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**CORRECTING BURIAL WRONGS BECAUSE THE DEAD HAVE RIGHTS: AN
ANALYSIS OF NATIVE HAWAIIAN BURIAL ISSUES AND THE ASSOCIATED
BURIAL PRESERVATION LAWS IN HAWAI'I**

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ABSTRACT

Hawai'i has attempted to combat cultural desecration to native Hawaiian burials through preservation laws (HRS Chapter 6E). Unfortunately, these legal provisions have been ineffectively "actuated" (enforcement, application, and interpretation) in the preservation of native Hawaiian burials and burial practices.

While the law establishes a process to protect native Hawaiian burials, the state agency given primary responsibility for enforcing the law has failed to fulfill its preservation responsibilities.

The law has also been misapplied. Because of the built-in conflict of interest flaw in the law, many contract archaeologists work on behalf of their developer-employers. Consequently, during the construction of many developments throughout Hawai'i, thousands of native Hawaiian burials are destroyed.

Finally, the legal expectations of native Hawaiians include the Hawaiian cultural norm of pono. Thus, because of the divergent cultural interpretations of justice, when the law adheres to non-Hawaiian legal expectations, Hawai'i's preservation laws fail (as interpreted by native Hawaiians).

LIST OF ABBREVIATIONS

Art. 12, sec. 7 Article 12, section 7

CRM Cultural Resource Management

DLNR Department of Land and Natural Resources

HI CON Hawai‘i Constitution

HRS Hawai‘i Revised Statutes

Ka Pa‘akai *Ka Pa‘akai o Ka ‘Āina v. Land Use Commission*

PASH *Public Access Shoreline Hawai‘i v. Hawai‘i County Planning Commission*

PDF Pele Defense Fund

SHPD State Historic Preservation Division

PREFACE

Throughout my life I have done some things Hawaiian such as hula, canoe paddling, and surfing, however my day-to-day life has been primarily Western, not Hawaiian. Thus, I felt I needed to do Hawaiian to be Hawaiian. Through my thesis research, I began to feel as if I was actually participating in my culture. This cultural participation took the form of learning and informing.

Whatever terminology that I use, I am obviously quite self-conscious about my identity, and hopefully through this research I am also able to find my "self" within my Hawaiian, native Hawaiian, or part Hawaiian identity. I feel that Jocelyn Linnekin specifically describes *my* identity struggle when she notes the differences between a Hawaiian and a hapa-haole (what I consider a part Hawaiian). She states that:

The categorical distinction between Hawaiian and hapa-haole involves the recognition of subtle behavioral cues that mark someone as not fully or not comfortably Hawaiian: not speaking pidgin or speaking it in a forced manner... [and] self-consciously using the Hawaiian language... Hapa-haoles are those who cultivate their Hawaiianness...¹

Although this paper may represent a form of self-determination for native Hawaiians, it is also a form of *my own personal self-determination* as a native Hawaiian, or part Hawaiian.

Before attending law school, I worked at the Office of Hawaiian Affairs ("OHA") in the Native Hawaiian Rights Division as an intern. During two summers at OHA, I reviewed proposed development projects and the subsequent effects these projects would have on native Hawaiian culture. Throughout my time at OHA, many active members of

¹ Jocelyn Linnekin, "The Politics of Culture in the Pacific," *Cultural Identity in the Pacific*, ed. Jocelyn Linnekin and Lin Poyer (Honolulu: University of Hawai'i Press, 1990), 156.

the Division often told me that there are constitutional and statutory laws that are intended to conserve Hawai'i's natural environments and preserve cultural resources. However, these preservation laws are frequently misdirected and are also circumvented by developers.

On the last day I worked at OHA, I left my internship wondering why Hawai'i's historic preservation laws, especially pertaining to native Hawaiian burials, have had little effect on native Hawaiian cultural conservation. I began law school soon after that final summer as an intern at OHA. I decided as a first year, or a 1L, to seek out an answer to my quandary sometime during my law school career. However, even after attempting to master the art of law, as a proud member of the Juris Doctorate club, I was still dumbfounded with Hawai'i's preservation laws and their (ironical) deleterious effects on native Hawaiian burials and burial practices. Thus, I set out on a divergent research path in order to make sense of the legal confusion. In addition to being a work of self-exploration, this paper will also try to answer the dilemma I dealt with during that seemingly distant summer at OHA, as well as during my law school career when I faced the realities surrounding the ineffectual application of the law.

Repeatedly, throughout the United States, the legal protection of archaeological sites of indigenous cultures has failed. Thus, many cultural artifacts and sites have been lost or destroyed. Accordingly,

Today, as they have been since the early 20th century, archaeological sites everywhere in the United States are continually damaged by unauthorized excavation and removal of artifacts and other maliciously destructive acts. Those sites on federal and Indian lands are often targets in spite of the protective efforts of government and tribal agencies.²

² Sherry Hunt, Elwood W. Jones, and Martin E. McAllister, *Archaeological Resource Protection* (1992), 13.

I always believed that native Hawaiians, as Hawai'i's indigenous people, had the right to perpetuate and preserve their culture. Thus, I believed that laws, such as historic preservation laws relative to native Hawaiian burials and burial practices, were created to enable these rights.³

Hawai'i has attempted to combat cultural desecration to native Hawaiian burials and burial sites through Article 12, section 7 ("Art. 12, sec. 7") of the Hawai'i Constitution,⁴ and Hawai'i Revised Statutes, Chapter 6E ("HRS Chapter 6E").⁵ Although the Constitutional Convention proposed Art. 12, sec. 7 in 1978,⁶ and HRS Chapter 6E was originally enacted in 1976,⁷ legal protection for native Hawaiian burials were only activated in 1990, with the 1990 amendment to HRS Chapter 6E.⁸ Unfortunately, these somewhat recently activated legal provisions have been ineffectively "actuated" (enforcement, application, and interpretation) in the preservation of native Hawaiian burials and burial practices.

Although a recent court decision favored the protection of native Hawaiian burials on the island of Hawai'i,⁹ it can be inferred that the decision was based partly on Hawai'i

³ Melody Kapilialoha MacKenzie, ed., *Native Hawaiian Rights Handbook* (Hawai'i: Native Hawaiian Legal Corporation, 1991), 97-98. MacKenzie believes that native Hawaiians, as indigenous peoples, have the legal right to control natural resources and assets, and to make decisions that have real and lasting effects on their culture and environment.

⁴ Hawai'i Constitution, art. 12, sec. 7.

⁵ Hawai'i, *Hawai'i Revised Statutes* (2002), ch. 6E.

⁶ Hawai'i Constitution, art. 12, sec. 7.

⁷ Hawai'i, *Standing Committee Report No. 490-76*, reprinted in *Journal of the Senate of the Eighth Legislature of the State of Hawai'i of 1976* (Hawai'i, 1976), 1096.

⁸ Hawai'i, *Standing Committee Report No. 2795*, reprinted in *Journal of the Senate of the Fifteenth Legislature of the State of Hawai'i of 1990* (Hawai'i, 1990), 1159.

⁹ *Walter John Kelly v. 1250 Oceanside Partners*, Civ. No. 00-1-0192K (Haw. Cir. Ct. order filed December 26, 2002). In this order, Judge Ibarra concluded that native Hawaiian burials and burial practices are constitutionally protected as traditional, cultural, and religious rights. Additionally, Judge Ibarra found that DLNR/SHPD does not have archaeological procedural rules regarding interim preservation plans relative to

law and legal precedent and partly on the cultural acuteness of the judge. However, the decision should have been primarily based on the law.¹⁰ If the laws on the preservation of burials were properly actuated, then these burial issues could not ripen within the judicial system. In other words, the judge would not have had to adopt native Hawaiian cultural values to justify the preservation of native Hawaiian burials and burial practices, but rather would have based his decision purely on precedent (an application of the law).

Native Hawaiian culture must be preserved in order to maintain a culturally viable future for native Hawaiians. Thus, it is a cultural imperative for society as a whole (in Hawai'i as well as elsewhere) to preserve native Hawaiian burials and burial practices for future generations of native Hawaiians. More importantly though, existing preservation laws should also operate effectively to preserve native Hawaiian burials and burial practices. Thus, an analysis of native Hawaiian burial issues and the associated burial preservation laws in Hawai'i is significant because it reflects the historic problems of legal insensitivity and cultural misunderstanding toward the preservation of native Hawaiian culture.

This paper (the aforementioned analysis) opens with a two-part introduction. The first subchapter of chapter one is an overview of native Hawaiian burials and burial practices. The purpose of the overview is to introduce native Hawaiian cultural beliefs

native Hawaiian burials and burial practices. Thus, the plan accepted and adopted by DLNR relative to Hōkūli'a's development in the case at bar was deemed invalid.

¹⁰ *Barron's Law Dictionary* (1984), s.v. "precedent." According to this dictionary, "precedent" is "a previously decided case which is recognized as authority for the disposition of future cases. At common law, precedents were regarded as the major source of law." (Ibid., 356) Thus, court decisions are grounded and based on prior court decisions, or precedent, that may also be based on the interpretation of a statute. Accordingly, the dictionary further defines precedent by noting that "[a] precedent may involve a novel question of common law or it may involve an interpretation of a statute" and thus "future cases rely upon it or distinguish it from themselves without disapproving of it, the case will serve as a precedent for future

concerning native Hawaiian burials and burial practices. The overview is important because it provides the Hawaiian framework which sets the tone (a Hawaiian voice) for the following four chapters. The second subchapter is a case study that highlights Hawai'i's native Hawaiian burial issues and the associated legal consequences. The case study provides a real-world feel for the theories proposed throughout the paper, thus allowing readers an opportunity to personally connect with the paper.

The provisions of Art. 12, sec. 7 of the Hawai'i Constitution ("HI CON") protect the traditional and customary rights of ahupua'a tenants,¹¹ and HRS Chapter 6E addresses native Hawaiian burials preservation.¹² While HRS Chapter 6E establishes a process to protect native Hawaiian burials, thus giving the dead rights, chapter two will reveal that the State Historic Preservation Division ("SHPD") of the Department of Land and Natural Resources ("DLNR"), given primary responsibility for implementing HRS Chapter 6E, has failed to fulfill its preservation responsibilities. For example, DLNR/SHPD failed to formally adopt procedural rules governing preservation within its Archaeology division. By failing to formally adopt procedural rules, DLNR/SHPD: 1) violated section 13-300-11 of the Hawai'i Administrative Rules, and 2) its burial preservation decisions surrounding development projects were considered inconsistent, thus engendering ethical concerns amongst DLNR/SHPD's staff. Moreover, DLNR/SHPD's staff displayed careless working methods in their preservation endeavors. Furthermore, DLNR/SHPD mismanaged its staff, even allowing an employee to teach at the University of Hawai'i during business hours. Therefore, DLNR/SHPD's failures

cases under the doctrine of stare decisis." (Ibid., 356) Therefore, in the instant case, the judge should have focused on both precedent, or prior court decisions, and the interpretation of any applicable statutes.

¹¹ Hawai'i Constitution, art. 12, sec. 7.

illustrate that there are clear flaws with HRS Chapter 6E's enforcement; flaws that harm native Hawaiian burials and burial practices.

