Configuring the Bo(u)nds of Marriage: The Implications of Hawaiian Culture & Values for the Debate About Homogamy

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* Eia ‘o Hawai‘i ua ao, pa‘alia i ka pono i ka lima.

Here is Hawai‘i, having become enlightened, confirmed by justice in her hands.1

1. MARY KAWENA PŪKU‘I & SAMUEL H. ELBERT, HAWAIIAN DICTIONARY 297 (1986). This is my translation of a name song (mele inoa) for Lili‘uokalani, the last monarch of Hawai‘i. Her government was overthrown with the assistance of resident American officials and citizens January 14-17, 1893. The literature on this event is voluminous, but the legal issues are conveniently summarized in Patrick W. Hanifin, Hawaiian Reparations: Nothing Lost, Nothing Owed, 17 HAW. B.J. 107 (1982), and the rebuttal, Ramon Lopez-Reyes, The Demise of the Hawaiian Kingdom: A Psycho-Cultural Analysis and Moral Legacy (Something Lost, Something Owed), 18 HAW. B.J. 3 (1983). All Hawaiian definitions herein are also checked against LORRIN ANDREWS, A DICTIONARY OF THE HAWAIIAN LANGUAGE (1865). All Hawaiian definitions are from either Andrews or Pūku‘i & Elbert unless otherwise noted.

Hawaiian and “Hawaiiana” are modern Anglicizations which are not orthographized, as are true Hawaiian words, with the hamzah (‘) and macron(-).

Throughout this Article, I include the Hawaiian-language texts when I make or use translations. For nearly a century, the Hawaiian language appeared to be on its way to extinction, but it is now enjoying a renaissance. For an account of this trend, see generally ALBERT J. SCHOTZ, VOICES OF EDEN: A HISTORY OF HAWAIIAN LANGUAGE STUDIES (1994). Readers (even those who do not understand Hawaiian) should get used to seeing it in print, just as they do French, Spanish, or German.

105
In the same-sex marriage case of *Baehr v. Lewin,* the Hawaiʻi Supreme Court, relying upon modern American constitutional jurisprudence, determined that the right to privacy does not extend to same-sex marriage, which I will hereafter refer to as "homogamy." In an analysis of state equal protection law, however, the court held that the state cannot withhold marriage licenses from homogamous couples absent the showing of a compelling state interest in doing so. While I agree with the equal-protection result in *Baehr,* I disagree with the privacy result. I believe that the values of traditional Hawaiian culture provide a basis for a determination that a right to privacy exists which protects homogamy, as well as many other values related to same-sex relationships.

I will define and explore what I mean by "the values of traditional Hawaiian culture" by discussing a section of footnote 6 in the 1986 United States Supreme Court case *Bowers v. Hardwick,* in which the Court held that there is no fundamental federal constitutional right to commit homosexual sodomy. The Court supported its holding by appealing to what it called the "ancient roots" of anti-sodomy traditions. In footnote 6, the Court assembled a laundry list of "states" in which anti-sodomy laws were in effect as of 1868—the year of ratification of the Fourteenth Amendment. As part of that laundry list, the Court cited the 1869 Hawaiʻi Penal Code.

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2. 852 P.2d 44 (Haw. 1993).
3. The oddity in *Baehr* is that Plaintiffs brought the case exclusively under Hawaiʻi state law. They specifically stated in both the trial court and the Hawaiʻi Supreme Court that there was no federal constitutional question. Nevertheless, the trial court adverted to *Bowers v. Hardwick,* and the Hawaiʻi Supreme Court relied on United States Supreme Court precedent on equal protection throughout its opinion.
4. This neologism was given to me by Rocky O'Donovan, to whom mahalo nui. Rocky O'Donovan, "The Abominable and Detestable Crime Against Nature:" A Brief History of Homosexuality and Mormonism, 1840-1980, in MULTIPLY AND REPLENISH 123 (Brent Corcoran ed., 1994).
5. Or, as one speaker at the Hawaiʻi State Commission on the Status of Women Conference on December 4, 1993, felicitously mispoke: a "compelling straight interest."
   The court's equally important (and astonishing) holding was to declare that women are a full-fledged "suspect class" under Hawaiʻi equal protection and equal rights law. This implicated the Hawaiʻi equal rights amendment because the basis of the court's decision was gender, not sexuality or sexual orientation or preference. As the court stated in a footnote: "Homosexual" and "same-sex" marriages are not synonymous; by the same token, a "heterosexual" same-sex marriage is, in theory, not oxymoronic. ... Parties to "a union between a man and a woman" may or may not be homosexuals. Parties to a same-sex marriage could theoretically be either homosexuals or heterosexuals.
   *Baehr,* 852 P.2d at 51 n.11.
This attempt to use Hawai‘i law was not appropriate for several reasons, the most important of which was that it ignored a set of Hawaiian statutory and constitutional provisions which I term the “Hawaiiana Clauses,” which require the state to recognize Hawaiian custom, usage, language, and tradition. The roots and mandates of this tradition date to a period before the invention of “homosexual” as a category of persons in the late nineteenth century, and do not derive their authority or lineage from Greek, Roman, Judeo-Christian, or European norms, or Puritan ethics. The nations from which those norms and ethics came were not a geographical, juridical, or political part of the United States, while Hawai‘i is.

In analyzing and deconstructing the use of Hawaiian materials in the Bowers appeal to “tradition” so as to reveal it for the sophistry which it is, we must look at kānāwai, traditional Hawaiian law. We will do well to do as the Hawaiians do and “look greatly into this story to understand whether it be true or false.” Fundamentally, the Bowers story about what constitutes deeply rooted traditions in Hawaii is false.

Bowers will give us a springboard to look at Hawaiian culture and values before 1778 (Captain Cook’s arrival), in order to show why the

8. HAW. CONST. art. XII, § 7; HAW. REV. STAT. § 1-1; HAW. REV. STAT. § 1-13; HAW. REV. STAT. §§ 5-7.5; HAW. REV. STAT. § 7-1.
10. For a discussion of the implications of Puritan ethics for homogamy, see Dwight Penas, Bless the Tie That Binds: A Puritan-Covenant Case for Same-Sex Marriage, 8 LAW & INEQ. J. 533 (1990).
11. This suggests that for the purpose of a Bowers-type analysis these civilizations are not on an equal par with Hawaiian civilization. As Alan Ryan, No Easy Way Out: Liberals, Conservatives, Gays, and What To Do About Them, THE NEW YORKER, Sept. 11, 1995, at 87 (reviewing Andrew Sullivan’s Virtually Normal: An Argument About Homosexuality), points out, arguments from ancient Greece, such as those made in Colorado’s Amendment 2 case, are “educated silliness” because the rights extended to homosexuals should not “hang on disputed passages in Plato’s ‘Laws,’ written circa 350 B.C.” Ryan is correct in that no federal or state statute mandates such a hanging. However, as I will point out infra, the laws of Hawai‘i do mandate such a hanging with reference to traditional Hawaiian culture.
12. e pono e nāna nui iā kēia ka‘ao ‘ana, i maopopo ka ‘oia‘i‘o a me ka ‘oia‘i‘o ‘ole. 5 ABRAHAM FORNANDER, COLLECTION OF HAWAIIAN ANTIQUITIES AND FOLKLORE 266-67 (1919). This collection is the single richest source, outside the Hawaiian-language newspapers, for Hawaiian texts.
failure to consider that culture is a glaring weakness in Bowers and Baehr. This is important for the future of Baehr because the case has been remanded to the trial court for a determination of whether any compelling state interest exists sufficient to deny same-sex couples a marriage license. 13 Surely, whichever side loses that evidentiary trial will appeal, and Baehr II will be the result. 14 The Hawaiian materials that I explore in this Article implicate issues of free speech, religion, assembly, due process, equal protection, education, and property—to name a few. They will hopefully extrude from the Bowers debacle a better rule of reason and honesty regarding same-sex marriages. 15

14. The national (indeed, the international) significance of what happens in Hawai'i, particularly if homogamy becomes a legal reality, is twofold. First, for the gay and lesbian community, it will radicalize and politicize activism along lines already being drawn between those who favor homogamy and those who oppose it. See the debate among the following: Warren J. Blumenfeld, Same Sex Marriage: Introducing the Discussion, 1 J. Gay, Lesbian, & Bisexual Identity 77 (1996); Victoria A. Brownworth, Tying the Knot or the Hangman's Noose: The Case Against Marriage, 1 J. Gay, Lesbian, & Bisexual Identity 91 (1996); Evan Wolfson, Why We Should Fight for the Freedom to Marry: The Challenges and Opportunities That Will Follow a Win in Hawai'i, 1 J. Gay, Lesbian & Bisexual Identity 79 (1996). Second, in terms of interstate and international comity, the results of Baehr II may challenge the meaning of the Full Faith and Credit Clause of the United States Constitution, and in doing so, redefine (by augmenting) the definition of "marriage." See infra note 20.
15. Janet E. Halley has noted that the "Supreme Court's decision to base its fundamental rights holding in Hardwick on a history of sodomy made sodomy's historiography a crucial medium of instability management . . . " Janet E. Halley, Reasoning About Sodomy: Act and Identity in and After Bowers v. Hardwick, 79 Va. L. Rev. 1721, 1758 (1993) (emphasis added). It seems that no matter how poorly reasoned or how irrelevant Bowers really is, it crops up in every discussion of homosexuality and the law. Wherever I use the words "homosexuality" and "homosexual" I adopt James B. Nelson's "linguistic comment":

I consider "homosexuality" an abstraction. There is no such thing as "homosexuality" per se. When we use the term we are speaking about people—people who happen to be more or less erotically oriented to their own sex; people who are more or less comfortable with their orientation and with people who experience more or fewer difficulties, personal and social, because of their orientation. Always we are speaking of concrete persons, in spite of the limitations of language.

James B. Nelson, Religious and Moral Issues in Working with Homosexual Clients, in Peculiar People: Mormons and Same Sex Orientation 296, 296 (Ron Schow et al., eds., 1991). Bowers was mentioned in the memoranda, oral arguments, and trial court's order in Baehr, just as it later appeared in the briefs, oral arguments, and decision of the Hawai'i Supreme Court. Bowers, like Baehr, has been discussed exhaustively in the legal literature. Earl M. Maltz states: "The attacks on the Bowers decision reflect two themes that have become widespread in academic commentary on constitutional law. The first is a general commitment to left-center political values. The second is the belief that increased judicial activism will inevitably result in advancement of those values." Earl M. Maltz, The Court, the Academy, and the Constitution: A Comment on Bowers v. Hardwick and its Critics, 1989 B.Y.U. L. Rev. 59, 92.

My deconstruction of footnote 6 hopefully avoids these charges since it is based on Hawaiian materials which predate modern academia and the politics of left and right, if not the English common law itself. As Nan D. Hunter has written: "Unless or until it is narrowed or overruled, Bowers v. Hardwick will dominate the law concerning government regulation of sexuality." Nan D. Hunter, Life After Hardwick, 27 Harv. C.R.-C.L. L. Rev. 531, 531 (1992). As Cathcart and Wolfson have noted: "Hardwick has provided an excuse for judges who would prefer to rubber-stamp discrimination rather than protect members of a vulnerable or controversial group."

Kevin M. Cathcart & Evan Wolfson, Lesbian and Gay Rights in the 1990s: At the Barricades, 29
In adverting to the mid-nineteenth century in Hawai‘i, the Bowers Court called attention to a legal environment that was intolerant and oppressive. As Edward C. Lydon has pointed out, the first Hawaiian Constitution of 1840 “was extraordinary in that it originated with the top levels of the existing government and not with demands by the populace.” Furthermore, the period produced two institutions that spelled the downfall of Hawai‘i: the Great Mahele beginning in 1848, and the Masters and Servants Act of 1850. The former was the process by which Hawaiian land was transferred out of Hawaiian hands to foreigners; the latter, which brought foreign workers to Hawai‘i to fill the growing needs of the new plantation economy, was closely akin to the infamous Fugitive Slave Laws in the United States.

A more specific and egregious example of the oppressive nature of the nineteenth-century Hawaiian legal system is the Constitution of 1839-40, which forbade the enactment of any laws “at variance with the word of the Lord Jehovah, or at variance with the general spirit of His word.”

While Bowers bases its authority on such discredited nineteenth-century law, the Hawaiian Clauses look at premodern Hawaiian culture as a rule of law. The Hawaiian Clauses thus provide a stronger and independent foundation for the analysis and expansion of Baehr; under the Hawaiian Clauses, privacy should have been an additional basis for the decision, since the Clauses direct the court to look to native Hawaiian culture, which, as I will show, contains a tradition of same-sex unions. This is important because when homogamy becomes legal in Hawai‘i, it will immediately raise implications in the other forty-nine states by virtue of the Full Faith and Morality Clause of the Constitution.

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18. Fugitive Slave Act, ch. 7, 1 Stat. 302 (1793); Fugitive Slave Act, ch. 60, 9 Stat. 462 (1850).
19. "kaʻe i ka 'ōlelo a ka Haku, a lehova, 'a'ole ho'i i kaʻe i ke 'ano nui o ia 'ōlelo. LORRIN A. THURSTON, THE FUNDAMENTAL LAW OF HAWAI'I 2 (1904). All references to the early Hawaiian constitutions are from this volume. The Hawaiian text in each instance is taken from microfiche copies of the originals located at Hamilton Library, University of Hawai'i at Mānoa (Honolulu).

This same constitution also defined “religious freedom” thus: “All men of every religion shall be protected in worshipping Jehovah, and serving Him, according to their own understanding.” E ho‘omalau 'ia nō nā kānaka a pau o kēlā pule o kēia pule, i ko làkou ho'omana 'ana ia lehova, a me ko làkou mālama 'ana ia ia, e like me ko làkou mana'o. Id. at 1-2.

If the Bowers court sees fit to refer to those times and laws for its definitions of modern sexual propriety, by parity of reasoning it should also now diminish the Establishment and Free Exercise Clauses to protect only modern Jehovah-worshippers, to the exclusion of Jews, Buddhists, followers of Islam, and atheists.
and Credit Clause.\textsuperscript{20} Whether or not the cultural mandates of the Hawaiian Clauses will carry any weight in those courts and legislatures, the \textit{Baehr} court's discussion of equality based on both state equal protection and equal rights doctrine may do so because all states have some form or another of an "equality" provision in their laws or constitutions. More importantly, the cultural mandates may raise important implications by analogy in those states or federal enclaves where Native American or other minority values and cultures must be recognized by law.\textsuperscript{21}

\textsuperscript{20} Generally, the Full Faith and Credit Clause requires each state to recognize the marriages performed in one state as valid in another. This is why an opposite-sex couple can leave Salt Lake City, go to Nevada for a quick marriage, and return to Utah where the marriage will be fully valid, even though it might not have been originally so. States are allowed not to give credence to the acts of another state where those acts violate a strongly held public policy of the second state. Hence, a victory on homogamy in Hawai'i will force each state thereafter to face the hard political and social question of whether homogamy is indeed contrary to that state's public policy. \textit{See}, e.g., \textit{Nebraska v. Hall}, 440 U.S. 410, 424 (1979) (stating that Full Faith and Credit does not require one state to enforce law of another state where doing so would be "obnoxious to its statutorily based policies.").

\textsuperscript{21} Christopher J. Keller's recent analysis of \textit{Baehr} supports my argument that the case will provide a powerful framework for analogy. Keller criticizes the Hawai'i Supreme Court's reliance on the "traditions and collective conscience" test of privacy jurisprudence as a means of rejecting a privacy right to legalized homogamy. Christopher J. Keller, \textit{Divining the Priest: A Case Comment on Baehr v. Lewin}, 12 LAW & INEQ. J. 483 (1994). Like Justice White in \textit{Bowers}, the \textit{Baehr} court selectively picked its history in order to exclude from consideration "the places and times where homosexuality has been fostered and legitimate." \textit{Id.} at 511 n.197. Citing such sources as Thomas Jefferson, James Madison, and the text of the Declaration of Independence, Keller argues that fundamental rights exist, not as formulated by majoritarian normative assertions, but as God-given "inalienable rights" which exist for every person. Furthermore, Keller notes the irony that, despite its frequent citation to \textit{Bowers}, the \textit{Baehr} court did not use the \textit{Bowers} ruling against privacy as a support for its own ruling against privacy. Both the \textit{Bowers} and the \textit{Baehr} courts rejected plaintiffs' privacy arguments. In that sense, the two cases are kindred spirits. It is odd, therefore, that the \textit{Baehr} court did not import the \textit{Bowers} argument into its discussion of why it was refusing to use the privacy doctrine to support same-sex marriage. In an even more egregious omission, the Hawai'i court employed the "traditions and collective conscience" test as if it were relying on \textit{Bowers} (and the English and American common law), when in fact it should have employed the traditions and collective conscience mandated by Hawaiian culture and the Hawaiian Clauses, all of which would support homogamy. By ignoring the legally mandated Hawaiian values, the \textit{Baehr} court allowed the values of what Keller calls the "mythical majority" to intervene. Keller writes:

For those who are resistant to the notion of homosexual equality, and are entrenched in their homophobia, \textit{Baehr} provides a device through fundamental rights analysis for the perpetuation of their intolerance.

