Hulihia ke Au: Implications of Hawai‘i Same-Sex Marriage for Policy, Practice, & Culture

Robert J. Morris (Kapā‘ihiahilina), JD, PhD*

Their way of life there received blow after blow from the people.[1]
—Hawaiian proverb

Introduction

When 2013 began, one event was certain—the twentieth anniversary of the seemingly defunct *Baehr v. Lewin*,[2] the Hawai‘i Supreme Court's same-sex marriage decision of May 5, 1993, would be duly celebrated. Before the year ended, however, two additional but rather surprising events had made 2013 a revolutionary year—the U.S. Supreme Court's two same-sex marriage decisions on June 26, and the Hawai‘i governor's signature on Senate Bill No. 1, House Draft No. 1, legalizing same-sex marriage (*ho‘āo keka like*) in the Aloha State beginning December 2.

These three events produced three substantive and interconnected results, which this article uses as a yardstick to measure the legal and cultural distance we have traveled since 1993. These events altered and expanded the previous contours of the law of marriage and of family. Additionally, and no less significantly, they reinstated *Baehr* as good law after it had lain dormant for fifteen years. They also revivified and validated the Hawaiian values of same-sex love and family, which the word *aikāne* epitomizes, and the State Constitution requires that we preserve and advance. Finally, the rejuvenation of *Baehr* pointed the way forward for the

* Formerly University of Hong Kong Department of Law (retired in 2011), J.D. University of Utah Quinney Law School (1980), Ph.D. University of Hong Kong Faculty of Law (2007), www.robertjmorris.net. This article is dedicated to David McEwan, M.D., who has moved the LGBT cause in Hawai‘i forward on multiple fronts for nearly forty years. Regarding the name, Kapā‘ihiahilina, *see* the discussion *infra* note 16.

1. *Ua ho‘opāku‘iku‘i ‘ia mai kō lāua nono ‘ana malaila e nā kānaka.* Mary Kawena Pukui & Samuel H. Elbert, Hawaiian Dictionary 306 (1986) [hereinafter Pukui & Elbert]; *lāua* = the two of them—hence, *kō lāua noho ‘ana*, the lifestyle of the two of them.

2. Baehr v. Lewin (Baehr I), 74 Haw. 530 (1993), reconsideration and clarification granted in part, 74 Haw. 645 (1993). The case was later styled *Baehr v. Miike* pursuant to Haw. R. App. Proc. 43(c)(1), and often appears as such in the literature. The entire history of the case is summarized and contextualized in Haw. Att'y. Gen. Op. No. 13-1 (Oct. 14, 2013), http://ag.hawaii.gov/wp-content/uploads/2012/11/AG-Opinion-13-1.pdf. *See also* Ed Kemper, *Interview with Judge Daniel Foley, Hawaii's Foray into Same Sex Marriage*, 2013 Haw. Bar J. 10 (Oct. 2013); Wendy Somera, *Note: Baehr v. Miike*, 8 Am. U. J. Gender Soc. Pol'y & L. 227 (2000). The subsequent history of *Baehr* is discussed at *infra* note 24 and accompanying text.

post-marriage-equality world of 2014, especially the growing importance of the "T" portion of the LGBT population—those called transgendered and transsexual (or perhaps the better neologism *agendered*), or *māhū*. All this reified a decades-long discussion of the very "Hawaiianness" of same-sexuality itself that moved into the world beyond Hawai'i by the adoption of *aikāne* and *māhū* in the LGBT lexicon.

The confluence of these events, and the nature of the quarter-century of struggles for LGBT equality which culminated in them, are redolent of the Hawaiian story of Hi'iaka, the little sister of the goddess Pele, and her friends, lovers, and family—recent publications of which have made the whole of them newly available and immediately relevant. As Hawaiian scholar Bryan Kuwada has noted, "Hawaiians have long looked to the stories of their ancestors' lives for direction in their own lives."[3] I will use this traditional story to introduce and explain the modern values that it exemplifies in the context of same-sex marriage. This article assesses those values and that hope. Truly, we could say that 2013-14 witnessed a new visitation of the same-sex spiritual ancestors, the *kūpuna aikāne* and the *kūpuna māhū*, to Hawai'i. In a very real sense, the arrival of marriage equality signaled a renascence of pristine Hawaiian values and a reification of the ancient hope expressed by the man Kauakahiapaoa for the man Lohi'au: "My only desire is for my lover to live again.[4]

This article urges a renewed attention to the *Baehr* decisions, an expansion of the vision of equality, and a revitalization of these key Hawaiian words and concepts. The Hawaiian view of interrelational sex and sexuality might provide a useful model for the future as the (inter)national debate over marriage continues. Taking the 1993 *Baehr* case as its springboard, this article proceeds by first providing an analytical summary of *Baehr*, its context, and its aftermath, including the later constitutional amendment that empowered the state legislature to define marriage as opposite-sex only (Part A).[5] It then moves to a more fine-grained study of the Hawaiian cultural imperatives that, by law, must always apply to such matters in Hawai'i, including implications for equality, education, politics, and gender (Part B).[6] The next section focuses more closely still on the meaning of equality, specifically within Hawaiian law and culture, both past and present, and provides some of the relevant history in the long struggle for equality (Part C).[7] The article then adds to the now voluminous literature on the vital importance of the living Hawaiian

3. Bryan Kamaoli Kuwada, *To Translate or Not To Translate: Revising the Translating of Hawaiian Language Texts*, 32 Biography 54 (2009) (problematizing the argument that primary Hawaiian-language texts should not be translated at all).

4. *'O ku'u makemake nō na'e, 'o ke ola hou o ku'u aikāne.* The text of the quoted sentence is reproduced in Ho'oulumāhiehie & M. Puakea Nogelemeier, Ka Mo'olelo o Hi'iakaikapoliopele 414 (2006) (Hawaiian text transcribed from Hawaiian-language newspapers and given modern orthography) and translated in Ho'oulumāhiehie & M. Puakea Nogelmeier, The Epic Tale of Hi'iakaikapoliopele 387 (2006) (English translation of the aforementioned Hawaiian text) [both collectively hereinafter as Ho'oulumāhiehie & Nogelemeier]. Both men were masters and teachers of the hula, and both were ruling chiefs (*ali'i nui*) at Hā'ena on the island of Kaua'i. *Id.* at 4 (Hawaiian) and at 4 (English).

5. *Infra* notes 12-40 and accompanying text.

6. *Infra* notes 41-59 and accompanying text.

7. *Infra* notes 60-86 and accompanying text.

language itself as the receptacle for the ideas, images, and values that have emerged in these days of intense politics (Part D). The penultimate section looks specifically at what we might expect for legal and political practice and policy in the future, with a particular nod to the *māhū*, or transgender community, and the implications of the marriage victory for them (Part E).[8] The study concludes with a focus on the Hawaiian language itself and the stories that it embodies, without which such possibilities for analysis, law, and culture would never have occurred.[9] The Hawaiian story could serve as a model for others in the same struggles elsewhere (Part F).[10]

A. Twenty-Plus Years of *Baehr*—Up, Down, and Back Up

On May 5, 1993, the Hawaiʻi Supreme Court decided *Baehr v. Lewin*,[11] the same-sex marriage case. The court held that the State's denial of same-sex marriage ran afoul of both the Equal Protection Clause[12] and the Equal Rights Amendment (ERA)[13] of the Hawaiʻi State Constitution—both of which include "sex" as a protected class. A sea change was at hand. The world had turned; the very ground beneath our feet had shifted.[14]

What would soon become The Hawaiʻi Marriage Project formed within a matter of days. Working together in coalitions of diverse disciplines and traditions, it embarked on a long journey of politics, education, law, and identity that, not unlike the epic pan-Hawaiʻi journeys of the Pele-Hiʻiaka Cycle,[15] would finally encompass all the Islands full circle. Perhaps few could have imagined then that twenty-plus years later, many other states, the federal government, and the District of Columbia would recognize same-sex marriage, as would many other nations.[16]

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8. *Infra* notes 87-120 and accompanying text.
9. *Infra* notes 121-37 and accompanying text.
10. *Infra* notes 138-43 and accompanying text.
11. Baehr v. Lewin (Baehr I), *supra* note 3 and accompanying text.
12. Haw. Const. art. I, § 5.
13. Haw. Const. art. I, § 3.
14. *Huli ke au, ka papa honua kona moku*. My slight adaptation of the first line of a chant by the man Kauakahiapaoa, the lover (*aikāne*) of the man Lohiʻau, who was also the lover (*ipo*) of the volcano goddess Pele, among others. The chant was performed for Hiʻiaka, the sister of Pele, who was the lover (*aikāne*) of the woman Hōpoe, among others. It occurs in the stories of the Pele Cycle. The text of the quoted sentence, which is a line in one of the many "overturning chants" *nā hulihia* of the Cycle, is reproduced in Hoʻoulumāhiehie & Nogelemeier, *supra* note 5, at 243, 512 (Hawaiian) and at 228, 486 (English), and translated as "The era, the foundation, her island, all changed / Overturned . . . ." For further on this "foundation," *see infra* note 72 and accompanying text.
15. John Charlot, *Pele and Hiʻiaka: The Hawaiian-Language Newspaper Series*, 93 Anthropos 55 (1998), www.johncharlot.me/Hawaiian-Polynesian-NativeAmerican/PeleHiiaka%20copy.pdf.
16. Man Yee Karen Lee, Equality, Dignity, and Same-Sex Marriage: A Rights Disagreement in Democratic Societies (2010); Peimin Ni, *Seek and You Will Find It; Let Go and You Will Lose It: Exploring a Confucian Approach to Human Dignity*, 13 Dao: J. Comp. Phil. 173 (2014); Richard Ante, *Same-Sex Marriage and the Construction of Family: An Historical Perspective* (Book Rev. Essay), 15 B.C. Third World L.J. 421 (1995) (reviewing John Boswell, Same-Sex Unions in Premodern Europe (1994) (summarizing the state of the law and legal research on same-sex marriage, including *Baehr*, two years post-*Baehr*)). The researcher may follow the fast-moving development of same-sex marriage on the resource-rich page of Equality on Trial, http://equalityontrial.com.