Chapter three describes another burial wrong within the (mis)application of HRS Chapter 6E. Because of the built-in conflict of interest flaw in the law, many contract archaeologists are not as accurate or thorough in their archaeological surveys. Thus, many contract archaeologists find themselves working on behalf of their developer-employers rather than working towards native Hawaiian burial preservation. Consequently, during the construction of many developments throughout Hawai'i, thousands of native Hawaiian burials are destroyed.

Finally, chapter four examines the divergent cultural interpretations of justice between the West or the non-Hawaiian, and the native Hawaiian. The legal expectations of native Hawaiians include the Hawaiian cultural norm of pono,¹³ whereas, non-Hawaiians simply follow the letter of the law (usually lacking cultural respect...lacking pono). Thus, when HRS Chapter 6E adheres to non-Hawaiian legal expectations, native Hawaiian burial preservation laws fail (as interpreted by native Hawaiians).

An awareness of these native Hawaiian burial issues can only help to shed light on possible solutions to the ineffectual "actuation" (enforcement, application, and interpretation) of Hawai'i's burial laws, and thus, provide for the preservation of native Hawaiian culture in the future.

¹² Hawai'i, *Hawai'i Revised Statutes* (2002), ch. 6E.

¹³ Lilikalā Kame'eleihiwa, *Native Land and Foreign Desires: Pehea lā e Pono Ai? How Shall We Live in Harmony?* (Honolulu: Bishop Museum Press, 1992), 25. According to Kame'eleihiwa, pono, "which is often translated in English as 'righteous,' ...actually denotes a universe in perfect harmony." Ibid.

CHAPTER I INTRODUCTION

Native Hawaiian Burials and Burial Practices – An Overview

The purpose of this overview is to introduce native Hawaiian cultural beliefs relative to native Hawaiian burials and burial practices, in order to provide readers with a Hawaiian perspective. Thus, readers should hear and conceptualize this perspective, or the Hawaiian voice, throughout this paper. It is also important to prescribe what a "burial" is when discussing native Hawaiian burials and burial practices. Therefore, for the purposes of this paper, the term "burial" is not to be defined within scientific or Western parameters.¹

In native Hawaiian culture, the death and subsequent proper burial of one's ancestors are extremely important for various reasons. It is believed that after a loved one dies, his or her spirit sometimes lingers near the bones or associated remains.² The time the spirit remains in the present world is difficult to calculate.³ In other words, after death, a spirit may linger near its remains for an extended period of time.

¹ June Noelani Johnson Cleghorn, "Hawaiian Burial Reconsidered: An Archaeological Analysis, A Thesis Submitted to the Graduate Division of the University of Hawai'i in Partial Fulfillment of the Requirements for the Degree of Master of Arts in Anthropology" (M.A. thesis, University of Hawai'i, 1987), 15-18. In her thesis, Cleghorn differentiates between anthropological terminology such as "burials," "disposal," and "mortuary."

² Edward Halealoha Ayau, Chapter 13: "Native Hawaiian Burial Rights," *Native Hawaiian Rights Handbook*, ed. Melody Kapili'alo'ha MacKenzie (Honolulu, Hawai'i: Native Hawaiian Legal Corporation, 1991), 247. Nā iwi, or bones, survived long after death and became the only lasting embodiment of the individual. Additionally, nā iwi placed in the earth became part of the earth, and thus, imparted the mana or supernatural and divine power of the dead to the area or ground associated with that iwi. Thus, the entire area would become sacred. Edward Halealoha Ayau made references to both M.K. Pukui, E.W. Haertling, C. Lee in *Nānā I Ke Kumu* and the affidavit of Pualani Kanaka'ole Kanahele regarding the cultural significance of Honokahua, Maui.

³ Ibid.

Thus, native Hawaiians believe that the physical and immortal manifestation of human life is embodied in the bones or remains of an individual.⁴ After death, his or her "psychic" spirit remains near his or her "physical" manifestation (the bones).⁵ Furthermore, the bones allow the spirit to remain identified.⁶ The presence of the dead's spirit near the associated remains, as well as the bones' identification of the spirit, provide a forum for a relationship to grow between lineal descendants and their dead; thus serving as an essential link for future generations of native Hawaiians to understand and know their ancestors who have passed on.⁷

In ancient times, when there was peace and tranquility among the Hawaiian chiefs and their people, there was no need to conceal the dead.⁸ In fact, Hawaiians buried corpses in known graveyards (not hidden away) and the dead were laid out in wooden troughs (holowa'a) and buried.⁹ However, after the arrival of the missionaries, before the burial or the concealment of the body, Hawaiians laid the corpse in the home with the feet towards the door of the dwelling.¹⁰ On the other hand, before the arrival of Christianity, it is believed that a separate dwelling was built for the corpse.¹¹ This dwelling, used to prepare the corpse, would be located away from the house.¹² If the body was to be buried, it "was drawn up into the position of a foetus before birth, knees

⁴ Ibid.

⁵ Ibid.

⁶ E.S. Craighill Handy and Mary Kawena Pukui, *The Polynesian Family System in Ka'u, Hawai'i* (Hawai'i: Mutual Publishing, 1998), 151.

⁷ Ayau, "Native Hawaiian Burial Rights," 247.

⁸ Samuel M. Kamakau, *Ka Po'e Kahiko: The People of Old*, ed. Dorothy B. Barrere (Honolulu: Bishop Museum Press, 1991), 38.

⁹ Ibid.

¹⁰ Handy and Pukui, 151.

¹¹ Ibid.

¹² Ibid.

to chest, arms folded, and with face down over the knees."¹³ As Davida Malo, a Hawaiian scholar of the 1840s, describes bodies to be buried, he notes that they were not only put in a fetal position or a "rounded shape...[but they were also] closely wrapped in tapa..."¹⁴

However, many Hawaiians did not necessarily bury their dead, but rather maintained the bones of their dead.¹⁵ Accordingly:

[A] relative tended the corpse, removing the decaying flesh and organs by hand, to clean completely (*ho'okele*) the bones. This was a labour of love, for a devoted relative. The fleshly refuse (*pela*) was thrown into the sea...The cleaned bones were made into a light compact bundle tied with sennit cords, and borne to the place of concealment. It was carried on the back by the *kahu* (guardian), who went alone in the night so that no one but he would know where they are placed [to protect from desecration by an enemy]. Sometimes the bundle of bones was buried under the dwelling house;¹⁶ for *ali'i* it was a cave that was known only to his *kahu*. But generally the bones were taken to a place identified with the '*aumakua* of the family, because the '*uhane* is with its '*aumakua*.¹⁷

Thus, in addition to actual burials in and under the earth or land, Hawaiians also used burial caves, disposal pits, and caverns to hide the bones of the dead.¹⁸

Samuel Manaiakalani Kamakau, a Hawaiian historian (among many other attributes) of the 1860's, notes that Hawaiians began to conceal the bones of their

¹³ Ibid.

¹⁴ Davida Malo, *Hawaiian Antiquities (Mo'olelo Hawai'i)*, trans. Nathaniel B. Emerson (Honolulu, Hawai'i: Bishop Museum, 1898), 97.

¹⁵ Handy and Pukui, 151-152.

¹⁶ John Papa I'i, *Fragments of Hawaiian History* (Honolulu, Hawai'i: Bishop Museum, 1959), 138-139. Moreover, John I'i, a Hawaiian writer of historical and cultural subjects in the 1800s, notes that some bones were even placed within the house of a *heiau*. For example, at Hale o Keawe, a *pu'uhonua* or place of refuge at Honaunau, "[t]he compact bundles of deified bones were in a row inside the house...[and at] the right front corner of the house, heaped up like firewood, were the unwrapped bones of those who died in war." Ibid., 139.

¹⁷ Handy and Pukui, 151-152.

¹⁸ Kamakau, *Ka Po'e Kahiko: The People of Old*, 40. Hawaiians also concealed cherished women as well as objects of supernatural force in these aforementioned places.

relatives and chiefs because of "the time of wicked, traitorous, and desecrating chiefs;"¹⁹ a time (after that of tranquility and peace among the Hawaiian chiefs and their people) when the bodies of the freshly buried were dug up from the burial grounds for food and bait for sharks. The bones of the dead were also dug up to use as arrows for rat shooting, for fishhooks,²⁰ and according to Sir Peter H. Buck, "to ornament slop bowls and so degrade the deceased and his family."²¹ Moreover, Martha Beckwith, a scholar who went through many books, articles, etc., recording Hawaiian oral narratives of which she compiled a written work, as well as contributing to ethnology and folklore in the early 1900s to the 1930s in Hawai'i, notes that chiefs would display calabashes containing the bones of warring chiefs²² to gain favor or power.²³ In her book, *Hawaiian Mythology*, she describes the legend of Palila.²⁴ In this legend, the warrior Palila is an invisible warrior who remains unknown until his last kill. He makes himself known when he slays three great warriors "each with a single stroke and hangs their jaws on a tree called Ka-haka-auwae (the shelf of jawbones) and becomes himself ruling chief of Hilo."²⁵ The legend of Palila is an excellent example of the way in which Hawaiians denigrated the dead and the bones of the dead in order to gain power, or rather to show their power.

¹⁹ Ibid., 38.

²⁰ Ibid.

²¹ Sir Peter Buck, *Arts and Crafts of Hawai'i: XIII Death and Burial* (Honolulu: Bishop Museum Press, 1957), 569.

²² Martha Beckwith, *Hawaiian Mythology* (Honolulu, Hawai'i: University of Hawai'i Press, 1970), 453.

²³ Ibid., 393.

²⁴ Ibid., 415.

²⁵ Ibid.

Regardless of whether the entire body (bones and flesh), or just the bones were buried (or concealed), once nā iwi, or bones²⁶ were buried (or concealed), they became a part of the earth.²⁷ Moreover, the power of nā iwi also imparts to the earth, and the entire area is sacred as well.²⁸ In fact, the earth or land, which is chosen for burial or concealment, is important in and of itself. Usually the burial land (or even the place of burial) would be a family's ao 'uhane, ao akua, and ao 'aumakua, "i.e., the place element or realm in which the ancestral akua and 'aumakua of the 'ohana lived."²⁹ Thus, nā iwi are highly respected and cherished by lineal descendants in native Hawaiian culture.³⁰ In fact, as previously mentioned, during the burial or concealment process (at the time in Hawaiian history when burial desecrations occurred), family members found native Hawaiian familial remains so sacred that the whereabouts of the remains were kept undisclosed to outsiders in order to prevent burial desecration.³¹ Consequently, any improper handling or removal of these remains from the familial burial or concealment place is considered desecration in native Hawaiian culture because it creates a break in the spiritual and cultural balance between those who have passed and those who still remain.³² Given that both the psychic and physical manifestation of the dead linger and

²⁶ Mary Kawena Pukui and Samuel H. Elbert, *Hawaiian Dictionary*, 104, rev. and enlarged ed., (Honolulu: University of Hawai'i Press, 1986). Iwi are the bones of the dead and are considered the most cherished possession by the Hawaiian people.