The malignant device employed by the \textit{Baehr} court is the "traditions and collective conscience" test. This test permits the traditional fears, hatred and prejudice of a mythical majority to be the filter through which fundamental civil liberties are defined. The "traditions and collective conscience" test does not foster jurisprudential reasoning based on principles of liberty, rather it appeals to and privileges popular prejudice. Jefferson and Madison did not locate the fundamental principles of the Declaration of Independence or Constitution in the history of our people, but rather found them within the nature of being human.

\textit{Id.} at 525. A related discussion of tradition occurs in Judge Ferren's concurring/dissenting opinion in \textit{Dean and Gill} v. D.C., 653 A.2d 307 (D.C. Super. Ct. 1995). In the analysis of "legislative facts" found in \textit{Dean and Gill}, Hawaiian traditions would be "social facts" and therefore questions of law of which the Hawaiian Clauses require lawmakers (including courts) to take judicial notice. It is these facts which at once provide the definitional canard in stating

\url{https://digitalcommons.law.yale.edu/yjlh/vol8/iss1/6}
Before turning to a discussion of the omissions of Bowers and Baehr, I wish first to describe the Hawaiiana Clauses in detail.\textsuperscript{22} These Clauses mandate that lawmakers give deference to Hawaiian usages, customs, practices, and language as they existed in 1778—the year of Captain Cook’s first contact with Hawai’i. The Hawaiiana Clauses require the cessation of all prohibitions against homogamy both because they are now part and parcel of our American “traditions and collective conscience,” and also because the Clauses themselves view equality as inherent among human individuals. The Hawaiiana Clauses suggest that if the “traditions and collective conscience” standard is to be used, it must not be used selectively on the side of homophobia. Because privacy is context- and tradition-sensitive, the Clauses require a leap back over time, back over all of the nineteenth century, over the first written statutes and constitutions, over the advent of the Calvinist missionaries and all other non-Hawaiians, to 1778, a pre-literate point when Hawai’i was pure Hawai’i.

In order to get to this point, we must conduct a far-ranging and multifarious “inquest on the past.” This inquest will establish that homosexuality and homosexual relations between persons were not marginalized or denigrated in Hawai’i. This finding may be counter-intuitive to many people, Hawaiians and non-Hawaiians alike, because the same-sex relationships we will study either blur or erase the usual lines of social hierarchy and rank, and because so many of them have to do with the chiefs of ali’i, whose lore is for the most part the lore of Hawai’i itself. Hence, homosexual relationships were political, egalitarian, chiefly, and usual.

If we will let it, the Hawaiian value system can lead us out of the heterosexist morass of modern culture. We can use the Hawaiiana
Clauses to deconstruct the “straight mind” of the law and allow history and tradition to be models for today.\(^{23}\) Once it was said: Conceal your love, do not tell about it, lest it be overheard, and someone be offended.\(^{24}\) Perhaps with greater respect for the Hawaiian culture, that caution, at least for same-sex couples who want to marry, will no longer be needed in the future.

I. THE GENEALOGY OF THE 1868 SOMOBY LAW

As of 1868, Hawai‘i was an independent kingdom, and it did have an anti-sodomy statute on the books. That much is given, but merely stating so is not sufficient to the analysis. In 1868 Kamehameha IV (Alexander Liholiho) was the sovereign or Mō'ī, and Hawai‘i already had its second constitution. By 1840, the first Hawaiian constitution and the first set of statutes based upon the American model were published.\(^{25}\) The 1840 Constitution, under the heading “Protection For The People Declared,”\(^{26}\) guaranteed that all the people “alike” had the benefit of law and that “chiefs and people may enjoy the same protection, under one and the same law.”\(^{27}\) In this period, it was the official position of the Calvinist mission in Hawai‘i, and apparently the United States government itself, that the “United States have regarded the existing authorities in the Sandwich Islands as a government suited to the conditions of the people, and resting on their own choice.”\(^{28}\) The records made by most Hawaiians at the time disagree.

By 1850, chapter 13, paragraph (a) of the Penal Code forbade “sodomy, that is, the crime against nature, either with mankind or any beast.”\(^{29}\) No equivalent for the phrase, “crime against nature,”


\(^{24}\) *E hāna 'oe i ke aloha, mai ha'i, o lohea 'ia awane'i, hewa kahi po'e*. PŪKUI & ELBERT, supra note 1, at 67.


\(^{26}\) *ho'omalu nā kānaka a pau.*

\(^{27}\) THURSTON, supra note 19, at 1. *i like ho'i ka malu o nā ali'i, a me nā kānaka ma lalo o ke kānāwai ho'okahi.* These provisions are discussed at HIRAM BINGHAM, A RESIDENCE OF TWENTY-ONE YEARS IN THE SANDWICH ISLANDS 562 (1981).

\(^{28}\) Am. Board of Comm'ns for Foreign Missions, 39 MISSIONARY HERALD 92 (1843).

\(^{29}\) WILLIAM LITTLE LEE, HE KĀNĀWAI HO'O'PA'I KARADMA NO KO HAWAI'I PĀE 'ĀINA I HO'OHOLO 'IA E NA 'LITI A ME KA PO'E I KOHO 'IA [PENAL CODE OF THE HAWAIIAN ISLANDS, PASSED BY THE CHIEFS AND THE ELECTED REPRESENTATIVES] 18 (1852).

appeared in the Hawaiian text. Later, the anti-sodomy law was constitutionalized in the Hawaiian Constitution of 1887—the so-called “Bayonet Constitution” forced upon King Kalākaua by resident foreigners. It was this constitution and the events that led up to it that virtually sealed the demise of the Hawaiian monarchy.

In January 1893, the government of Queen Lili'uokalani was overthrown and a Provisional Government established. In 1894, foreign residents, mostly Americans, replaced the Provisional Government with the Republic of Hawai'i. Hawai'i did not become a United States Territory until the period 1898-1900, and did not become a state until 1959. With each change in status, some of the previous administration's laws were abrogated or amended, and more importantly, new laws were enacted creating rights and interests based partially on the societal standards of the prior eras. This process always included a greater infusion of non-Hawaiian ways.

This history of transition lends context to the vexing question raised by the Hawai'i Supreme Court in its decision in Robinson v. Ariyoshi (a water-rights case).

Our reference to “Hawai'i's caselaw” governing water is perhaps misleading for the volumes of Hawai'i Reports represent four separate political regimes . . . .

The only cases treating “surplus water” as private property are to be found during the territorial period, when the judiciary was not a product of local sovereignty. While the decisions of the territorial courts were unquestionably binding upon the parties before it [sic], we doubt whether those essentially federal courts could be said to have definitively established the common law of what is now a state. So long as the federal government was sovereign its authority to frame the law was unquestionable, but upon our assumption of statehood our own government assumed the whole of that responsibility, absent any explicit federal

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*Islands*, 2 HAW. SPECTATOR 121 (1839); *Sandwich Islands Laws*, 2 HAW. SPECTATOR 345 (1839).

30. THURSTON, supra note 19, at 192. As will be seen infra, sodomy was taken out of the subsequent constitution and out of the statutes in the 1970's. However, the requirements as to Hawaiian custom and usage remained and were strengthened by the Constitutional Convention in 1978.

31. The territorial process took two years, from 1898 to 1900. Both dates are used as “the date” Hawai'i became a territory.

32. See, e.g., United States v. Fullard-Leo, 331 U.S. 256 (1947) (holding that land rights survived into post-annexation era).

33. This history is further complicated by the fact that many students of these events consider the incidents of 1887, 1893, and 1894—that is, the overthrow of the monarchy and its aftermath—to have been illegal. Therefore, they argue, all that flowed from those events was likewise illegal, including eventual Territoriality and Statehood.

34. 658 P.2d 287 (Haw. 1985).
interest. And it is from our authority as a state that our present common law springs . . . .

It is difficult to manufacture a legitimate genealogy out of these facts. If the “genealogy” of the law is in doubt, then the Bowers Court’s invocation of a “long tradition” is also in doubt. The law of the Territory of Hawai‘i held that sodomy was an “infamous” crime within the meaning of the Fifth Amendment; one accused of sodomy could be convicted on the uncorroborated testimony of the complaining witness. The old definitions involving per os and per annum were used, and the territorial court clearly acknowledged that

35. 658 P.2d at 306 n.25; but see Kainea v. Kreuger, 30 Hawai‘i 860, 868 (1929).
36. Ex Parte Edwards, 11 Haw. 571 (1889) (Edwards I); Ex Parte Edwards, 13 Haw. 32 (1900) (Edwards II).
37. Territory of Hawai‘i v. Bell, 43 Haw. 23 (1958). Both the Bowers and the Bell courts asserted that the first sodomy statute in Hawai‘i was that found in the 1869 Penal Code. Both courts were wrong. The first Penal Code of the Hawaiian Islands Passed by the House of Nobles and Representatives of 1850 contained the language that the 1869 Penal Code later adopted verbatim. Penal Code of the Hawaiian Kingdom, Compiled from the Penal Code of 1850, and the Various Penal Enactments Since Made, Pursuant to Act of the Legislative Assembly, June 22, 1868 (1869).

For Bowers purposes, the statute covering the post-Civil War Amendments was chapter 13, Paragraph 11 of the 1869 Penal Code. Some later statutory references to legislative history cite section 96 of the Penal Laws of 1897, but these were not enacted. The only earlier “penal code” was that of 1850. Hence, the genealogy of this law is not the straightforward path the Bowers Court would suggest. Chapter XIII, section 9 of the 1850 law reads in English: “Whoever commits sodomy, that is, the crime against nature, either with mankind or any beast, shall be punished by a fine not exceeding one thousand dollars, and by imprisonment at hard labor not more than twenty years.” The Hawaiian text, with modern orthography followed by my translation, reads as follows: “O ka mea me o aikâne, a meo me ka holoholona paha, e hōʻōoku ia ʻo ia i nā Lāʻa, ʻaʻole e ʻoʻi aku mamua o nā Lāʻa hoʻokahi aawani, a me ka hōʻōpāʻahao ʻia, ʻaʻole e ʻoʻi aku i nā mahakihiki he iwâkâlua (“One who sleeps with a lover of the same sex, or sleeps with an animal, shall be fined not more than one thousand dollars, and shall be imprisoned not more than twenty years.”). Noticeably, the phrases “crime against nature” and “hard labor” are missing from the Hawaiian. The reason for the first omission is that Hawaiian has no word or concept for “nature” in the sense that is connected with sodomy and against which one could somehow commit a “crime.”

If by “nature” one means the universal order, the way “we” have always done things, then Hawaiian would use the word pono, which Kame‘elehiwa defines as “perfect equilibrium” and harmony. Lili‘ikalā Kame‘elehiwa, Native Land and Foreign Desires: Pehea Lā E Pond Ai? (1992). To be “out of order” would be un-pono. These themes occur throughout her work. Kapu means tabu or taboo, and encompasses the system of regulations which formed Hawaiian law and custom, including dietary rules, rites, seasons of fishing, and the status of men and women.

One Hawaiian approximation of “nature” is kūholohe, bare, lone, lacking in human intervention, uninterfered with, Pōkū’ī & Elbert, supra note 1, at 17. Others are ‘o‘o‘o, custom or practice, Andrews, supra note 1, at 28; Pōkū’ī & Elbert, supra note 1, at 27, and kāpōno, Andrews, supra note 1, at 319; Pōkū’ī & Elbert, supra note 1, at 185-86. Or perhaps mēheuhea, as in “O ka mēheuhea nō ia mai nā mākuai mai (“that was the customary way handed down from the parents’”). Pōkū’ī & Elbert, supra note 1, at 245. Another possibility is the modern coinage mo‘omehe (culture).

Perhaps less troublesome might be one’s “identity” or “orientation,” such as the modern ‘ike e hoʻoməoa popo ai (that which is conscious, to know what can be understood, knowledge by which to understand). Pōkū’ī & Elbert, supra note 1, at 462.
its definition of sodomy “derives its name from the city of Sodom where, according to the Bible, it was a common practice.”

This view of sodomy would be consistent, of course, with the view in the Georgia statute under which Michael Hardwick was arrested. That statute criminalized “any sexual act involving the sex organs of one person and the mouth or anus of another.”

However, as noted earlier, the Hawai‘i legislature abolished the old sodomy law in 1972, effective as of January 1, 1973. The significant new operative language forbade “deviate sexual intercourse” by “forcible compulsion,” where “the other person was not, upon the occasion, his voluntary social companion who had within the previous twelve months permitted him sexual contact of the kind involved.”

The official commentary noted that the “problem is essentially one of sexual attentions directed toward another either by force or without consent,” and that the “Code eliminates consensual sexual activity, between adults in private, as a proper subject of penal law.”

The record of the debate in the 1972 legislature reveals that, overwhelmingly, the Senators were concerned with the new Code’s relaxation of the former laws on “social gambling,” not sodomy. Nevertheless, one Senator (Forbes), citing “the most beleaguered unit in our society today—the family,” as well as “the sanctity of marriage,” attacked the proposed Code as follows:

In particular, I speak against the liberalization of the laws relating to sexual offenses including adultery and homosexuality. Although it has been eloquently argued that many of the laws which have been part of our society for years and have helped to preserve at least high standards for the youth of our State, involve “crimes without victims,” this logic can sometimes be disputed.

Any crime which degrades man or woman in or out of the marriage contract lowers the entire standards of our community, and as a consequence we are all victims.

However, the Conference Committee ultimately recommended the new Code. Most significantly, as to sections 730 through 740 on

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38. Territory of Hawai‘i v. Bell, 43 Haw. 23, 24 (1958). This date—one year before statehood—is remarkable for its lateness.
42. HAW. REV. STAT. §§ 707-735 (1993).
"sexual offenses," the Conference Committee stated: "Your Committee concurs with the absence of criminal provisions pertaining to fornication, adultery and homosexuality between consenting, sexually mature persons, feeling that to invoke the criminal process serves no social function."

Hence, by the time Bowers was decided the Hawai‘i law in effect was the 1972 law, and the linkages of the so-called anti-sodomy "tradition," as least for Hawai‘i, had been severed. The backbone of the genealogy was broken.

Interestingly, a review of the code's annotations, as well as West's Hawai‘i Digest, reveals that under the old (pre-1972) law, the last case specifically dealing with "sodomy" was in 1958. Statehood occurred in 1959. Thereafter, the next sodomy case was State v. Jones in 1980. This gap of twenty-two years suggests a policy of the new state to abandon the old definitions. Such a policy contradicts the majority's view in Bowers that sodomy prosecutions were a Hawaiian tradition.

The absence of any continuity between the present and the pre-1868 sodomy statutes in Hawai‘i would by itself be sufficient to negate the use of Hawaiian law by the Bowers Court. There is, however, an even more compelling reason to reject the Bowers Court's analysis. Hawaiian law mandates the persistence of Hawaiian usages, customs, practices, traditions, and language.

II. THE FIVE "HAWAIIANA CLAUSES"

The first Hawaiiana Clause is article XII, section 7, of the Hawai‘i State Constitution, which has, since 1978, provided as follows:

The State reaffirms and shall protect all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes and possessed by ahupua‘a [land area] tenants who are descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778, subject to the right of the State to regulate such rights.

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45. This recommendation is interesting for two reasons. First, it conflates "fornication, adultery and homosexuality." Second, it uses the broad term "homosexuality" as a synonym for the topic then under consideration, "sodomy." JOURNAL OF THE HOUSE OF REPRESENTATIVES OF THE SIXTH LEGISLATURE OF THE STATE OF HAWAI‘I, supra note 43, at 1038.

46. Territory of Hawai‘i v. Bell, 43 Haw. 23 (1958).

47. 617 P.2d 1214 (Haw. 1980).

48. My term; one gleans these passages from several sources according to their contexts and cross-referencing, which is not exhaustive. In other words, in the statute books they are brought together but not put together.

49. HAW. CONST. art. XII, § 7 (emphases added). For a general discussion of state constitutional rights in this context, see Jon M. Van Dyke et. al., The Protection of Individual Rights Under Hawai‘i's Constitution, 14 U. HAW. L. REV. 311 (1992).
This clause has been used to broaden modern Hawaiian rights by recourse to the pre-Western past. So too has the second Hawaiian Clause.

Beginning in 1892, a year before the overthrow of Queen Lili'uokalani, but after the advent of the first sodomy statutes in the Kingdom, the law of the Kingdom was amended to state:

The common law of England, as ascertained by English and American decisions, is declared to be the common law of the State [then Kingdom] of Hawai'i in all cases, except as otherwise expressly provided by the Constitution or laws of the United States, or by the laws of the State, or fixed by Hawaiian judicial precedent, or established by Hawaiian usage . . . .

