacKenzie et al., *supra* note 87, at 38–40.

116. *Id.* at 38.

117. *Id.*

118. *Id.*; *see also* Pele Defense Fund v. Paty, 837 P.2d 1247 (Haw. 1992) (finding that the exchange between the state and the Campbell Estate was allowable under Hawaii’s Constitution).

119. MacKenzie et al., *supra* note 87, at 38–40; *see also* Paul Faulstich, *Hawaii’s Rainforest Crunch: Land, People, and Geothermal Development*, CULTURAL SURVIVAL (Dec. 1990), <https://www.culturalsurvival.org/publications/cultural-survival-quarterly/hawaiiis-rainforest-crunch-land-people-and-geothermal> [<https://perma.cc/PM62-NBEK>].

permitted to stand.¹²⁰ However, in 1994, the Campbell Estate was forced to abandon its plans for geothermal development, and in 2001, it put Wao Kele o Puna up for sale.¹²¹ In 2006, the OHA, the Trust for Public Land (TPL), and the Department of Land and Natural Resources (DLNR) paid \$3.65 million to convey the land to the OHA, thereby placing it back under Native Hawaiian ownership.¹²²

A similar example is the “return” of Kaho’olawe. Kaho’olawe is the smallest of Hawaii’s eight main islands and traditionally held religious and cultural importance as the physical embodiment of the Hawaiian god Kanaloa.¹²³ The island was also a place where the Hawaiian people could come for spiritual cleansing.¹²⁴ But because Kaho’olawe belonged to the Hawaiian government in 1898, it was among the lands ceded to the United States. In the 1920s, it was leased to the U.S. military for weapon practice.¹²⁵ During World War II, the U.S. government took full control of the island, banning all public access, even for traditional Hawaiian practices.¹²⁶ The military’s activities included torpedoing shoreline cliffs, air missile bombing, and underwater high-explosive detonations, which continued for almost fifty years¹²⁷ and damaged hundreds of cultural sites and environmental resources.¹²⁸

In 1976, Native Hawaiian protestors under Protect Kaho’olawe Ohana (PKO) filed a civil suit to enjoin the Navy’s activities on the island.¹²⁹ In 1980, the parties reached a settlement in which the Navy agreed to remove ordnance from approximately 10,000 acres of island land, survey and protect historic cultural sites, rehabilitate the environment, and allow PKO members limited access to the island.¹³⁰ In 1994, the United States then transferred title of the island to the State of Hawaii for management under the Kaho’olawe Island Reserve Commission (KIRC) with four purposes: (1) the preservation and practice of traditional Native Hawaiian culture; (2) the

120. Theresa Dawson, *Hawaiian, State Agencies Race to Reclaim Wao Kele O Puna from Campbell Estate*, ENVIRONMENT HAWAII’I (Oct. 2005), <https://www.environment-hawaii.org/?p=1545> [<https://perma.cc/YF2J-HVZ6>].

121. MacKenzie et al., *supra* note 87, at 39.

122. *Id.* at 39–40.

123. *Id.* at 41.

124. *Id.*

125. *Id.*

126. *Id.*

127. *Kaho’olawe History*, KAHOO LAWE, <http://www.kahoolawe.hawaii.gov/history.shtml> [<https://perma.cc/G9Q8-WREJ>] (last visited Nov. 9, 2019) (stating that President Bush officially halted the bombings in 1990 because of the actions and litigation of Protect Kaho’olawe Ohana).

128. MacKenzie et al., *supra* note 87, at 41.

129. *Aluli v. Brown*, 437 F. Supp. 602 (D. Haw. 1977) (involving a suit filed by members of PKO against the U.S. Navy to enjoin the bombing of the island and preserve its environment and historic sites).

130. MacKenzie et al., *supra* note 87, at 42; *see also History*, PROTECT KAHOO LAWE OHANA, <http://www.protectkahoolaweohana.org/history.html> [<https://perma.cc/9TPY-BYB6>] (last visited Nov. 9, 2019).

preservation of the island's archaeological, historical, and environmental resources; (3) the rehabilitation and restoration of the environment; and (4) education.¹³¹

Although the returns of Wao Kele o Puna and Kaho'olawe to Native Hawaiian control were a positive gain for the Hawaiian people, neither constitutes dignity restoration because these lands were not returned in conciliation or recognition of repairing any past harm. Rather, their availability was more the result of a lucky confluence of economic and political factors and the successful mobilization of Native Hawaiian interest groups to take advantage of these opportunities. Thus, although some dignity may be gained from the autonomy that Native Hawaiians can now exercise over these lands, these returns are not a reparation from the dispossessor, and therefore do not actually constitute dignity restoration.

3. *Cayetano's 1999 Settlement Offer to the OHA*

A third example of incomplete restoration is former Governor of Hawaii Ben Cayetano's 1999 settlement offer to the OHA. In 1999, responding to ongoing disputes over adequate payment for the use of various ceded lands, Governor Cayetano offered the OHA \$251 million and 360,000 acres of ceded land to settle the issue, on the condition that the agreement would be a final settlement shielding the state from any future claims by the OHA.¹³² Ultimately, the OHA refused the settlement.¹³³

Though there were differing views on its acceptability,¹³⁴ from the perspective of dignity restoration, this offer would not have been sufficient. Dignity restoration mandates that a remedy include not only compensation, but also a process that affirms the dignity of the dispossessed. Considering adequate compensation, the 360,000 acres (about 20% of the ceded land) and payment of \$251 million were likely inadequate, as evidenced by the OHA's counteroffers requesting between \$304.6 and \$309.5 million and any lands with a revenue stream of \$7.4 million,¹³⁵ illustrating a difference of at least \$53 million between the monetary offers alone.

131. MacKenzie et al., *supra* note 87, at 42.

132. Ron Staton, *Hawaii Debates Wealth of Ceded Lands*, L.A. TIMES (Mar. 2, 2003, 12:00 AM), <https://www.latimes.com/archives/la-xpm-2003-mar-02-adna-ceded2-story.html> [https://perma.cc/5MN2-DHX4].

133. *Id.*

134. Rowena Akana, *Cayetano Offered Better Ceded Land Deal*, ROWENA AKANA (Feb. 4, 2008), <http://www.rowenaakana.org/cayetano-offered-better-ceded-land-deal> [https://perma.cc/P6GE-CP9P] (stating Trustee's opinion as the former chairwoman of the OHA at the time of the offer that the Governor's settlement deal would have bettered the Native Hawaiian people, and that negotiations should have continued).

135. *OHA Scrambles to Get Back Ceded Land Revenues*, STARBULLETIN (Sept. 23, 2001), <http://archives.starbulletin.com/2001/09/23/news/story5.html> [https://perma.cc/E6XM-7FU3].