The journey has generated vast research in virtually every field of scholarship and has reified and enriched the definition of equality.[17] Many of these actions trace their lineage directly to *Baehr* and its Hawaiian context[18] as well as the ongoing Hawaiian Renaissance of culture and language.[19] Although same-sex marriage seemed foreign to many in 1993, it should not have. Hawaiian tradition was rife with stories of same-sex love, same-sex partners, and bisexuality. Even so, it became necessary post-*Baehr* for us to bring this information to light, to flesh it out and reify it for a new generation from whom years of colonial homophobia had hidden it, and to "put feathers on our words"[20] as proof of the ancient "Hawaiianness" and continuous "indigeneity" of these things.[21] Only after we had done that could we turn these findings outward to the larger world of politics and law.

At the same time, in *Bronster v. Yoshina*,[22] which involved the state legislature and its members and officers, I was co-counsel in defense of an action brought by the Attorney General regarding a crucial constitutional legislative procedure that involved the separation of powers. Preparing that defense required my co-counsel and I to search deeply into the records and history of the 1950 Hawai'i Constitutional Convention. That convention prepared the original statehood constitution that would come into force in 1959 when Hawai'i was admitted to the union on an "equal footing" with all the other states.[23] Fortuitously, that research produced volumes of materials that would be of use in the political and legal tumult over

17. Kenji Yoshino, *The New Equal Protection*, 124 Harv. L. Rev. 747 (2011) (asserting the idea of achieving equality through the status of "human dignity" rather than class-based parsing) [hereinafter Yoshino, *New*].

18. *See, e.g.*, Jon M. Van Dyke, Who Owns the Crown Lands of Hawai'i? (2008); *see also Prepared Statement of Associate Professor Melody Kapilialoha MacKenzie: Hearing on S. 65 Before the S. Comm. on Indian Affairs*, 112th Cong. (2012) (statement of Melody Kapilialoha MacKenzie, Director, Ka Huli Ao Center for Excellence in Native Hawaiian Law, William S. Richardson School of Law), www.amjudges.org/conferences/2013Annual/EducationMaterials/MacKenzie-Testimony-S-65.pdf; Jon M. Van Dyke & Melody K. MacKenzie, *An Introduction to the Rights of the Native Hawaiian People*, 2006 Haw. Bar J. 63 (July 2006), www.thefederation.org/documents/Haw%20Bar%20Journal%20Article.pdf; Richard Guest, *Tribal Supreme Court Project Ten Year Report: October Term 2001—October Term 2010*, 1 Am. Indian L. J. 28 (2012) (citing, *inter alia*, Hawaii v. Office of Hawaiian Affairs, 556 U.S. 163 (2009)). For a discussion of *Hawaii v. Office of Hawaiian Affairs*, see *Note: The Supreme Court, Leading Cases: Hawaii Apology Resolution*, 123 Harv. L. Rev. 302 (2009).

19. *See, e.g.*, Jon Van Dyke, *The Constitutionality of the Office of Hawaiian Affairs*, 7 U. Haw. L. Rev. 63 (1985); Melody Kapilialoha MacKenzie, *Hawaiian Custom in Hawai'i State Law*, 13 Yearbook of New Zeal. Jur. 112 (2010); Melody Kapilialoha MacKenzie, *Ke Ala Loa—The Long Road: Native Hawaiian Sovereignty and the State of Hawai'i*, 47 Tulsa L. Rev. 621 (2011). Hawaiian-Native American connections are reviewed briefly *infra* note 50 and accompanying text.

20. Brandy Nālani McDougall, *Putting Feathers on Our Words: Kaona as a Decolonial Aesthetic Practice in Hawaiian Literature*, 3 Decolonization: Indigeneity, Educ. & Soc'y 1 (2014) (explaining that Hawaiian language primary sources provide a continuing "connectivity" between the historical present and the legendary past).

21. Sean M. Smith, *The "Hawaiianness" of Same-Sex Adoption*, 30 U. Haw. L. Rev. 517 (2008) (asserting that preservation of Hawaiian culture and values as mandated by the state constitution includes same-sex families).

22. Bronster v. Yoshina, 84 Haw. 179 (1997).

23. *See infra* notes 25, 48-50 and respective accompanying texts.

marriage equality. The framers of the Hawaiʻi statehood constitution were concerned for the premises on which our state was to be founded: justice, equality, dignity, and fairness—especially for "the little guy." They were at great pains to ensure in multiple provisions of the new constitution that the people would preserve and perpetuate by law the Hawaiian language, culture, tradition, and history to secure those premises—and vice versa.[24] Within the nexus of that culture, we hoped that same-sex relationships and homosexual *being* would be recognized and instantiated on an equal footing as well.

Research on those questions in the aftermath of the *Baehr* decision included the constitutional provisions regarding "equal protection" and the state's ERA, as well as the separation of powers and checks and balances.[25] It also focused on the state constitution's mandates regarding Hawaiian culture (*moʻomeheu Hawaiʻi*)—the "Hawaiiana Clauses."[26] In 1998, after some failed attempts of the legislature in amending the marriage statute to prohibit same-sex marriage, the electorate approved a ballot initiative called Amendment 2 to the State Constitution, which provided: "The legislature shall have the power to reserve marriage to opposite-sex couples."[27]

Even after *Baehr* was temporarily decommissioned by the constitutional amendment, the case remained valuable precedent and has been cited widely in briefs, cases, and articles.[28] During the five years that intervened between *Baehr* and Amendment 2, we organized the Hawaiʻi Marriage Project and Equality Hawaiʻi[29] and produced meticulously researched and argued scholarship in support of same-sex marriage on cultural and legal grounds. This brought together the imposing triplet of (1) absolute equality (*kaulike*), (2) the newly emergent research on same-sex love in traditional Hawaiian lore (persons marked by the word *aikāne* (never to be confused with the also familiar and much-abused *māhū*))[30] and their

24. Paul F. Nahoa Lucas, *E Ola Mau Kākou I Ka ʻŌlelo Makuahine: Hawaiian Language Policy and the Courts*, 34 Haw. J. Hist. 1 (2000).

25. Robert J. Morris, *Court Bashing in the Legislature: A Modern Lesson in Civics from the "Federalist"*, 6(6) L. Rptr.: J. Haw. Trial Law. Ass'n. 5 (1994). The process was redolent of what Fareed Zakaria, *The Rise of Illiberal Democracy*, 76 Foreign Aff. 22, 38-39 (1997), would describe as the "unwieldy contraption" of the American democratic system of government.

26. Robert J. Morris, *Configuring the Bo(u)nds of Marriage: The Implications of Hawaiian Culture & Values for the Debate About Homogamy*, 8 Yale J. L. & Human. 105 (1996) (discussing, *inter alia*, the epic tale of Lonoikamakahiki and his partner (*aikāne*), Kapāʻihiahilina, the defining idea of which is, "Because I love you, I will accompany you" on the epic journey / *Aloha au iā ʻoe, ukali mai nei*.). The word *ukali* here means to follow with the intent of waiting upon, serving, taking care of.

27. Haw. Const. Art. I, § 23. *See* a contemporary history of these actions in David Orgon Coolidge, *The Hawaiʻi Marriage Amendment: Its Origins, Meaning and Fate*, 22 U. Haw. L. Rev. 19 (2000).

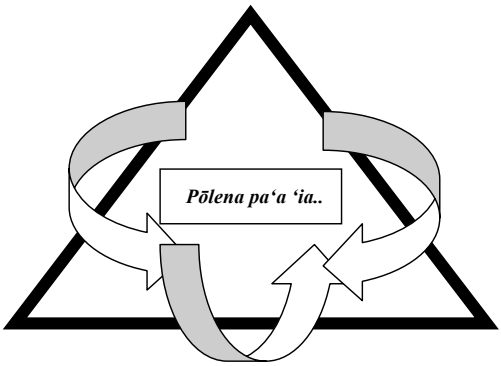
28. *See, e.g.*, Clifford J. Rosky, Perry v. Schwarzenegger *and the Future of Same-Sex Marriage Law*, 53 Ariz. L. Rev. 913 (2011) (providing a lengthy discussion of *Baehr* vis-à-vis the background of Perry v. Brown, 671 F.3d 1052 (9th Cir. 2012), which held that California's Proposition 8 was unconstitutional). The U.S. Supreme Court cited *Baehr* favorably as a fountainhead in the history of same-sex marriage on the first page of its opinion in United States v. Windsor, 570 U.S. 12 (2013) (holding that the federal Defense of Marriage Act (DOMA) was unconstitutional).

29. Equality Hawaii, www.equalityhawaii.org.

30. Robert J. Morris, *Same-Sex Friendships in Hawaiian Lore: Constructing in the Canon*, *in*

relationships,[31] and of course (3) the all-important element of *aloha* (love). These three elements are expressed in the Hawaiian poem: "Love bound tightly together is the means whereby we have equal rights (with responsibilities/obligations) with each other."[32]

***Aikāne* / Same-Sex Partner/Relationship**



Oceanic Homosexualities 71-102 (Stephen O. Murray ed., 1992) [hereinafter Morris, *Canon*]. *Aikāne* is sometimes conflated with "mahu," a modern pejorative often heard in Hawai'i to mean "faggot" and "queer." It is probably related to the Hawaiian *māhū*, which in traditional lore were *kupua*, supernaturals, immortals, demigods, sorcerers, shape-shifters. Today the word is sometimes used to mean hermaphrodite, transsexual, and cross-dresser—and not as a pejorative. The relationships and sometimes wrongful conflations of the two words, as well as the persons they describe, are the subject of much discussion and a growing literature, including that of "queer theory," "gender and feminist studies," "colonialism," and "indigenous studies," to name but a few, all of which are beyond the scope of this article, but *see generally* Milton Diamond, *Intersex and Transsex: Atypical Gender Development and Social Construction*, 19 Women's Stud. Rev. 76 (2012), www.hawaii.edu/PCSS/biblio/articles/2010to2014/2012-intersex-and-transsex.html; Ty Tengan, Rev. Essay, 15 Contemp. Pac.: J. Island Aff. 231 (2003), www.anthropology.hawaii.edu/people/faculty/Tengan/pdfs/tengan_2003.pdf (reviewing the film *Ke Kūlana He Māhū: Remembering a Sense of Place* (2001)). *See also* Joan Roughgarden, Evolution's Rainbow: Diversity, Gender, and Sexuality in Nature and People (2013), and Mary Weismantel, *Towards a Transgender Archaeology: A Queer Rampage Through Prehistory*, *in* The Transgender Studies Reader 2 319-34 (Susan Stryker & Aren Z. Aizura eds., 2013). None of these words is to be confounded with *ipo*, an opposite-sex lover, as the representative texts quoted herein will show. The words stand in absolute parity of social status *inter sese*, but are never homogenized. As in English, an "intimate friend" may be a "lover," and vice versa, but they are not fungible synonyms. The simplistic translation of *aikāne* merely as "friend" or even "intimate friend" is neither necessary nor sufficient. A bisexual person may, of course, be both an *ipo* and an *aikāne* with different partners. This subject remains greatly under-researched, under-theorized, and under-analyzed.