This specifically means "Hawaiian usage" which predated 1892. However, as noted above, article XII, section 7, of the state constitution takes the date back to 1778, at least in some cases. In Kalipi v. Hawaiian Trust Co., Ltd., the Hawai'i Supreme Court added that where practices associated with the Hawaiian way of life have, without harm to anyone, been continued, reference to "Hawaiian usage" in the statute ensures their continuance so long as no harm occurs. "The relevant inquiry," said the Court, is to determine "whether the privileges which were permissibly or contractually exercised persisted to the point where it [sic] had evolved into an accepted part of the culture and whether these practices had continued without fundamentally violating the new system."

Since Hawaiian law does not now prohibit consensual acts of sodomy between adults, this principle would appear to place the burden of proof on the state to show that consensual sodomy is somehow "actually harmful," a requirement tantamount to a showing of "compelling state interest." For Hawai'i, the showing of

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52. 656 P.2d 745 (Haw. 1982).
53. Id. at 751 n.5.
54. This is a matter of constitutional dimension, especially in reviewing the nineteenth-century processes by which Western capitalism came to replace Hawaiian lifestyles and, eventually, to occupy the field. In Petrogradsky M. K. Bank v. Nat'l City Bank, 253 N.Y. 23, 35 (1930), Judge Cardozo wrote with regard to foreign law:

At such times and for such inquiries, opinion has a significance proportioned to the sources that sustain it. Especially is that so where the problem to be solved is the measure of recognition that is due under a given legal system to the acts of another system that professes to displace and supersede it.

As to the reservation that any social usage must do no "actual harm," it is no argument to say that sanctioning homogamy would likewise sanction nonconsensual "sodomy" or other sexual offenses under HAW. REV. STAT. §§ 707-734 (1993) ("sexual offenses") or former laws. The
"compelling state interest" would have to include, at the very least, a showing that no traditional Hawaiian practice or usage was being harmed or causing actual harm. Under this analysis, prohibiting homogamy appears to constitute an affirmative harm to traditional Hawaiian views, such as those regarding persons recognized or self-defined as aikāne, the partners in a same-sex relationship.

Since 1864, the third Hawaiian Clause, Hawai‘i Revised Statutes section 1-13, has included Hawaiian as an official language of the state (then kingdom). The Hawaiian language has always been one of the official languages of Hawai‘i since "official" became a legal concept in the Islands.55 Beginning around 1840, the court required any discrepancy between Hawaiian and English meanings to be resolved in favor of the Hawaiian.56 In McCandless v. Waiahole Water Co.,57 the Territorial Supreme Court held that the Hawaiian language is not to be regarded as a foreign language, but rather as a language of which courts and judges must take judicial notice. This case remains good law.

A related provision provides further instruction regarding linguistic interpretation: "The words of a law are generally to be understood in their most known and usual signification, without attending so much to the literal and strictly grammatical construction of the words as to their general or popular use or meaning."58 This provision applies to the Hawaiian as well as to the English, hence, the need to explore the meaning of crucial Hawaiian words in order to ascertain "their most known and usual signification." We must examine the Hawaiian meaning of any contemporary or historical sodomy statute in order to learn whether the Bowers footnote 6 can claim legitimacy.

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prohibitions of sexual acts therein (such as sexually abusing children, incompetents, and prisoners) apply equally to heterosexual persons and couples, or they are negated by statutory exceptions if the two persons involved are married. See Catherine M. Cullem, Fundamental Interests and the Question of Same-Sex Marriage, 15 TULSA L.J. 141 (1979).

In other words, marriage alone, whether heterogamous or homogamous, does not necessarily sanction every kind of sexual behavior under the relevant law. Marriage would, however, legitimate and regulate certain conduct for homogamy on exactly the same basis that it now does for opposite-sex marriages.

55. The modern provisions include HAW. CONST. art. XV, § 4, which provides: "English and Hawaiian shall be the official languages of Hawai‘i, except that Hawaiian shall be required for public acts and transactions only as provided by law."

HAW. REV. STAT. § 5-6.5 states: "The Hawaiian language is the native language of Hawai‘i and may be used on all emblems and symbols representative of the State, its departments, agencies and political subdivisions."


56. Hardy v. Ruggles, 1 Haw. 255 (1856); Metcalf v. Kahai, 1 Haw. 225 (1856).

57. 35 Haw. 314 (1940).

The fourth Hawaiiana Clause, Hawai‘i Revised Statutes section 5-7.5, defines the “Aloha Spirit” thus:

(a) “Aloha Spirit” is the coordination of mind and heart within each person. It brings each person to the self. Each person must think and emote good feelings to others. In the contemplation and presence of the life force, “Aloha,” the following unuhu laula loa [free translations] may be used: “Akahai” meaning kindness to be expressed with tenderness; “Lokahi” meaning unity, to be expressed with harmony; “Oluolu” meaning agreeable, to be expressed with pleasantness; “Haahaa” meaning humility, to be expressed with modesty; “Ahonui” meaning patience, to be expressed with perseverance.

These are traits of character that express the charm, warmth and sincerity of Hawai‘i’s people. . . . “Aloha” is more than a word of greeting or farewell. “Aloha” means mutual regard and affection and extends warmth and caring with no obligation in return. “Aloha” is the essence of relationships in which each person is important to every other person for collective existence.59

For present purposes, the most important parts of this definition are that the Aloha Spirit “brings each person to the self,” and that it fosters relationships where each person is important “for collective existence.” As anthropologist Marshall Sahlins has shown, aloha was the essence not only of interpersonal relationships in the traditional culture, but of government as well. Love-relationships formed the essence of the polity. Sahlins has described how, in the “dialectics of structure and practice in the history of the Sandwich Islands,” love has played this central role.60 “The name of the political relationship in Hawai‘i is aloha.”61 “If we think merely of ‘ideology’ or ‘superstructure,’ we deceive ourselves: this is a political economy of love. The erotic is the pragmatic . . . the structure of the kingdom is the sublimated form of its forces of sexual attraction.”62 Aloha instantiates reciprocal relationships between the two social categories of homogamous and heterogamous relationships,63 as well as between the upper and lower ranks of society.64 Kapā‘ihi the

59. The astute reader will have noted that the five initial letters of the romanized Hawaiian words add up to the acronym ALOHA. Linguistically, ‘olu’olu cannot be counted because it begins with a glottal stop (‘), which is a consonant, not the letter o. HAW. REV. STAT. § 5-7.5 (1993).
60. MARSHALL SAHLINS, ISLANDS OF HISTORY 3, 9 (1987).
61. Id. at 17.
62. Id. at 19, 116.
64. Id. at 87-89.
commoner said to Lono the ruling chief, "I love you," and so began his rise to the political rank of kuhina nui (the prime minister or premier). 65

Under the Hawaiian analysis, love alone, in and of itself, is a sufficient cause to justify homogamy even on the basis of politics. Love is central to the same-sex relationship; the denial of same-sex marriage chills this love. Those who argue that "same-sex love doesn't need a marriage license" are wrong in a profoundly Hawaiian sense.

The recent Hawai'i Supreme Court case of Public Access Shoreline Hawai'i v. Hawai'i County Planning Commission 66 specifically recognized the value of aloha in the context of native-Hawaiian rights and the land. The survival and collective existence of the people, specifically with regard to their "relationships" was recognized.

The fifth and final Hawaiiana Clause, 67 Hawai'i Revised Statutes section 7-1, states in pertinent part:

Where the landlords have obtained, or may hereafter obtain, allodial titles to their lands, the people on each of their lands shall not be deprived of the right to take firewood, house-timber, aho cord, thatch, or ki leaf, from the land on which they live, for their own private use, but they shall not have a right to take such articles to sell for profit. The people shall also have a right to drinking water, and running water, and the right of way. The springs of water, running water, and roads shall be free to all . . .

.. .68

As we shall see throughout this discussion, rights to land and its usufructs, water, roads, and habitability were all part of, and inhered in, Hawaiian relationships, including those of the aikāne. The rights and the relationships would be diminished or even meaningless without each other. No Hawaiian relationship, whether in the family or the polity, existed independent of the place on which the people dwelt and had their livelihood. 69 Where modern laws protecting and restoring Hawaiian rights to land, its usufructs, and its privileges are

65. 4 Fornander, supra note 12, at 352 (1917).
67. These five Hawaiiana Clauses do not by any means exhaust the statutory references to Hawaiian values and culture. For example, Haw. Rev. Stat. § 205A-4 (1993) ("Coastal Zone Management Act") requires that administrative agencies "shall give full consideration to ecological, cultural, historic, esthetic, recreational, scenic, and open space values . . . ." I have limited the discussion to these five, however, because they sufficiently support the case for homogamy.
69. Kame'elehiwa, supra note 37, at 28-33; Neil M. Levy, Native Hawaiian Land Rights, 63 Cal. L. Rev. 848, 848-53 (1975); Marion Kelly, Changes in Land Tenure in Hawai'i, 1778-1850, at 27-49 (1956) (unpublished M.A. Thesis, University of Hawai'i (Honolulu)).
gaining new life, they bring with them a strong bias in favor of permitting homogamy. Homogamous relationships existed vis-a-vis the land and the activities that occurred upon it. The land was not a "commodity" that could be actually or metaphysically separated from people and their practices upon it.

These five Hawaiiana Clauses are a powerful force in the discussion of homogamy and the analysis of both Baehr and Bowers. Collectively, their impact is, or ought to be, as primary and massive engines for social change. Their mandates should restrain and shape the moral, legal, civic, and political judgments made about homogamy in Hawai'i. In short, they provide, or ought to provide, both the strategic and rhetorical critique that makes possible our rational thought about homogamy. They give insightful content to the view of Justice Hugo Black: "I am still in doubt as to why we should consider only the notions of English-speaking peoples to determine what are immutable and fundamental principles of justice."70

A judicial or legislative statement that laws against homosexual conduct form a "pattern so deeply pressed into the substance of our social life that any Constitutional doctrine in this area must build upon that basis,"71 cannot automatically apply to Hawai'i and her laws. Simply to defer to federal or sister-state precedent for any such application would constitute an illegal abdication. The Hawaiiana Clauses must play a significant role in determining the rooted patterns of Hawaiian social life.

The elasticity for employing the Hawaiiana Clauses in new and creative ways is, it seems, already in place. First, in deciding one of Hawai'i's earliest products-liability cases, the Federal District Court in Honolulu wrote:

The Hawai'i Supreme Court has not from the very beginning, and especially during recent years, regarded itself as bound to adopt for this jurisdiction a static common law, or the majority view of other jurisdictions, if a sounder, more just and equitable new rule can be devised.

[We note] the open-mindedness of the Hawai'i Supreme Court and its determination to follow rules designed to achieve greater justice and equity rather than to be hidebound and confined by narrower earlier common law rules no matter by how many jurisdictions adopted.72

72. Chapman v. Brown, 198 F. Supp. 78, 105, 111 (D. Haw. 1961), aff'd, 304 F.2d 149 (9th Cir. 1962). These passages are discussed and compared in Robert J. Morris, Products Liability in Hawai'i, 14 HAW. B.J. 127 (1979), and William S. Richardson, Judicial Independence: The
Second, in the 1978 State Constitutional Convention, the question was raised whether a specific provision should be placed in the constitution to protect sexual minorities:

Certain members of [the Standing Committee on the Bill of Rights, Suffrage and Elections] argued that the inclusion of such a provision would extend nondiscrimination to another minority group.

Your Committee believes that the inclusion of such a provision would be duplicative of the equal protection and due process protections already existing in the Constitution.73

III. THE ILLEGITIMACY OF THE Bowers FOOTNOTE

The deepest Hawaiian problems with Bowers are its illegitimate genealogy74 and its articulation of only the white (foreign, haole, English-speaking) Western “tradition” of morality.

In Bowers, the police entered Michael Hardwick’s bedroom, where he was engaging in sex with another man, and arrested him based on a Georgia criminal statute prohibiting “sodomy.” He found himself in a true Kafkaesque nightmare: “I was seized in bed before I could get up.”75 The Court held that to claim what it characterized as the right to commit homosexual sodomy as “deeply rooted in this Nation’s history and tradition” or “implicit in the concept of ordered liberty” was, at best, “facetious.”76 The Court stated: “Proscriptions against that conduct have ancient roots.”77 It is at this point that the

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74. To Hawaiians, genealogy is everything. To possess a genealogy is to possess a family, and to be related either by affinity or by friendship. Affinal relatives, non-affinal relatives, and friends may all be designated by the term inoa “name.” Genealogy is mo’o kā‘auhau “the pedigree of succession” like the vertebrae of the backbone. To assert a “pretended genealogy” is to get hold of “only the middle part, but no head or tail” (“Ke ʻi lā paku ʻoe i ka paku waena, he neo ke poʻo me ka hiʻu”), MARY KAWENA PŪKUʻI, ʻŌLELO NOʻEAU, HAWAIIAN PROVERBS & POETICAL SAYINGS 183 (1983). In alleging a phony legal genealogy in its footnote 6, the Bowers Court committed one of the worst of all Hawaiian wrongs. Presumably, this should not have mattered in a case such as Baehr, grounded as it was solely on state law. Instead, courts and scholars have implicated Bowers in most cases involving same-sex relationships. Because the Hawaiian Clauses deal with values antedating even the English and American common law itself, not to mention the advent of Western law in Hawai‘i, their genealogy must be presumed valid. The legitimacy of persons born before the enactment of marriage and descent statutes may not be determined by such statutes. See In re Kailikanoa’s Estate, 3 Haw. 459 (1871).


76. 478 U.S. at 191-92.

77. Id.
Bowers Court provided its laundry list of “states” prohibiting “sodomy.” Footnote 6 purported to give citations to the effect that as of 1868, the date the Fourteenth Amendment to the United States Constitution was ratified, “all but 5 of the 37 States in the Union had criminal sodomy laws.” Among the “States” listed was the “Kingdom of Hawai‘i.”

This appeal to Hawai‘i law not only committed a factual error, but unwittingly incorporated a body of law and language that is very nearly the antithesis of its holding—a body of law that largely deconstructs the premises upon which that holding is based. The Court ignored this surrounding body of law and whatever it may have to say about privacy and homosexual activity. At the very least, what the Court upheld was un-Hawaiian. Careful study of the time period around 1868 reveals, as Maiván Clech Lăm has felicitously put it, a bad fit between Western and Hawaiian concepts, a certain “linguistic noncalibration,” ambivalence, and uncertainty. Furthermore, cases decided for a half century (from the 1850’s to the 1890’s) held that where there was a conflict between the Hawaiian and English versions of a law, the Hawaiian prevailed. This principle becomes crucial in our examination of what “sodomy” meant in Hawai‘i as of 1868. Scrutiny of the Hawaiian-language meanings of the subjects in question casts considerable doubt on the veracity of the 1869 Penal Code as a viable source for the Bowers argument.

Whatever Georgia law may have been in 1986, Bowers could not have been litigated under Hawaiian law in 1986 because Hawai‘i had already repealed its consensual sodomy laws, and in traditional Hawaiian culture, same-sex relationships and conduct were honored and honorable. By this singular erroneous citation in footnote 6, the Bowers Court attempted to leap back over an extraordinarily diffuse and complex legal progression through which Hawai‘i went from sovereign kingdom to United States Territory to state.

78. Id. at 193 n.6.
79. Id.
Hawai‘i did not participate in the American Civil War or the ratification of the Fourteenth Amendment in 1868. The “Tyler Doctrine” of 1822 effectively recognized Hawai‘i as an independent monarchy in the eyes of both the United States and the world. Footnote 6 creates the illusion of continuity and unanimity where they do not exist; it creates an illegitimate and one-sided genealogy.

Even Bowers’ seemingly simple appeal to “the common law,” whether that of England, America, or Hawai‘i, is fraught with similar disjunctions. Hawai‘i Revised Statutes section 1-1, as we have seen, has always provided that the “common law of England, as ascertained by English and American decisions, is declared to be the common law of the State [then kingdom] of Hawai‘i in all cases . . . .” Nevertheless, even William Blackstone, who memorialized sodomy as the “crime not to be spoken of among Christians,” acknowledged that the common law acquiesed to local custom:

The second branch of the unwritten laws of England are particular customs, or laws which affect only the inhabitants of particular districts.

. . . .

. . . [F]or reasons that have been now long forgotten, particular countries, cities, towns, manors, and lordships, were very early indulged with the privilege of abiding by their own customs, in contradistinction to the rest of the nation at large: which privilege is confirmed to them by several acts of parliament.

Janet E. Halley has noted that “it cannot be conclusively shown that sodomy was a common law crime in England,” and that it may

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85. HAW. REV. STAT. § 1-1 (1993).
86. 1 WILLIAM BLACKSTONE, COMMENTARIES *74 (1765). In any case, how can anything in the common law relevant specifically to Christians properly form any part of Hawai‘i law today? The Hawai‘i Constitution provides: “No law shall be enacted respecting an establishment of religion . . . .” HAW. CONST. Art. 1, § 4. Hawai‘i’s people represent a diversity of religious and nonreligious cultures. Hawai‘i is definitely not a “Christian state.” Nor is the United States any longer a “Christian nation” (if it ever was), as alleged by the United States Supreme Court in such cases as Church of Holy Trinity v. United States, 143 U.S. 457, 471 (1892), and Vidal v. Gerard’s Executors, 43 U.S. 127, 198 (1844).