Even assuming Cayetano's offer was adequate, the process by which the offer was made did not affirm the dignity of Native Hawaiians. Cayetano's offer specifically precluded any future ownership claims by Native Hawaiians to the ceded lands, including those that might result from future settlements or reparations associated with claims regarding the illegality of the Hawaiian Kingdom's overthrow and annexation.¹³⁶ Dissatisfied, the OHA's trustees argued for a larger settlement, and when Cayetano failed to give a timely response to their counteroffer, a majority of the nine trustees voted to walk away from the agreement.¹³⁷ The preclusion of all future land claims is a key element indicating incomplete restoration here; while Cayetano's offer did include some financial and land compensation, it also minimized the importance of land to Native Hawaiian restoration interests by assuming that centuries of harm could be satisfactorily reduced to a single, permanent settlement. Full dignity restoration is not only about material compensation; it is also about developing unique remedies to address the continuing "infantilization, dehumanization, and community destruction."¹³⁸ Here, however, rather than recognizing the significance of the ceded lands to Native Hawaiian interests and adjusting the negotiations accordingly, Governor Cayetano described the dissenting trustees as "greedy."¹³⁹ His response suggests that the offer was less about facilitating true reconciliation and more about simply relieving the state of the OHA's claims. Thus, the 1999 offer, making only an appearance of conciliation, failed to actually restore dignity.

These examples illustrate the importance of applying the dignity takings framework to Hawaii's ceded lands. When considering Wao Kele o Puna and Kaho'olawe, it may be easy to think that since Native Hawaiians already had opportunities to get their land back, they do not need other processes. However, dignity restoration requires intentional process and conciliation, and cannot be satisfied by the fact that some parcels of land happened to become available on their own. Additionally, when looking at Governor Cayetano's offer, some have argued in hindsight that Native Hawaiians refused a good settlement when it was offered.¹⁴⁰ But dignity restoration is not about accepting whatever solution happens to be offered. An offer like Cayetano's which suggested that it was more about claims

136. Senate Committee on Agriculture and Hawaiian Affairs; Water and Land; and Judiciary and Labor, SB 2733 – Relating to the Public Trust Lands Settlement 2 (Feb. 9, 2008).

137. *Id.*; Staton, *supra* note 132.

138. Atuahene, *supra* note 88, at 802.

139. See Pat Omandam, *Governor Admits Failure Over OHA*, STARBULLETIN, <http://archives.starbulletin.com/2002/01/06/news/index2.html> [<https://perma.cc/6WWD-TNG7>] (last visited Feb 17, 2021).

140. See *OHA Scrambles to Get Back Ceded Land Revenues*, *supra* note 135 (quoting OHA trustee Clayton Hee's opinion that had the OHA taken Cayetano's offer as "a bird in the hand," the OHA could have had a trust worth close to \$1 billion and a land trust three times the size of Molokai today).

relief than restoration is not truly dignity restoring, regardless of any ancillary benefits it might have conferred. Furthermore, if one believes in the sincerity of the Apology Resolution, one could argue that the United States has already apologized, and that Native Hawaiians should just move on. However, its lack of any concrete offer of repair casts doubt on this claim, as dignity restoration requires more than mere words to be effective. Although each of these three examples had some elements of restoration, none constitute a full, just, and dignity-affirming remedy. Thus, the need for proper dignity restoration continues.

B. *Sovereignty and Self-Determination*

What might full dignity restoration for Native Hawaiians look like? Although dignity restoration generally requires compensation and a process that affirms dignity, according to Professor Justin B. Richland, it should also make an important departure when considering indigenous peoples.¹⁴¹ Specifically, rather than affirming dignity by incorporating the dispossessed back into the polity of society, indigenous restoration should ask for the opposite: sovereignty and self-determination. This understanding comes from the fact that (1) Native Americans (and Native Hawaiians) have historically called for sovereignty rather than integration, and (2) “dignity restoration is predicated upon autonomy.”¹⁴² Therefore, adequate dignity restoration for such groups may require separation for the sake of autonomy, and hence, dignity.¹⁴³ This view is also supported by the United Nations Declaration of the Rights of Indigenous Peoples, which states that to enable indigenous peoples to advance their own autonomous needs and interests, they should have not only a right to self-determination, but also control over their lands and resources.¹⁴⁴

It is important to note that sovereignty and self-determination are not the same thing. Though both are intertwined as they relate to indigenous peoples, sovereignty refers to having governmental authority and jurisdiction within clearly defined territorial boundaries, whereas self-determination refers to the ability of a people “to freely pursue [] economic, social, and cultural development.”¹⁴⁵ Thus, sovereignty is substantively legal in nature, and self-determination is a morality-based political right.¹⁴⁶

141. Richland, *supra* note 99, at 222.

142. Atuahene, *supra* note 88, at 815.

143. *See id.* (noting that “since dignity restoration is predicated upon autonomy, the concept has to make space for dispossessed peoples who are calling for both integration and separation”).

144. U.N. Declaration on the Rights of Indigenous Peoples art. 1, 4, 8 (Sept. 13, 2007).

145. Rebecca Tsosie, *Indigenous People and Environmental Justice: The Impact of Climate Change*, 78 U. COLO. L. REV. 1625, 1663–64 (2007).

146. *Id.* at 1663.

Both concepts are relevant for Native Hawaiians because, unlike any other indigenous people in the United States, they lack political sovereignty, which means they cannot exercise the self-governance that other indigenous groups can.¹⁴⁷ This lack of recognition also prevents Native Hawaiians from interacting with the United States on a government-to-government basis and promulgating their own laws and court systems.¹⁴⁸ Accordingly, both sovereignty and self-determination are needed to fully restore dignity, since sovereignty would help Native Hawaiians achieve parity with other indigenous peoples under the law, and self-determination would provide the invaluable benefit of letting them determine their culture and community's future.

Professor Richland's analysis of the Hopi, whose experience is analogous to that of Native Hawaiians, shows that sovereignty and self-determination constitute ideal dignity restoration for indigenous peoples because dignity is rooted in their relationships to their traditional lands.¹⁴⁹ Similar to Native Hawaiians, the Hopi lost almost 90% of their land through various federal acts, resulting in the Hopi people struggling to continue their traditional practices on land that, legally, was no longer theirs to use.¹⁵⁰ Such dispossession of traditional land, according to Professor Richland, enacts a kind of violence with long-lasting and severe emotional consequences, making solutions such as monetary compensation alone often unsatisfying.¹⁵¹ Thus, proper restoration must recognize this trauma and aim to help indigenous peoples regain the ability to exercise the sovereignty and self-determination they had before the dispossession of their lands.¹⁵²

Professor Richland draws attention to two cases to illustrate the difficulties in restoring dignity when indigenous viewpoints and traditional lands are disregarded by Western entities. In *Wilson v. Block* and *Navajo Nation v. U.S. Forest Service*, the Hopi and their allies fought against the use of treated sewage artificial snow on Nuvatukya'ovi mountain on the grounds that it defiled the dignity of the mountain and violated their religious beliefs.¹⁵³ Nuvatukya'ovi is particularly significant as one of the Hopi

147. Trask, *supra* note 10, at 84–85 (noting that Native Hawaiians are the only group of Native people in the United States who still lack this political sovereignty designation).

148. *Id.* at 83–84.

149. See Richland, *supra* note 99, at 934–36.

150. *Id.* at 919–20, 928 (explaining how traditional Hopi pilgrimages to the Nuvatukya'ovi mountains have become dangerous because it lies outside official Reservation boundaries).