²⁷ Ayau, "Native Hawaiian Burial Rights," 247.

²⁸ Ibid.

²⁹ Handy and Pukui, 153.

³⁰ Ibid.

³¹ Ayau, "Native Hawaiian Burial Rights," 247-248.

³² Ibid.

surround both the remains and the burial site, outsider disturbances interfere with and desecrate the dead, and thus, create spiritual trauma to the descendants of the dead.³³

Throughout the Hawaiian islands, heiau or Hawaiian burials in general, once in known existence, have been desecrated and/or destroyed in one form or another. For example, J. Gilbert McAllister, a scholar who (along with others) recorded hundreds of archaeological sites throughout the Hawaiian islands,³⁴ notes that burial caves, located at Niu on the island of O'ahu, were famously known for Hawaiian burials, even of ali'i.³⁵ Accordingly, bodies of chiefs [ali'i] were placed in canoes.³⁶ The caves also contained coffins holding bones, as well as tapa, cloth, and lauhala mats.³⁷ Unfortunately, McAllister states that now all of the burials at this site "have been disturbed and plundered."³⁸ Via his surveys and fieldwork pertaining to the archaeology of O'ahu, he notes that "[he] did not see an undisturbed burial cave. It has long been a hobby with residents, tourists, and soldiers to explore caves and hunt for burials, for everyone has heard of the treasure in store for the finder of a chief's sepulcher."³⁹

According to Edward Halealoha Ayau, an attorney and a native Hawaiian cultural specialist, native Hawaiians consider certain acts as sacrilegious toward nā iwi.⁴⁰ As previously mentioned, any mishandling of the remains or any disturbances to the area

³³ Ibid., 247.

³⁴ Patrick Vinton Kirch, *Legacy of the Landscape: An Illustrated Guide to Hawaiian Archaeological Sites* (Hawai'i: University of Hawai'i Press, 1996), 7-8.

³⁵ J. Gilbert McAllister, *Archaeology of O'ahu* (Honolulu, Hawai'i: Bishop Museum, 1933), 70.

³⁶ Ibid.

³⁷ Ibid.

³⁸ Ibid.

³⁹ Ibid., 32.

⁴⁰ Ayau, "Native Hawaiian Burial Rights," 247.

where the remains lay is considered a desecration.⁴¹ Other sacrilegious acts include leaving bones uncovered and exposed to sunlight, turning bones into fishhooks, the misuse of skulls, and the complete destruction of the bones, "because then the 'uhane [spirit] was prevented from joining the 'aumākua [family or personal gods]⁴² in eternity."⁴³ According to Beckwith, because of the importance of the dead and their bones⁴⁴ "[e]ven the preservation of an ancestor's bones from ignoble uses becomes a sacred obligation"⁴⁵ to native Hawaiians.

Thus, without proper traditional preservation, native Hawaiian burials and burial practices are exposed to cultural desecration. This desecration is not only the actual physical damage to the burials and their associated sites, but native Hawaiians interpret the mishandling of the bones as a degradation to the familial descendants of the dead.

Hōkūli'a

The following case study highlights Hawai'i's native Hawaiian burial issues and the subsequent litigation, providing a real-world view that enables readers to personally connect with the theories proposed throughout this paper.

In Kealahou, the luxury development project called Hōkūli'a, has recently stirred much controversy surrounding native Hawaiian rights. Since October 2000, 1250 Oceanside Partners, the developers of Hōkūli'a, have found themselves in the

⁴¹ Ibid.

⁴² Pukui and Elbert, 32, 363. According to the Pukui & Elbert Hawaiian Dictionary, 'uhane is defined on page 363 as a spirit and 'aumākua is defined on page 32 as one's family or personal gods.

⁴³ Ayau, "Native Hawaiian Burial Rights," 247.

⁴⁴ The presence of the dead's spirit near the associated remains, as well as the bones' identification of the spirit, provide a forum for a relationship to grow between lineal descendants and their dead; thus serving as an essential link for future generations of native Hawaiians to understand and know their ancestors who have passed on.

⁴⁵ Beckwith, 274-275.

Kona court over various issues because project foes, such as Protect Keopuka 'Ohana and other Kona residents, after becoming aware of the project's damage to native Hawaiian burials in an area previously occupied by (ancient) Hawaiians,⁴⁶ filed a protective suit based on constitutional and statutory guarantees.⁴⁷ Besides allegations of violating the federal Clean Water Act and the improper use of land, the suit alleged that the project violates constitutionally and statutory protected rights dealing with the preservation of native Hawaiian cultural and religious practices.⁴⁸ Accordingly, the Hōkūli'a development threatens specific native Hawaiian remains found in the development area. In fact, during the initial construction of the project, over one hundred native Hawaiian burials were discovered, and many of these were destroyed.⁴⁹

The acknowledgment of Hōkūli'a's native Hawaiian burial disturbances started when Jim Medeiros Sr. (a now former employee of Hōkūli'a), working with his Hōkūli'a crew at the Old Government Trail, saw that activity halted in the area where the bulldozers of another crew were operating.⁵⁰ He sensed something was wrong and consequently approached the bulldozer area.⁵¹ Upon his arrival he noticed that the bulldozer operators were picking up bone fragments and bagging them in plastic bags, as

⁴⁶ Moses Haia and Alan Murakami, "Water and Land: Native Hawaiian Legal Issues" (Lecture at the William S. Richardson School of Law on February 25, 2004).

⁴⁷ Jack Kelly, "Last Phase of Hōkūli'a Trial Addresses Land Use Questions: An HIJ Update," *available at* <http://www.hawaiiislandjournal.com/stories/>.

⁴⁸ Ibid.

⁴⁹ Ibid. According to Jack Kelly:

...[B]ecause of its failure to monitor the extent of a burial discovery, the developer's contractor bulldozed iwi kupuna, which were broken in pieces and spread throughout a huge mound of soil. Another section of burials in that area was partially destroyed and the developer covered them with a tarp. No further action was done for three months until heavy rains in September flooded the remains. Ibid.

⁵⁰ Ibid.

⁵¹ Ibid.

per their supervisors' instructions.⁵² He knew that the bagging of the bones was wrong because the proper protocol, according to the burial laws, is to stop work and contact the State Historic Preservation Division ("SHPD") of the Department of Land and Natural Resources ("DLNR").⁵³

After the incident, it became apparent that Hōkūliʻa developers were circumventing legal protocols pertaining to burials preservation throughout Hōkūliʻa's construction (prior to Medeiros' discovery...perhaps even after his discovery).⁵⁴

Throughout Hōkūliʻa's evolution, over one hundred burials were allegedly "inadvertently"⁵⁵ discovered and removed from twenty eight different burial sites on the project area.⁵⁶ Project protestors, many of whom with lineal and cultural ties to the lands that constitute the Hōkūliʻa project, strongly believe that the native Hawaiian burials should not have been removed, but rather have been kept in their original places.⁵⁷ Many native Hawaiians, such as those protesting the Hōkūliʻa development project, believe that the removal of native Hawaiian remains are acts of desecration toward native Hawaiian culture.

⁵² Ibid.

⁵³ Ibid.

⁵⁴ Ibid.

⁵⁵ Hawaiʻi, *13 Hawaiʻi Administrative Rules of DLNR, SHPD* (1996), sec. 13-300. According to the Hawaiʻi Administrative Rules, Title 13 of DLNR/SHPD, surrounding the practice and procedure relating to burial sites and human remains, an "inadvertent" discovery is defined as "the unanticipated finding of human skeletal remains and any burial goods resulting from unintentional disturbance, erosion, or other ground disturbing activity."

⁵⁶ Kelly, "Last Phase of Hōkūliʻa Trial Addresses Land Use Questions: An HIJ Update," *available at* <http://www.hawaiiislandjournal.com/stories/>.

⁵⁷ Bobby Command, "Vigil for Unearthed Remains/Native Hawaiian Group Protests Storage of Bones at Hōkūliʻa Office," *West Hawaiʻi Today*, 15 February 2001, *available at* <http://www.westhawaiiitoday.com/daily/2001/Feb-15-Thu-2001/news/news1.html>.

In February 2001, more than fifty protestors held an all-night vigil to "apologize to their kupuna"⁵⁸ for the burial desecration or removal of the iwi.⁵⁹ In fact, not only were the bones or iwi removed, but placed in temporary storage, an act that is very insulting to native Hawaiian culture, especially since they were allegedly placed in a washroom closet.⁶⁰ Although many protestors believed that the iwi were placed in a washroom closet, the president of Hōkūli'a claimed the iwi were placed in a secure and quiet part of a holding house.⁶¹

In response to the protective suit, in August 2001, Judge Ibarra of the Third Circuit Court in Kona, issued a Preliminary Injunction Order that required the reinterment of previously unearthed remains found during Hōkūli'a's construction.⁶² However, Plaintiffs Protect Keopuka 'Ohana and protestors of the development suspected that many iwi were not returned to their original burials, as the order required.⁶³ Thus, protestors, such as Jim Medeiros, believe that the continuing project resulted in "the shameful desecration of Hawaiian graves."⁶⁴

⁵⁸ Pukui and Elbert, 186. Kupuna can either be a grandparent, ancestor, or relative. It can also mean starting point or source.

⁵⁹ Command, *available at* <http://www.westhawaii.com/daily/2001/Feb-15-Thu-2001/news/news1.html>.

⁶⁰ Ibid.

⁶¹ Ibid.

⁶² Development Digest, H7. Hōkūli'a (formerly Oceanside 1250), South Kona, *available at* <http://environment-hawaii.org/ddhawaii.htm>.

⁶³ Jack Kelly, Hōkūli'a Article, 14 February 2002, *available at* <http://www.hi.sierraclub.org/kealakekua/newsrelease.htm#2/14/02>.

⁶⁴ Catherine Black, "The Bones of Kona: An Arizona Golf-Course Developer Stirs Things Up in Rural South Kona," *Honolulu Weekly*, 25 July 2001, *available at* <http://www.honoluluweekly.com/archives/coverstory%202001/07-25-01%20Kona/07-25-01%20Kona.html>.

Judge Ibarra then issued the most protective order toward burials within the development area on December 26, 2002.⁶⁵ Judge Ibarra found that although a cultural and archaeological survey had been conducted by the developers and submitted to DLNR in 1994, which DLNR/SHPD had approved in 1995/1996, the survey had incorrectly identified only 408 burial sites (when in fact there were many more burials in the area that should have been initially identified).⁶⁶ Consequently, Judge Ibarra found that during the cultural monitoring phase of the project, many burial sites were encountered that had not been previously identified in the 1994 survey,⁶⁷ and these burials were treated as inadvertent burials. Furthermore, subsequent archaeological sweeps that were conducted to find further inadvertent burials resulted in the unearthing of yet more undiscovered or inadvertent burials.⁶⁸ "Inadvertent," or unexpectedly found burials,⁶⁹ are legally treated differently from previously identified or known burials (those usually recorded in an archaeological survey).⁷⁰ Inadvertent burials are under the purview of DLNR, whereas previously identified burials are under the authority of the appropriate island burial council.⁷¹ What this means is that the fate of the inadvertent burials found, during the construction of a development, for example, are at the discretion of DLNR, a state agency which has proven to be insufficient in its regulatory responsibilities,

⁶⁵ *Walter John Kelly v. 1250 Oceanside Partners*, Civ. No. 00-1-0192K (Haw. Cir. Ct. order filed December 26, 2002).