To my knowledge, the Hawai‘i appellate courts have never declared Hawai‘i to be a “Christian” kingdom, territory, or state. However, the American Board of Commissioners for Foreign Missions of Boston did so in 1853, stating that in the few years after the first missionaries arrived in 1820, Hawai‘i became totally evangelized. Am. Board of Comm’rs for Foreign Missions, “Sandwich Islands,” 49 MISSIONARY HERALD 10, 335-37 (1853). Also, the Hawai‘i Supreme Court declared marriage in Hawai‘i to be “Christian marriage.” Kamoku v. Kalauauha, 4 Haw. 548 (1882). Furthermore, there have been efforts to translate the Hawaiian word “pono” in the State motto as “righteousness.” See Derek Ferrar, God on Their Side (The Religious Right in Hawai‘i), HONOLULU WEEKLY, July 13, 1994, at 8. This is a grievous error as pono is better translated as justice, right, rights, correctness, or uprightness. ANDREWS, supra note 1, at 482; PŪKUI & ELBERT, supra note 1, at 340.
have even been "entirely statutory in nature." Even so, Hawaiians, who probably first arrived in the Islands during the first four centuries of the Common Era, brought with them laws and traditions antedating anything we may call "the common law."

For this reason alone, the United States Supreme Court's reference in *Bowers* to Hawaiian law in 1868 was anachronistic, and no clear lineage of either statutory or case law can be established. Certainly, it was not "state" law in Hawai'i in 1868. Whatever connection the English common law may have made between the modern world and the ancien régime, citing Hawaiian law introduced a second ancien régime, one given priority by the Hawai'i Constitution. This consideration of different histories would appear to bring the nation closer to Madison's ideal of "comprehending in the society so many separate descriptions of citizens as will render an unjust combination of the majority of the whole very improbable, if not impracticable."

Hence, the *Bowers* Court's attempt to locate and declare a monolithic sexual ethic in the Constitution, and to impose that ethic upon the nation via the Georgia statute, is plainly wrong so long as Hawai'i remains a part of the United States.

Despite the common law's formal deference to local custom, Anglo-Saxons in Hawai'i in the early 1800's hardly viewed Hawaiian custom as legitimate. Many of the foreigners who came to Hawai'i in the early 1800's called it (and its language) childish, simplistic, deficient, defective, heathen, pagan, native, and feudal. In doing so, they defined themselves in opposition to the Other and simultaneously changed the Other. They necessarily viewed Hawai'i as the despotic, barbaric Other; and a good part of this Otherness was the Hawaiians' sexuality.

Calvinist missionaries dealt with a culture that had aikane by calling christianist and capitalist culture "manly," Hawaiian society "feudal," and feudalism "effeminate." Any language other than the King's English was "emasculated." The discussion was in sexual terms, and the patriarchy-driven mission off-handedly acknowledged that

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88. As an earlier Court noted:
The Fourteenth Amendment, itself a historical product, did not destroy history for the States and substitute mechanical compartments of law all exactly alike. If a thing has been practiced for two hundred years by common consent, it will need a strong case for the Fourteenth Amendment to affect it . . . .

89. THE FEDERALIST No. 5, at 324 (James Madison) (Clinton Rossiter ed., 1961).
91. See Lynn White, Jr., The Legacy of the Middle Ages in the American Wild West, 40 SPECULUM J. MEDIEVAL STUDIES 191 (1965).
92. Davenport, supra note 90.
"[n]o nation on earth perhaps allow[s] females a higher proportionate rank [than Hawaiʻi]." For Hawaiʻi, this was the "dawn of tyranny" under the new foreignization.

Haunani-Kay Trask has rightly challenged the characterization of Hawaiian "feudalism" as factually inaccurate, since the Hawaiian system of land tenure did not fit the European model of feudalism. The invention of Hawaiian "feudalism" allowed foreigners to subjugate Hawaiian culture. By describing the traditional culture pejoratively, then extolling the virtues of the new Western system of tenure, the foreigners could "liberate" the Hawaiians from an "oppressive" system. This terminology provided a pretext for massive theft of land and culture.

Thus, the first issue of the Maile Quarterly (a Hawaiʻi Protestant publication), in September 1865, editorialized on land and the Hawaiian character under "feudalism":

The people do not think for themselves. Like children, they depend on some one on whose judgment they can rely. They are chary of their confidence at first, but when it is yielded, they are entirely under control. They possess all the softer and effeminate qualities of character, and lack the harder and sterner traits of energy, perseverance, decision, and calculation of and preparation for difficulties. The older system suited them.

An unsigned letter following this editorial carried the feudal motif further by noting that the "natives, partly Christianized, partly civilized, needed an influence which would mold them into good citizens, bring out their loyalty, and mature their other manly virtues. . ." This, among other things, included the Anglo-Saxon version of marriage and family.

Thus, to the missionaries, "feudalism" (Hawaiian culture) equalled effeminacy, while capitalism (primarily American culture) equalled manliness. Unsurprisingly, modern Hawaiians eschew the appellations "effiminate" and "feudal" altogether as descriptions of their native culture.

98. Letter to the Editor, 1 MAILE QUARTERLY 57, 57-58 (1865) (emphasis added).
In his study of Medieval Europe, John Boswell states that “[F]eudalism—the predominant mode of social organization in the Middle Ages—was based on loyalty and trust between rungs of hierarchy, and this seemed to most of those imbricated in the structure to be consistent with Christian admiration of those qualities.”99 He further notes “the profoundly patriarchal nature of Christian society in Europe” at the time.100 But the Hawaiians the missionaries found in 1820 were not imbricated in the same structure or values, nor were they Christians. Hence, when Christians applied the term “fuedal” to them and their culture, it became instead a pejorative meaning backward, barbaric, primative, partaking of the “bondage” of “serfdom.” The point was that the Hawaiian “serfs” did not own the land they lived on because it was all in the control of the chiefs. By this ruse, the foreigners introduced the parceling and sale of Hawaiian land to Hawaiians (who did not understand Western real property concepts), knowing that within a few years most Hawaiian-owned parcels would be bought or adversely-possessed by foreigners.

Bowers v. Hardwick is a feudal document. It chisels into constitutional stone the core myths and disinformation about homosexuality that were part and parcel of the “gospel.” The irony is that while the foreigners called the traditional Hawaiian culture “feudal” as a pejorative, in reality it was the foreigners and their culture that, on the subject of same-sex relations, were truly feudal (i.e., backward). The non-feudal reality of Hawaiian traditions deconstructs the feudal homophobia so carefully encapsulated in Bowers by footnote 6.

IV. THE SODOMY STATUTE IN HISTORICAL CONTEXT: CUSTOM, LAW, AND LANGUAGE

As the discussion above demonstrates, nineteenth-century visitors to Hawai‘i did not respect local custom. Yet, in order to understand what the first Hawai‘i sodomy statute meant, we must consider the Hawaiian-language meaning of the statute, as well as several other statutory and constitutional provisions which affect the interpretation. Most particularly, we must analyze the translation of “sodomy” as moe aikāne, as well as other points about the Hawaiian language itself.

Exact translation is not an easy task. Some concepts of the Hawaiian language were buried with the advent of Christianity and
capitalism in Hawai‘i. *Aikāne* was among these. *Aikāne* marks persons of any gender in a homogamous relationship. Despite Christianity, this meaning persists well into the twentieth century among those who know Hawaiian. In his 1864 *Dictionary of the Hawaiian Language*, Lorrin Andrews attempted to assert that such was only the meaning “formerly,” and that the word, by 1864, meant only “an intimate friend of the same sex.”\(^{101}\) However, I know of no Hawaiian-language text of that era that supports such a conclusion (unless, of course, Andrews’ use of the word “intimate” implied a sexual or romantic relationship). This contested translation is important for the interpretation of the law which had its formative years at the time when Andrews was compiling his dictionary and apparently attempting to make his work prescriptive instead of descriptive.\(^{102}\)

The traditional meaning of *aikāne* as a same-sex lover is crucial. From the first day of Captain Cook’s arrival in Hawai‘i through the formative years of the American and other foreign presence in Hawai‘i, the *aikāne* of the chiefs (ali‘i) of each island facilitated the foreigners’ livelihoods, their use of land, their very existence. An ancient pattern was continued under new circumstances. Cook’s arrival revealed another of the most important aspects of the Hawaiian character: the willingness and ability to question, debate, argue, redefine, and make room for new ideas and new ways. The foreigners were occasion for intense debate, curiosity, and learning.\(^{103}\) The Hawaiians were willing to adjust their linguistic categories to accommodate new and expansive realities.

The legal maxim is that laws are to be interpreted according to the common, everyday meaning of their words. In *Shillaber v. Waldo*, the Hawai‘i Supreme Court declared that where the expressions of a statute are clear and intelligible, no court has the right to distort the meaning of those expressions on the grounds that they are “unanswerable.”\(^{104}\) In 1892, the same court stated that although the statutes of the Kingdom were passed and promulgated in both English and Hawaiian versions, the two versions constitute but one act, “and it is presumed that they exactly coincide.”\(^{105}\) This was and is a rebuttable presumption—a fact of great importance for both *Bowers*

\(^{101}\) ANDREWS, supra note 1, at 25.
\(^{104}\) 1 Haw. 21, 24 (1847).
\(^{105}\) In re Ross, 8 Haw. 478, 480, 490 (1892).
and *Baehr*, especially when our interpretation of the law of the period must favor the Hawaiian meaning.

Did Hawaiian homogamous pairs, i.e., the two *aiıkāne*, commit “sodomy?” The Hawaiian term always employed to mean sodomy in the early statutes was *moe aiıkāne*, the sleeping with, lying with, or intercourse with an *aiıkāne*, either male or female. *Moe* is a noun, as well as a transitive and intransitive verb. It means more than merely “to sleep with,” for it also implies informal marriage or mating. *Moe aiıkāne* was a coinage of the Calvinist missionaries who arrived in 1820. The Hawaiian language had no native word equivalent to sodomy or any other sexual “sin.” At first, the English word was simply transliterated: *sodomi* or *kokomi*, or translated as *kohe lemu*, buttocks-vagina, apparently assuming intercourse _per anum_ but not _per os._

This phrase occurs, for example, in a famous reference to homogamous intercourse in Davida Malo’s section on the ruling chief Līloa, whose *aiıkāne* “uses me [i.e., works his genital] on/against my thighs.” Homogamous intercrural or interfemoral intercourse using the inner thighs (ʻūhā) is neither _per os_ nor _per anum_, and therefore not “sodomy.” Finally, *aiıkāne* and its permutations do not help us because they describe only persons, not acts.

Did the Hawaiians “marry?” Not in the sense or the ways mainland Americans usually associate with that term. Hence, the missionaries felt the need to coin (or rather transliterate) the terms _male_ and _mare_ for “marriage.” Hawaiian society apparently did not evolve the need for the same kinds of fixity provided by marriage ceremonies in common-law countries. The high chiefs were joined with ceremonies to celebrate and guaranty the lineage and _mana_ of their offspring; the commoners just started living together.

The missionaries’ linguistic attempt to fix the meaning indicates that the pre-missionary meaning of marriage-like relationships to the Hawaiians themselves was malleable. “Marriage” among the royalty (termed _hoʻāo_) involved important concepts of sacrifice and genealogy

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106. PŪKU‘I & ELBERT _supra_ note 1, at 161.
107. PŪKU‘I & ELBERT, _supra_, note 1, at 159.
109. Hence, these acts would not be cognizable under common-law “sodomy”; nor would be the “sin of Onan” noted by the Cook journalists. Morris, *Aikāne, supra* note 82, at 30. To masturbate is *ʻu‘u_. ANDREWS _supra_ note 1, at 114; PŪKU‘I & ELBERT _supra_ note 1, at 374 (“onanism”).
110. Early on, the missionaries complained of “the apparent poverty and ambiguity of the Owhyean [Hawaiian] language, which needs the aid of gesticulation to make it clear and forcible . . . .” Am. Board of Comm’rs for Foreign Missions, _supra_ note 28, at 11.
that did not usually pertain to the commoners.\textsuperscript{111} For most traditional Hawaiians, Justice Douglas’s definition of “marriage” (which, significantly, omits the church, priest, and ceremony) would be perfectly apropos: “Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects.”\textsuperscript{112} This fairly describes the relationships between \textit{aikāne} throughout Hawaiian culture and literature. The preservation of the commoner \textit{aikāne}’s genealogy was not important compared to the preservation of the chief’s genealogy.

If the \textit{Bowers} analogue to a long genealogy of anti-sodomy tradition in Hawai‘i cannot hold up, then what of the “commonness” of sodomy prosecution under any statute(s), particularly before 1868? In fact, such prosecutions were quite rare in Hawai‘i, and those few that did occur were motivated by race or rape. Yet the \textit{Bowers} court was not the first to make this erroneous allegation that such prosecutions were common.

In 1848, when Hawai‘i Foreign Minister R. C. Wyllie asked the missionaries what they knew about the “unnatural crime” of sodomy among the natives, they replied that it was “doubtless very prevalent,” though difficult to learn about because “they have fled to hide themselves in darkness, away from the light of the pure gospel.”\textsuperscript{113} Bishop Henry Bond Restarick, writing independently, confirmed the “chilling” effect:

As children of Nature, many words and deeds, considered indecent and vulgar by persons of advanced civilizations, were to them natural with no need of concealment. When they learned that these were offensive to the missionaries and respectable haoles [foreigners], they said and did them in secret, as they are very quick to see what others do not consider proper. Among themselves they would say and do things which they did not consider improper, but they concealed them from haoles because they knew their opinions and principles, and this is the case today.\textsuperscript{114}

\textsuperscript{111} Valerio Valeri, \textit{Kingship and Sacrifice: Ritual and Society in Ancient Hawai‘i} 161-71 (1985).
\textsuperscript{113} R. Armstrong et al., \textit{Answers to Questions Proposed by His Excellency, R. C. Wyllie, His Hawaiian Majesty’s Minister of Foreign Relations, and Addressed to All the Missionaries in the Hawaiian Islands, May, 1846, at 65 (1848).}
\textsuperscript{114} Henry Bond Restarick, \textit{Hawai‘i 1778-1920 From the Viewpoint of a Bishop, Being the Story of English and American Churchmen in Hawai‘i With Historical Sidelights} 87 (1924).
This statement, made for wide public dissemination, appears to be self-serving. It helped those who wrote it define themselves as "righteous" as against the evil Hawaiians. In fact, in their own Missionary Herald, the missionaries readily acknowledged that "[c]riminal cases are extremely rare; and, indeed, generally in our district [Kohala, the Big Island] little overt wickedness is observed."  

In order to learn whether prosecutions for "sodomy" were as common as alleged in Bowers in the nineteenth century on either side of 1868, I investigated all of the criminal records at the Hawai‘i State Archives since they were first kept from about 1845 until about 1892.  

For the forty-seven year period, I found only eleven cases from all of the Islands. I excluded those that concerned bestiality on the assumption that the Bowers Court referred only to human sodomy. Of the remaining seven prosecutions, all were for forcible sodomy, all were upon young victims, and all were male-to-male. I found no records of arrests or prosecutions for consensual sodomy, female sodomy, or heterosexual sodomy.

During this era, the chief justices of the Hawai‘i Supreme Court made periodic reports to the legislature. In his report for 1852 and 1853, Chief Justice William Little Lee passed on a report from the Big Island that there were nineteen cases of sodomy in 1852, but in his footnote he wrote: "This is an error, as the crime of sodomy is unknown at the Islands." Legally, but not socially, speaking he was nearly accurate.

With only one exception, all cases occurred during the era of Kalākaua or later (after 1875)—the era when sexual repression of Hawai‘i under foreign influence, particularly anti-sodomy sentiment, was most severe. Many of the cases contain derogatory racial

116. The cases were numbered according to docket numbers assigned in the respective courts and districts or circuits in which they were brought. My research benefited materially from Ball and Silverman’s computerized analysis of the old court records. These were based upon references to, and notes of, the cases found in the Minute Books at the Archives. See Harry V. Ball & Jane Silverman, Criminal Cases Index, Hawai‘i State Judiciary (1981) (unpublished computer analysis, Archives of Hawai‘i at the University of Hawai‘i (Honolulu)); Harry V. Ball, First Circuit Criminal (O‘ahu) Offense Index, (1992) (unpublished computer analysis, University of Hawai‘i (Mānoa)).  