151. *Id.* at 921–22.

152. *Id.* at 922.

153. *Id.* at 930–34. Professor Richland discusses *Wilson v. Block*, in which the court upheld the government's development plans over Hopi First Amendment religious claims because "governmental actions must not just offend...but actively 'penalize faith, to run afoul of the First Amendment.'" *Id.* at 933 (citing *Wilson v. Block*, 708 F.2d 735, 740 (D.C. Cir. 1983)). Likewise, he notes that in *Navajo Nation et al. v. USFS*, the court allowed the proposed snowmaking on the mountain because "the diminishment of spiritual fulfillment—serious though it may be—is not a 'substantial burden' on the free exercise of

peoples' most sacred places—a home of ancestor spirits and a visible marker of ceremonial significance.¹⁵⁴ Though the Hopi lost in both cases, their outcomes illustrate the ways that dignity is taken not only through the confiscation of traditional lands, but also through the political and legal disregard for indigenous viewpoints as they relate to such lands. All of these issues are also at play for Native Hawaiians in the ongoing disputes over Mauna Kea.

V. MAUNA KEA AND THE TMT

Much like Nuvatukya'ovi and the Hopi, the building of the TMT on Mauna Kea represents an ongoing dignity taking.¹⁵⁵ As ceded land, Mauna Kea was taken at annexation as part of the original dispossession from the Hawaiian people. Additionally, recent actions by the state indicate a continuation of the United States' historical trend of infantilizing Native Hawaiians and belittling their concerns. On July 17, 2019, Hawaii's Governor David Ige announced an emergency proclamation in response to Native Hawaiian TMT protests.¹⁵⁶ The proclamation, in addition to failing to identify any actual "emergency" as required by HRS section 127A-14, misrepresented Native Hawaiian peaceful protests as a "volatile situation" that posed a risk of "substantial injury or harm."¹⁵⁷ Furthermore, Governor Ige later indicated that the real purpose of the proclamation was to facilitate construction of the TMT.¹⁵⁸ This purposeful misrepresentation and characterization of Native Hawaiians as a public safety concern in need of control continues the United States' historical rhetoric of infantilization.

This Part will first discuss the cultural significance of Mauna Kea to Native Hawaiians, then provide an overview of the long history of telescope building on Mauna Kea's summit, and finally discuss the underlying conflicts between Western and indigenous viewpoints as they relate to land and dignity.

religion" and so did not preclude such action. *Id.* at 933–34 (quoting *Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058, 1070 (2008)).

154. *Id.* at 919.

155. See discussion *supra* Part III.

156. OFF. OF THE GOVERNOR STATE OF HAW. PROCLAMATION (2019), <https://governor.hawaii.gov/wp-content/uploads/2019/07/1907086-Mauna-Kea.pdf> [<https://perma.cc/SE6N-LTQ5>] [hereinafter PROCLAMATION].

157. Memorandum in Support of Mot. for Temp. Stay or Suspension of the July 17, 2019 Proclamation of David Y. Ige, Governor of the State of Haw. at 5–7, 10–12, *Neves v. Ige* (2019) (No. ICC191001134) [hereinafter Memorandum]; PROCLAMATION, *supra* note 156, at 1, 2.

158. Memorandum, *supra* note 157, at 6.

A. Cultural Significance of Mauna Kea

Native Hawaiian traditional beliefs imbue Mauna Kea with important cultural and religious significance.¹⁵⁹ Hawaiian lore holds that the Earth Mother Papahānaumoku and the Sky Father Wakea created the Hawaiian Islands, starting with the big island of Hawaii.¹⁶⁰ Mauna Kea on the island of Hawaii was the first-born child of Papahānaumoku and Wakea.¹⁶¹ Accordingly, it is seen as an ancestor to the Hawaiian people, and its summit is viewed as the spiritual *piko* (navel) for the people to connect with their gods and ancestors.¹⁶² Various mountain features such as Lake Waiau are seen as places in which gods such as Poli'ahu, Kukahau, Lilinoe, and Waiau reside or take earthly form, and there are a number of shrines across the mountain for the purpose of their worship.¹⁶³ Furthermore, even the *'aina* (land) itself has value to Native Hawaiians as a “life force” that cannot be traded for profit, and should be nurtured and cultivated respectfully (the concept of *malama 'aina*) as a source of mental and physical sustenance.¹⁶⁴ The mountain is also the burial place of many Hawaiian chiefs and priests,¹⁶⁵ and some Hawaiians today continue to bury the umbilical cords of their children on the mountain to create a tangible connection to the land.¹⁶⁶ Given Mauna Kea's great cultural significance, there has been tension between those who believe that it should be respected and preserved in its natural state, and others who either overlook such values or believe the mountain would be better used for development and scientific purposes.

B. Telescope Building and the TMT

For decades, various institutions have leased land on Mauna Kea's summit to build observatories. The University of Hawaii opened the first observatory on Mauna Kea in 1968, following the negotiation of a lease with the Board of Land and Natural Resources (BLNR) for the Mauna Kea Science Reserve, an 11,288-acre site that includes a 525-acre Astronomy

159. See *id.* at 8 (describing the plaintiff's belief that “Mauna Kea is the center of [Native Hawaiians'] continued existence”).

160. Christine Hitt, *The Sacred History of Maunakea*, HONOLULU MAG. (Aug. 5, 2019), <http://www.honolulumagazine.com/Honolulu-Magazine/August-2019/The-Sacred-History-of-Mauna-Kea> [<https://perma.cc/W6EQ-ECYA>].

161. *Id.*

162. *In re* Conservation Dist. Use Application (CDUA) HA-3568 for the Thirty Meter Telescope at the Mauna Kea Sci. Reserve, 431 P.3d 752, 758 (Haw. 2018).

163. *Id.*

164. VAN DYKE, *supra* note 45, at 12, 375.

165. Dominique Saks, *Mauna Kea*, COLO. COLL., <https://sites.coloradocollege.edu/indigenoustraditions/sacred-lands/sacred-lands-mauna-kea> [<https://perma.cc/GBM8-NSWW>] (last visited Nov 29, 2019).

166. Zuri Aki, *A New Telescope and the Politics of Cultural Destruction*, HONOLULU CIV. BEAT (Apr. 7, 2015), <https://www.civilbeat.org/2015/04/a-new-telescope-and-the-politics-of-cultural-destruction> [<https://perma.cc/BKZ2-PSW4>].