31. Sometimes signified by an oath (*ho'ohiki*) made by interlocking fingers with each other: ". . . *kīlou nō ho'i ko lāua mau manamana lima i ko kekahi a me kekahi, a pa'a ihola kā lāua ho'ohiki e pü lāua he mau aikāne*." Ho'oulumāhiehie & Nogelemeier, *supra* note 5, at 41 (Hawaiian) and at 40 (English).

32. *Pōlena pa'a 'ia iho ke aloha i kuleana like ai kāua*. Pukui & Elbert, *supra* note 2, at 338. The word *kuleana* includes many related meanings such as rights, privileges, prerogative, jurisdiction, property, claim to and in, belonging to, responsibilities, and obligations. The word appears with these

This growing body of scholarship appealed broadly to the constitutional mandates of the Hawaiʻi State Constitution (the "Hawaiiana Clauses), one of which reads:

> **Section 4** The State *shall promote* the study of Hawaiian culture, history and language.
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> The State *shall provide* for a Hawaiian education program consisting of language, culture and history in the public schools. The use of community expertise *shall be* encouraged as a suitable and essential means in furtherance of the Hawaiian education program.[33]

Amendment 2, or the "marriage amendment," was contrary to both the letter and spirit of the 1950 statehood constitution.[34] Following the enactment of Amendment 2, the Hawaiʻi Supreme Court decided that it had no choice but to yield to the result, and on December 9, 1999, ruled that:

> The passage of the marriage amendment placed HRS § 572-1 [Requisites of a valid marriage contract] on new footing. The marriage amendment validated HRS § 572-1 by *taking the statute out of the ambit of the equal protection clause of the Hawaiʻi Constitution*, at least insofar as the statute, both on its face and as applied, purported to limit access to the marital status to opposite-sex couples. Accordingly, whether or not in the past it was violative of the equal protection clause in the foregoing respect, HRS § 572-1 no longer is. In light of the marriage amendment, HRS § 572-1 must be given full force and effect.[35]

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meanings in reference to *aikāne* pairs or *ménage a trois* in Hoʻoulumāhiehie & Nogelemeier, *supra* note 5, at 420 (Hawaiian) and at 392 (English). Probably the most concise expression of these combined ideas in modern law is still Elliot L. Richardson, *On Behalf of Obligations*, 8 Lincoln L. Rev. 109 (1973) ("There is no right without a corresponding obligation").

33. Haw. Const. art. X, § 4 (emphases added).

34. Robert J. Morris, *Framers of Hawaii Constitution Did Envision Marriage as a Civil Right Unfettered by Sex*, Honolulu Star-Bull (Oct. 24, 1998), http://archives.starbulletin.com/98/10/24/editorial/special2.html.

35. *Baehr v. Miike* (Baehr II), 994 P.2d 566 (Haw. *1999*), emphasis added. Baehr II did not nullify or reverse Baehr I. Justice Ramil noted this in his concurring opinion in Baehr II and urged: "I emphatically believe that this court's opinion in Baehr I should be overruled." His concurrence also adumbrated the issues of transgender and transsexual concern discussed here, as well as the confusion that often conflates the terminologies, when he wrote this in his footnote 1 (emphases added):

> I disagree with the plurality's perfunctory use of the plain meaning rule of statutory construction in Baehr I to construe HRS § *572-1* as classifying on the basis of gender. In my view, the trait on which HRS § *572-1* distinguishes applicants for marriage licenses is not gender, but rather sexual orientation. For example, if a male plaintiff in this case *somehow changed his gender to become a woman*, but remained homosexual (i.e., lesbian), she would still be disadvantaged by the prohibition on same-sex marriage inasmuch as she would not be permitted to marry another woman. However, if that same male plaintiff somehow changed his homosexual orientation, he would not be disadvantaged by HRS § *572-1* inasmuch as he would be able to marry a female. In short, HRS § *572-1* disadvantages homosexuals, whether male or female, on account of their desire to enter into a marriage relationship with a person *of the same sex*.

The editors and advisers of the *Hawai'i Law Review* organized a symposium entitled, "Same-Sex Marriage: The Debate in Hawai'i and the Nation," for the first number of Volume 22 in Spring 2000, to which I contributed the first of five articles.[36] The cultural and legal stakes in the debate were enormous. Most of the constitutional pioneers of 1950 have passed on, but we have kept them in memory,[37] and we have sung many lamentations[38] for our deceased *aikāne* as part of our search for a "usable past"[39] and for direction in living our own lives. Understanding this bridge between the legendary past and the cultural present and the continuity it establishes requires an understanding of the world in which the Hawaiian people lived before Captain Cook arrived and initiated the first outside Contact with Hawai'i. It was a unique world, which, for present-day Hawaiians, is still very much with us even in the era of globalization. Some particularly salient examples follow in the story of Pele and Hi'iaka, as well as the statements of Hawaiian authors and scholars.

B. Cultural Imperatives—The Past in the Present

Pre-Contact Hawaiian civilization developed indigenously and independently as a sovereign "primary state."[40] This created a unique laboratory for the evolution of society and human nature, which means that Hawai'i is a particularly special subject for study and analysis. Hence, the cultural records of this society are, in the words of King David Kalākaua's 1870 editorial for the newspaper, *Ka Manawa*, "a *gold mine* and a *strong box*, the *key* that opens the *lock* securing that strong box, and each and every one is welcome to come and seek according to his or her own desires."[41] In recent years, scholarly research, based on newly available primary sources, such as the Pele-Hi'iaka stories, has reinforced the indivisible nexus of the Hawaiian values inherent in the civilization with modern constitutionalism

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Whatever currency such sentiments—like those of the Minority Report discussed at *infra* notes 55, 56, and 57 and respective accompanying texts—might have in other languages and cultures, they have no place in Hawai'i.

36. Robert J. Morris, *Re-Identifying American State Democracy: Implications for Same-Sex Marriage and the Nonfungibility of Hawai'i in the Exotic 1950 Statehood Constitution*, 22 U. Haw. L. Rev. 1 (2000).

37. Of those lost, particularly to HIV/AIDS, I wrote a short story: Robert J. Morris, *Trade*, 1 Tribe: An Am. Gay J. 51 (1991), www.robertjmorris.net/ShortStoryTribe.pdf.

38. *See* the Hawaiian sources and discussion of funeral lamentation chants (*kanikau*) at Kaeppler, *infra* note 57 and accompanying text.

39. Henry Steele Commager, The Search for a Usable Past and Other Essays in Historiography (1965).

40. Robert J. Hommon, The Ancient Hawaiian State: Origins of a Political Society (2013).

41. Editor [Kalākaua], *He Manao Akea*, [Ka Nupepa] Ka Manawa, November 7, 1870, at 1 (original Italics in the Hawaiian as reflected also in my slightly paraphrased translation):

> Oia *lua gula* a *pahuhao* hoi, o ka nupepa "Ka Manawa," ke *ki* nana e wehe ka *laka* e hoopaa ana ia pahu; a e komo kela a me keia e wae e like me kona makemake.

Puakea Nogelmeier, Mai Pa'a I Ka Leo: Historical Voice in Hawaiian Primary Materials, Looking Forward and Listening Back 158 (2010) [hereinafter Nogelmeier, Voice] (naming the "Editor King" Kalākaua as the author).

and LGBT equality.[42] As Pele's youngest sister, Hiʻiaka, in her own epic journey repeatedly says to her *aikāne*, Wahineʻōmaʻo: "I am indeed you, and you indeed are me."[43] The recognition of Hawaiian same-sexuality in tradition and history is now established beyond peradventure,[44] and this understanding has contributed to our larger and more malleable understanding of "family"[45] and the construction of "families we choose."[46] As with the story of Pele and Hiʻiaka, other powerful women and men of legend provide additional examples. As Kapo says to her adopted/foster (*hānai*) daughter, whom she raised and nurtured as her own flesh-and-blood (*hānaiāhuhu*),[47] "When family ties are broken, and the relationship between parent and child is lost, the day of evil comes."[48] Similarly, the epic tale of Kalapana suggests the complexity of the modern challenge of gathering and mastering the many subjects, disciplines, and skills required to promote LGBT civics with its reference to the need for plural "knowledges" in the ongoing battle of wits:

> O Chief, the little [local, partial, parochial, personal] knowledge of the two of us (*kō māua wahi ʻike*) has indeed been exhausted. If you want some new knowledge, it is right for you the chief *to go there* [to the places of knowledge], because the correct procedure of this work lies in *exhausting all the different knowledges* (*ka pau mai o nā ʻike a pau*), lest perhaps you get defeated by your companion in the contest of wits.[49]

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42. *See, e.g.*, Ty P. Kāwika Tengan & Jesse Makani Markham, *Performing Polynesian Masculinities in American Football: From 'Rainbows to Warriors'*, 26 Int'l J. Hist. Sport 2412 (2009); Robert J. Morris, *Translators, Traitors, and Traducers: Perjuring Hawaiian Same-Sex Texts Through Deliberate Mistranslation*, 51 J. Homosexuality 225 (2003) [hereinafter Morris, *Traitors*]; Stephanie Nohelani Teves, We're All Hawaiians Now: Kanaka Maoli Performance and the Politics of Aloha (2012) (unpublished Ph.D. dissertation, Univ. Michigan), http://deepblue.lib.umich.edu/bitstream/handle/2027.42/91591/tevess_1.pdf;jsessionid=279D6A3463EAC3C6A3A9EC0007949DEE?sequence=1.