In the same report for 1868 by Chief Justice Elisha H. Allen, he noted one sodomy for Māui—the only one reported for the period. Elisha H. Allen, Sixteenth Annual Report of the Chief Justice of the Supreme Court to the Hawaiian Legislature of 1868, at 4 (1868).
language suggesting the connection of sodomy prosecutions with racism.\footnote{118} Thus, in my calculations at least, the paucity of sodomy prosecutions stands in radical contrast to the allegation in Bowers and the Wyllie document that in practice the common law routinely frowned on sodomy.\footnote{119}

V. THE HISTORICAL FAMILY AIKĀNE

"Hawaiian usage" has usually been applied to cases involving water (wai), fishing (lawai'a), farming (mahī'ai), and gathering rights (lapulapu, kōhi, aulau, laua'e); general subsistence activities; and land matters.\footnote{120} There is nothing in the Hawaiian Clauses themselves to limit their use to those subjects. However, even keeping within these enumerated areas, each has been characterized by aikāne involvement, as shown by both legendary and historical sources. Rights of gathering and piscary (gathering at sea) were, for example, intertwined with aikāne relationships, as was religion.\footnote{121}

The aikāne of the chiefs were of critical importance in dealing with the politics and government (kālaiāina) of usufructs, accesses, and rights-of-way of the beaches and uplands. To be "made an aikāne" or to "take as an aikāne," especially for a chief, meant that the person so made or taken obtained rights in land relative to the chief. In

\footnote{118. On the unity of racism and homophobia, see Evan Wolfson, Civil Rights, Human Rights, Gay Rights: Minorities and the Humanity of the Different, 14 HARV. J.L. & PUB. POL'Y 21 (1991). Comparisons between racism and homophobia have been accused of diminishing or appropriating the gravity of the Black civil-rights movement. By making the comparison, I do not in any way minimize the travails of Black Americans or the uniqueness of their cause. Often, however, homophobia, unlike racism, turns parent against child, sibling against sibling. It is hard to imagine anything more familialcidal (‘ohanacidial) than homophobia. See Williamion B. C. Chang, The "Wasteland" in the Western Exploitation of "Race" and the Environment, 63 U. COLO. L. REV. 849 (1992); Testimony of Williamson B. C. Chang in Opposition to House Bill 1825, H.D. 2 (Honolulu, March 20, 1995).

119. A closer look at the facts of some of the cases of this period is revealing. In Case No. 739 on the Big Island, a jury found the defendant guilty and sentenced him to ten years hard labor for ka hewa moe aikāne, the crime of sodomy. The reporter's notes of the trial condemn the "wicked Chinese" (Pākē 'ino) because sodomy was "indeed the customary way of the Chinese in their own land" (Kēlā nō ka hana mau a ka Pākē ma ko lākou 'aina, my translation). In Case No. 810, the jury returned a verdict of not guilty. The defendant, a Black man, was charged with the act of sleeping with a white boy named David, who was "tall and slim." The reporter's notes refer to the boy as a haole (foreigner) and the adult as a "nigger." These quotations are all taken from reporters' notes, which are handwritten, loose pages which can be found in the Hawai'i State Archives.


121. See HAWAIIAN MEDICINE BOOK, HE BUKU LĀ'AU LAPA'AU (Malcolm Nēa Chun trans., 1986); DAVID KAWAHARADA, HAWAIIAN FISHING LEGENDS (1992); THOMAS THRUM, HAWAIIAN FOLK TALES: A COLLECTION OF NATIVE LEGENDS 229, 231 (1907); KALI WATSON, REPORT FOR ALU LIKE: THE ACCESS PROBLEM 33-37 (1977); see also, E.S. CRAIGHILL HANDY & ELIZABETH GREEN HANDY, NATIVE PLANTERS IN OLD HAWAI'I: THEIR LIFE, LORE, AND ENVIRONMENT 309 (1978); DAVID KAWAHARADA, HAWAIIAN FISHING LEGENDS 1-28 (1992).}
discussing seven of the key *aikāne* of Kamehameha the Great and his heirs, Kame'elehiwa notes their official status and involvement in land use and distribution. These seven *aikāne* held such powerful and prestigious posts as governor,122 King’s Privy Council member,123 Kuhina Nui (prime minister),124 ambassador to Europe,125 and deputy of the King.126 All of these men, well-known and documented in the monarchical period, served side-by-side with the missionaries who were advisors and officers of the King.127 Nothing could be done without them.128

Turning to the legendary materials, there is the lengthy, largely pastoral, legend of *Kama-a-ka-Mahi'ai* (Son of the Farmer, “Kama” for short). In the 1870’s, newspapers serialized the legend of Kama, versions of the legend ran in the newspapers *Kā’oko’a* in 1869-70 and *Ke Aloha ‘Āina* in 1910-11. On at least one occasion Kama’s *aiKāne* was mentioned and described as “very beloved.”129 Throughout cultural lore, the *aiKāne* relationship consistently involves the *aiKāne* in lawmaking.

Jocelyn Linnekin’s research has shown that *aiKāne* relationships were recognized at law in probate proceedings as part and parcel of the Hawaiian extended family.130 Her research also reveals that the Hawaiian concept of “home” (*ōpū malumalu, ōpū weuweu, kauhale, kīnana hale*) was much more flexible than in the West. Certainly families were united by marriage (*alohiki*), but also by various forms of adoption (*hānai, po‘olta, ho‘okama*). In fact, a far more useful concept in understanding the Hawaiian extended family is the *ramage* ("companions" or "associates") spoken of so frequently in Hawaiian literature. This analysis reveals how procreation, crucial though it

122. Kuakini (*aiKāne* to Kamehameha I) became the *Kia‘aina* (governor) of O‘ahu and was zealous in caring for the land. He gave particular attention to the building of roads. KAME‘ELEHIWA, supra note 37, at 116-19.
123. Kekūhanao (*aiKāne* to Liholiho (Kamehameha II)) became *Kia‘aina* of O‘ahu and a member of the King’s Privy Council. He was present when crucial land divisions were discussed and voted upon. Id. at 145, 192. 214-15, 220, 224, 266. Kana‘ina (*aiKāne* to Liholiho) was also a member of the Privy Council. Id. at 264.
124. Kaomi (*aiKāne* to Kauikeaouli (Kamehameha III)) was a quasi-*Kuhina Nui* (prime minister). It was this Kauikeaouli who first declared what is now the Hawai‘i motto: *Ua mau ke ea o ka‘aina i ka pon* (The sovereignty of the land is perpetuated in justice). Id. at 157-60. Keoniana (*aiKāne* to Kauikeaouli) was appointed Kuhina Nui and Minister of the Interior. Id. at 191, 220-21.
125. Nāhihekuhi (*aiKāne* to Liholiho) was an ambassador to Europe and Kamehameha I’s harbor master. Id. at 166, 263, 366.
126. Ha‘aliiho (another *aiKāne* to Kauikeaouli) was a deputy of the King in negotiating a treaty in Europe to prevent seizure of the Island by European powers. He was also a member of the Treasury Board. Id. at 180-82.
127. Id. at 142, 285, 289.
128. Id. at 222-23.
was, was not the *sine qua non* of marriage or the home, or vice versa, contrary to footnote 6 of *Bowers*.

Linnekin's research shows that even in commoner families, the *aikāne* were considered part of the "family." The Hawaiian *ʻohana* included not only the nuclear family, but also cousins, aunts, uncles, and others, usually related by blood. This group was also referred to as the *mā* and was not defined as "nuclear" or as synonymous with marriage.

Thus, the Hawaiian concepts of "family" and "marriage" are far more plastic than modern definitions allow. As Linnekin has shown, the fundamental unit of local-level Hawaiian society was a bilateral household group, the *mā*, which is a particle appended after proper names to indicate those who habitually attend to or accompany the person named. So *Hoapili mā* means Hoapili and those known to be about him—his servants, favorites, friends, retainers, stewards, and lovers. Linnekin summarizes:

[T]rue family (*ʻohana*) were differentiated from unrelated add-ons, who were called *ʻōhua* . . . . The nineteenth-century family histories attest that *ʻōhua* who remained permanently attached to the household would over time be assimilated as fictive or stipulated kin, a process facilitated by the commoners' shallow genealogies. Kinship categories did not define the composition of the *mā*; rather, putative kinship could follow from co-residence. In sum, Hawaiians recognized numerous options for co-residence. Essentially any form of relationship—kin, affinal, or friendship—constituted a potential accessway or path into a household.

This is what Linnekin calls the "performative aspect" of Hawaiian kinship, *i.e.*, kinship was readily attributed to those who acted like

131. Samuel Kamakau notes that in Hawaiian culture, children entered the service of the ruling chiefs as their *aikāne*:

In the genealogies of children who were taken to be *aikāne* in the household of a chief, one might then be known as the child by some high chief, and a very close relative of the rulers of the kingdom. In such a way, ruling chiefs were connected with the commoners.


The Hawaiians recognized the great influence of caretakers upon children. *Kū nō i ka māna a ke kahu hānai* denoted a trait acquired from association with the one who raised the child. *Poku'i & Elbert, supra* note 1, at 235-36. See also Walker v. O'Brien, 115 F.2d 956 (9th Cir. 1940); In re Trust Estate of Farrington, 42 Haw. 640 (1958); O'Brien v. Walker, 35 Haw. 104 (1939).

133. *Andrews supra* note 1, at 356; *Poku'i & Elbert supra* note 1, at 217.

134. *Id.*
relatives. This dynamic encompassed the *aikäne* as an "unranked brother." Linnekin notes: "The use of this term of friendship induces an ethic of siblingship rather than hierarchy, which normally characterizes the brother/brother tie." Thus, an *aikäne* relationship, as one form of friendship, implicates vast connections to family and social values. A marriage or the initiation of a formal friendship, like an adoption, often appears to initiate relationships which are tantamount to those of consanguinity in at least some respects.

Perhaps surprisingly, this liberal view of the family would comport with the view of at least some influential missionary and Christian thinkers of the evangelical period in Hawai'i. For example, in 1845 Rufus Anderson, then senior secretary of the American Board of Commissioners for Foreign Missions, gave a sermon entitled, "The Theory of Mission to the Heathen," in which he identified the "problem" as the fact that Christians were conditioned to identify Christianity with "the blessings of education, industry, civil liberty, family government, social order, the means of a respectable livelihood, and a well-ordered community." Hence, their ideas of piety and the propagation of the Gospel were clothed in social and doctrinal forms that they mistakenly associated with the Gospel itself. The resulting cultural bias resulted in confusion of the missions' "sublime spiritual object" with the more dubious aim of "reorganizing, by various direct means . . . the structure of that social system, of which the converts form a part."

Even as late as the late 1890's, adoption was related to the "custom of *aikäne*." Such kin terms might be evidence for the earliest forms of marriage. As part of the extended family, an *aikäne* might have been interchangeably designated as a relative.

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135. *Id.* at 99-100, 147-49.
138. *Id.* The American Board of Commissioners for Foreign Missions was the sponsoring organization of the first missionaries to Hawai'i. The question of the restructuring of society is taken up in greater detail in NICHOLAS THOMAS, *OUT OF TIME: HISTORY AND EVOLUTION IN ANTHROPOLOGICAL DISCOURSE* (1989).
Handy and Handy have also shown how the ruling chief governed through his stewards, counsellors, and land experts. They discuss how breeding and interpersonal relationships on the one hand were considered to be equal in value to feeding and relationships to the earth, environment, and natural resources on the other.142 The aikāne of a ruling chief would often have the power to apportion lands, including the family’s lands.143

Such “siblingship” appears to be more like a marriage than a “brother/brother tie,” and characterizes what in these materials is important to the current debate about same-sex marriage. Citing the 1873 probate case Estate of Kami‘i,144 Linnekin notes that the “household included adult brothers, affines, a friend (aikāne), and the aikāne’s adopted child, who married the two brothers in succession.”145

[A]n unrelated member of Kami‘i mā testified that he had formerly lived with the landholder’s younger brother in Waikīkī: “I knew Kamomokuali‘i. He was my aikāne. He lived at Waikīkī. We all then lived there. Kameahaiku was a child I brought up, and gave her to Kamomokuali‘i.”146

This narration indicates not only that the two homogamous lovers were part and parcel of the family, but that a child, whom they did not of course mutually procreate, was entrusted to their care for upbringing.147 The homogamous couple’s role in raising a child thus indicates their centrality and position of trust in the family.

Not only was a person’s aikāne family, but he or she was often part of the family’s innermost circle. Many stories in both legend and history recite the role of the chief’s aikāne in hiding his bones after death so that they could not be despoiled by enemies. Often, no one else in the world knew of the chief’s final resting place.148 To summarize: The aikāne were part of family relationships. The existence

142. Handy & Handy, Native Planters, supra note 121, at vi, 325.
143. Thrum, supra note 141, at 66.
144. Probate No. 1702 (1873). The matter, considered by the Hawai‘i Supreme Court, was initiated in 1858. The case is available in the Hawai‘i State Archives.
145. Linnekin, supra note 130, at 140.
146. Id.
147. Id. The later gift of the child to Kamomokuali‘i refers no doubt to the Hawaiian practice of hānai, a form of adoption whereby parents would give a child, usually the first-born, to loved ones for rearing. They were not by any means “getting rid of” the child but rather giving a most precious gift.
148. In the story of Kuali‘i, the aikāne secretly pulverized his chief’s bones to powder, then hid them on his person. When he returned to court, he ordered a grand feast to commemorate the dead chief. The night before the feast, he mixed the powder with the poi. When those at the feast asked him if he had faithfully hidden his chief’s bones, he pointed to their stomachs and replied that he had hidden them well in a hundred living tombs. 4 Fornander, supra note 12, at 433-34.
and roles of aikāne were encoded in the language describing those relationships. In turn, the language reinforced the full meaning of the relationship.

In his study of Greek law and the vocabulary of kin, family groups, and role words, Eric Havelock wrote:

This kind of vocabulary implies a set of proprieties; as it implies them, it also recommends. The words, becoming part of the custom of the language, embody the assumption that the relationships thus denoted will continue to be so, and therefore that behavior appropriate to the relationships will also continue to be so. In this way the language itself carries the tradition of the culture.149

The aikāne relationship tradition, sustained through language, can be translated into modern terms. Aikāne couples, for example, could not be denied access to a dying homogamous mate. No longer would blood relatives be able to exclude the mate from caretaking, decision-making, and funeral preparations on the ground that the mate is not "family."150 Instead, the mate, the aikāne would take priority.

This stands in striking contrast to the current condition of gay couples under American law. Mary Anne Case has noted the nearly total absence of the gay couple from public attention, particularly in the courts.151 She cites Richard D. Mohr for the crucial proposition:

The courts may give rights to gays by ones, but they will not give rights to gays by twos. They will not give rights to gays in relations, which is after all what it is to be gay—to have relations of a certain sort. So when the courts do on occasion give rights to gays—by ones—they do so in spite of rather than because of their gayness. And in giving rights to gays by one only, the courts, even as they hand out a right, destroy the very basis and idea of gayness, that it is a relation between people.152

Thus, even in favorable treatment of gay people, the tendency has been to separate them into single individuals and to denature the couple.

However, with the Hawaiian aikāne relationship, such singling is absolutely impossible because of the fact that aikāne is one of those Hawaiian status words that cannot be ascribed to an individual except in terms of, and in relation to, another individual. One cannot be an aikāne alone. This is one of the reasons I argue for the adoption of the word itself as part of the new vocabulary of homogamy. I would call homogamous marriage an “Aikāne Marriage,” and the members of the couple “Aikāne Spouses.”

The Hawaiian extended family (‘ōhana, kaka‘i) including the aikāne thus deconstructs the modern notion that a relationship between a man and a woman must be a prerequisite or the only correct enactment of a “marriage.” This modern notion, which assumes a binary nature for sex and gender, weakens daily as the recognition of the plasticity of these attributes increases. Today, Hawai‘i’s family courts, charged with the obligation to look after the welfare of the children first, occasionally award custody to gay parents. Modern law is coming to recognize more and more the plasticity of the concept “family.” Article XII, section 7 of the state constitution would require these broader definitions of family to adhere, so far as can be discovered, to what they meant in 1778, prior to the Westernization of the concepts of family and marriage in Hawai‘i.

Significantly, the Hawaiiana Clauses, both statutory and constitutional, were enacted well into the Westernization period, when the Hawaiian population was decimated and some were even predicting its extinction. Opponents of the admission of Hawai‘i

153. Of rather limited use is Nathaniel B. Emerson, Regarding Ho-Ao, Hawaiian Marriage, 6 Haw. Hist. Soc. Ann. Rep. 16 (1898), which largely describes Christianist marriage late in the “historical” period. For a source containing a great amount of material on Hawaiian marriage customs that forces us to plasticize the boundaries of “marriage,” see Edward Westermarch, 3 The History of Human Marriage (5th ed. 1925). His materials must be read with caution, however, because his sources are dated and limited, particularly by the fact that all are non-Hawaiian, mostly English. See also Otis R. Damslet, Same-Sex Marriage, 10 N.Y.L. Sch. J. Hum. Rts. 555 (1993).