Precinct on the mountain's summit.¹⁶⁷ Soon after the building of this first observatory, twelve additional telescopes were built on or around the mountain's summit between 1970 and 2002.¹⁶⁸

Plans for the TMT began in 2003 as a partnership between the California Institute of Technology and the University of California to foster advancement in astronomy,¹⁶⁹ though the organization has now expanded to include seven members.¹⁷⁰ The TMT conducted a five-year study examining five potential telescope locations,¹⁷¹ and the results of this study led to the selection of Mauna Kea for several reasons, including its altitude, climate, and atmosphere that provides "exceptional conditions for astronomical measurements with adaptive optics which will be equipped on the TMT."¹⁷² The TMT would be located on the northwest slope of Mauna Kea (Area E) for various reasons: (1) its distance from historical and cultural sites, (2) its minimal visibility, (3) to reduce wind interference, (4) to avoid interfering with the habitat of native insect species, and (5) to minimize its interference with the existing observatories.¹⁷³

Supporters of the TMT emphasize that its advancements in technology and capabilities would open new opportunities in scientific observation.¹⁷⁴ The TMT, if built, would be three times as wide and have nine times the area of the largest currently existing visible-light telescope, making it capable of providing images more than twelve times sharper than those provided by the Hubble Space Telescope.¹⁷⁵ It would also be the first observatory of its size to integrate adaptive optics into its optical and infrared technology design,

167. *In re* Conservation Dist. Use Application, 431 P.3d at 758.

168. *In re* Conservation Dist. Use Application (CDUA) HA-3568 for the Thirty Meter Telescope at the Mauna Kea Sci. Reserve, 431 P.3d 752, 758 (Haw. 2018) (providing a timeline of when all additional telescopes on Mauna Kea were built: the University 2.2-meter Telescope in 1970, the United Kingdom Infrared Telescope in 1979, the NASA Infrared Telescope Facility in 1979, the Canada-France-Hawaii Telescope in 1979, the California Institute of Technology Submillimeter Observatory in 1986, the James Clerk Maxwell Telescope in 1986, the Very Long Baseline Array in 1992, the W. M. Keck Observatory, phase 1 in 1992, and phase 2 in 1996, the Subaru Observatory in 1999, the Gemini North Observatory in 1999, and the Submillimeter Array in 2002).

169. *Id.* at 759.

170. The TMT's full partners are Caltech, the Department of Science and Technology of India, the National Astronomical Observatories of the Chinese Academy of Sciences, the National Institutes of Natural Sciences of Japan, the National Research Council Canada, and the University of California. The Association of Universities for Research in Astronomy is an associate member. *Partners*, TMT INT'L OBSERVATORY, <https://www.tmt.org/page/partners> [<https://perma.cc/UFX8-8K95>] (last visited Nov. 8, 2019).

171. *Our Story in Hawaii*, TMT INT'L OBSERVATORY, <https://www.tmt.org/page/our-story-in-hawaii> [<https://perma.cc/S4Y8-G4ZE>] (last visited Nov. 29, 2019).

172. *Id.*

173. *In re* Conservation Dist. Use Application, 431 P.3d at 759.

174. *About*, TMT INT'L OBSERVATORY, <https://www.tmt.org/page/about#what-is-tmt> [<https://perma.cc/W2HY-VL6Z>], (last visited Feb. 18, 2021).

175. *Id.*

providing increased correction against atmospheric interference.¹⁷⁶ The TMT would be used to research topics such as physics and cosmology, early universe and galaxy formation, supermassive black holes, exoplanets, time domain science, and the formation of stars and planets.¹⁷⁷

However, the TMT is not the only large telescope being built. Currently, there are two other similarly large telescopes around the world in various stages of planning and construction: the Giant Magellan Telescope (GMT) and the Extremely Large Telescope (ELT), all of which have the potential to achieve similar scientific benefits.¹⁷⁸

C. *The Science and Culture Conflict*

Many Native Hawaiians oppose the TMT because they believe scientific advancement alone is not a compelling enough reason to disturb sacred land.¹⁷⁹ Rather, the benefits of such drastic actions must be weighed against their social, cultural, and environmental impacts. Applying these considerations to the construction the TMT, the benefits that the telescope would provide to Native Hawaiians must therefore be greater than its adverse effects—especially given the culturally significant and highly contested nature of the ceded land on which the TMT would be built.¹⁸⁰

As noted in Professor Richland's analysis of the Hopi,¹⁸¹ indigenous dignity restoration may be best achieved through sovereignty and self-determination. Yet, for this solution to apply to Mauna Kea, the mountain would essentially have to be given back to the Native Hawaiian people. Given that this has not occurred, the issue of how to navigate competing Native Hawaiian and state interests over ceded land remains. Thus, it is worthwhile to consider the conflicts between scientific interests and indigenous culture more deeply in order to see if such viewpoints are truly at odds, and how dignity restoration might work in such contexts.

The TMT dispute is a clash between Western beliefs, which privilege scientific advancement,¹⁸² and Native Hawaiian beliefs, which hold that Mauna Kea's spiritual and cultural significance is reason enough not to build

176. *In re* Conservation Dist. Use Application, 431 P.3d at 759.

177. *Science Themes*, TMT INT'L OBSERVATORY, <https://www.tmt.org/page/science-themes> [<https://perma.cc/MG2K-NSDM>] (last visited Nov. 8, 2019).

178. Richard Talcott, *Four New Giant Telescopes are About to Rock Astronomy*, ASTRONOMY (Oct. 28, 2020), <https://astronomy.com/news/2020/10/four-new-giant-telescopes-are-about-to-rock-astronomy> [<https://perma.cc/S3M3-NRC>].

179. Lam, *supra* note 3 (“[s]cience itself doesn't just get a free pass . . . [i]t needs to be balanced with what does it impact and how does that benefit the world that we live in and move us forward” (quoting Camille Kalama, a Native Hawaiian civil rights lawyer)).

180. *See id.*

181. *See* discussion *supra* Section IV.B.

182. *See* Rebecca Tsosie, *Indigenous Peoples and Epistemic Injustice: Science, Ethics, and Human Rights*, 87 WASH. L. REV. 1133, 1137–38 (2012) [hereinafter Tsosie, *Indigenous Peoples*].

an observatory on it.¹⁸³ This pitting of science against culture is nothing new—according to Professor Rebecca Tsosie, there is often a perceived incongruence between the interests of scientists and those of indigenous peoples.¹⁸⁴ However, Professor Tsosie makes clear that this dichotomy is a false construction, and that scientific interests can benefit both indigenous peoples and the public at large, provided that relevant harms are identified and adequately addressed.¹⁸⁵

In typical Western thought, concepts like science, ethics, and religion may intersect, but are understood to be separate disciplines governed by different principles.¹⁸⁶ Western society also has a tendency to separate the physical environment from the social environment.¹⁸⁷ By contrast, in many indigenous societies, religion, science, and philosophy are intertwined in an epistemology that defines personal expression, relationships to the land, and what is seen as ethical and appropriate.¹⁸⁸ Thus, Western and indigenous thoughts represent very different systems of knowledge formation: whereas Western thought is representational, given its belief that knowledge of the natural world is distinct and separate from the reality of the world, indigenous thought is presentational, in that knowledge depends on a continual integration with the natural and spiritual worlds.¹⁸⁹

Is either system inherently better or worse than the other? In the United States at least, the science-centric Western ideology prevails. Science often receives priority status in policy decisions¹⁹⁰ and tends to be viewed as promoting progress, which is seen as a valuable social good.¹⁹¹ This observation is further supported by society's tendency to defer to scientists for their perceived knowledge and expertise,¹⁹² as well as the U.S. government's demonstrated history of disregarding the importance of indigenous peoples' holy and sacred places.¹⁹³

183. See Watson-Sproat, *supra* note 1.

184. Tsosie, *Indigenous Peoples*, *supra* note 182, at 1136.

185. *Id.*

186. *Id.* at 1137–38.