43. *ʻO au, ʻo ʻoe nō ia, a ʻo ʻoe hoʻi, ʻo au nō ia*. Sometimes the formula is stated in reverse order (You are me, and I am you), reinforcing the image of equality. It is *à propos* of the analysis provided in Susan B. Estrich & Virginia Kerr, *Sexual Justice*, *in* Our Endangered Rights 98-133 (Norman Dorsen ed., 1984). The Hawaiian texts are reproduced and translated, respectively, in Hoʻoulumāhiehie & Nogelemeier, *supra* note 5, at 155 and 179 (Hawaiian), and 146 and 168 (English). The text reports that Hiʻiaka is, at the outset of her adventure, a prepubescent teenager who "had not yet reached womanhood" (*he ʻulapaʻa*) or had sex with a man. *Id*. at 37 (Hawaiian) and at 37 (English).

44. Adam R. Chang, *A Non-Native Approach to Decolonizing Settler Colonialism within Hawaii's LGBT Community*, 14 Asian-Pac. L. & Pol'y. J. 132 (2013), http://blog.hawaii.edu/aplpj/files/2013/02/APLPJ_14.2_Chang.pdf; *see also* Sally Engle Merry, Colonizing Hawaiʻi: The Cultural Power of Law (2000); Susan Y. Najita, Decolonizing Cultures in the Pacific: Reading History and Trauma in Contemporary Fiction 42-44 (2006); and Andrea Smith, *Queer Theory and Native Studies: The Heteronormativity of Settler Colonialism*, 16 GLQ: J. Lesbian & Gay Stud. 41 (2010).

45. Robert J. Morris, The Crossroads of the Pacific: The Development of Multicultural Families in Hawaiʻi (Aug. 12-15, 1980) (unpublished manuscript) (presented at the World Conference on Records, Salt Lake City), www.robertjmorris.net/WorldConference.pdf.

46. Kath Weston, Families We Choose: Lesbians, Gays, Kinship (1997).

47. Hoʻoulumāhiehie & Nogelemeier, *supra* note 5, at 323 (Hawaiian) and at 300 (English).

48. "[*W*]*ehe ka piko lā o nā hoa hānau, hemo ka pili a ka makua me ke keiki, ua hōʻea mai ka lā ʻino*." *Id*. at 325 (Hawaiian) and at 302 (English).

49. My translation is based on texts at John Charlot, Classical Hawaiian Education: Generations

In sum, keeping the families we create intact, "exhausting all the different pieces of knowledge," and bringing things "full circle" will require both the same and new diverse coalitions of people and disciplines to "go there" for new knowledge.[50] One such piece of knowledge is the deep understanding of equality that has come from the lessons of the *Baehr* era. Pele, the all-powerful goddess of the volcano, in selfish concern for her own lover (*ipo*), the handsome Lohi'au, speaks disparagingly to her little sister, Hi'iaka, about Hi'iaka's lover (*aikāne*), the beautiful young woman Hōpoe. Hi'iaka stands up to her powerful sister, and in speaking truth to power unflinchingly registers one of the best defenses of equality ever recorded in literature:

> Lohi'au is your beloved one, and I shall go afar to fetch your love for you. But Hōpoe is my love, and you, Pele, will take good care to preserve and protect her.[51]

It is this mindset of *enacted* justice and *enacted* equality that Hi'iaka ramifies repeatedly on her epic journey, and it is an example for modern justice as well. It states an absolute *quid pro quo*, a standard of equality that is not malleable, flexible, parsable, negotiable, or relative. The foundational status of these truths is recognized at the highest echelons.[52] Noenoe Silva, a Hawaiian scholar of these stories about "powerful Hawaiian women"—Hi'iaka, Hōpoe and others—has expressed her own vision of their present-day relevance in these words:

> In this and other Hawaiian mo'olelo [traditional stories], romantic love between people of the same sex is presented as a normal practice of everyday life rather than as an identity marker. In the stories, such love relationships are cherished by those engaged in them and are supported by others. *An understanding of these relationships as valuable in our ancestors' culture assists us in understanding ourselves as healthy when we, too, cherish such relationships*.[53]

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of Hawaiian Culture 127 (2005), www.johncharlot.me/BOOKS/CHE%20post/che.pdf.

50. Keith Bettinger, *Historically Speaking: A Quick Look at Homosexuality and Gender Roles in Pre-contact Hawai'i*, Honolulu Weekly (June 20, 2007), http://honoluluweekly.com/cover/story-continued/2007/06/historically-speaking (providing a useful summary of understanding as of 2007, with a view forward); for an update of that information, see Curt Sanburn, *The Painful Path to Same-Sex Marriage in Hawaii: A First-person Account of the Saga*, Honolulu Mag. 41, Mar. 5, 2014, www.honolulumagazine.com/Honolulu-Magazine/March-2014/The-Painful-Path-to-Same-Sex-Marriage-in-Hawaii; *see also* Evan Wolfson, Why Marriage Matters: America, Equality, and Gay People's Right to Marry (2004).

51. *'O Lohi'au kāu ipo aloha, a eia au ke ki'i nei i kāu aloha a loa'a i ka loa. 'O Hōpoe ho'i ka'u aloha, e mālama 'oe (Pele) iā ia*. Ho'oulumāhiehie & Nogelemeier, *supra* note 5, at 37 (Hawaiian) and at 36 (English); my translation.

52. After a fiery assault by Pele that kills Lohi'au and wounds Hi'iaka, the immediate (and, to Hi'iaka, counterintuitive) instinct of the now disembodied spirit of Lohi'au is to leave Hi'iaka behind and fly home to Kaua'i to "reveal himself to his *aikāne*, Kauakahiapaoa." *Aia paha kō kāne i Kaua'i. Malia, ua ho'i akula nō e hō'ike iā ia iho i ke aikāne, iā Kauakahiapaoa . . . . Id*. at 391 (Hawaiian) and at 366 (English).

53. Noenoe K. Silva, *Pele, Hi'iaka, and Haumea: Women and Power in Two Hawaiian Mo'olelo*, 30 Pac. Stud. 159, 166 (2007) (emphases added).

Today many *aikāne* lovers and other beloved friends wish, as in the Hiʻiaka story, to be free to "cuddle with [each other] in the rain and cold, in the burning heat of the sun in whatsoever places we go, sharing so many trials and difficulties."[54]

> This is how an *aikāne* and loving friend can truly be recognized. If trouble befalls one, the other helps wherever necessary. But that is not the case if the lover is nothing but talk. That kind of *aikāne*, let me tell you, is only there for the meat and the fish. In your days of prosperity and wealth, there is no limit to the number of such friends as those that you may have, but in your days of need, those kinds of friends are nowhere to be found. So, let me tell you, an *aikāne* who is a loving friend is one who will shoulder equally with you (*ʻauamo pū ana me ʻoe*) all the travails of life.[55]

The death of such a loved one is an occasion for the expression of the deepest grief, as exemplified by the chant of Kahekili, the ruling chief of Maui, in mourning his deceased *aikāne*, with whom he had "resided, indeed, with *aloha*."[56] The "revolution of the world" today gathers strength and moves on apace. We are a few ineluctable steps closer to what Adrienne Rich called "a democracy without

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54. ". . . *ka hoa pili, hoa pūkuʻi o ka ua a me ke koʻekoʻe, o ka lā kikiki welawela o nā wahi a pau a lāua i hele mai ai, a i komo pū ai nō hoʻi i loko o nā ʻīnea a me nā pōpilikia he nui* . . . ." Hoʻoulumāhiehie & Nogelemeier, *supra* note 5, at 255 (Hawaiian) and at 239 (English); my translation and adaptation.

55. *ʻo kēia ihola ka mea e ʻike ʻia ai ʻo nei mea lā he aikāne a he hoa aloha. Kū ka pilikia i kahi, e kōkua kahi e pono ai. ʻAʻole auaneʻi ʻo ke aikāne aia i ka lehelehe wale nō. ʻO ia ʻano aikāne lā, ʻeā, e haʻi aku au iā ʻoe, he pono na ka ʻai a me ka iʻa. I kō lā o ka loaʻa a me ka waiwai, ʻaʻole i kana mai ua mea he nui o ke aikāne, a i kō lā o ka nele, mamao ua poʻe aikāne ala maiā ʻoe aku. No laila, e haʻi aku au iā ʻoe, ʻo nei mea he aikāne a he hoa aloha ʻoiaʻiʻo, ʻo ia nō ka mea e ʻauamo pū ana me ʻoe i nā ʻehaʻeha a pau o ka noho ʻana." Id*. at 121 (Hawaiian) and at 114 (English); my translation. The phrase *ʻauamo pū ana me ʻoe* is particularly forceful. The *ʻauamo* is the pole or stick placed behind the neck and balanced across the shoulders for carrying heavy loads—a yoke. The load on both sides, left and right, must be absolutely equal in weight and balance. Hence, the phrase means "sharing our burdens equally yoked together." It is redolent of the *pōlena paʻa ʻia* passage discussed *supra* note 21 and accompanying text and diagram.

56. Kahekili, *He Mele Kanikau Na Kahekili No Ka Make Ana o Kana Aikane* [A Dirge by Kahekili on the Death of His *Aikāne*], Ke Kumu Hawaiʻi, Feb. 18, 1835, at 64 (It is the anguish of love, the tears, / All that he bore [i.e., his life, his being, his memory, himself] flows away . . . / *O ka eha ia a ke aloha, he waimaka, / O kana ukana ia, ke hanini nei* . . . .), www.papakilodatabase.com/pdnupepa/cgi-bin/pdnupepa?a=d&d=KKH18350218-01.2.19&srpos=&e=-------en-20--1--txt-txIN|txNU------#.

The beautiful and passionate *mele*, which brings together in proximity both *aikāne* and *hoa* "friend," but does not conflate them, is reproduced, translated, and discussed in Adrienne L. Kaeppler, *Chanting Grief, Dancing Memories: Objectifying Hawaiian Laments*, 19 Human. Res. 71, 76-78 (2013). However, the transcription there differs in places from the newspaper text, so reference to the original text of the newspaper is crucial. Regarding the importance of such laments for the dead (*kanikau*), Kaeppler writes:

> When performed, emotions are expressed through affect-encoding words, such as *auē* (or *auwē*), and express relationships among the chanter, the deceased and those listening. Funerals show how the deceased is related to others, and *kanikau* demonstrate verbally how much and by whom he or she is beloved. Hence, funerals were, and are, the distilled essence of society and social relations realized through poetry spoken or sung.

Id. at 79.

exceptions,"[57] and hopefully to a place where nothing has the power ever again to take someone's fundamental rights of love and family "out of the ambit of the equal protection clause of the Hawai'i [or any other] Constitution."[58] We now turn to a closer look at what that equality means in the context of modern Hawai'i.