Students of Polynesian sexuality will be especially interested in Melody Kapilialoha MacKenzie, Transsexuals' Legal Sexual Status and Same Sex Marriage in New Zealand: M v. M, 7 Otago L. Rev. 556 (1992). Also from New Zealand, an organization called “The Minorities Trust” has self-published a large volume of materials dealing with “Transism” and “Transpeople” within the Polynesian context. A set of these materials is housed at the University of Hawai‘i at Mānoa, Hamilton Library, Pacific Collection.

157. For accounts of the decline of of the native Hawaiian population, see generally O.A. Bushnell, The Gifts of Civilization (1993); David Stannard, After the Horror
to the union focused on the masses of non-whites and their alien traditions and languages. However, it must be presumed from the admission of Hawai‘i in 1898-1900 that those objections were overcome. Hence, it cannot truly be argued that the admission of Hawai‘i did not give notice that Hawaiian customs, usages, practices, and language would be a part of the new corpus of United States law.

The data indicate that this pattern of homosexual relations continued well into the monarchy of the mid-nineteenth century, i.e., past 1778. The aikâne were not only the intimates and confidants of the ruling chiefs, or Mō‘ī, but were also their advisers and deputys.

Throughout this period, Hawaiians actually replicated ancient patterns and re-instantiated them in the modern context. I do not mean to argue that the modern term “marriage” has an exact equivalent in Hawaiian tradition. But such an equivalence is not necessary under the law, which is designed to protect Hawaiian tradition. Unlike article XII, section 7 of the state constitution, limited to the protection of Hawaiian tradition by and for Hawaiians only, Hawai‘i Revised Statutes section 1-1 protects Hawaiian tradition without limits according to person or class. Thus, it appears that Hawaiian tradition must be upheld for Hawaiians and non-Hawaiians alike. In this sense, “Hawaiian tradition” is the tradition of Hawai‘i.

The relevant inquiry so far as Hawaiian custom is concerned is not 1868 (the date of the Fourteenth Amendment), but 1848, the date of the Great Mahele. In Oni v. Meek, the Hawai‘i Supreme Court held that Hawai‘i Revised Statutes section 7-1 was declarative of all the specific Hawaiian property rights that survived the Mahele. In that case, the court found the particular right asserted (the pasturage of horses) to be “so unreasonable, so uncertain, and so repugnant to the spirit of the present laws, that it ought not to be

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158. See generally KAMILĪ'I, supra note 29.
161. The Great Mahele was the process by which Hawaiian land was transferred out of Hawaiian hands into foreign control.
162. Oni v. Meek, 2 Haw. 87 (1858).
sustained by judicial authority."162 The court in *Kalipi v. Hawaiian Trust Co.*163 affirmed this position, but also added:

The relevant inquiry is therefore not whether those who once ruled continue to benefit, but rather whether the privileges which were permissibly or contractually exercised persisted to the point where it [sic] had evolved into an accepted part of the culture and whether these practices had continued without fundamentally violating the new culture.164

The court then reserved the exception in section 1-1 for other rights "which continued to be practiced and which worked no actual harm upon the recognized [property] interests of others."165 The test is not whether a particular practice is repugnant to others (stabling horses or gathering limpets may be repugnant to some), but whether such practice actually harms another.

Formalized homogenous relationships were established as an accepted part of Hawaiian society prior to 1848, and they continued thereafter without working actual harm on the recognized interests of others. What has changed since 1848? The state constitution now has an equal rights amendment as well as an equal protection clause; and since *Kalipi* was decided, newer case law has greatly expanded these Hawaiian rights.166

Hence, this peculiarly Hawaiian solution to modern problems operates as a kind of *cy pres*: If we cannot duplicate Hawaiian methods exactly in modern times, we can come close. Valeri argues that the hallmark of Hawaiian culture is the way it continues and regenerates itself.167 Its continuity is marked by re-enactment from generation to generation of central cultural patterns in which values and practices are instantiated anew, even though inflected through

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162. *Id.* at 90.
163. 656 P.2d 745, 751 (Haw. 1982) (holding that where practices associated with Hawaiian way of life have continued without harm to anyone they are protected by references to Hawaiian usage in statute).
164. *Id.* at 751 n.5.
165. *Id.* at 752.
modern forms or devices. Hence, Hawaiian culture operating through
time does not conform to the usual understandings of “linear” time
in the West, or “cyclical” time elsewhere, but renews itself in waves
or pulsations of rebirth that are “transformations.” These actions
cross over and blur the lines between “traditional” and “historical.”
Aikâne persons and relationships continue to this day, hidden, if at all,
because of modern homophobia, not because their validity or
Hawaiianess has died out.

As Valeri suggests, Hawaiian culture finds ways to re-instantiate
itself in modern forms but with traditional (i.e., pre-1778) values.168
One need only listen to the chants and watch the performances of
the modern hula schools (hâlau), or become aware of the exciting new
scholarship on Hawaiian language and literature, to understand the
persistence of aikâne values in modern times. Deference paid by
lawmakers to Hawaiian values and traditions honors this method of
cultural survival. With respect to homogamy, true respect for
Hawaiian traditions necessitates finding a legal way for it and
heterogamy to co-exist.

Nevertheless, the Bowers Court declared that there is no fundamen-
tal right to engage in homosexual sodomy and that the Court itself
ought to be slow to recognize new rights.169 The Court assumed a
common understanding of the explicit and implicit terminology of its
opinion, words such as marriage, family, due process, and tradition.
By including the Hawaiian materials in footnote 6, the Court actually
precluded such an understanding. Words do not always mean the
same thing across cultures, even when the differing cultures are
encompassed within the United States.

A look at two contemporaneous Hawaiian translations of the Due
Process Clauses in the United States Constitution will prove il-
 luminating. One text was translated by the lawyer, scholar, and
politician Joseph Moku‘ōhai Poepeoe,170 the other by the ‘Aahului
Ho‘ohui‘aina (Annexation Club).171 There are striking differences in
the ways in which the ideas of “due process of law” and “the equal
protection of the laws” (in the Fifth and Fourteenth Amendments,
respectively) are translated. Both authors vary their translations of
“due process of law” between the two amendments. They suggest
two fundamentally different understandings of the idea even among

168. Kame‘elehiwa goes a long way toward commencing this process in her “An Afterward
To My People,” KAME‘ELEHIWA, supra note 37, at 321.
169. 478 U.S. at 194-95.
170. JOSEPH MOKU‘OHAI POEPOE, KE KANAWAI 1-21 (1902).
171. “AHAHUI HO‘OHUI‘AINA [ANNEXATION CLUB], KUMUKANAWAI O ‘AMERICA HUIPO‘IA
[CONSTITUTION OF THE [UNITED STATES OF] AMERICA]” (I estimate the date as around 1900
based on the “explanatory remarks” (He Mau ‘Olelo Hoakaka) which speak of annexation).
Hawaiian-language speakers. For the Fifth Amendment, Poepeo gives “unless according to the dictate made by the law”172 while the ‘Ahahui translation gives “without first being processed at law.”173

For the Fourteenth Amendment, Poepeo writes, “unless according to law,”174 changing it only by omitting the word “dictate” (kauoha) that he used in the Fifth Amendment. The ‘Ahahui translation is “without being properly executed on the paths of the Law”175—a somewhat more radical difference. There seems to be no explicit rendition of the concept of “due” in either case.

The translations of “the equal protection of the laws” in the Fourteenth Amendment are closer to each other in language and concept than those of the other translations. Poepeo’s translation is “the equal protection made by the laws,”176 while ‘Ahahui’s is “the equal cherishments (plural) according to the Law.”177

Most interesting are not the comparative differences between the two translators but the internal differences within each translation. The rather radical departure of the ‘Ahahui translation “due process of law,” from its technical Fifth Amendment version to the poetic Fourteenth Amendment version (“the paths of the Law”), together with the less radical but equally important departure of Poepeo (by dropping kauoha (dictate) in the Fourteenth Amendment), suggest that these translators perceived a flexibility and vagueness in the constitutional language.

These two translations also demonstrate important features of the Hawaiian use of the possessive, which sheds light on the intracacies of aikane “marriage.” Hawaiian, unlike English, requires attention to both the relationship between the related parties or things, and also to their relationship to the relationship. To simplify greatly: Human relationships are shown by possessives that are either a-class or o-class. A-class possessives generally indicate relationships that a person chooses or controls, such as that between spouses or lovers; while o-class possessives indicate relationships that are already given, such as inherited family structures into which a person is born. The due-process phrase “of the law(s)” is given the o-class possessive by the ‘Ahahui, but the a-class by Poepeo. Hence, the ‘Ahahui gives nā alahele ke Kānawai in the Fourteenth Amendment, while Poepeo

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172. ke 'ole mamuli o ke kauoha a ke kānāwai. POEPEO, supra note 170, at 17.
173. me ka ho'okolokolo mua 'ole 'ia ma ke kānāwai. 'AHAHUI HO'OHU'TĀINA, supra note 171, at 26.
174. ke 'ole mamuli o ke kānāwai. POEPEO, supra note 170, at 19.
175. me ka ho'okō poiole'i 'ole 'ia ma nā alahele o ke kānāwai. 'AHAHUI HO'OHU'TĀINA, supra note 171, at 30-31.
176. ka ho'omalu like 'ana a nā kānāwai. POEPEO, supra note 170, at 19.
177. Nā pālama ka'aikaie 'ana ma ke Kānawai. 'AHAHUI HO'OHU'TĀINA, supra note 171, at 31.
gives *ke kauoha ke kānāwai* and *ka ho'omalule 'ana A nā kānāwai*. Thus, the *alahele* (paths) of the law are already part of (inherent in) the law as givens, while the *kauoha* (edict) and the *ho'omalule 'ana* (equal protection) of the law are created or chosen by the law itself. Interestingly, both versions refer to the *Kumukānāwai O 'America Huipū‘ia*, the Constitution of America, using the o-possessive: The Constitution was not the creature of the United States, but vice versa.  

Significantly, *aikāne* always takes the a-class possessive, never the o-class. Therefore, grammatically speaking, *aikāne* relationships are thought of in exactly the same way as heterosexual relationships and marriages, as chosen, not given.

The a/o categories are immutable and exclusive. There is never a cross-over from one to the other. *Aikāne* always belongs to the a-class, while *hoa* 'friend' (along with all other friendship words) always belongs to the o-class.  

Hawaiian, unlike English, forces speakers to define their linguistic relationships; language reveals the individual's nature and defines him or her according to his or her relationships. This suggests that to the Hawaiian mind, one's very nature, one's *'ano* (or *hulu*), what one essentially "is," is not mutable or subject to meaningful choice or "structuring" by culture. It is one of life's "givens." "It is in the mother's womb that one's song is (be)gotten." Thus, while one's homogamous relationship as and with an *aikāne* may be chosen, i.e., as part of one's lifestyle or *nohona*, one's predilection or orientation to such a relationship is not.

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179. The reader may think: "Aren't friends chosen?" We think that they always are, but in the universe of the Hawaiian language, that is not the perception. For example, compare *kona hoa* (his or her friend), POKU'I & ELBERT supra note 1, at 73, with *kāna aikāne* (his or her lover), POKU'I & ELBERT supra note 1, at 10. This is my point in going into the Hawaiian grammar: We are in a different perceptual universe here, and because of the Hawaiian Clauses, the law must take that different universe into account. To speculate: It may be that "friends" are "givens" either because it would be unusual to go outside of one's social stratum to find friends, or because it is expected that everyone within the community is and must be a friend—or both.

180. *I loko o ka 'opū o ka makuahine loa'a ke mele.* 5 FORNANDER, supra note 12, at 352-53.
VI. THE LEGENDARY FAMILY AIKĀNE

We come now to the best paradigm for a homogamous union in the traditional (i.e., 1778) materials: the story of the Big Island Ruling Chief Lonoikamakahiki ("Lono") and his aikāne Kapāʻihiahihihihina ("Kapāʻihi"), the commoner of Kauaʻi. The people deserted Lono, and he made an arduous journey through the Kauaʻi rainforest with only Kapāʻihi, who cared for him and arguably saved his life.\(^\text{181}\) In order to reward him, Lono took him back to the Big Island and made him his second in command, the Kuhina Nui, Prime Minister or Premier—a position of high public trust.

Nevertheless, a rift developed between the two men out of jealousy falsely provoked by a group of Lono's former aikāne. Kapāʻihi left to return to his home on Kauaʻi, and Lono, obsessed, followed him. The legend tells how the two reconciled each other and formalized their relationship:

When Lono set sail on his search . . . Lono saw Kapāʻihi sitting on the sand when the canoes of Kapāʻihi's party were being hauled ashore. Lono immediately began to wail with great sobbing . . . Immediately upon seeing the weeping of the chief, Kapāʻihi also commenced to wail. When they came together and ceased their weeping and conversing, then Lono made a covenant between them, that there would be no more strife, nor would he hearken any more to the voice of slander of those in his court, and in order that the understanding between them should be made truly binding. Lono built a rock altar [temple] as a place for them to pray and make oaths before Lono's god to fully seal their covenant. Kapāʻihi observed that Lono verified his oath, and at that moment gave his consent to return with Lono.\(^\text{182}\)

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\(\text{181.} \) Fornander, supra note 12, at 360-63. The Fornander text is my primary Hawaiian-language source for this discussion, although the word aikāne does not occur in this particular text. I have discussed this and other versions of the story in Morris, Aikāne: Accounts of Hawaiian Same-Sex Relationships, supra note 82, and Morris, Same-Sex Friendships, supra note 82.

\(\text{182.} \) I ka manawa i 'imi aku ai 'o ua 'o Lonoikamakahiki, ua pua mau aku 'o Kapāʻihiahihihihina i 'Aanahoʻoamalu a ma ho′pua aku lākou nei (Lonoikamakahiki mā). A i ka manawa i 'ikeaku ai 'o Lonoikamakahiki i'a Kapāʻihiahihihihina e noho mai ana i kaha one, ma kahi e kau ana nā wa'a o lākou (o Kapāʻihiahihihihina mā), a laila, uvē akula 'o Lonoikamakahiki, ma ka uvē helu 'ana, e like me kā lāua hele 'ana. A 'ike maila nō ho'i o Kapāʻihiahihihihina i ka uvē helu aku a ke ali'i, a laila uvē helu maila nō ho'i o ia. A ia lāua i hālāwai ai, a pua kā lāua uvē 'ana a me kā lāua kama'iilio 'ana, a laila kau iho 'o Lonoikamakahiki i 'olelo hoʻohiki ma waena o lāua, 'a'ole e loa'a hou kekah kā'e, 'a'ole ho'i e ho'olole i nā 'olelo 'aki'aiki a kona mau 'alia. Akā, i mea e pa'a 'i'o ai kā lāua hoʻohiki, no laila, kākulu iho 'o Lonoikamakahiki i wahi aku pōhaku (helau), i wahi no lāua e pule ai me ka hoʻohiki i mua o ka aku o Lonoikamakahiki, no ka hoʻop'a 'ana ia ko lāua hoʻohiki 'ana. A 'ike akula 'o Kapāʻihiahihihihina ua hoʻōia'i'o mai 'o Lonoikamakahiki i kāna hoʻohiki 'ana, ia manawa ko Kapāʻihiahihihihina 'ae 'ana aku e ho'i me Lonoikamakahiki. 4 Fornander, supra note 12, at 360-61.

https://digitalcommons.law.yale.edu/yjlh/vol8/iss1/6
The difference in social status between the two men is crucial—Lono was a ruling chief, Kapā'īhi a commoner. When they met on Kaau'i, Kapā'īhi was properly deferential to the high chief. On their arduous trek through the uplands, he waited upon Lono, fed and clothed him because, he said, *Aloha au iā 'oe, ukali mai nei* (I love you, so I follow you). 183 Then, partly in gratitude, but more out of love, when they were in the midst of great suffering, Lono said:

“Do not hold me in sacredness, because you are my own brother. I have no one more important, you are the only one. Therefore, where I sleep, there you will sleep also. Do not be separate from me, because all that is good has passed, and the place we are now travelling is the realm of the gods.” In consequence of this, the chief’s words were observed, and the two of them lived together. 184

What is forged here is a family and a marriage, told in the plainest possible language. 185 This is a paradigmatic story, where we find most of the standard elements of the aikāne tradition. These elements include

—the approval of the aikāne and their relationship by the general populace (“they shouted their admiration because he was such a handsome man”); 186

—an aikāne of a chief is made a ruler in his own right over an island or district; 187

—an aikāne is made the chief’s property holder (*ho’oilina ‘āina*) and the “one who governs the land”; 188

—an aikāne is rescued from filth and degradation, or raised in social status; 189

—the marriage may be between two aikāne of different social ranks; 190

—the aikāne couple lives together in peace (*‘olu’olu*). 191

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183. *Id.* at 352-53.
184. “*Ma‘ho‘okapakapu mai ‘oe ia‘u, no ka mea, ‘o ‘oe nō ko‘u hoahānau pono‘i,‘a‘ole a‘u mea nui ‘i e a‘e, ‘o ‘oe ho‘okahi wale nō; no laila, ma ka‘u wahi moe, ma laila mai ‘oe, mai ho‘oka‘awale ‘oe ia‘u, no ka mea, ua pale ka pono eia kāua i ke au akua kahi i hele ai.* A no laila, ua ho‘okō ‘ia ke ali‘i ʻōlelo, a noho pū ihola lāua. *Id.*
185. As well as a sexual bond. The sexual imagery comes in Kapā‘īhi’s love chant to Lono. *Id.* at 356-59 (1917). This chant is a great act of both personal and political speech. I cannot do justice to the chant or the story in this effort to paraphrase it. Everyone should read at least the complete translation, better still the original Hawaiian.
187. *Id.* at 404-05.
188. ‘*O ka mea ia nona ka ‘aina.* *Id.* at 438-39.
190. *Id.* at 482-87; 6 Fornander, *supra* note 12, at 194-95.
191. 5 Fornander, *supra* note 12, at 600-01. See also Linnekin’s notes on modern Hawaiian marriage in Linnekin, *supra* note 141, at 59-64, 68.
—virginity and faithfulness are the desiderata, and places on the land are named after the aikāne.