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

188. Tsosie, *Indigenous Peoples*, *supra* note 182, at 1138–39.

189. Laurie A. Whitt et al., *Belonging to Land: Indigenous Knowledge Systems and the Natural World*, 26 OKLA. CITY U. L. REV. 701, 702–05 (2001).

190. Rebecca Tsosie, *Privileging Claims to the Past: Ancient Human Remains and Contemporary Cultural Values*, 31 ARIZ. ST. L. J. 583, 617 (1999) [hereinafter Tsosie, *Privileging Claims*].

191. *Id.* (citing J. Maienschein et al., *Biology and Law: Challenges of Adjudicating Competing Claims in a Democracy*, 38 JURIMETRICS J. 151, 156 (1998)).

192. *Id.* (citing F. A. Hayek, *The Use of Knowledge in Society*, 35 AM. ECON. REV. 519, 521 (1945)).

193. Sarah P. Bailey, *The Dakota Access Pipeline Isn't Just About the Environment. It's About Religion.*, WASH. POST (Dec. 5, 2016, 4:00 AM), <https://www.washingtonpost.com/news/acts-of-faith/wp/2016/12/05/the-dakota-access-pipeline-isnt-just-about-the-environment-its-about-religion> [https://perma.cc/NS9T-BXAC] (quoting Stephen Pevar, an ACLU attorney who specializes in Indian and tribal rights, that if damaging developments like oil pipelines were being proposed for a place with Western

But, as Professor Tsosie makes clear, science is just one of many forms of knowledge, and the fact that it is highly regarded does not mean that other forms of knowledge such as religion or culture are less important.¹⁹⁴ Native Hawaiian culture “is based in research and observation” and incorporates a deep respect for the environment.¹⁹⁵ Additionally, Native Hawaiians’ respect for the environment incorporates a deep familiarity with “variations and patterns” in nature.¹⁹⁶ This connection between different modes of knowledge is the crux of the difference between Western and Native Hawaiian perceptions of science and land—Native Hawaiians see these other modes of knowledge as essential to their understanding of the world, whereas Western views do not see such elements as essential.

For Native Hawaiians, the importance of Mauna Kea and the intertwined nature of their knowledge systems and connections to the land suggest that rather than privileging science, spiritual, genealogical, and cultural knowledge must be given equal weight and consideration. Indeed, Native Hawaiians who oppose the TMT do not oppose science or what the TMT aims to do.¹⁹⁷ Instead, they argue that science should not hold any more weight than cultural or religious considerations of Mauna Kea.

D. Additional Dignity Considerations

Accepting that Western viewpoints are not the only answer, any attempt at dignity restoration for Mauna Kea, and for ceded land generally, must make a serious effort to integrate both Western and Native Hawaiian values. However, giving equal weight to both viewpoints is not easy. Although Native Hawaiians do participate in some aspects of Mauna Kea’s management,¹⁹⁸ it is not enough. Additionally, Mauna Kea is still under state control, and Native Hawaiians lack the political power to force the state to give equal recognition to their views. Moreover, some Native Hawaiians

religious or cultural significance like Jerusalem, the Government would be much less likely to condone such actions).

194. Tsosie, *Privileging Claims*, *supra* note 190, at 619 (“Science is one way of ascertaining knowledge about the world, but it is not the only way.”).

195. Kelsea Kanohokuahiwi Hosoda, *Native Hawaiian Culture is Science*, HAWAII BUSINESS (April 4, 2018) <https://www.hawaiiibusiness.com/native-hawaiian-culture-is-science> [<https://perma.cc/8JPC-FMUE>].

196. *Id.*

197. Watson-Sproat, *supra* note 1.

198. See *Management*, OFF. OF MAUNA KEA MGMT., <http://www.malamamaunakea.org/management> [<https://perma.cc/FX8G-TWQZ>] (last visited Dec. 18, 2019) (stating that although Mauna Kea is managed by the University of Hawaii, which is advised on matters concerning the mountain by the Office of Mauna Kea Management, the Mauna Kea Management Board, and Kahu Ku Mauna, a Native Hawaiian community-based council, Native Hawaiians lack the substantive power to enact change on their own accord).

even feel that given the state's history of broken promises and the severity of the harm done, any negotiation with the state would be inadequate.¹⁹⁹

Also notable is that there are Native Hawaiians who do support the TMT.²⁰⁰ These supporters argue that the TMT is actually in line with a modern narrative of Native Hawaiians' continued search for knowledge and understanding, would be "compatible with the sacred landscape," and would help Native Hawaiians learn more about themselves and the universe given their history as a people who have always held the stars and heavens in great importance.²⁰¹ Considering these disagreements, there is some uncertainty over what the Native Hawaiian community as a whole wants for Mauna Kea. As Professor Rose Cuison Villazor notes, because culture is not static, we must be careful with what we are trying to protect, lest we inadvertently protect cultural beliefs that no longer exist or marginalize members of the indigenous group whose culture we are seeking to protect in the first place.²⁰² This warning is why giving equal consideration to Native Hawaiian viewpoints is important for dignity restoration. Letting outside groups like the TMT or the state have the final authoritative say takes dignity away by essentially allowing them to determine what solution is best or which of the community's viewpoints is correct. But when decisions are made with full consideration of the Native Hawaiian community's interests, what results is a more accurate direction that aligns with the actual goals of the Native Hawaiian people.

Notable too is that the TMT has a backup location on the island of La Palma in the Canary Islands,²⁰³ which raises the idea of moving the telescope and avoiding the conflict entirely. The La Palma location is comparable to Mauna Kea, with the exception of Mauna Kea's slightly better altitude and

199. See E-mail from Eric Keawe to Cody Uyeda (Nov. 14, 2019, 08:25 PST) (on file with author) ("No more temporary fixes. There has been so much damage done by the U.S. regarding land titles, corporate/international transactions under U.S. laws.").

200. See, e.g., *Mauna Kea Ainana Hou v. Bd. of Land & Nat. Res.*, 363 P.3d 224, 233–34 (Haw. 2015) (listing varying testimonies regarding the construction of the TMT); see also HNN Staff, *Heated Forum on TMT Has More Wondering: How Can This Conflict Be Resolved?*, HAW. NEWS NOW (Oct. 4, 2019), 5:19 AM), <https://www.hawaiinewsnow.com/2019/10/04/panel-discussion-coexistence-culture-science-mauna-kea-set-state-capitol> [<https://perma.cc/6FX2-Q3HG>] (noting a comment by former OHA trustee Judge Walter Heen supporting the TMT as "an advancement in knowledge that Hawaii can be proud of and Hawaiians can benefit from.").

201. See *Mauna Kea Ainana Hou*, 363 P.3d at 386 (quoting Wallace Ishibashi, Jr., a member of the Kealoha Poli'ahu family, stating that he supports the TMT because "it would help his grandchildren 'learn more about ourselves, our God, and what's out there beyond the stars that we can see with only our eyes.'").