C. Equality in Hawai'i & Hawaiian Equality

When Hawai'i was admitted to the union as a state in 1959, Congress passed the Hawai'i Admission Act.[59] The opening statement of this Act mentioned or implied equality in at least five places:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That, subject to the provisions of this Act, and upon issuance of the proclamation required by section 7(c) of this Act, the State of Hawaii is hereby declared to be a State of the United States of America, is declared admitted into the Union on an equal footing with the other States in all respects whatever, and the constitution formed pursuant to the provisions of the Act of the Territorial Legislature of Hawaii entitled "An Act to provide for a constitutional convention, the adoption of a State constitution, and the forwarding of the same to the Congress of the United States, and appropriating money

57. Adrienne Rich, What Is Found There: Notebooks on Poetry and Politics (1993) [hereinafter Rich, Found]. Her title is taken from the William Carlos Williams poem, "Asphodel, That Greeny Flower," and is, as I hope this article demonstrates, fully *à propos* of Hawaiian lore as well:

> It is difficult
> to get the news from poems
> yet men die miserably every day
> for lack
> of what is found there.

Id. at ix.

58. Baehr II, *supra* note 36 (Ramil, J., concurring). It is beyond the scope of this article to analyze the seemingly nonsensical notion that any one provision of a constitution can, absent an express intent to do so, operate to take a question "out of the ambit" of another equally valid provision of the same constitution, given the fundamental rule that all provisions of the constitution, like those of all other legal documents and statutes, must be construed together and given meaning and effect within the four corners of the text. (It is a good rule, also, for construing literary documents.) No language appeared in the amendment to state that its intent was to repeal any other section of the state constitution—whether Equal Protection, the Hawaiian Clauses, or any other part. Indeed, the language of Amendment 2 was permissive only—neither hortatory nor mandatory. *See supra* note 17 (text of amendment), and note 3 (Attorney General Opinion), and respective accompanying texts. Hawaiian Association of Seventh-Day Adventists v. Wong, No. SCWC-28592 (June 28, 2013) (contracts) (a statute should be construed to give effect to *all* of its provisions). Kokoszka v. Belford, 417 U.S. 642, 650 (1974) (a court should, if it is reasonably possible to do so, interpret a statute so as to give it efficient operation and effect as a whole). Any interpretation under which the statute being construed is defeated, nullified, repealed, or explained away, even in part, should, if possible, be avoided. Armstrong Paint & Varnish Works v. Nu-Enamel Corp., 305 U.S. 315 (1938). *See generally* Vito J. Titone, *State Constitutional Interpretation: The Search for an Anchor in a Rough Sea*, 61 St. John's L. Rev. 431 (1987), http://scholarship.law.stjohns.edu/cgi/viewcontent.cgi?article=2036&context=lawreview. *See* general rules of construction in Haw. Rev. Stat. ch. 1.

59. Act of March 18, 1959, Pub. L. No. 86-3, 73 Stat. 4, *reprinted in* Haw. Rev. Stat. 135 (2009); first sentence original Italics, emphasis added to subsequent part. The internal reference is to the 1950 Hawai'i statehood constitution discussed *supra* notes 22 and 25 and respective accompanying texts.

> therefor", approved May 20, 1949 (Act 334, Session Laws of Hawaii,1949), and adopted by a vote of the people of Hawaii in the election held on November 7, 1950, i*s hereby found to be republican in form and in conformity with the Constitution of the United States and the principles of the Declaration of Independence*, and is hereby accepted, ratified, and confirmed.

The five references to equality can be found in (1) the "equal footing" doctrine, (2) the 1950 Hawaiʻi statehood constitution, (3) the U.S. Constitution (Art. IV, § 4: "The United States shall guarantee to every State in this Union a Republican Form of Government"), (4) the 14th Amendment ("the equal protection of the laws"), and (5) the Declaration of Independence ("all men are created equal"). "Equal footing," like every formulation of equality, is a fraught yet crucial two-way road.[60] The people of Hawaiʻi thought it was important that their new State be included in the American body politic. Conversely, the American people thought it was important to include Hawaiʻi in the Union. But much of that two-way inclusion is still on hold, in part because the nation has not yet fully recognized the "historical continuity" of Hawaiian values on the subject of sexuality *vis-à-vis* equality, despite the federal statutory mandates to do so.[61]

In sum, "understanding the ancestors' culture in order to understand ourselves,"[62] and seeking the gold from the Hawaiian "gold mine," while preserving the treasure in the Hawaiian "strongbox,"[63] requires a true "Hawaiian epistemology."[64] This is because in the "contest of wits," the "little knowledge" is misleading,

60. Corboy v. Louie, 283 P.3d 695 (2011); *see also* Sweatt v. Painter, 339 U.S. 629 (1950) (finding "separate but equal" law schools unconstitutional).

61. For example, 20 U.S.C. §§ 4401 *et seq.* ("American Indian, Alaska Native, and Native Hawaiian Culture and Art Development") require the federal government to enhance, support, preserve, protect, and revitalize Hawaiian art and culture. In 20 U.S.C. § 7512(1) ("Indian, Native Hawaiian, and Alaska Native Education")—which is redolent of both Hommon, *supra* note 41, and of Haw. Const. art. X, § 4, *supra* note 34—Congress finds that "Native Hawaiians are a distinct and unique indigenous people with a historical continuity [i.e., *mo'omeheu*] to the original inhabitants of the Hawaiian archipelago . . . ." This assimilation is evident in State of Hawaiʻi v. Office of Hawaiian Affairs, 556 U.S. 163 (2009) (state's power regarding disposition of Hawaiian "tribal interests" in "ceded lands"), *analyzed in* Guest, *Tribal Supreme Court Project, supra* note 19, at his note 37 and accompanying text. With regard to same-sex marriage and related questions, *see also* Joanne Barker, Native Acts: Law, Recognition, and Cultural Authenticity (2011), esp. PART III, Ch. 6, "Of Marriage and Sexuality," citing, *inter alia*, Hawaiian and Pacific Island materials; Christopher L. Kannady, *The State, Cherokee Nation, and Same-Sex Unions: In Re: Marriage License of McKinley and Reynolds*, 29 Am. Indian L. Rev. 363-81 (2004-05). The political issues surrounding the question of whether Hawaiians are a "tribe" within the meaning of "Indian Law" are fraught, and are beyond the scope of this article. *See e.g.*, U.S. Dept. of the Interior, *Interior Considers Procedures to Reestablish a Government-to-Government Relationship with the Native Hawaiian Community*, DOI News (Jun. 18, 2014), http://interior.gov/ohr/notifications/interior-considers-procedures-to-reestablish-a-government-to-government-relationship-with-the-native-hawaiian-community.cfm. Many of the basic sources and issues are collected and analyzed in Gregory G. Justis, *Defining "Union": The Defense of Marriage Act, Tribal Sovereignty and Same-Sex Marriage*, paper for the 2013 Midwest Political Science Association Annual Conference, Chicago, IL (April 2013), www.law.louisville.edu/sites/www.law.louisville.edu/files/Justice%20Paper.pdf.

62. Silva, *supra* note 54.

63. Kalākaua, *supra* note 42.

64. Manulani Aluli Meyer, *Our Own Liberation: Reflections on Hawaiian Epistemology*, 13

and we must shun it.[65] A singular non-Hawaiian approach will not serve. For example, in 1995, the seven-member Hawai'i Commission on Sexual Orientation and the Law, which the legislature appointed and funded, stepped into the post-*Baehr* fray by issuing its official *Report*.[66] The five-member Majority of the Commission favored same-sex marriage and LGBT rights generally, and made recommendations as such to the Legislature. However, the two-member Minority Opinion did not.[67] In building its case against marriage equality and LGBT rights generally, the Minority wrote:

> [L]ooking to the sometimes-cited ancient Hawaiian cultural view of homosexuality in reference to the Aikane and the Mahu, [we] cannot support same-sex marriage in light of the fact that before going to war, the Hawaiians would purge all the Mahus, including in many instances, killing them. *Abandoning such Hawaiian traditions was a great improvement in Hawaiian society*.[68]

Not only was this statement *prima facie* factually incorrect (a "little knowledge") regarding both the *aikāne* and the *māhū*, but it also passed an offensive and non-Hawaiian judgment on what the Minority claimed they knew to be "a great improvement in Hawaiian society." The Minority did not footnote or support the statement with evidence or scholarship of any kind, and they made no research data available to scholars.[69] The Minority attempted to foist negative meanings upon the Hawaiian relationship terms (*aikāne* and *māhū*) other than what fairly "the words will bear."[70] The assertion about "purges" before "going to war" is particularly egregious. Both traditional and historical literature explain that in warfare, the *aikāne* were among the allies, warriors, confidants, envoys, and adjutants of the forces—not in spite of that status, but *because* of it. Theirs was a relationship of trust and authority.[71] Surely, as the proverb says, the feet of warriors form the colors

Contemp. Pac. 124 (2001).

65. Charlot, *supra* note 16. *See supra* text accompanying note 50.

66. Thomas P. Gill, Morgan Britt, L. Ku'umeaaloha Gomes, Lloyd James Hochberg, Jr., Nanci Kreidman, Marie A. "Toni" Sheldon & Bob Stauffer, *State of Hawaii Report of the Commission on Sexual Orientation and the Law* (Dec. 8, 1995), http://hawaii.gov/lrb/rpts95/sol/soldoc.html.

67. The Minority members were Hochberg and Sheldon.

68. Minority Opinion, *id.* at Chapter 5, Part 2.F., para. 1 (emphasis added). Regarding the *māhū*, *see* the information at *supra* note 19.

69. A tactic not acceptable for modern law and policy. Robert J. Morris, Book Rev. Essay, 41 Hong Kong L.J. 883 (2011), reviewing The Oxford Handbook of Empirical Legal Research (Peter Cane & Herbert M. Kritzer eds., 2010). For an excellent review of the implications of this reality, see Richard Garnett, *Religion, Division, and the First Amendment* (Notre Dame Law Sch. Legal Studies Research Paper No. 05-23, 2005), esp. discussion at 3, 20, 22, 25, 27, 30, 37, 41, 46, 55, 57-59, and 62-63, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=855104 (noting the inadequacy of "unexamined, law-office history" for legal analysis).