A different kind of example comes from the story of 'Umi, a progenitor of Lono, and the son of the famous Liloa of Waipi'o Valley on the Big Island. 'Umi is one of the greatest personages in Hawaiian history; most Hawaiianists agree that his story is paradigmatic:

He had multitudes of women, among whom were daughters of the common people, so that he became an ancestor of both chiefs and commoners. There was not a commoner in Hawai'i who would say that 'Umi, son of Liloa, was not an ancestor of ours, and if there is anyone who denies it, it is out of ignorance of his ancestors.

As a young man, 'Umi “adopted” at least three other young men as his “adopted sons.” He had other associates whom the stories designate as his favorites (punahele) and lovers (aikāne), but the named three are specifically called “adopted sons” (keiki ho'okama). These were not keiki hānai, i.e., given as infants to 'Umi or his parents by others to raise. Rather, their adoption was an affirmative act by 'Umi himself. This point is crucial because the Hawaiian text informs us that these three were also designated as the aikāne of 'Umi. I have argued elsewhere that adoption was one means by which a person became the lover of another person of the same sex.

To return to Linnekin’s explanation of the mā, these men form part of 'Umi’s family and entourage. In the process of forming relationships, unequals become equals, both adopted and married to each other. Hawaiian custom and usage support the argument that homogamy should be legalized, and if desired by the parties, made sacred by a religious ceremony in a religious place. Furthermore, tradition and conscience can be retained as the basis for “fundamental rights” if they are retained and upheld in their plurality. Hawaiian custom and usage do not support the majority’s conclusion in Bowers that sodomy is, or ought to be, illegal, or that such is the unbroken and monolithic “tradition” of the United States.

192. 4 FORNANDER, supra note 12, at 544-45.
193. 5 FORNANDER, supra note 12, at 214-15.
194. He ana'ina wāhine ali'i he lehulehu kā 'Umi a Liloa, wa hui pā 'ia me nā kaikamāhine a ka noa, a ua lilo 'o 'Umi a Liloa i kupuna no nā ali'i, a ua lilo i kupuna no nā maka'a'īnana. 'A'ole he maka'a'īnana o Hawai'i e 'ōlelo mai ana 'a'ole he kupuna no mākou 'o 'Umi a Liloa, a inā 'o ke kanaka e hō'ole mai, no ka ike 'ole i nā kūpuna. 4 FORNANDER, supra note 12, at 229.
195. Morris, Same-Sex Friendships, supra note 82, at 78.
Nevertheless, so long as the implied definition of privacy is "the right to be let alone," the Baehr trial court seemed willing for the government to allow homosexuals the "unfettered freedom to control their personal and intimate affairs and to select their lifestyle." However, homosexuals "cannot expect government's policies to support their lifestyle or personal choices as opposed to those of another class of people." The court did not explain why not.

Such a rule flies in the face of traditional Hawaiian usage and the facts of the case. As shown by their complaint, plaintiffs never sought a marriage license "as opposed to" anyone else in Hawai'i. The plaintiffs never alleged that they were homosexual or lesbian; they merely sought a marriage license. They merely sought to be included in the larger 'ohana of those-who-can-get-married, and would have received marriage licenses but for the fact that the partners were the same sex.

The court relied upon Coates v. Pacific Engineering for the proposition that a group must have been subject to purposeful, unequal treatment or have been "relegated" to a position of political powerlessness in order to be considered a suspect class. The court minimized the political powerlessness of gays in Hawai'i by noting their recent legislative victory in the passage of a bill prohibiting discrimination in employment based upon sexual orientation. Existing, as it does, in a vacuum, this statement seems plausible at first reading.

However, given the high status afforded to the Hawaiian aikâne (once elevated through relationship with the chief) in former times and in legend, the political status of today's same-sex community is insignificant and next to powerless. Traditional society did support a homogamous lifestyle and conduct. The sheer aggregate

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197. Id.
198. Id.
202. Id. at 5 (citing HAW. REV. STAT. § 378-1 (1993)).
weight of Plaintiffs' laundry list of rights denied\textsuperscript{204} should have revealed the circular and inaccurate reasoning of the lower court in asserting that the marriage-license statute "does not criminalize, restrict, prohibit, burden or regulate the exercise of the right to engage in a homosexual lifestyle."\textsuperscript{205}

Research on the Hawaiian-language materials is not sufficient yet to determine if Hawaiians viewed same-sex conduct or relationships in ways that we would call either "essentialist" or "constructionist." This may be a moot point, however, for purposes of statutory analysis. Those laws which require the protection of traditional customs, usages, and traditions do not require an inquiry into the source of the practice(s) in question, whether societal or psychological, nor of their duration or immutability. The Hawaiian laws look only for the establishment of the practices as of 1778 and that they have been continued by the Hawaiians. In other words, the focus of the tradition-protection statutes is not on the "homosexuality" of the "homosexuals" involved, but on the nature of the relationship between them.\textsuperscript{206}

The recognition of Hawaiian traditions is gaining strength. In two recent cases, Hawai‘i's appellate courts have recognized Hawaiian traditions in new ways. In Pele Defense Fund \textit{v. Paty}\textsuperscript{207} and Public Access Shoreline Hawai‘i \textit{v. Hawai‘i County Planning Commission,} ("PASH I" and the appeal, "PASH II"),\textsuperscript{208} the courts greatly expanded the application of the Hawaiiana Clauses. In Pele, the supreme court, citing the earlier precedent of \textit{Kalipi v. Hawaiian Trust Co.,}\textsuperscript{209} noted that although the rights preserved under article XII, section 7 of the state constitution have usually been associated with

\textsuperscript{204} The laundry list consists of over 60 rights, including, for example, income tax deductions, credits, rates, exemptions, and estimates, HAW. REV. STAT. §§ 235-1, 235-2.4(a), 235-4, 235-7, 235-7.5, 235-51, 235-52, 235-54, 235-55.6, 235-61, 235-93, 235-97; payment of worker's compensation payments after death, HAW. REV. STAT. §§ 386-34, 386-41 to -43; notice of probate proceedings, rights of dower or curtesy, and right to inherit property, HAW. REV. STAT. §§ 533-1, 533-3 to -5, 533-7 to -8, 533-16.

\textsuperscript{205} \textit{Baehr,} slip op., at 3.

\textsuperscript{206} Focus on the relationship is also required by the grammar of possessives and relationships in Hawaiian. \textit{See supra} text accompanying notes 179-80.

\textsuperscript{207} 837 P.2d 1247 (Haw. 1992), cert. denied, 113 S. Ct. 1277 (1993). The opinion was authored by Justice Robert G. Klein, a part-Hawaiian, who was the trial judge in \textit{Baehr v. Lewin.} Klein is casting a particularly Hawaiian light on the court. His recent opinion in \textit{The Aged Hawaiians v. Hawaiian Homes Comm'ns,} 891 P.2d 279 (Haw. 1995), is steeped in detailed and accurate Hawaiian.

\textsuperscript{208} 500 P.2d 1313 (Haw. App. 1993) ("PASH I"); Public Access Shoreline Hawai‘i \textit{v. Hawai‘i County Planning Comm'ns,} 903 P.2d 1246 (Haw. 1995) ("PASH II"). These cases offer the most comprehensive review to date, of the law of Hawaiian traditions, customs, and usages. However, a non-Hawaiianist reading of these cases could receive the impression "the people" (kānaka) connected with the land were somehow a separate class from another group of unlanded kānaka. On the contrary, all the people had access to the use of land.

\textsuperscript{209} 565 P.2d 745 (Haw. 1982).
the actual tenancy of Hawaiians on the land, the 1978 Constitutional Convention Committee reported that section 7 "reaffirms all rights customarily and traditionally held by ancient Hawaiians." Even more significantly, the committee report said:

Your Committee did not intend to have the section narrowly construed or ignored by the Court. Your Committee is aware of the courts' unwillingness and inability to define native rights, but in reaffirming these rights in the Constitution, your Committee feels that badly needed judicial guidance is provided and enforcement by the courts of these rights is guaranteed.

In *PASH I*, the intermediate court of appeals dealt with the rights of Native Hawaiians to gather materials, such as plants, on the land for subsistence, cultural, and religious purposes. On writ of certiorari, the Hawai'i Supreme Court ("*PASH II*") refined these analyses and expanded the concept of native rights. Citing both *Kalipi* and *Pele*, the court was forced to decide whether to distinguish between developed and undeveloped lands. Another determination the court had to make was whether the Hawaiian person must actually live upon the land relative to which he or she wishes to exercise his or her rights. The court's central holding was that, unlike real property in other states, real property in Hawai'i is not subject to the same absolute right of its owner to exclude others.

The greatest significance of all three cases is that they declare that "other" rights preserved to all the people under Hawai'i Revised Statutes section 1-1 *but not specifically enumerated therein or elsewhere* may be found on a case-by-case basis. The *PASH I* court cited some of the relevant testimony that was adduced to show how customs and traditions could be established. For example, the court accepted testimony such as this given by one Hawaiian: "In the late 1920's and early 1930's [my family] talked about seeing two fishermen, Kanakamaikai and Pali, who lived at Honokohau and went to the opae [ʻōpae, shrimp] ponds to get bait to fish to opelu [ʻōpelu,
If such testimony is acceptable to establish tradition, then testimony about the practice of homogamous relationships should be acceptable for the plaintiffs in a homogamy petition. As noted, each of these cases had to do with traditional Hawaiian rights relating to land use. As the winning attorneys in the PASH II case noted: “There is no reason for Hawaiians to tolerate the hurt inflicted upon a keiki [kid] who is told ‘get off the beach,’ simply because the road that provided access to his family for years now bears a ‘private’ sign.” This sounds like an affirmative action cum equal protection result, where rights once enjoyed, then suppressed, now enjoy a renascence. As early as 1904, in an opinion authored by Oliver Wendell Holmes, Jr., the United States Supreme Court recognized the unique nature of real property in Hawai‘i. Can these cases be analogized to homogamy? If this part of Hawai‘i law has unique standing, might not related law? Can some citizens “own” the right to marriage and put up a “private” sign to all other citizens?

Even more specifically, should religion have its own private preserve called “marriage,” outside of which nothing else is marriage? If religion and marriage are taken as a symbiosis, how may one inform (or dictate) the other? John Boswell, for example, reminds us that marriage in Europe was not always a church sacrament and, in fact, was only gradually brought inside the church building itself. The “couple married each other: The church at most witnessed and blessed.” Might not modern marriage, then, first define itself and then seek religion’s blessing if desired? Might not that religion be a form of one’s own making or adaptation? The Hawaiian materials support this view.

To illustrate this support, let us return to the story of Lono and Kapā‘īhi. Following their emotional meeting on the beach at

215. 900 P.2d at 1318.
216. Mary Kawena Pūkū‘i provides an excellent example. When she first published materials about her youth in her home area of Ka‘ū on the Big Island, she was very area-specific in stating that the aikāne relationship was “never homosexual.” However, as her writings expanded to consider all Hawai‘i, her position likewise expanded to include the statement that homosexuality was not forbidden or wrong. See, e.g., MARY KAWENA PŪKŪ‘I, 1 NĀNA I KE KŪMU (LOOK TO THE SOURCE) 114 (1972) (admitting that some homosexual “experimentation” was allowed for young); MARY KAWENA PŪKŪ‘I, THE POLYNESIAN FAMILY SYSTEM IN KA‘Ū, HAWAI‘I 73 (1978) (stating that genuine aikāne relationship is never homosexual); MARY KAWENA PŪKŪ‘I, 2 NĀNA I KE KŪMU (LOOK TO THE SOURCE) 106-114 (1979) (stating that homosexuality is not wrong (hewa) at all).
217. Lum & Christensen, supra note at 214, at B4.
219. BOSWELL, supra note 99, at 165.
220. Id. at 165.
Anaeho‘omalu, where they built their heiau and covenanted their love, the story records the following:

It is said in the tradition that because of their making the covenant for the building of the altar of rocks at Anaeho‘omalu, the name of that boundary between Kohala and Kona was called Keahualono, [Ke Ahu a Lono (Altar Built by Lono)] and that place has been known ever since by that name, signifying the erection of a stone altar of Lono.

The acts of Lono and Kapā‘ihi in forging and formalizing their union were forever imprinted upon the land itself and have remained as a boundary to this day. Their union was forged publicly, in a heiau (temple) of their own design, not of the usual variety for the general worship of the community at large.

The Hawaiian heiau was interwoven with language, religion, and the arts by the ‘aha cord, the strands of which are intertwined to form a sturdy braided cord. Concerning the function of the heiau as it organized society, Valeri has noted:

From the very beginning of the ritual the reproduction of the king’s relationship with the god presupposes the reproduction of his relationship with his men and is not simply its presupposition. And of course the king’s relationship with his men also presupposes that a certain recognized bond exists between these men.

Had Lono and Kapā‘ihi chosen a regular, existing heiau, some (including the commoner Kapā‘ihi) might have been excluded by the religious and social rules of the day, or excluded from certain rites therein. Yet before the altar they built, they were equals. Lono the lawmaker and ruling chief brought the commoner forward, elevated his status, leveled the field, all in the nexus of land and custom. The story also suggests a freedom-of-religion implication for homogamy insofar as the modern partners might pattern themselves after Lono and Kapā‘ihi: Their relationship defined their religion.

Finally, the story argues for the law’s recognition of such unions, since the relationship between Lono and Kapā‘ihi was recognized by and at the highest level of government: Lono was the ali‘i ‘ai moku, and Kapā‘ihi, the Prime Minister.

221. Ua ‘ōlelo ‘ia ma ka mo‘olelo o ko lāua hana ‘ana i ‘ōlelo ho‘ohiki no ke kākulu ‘ana i ke ahu pōhaku ma Anaeho‘omalu, ua kapa ‘ia ka inoa o ia palena ma waena o Kohala a me Kona “O Keahualono”; o ka inoa mau ia o ia wahi a hiki mai i kēia manawa; ‘o ia ho‘i ke kākulu ‘ana o Lono i ahu pōhaku. 4 FORNANDER, supra note 12, at 362-63.
222. VALERI, supra note 111, at 297 (emphasis added) (citations omitted).
223. 4 FORNANDER, supra note 12, at 354-55.
It is also important to consider the concept *kapu* (tapu, tabu, taboo).\(^{225}\) for it is a concept of crucial importance in Hawaiian thinking.\(^{226}\) *Kapu* was one of the first words noted by Captain Cook during his visit to Hawai‘i in 1778-79.\(^{227}\) As Mary Douglas has explained, it involves concerns about what or who is or is not sacred, clean, marginal, profane, acceptable, ethical, prohibited, or ambiguous.\(^{228}\) It tells us much about what—and who—is clean or unclean, natural or unnatural, orderly or disorderly. “Taboos are concerned with the passings of things into the body and out of it; they guard the body’s orifices.”\(^{229}\)

*Kapu*, in turn, is related to *mana*, which is supernatural or non-ordinary power, vital force, influence, efficacy, potency, success, obedience, law and order, coercion, and authority.\(^{230}\) Both terms have much to do with ritual and “religious awe.” These concepts, *kapu* and *mana*, are means of enforcing moral values and good citizenship, expressed as either hierarchy or symmetry, particularly with regard to human relationships. Valeri writes:

[M]ana depends on feelings and dispositions (such as sympathy) that are eminently connected with “fellowship” . . . . This hypothesis is confirmed by the temple [heiau] ritual in which the constitution of mana in both gods and humans is explicitly related to the constitution of mutual feelings of love and sympathy [aloha] . . . . It is also confirmed by the fact that the

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224. In this same vein, the boy Nāmakaokap‘o of O‘ahu had an aikāne named Nāmakaokai‘a of the Big Island, who adopted him as his aikāne. S FORNANDER, supra note 12, at 274-83. Both were royalty and sons of royalty. The two of them “together, in-dwelt in the most restricted sacredness.” [lawe akula iā ia i aikāne, a noho pā ihola lāua, me ke kapu loa] Id. at 282-83. The word pā means together, entirely, completely, exactly—hence, equal. There is no gender-like hierarchy apparent in their relationship. As Valeri has noted, “Only people of the same rank and sex are proper commensals.” VALERI, supra note 111, at 124. *Noho pā* is a common phrase in Hawaiian literature denoting conjugal relations between men and women as well. This is a story about supernatural events, magic, and ritual purity and defilement. But it is especially about *kapu* (sacredness).