202. Rose Cuison Villazor, *Problematizing the Protection of Culture and the Insular Cases*, 131 HARV. L. REV. F. 127, 132 (2018).

203. AP, *Canary Islands Selected as Alternate Site for Thirty Meter Telescope*, NBC NEWS (Nov. 2, 2016, 3:41 PM), <https://www.nbcnews.com/news/asian-america/canary-islands-selected-alternate-site-thirty-meter-telescope-n677001> [<https://perma.cc/X5J3-UR96>].

environment.²⁰⁴ Additionally, it would not cost more money or time to build on La Palma.²⁰⁵ Furthermore, some scientists have acknowledged that other technological advancements would compensate for any disadvantage in moving the telescope.²⁰⁶ For example, the James Webb Space Telescope, which NASA plans to launch in 2021, would bypass all atmospheric interference at either the Mauna Kea or La Palma locations.²⁰⁷ From this perspective, it may seem that the best solution is to move the TMT, or perhaps not have a new telescope at all. However, La Palma is not without its own potential issues. The proposed site would interfere with a protected conservation area, as well as archaeological sites containing ancient hieroglyphics and other artifacts.²⁰⁸ Thus, although moving the TMT would free Native Hawaiians of this conflict, it may push it onto another community instead. Additionally, with competitors such as the GMT and the ELT in production, the question is not so much *whether* there will be a TMT, but *where* it will be. Moving the TMT would also only delay, rather than resolve, the ceded lands conflict, as Mauna Kea is just one of many parcels of ceded land facing similar conflicts.²⁰⁹ Ultimately, regardless of whether the TMT is built on Mauna Kea or La Palma, the underlying conflict will remain.

VI. DIGNITY RESTORATION: COMPENSATION AND LEGAL PERSONHOOD

Though many see sovereignty and self-determination as the ideal end goals²¹⁰ for fully restoring Native Hawaiian dignity, as long as the United States maintains its current control over Hawaii's ceded lands, such outcomes are not an immediate reality. And, even if these restorative processes are feasible, they may still require centuries to fully take shape.²¹¹ The state has also not given any indication that they are willing to give ceded

204. AP, *Hawaii or Spain? Why Experts Say Location Might Not Matter for World's Largest Telescope*, CBS NEWS (Aug. 25, 2019, 10:35 PM), <https://www.cbsnews.com/news/worlds-largest-telescope-why-locations-mauna-kea-hawaii-la-palma-spain-might-not-matter> [https://perma.cc/JX59-2C6L].

205. *Id.*

206. *Id.*

207. *Id.*

208. Daniel Clery, *Stalled in Hawaii, Giant Telescope Faces Roadblocks at Its Backup Site in the Canary Islands*, SCI. MAG. (Sept. 3, 2019, 5:55 PM), <https://www.sciencemag.org/news/2019/09/stalled-hawaii-giant-telescope-faces-roadblocks-its-backup-site-canary-islands> [https://perma.cc/L2LF-XA5W]; see also Jonathan Saupe, *Environmentalists in Canary Islands Gear Up for Fight Against TMT*, HAW. NEWS NOW (Aug. 7, 2019, 1:20 PM), <https://www.hawaiinewsnow.com/2019/08/07/environmentalists-canary-islands-gear-up-fight-against-tmt> [https://perma.cc/9F49-6A96].

209. Keawe, *supra* note 199 (noting numerous examples of conflict between Native Hawaiians and the state over issues such as water rights on Maui and Oahu, military practice in Makua Valley, and a proposed missile site on Kauai).

210. Melody Kapilialoha MacKenzie, *The Long Road: Native Hawaiian Sovereignty and the State of Hawaii*, *Symposium: State Tribal Relations: Past, Present, and Future: Ke Ala Loa*, 47 TULSA L. REV. 621, 657 (2012).

211. Keawe, *supra* note 199 (noting that a full restoration of an independent Hawaiian Kingdom could take centuries to become fully functioning).

lands such as Mauna Kea back to the Native Hawaiian people. There is the possibility of eventually negotiating a different outcome, given that the TMT, if built, is only designed to provide service for fifty years, and the University of Hawaii's lease on the land ends 2033.²¹² However, these dates are still far in the future, and such possibilities are merely speculative. Moreover, the Hawaii Supreme Court has indicated a preference for weighing Native Hawaiian and private development interests equally at best.²¹³ This preference suggests that conflicts between Native Hawaiians and the state over ceded lands will likely continue long into the future,²¹⁴ and that Native Hawaiians cannot simply hope for the state to always recognize and prioritize their interests.

Against this backdrop, there may be room for intermediary dignity restoring remedies that advance the dignity of Native Hawaiians in concrete and more readily achievable ways. Dignity restoration can be ongoing, and enacting any one restoration by no means implies that it alone must be an all-encompassing solution.²¹⁵ For a taking as severe as Hawaii's ceded lands, it is unlikely that full or even substantial healing would happen through any single dignity restoration remedy. Rather, it will likely require a process of many restoration efforts, both large and small. This Article will examine two such possible methods of dignity restoration: compensation and legal personhood.

A. Compensation

What, if anything, makes compensation adequate? For a harm as ongoing as the ceded lands' dispossession, reaching a specific compensatory amount is not easy. Given that the ceded lands encompass so many different locations, each with their own histories and issues, it may well be impossible to arrive at any definitive, agreed-upon number for the lands, much less account for the psychological, emotional, and other intangible harms. It is true that monetary compensation on its own is often not enough to fully restore dignity.²¹⁶ Additionally, some Native Hawaiians feel that compensation in any form is out of the question because it does not give permanent, lasting control of the land.²¹⁷ However, when taken not as a singular solution but as one component of a larger dignity restoration

212. *Mauna Kea Ainana Hou v. Bd. of Land & Nat. Res.*, 363 P.3d 224, 233 (Haw. 2015).

213. See *In re Conservation Dist. Use Application (CDUA) HA-3568 for the Thirty Meter Telescope at the Mauna Kea Sci. Reserve*, 431 P.3d 752, 768 (Haw. 2018); see also *Ka Pa'akai O Ka'Aina v. Land Use Comm'n*, 94 Haw. 31, 35 (2000).

214. See MacKenzie, *The Long Road*, *supra* note 210, at 644.

215. See Atuahene, *supra* note 88, at 813–815 (showing how French and Dutch compensation to Jews occurred in several rounds and that each round affirmed different aspects of dignity).

216. Richland, *supra* note 149, at 921–22.

217. Keawe, *supra* note 199.

process, there may be room for monetary compensation as a dignity-restoring element, provided it fulfills certain criteria.