⁶⁶ *Ibid.*

⁶⁷ *Ibid.*

⁶⁸ *Ibid.*

⁶⁹ *Hawai'i, 13 Hawai'i Administrative Rules of DLNR, SHPD* (1996), sec. 13-300.

⁷⁰ *Hawai'i, 13 Hawai'i Administrative Rules of DLNR, SHPD* (1996), sec. 13-300, *Hawai'i Revised Statutes* (2002), ch. 6E-43.6, and *Hawai'i Revised Statutes* (2002), ch. 6E-43(b).

⁷¹ *Ibid.*

especially pertaining to native Hawaiian burials.⁷² In summary, Judge Ibarra found that there was a gross failure on the part of the developers to accurately account for the native Hawaiian burials at the Hōkūli‘a development project, and moreover, DLNR/SHPD, given primary responsibility for implementing the burial laws and burial preservation processes, inappropriately relied upon the inaccurate burial information.⁷³ Moreover, DLNR/SHPD failed to conduct independent inspections and investigations by their own staff pertaining to the burial information given to them by Hōkūli‘a's archaeologists, and thus failed to properly enforce the burial laws.⁷⁴ Judge Ibarra saw this as an inappropriate "concurrence" on the part of DLNR/SHPD with Hōkūli‘a developers,⁷⁵ which ultimately contributed to the desecration of the native Hawaiian burials at Hōkūli‘a.

Thus, Judge Ibarra ordered that: 1) The hundreds of "inadvertent" discoveries found during the sweeps must be treated as if they had been identified in the original 1994 survey, and must be governed by the appropriate burial council as per Hawai‘i Revised Statutes, Chapter 6E ("HRS Chapter 6E"); the developers must also submit a burial treatment plan by January 27, 2003; 2) The developers must identify the cultural significance of the area, address the development's impact on the cultural significance, and provide a mitigation plan by February 26, 2003; and 3) The developers must cease all grading activity until the developers comply with the aforementioned requirements.⁷⁶ Furthermore, Judge Ibarra ordered that there must be a monthly certification of

⁷² Office of the State Auditor, *Audit of the State Historic Preservation Division of the Department of Land and Natural Resources*, Report No. 02-20 (Hawai‘i, December 2002), summary.

⁷³ *Walter John Kelly v. 1250 Oceanside Partners*, Civ. No. 00-1-0192K (Haw. Cir. Ct. order filed December 26, 2002).

⁷⁴ *Ibid.*

⁷⁵ *Ibid.*

discoveries found by the developers and that Plaintiffs must have access to the property in order to monitor the development's progress.⁷⁷

Other issues surrounding the Hōkūliʻa dispute include the destruction of an ancient Ala loa trail and the placement of a protective wall.⁷⁸ Five years ago, Hōkūliʻa agreed to build a wall at the base of a mound called Puʻu Ohau.⁷⁹ The developers agreed to build a protective wall because the mound not only holds many ancient remains, but also contains the crypt of the grandmother (Kamaʻeokalani) of Queen Liliʻuokalani and King Kalākaua.⁸⁰ However, the developers later claimed that the wall should not be built at the base of the mound, but rather 100 feet from the base of Puʻu Ohau, in order to protect home lots with stunning views.⁸¹

On December 23, 2004, the State Supreme Court denied requests from the Hōkūliʻa developers and from Hawaiʻi island county officials to expedite the developer's appeal (of the Circuit Court decision surrounding the illegal use of agricultural land; another issue associated with the Hōkūliʻa dispute) which was made in November of 2004.⁸² Now the lot owners want to sue the state because they cannot move into their luxury homes (because the judge halted the project).⁸³ Apparently, their lawyer believes that they (these "millionaires") don't have anyplace to go⁸⁴ (as if they are homeless!). Although the State Supreme Court rejected the request to expedite the appeal, the court

⁷⁶ Ibid.

⁷⁷ Ibid.

⁷⁸ Timothy Hurley, " Hōkūliʻa Developer Ordered to Fix Trail," *Honolulu Advertiser*, 10 October 2002, B1.

⁷⁹ Timothy Hurley, "Hōkūliʻa Foes Take Stand Over Burial Site," *Honolulu Advertiser*, 7 October 2002, A1, A4.

⁸⁰ Ibid.

⁸¹ Ibid.

⁸² Advertiser staff, "Court Denies Hōkūliʻa Request," *Honolulu Advertiser*, 28 December 2004, B2.

⁸³ Andrew Gomes, "Hōkūliʻa Buyers Planning Lawsuit," *Honolulu Advertiser*, 23 February 2005, A1, A2.

has yet to make its decision as to the actual appeal. According to the homeowners' attorney, because of the backlog of cases, the court's decision could be on hold for another four years.⁸⁵ Regardless of the legal issue, the litigation surrounding the Hōkūliʻa development continues to be fraught with political agendas, economic strategies, and legal inconsistencies.

As previously discussed, the presiding judge in the Hōkūliʻa dispute ruled in favor of preserving burials. However, it can be inferred that the decision was based on Hawaiʻi law *and on the cultural sensitivity of the judge*. The preservation of Hōkūliʻa's native Hawaiian burials would not have become an issue of litigation if the constitutional and statutory protections (or laws) regarding native Hawaiian burials had been properly "actuated" (enforcement, application, and interpretation). In other words, the Hōkūliʻa dispute exposes Hawaiʻi's burial laws, such as HRS Chapter 6E, as an ineffectively actuated law in the preservation and protection of native Hawaiian burials and burial practices. For example, although HRS Chapter 6E establishes a process to protect native Hawaiian burials and burial practices, the State Historic Preservation Division ("SHPD") of the Department of Land and Natural Resources ("DLNR"), given primary responsibility for enforcing HRS Chapter 6E, has failed to fulfill its preservation responsibilities. This ineffectual enforcement of Hawaiʻi's burial laws is revealed in the following chapter.

⁸⁴ Ibid.

⁸⁵ Ibid.

CHAPTER II

BURIAL WRONG NUMBER ONE: FLAWS WITH BURIAL PRESERVATION LAWS' ENFORCEMENT

The provisions of Art. 12, sec. 7 of the Hawai'i Constitution ("HI CON") protect the traditional and customary rights of ahupua'a tenants,⁸⁶ and HRS Chapter 6E addresses native Hawaiian burials preservation.⁸⁷ It is important to note here that both Art. 12, sec. 7 and HRS Chapter 6E, operate (separately or in combination) to protect and preserve native Hawaiian burials and burial practices through legislative intent, legal interpretations, and through case law. This paper's appendix further describes Hawai'i's burial laws (Art. 12, sec. 7 and HRS Chapter 6E) and the associated legal applications to native Hawaiian burials preservation, especially as pertaining to the Hōkūli'a dispute. Thus, as previously discussed, while HRS Chapter 6E establishes a process⁸⁸ to protect native Hawaiian burials, thus giving the dead rights, this chapter will reveal that the State Historic Preservation Division ("SHPD") of the Department of Land and Natural Resources ("DLNR"), given primary responsibility for implementing HRS Chapter 6E, has failed to fulfill its preservation, or rather, its enforcement responsibilities.

HRS Chapter 6E-1 states that the HI CON "recognizes the value of conserving and developing the historic and cultural property within the State [Hawai'i] for the public good."⁸⁹ Thus, the State Legislature asserts that it is not only in the public interest, but it

Shall be the public policy of this State [Hawai'i] to provide leadership in preserving, restoring, and maintaining historic and cultural property, to ensure the administration of such historic and cultural property in a spirit of stewardship and trusteeship for

⁸⁶ Hawai'i Constitution, art. 12, sec. 7.

⁸⁷ Hawai'i, *Hawai'i Revised Statutes* (2002), ch. 6E.

⁸⁸ A process of preservation that operates through the intent of the legislature, statutory interpretation, and through case law.

⁸⁹ Hawai'i, *Hawai'i Revised Statutes* (2002), ch. 6E-1.

future generations, and to conduct activities, plans, and programs in a manner consistent with the preservation and enhancement of historic and cultural property.⁹⁰

The leadership, maintenance, and administration relative to the preservation of historic and cultural entities are delegated to DLNR. Accordingly, HRS Chapter 6E-3 states that "...established within the department [DLNR] a division [SHPD] to administer a comprehensive historic preservation program,"⁹¹ shall adopt rules "in accordance with Chapter 91; necessary to carry out the purposes of this chapter..."⁹² Moreover, DLNR/SHPD shall coordinate the evaluation and management of burial sites (per HRS Chapter 6E-43),⁹³ regulate archaeological activities,⁹⁴ and shall be in charge of developing a statewide survey and inventory of burial sites (and burial objects/remains) throughout the Hawaiian islands.⁹⁵

Clearly, the HI CON intends for DLNR/SHPD to *properly enforce* HRS Chapter 6E, in order to fulfill its legislative purpose (in the public interest) to preserve and protect cultural and historic entities, such as native Hawaiian burials and burial practices. However, DLNR/SHPD failed many of its enforcement responsibilities in the actuation of both Art. 12, sec. 7 and HRS Chapter 6E in the protection of native Hawaiian burials, burial sites, and burial practices at Hōkūli'a. One such enforcement failure surrounds the department's "draft" rules. These draft rules govern preservation procedures within the Archaeology division of DLNR/SHPD.⁹⁶ According to Judge Ibarra's December order,

⁹⁰ Ibid.

⁹¹ Ibid., ch. 6E-3.

⁹² Ibid., ch. 6E-3(16)

⁹³ Ibid., ch. 6E-3(10).

⁹⁴ Ibid., ch. 6E-3(13).

⁹⁵ Ibid., ch. 6E-3(3).

⁹⁶ Edward Halealoha Ayau, interview by author, 4 April 2003, Honolulu, HI. I interviewed Halealoha at the Center for Hawaiian Studies located on the University of Hawaii Campus at Manoa. I not only

DLNR/SHPD violated its general administrative rules (section 13-300-11) which mandate the promulgation of archaeological rules by which the department shall follow surrounding the implementation of its burials program.⁹⁷ Judge Ibarra ruled that DLNR violated section 13-300-11 of the Hawai'i Administrative Rules regarding burials because DLNR failed to "promulgate rules in accordance with a specified procedure designed to allow and incorporate public input into the formulation of regulations for any particular department."⁹⁸ Accordingly, Subchapter 2, Rulemaking, section 13-300-11 of the Hawai'i Administrative Rules of DLNR/SHPD regarding the rules of practice and procedure relating to burial sites and human remains states that:

a) Pursuant to a petition or upon its own motion, the department shall adopt, amend, or repeal a rule which is designed to implement, interpret, or prescribe law, policy, organization, procedure, or practice of the provisions of chapter 6E, HRS, in accordance with the procedures set forth in this chapter and in chapter 91, HRS.⁹⁹

Although DLNR retained and abided by draft or proposed archaeological rules of the SHPD since 1976, that were intended to administer the law relating to the cultural preservation process,¹⁰⁰ at the end of 2002, when Judge Ibarra's December order was issued, the rules had not been formally adopted as per section 13-300-11.¹⁰¹ Furthermore, in May 2001, during a preliminary hearing, Judge Ibarra asked Ross Cordy, the Branch Chief of Archaeology at DLNR/SHPD, whether DLNR had ever requested advice on the

gathered information concerning Halealoha's professional endeavors surrounding native Hawaiian burial issues, but also learned about his personal opinions concerning current burial issues (like at Hōkūli'a).