70. Robert J. Morris, *Not Thinking Like a Non-lawyer: Implications of "Recognization" for Legal Education and Intellectual Due Process*, 53 J. Legal Educ. 267 (2003) (applying cognitive psychology and the study of "heuristics" to legal education and shifting social paradigms). *See also* Robert J. Morris, *China's* Marbury*:* Qi Yuling v. Chen Xiaoqi*—The Once and Future Trial of Both Education and Constitutionalization*, 2 Tsinghua China L. Rev. /《清华中国法律评论》273 (2010) (both dealing with the problems of what meanings "words will bear").

71. The literature on this topic is vast and is beyond the scope of this article, but *see generally*

of the rainbow.[72] "Unfortunately," as Professor Milton Diamond puts it, "there are some social constructionists who do not search for truth nor want to accept demonstrated evidence."[73] Yet, despite the fact that all this information about the *aikāne* was open and readily available, as the Minority admitted, the government followed the Minority in 1995—a misdeed not rectified until 2013.

We must oppose all such instances of "cultural abuse"[74] promptly and thoroughly, and "nip the *wauke* in the bud,"[75] as Lohiʻau's lover, Kauakahiapaoa, would advise if he were with us. Unless we do so, we perpetuate what Hawaiian scholar, Manulani Aluli Meyer, describes in her monograph as non-Hawaiian structures and categories that hold her "hostage to ideas and philosophies [she had] had no hand in forming. . .[and that had] not been shaped by a Hawaiian mind."[76]

Today, the cycle is more nearly complete, and we have safely negotiated much of the politics, education, law, prejudice, and identity surrounding same-sex marriage in Hawaiʻi, so that same-sex couples may *once again* kiss each other openly and in public like the two women, Hiʻiaka and Wahineʻōmaʻo,[77] and the two men, Lohiʻau and Kauakahiapaoa,[78] throughout the Islands. At the end of the great Pele-Hiʻiaka story as we have followed it, the protagonists go home to Hāʻena, the northernmost point on Kauaʻi, not in exile, but in homecoming to find life and

Joseph M. Poepoe, *Kamehameha I: Ka Nai Aupuni o Hawaii, Ka Liona o Ka Moana Pakipika*, Ka Nupepa Ka Nai Aupuni, November 27, 1905-November 16, 1906; Edith Kawelo Kapule McKinzie, *An Original Narrative of Kamehameha the Great Written in Ka Naʻi Aupuni (1905-1906) by Joseph M. Poepoe: Hawaiian Text with English Translation and Brief Comparative Review of Earlier Historical Biographers of Kamehameha I*, 2 vols. Univ. Haw. Coll. Educ., Dept. Curriculum and Instr. Master's Thesis (1982). McKinzie's work, among many cognate others, is discussed in Ty P. Kāwika Tengan, Native Men Remade: Gender and Nation in Contemporary Hawaiʻi (2008). The translated title of Poepoe's serialized epic tale is, "Kamehameha I: The Conqueror of Hawaiʻi, The Lion of the Pacific Ocean."

72. . . .*e wai ānuenue ana nā wāwae o nā koa.* Pukui & Elbert, *supra* note 2, at 26; my translation.

73. Diamond, *supra* note 31, at 88.

74. Robert J. Morris, *"What Though Our Rights Have Been Assailed?": Mormons, Politics, Same-Sex Marriage, and Cultural Abuse in the Sandwich Islands (Hawaiʻi)*, 18 Women's Rts. L. Rep. 129, 132 (1997) [hereinafter Morris, *Cultural Abuse*].

75. . . . *ʻōʻū i ka maka o ka wauke*. Hoʻoulumāhiehie & Nogelemeier, *supra* note 5, at 418 (Hawaiian) and at 390 (English), my translation and adaptation. The *wauke* is the paper mulberry plant from which *kapa* cloth is made. On nipping an evil "in the bud," *see also* Mary Kawena Pukui, ʻŌlelo Noʻeau: Hawaiian Proverbs & Poetical Sayings 37, proverb #302 (1983).

76. Meyer, *supra* note 65 at 124.

77. Hoʻoulumāhiehie & Nogelemeier, *supra* note 5, at 121 (Hawaiian) and at 114 (English). The image, of course, is touching noses, *honi i ka ihu*. In pre-Contact culture, this might be sufficient to signify that the two were in an intimate relationship that we might be analogize to modern "marriage," but that culture did not have a "state" of the kind that "licensed" marriages. Modern Hawaiʻi law, as the *Baehr* court noted, does not recognize "common-law marriage." Baehr, *supra* note 3, 852 P.2d at 58, *citing* Parke v. Parke, 25 Haw. 397 (1920) (other internal citations omitted); *but see* Hommon, *supra* note 41 and accompanying text.

78. Hoʻoulumāhiehie & Nogelemeier, *supra* note 5, at 446 (Hawaiian) and at 416 (English).

family afresh.[79] As Lohi'au chants there to his *aikāne* Kauakahiapaoa, they do so "in order to make things right."[80]

Doing what is "right" (*pono*) is a matter, not only of Realpolitik, but also of constitutional mandate, including the separation of church and state. The Hawai'i Constitution provides that the state motto is the now justly famous, "The life of the land is perpetuated by making things right (*pono*)."[81] In naming Hawai'i "The Aloha State,"[82] the statute provides in pertinent part the following definitions:

> "Aloha Spirit" is the coordination of mind and heart within each person. It brings each person *to the self*. . . . "Aloha" is the *essence of relationships* in which each person is important to every other person *for collective existence*.[83]

Those who are willing to prospect there can readily glean and assemble a collective understanding of *pono*, and they can establish the "historical continuity" from the Hawaiian texts themselves from Kalākaua's "gold mine." Tony Conjugacion's contemporary lyric nicely captures the whole of the collective vision and connects the past to the present:

> In the first light of a new day's life
> Shines a ray of hope
> From the strength of the Ancient's might
> Lives a Great Hawaiian Hope
>
> In a song for the children
> We sing our hopeful notes
> To a new, a bright new generation
> You've got to hold on to the Great Hawaiian Hope
>
> The valley spirit never dies
> It's the primal Mother
> It is heaven and earth
> Use it, it will never fail, no it will never fail
>
> The foundation has been firmly set
> We'll grow strong as the tallest oak
> Reaching on high to the sky's summit

79. Ho'oulumāhiehie & Nogelemeier, *supra* note 5, at 451 (Hawaiian) and at 421 (English). As we shall see, their joy will not continue uninterrupted.

80. . . . *ho'okolo 'ana mai 'o ka pono.* Ho'oulumāhiehie & Nogelemeier, *supra* note 5, at 443 (Hawaiian) and at 413 (English). The text refers to these "*aikāne* chants" as *mele ho'ālohaloha*, lovemaking songs. Ho'oulumāhiehie & Nogelemeier, *supra* note 5, at 396 (Hawaiian) and at 370 (English), my translation. All are rife with the familiar poetic sexual images of nature, here as between both the two women as well as the two men—the "affect-encoding words" of Kahekili, *supr*a note 57. The diction here is powerful as well. The preposed *ai* (to copulate) of *aikāne*, the causative *ho'*-, and the reduplicated *ālohaloha*, all combine to make a triply forceful image. Ho'oulumāhiehie & Nogelemeier, *supra* note 5, at 396 (Hawaiian) and at 370 (English), my translation. For another poem in a similar vein, *see* the dirge of Kahekili for his same-sex lover, *supra* note 57.

81. Haw. Const. art. XV, § 5 (*Ua mau ke ea o ka 'āina i ka pono*, my translation).

82. Haw. Rev. Stat. §§ 5-7 (2014).

83. Haw. Rev. Stat. §§ 5-7.5(a) (*emphasis added*).

> Will come to pass the Great Hawaiian Hope[84]

We must try always to keep that vision and use it for in this epic tale, "I am you, and you are me."[85] "The foundation has been firmly set" in the language of the stories.

D. The Hawaiian Contribution to the Growing LGBT Lexicon

Language matters. Words matter. Diction, grammar, and syntax matter. The "affect-encoding words" in performed language reveal the "distilled essence of society and social relations."[86] One of the functions of the law is to ensure that words, especially those words and phrases that are legal terms of art, do not "lose their meaning."[87] In his discussion of the colonialist-imperialist project of linguistic genocide in the Belgian Congo, Johannes Fabian poignantly noted that there is a "complex linkage between power, inequality, and 'reduced' ways of speaking."[88] When words like *aikāne* and *māhū* are "reduced" in ways of speaking to mere "friend" and "faggot," or even to the pretentious euphemism "intimate friend," then language, culture, law, and equality all suffer an egregious impoverishment.[89] When those in power can impose their will that words such as these "ought not to appear in the dictionary," that if they do, they must be marked "vile," and that there should be a philology of language based on censorship,[90] then the fabric of *aloha*, equality and dignity—not to mention the law itself—are threatened. Hence, we must preserve words, such as *aikāne* and *māhū*, as legal terms of art as part of our "knowledges."[91] As Eric Havelock has written of such control-language:

> 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 relationship thus denoted will continue to be so*, and therefore that *behavior appropriate to the relationship* will also continue to be so. *In this way the language itself carries the tradition of the culture*.[92]

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84. Anthony K. Conjugacion, *Great Hawaiian Hope*, *on* The Collection (The Mountain Apple Company (Hawai'i) 1994)(1986), http://www.mele.com/music/artist/tony+conjugacion/the+collection. The references in verse 3 to the "primal Mother" and "heaven and earth," and then in verse 4 to "the foundation," suggest the images discussed *supra* at notes 6 (the foundation the earth) and 44 (Papa and Wākea) and respective accompanying texts. The phrases "hold on" and "come to pass" nicely negotiated the pivot from past to future.

85. *See* discussion *supra* note 32 and accompanying text.

86. Kaeppler, *supra* note 57 and accompanying text.

87. James Boyd White, When Words Lose Their Meaning: Constitutions and Reconstitutions of Language, Character, and Community (1984).

88. Johannes Fabian, Language and Colonial Power: The Appropriation of Swahili in the Former Belgian Congo 1880-1938 128 (1986).

89. *See* Noenoe K. Silva, Aloha Betrayed: Native Hawaiian Resistance to American Colonialism (2004)(While the literature on this cluster of subjects is voluminous, this is a sound recent volume that collects the literature for Hawai'i). *See also* the discussion in Morris, *Traitors*, *supra* note 43.

90. Morris, *Traitors*, *supra* note 43.

91. *See supra* note 51 and accompanying text.