The question we might ask, then, in the words of Professor Valerie P. Hans, is “to what extent are money damages effective in restoring the dignity of the plaintiff?”²¹⁸ Although Professor Hans applies this question to tort law considerations, it is applicable here in that it describes the relationship between monetary compensation and dignity restoration. Specifically, Professor Hans notes that monetary damages can help restore the dignity of a dispossessed individual and identifies two elements that play a role in such processes: the symbolism of the monetary amount and the identity of who provides compensation.²¹⁹ One can see the amount in a compensatory award as a reflection of the worth of who (or what) was lost, or as an acknowledgement of the harm’s severity.²²⁰ Professor Hans illustrates this with the example of Fox News anchor Gretchen Carlson’s \$20 million settlement to resolve her workplace sexual harassment claims.²²¹ The unusually large award was recognition that not only was Ms. Carlson correct in her claims, but also that the injury was serious enough to warrant an extreme remedy.²²² Secondly, Professor Hans cites research showing that victims also feel more satisfaction when their compensation comes directly from the wrongdoer, and that the amount of compensation tends to increase when given directly from the wrongdoer to the victim rather than through a third party.²²³ Together, these factors support the idea that monetary damages can help restore equity and balance between the victim and the wrongdoer.²²⁴

Applying these ideas to the ceded lands, one can argue first that any compensation should come directly from the dispossessor—in this case, the U.S. government—to help restore balance and respect between the United States and Native Hawaiians. Although compensation from third parties could potentially restore dignity,²²⁵ for Native Hawaiians, the compensation should come directly from the government because of the extent of the takings and the severity of harm. In particular, given the 1993 Apology Resolution’s failure to mandate any actual reparation, a direct compensation

218. Valerie P. Hans, *Dignity Takings, Dignity Restoration: A Tort Law Perspective*, 92 CHI.-KENT L. REV. 715, 718 (2017).

219. *Id.* at 721–23.

220. *Id.* at 721.

221. *Id.* at 719.

222. *Id.* at 719–20.

223. *Id.* at 721–22 (citing Andre deCarufel, *Victims’ Satisfaction With Compensation: Effects of Initial Disadvantage and Third Party Intervention*, 11 J. APPLIED SOC. PSYCHOL. 445 (1981); Jonathan Baron & Ilana Ritov, *Intuition About Penalties and Compensation in the Context of Tort Law*, 7 J. RISK & UNCERTAINTY 17, 31 (1993)).

224. Hans, *supra* note 218, at 722.

225. *Id.*

could help show that the United States is actively taking steps to mitigate the damage done and right a past wrong.

Secondly, a minimum starting point could be “just compensation.” Under the Fifth Amendment, just compensation for a constitutional taking is that which constitutes “a full and perfect equivalent for the property taken.”²²⁶ This value is determined as of the date the taking occurred, and is considered to be the fair market value of what a willing buyer would pay a willing seller.²²⁷ Additionally, if property is taken before the ascertainment or payment of compensation, “the owner is not limited to the value of the property at the time of the taking; he is entitled to such addition as will produce the full equivalent of that value paid contemporaneously with the taking.”²²⁸ Therefore, if the taking of the ceded lands were evaluated as constitutional, then the valuation of the original 1.8 million acres of the ceded lands at the time of the dispossession could be one way to conceptualize a minimum compensatory amount.

However, given the arguments against this taking’s constitutionality,²²⁹ as well as the extent of the suffering Native Hawaiians have endured because of this dispossession, it seems unlikely that just compensation, on its own, would be an acceptable amount. Professor Atuahene does note that small amounts of compensation can have symbolic value, and, through the recipient’s strategic use, restore some dignity.²³⁰ But she also makes clear that such small awards are more often a missed opportunity to meaningfully address the economic inequalities faced by the dispossessed.²³¹ Thus, the amount of compensation to restore Native Hawaiians’ dignity should be more than a Fifth Amendment just compensation amount.

One might argue that any compensatory amount to Native Hawaiians should be far higher than just compensation. Like the reasoning behind Ms. Carlson’s \$20 million settlement,²³² the purpose of awarding a significantly larger amount would be to provide symbolic recognition of not only the

226. *Monongahela Navigation Co. v. U.S.*, 148 U.S. 312, 326 (1893).

227. *United States v. Miller*, 317 U.S. 369, 374 (1943).

228. *Seaboard Air Line Ry. Co. v. United States*, 261 U.S. 299, 306 (1923); *see also* *United States v. Klamath & Moadoc Tribes*, 304 U.S. 119, 123 (1938) (holding that the value of timber should be calculated into just compensation for the dispossessed land); *Jacobs v. United States*, 290 U.S. 13, 17 (1933) (quoting *Seaboard Air Line*, *supra*); *Kirby Forest Indus., Inc. v. United States*, 467 U.S. 1, 11 (1984) (same).

229. *See* discussion *supra* Section II.D.

230. ATUAHENE, *supra* note 92, at 152–63 (noting that although the financial awards given to the dispossessed through South Africa’s Land Restitution Program were generally inadequate, many who received such awards used the money in such a way that it restored dignity, such as by purchasing tombstones for the “loved ones who suffered during the forced removals” and making home improvements).

231. *Id.* at 157 (stating that most compensatory awards were below market value and did not create lasting economic outcomes for those recipients).

232. *See supra* text accompanying note 222.

severity of the dispossession, but also the extent to which the taking has detrimentally affected the Native Hawaiian people. Although Native Hawaiians do currently receive some payment in the form of 20% of the revenue generated on the ceded lands as mandated by section 5(f) of the Admission Act and HRS section 10-13.5, even the payment of this 20% has not always been smooth, as disputes over the classification, definition, and payment systems for various ceded land parcels have often prevented the OHA from receiving its full revenue share.²³³ Furthermore, even if it were the case that the OHA received its 20% revenue share in full and considered it just compensation, one could argue that such payments compensate only for the current, continued use of the lands, not for the original dispossession.

Regarding Mauna Kea, Kealoha Pisciotto, President of Mauna Kea Ainana Hou, noted that an economic proposal had been made in 2001 that all telescopes on Mauna Kea pay a collective yearly rent of \$50 million, rather than the \$1 per year they currently pay.²³⁴ Although the TMT has set itself apart from other telescopes by agreeing to pay more than the \$1 rent, it proposed only \$1 million.²³⁵ If we take the \$50 million per year figure as a more accurate assessment of not only current rent but also compensation for past use, the TMT's proposed amount still falls far short of adequate. If compensation is to restore any dignity, then giving Native Hawaiians a unilaterally decided minimal amount is not likely to achieve such a goal. Rather, any compensatory amount should be well above any minimum to acknowledge the severity of the taking, and come directly from the U.S. government to show true conciliation. In this way, compensation can potentially restore some dignity.

B. Legal Personhood

Another possible intermediate dignity restoration remedy is granting various ceded lands legal personhood. Granting legal personhood to a natural entity was first achieved in 2014 when New Zealand designated the Te Urewera forest a "legal entity."²³⁶ In 2017, New Zealand's Parliament passed similar legislation recognizing that the Whanganui River has "all the rights,

233. MacKenzie, *supra* note 210, at 640 (2012); *see also* Off. of Hawaiian Affs. v. State, 133 P.3d 767 (Haw. 2006) (Native Hawaiians contested adequate payment of the 20% revenue of "ceded lands" guaranteed to them by law); Trs. of the Off. of Hawaiian Affs. v. Yamasaki, 737 P.2d 446 (Haw. 1987) (same).