⁹⁷ Kelly, Civ. No. 00-1-0192K.

⁹⁸ Ibid.

⁹⁹ Hawai'i, *13 Hawai'i Administrative Rules of DLNR, SHPD* (1996), sec. 13-300, subch. 2, prov. 11 "Rulemaking."

¹⁰⁰ Jack and Gretchen Kelly, "Historic Preservation in Hawai'i, Part Two: In Danger's Path," 2001, available at <http://www.Greenhawaii.org/kelly/articles/2001/ancestor.html>.

¹⁰¹ Kelly, Civ. No. 00-1-0192K.

draft rules from the Attorney General.¹⁰² Cordy responded that DLNR had never elicited advice from the Attorney General.¹⁰³ Additionally, as of April 2003, the draft rules were still going through the review process, and Governor Linda Lingle at that time had yet to accept the rules.¹⁰⁴

According to Jack and Gretchen Kelly, Plaintiffs in the Hōkūli‘a dispute, the doubtful status of DLNR/SHPD's draft rules also "brings into question the legality and force of law of any departmental decisions the division has made"¹⁰⁵ regarding archaeological work within the division relating to the burials program. Similarly, Judge Ibarra believed that the draft rules regarding archaeological procedures were inadequate, and in his December order, he ruled that the interim preservation plan (allowing construction at Hōkūli‘a to begin) which DLNR/SHPD accepted, was invalid (DLNR/SHPD did not properly execute HRS Chapter 6E's legislative scheme to preserve and protect native Hawaiian burials by including lineal descendants in the preservation process).¹⁰⁶ Thus, the draft rules create an arbitrary set of procedures by which DLNR/SHPD operates. The overall result has been inconsistencies among different developments regarding the historic preservation process. In March 2002, acting State Senator Jan Yagi Buen stated that the arbitrariness of the draft rules created inconsistencies in the application of historic preservation laws. According to Senator Buen, "[i]f they don't have rules, they can come up with whatever they choose and be

¹⁰² Jack Kelly, Hōkūli‘a Article, 2 May 2001, *available at* <http://www.hi.sierraclub.org/kealakekua/newsrelease.htm#5/2>.

¹⁰³ Ibid.

¹⁰⁴ Ayau interview, 4 April 2003.

¹⁰⁵ Kelly, "Historic Preservation in Hawai‘i, Part Two: In Danger's Path," *available at* <http://www.Greenhawaii.org/kelly/articles/2001/ancestor.html>.

very selective in the approvals they're making."¹⁰⁷ Thus, Senator Buen signed off on a resolution requesting an audit of DLNR/SHPD, in order to investigate DLNR/SHPD's failures in the implementation of historic preservation laws and the possible effects upon the protection and preservation of Hawai'i's historic entities.¹⁰⁸ By failing to formally adopt a set of rules pertaining to archaeological procedures within the burials program, as required by section 13-300-11 of the Hawai'i Administrative Rules, DLNR/SHPD violated its administrative obligation and thus, jeopardized the protection and preservation of native Hawaiian burials, burial practices, and burial sites throughout the Hawaiian islands.

Senator Buen's resolution consequently resulted in a December 2002 State audit. State Auditor Marion Higa's December 2002 audit on DLNR also cited the aforementioned failure surrounding the arbitrariness of the draft rules.¹⁰⁹ State Auditor Higa noted that DLNR did not have formally adopted rules as required by section 13-300.¹¹⁰ More specifically, she stated that DLNR currently did not have policies requiring archaeological reports on development sites to be reviewed within specific time frames.¹¹¹ Although the department had a general time frame of a thirty to forty-five day response period, it usually followed that the archaeological reports failed to be conducted and submitted within the general time frames.¹¹² In fact, State Auditor Higa found that it took

¹⁰⁶ Kelly, Civ. No. 00-1-0192K.

¹⁰⁷ Mark Adams, "State Historic Preservation Division 'needs to be fixed,'" 14 March 2002, *available at* <http://www.moolelo.com/hist-pres-dist-fix.html>.

¹⁰⁸ Ibid.

¹⁰⁹ Office of the State Auditor, *Audit of the State Historic Preservation Division of the Department of Land and Natural Resources, Report No. 02-20* (Hawai'i, December 2002), 12-13.

¹¹⁰ Ibid.

¹¹¹ Ibid.

¹¹² Ibid.

months to years to conduct and submit the archaeological reports.¹¹³ She found that these delays create "disparate review standards [that] threaten the division's ability to protect historic sites,"¹¹⁴ as well as native Hawaiian burials, burial sites, and burial practices.

Furthermore, ethical issues have sprouted from the disparate review standards. Judge Ibarra demonstrated these ethical concerns in the Hōkūliʻa dispute. At the May 2001 preliminary hearing, Judge Ibarra asked Cordy, about the professional standards of archaeologists.¹¹⁵ Cordy responded that DLNR had no specific rules governing the ethical standards of archaeologists. The lack of formal rules regarding archaeological procedures within the DLNR has not only raised preservation issues, but has also generated ethical concerns among DLNR/SHPD's staff. Thus, according to State Auditor Higa, the procedural and ethical problems associated with archaeologists within DLNR/SHPD and their associated roles relative to development projects, "compromise the program's mission and foster an environment conducive to corruption."¹¹⁶

Another enforcement failure surrounds DLNR/SHPD's (mis)management of "inadvertently" discovered remains on development sites [per HRS Chapter 6E-3(10) and HRS Chapter 6E-43]. According to the Hawaiʻi Administrative Rules, Title 13 of DLNR/SHPD, surrounding the practice and procedure relating to burial sites and human remains, an "inadvertent" discovery is defined as "the unanticipated finding of human skeletal remains and any burial goods resulting from unintentional disturbance, erosion,

¹¹³ Ibid.

¹¹⁴ Ibid., summary.

¹¹⁵ Kelly, Hōkūliʻa Article, (5/2/2001), available at <http://www.hi.sierraclub.org/kealakekua/newsrelease.htm#5/2>.

¹¹⁶ Office of the State Auditor, *Audit of the State Historic Preservation Division of the Department of Land and Natural Resources*, Report No. 02-20 (Hawaiʻi, December 2002), 12.

or other ground disturbing activity."¹¹⁷ The provisions set forth by HRS Chapter 6E-43.6¹¹⁸ and Hawai'i Administrative Rules section 13-300-40 of the DLNR/SHPD regarding burial sites and human remains,¹¹⁹ state that the "inadvertent" findings of human remains over fifty years old during the construction process of developments, are under the jurisdiction of DLNR. This means that DLNR/SHPD has discretionary powers as to what happens to the inadvertently found remains. If the department determines that the remains are substantial enough for further inquiry and protective measures, the department then *may* notify¹²⁰ the appropriate burial council and associated native Hawaiian organizations for consultation.

In 1990, the Legislature found that native Hawaiian burials and burial sites were "often not afforded the protection of the law that assures dignity and freedom from unnecessary disturbance,"¹²¹ and thus, established island burial councils in Act 306.¹²² The Legislature established burial councils for Hawai'i, Maui and Lana'i, Moloka'i, O'ahu, Kaua'i and Ni'ihau.¹²³ The purpose of the burial councils is to decide on the place of preservation of previously identified native Hawaiian burial sites, to make recommendations as to the appropriate (cultural) treatment of native Hawaiian burials, as well as assisting DLNR/SHPD in the inventory and identification of native Hawaiian

¹¹⁷ Hawai'i, *13 Hawai'i Administrative Rules of DLNR, SHPD* (1996), sec. 13-300.

¹¹⁸ Hawai'i, *Hawai'i Revised Statutes* (2002), ch. 6E-43.6.

¹¹⁹ Hawai'i, *13 Hawai'i Administrative Rules of DLNR, SHPD* (1996), sec. 13-300.

¹²⁰ According to HRS Chapter 6E-43.6(a)-(b), DLNR *must* notify the appropriate burial council. Hawai'i, *Hawai'i Revised Statutes* (2002), ch. 6E-43.6(a)-(b). However, often times DLNR does not involve the appropriate burial council in their final determinations as to the fate of the inadvertently discovered burial(s).

¹²¹ Office of the State Auditor, *Investigation of the Department of Land and Natural Resources' Process for Developing Recommended Candidate Lists for Appointment to the Island Burial Councils*, Report No. 04-15 (Hawai'i, December 2004), summary.

¹²² *Ibid.*

burials and burial sites. Members of each council must live within their respective areas and must represent native Hawaiian interests as well as landowner and large property interests.¹²⁴ The regional representatives of the burial councils should be members of the Hawaiian community,¹²⁵ must have a strong background in native Hawaiian culture, and specifically must be well informed concerning native Hawaiian traditions regarding burials and burial practices.¹²⁶ The appropriate burial council makes determinations based on whether relocation is warranted using criteria centered on the importance of the burial or burials.¹²⁷ Such criteria include whether the burials are of high preservation value (high concentration of remains), or if the burial or burials are of high-ranking ali'i.¹²⁸

If native Hawaiian burials are inadvertently found (an unanticipated human remain discovery) during construction or development, HRS Chapter 6E explicitly provides protection for the burials.¹²⁹ Once remains are discovered, the discovery must be reported as soon as possible to DLNR and any activity in the immediate area that could potentially damage the remains must cease until final determinations are made.¹³⁰ DLNR's determination as to the burial's or burials' future includes: 1) an examination by a medical examiner or coroner and a qualified archaeologist, and if the remain or remains are found to be prehistoric, then 2) a gathering of sufficient information documenting the context

¹²³ Hawai'i, *Hawai'i Revised Statutes* (2002), ch. 6E-43.5(a).

¹²⁴ *Ibid.*, ch. 6E-43.5(b).

¹²⁵ Office of the State Auditor, *Investigation of the Department of Land and Natural Resources' Process for Developing Recommended Candidate Lists for Appointment to the Island Burial Councils*, Report No. 04-15 (Hawai'i, December 2004), 3.

¹²⁶ Hawai'i, *Hawai'i Revised Statutes* (2002), ch. 6E-43.5(b).

¹²⁷ *Ibid.*, ch. 6E-43(b).

¹²⁸ *Ibid.*

¹²⁹ *Ibid.*, ch. 6E-43.6.

and importance of the burial/burials.¹³¹ According to the law, these determinations must be done within one to three working days (depending on the amount of burials and the location of the discovery).¹³² After these determinations are made, a mitigation plan is drawn up accordingly.¹³³

Therefore, although the burial councils are designated by law to make important calls as to the relocation or preservation of burials,¹³⁴ their expertise applies to previously identified burials and can only be drawn upon *after* DLNR/SHPD has made its determinations regarding inadvertently discovered burials.