92. Eric A. Havelock, The Greek Concept of Justice From Its Shadow in Homer to Its Substance in Plato 19 (1978), emphases added.

Language preservation, and specifically the tools and methods some use to destroy language, were subjects well contemplated by an author signed only as "J.N.*****." In 1873, J.N. penned a highly critical article for the *Kū'oko'a* newspaper [The *Independent*] entitled, "How Are We To Speak the Hawaiian Language Correctly?"[93] The author noted that the language of a people is like a good tool[94], to be kept sharp, and like a good road[95], to be kept clean. The article further lamented the abuse of pure Hawaiian language by the modern generation of Hawaiians, noting that "mixed Hawaiian"[96] "is like mixing *poi* made of sweet potato with *poi* made of *kalo* (taro)" (sweet-potato *poi* was considered "peasant food" compared to *kalo poi*). Most strikingly, J.N. noted that the changes in words and the importations of "useless words" merely *conceal or bend the meaning,* or simply amuse their users.[97] There is a desperation for the reclamation of language—a desperation that still exists today.

These concerns raise serious implications for the truths that children are taught about "gender identity" and "sex education" in Hawai'i today. They mandate that we instruct them in *mo'olelo piha* (the *whole* story)[98] for people are dying miserably every day "for lack of what is found there."[99] These facts also have serious implications for all who believe that the renascence of Hawaiian culture in fact means repairing the damage caused by colonialism—including the linguicide[100] practiced on the language itself.[101] It is important for the present generation to *see* the Hawaiian language on the page as a text as well as to hear it spoken. As Audre Lorde points out, our silence on these subjects will not protect us,[102] and the tools of the colonial master will not dismantle the colonial master's house.[103] H.G.A. Hughes writes:

> Whatever the ultimate fate of "small" languages, we . . . must stress the uniqueness and intrinsic worth of each language—and ensure that none disappear without trace. We must become "remembrancers" on behalf of the Pacific

93. J.N.*****, *Pehea lā e Hiki ai i Kākao e Kama'ilio Pololei i ka 'Ōlelo Hawai'i?* Ka Nūpepa Kū'oko'a, Nov. 29 and Dec. 6, 1873; an English translation may be read at 1 Hawaiian Ethnological Notes (HEN) 3009-12, Bishop Museum Library (Mary Kawena Pūku'i ed and trans). For consistency, I have added modern orthography to the Hawaiian texts in this section.

94. *ka mea pa'ahana maika'i. Id*.

95. *ke alanui maika'i. Id*.

96. *ka 'ōlelo Hawai'i 'āwili 'ia. Id*.

97. *Ua pāku'i wale 'ia mai he mau hua 'ōlelo 'ano 'ole, i mea e nalo ai, a i 'ole ia, i mea e le'ale'a ai.... Id*.

98. Charlot, *supra* note 50 and accompanying text.

99. *See* Rich, Found, *supra* note 58 at ix.

100. Sometimes also spelled linguacide or lingocide.

101. Silva, Aloha Betrayed, supra note 90.

102. Audre Lorde, *The Transformation of Silence into Language and Action*, *in* Sister Outsider: Essays and Speeches 40-44 (Crossing Press Reprint ed. 2007) (1984).

103. Audre Lorde, *The Master's Tools Will Never Dismantle the Master's House*, *in* Sister Outsider: Essays and Speeches 110-14 (Crossing Press Reprint ed. 2007) (1984).

> peoples, creators and keepers of the records of culture, trustees for the islanders yet to be born.[104]

Language matters. If the words and phrases of the law matter, then the future of legal practice will no doubt see further refinements of the doctrine of equality. The objective must always be to do what is *pono* regarding equality:[105] an equality "without exceptions"[106] and without group-based classes of civil rights, an equality with universal human rights,[107] an equality that is not parsed.[108] Neither shall take the other's love "out of the ambit" of protection. As Congressman Thaddeus Stevens said in defense of the Civil War Amendments (13th, 14th, and 15th):

> . . . the intelligent, pure and just men of this Republic, true to their professions and their consciences, would have so remodeled all our institutions as to have freed them from every vestige of human oppression, of inequality of rights, of the recognized degradation of the poor, and the superior caste of the rich. In short, that *no distinction would be tolerated in this purified Republic but what arose from merit and conduct*.[109]

At the very least, this means that persons whose identity is *aikāne* and *māhū* would,[110] both in their individual lives and in their relationships, no longer "receive blow after blow from the people,"[111] but would finally be at rest and open to celebrate[112]

The adoption and mainstream use of the words *aikāne* and *māhū*, in their true and correct Hawaiian meanings, might also help resolve the current debate over the use of the "T" portion of LGBT and the propriety of denominations, such as "transsexual" and "transgender," and "agender."[113] For everyone involved in

104. H.G.A. Hughes, *Polynesian Language Studies Since 1945—And Into Tomorrow*, 2 Rongorongo Stud. 35 (1992). Kuwada, *supra* note 4.

105. *See* the discussions at *supra* notes 68-71 and respective accompanying texts.

106. *See* Rich, Found, *supra* note 58 at xiv.

107. *See* Yoshino, *New*, *supra* note 18 at 793.

108. *See* the discussion of Hiʻiaka and Pele *supra* note 15 and accompanying text.

109. Thaddeus Stevens, Speech on the Fourteenth Amendment in Congress (June 13, 1866); *reproduced in* Thaddeus Stevens, 2 The Selected Papers of Thaddeus Stevens: April 1865-August 1868 156 (Beverly Wilson Palmer and Holly Bryers Ochoa, eds., 1998), emphasis added. Stevens was one of the Representatives of Pennsylvania.

110. As would their counterparts throughout the Pacific Basin and within the Pacific Rim. With reference, for example, to Chinese culture, both within Greater China and abroad ("Overseas Chinese" 華僑). *See, e.g.*, *Tsu Chieh-Chien (簡至潔), From "Same Sex Marriage" to "Pluralistic Family Arrangements": The Legislative Movement for Democratic Intimate Relationship* (從「同性婚姻」到「多元家庭」－ 朝向親密關係民主化的立法運動), 1 Taiwan Hum. Rts. J. (台灣人權學刊) 187 (2012) (www.taiwanhrj.org/contents/zh_tw/1/7); and Mei-Hua Chen (陳美華), *Say Whatever Doctors Want to Hear: Gender and Sexuality in the Diagnosis of Transsexualism* (說些醫生想聽的話－ 變性評估的性別政治), 2 Taiwan Hum. Rts. J. (台灣人權學刊) 3 (2013) (www.taiwanhrj.org/contents/zh_tw/4/6).

111. *See* the Hawaiian proverb as the epigram, *supra* note 2.

112. *Ua kili ʻopu māua i ka pō nei*. Pukui & Elbert, *supra* note 2, at 151; my translation.

113. Parker Marie Molloy, Daniel Reynolds & Sunnivie Brydum, *Is the* T *Word the New* N *Word?*, Advocate (April 17, 2014), http://www.advocate.com/politics/transgender/2014/04/17/t-word-new-n-word.

the practice of law and the making of policy[114]—bench, bar, and legislature—an "understanding of these relationships as valuable in our ancestors' culture assists us in understanding ourselves as healthy when we, too, cherish such relationships."[115] Understanding these relationships should help us more closely approximate the ideal of the motto on the Supreme Court building: Equal Justice Under Law.[116] Congress should enact an appropriate version of the Employment Non-Discrimination Act (ENDA),[117] or a reasonable cognate of it, and similar protections on these principles of justice and equality, for as Hi'iaka said[118] in speaking truth to power:

> Lohi'au is your beloved one, and I shall go afar to fetch your love for you. But Hōpoe is my love, and you, Pele, will take good care to preserve and protect her.[119]

E. Practice in the Future: "A Pig Is Coming"

At the end of the Hi'iaka story, the small band of friends and lovers, who have literally and symbolically borne the heat of life and death, returns to the home of Lohi'au and Kauakahiapaoa and their community at Hā'ena on Kaua'i, where it appears at first that they will comprise a family of their own making in peace and love "as the din of their joyful cries resounded."[120] Yet, both sadly and heroically, Hi'iaka eventually announces that she must leave them. She, who has repeatedly referred to her own transgendered "(tom)boyish nature,"[121] is called to a new challenge that summons the advancing prowess of her pluralistic destiny. It is inevitable. They ask her why

114. As, for example, in the area of public health. *See* Gilbert Gonzales, *Same-Sex Marriage—A Prescription for Better Health*, 370 New Eng. J. Med. 1373 (2014), (*available at* http://www.nejm.org/doi/pdf/10.1056/NEJMp1400254) (discriminatory environments and bans on same-sex marriage are detrimental to health, while legalizing same-sex marriage, among other policies expanding protections, contributes to better health for LGBT people). Actually such findings were adumbrated over twenty years ago for Hawai'i in Robert J. Bidwell, *A Report on Hawai'i's Gay and Lesbian Youth Prepared for the Hawai'i State Legislature by the Hawai'i Gay and Lesbian Teen Task Force* (1992), a copy of which is deposited in the Hawai'i State Legislative Reference Bureau.

115. *See* the full quotation at Silva, *supra* note 54.

116. The motto is inscribed in the stone above the main entrance. Supreme Court of the United States , www.supremecourt.gov/about/constitutional.aspx (last visited Mar. 24, 2015).

117. Employment Non-Discrimination Act of 2013, H.R. 1755, 113th Congress § 815 (2013). With the decision of the U.S. Supreme Court in Burwell v. *Hobby Lobby*, 134 S.Ct. 2751 (2014), the question of LBGT support for the measure has become fraught, and is a debate which is beyond the scope of this article. *See, e.g.*, David Badash, *Distancing Itself from ENDA's Religious Exemptions, HRC Calls for LGBT Civil Rights Bill*, The New Civil Rights Movement (Jul. 10, 2014), www.thenewcivilrightsmovement.com/distancing_itself_from_enda_overly_broad_religious_exemption_hrc_calls_for_comprehensive_lgbt_civil_rights_bill.

118. *Supra* note 43 and accompanying text.

119. *'O Lohi'au kāu ipo aloha, a eia au ke ki'i nei i kāu aloha a loa'a i ka loa. 'O Hōpoe ho'i ka'u aloha, e mālama 'oe (Pele) iā ia*. Ho'oulumāhiehie & Nogelemeier, *supra* note 5, at 37 (Hawaiian) and at 36 (English); my translation.