234. Kealoha Pisciotto, *Rent is Past Due*, HAW. TRIB.-HERALD (Sept. 12, 2008), [http://www.hawaiifreepress.com/Portals/0/Article%20Attachments/Telescope%20Pisciotta%20\\$50M%20Demand%20Letter.pdf](http://www.hawaiifreepress.com/Portals/0/Article%20Attachments/Telescope%20Pisciotta%20$50M%20Demand%20Letter.pdf) [<https://perma.cc/S8QQ-MRFY>].

235. *Our Story in Hawaii*, *supra* note 171.

236. Jacinta Ruru, *Tuhoe-Crown Settlement – Te Urewera Act 2014*, MAORI L. REV. (Oct. 2014), <https://maorilawreview.co.nz/2014/10/tuhoe-crown-settlement-te-urewera-act-2014> [<https://perma.cc/G8CJ-WXQA>].

powers, duties, and liabilities” of a legal person.²³⁷ The river in particular shares many similarities with Mauna Kea, as it holds great significance for the Whanganui tribe of New Zealand’s Native Maori people, who see it as an ancestor and living being to whom they have an inseparable tie and an obligation to protect.²³⁸ Legal personhood recognized the Whanganui River as “an indivisible and living whole,” incapable of being owned by anyone or anything.²³⁹ It effectively extinguished any prior ownership claims that the Crown (New Zealand government) exercised over the river and designated two guardians to oversee the river’s interests: one appointed by the Crown, and the other appointed by all Whanganui *iwi* (people) with an interest in the river.²⁴⁰ Importantly, this decision came as a form of resolution after decades of legal conflict between the Whanganui *iwi* and the Crown over the use and management of the river, starting in 1848 when the Crown purchased 86,200 acres of land that included a portion of the river and began activities such as riverbed gravel mining and diversion of the river’s headwaters, which were seen as a severe cultural affront to the Whanganui *iwi*.²⁴¹ Since this decision, several other landmarks in New Zealand have gained legal personhood, and this framework has begun to find traction in other parts of the world.²⁴²

Although the decision to grant legal personhood did not restore full ownership of the Whanganui to the Maori,²⁴³ it did accomplish several important and symbolic things. First, it recognized the Maori peoples’ belief that the river is an indivisible and living entity, thus taking the unprecedented step of having a Western government accord respect and institute legal protection based on indigenous peoples’ beliefs. Second, as an official designation, it provides tangible support for the indigenous idea that land, identity, and culture are intertwined and inseparable. Third, because guardianship of the river is shared equally between the Crown and the Whanganui *iwi*, granting legal personhood illustrates that the protection of culturally and environmentally valuable land is the responsibility of both the indigenous people and the government, with each bearing the burden equally. Thus, rather than privileging Western viewpoints, it symbolizes the

237. Kennedy Warne, *A Voice for Nature*, NAT’L GEOGRAPHIC (Apr. 2019), <https://www.nationalgeographic.com/culture/2019/04/maori-river-in-new-zealand-is-a-legal-person> [https://perma.cc/7MFU-MSMQ].

238. *Id.*

239. Tutohu Whakatupua, N.Z.-Whanganui Iwi, § 2.4, Aug. 30, 2012, <http://files.harmonywithnatureun.org/uploads/upload664.pdf>; see also *Whanganui Iwi (Whanganui River) Deed of Settlement Summary*, N.Z. GOV’T, <https://www.govt.nz/browse/history-culture-and-heritage/treaty-settlements/find-a-treaty-settlement/whanganui-iwi/whanganui-iwi-whanganui-river-deed-of-settlement-summary/> [https://perma.cc/9LDX-ATU3] (last updated Nov. 17, 2020).

240. Tutohu Whakatupua, *supra* note 239, § 2.9–2.19.

241. *Whanganui Iwi Deed of Settlement Summary*, *supra* note 239.

242. Warne, *supra* note 237 (noting that attempts have been made to gain legal personhood for features such as India’s Yamuna and Ganges rivers and the United States’ Lake Erie).

243. *Id.*

idea that both indigenous and Western concerns are of equal value, and that solutions that work equally with both parties can achieve positive results.

The close similarities between the Whanganui river and Mauna Kea suggest that legal personhood could also benefit Native Hawaiians. First, both are sacred and culturally significant landmarks that function as embodiments of ancestral deities and sources of cultural practice. Second, both were traditional lands taken by a Western entity that did not use the land in ways that would be seen as respectful under Native views. Third, both landmarks have been the subject of longstanding claims from the Native people to return them to their stewardship and control. Thus, Mauna Kea in many ways is a parallel to the Whanganui river, which suggests that if the United States were to provide it legal personhood, it would produce similarly beneficial outcomes.

Although Native Hawaiians would not be able to assert full ownership of Mauna Kea under such arrangements, they would nevertheless have an equal voice in its future. This would ensure not only that Mauna Kea will be respected as an entity per Native Hawaiian beliefs, but also that the state cannot forge ahead with any development projects without discussion and agreement from Native Hawaiians. In this way, legal personhood would also restore dignity because it would respect Native Hawaiian beliefs while providing a long-term process that ensures that Native Hawaiian interests in Mauna Kea are heard, equally valued, and given power. Because there has not yet been any litigation concerning this form of legal personhood, the question of how much power the lands have and will ultimately be able to assert is still unclear.²⁴⁴ However, given legal personhood's growing support and its unique recognition of indigenous viewpoints, it holds valuable potential as a dignity-restoring solution.

To be clear, this analysis does not imply that providing compensation or legal personhood as a means of dignity restoration would detract from the greater call for Native Hawaiian sovereignty and self-determination. Rather, it is an acknowledgement that dignity restoration may need to happen incrementally, and that if sovereignty and self-determination cannot be fully realized in a timely manner, intermediate remedies can still generate restorative and beneficial outcomes for the Native Hawaiian community.

CONCLUSION

The dignity takings framework helps strengthen calls for Native Hawaiian restorations, which have been ongoing since at least the 1970s,²⁴⁵ by further articulating the profound historical harms that Native Hawaiians have experienced through the dispossession of the ceded lands, highlighting

244. *Id.*

245. SMITH, *supra* note 28, at 56.

the central role of dignity in facilitating restoration, and explaining why these restorations are still needed today.

Because land is at the heart of Native Hawaiian culture and identity, the dispossession of the ceded lands is a wound not easily healed. While Native Hawaiian sovereignty and self-determination is ideal, a more achievable solution given the current state of the ceded lands may lie in incremental dignity restoration remedies. Compensation and legal personhood are two such possible considerations, and illustrate that dignity restoration can take various forms and need not be a single event. Regardless of how dignity is restored though, Native Hawaiians must be given a meaningful voice in both the process and the result. To do any less is not dignity restoration.

At its heart, dignity restoration is not just about the dispossessed. Restoration is contingent upon the dispossessor recognizing the harm it has done and taking concrete steps to repair that harm. Ultimately, then, for Mauna Kea and the many other parcels of ceded land in Hawaii, the question is whether the United States will take responsibility for its history or continue to sideline a people it knows²⁴⁶ it has wronged.

246. See discussion *supra*, Section I.C.