Thus, inadvertent discoveries avoid the island burial councils. In such cases, archaeologists can ignore Hawaiian cultural experts and practitioners [who have strong Hawaiian community ties] by classifying a known burial site as, say, an agricultural structure. If human skeletal remains are subsequently unearthed, the site is classified as an inadvertent discovery, bypassing the burial councils and giving jurisdiction to the department [DLNR]. While this process may undermine the intent of the historic preservation law and the authority of island burial councils, it enables construction projects to move forward.¹³⁵

¹³⁰ Ibid., ch. 6E-43.6(b).

¹³¹ Ibid., ch. 6E-43.6(c).

¹³² Ibid., ch. 6E-43.6(c)-(d).

¹³³ Ibid., ch. 6E-43.6(c).

¹³⁴ Hawai'i, *Hawai'i Revised Statutes* (2002), ch. 6E-43(b). HRS Chapter 6E-43(b) states that:

The appropriate island burial council shall determine whether preservation in place or relocation of previously identified native Hawaiian burial sites is warranted, following criteria which shall include recognition that burial sites of high preservation value, such as areas with a concentration of skeletal remains, or prehistoric or historic burials associated with important individuals and events, or areas that are within a context of historic properties, or have known lineal descendants, shall receive greater consideration for preservation in place. The criteria shall be developed by the department [DLNR] in consultation with the councils, Office of Hawaiian Affairs, representatives of development and large property owner interests, and appropriate Hawaiian organizations, such as Hui Malama I Na Kupuna O Hawaii Nei, through rules adopted pursuant to Chapter 91. A council's determination shall be rendered within forty-five days of referral by the department [DLNR] between the landowner and the department [DLNR].

¹³⁵ Office of the State Auditor, *Investigation of the Department of Land and Natural Resources' Process for Developing Recommended Candidate Lists for Appointment to the Island Burial Councils*, Report No. 04-15 (Hawai'i, December 2004), 24-25.

Ultimately, the completion of a project generates large sums of money for various people. It could be that payoffs from developers are used as an incentive for DLNR supervisors, etc. to "inadvertently" discover and determine the fate of many native Hawaiian remains without the extremely valuable input from the island burial councils. Thus, not only is the Hawaiian community at a loss when remains are inadvertently discovered (usually no appropriate burial council input), but the aforementioned process raises many ethical questions regarding DLNR/SHPD supervisors who make these very important preliminary determinations as to the fate of many native Hawaiian burials.

According to Kai Markell, the acting director in March 2003 of the Burial Treatment program, which is a part of SHPD, the lack of burial council participation surrounding inadvertent finds is a product of the statutory timelines within HRS Chapter 6E-43.6.¹³⁶ Markell further stated that, "[t]he councils make recommendations to the DLNR on their treatment but this also doesn't happen as much as it should."¹³⁷

HRS Chapter 6E-43.6 states that when remains are inadvertently found, all activity must cease and the discovery must be reported to DLNR. Thereafter, DLNR must notify the appropriate council as well as the Office of Hawaiian Affairs.¹³⁸ According to HRS Chapter 6E-43.6(d), "[i]n cases involving the discovery of a single skeleton, the requirements...shall be fulfilled in one working day if on Oahu, and two working days if

¹³⁶ Kai Markell, e-mail interview by author, 3 March 2003, Honolulu, HI. I e-mailed questions to Kai Markell on February 24, 2003 concerning a variety of issues surrounding the provisions of HRS Chapter 6E and its actual implementation.

¹³⁷ Ibid.

¹³⁸ Hawai'i, *Hawai'i Revised Statutes* (2002), ch. 6E-43.6(a)-(b).

in other council jurisdictions."¹³⁹ Thus, Markell correctly stated in an e-mailed response to a series of detailed questions surrounding burial issues, that:

If a single set of remains is found on O'ahu, the DLNR must do a host of things leading up to a decision on whether to disinter or preserve in place within one working day. It is impossible for the council to meet to discuss the inadvertent prior to making a decision. Sunshine laws prevent meaningful interaction of council members outside a quorum.¹⁴⁰

He further explained the interaction between DLNR and the burial councils. Thus, according to Markell;

We do notify the council member for the region and they sometimes come along to oversee the inadvertent but that doesn't happen as much as it should. Most times, one or two staff members get out to the scene, maybe construction in a roadway with an open trench which has to be closed up by a certain time before afternoon traffic starts and you have to make a decision on whether to recover a kupuna or leave them in place. Often, you don't have enough information about whether the remains are complete, incomplete, previously disturbed, by themselves or is someone else lying next to them that you can't see, etc. There are many factors which go into a decision to take someone out of the ground.¹⁴¹

Markell may have uncovered a flaw in the law concerning a limited working period as to the inadvertent find of a single remain, however, he failed to address the lack of burial council activity when more than one remain is inadvertently found. According to HRS Chapter 6E-43.6(c), "[a]fter notification of the discovery of multiple skeletons, the following shall be done *within two working days, if on Oahu, and three working days, if in other council jurisdictions.*"¹⁴² Although there may be more remains to investigate, and thus more work involved surrounding multiple finds, as opposed to a single find, an

¹³⁹ Ibid., ch. 6E-43.6(d).

¹⁴⁰ Markell interview, 3 March 2003.

¹⁴¹ Ibid.

extra day would allow for an adequate amount of time for a burial council member to participate in a final decision by DLNR. Therefore, the time restriction argument as to the lack of burial council input in DLNR decisions concerning inadvertent finds is not compelling. Furthermore, Markell admitted that he believed that there should be more burial council participation. According to Markell, "[w]e would rather have the island burial councils make these decisions and spread the kaumaha, or emotional burden, across several people than just one or two."¹⁴³

The issue concerning the lack of burial council involvement in final DLNR determinations was addressed during the Hōkūli‘a preliminary hearing. Testimony during this hearing included that of Markell.¹⁴⁴ According to his testimony, he had not been notified by DLNR/SHPD prior to the issuance of grading and grubbing permits at Hōkūli‘a.¹⁴⁵ Thus, no burial plan had been initiated before construction of the area had begun. According to the testimonial records;

Under questioning it became apparent that Mr. Markell wasn't even aware at the time that his supervisors had signed off on the permits or that construction had begun at Hōkūli‘a. The first he heard of it was at a Hawai‘i Island Burial Council meeting in February 1999 when complaints were raised by Heather Cole, a council member. Mr. Markell said he did not agree with the permit approvals but "was just busy trying to do my job." He said representatives of Hōkūli‘a, Rick Humphreys and Dick Frye phoned him early March 1999 about the possible approvals of subsequent permits. Mr. Markell stated that he made it clear he would not approve anything until the Burial Treatment Plan was adopted.¹⁴⁶

¹⁴² Hawai‘i, *Hawai‘i Revised Statutes* (2002), ch. 6E-43.6(c).

¹⁴³ Markell interview, 3 March 2003.

¹⁴⁴ Jack Kelly, Hōkūli‘a Article, 9-11 April 2001, *available at* <http://www.hi.sierraclub.org/kealakekua/newsrelease.htm#4/9>.

¹⁴⁵ Ibid.

¹⁴⁶ Ibid.

Did DLNR/SHPD supervisors simply make a mistake by issuing the permits prior to consultation with the burial program section (burial councils) of SHPD (prior to a Burial Treatment Plan), or were their management actions unethical? Could there have been major benefits accrued by the supervisors in failing to institute a plan and allowing the issuance of permits? If historic preservation laws are being circumvented to benefit a few individuals, this could have disastrous effects upon the preservation and protection of native Hawaiian burials, burial sites, burial practices, and native Hawaiian culture in general. According to State Auditor Higa, "[t]he department's [DLNR's] haphazard approach to its responsibility to coordinate and manage the State's burial sites reflects an overall lack of respect for the native Hawaiian culture."¹⁴⁷

Yet another DLNR/SHPD enforcement failure revolves around DLNR/SHPD's responsibilities in regulating archaeological activities [per HRS Chapter 6E-3(13)]. Ethical concerns surround the archaeological surveys conducted as a prerequisite to receiving approvals for development. As previously stated, there are no ethical standards promulgated by procedural rules within DLNR guiding the actions of archaeologists.¹⁴⁸ Following the aforementioned argument, if archaeological surveys are poorly done (perhaps even unethically done) and do not accurately reflect the number of burials (an undercount), then the subsequent process for the DLNR/SHPD supervisors is made even more discretionary. Thus, if a survey erroneously reports only a few burials, wherein there are actually many more in the area surveyed, but which are not reported, these

¹⁴⁷ Office of the State Auditor, *Investigation of the Department of Land and Natural Resources' Process for Developing Recommended Candidate Lists for Appointment to the Island Burial Councils*, Report No. 04-15 (Hawai'i, December 2004), 29.

burials will inadvertently be found during construction, allowing DLNR/SHPD to have full discretionary power as to their future. However, if these burials were properly reported in the initial survey, the burial councils would be immediately informed and their role in preservation consultation would be direct and instantaneous.

The lack of DLNR/SHPD's archaeological regulation, which leads to the probable poor or unethical archaeological surveys, was stated in Judge Ibarra's December order.¹⁴⁹ Judge Ibarra found that "DLNR/SHPD continued to inappropriately rely upon information supplied by Oceanside's [developer's] archaeologists and employees, rather than on independent inspections and investigations conducted by DLNR/SHPD staff..."¹⁵⁰ Moreover, Judge Ibarra viewed DLNR/SHPD's inaction relating to archaeological regulation or enforcement as a "concurrence with the developer..."¹⁵¹ These issues will be explored in the following chapter of this paper.

DLNR/SHPD has also failed to protect native Hawaiian burials, burial sites, and burial practices at Hōkūliʻa because of its inadequate and careless working methods and conditions, duties that are a part of its enforcement responsibilities in conducting surveys and inventories of burial sites [per HRS Chapter 6E-3(3)]. DLNR/SHPD has not only poorly documented and classified historic burials, but also has misplaced skeletal remains because of shoddy storage techniques.¹⁵² According to State Auditor Higa,

The division also failed to ensure the safekeeping of historical artifacts in its

¹⁴⁸ Office of the State Auditor, *Audit of the State Historic Preservation Division of the Department of Land and Natural Resources, Report No. 02-20* (Hawaiʻi, December 2002), 13.

¹⁴⁹ Kelly, Civ. No. 00-1-0192K.

¹⁵⁰ Ibid.

¹⁵¹ Ibid.