225. I hesitate to give these alternate Anglicized spellings, especially “taboo,” which implicate English and Western meanings, such as “forbidden” or “naughty,” that are utterly foreign to the main ideas here.

226. For a discussion of the importance of the concept, see POKU‘I & ELBERT supra note 1, at 92 (providing definition and saying related to hupu).

227. FRANZ STEINER, TABOO 22-23 (1956). See also Morris, Aikāne: Accounts of Hawaiian Same-Sex Relationships, supra note 82, at 29-30, (discussing connection between *kapu* and aikāne).

228. For a thorough analysis, see generally MARY DOUGLAS, PURITY AND DANGER: AN ANALYSIS OF THE CONCEPTS OF POLLUTION AND TABOO (1988).

229. STEINER, supra note 227, at 116.

230. Id. at 37. For a comparison (albeit inexact) of these ideas with modern law, see John d’Errico, ‘The Law Is Terror Put Into Words,’ A Humanist’s Analysis of the Increasing Separation Between Concerns of Law and Concerns of Justice, 2 LEARNING & L. 39 (1975).
most frequently used form of the word mana is a verb that implies a reciprocal relationship . . . 231

To be kapu is to be “set apart” and differentiated. The condition of being un-kapu is noa. 232 Superiors (royalty, ali‘i) are kapu to inferiors (commoners), who are noa to them. These relationships refer to syntagmatic (i.e., hierarchical) relationships between social categories and are not necessarily fixed statuses. Two individuals who have the same rank are equal, that is, noa to one another. Valeri states: “Thus two ali‘i of the same rank, their regalia, and whatever they put ‘under the shadow’ of their kapu, that is assimilate to their persons, are noa to one another because they have the same position in the social syntagm, because they are equivalent.” 233

Thus, to say that two persons of the same sex lived “together in greatest kapu” is to say something of immense importance, not only within the Hawaiian context, but also within the context of homogamy, for it relates to the values of both fellowship and equality as they are mediated by legitimized authority in society.

In analyzing the idea of kapu in Māori culture, Jean Smith has written: “The special significance of the relationship of elder and younger brother is that it bridges the relationships of man:man and man:god . . . ” 234 In her discussion of the “abominations” set forth in the book of Leviticus, 235 Mary Douglas points out the following:

231. Valeri, supra note 111, at 99. Compare with this statement the provisions of Hawaiian law which sanction licensed ministers and priests to perform civil marriages and require that some kind of “ceremony” be performed to solemnize the marriage. Haw. Rev. Stat. §§ 572-1(7), 572-12 (1993). This spiritual dimension, connected to a ceremony, compares with the materials on Lono and Kap‘ihi in the solemnization of their union at their makeshift heiau; but does this modern statute violate the separation of church and state?

232. The following discussion is summarized from Valeri, supra note 111, at 90-105.

233. Valeri, supra note 111, at 93 (emphasis added). Valeri cites the story of ‘Umi for the proposition that “an inferior who comes in contact with something royal becomes imbued with its divine substance.” Id. at 94. This accounts for the relationship between Lono and Kap‘ihi.

234. Jean Smith, Tapu Removal in Maori Religion, J. Polynesian Society 65 (Supp. 1974). By using this comparison, I do not mean to suggest a pan-Polynesia uniformity on this subject. See, e.g., Steiner, supra note 227, at 142-43 (discussing Margaret Mead’s differentiation between Hawaiian and Māori). As Robin Fox has noted, the Hawaiian system of kinship and family has many unique elements. Robin Fox, Kinship and Marriage 256-59 (1974). See also Ross Clark, Comment on Polynesian Sibling Terms, 77 AM. ANTHROPOLOGIST 85 (1975). Smith’s comment also calls to mind the extensive use of “adoption” in relation to Medieval Christian homogamy, see generally Boswell, supra note 99, as well as the young men whom ‘Umi adopted, see 4 Forandner, supra note 12, at 178-235.

235. See, e.g., Leviticus 18:22 (“Thou shalt not lie with mankind as with womankind: it is an abomination.”); Leviticus 20:13 (“If a man also lie with mankind, as he lieth with a woman, both of them have committed an abomination: they shall surely be put to death; their blood shall be upon them.”). For an exegesis of these passages by a rabbi who concludes that the “Biblical prohibition is addressed only to male Jewish homosexuals,” see Jacob Milgrom, Does the Bible Prohibit Homosexuality?, 9 Bible Rev. 11, 11 (1993); Reconstructionist Commission on Homosexuality, Homosexuality and Judaism: The Reconstructionist Position (1993).
We can conclude that holiness is exemplified by completeness. Holiness requires that individuals shall conform to the class to which they belong. And holiness requires that different classes of things shall not be confused . . . . Holiness means keeping distinct the categories of creation. It therefore involves correct definition, discrimination and order. Under this head all the rules of sexual morality exemplify the holy.\(^{236}\)

"To be holy is to be whole, to be one; holiness is unity, integrity, perfection of the individual and the kind."\(^{237}\) Hence, all the Hawaiian rules of sexual morality that permit and celebrate homogamy "exemplify the holy."

In sum, kapu, mana, and the related concepts seen in these aikāne stories, where sisterhood and brotherhood are spoken of synonomously with loverhood, lead inexorably to the conclusion that the unions were of equals. They do indeed suggest that such unions subverted other hierarchies that otherwise might have been operative in society, and they did so with power and honor.

In her critique of William N. Eskridge’s recent compilation of cross-cultural materials on homogamy,\(^{238}\) Nancy D. Polikoff notes:

[M]ost of the marriages Eskridge uncovered support rather than subvert hierarchy based upon gender. His historical and anthropological evidence contradicts any assumption that "gender dissent" is inherent in marriage between two men or two women.

The vision of same-sex marriage presented in the research Professor Eskridge proffers is a profoundly constricted one. In some instances, the relationships he describes do not seem to be same-sex unions at all . . . . Hierarchy was a component of all such ostensibly same-sex marriages, with the partner embodying the most male characteristics accorded higher status and greater control. Accordingly, an argument based on continuity between lesbian and gay marriage today and same-sex marriage of other eras and cultures is not one that makes deconstruction of gender the core reason to fight for the ability of lesbians and gay men to marry.\(^{239}\)

Had both Eskridge and Polikoff been aware of the Hawaiian materials, I believe the outcome of their exchange would have been

\(^{236}\) **DOUGLAS**, *supra* note 228, at 53 (emphasis added).

\(^{237}\) *Id.* at 54.

\(^{238}\) *Eskridge*, *supra* note 150.

profundely different. Both traditional and historical Hawaiian homogamy does not appear to have set up a gender-like hierarchy. It even seems to have reduced or obliterated some of the social distinctions between classes. For instance, Hawaiian women were traditionally important and powerful, not subservient, beings. Furthermore, as the above examples and analysis suggest, whatever other seeming similarities the aikane relationships may have to these other institutions, gender-based hierarchy and its look-alikes (dominant and recessive partners, active-passive power) were not present and did not mimic what Polikoff calls "conventional gendered roles." Both male and female aikane relationships fit within the patterns and definitions of kapu, mana, and the extended family ('ohana), apparently without requiring the gendered patterning that marked other systems. As Linnekin noted, "The [Hawaiian] family is a category not a bounded group. It has no corporate functions." 

In her remarkable study of Hawaiian genealogies, Edith McKinzie has noted that it is often impossible to tell the gender of persons named in genealogical lists. Gender there is not to be assumed. Nevertheless, loss of these genealogies through loss of the Hawaiian language and culture constitutes destruction of the Hawaiian family.

Furthermore, Patricia Grimshaw has demonstrated how the Protestant missionaries who came to Hawai'i had as their avowed purpose "one central goal which would underwrite all their labors: the reform of the family." Their first rules governing the new "marriage" were established by the mission in 1826—six years after the arrival of the First Company. This included the new idea of wisely submission to the husband. They recorded the first "Christian" marriage in Hawai'i on October 19, 1823, long before any statute permitted it or authorized them to perform it. Such a written law apparently did not exist until 1828. They complained of Hawaiian "unscriptural marriages," with those who offended against "Chris-

241. Polikoff, supra note 239, at 1539.
242. LINNEKIN, supra note 141, at 88.
244. PATRICIA GRIMSHAW, PATHS OF DUTY: AMERICAN MISSIONARY WIVES IN NINETEENTH-CENTURY HAWAI'I 161 (1989).
245. The First Company was a group of pioneer missionaries from New England who arrived in Hawai'i in 1820.
246. MISSIONARY HERALD, supra note 28, at 103 (1825).
247. Id. at 275 (1828).
248. Id. at 291 (1853).
tian marriage” being “made to work on a public road.” The missionaries caused laws to be passed mandating compulsory education; parents were fined for truant children. Unless the students learned to read and write, they themselves were “debarred from the privilege of marrying.” Such compulsory education as a prerequisite to marriage functioned as compulsory Christianity since “the New Testament is the chief reading book in all our schools.”

The new laws admittedly “inverted” everything essentially Hawaiian and wrought great changes in “the old habits and customs” and “immemorial customs and usages,” which they were specifically designed to override and replace. As a case in point, the new laws narrowed what the Hawaiians understood as “marriage” by making the new form “more clearly defined.”

In connection with this, it was “the kinship network, the ‘relations,’ that many missionaries realized was the stumbling block to submissive wifely behavior.” They believed that “true family feeling” did not exist among the Hawaiians, and that the Hawaiian kin system was “predatory.” Hence, they turned their attention to the political and economic structures of Hawaiian society, including those relating to land, which they believed undermined the fundamental reforms they were sent to effect.

The Hawaiian Clauses are suited to repair these damages caused by missionary rule. Modern homogamy modeled on the original Hawaiian standard could do two things at once: Homogamy (1) could fit well within the statutory structure of marriage; and (2) could redefine the power dynamics within a marriage as well as within the larger family, in the Hawaiian sense. The Hawaiian paradigm is far older than even the English common law. Indeed it is widely thought that the first migrations of Hawaiians to the Island occurred in about 300-400 A.D., the era of King Arthur in England. Those Hawaiian pioneers brought with them their language, customs, and traditions from Kahiki, the homeland. These languages, customs, and

249. Id. at 275 (1828).
250. Id. at 367 (1843).
251. Id. at 373 (1853).
252. Id. at 265 (1841).
253. Id. at 152, 282 (1841).
254. GRIMSHAW, supra note 244, at 165.
255. Id. at 169.
256. GRIMSHAW, supra note 244, at 160-61, 165, 168-69, 174, 177.
257. PATRICK VINTON KIRCH, FEATHERED GODS AND FISHHOOKS: AN INTRODUCTION TO HAWAIIAN ARCHAEOLOGY AND PREHISTORY 58 (1985).
traditions are elevated to a protected status by the Hawaiiana Clauses and the deconstruction of the Bowers footnote.\textsuperscript{258}

VII. CONCLUSION

The U.S. Supreme Court in \textit{Bowers v. Hardwick} grounded its holding on the supposed ancient roots of anti-sodomy tradition. In doing so, it cited without question mid-nineteenth century Hawai‘i law as a precedent concurring in that view. However, that Hawai‘i law can be mined from many points of view as to its validity and meaning. Whether examined linguistically, traditionally, historically, or culturally, Hawaiian law does not support the Supreme Court’s assertions. In dealing with the importance of both precedent and tradition, Anthony T. Kronman states:

If the distinctiveness of our humanity is tied to our participation in the world of culture, then respect for the work of past generations, who have given that world to us, is founded upon something deeper than utilitarian or deontological defenders of precedent acknowledge. We must respect the past not because doing so increases the welfare of human beings or because their right to equality demands it. We must respect the past because the world of culture that we inherit from it makes us who we are. The past is not something that we, as already constituted human beings, choose for one reason or another to respect; rather, it is such respect that establishes our humanity in the first place.\textsuperscript{259}

In a similar vein, Jeremy Waldron has noted that “particular values and critical morality” are inherent in language itself, and therefore that preservation of language is crucial, especially where survival of the language is in doubt. He writes: “Understood in this way, it

\textsuperscript{258} Article I, section 21 of the Hawai‘i State Constitution prohibits the state from “making any irrevocable grant of special privileges or immunities.” Territory \textit{v.} Fung, 34 Haw. 52 (1936). Equality, however, is not a special privilege or immunity.


The state constitution intentionally removes the courts from the push-and-shove of popular politics because the courts presumably are swayed by popular prejudice, such as the “special-rights” argument advanced by the “religious” right. However, under the Hawaiiana Clauses, giving their provisions due attention could not, by definition, be a grant of “special rights.” Hence, the proper focus of legislation should regard, not the instance of marriage, but the aftermath of family and children. \textit{See}, e.g., ANNE FEDER LEE, \textit{THE HAWAI‘I STATE CONSTITUTION: A REFERENCE GUIDE} 34-45 (1993); Samuel A. Marcossen, \textit{The “Special Rights” Canard in the Debate Over Lesbian and Gay Civil Rights}, 9 NOTRE DAME J.L. ETHICS & PUB. POL‘Y 137 (1995). “The Constitution cannot control . . . prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, given them effect.” Palmore \textit{v.} Sidoti, 466 U.S. 429, 433 (1984).

[language] is not something which is 'fungible,' that is, fully replaceable by any functional equivalent, by any other language that would facilitate communication and social interaction as well. If the Bowers Court’s reliance upon its supposed reading of Hawaiian tradition was wrong, it follows that that the same tradition argues strongly for the legalization of same-sex marriage in Hawai‘i.

This is why the emphasis in the Hawaiiana Clauses upon Hawaiian customs, usages, practices, and language is so important. The Clauses relate to and potentiate each other to produce the entity which the law mandates we respect. The Clauses are as important for Hawaiians as for non-Hawaiians, both of whom have imbibed the concepts of masculinity and femininity of American culture at large. Consider these words on gay rights and homogamy from Dr. Kekuni Blaisdell, a leader in the Hawaiian Sovereignty movement:

Among the Kānaka Maoli [true people, natives, Hawaiians] community, we have internalized western and other foreign views—we are so westernized, so Americanized, so Christianized that we’ve internalized these ways . . . . [P]art of our pre-western culture is the open acknowledgement and respect for gender diversity . . . . We’re definitely with native gays on this issue.

The research presented here supports Blaisdell’s position and the liberty it would embody. Lono, the ruling chief (ali‘i ‘ai moku), was free to unite with a commoner from another chiefdom (Kaua‘i). That commoner, Kapā‘ihi, was similarly free to walk away from Lono and return to Kaua‘i when Lono did not treat him properly. Neither owned or controlled the other, and each was free to realize himself. When Lono brought Kapā‘ihi to the Big Island as his aikāne to rule with him, both of them had to protect the other from the slander and murderous jealousies of other men at court who felt Kapā‘ihi to be an interloper. All had the “right to be sexual” in ways of their own choosing.

Furthermore, the Hawaiians were expansive of mind, willing to take in new realities and perceptions and find room for them in existing social categories. Similarly, the long biography of Lonoikamakahiki,
which culminates in his relationship with Kapahi, commences with his skill as a young man in the art of ho'opapā (wrangling, oral debate, argument, riddling, ferreting out information by skill at indirection). The image is one of cultural dynamism, not cultural determinism.

Given these realities and the mandates of the Hawaiian Clauses, the law’s concerns about how families are formed and how they function are far more salient than petty and unresolvable inquiries into whether “homosexuality” is or is not “immutable,” or whether “homosexuals” are or are not a “suspect class.” As Hawaiian wisdom has it: Polena pa’a ‘ia iho ke aloha, i kuleana like ai kāua (In love knotted tightly together, you and I have equal rights). If today we cannot reinstantiate the totality of Hawaiian culture, we can do as George Kanahele has suggested: “If we cannot possibly duplicate the past, should we not create a new set of beliefs in order to ensure the same values?” As the attorneys for the Hawaiian interests in the PASH II case have written: “[W]e hold out the hope that the Hawai‘i Supreme Court’s opinion will lift the stigma some have associated with Hawaiian traditional and cultural practices.” It is an end devoutly to be wished.

264. POKU'I & ELBERT, supra note 1, at 316.
265. Id. at 338.
266. GEORGE KANAKELE, KU KANAKA, STAND TALL: A SEARCH FOR HAWAIIAN VALUES 87 (1986).
267. Lum & Christensen, supra note 214, at B4.