120. . . . *ua olo a'ela kā lākou pihe uē hau'oli*. Ho'oulumāhiehie & Nogelemeier, *supra* note 5, at 451 (Hawaiian) and at 421 (English).

121. *'ao'ao keiki kāne*, Ho'oulumāhiehie & Nogelemeier, *supra* note 5, at 167 and 188 (Hawaiian) and at 157 and 176 (English); and "if I were a man. . . ." *inā he kāne au*. . ., Ho'oulumāhiehie & Nogelemeier, *supra* note 5, at 49 and 127 (Hawaiian) and at 48 and 120 (English).

this must be so, and she replies, "A supernatural shape-shifter is coming. . . A pig is coming."[122] Her words presage the advent of the revered (and sometimes dreaded) Kamapuaʻa, the shape-shifting (*kupua*) Pig-Boy of legend and protagonist of another cycle of culturally important stories.[123] He, too, will pursue Pele. He, too, will encounter *aikāne* relationships. But he will bring his own supernatural persona and manifold natures (pig + human) in tension to the stories. The cryptic sentence, "*A pig is coming*" on which the first adventure ends and the second begins, is a pivot toward an inevitable future that comprises "[a]ction, humor, sex, resistance—taking back what is rightfully yours."[124] By the challenges that his very shape-shifting ("trans") nature brings to existing categories of perception and received thought, Kamapuaʻa will be "a symbol of the upsurgence of the underclass, the oppressed. His persistent rooting, his digging and turning up dirt with his snout, makes trouble but also brings about change, new life. . .and strength."[125] In short, he represents yet another kind of overturning *hulihia*—a companion force to the volcano of Pele and a model for the modern emergence of the LGBT community.

The shape-shifters of today are the "T" people of LGBT, the transgendered and transsexual individuals (often called "mahu," but no longer pejoratively, in Hawaiʻi),[126] the people "in the middle," the agendered, who deconstruct the received categories of male and female.[127] Theirs is the unfinished work that lies ahead. Where gender-*bending* used to be something of a pejorative, now gender-*blending* has become the new normal, from the realms of molecular biology to macro-politics.[128]

Before she takes leave of her family, Hiʻiaka blesses Lohiʻau: "Your body is free of restriction for anyone you desire."[129] It is also an apt pivot for the end of the epic year 2013 and the beginning of the coming era. The salutary impact of same-sex marriage on Hawaiʻi seems to be assured.[130] As the *Baehr* majority noted,

122. *E hōʻea ana he kupua. . . . Eia lā he puaʻa*. *Id*. Of course, in Hawaiian tradition the pig does not carry the sometimes negative or pejorative associations it has in the English language.

123. He Moʻolelo Kaʻao o Kamapuaʻa: A Legendary Tradition of Kamapuaʻa, the Hawaiian Pig-God (Lilikalā Kameʻeleihiwa ed. and trans.,1996).

124. Cristina Bacchilega, 13 Marvels & Tales: J. Fairy-Tale Stud. 244 (1999)(reviewing He Moʻolelo Kaʻao o Kamapuaʻa: A Legendary Tradition of Kamapuaʻa, the Hawaiian Pig-God (Lilikalā Kameʻeleihiwa ed. and trans., 1996)).

125. *Id*.

126. *See, e.g.*, information regarding the school, Hālau Lōkahi, http://www.halaulokahi.com (last visited May 12, 2015); *see also* Jaime M. Grant et al., *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey* (2011), http://www.thetaskforce.org/downloads/reports/reports/ntds_full.pdf; Gender Spectrum, www.genderspectrum.org (last visited May 12, 2015).

127. *See* the discussion and sources at *supra* note 19 and accompanying text. This also includes the revolutions posed by molecular biology in, for example, the phenomenon of "three-parent children." James Gallagher, *UK Government Backs Three-Person IVF*, BBC NEWS (June 28, 2013), www.bbc.co.uk/news/health-23079276; *see also* Sam Winter, *Identity Recognition Without the Knife: Towards a Gender Recognition Ordinance for Hong Kong's Transsexual People*, 44 Hong Kong L. J. 115 (2014).

128. *See, e.g.*, The Council for Global Equality, http://www.globalequality.org (last visited May 12, 2015).

129. *Ua noa kō kino i nā mea a pau āu e makemake ai*. Hoʻoulumāhiehie & Nogelemeier, *supra* note 5, at 451 (Hawaiian) and at 421 (English).

130. Sumner LaCroix & Lauren Gabriel, *The Impact of Same-Sex Marriage on Hawai'i's Economy*

"constitutional law may mandate, like it or not, that customs change with an evolving social order."[131] Same-sex marriage became the law in Hawai'i on November 13, 2013,[132] and thus brought *Baehr v. Lewin* full circle. It was by all accounts a victory for indigenous culture. To many, this seems to be the direction the same-sex ancestors, the *kūpuna aikāne* and the *kūpuna māhū*, are pointing towards—as one book's title has it, both "looking forward and listening back."[133] As Kauakahiapaoa expressed his love for Lohi'au: "My only and fondest desire is for my lover to live again.[134] If the "renaissance" of Hawaiian Renaissance means rebirth from death, then the story of Lohi'au and Kauakahiapaoa, like the renewal of *Baehr*, is entirely apt for the revolution that has occurred in the world's understanding of both *indigenous* and *natural* sexuality and relationships.[135] It is altogether appropriate that Hawai'i should be the location for these changes. The law commands that Hawaiian values infuse the rule of law.[136]

F. Conclusion: "Putting Feathers on Our Words"

In the nearly quarter-century since the start of the *Baehr* era, and even during the years when *Baehr* lay dormant, a revolution in LGBT rights occurred. Hawaiian culture, language, and values have played an integral part. They have decorated the national discourse with the feathers of the Hawaiian chiefs and lovers. The words *aikāne* and *māhū* have moved into the mainstream lexicon. Much of the hegemonic culture that once insisted that homosexuality is "unnatural," and that once inflicted "blow after blow from the people," has been deconstructed and ameliorated. This has occurred, in part, because the sum total of the "gold mine" of Hawaiiana has stood as witness against it—the power in this being its very Hawaiianness. As Sean Smith writes, "Hawai'i's unique history and legal landscape"[137] must "broadly operate to preserve all vestiges of Hawaiian culture, including traditionally accepted family arrangements."[138] Today we can say with Kahekili, "Let the fretful waters

and Government: An Update After the U.S. Supreme Court's Same-Sex Marriage Decisions (U. Haw. Econ. Research Org., Working Paper, 2013), *available at* http://www.uhero.hawaii.edu/assets/LaCroix.Gabriel.MEUpdate.FINAL.pdf. Findings of related interest with regard to the children of same-sex couples are reported in Simon R. Crouch et al.,, *Parent-reported measures of child health and wellbeing in same-sex parent families: a cross-sectional survey*, 14 BMC Pub. Health 635 (2014), http://www.biomedcentral.com/1471-2458/14/635/abstract#.

131. Baehr, *supra* note 3, *citing* Loving v. Virginia, 388 U.S. 1 (1967).

132. Hawai'i Marriage Equality Act of 2013, S. B. 1, H. D. 1, 27th Leg., 2nd Spec. Sess. (Hi. 2013).,*available at* http://www.capitol.hawaii.gov/splsession2013b/SB1_HD1_.pdf.

133. Nogelmeier, Voice, *supra* note 42; the "historical continuity" discussed at *supra* note 62 and accompanying text.

134. *'O ku'u makemake nō na'e, 'o ke ola hou o ku'u aikāne*. Ho'oulumāhiehie & Nogelemeier, *supra* note 5, at 414 (Hawaiian) and at 387 (English).

135. *See, e.g.*, the discussion and sources collected in William Kremer, *The Evolutionary Puzzle of Homosexuality* (February 18, 2014), http://www.bbc.com/news/magazine-26089486.

136. Haw. Const., Art. 10, § 4, *supra* note 22; *see also* Robert J. Morris, *Products Liability in Hawai'i*, 14 Haw. Bar J. 127 (1979), and Morris, *Cultural Abuse*, *supra* note 75.

137. Smith, s*upra* note 22, at 518.

138. *Id*. at 519.

of regret over pain be gone."[139] All these matters were of paramount importance to the ruling chiefs (*aliʻi nui*)—such as Lohiʻau, Kauakahiapaoa, and Kahekili and his *aikāne*[140]—of Hawaiʻi, both pre- and post-Contact.[141] Whatever had value for them had value for society, and our understanding of those values is essential to our understanding of them.[142]

Thus, the rebirth and vindication of *Baehr v. Lewin* have signaled an irresistible wave of change in favor of same-sex marriage that, in the language of the Pele-Hiʻiaka legend, has, like the volcano, "overturned the world." What does the fullness of this phrase mean? In the metonymy of the volcano, the fire and the lava flow are destructive at first, but as the flow proceeds from the caldera to the sea, it creates new land not only by building upon the old, but also by extending the shoreline further into the water. The dual process is natural and inevitable. Hence, it is an apt metaphor for the social processes we have explored. *Hulihia ke ao* is natural and inevitable. It is *supposed* to happen.

139. *Pau ka wai mihi hopo o ka eh'e*. . . Kaeppler, *supra* note 57 at 77.

140. Who was this man? The dirge itself does not apparently identify him, and the sources that treat it, which I have cited here, do not. Perhaps the identity exists in a poetic allusion (*kaona*) that was familiar only to the two men but is lost on us. However, we do have the authoritative voice of S. M. Kamakau, which names several *aikāne* in the company of Kahekili. S. M. Kamakau, *Ka Moʻolelo o Kahahana, ka Hopena / The Story of Kahahana, Conclusion*, Ka Hoʻoilina: J. Haw'n. Lang. Sources 304 (2002), http://hooilina.org/collect/journal/index/assoc/HASH01ce.dir/8.pdf. A corroborating version of the Kahahana story may be read at 6(2) Abraham Fornander, Collection of Hawaiian Antiquities and Folklore 288-89 (1919).

141. Morris, *Canon*, *supra* note 31 and accompanying text.

142. Morris, *Canon*, *supra* note 31, at 71, *citing* Patrick Vinton Kirch, The Evolution of the Polynesian Chiefdoms 62 (1984), and Valerio Valeri, Kingship and Sacrifice: Ritual and Society in Ancient Hawaiʻi 50 (1985).