¹⁵² Office of the State Auditor, *Audit of the State Historic Preservation Division of the Department of Land and Natural Resources, Report No. 02-20* (Hawaiʻi, December 2002), summary.

custody...Furthermore, the division's inventory of human skeletal remains is piecemeal and does not routinely provide geographical information...The inadequate inventory of human skeletal remains coupled with overcrowded storage conditions makes it difficult for the division to account for all remains and to ensure their timely re-interment.¹⁵³

Archaeologist Theresa Donham, who worked at DLNR from 1991 until 1997, concurred with the auditor's statement. She stated that "[t]he division makes little use of tools like the Internet, e-mail, standard application checklists or computer databases that pinpoint critical areas of the state that need protection."¹⁵⁴ She also noted that "[w]ith the information age here, I don't see how it [DLNR's current system] can survive. It just hasn't moved forward with the times."¹⁵⁵

DLNR/SHPD has also mismanaged its staff. According to State Auditor Higa, DLNR's "administrator also allowed staff to engage in outside employment during state time. For example, the archaeology branch chief routinely teaches courses at the University of Hawaii during his normal work hours."¹⁵⁶ Thus, valuable archaeological expertise that should be used in the field, in the protection and preservation of archaeological resources, is spent illicitly on UH campus. DLNR/SHPD's inadequate handling of historic entities using substandard methods as well as its cavalier management of its staff ultimately leads to an unsatisfactory means of preserving and protecting native Hawaiian burials, burial sites, and burial practices.

Although DLNR/SHPD has failed in many of its enforcement responsibilities, there could be two possible explanations for its shortcomings. One explanation could be

¹⁵³ Ibid.

¹⁵⁴ Adams, *available at* <http://www.moolelo.com/hist-pres-dist-fix.html>.

¹⁵⁵ Ibid.

¹⁵⁶ Office of the State Auditor, *Audit of the State Historic Preservation Division of the Department of Land and Natural Resources, Report No. 02-20* (Hawai'i, December 2002), summary.

the lack of funding at DLNR. According to the Maui activist Dana Naone Hall, budget restraints are to blame for DLNR/SHPD's faults, such as inadequate record keeping and poor storage techniques. Accordingly, she stated that "[i]t is obvious to anyone who has worked closely on historic preservation matters that the State Historic Preservation Division's primary problem is a lack of adequate funding."¹⁵⁷ She further noted that the "underfunding is the cause of the division's most serious deficiency: the inability to hire sufficient personnel to conduct necessary historic preservation program activities."¹⁵⁸

Another explanation for DLNR/SHPD's inadequacies in the historic preservation process is the preservation laws themselves. To begin with, historic preservation laws are activated only when private landowners request land use permits or variances from a governmental agency.¹⁵⁹ Thus, because the law has only required the preservation process to be enacted when permits are requested by private landowners, construction-like activity not requiring a permit will not activate preservation laws or measures. Burial desecration will likely materialize when a permit is not needed for the construction, alteration, or improvement of private land that affects historic resources.

Moreover, HRS Chapter 6E-10 unintentionally allows for abuses of power and the circumvention of the law, which leads us to the following chapter of this paper.

¹⁵⁷ Crystal Kua, "Lawmakers call for Audit of Isle Preservation Office: Critics Say the State Division Wasted Taxpayers' Dollars," 28 March 2002, *available at* <http://starbulletin.com/2002/03/28/news/story1.html>.

¹⁵⁸ *Ibid.*

¹⁵⁹ Hawai'i, *Hawai'i Revised Statutes* (2002), ch. 6E-10.

CHAPTER III

BURIAL WRONG NUMBER TWO: FLAWS WITH BURIAL PRESERVATION LAWS' APPLICATION

Yet another failure in the actuation of HRS Chapter 6E surrounds the misapplication of the law. Because of the built-in conflict of interest flaw in HRS Chapter 6E, many contract archaeologists are not as accurate or thorough in their archaeological surveys. Thus, many contract archaeologists find themselves working on behalf of their developer-employers rather than working towards the legally mandated preservation of native Hawaiian burials. Consequently, during the construction of many developments throughout Hawai'i, thousands of native Hawaiian burials are destroyed.

The Hawai'i Legislature created HRS Chapter 6E to preserve and protect historic entities including native Hawaiian burials and burial practices.¹⁶⁰ In order to fulfill the Legislature's aforementioned preservation goal, various organizations, public as well as private, shall work together.¹⁶¹ For example (and as previously discussed) DLNR/SHPD has a substantial administrative/enforcement role in the preservation of native Hawaiian burials. In addition, private archaeological firms also participate in the preservation process.¹⁶² According to HRS Chapter 6E-10(a)(3):

Before any construction, alteration, disposition or improvement of any nature, by, for, or permitted by a private landowner may be commenced which will affect an historic property...the landowner shall notify the department [DLNR/SHPD and]...[w]ithin ninety days after notification, the department [DLNR/SHPD] shall...[i]n coordination with the owner, undertake or permit the investigation, recording, preservation, and salvage of any historical information deemed necessary to preserve Hawaiian history, by any qualified agency for this purpose.¹⁶³

¹⁶⁰ Ibid., ch. 6E-1.

¹⁶¹ Ibid.

¹⁶² Ibid., ch. 6E-10(a)(3).

¹⁶³ Ibid.

As stated by HRS Chapter 6E-10(a)(3), any "qualified agency" for the purpose of the gathering of historical information would include private archaeological firms. Moreover, HRS Chapter 6E-10(a)(3) stipulates that the private landowner or developer must facilitate and fund the archaeological survey (usually done by private archaeological firms) that is required in the preliminary stages of the historic preservation process.¹⁶⁴

However, archaeological firms (and their developer-employers) have misapplied HRS Chapter 6E-10(a)(3), thus creating the ineffective actuation of the burial laws in the preservation of native Hawaiian burials and burial practices. HRS Chapter 6E-10(a)(3) has also been misapplied at Hōkūliʻa. This misapplication surrounds the various preservation approaches, and thus translates into differences between archaeological preservation, which has unfortunately materialized into developer-driven contract archaeology in many developments in Hawaiʻi, and native Hawaiian preservation.

Although "preservation" is defined by the *Webster's Dictionary* as the act or state of being kept safe from "injury, harm, or destruction,"¹⁶⁵ the concept of preservation has variously interpreted meanings. For example, within the early American preservation movement, preservationists differed in their approaches to preservation.¹⁶⁶ In 1913 Edward Hall, a preservationist, explored the definition of preservation.¹⁶⁷ According to Hall:

¹⁶⁴ Ibid.

¹⁶⁵ *Webster's Seventh New Collegiate Dictionary* (1969), s.v. "preservation."

¹⁶⁶ Charles Bridgham Hosmer, *Presence of the Past: A History of the Preservation Movement in the United States Before Williamsburg* (New York: G.P. Putnam's Sons, 1965), 193. According to Hosmer, "[a]rchitects frequently 'preserved' structures by means of sketches, floor plans and measured drawings. Museum directors 'preserved' by moving houses and woodwork to new locations. Antiquaries recorded buildings in books through sketches or photographs." Ibid.

¹⁶⁷ What Hall found to be "worthy" of preservation in 1913 would not include many native Hawaiian burials, especially if these were less than one hundred years old.

Some places were "use-historic" because famous Americans had been born in them or had lived in them, or because they had been the scene of important events. Such structures, reasoned Hall, could become "historic" within the lifetime of one man. Sites that did not have any connection with particular men or events were only "time-historic," [and thus] would therefore have to reach a certain age in order to be worthy of preservation.¹⁶⁸

Hall's early notion of preservation also differed greatly from early scientific approaches to preservation. Archaeology, anthropology, and other "ologies" are Western scientific approaches, or rather technological approaches to preservation.¹⁶⁹ Even today, approaches to preservation, whether scientific or theoretical, differ greatly. Thus, the necessary question to ask is; what is really preserved through the archaeological study, for example, of historic sites, or more specifically, native Hawaiian burials?

There are differing views between archaeological/anthropological/ethnological preservation and cultural or indigenous preservation. Although Western scientific preservation, which is now commonly accepted as the anthropological and archaeological study of a culture or an associated place, is directed towards the continuation of "jeopardized"¹⁷⁰ cultures, it may in fact continue to denigrate cultures through its preservation methods.¹⁷¹ Accordingly, Alexander Stille, a historian who has researched the notion that there exists a cycle of preservation and destruction which then perpetuates itself, notes that:

The loss of historical memory may be directly related to our thirst for knowledge and information. "In physics, we have the Heisenberg uncertainty principle, which says that we change what we observe. Something similar happens in archaeology: 'You

¹⁶⁸ Hosmer, 261-262.

¹⁶⁹ Alexander Stille, *The Future of the Past* (New York: Farrar, Strauss and Giroux, 2002), xviii.

¹⁷⁰ James Clifford, *The Predicament of Culture: Twentieth-Century Ethnography, Literature, and Art* (Cambridge, Massachusetts, and London, England: Harvard University Press, 1988), 147.

¹⁷¹ Stille, xix.

study it, you kill it," says Egyptologist Mark Lehner... ¹⁷²

Furthermore, anthropologists are taught to preserve as well as document indigenous cultures.¹⁷³ According to Stille, "...one of the central ironies of the field [of anthropology] is that the arrival of the anthropologist has generally been part of the process of extending Western influence."¹⁷⁴ Stille finds that anthropologists, through their scientific study and subsequent preservation of cultures, tend to transform cultures. For example, he describes how an anthropologist spent many years studying and documenting an island off the coast of Papua New Guinea called Kitawa.¹⁷⁵ There he learned the importance of their traditions and customs concerning oral poetry.¹⁷⁶ Because many of the Kitawan elders have died,¹⁷⁷ the anthropologist's work is what remains of their oral traditions.¹⁷⁸ Ironically, these "oral" traditions are no longer oral in that their documentation is found within books, as well as notes found in films, photographs, and tape recordings;¹⁷⁹ these are Western forms of documentation not consistent with Kitawan oral traditions and customs. Stille notes:

Thus Scoditti's [the anthropologist's] written work has become the principle repository of some of the island's traditions yet, at the same time, writing-in the form of the Christian Bible and as transmitted by the missionary schools and the state educational system-has discouraged and replaced these traditions. The vehicle of the first great information revolution, writing, is itself a tool both of memory and loss.¹⁸⁰

¹⁷² Ibid., xvii.

¹⁷³ Ibid., xix.

¹⁷⁴ Ibid.

¹⁷⁵ Ibid.

¹⁷⁶ Ibid., 156.

¹⁷⁷ Ibid., 179.

¹⁷⁸ Ibid., xix.

¹⁷⁹ Ibid., 158.

¹⁸⁰ Ibid., xix.

James Clifford, an academic who has focused on issues surrounding anthropology, literary theory and cultural criticism, notes that ethnography, the systematic recording of human cultures, is "a translation of experience into textual form."¹⁸¹ What happens to the experience when it is translated? Can an experience actually be translated, or would that translation make it a new experience? It could be argued that the experience changes once it is translated. Thus, Western science, as seen in anthropology and archaeology, can be very problematic to the preservation of culture.

Archaeology and anthropology are also scientific inquiries that embody notions of comparisons, statistics, numbers and charts. According to Patrick Vinton Kirch, an archaeologist who has studied the archaeology of the Hawaiian islands for many years, the science of archaeology encompasses concepts such as "discovery, study, and interpretation."¹⁸² Furthermore, Kirch notes that Hawaiians' relationship with their environment, as well as Hawaiian culture in general, can be studied, interpreted, and understood "through analysis of excavated bones and plant remains, through pollen analysis of sediment cores, identification of carbonized wood in ancient hearths and oven pits, and other techniques."¹⁸³

Many archaeologists view culture through scientific lenses. They see an archaeological site as one would see a scientific phenom in a petri dish. Although their intent is to preserve native Hawaiian culture, for example, their methods and theories are purely products of the haole. And as Kahikāhealani Wight describes in her *Illustrated*

¹⁸¹ Clifford, 25.

¹⁸² Patrick Vinton Kirch, *Legacy of the Landscape: An Illustrated Guide to Hawaiian Archaeological Sites* (Hawai'i: University of Hawai'i Press, 1996), 7.

¹⁸³ Ibid., 8.

Hawaiian Dictionary, haole was "previously used to denote non-Hawaiians of any race"¹⁸⁴ and thus, archaeology in general can be seen as a non-Hawaiian view or interpretation of native Hawaiian culture. Similarly, Martha Sharp Joukowsky¹⁸⁵ believes that many archaeologists unconsciously work within their own value-laden parameters. Joukowsky notes that:

Often we would like to believe that as archaeologists we are disclosing an inalienable truth. However what we are actually doing is interpreting a voiceless Past based on our own values: what we believe is important to excavate and what questions we feel must be addressed in regard to a specific civilization or group of people.¹⁸⁶

Unfortunately, through the study and interpretation of native Hawaiian culture by many archaeologists, a fabricated Western cultural past is created (and accepted by society) for native Hawaiians, which can in many ways destroy native Hawaiian culture.

Native Hawaiians do not scientifically study their culture through intrusive examinations of their relatives' remains, such as photography and radio carbon dating.¹⁸⁷ Moreover, Haunani-Kay Trask, former Director of the Center for Hawaiian Studies at UH Mānoa, as well as a key member of Ka Lāhui Hawai'i, a native Hawaiian organization, states that:

Unlike white people, [Hawaiian] culture is not obsessed with [the] "scientific" study of

¹⁸⁴ Kahikāhealani Wight, *Illustrated Hawaiian Dictionary* (Hawai'i: The Bess Press, 1997), 16.

¹⁸⁵ In 1991, Martha Joukowsky was the president of the Archaeological Institute of America, a professional Archaeologist, a 11-year member of the Society of Professional Archaeologists, as well as an Associate Professor of Archaeology at Brown University. Martha Joukowsky, "Ethics in Archaeology: An American Perspective" in *Berytus*, (1991), available at <http://almashriq.hiof.no/ddc/projects/archaeology/berytus-back/berytus39/ethics/>.

¹⁸⁶ Ibid.

¹⁸⁷ In fact, the law recognizes this, and Hawai'i Administrative Rules Subsection 13-300-32(c) "limits the physical examination of remains to observation and prohibits intrusive examination (photography) and other methods such as radio carbon dating, since the *iwi* [bones] would be destroyed." Office of the State Auditor, *Investigation of the Department of Land and Natural Resources' Process for Developing Recommended Candidate Lists for Appointment to the Island Burial Councils*, Report No. 04-15 (Hawai'i, December 2004), 21.

human skeletons. [Native Hawaiians] have much aloha for [their] ancestors, and think of their burials as worthy of both ceremony and respect...Some things are sacred, even though, to the West, nothing is."¹⁸⁸

Joukowsky similarly notes that many archaeologists have not incorporated "cultural respect" into their archaeological endeavors.¹⁸⁹ In fact, Joukowsky focuses on the archaeological studies of Native Americans, stating that:

Historically most archaeological endeavors in the United States have held little concern for Native American values – beginning with Thomas Jefferson's opening of an Indian mound in Virginia... In spite of a recent surge of training in cultural anthropology, it seems archaeologists and anthropologists often fail to carry over their learned classroom rhetoric of sensitivity to actual dealings with sacred Native American sites.¹⁹⁰

Without ignoring the roles that both cultural anthropology and archaeology have played within the exploration of indigenous cultures, it is important to note that the sciences continue to dismiss, or possibly misunderstand, the significance of respect within indigenous or Native cultures, such as Native American and native Hawaiian cultures. Therefore, many archaeologists preserve the scientific integrity of artifacts, human remains and historical sites, and do not necessarily preserve the culture of these aforementioned entities, whereas Native communities fight to preserve their cultural heritage associated with the sites or artifacts. Trask views distinct differences between haole preservation and Hawaiians' love and respect for their land and their ancestors. She

¹⁸⁸ Haunani-Kay Trask, *From a Native Daughter: Colonialism and Sovereignty in Hawai'i* (Hawai'i: Common Courage Press, 1993), 173.

¹⁸⁹ Joukowsky, available at <http://almashriq.hiof.no/ddc/projects/archaeology/berytus-back/berytus39/ethics/>.

¹⁹⁰ Ibid.

notes that haole preservation lacks "an anger and attachment that comes from deep cultural wounding of [native Hawaiians'] ancient love for [their] land."¹⁹¹

Most importantly (and unfortunately), archaeology has also become a privatized science or contract archaeology. According to Joukowsky, ironically, contract archaeology developed under the passage of the environmental protection laws of the 1970s.¹⁹² Contract or business archaeology occurs when the archaeology or the archaeological survey (as mandated by law) is ordered by a private consulting firm who works under a contract for a development company (or sometimes a government agency) for profit.¹⁹³ Joukowsky believes that "[p]erhaps the most dramatic ethical vacillations [in archaeology] are a result of the emergence of contract...archaeology in the United States which [has] delivered archaeologists from their insular academic world to a broad spectrum of professional and political communities."¹⁹⁴ Thus, Joukowsky notes that contract archaeologists then find themselves in projects that become "ethical mazes, logistic nightmares and business fiascoes."¹⁹⁵ Given the overwhelming considerations outside the actual scientific or archaeological work, it is safe to assume that many contract archaeologists and their associated surveys are not as accurate and thorough as they should or need be. For example, a contract archaeologist may find himself concerned with pleasing his employer (his bread-and-butter). He may be consumed only with preparing time sheets, as well as other business-like documentation, and thus may

¹⁹¹ Trask, 252.

¹⁹² Joukowsky, *available at* <http://almashriq.hiof.no/ddc/projects/archaeology/berytus-back/berytus39/ethics/>.

¹⁹³ Ibid.

¹⁹⁴ Ibid.

¹⁹⁵ Ibid.

overlook many important archaeological finds. Moreover, a contract archaeologist may also find his ethical values compromised. For example, given that archaeologists (within the field of contract archaeology) "owe their existence to pleasing the client [or developer],"¹⁹⁶ when and if they find something at the site that hinders the developer's prospects of actual development, the find may be disregarded even if it has significant cultural worth (in order to please the developer with the progression of the development project).

Also known as "cultural resource management" or CRM, Kirch believes that contract archaeology is "driven by the pressures of modern land development."¹⁹⁷ Unfortunately, many archaeological sites are located on lands appropriated for development.¹⁹⁸ Development (hotels, resort complexes, and golf courses) includes road expansions, water and electric lines, airports, harbors, and other (detrimental) infrastructures.¹⁹⁹ These infrastructures tend to endanger archaeological sites, and when archaeologists are hired to address the affected (or unaffected) sites, Kirch notes that even "[m]ore disturbing , archaeologists have tended to become linked in the public vision with land developers."²⁰⁰ According to Kirch:

Unfortunately, the great increase in the scope of archaeological work being carried out does not always seem to have been matched by concomitant gains in our knowledge of prehistoric Hawaiian culture. In part, this is a reflection of the nature of contract archaeology, where the defining parameters of a project are usually set by the boundaries of land development, rather than by significant research questions.²⁰¹

¹⁹⁶ Ibid.

¹⁹⁷ Kirch, *Legacy of the Landscape*, 9.

¹⁹⁸ Ibid.

¹⁹⁹ Ibid.

²⁰⁰ Ibid.

²⁰¹ Ibid., 20.

Trask accurately simplifies the nature of the archaeologist (especially the contract archaeologist), as well as the anthropologist as "a taker and a user. And if the people [native Hawaiians] who are taken suffer from the anthropologist's work, too bad; there is no moral responsibility which attaches to the anthropologists."²⁰²

Even the law, a supposed neutral force in preserving historic sites, allows itself to be tainted by external forces; forces that are seemingly against preservation. According to Marion Kelly:

It is still a struggle to convince members of the innumerable councils and commissions that *Kānaka Maoli* have rights to *wahi pana* (celebrated places) that were the sites of their traditional religious structures, and that those who claim to "own" those sites have something less than full alodial title. An environmental impact statement requires only that the "landowner" reveal the presence of historical sites and the impact of his development plans may have on them. What happens subsequently is a process that is often flawed, a process in which politically advantaged non- *Kānaka Maoli* make the final decisions. I have seen a beautiful *heiau* completely surrounded by a golf course, with foreign players hitting their golf balls over and sometimes onto the site.²⁰³

Kirch even admits that the law falters (as well) when dealing with human burials. He explains that "[p]rocedural inadequacies and loopholes in the present legal system clearly require correction (there have been many cases of 'legal' desecration of burials in recent years, especially on construction sites). Although reaching a satisfactory agreement between all viewpoints will not be easy."²⁰⁴ Although Kirch notes this prior to the establishment of Hawai'i's preservation law (the 1990 amendment that created a more stringent program to protect native Hawaiian burials and burial sites), the same legal

²⁰² Trask, 166-167.

²⁰³ Marion Kelly, "?" *Pana O'ahu: Sacred Stones, Sacred Land*, ed. Jan Becket and Joseph Singer (Hawai'i: University of Hawai'i Press, 1999), x.

²⁰⁴ Kirch, *Feathered Gods and Fishhooks* (Hawai'i: University of Hawai'i Press, 1985), 246.

problems exist today. In fact, Hawai'i's law governing the protection of historic and cultural vestiges unintentionally allows for abuses of power.

As previously discussed, HRS Chapter 6E-10(a)(3) specifies that the private landowner or developer must facilitate and fund the archaeological survey that is required. Thus, an archaeological survey could be seen as developer driven and amenable to manipulation. Consequently, an archaeologist will keep the developer's interest in mind when bidding for a job and, more importantly, when doing the archaeological survey, because the archaeologist will ultimately be employed and paid by the developer. Unfortunately, contract archaeology, or the beneficial relationship between the developer and archaeologist (and the subsequent archaeological survey) has been realized in many of Hawai'i's development projects, resulting in widespread native Hawaiian burials desecration. In the Hōkūli'a case, Native Hawaiian Legal Corporation ("NHL") attorneys have recognized the aforementioned beneficial relationship. NHL attorney Alan Murakami, one of the attorneys working for the plaintiffs in the Hōkūli'a case, believes that most of the problems associated with burials protection surround the beneficial relationship between the developers and archaeologists and the subsequent pro-developer archaeological surveys.²⁰⁵ Murakami believes that one possible alternative to the survey-relationship problem is to change the law to require that state employed archaeologists conduct surveys instead of independent archaeological firms hired by

²⁰⁵ Alan Murakami and Moses Haia, interview by author, 6 March 2003, Honolulu, HI. I interviewed Alan Murakami and Moses Haia at the Native Hawaiian Legal Corporation on Bishop Street. I not only gathered general information concerning native Hawaiian burial issues and the law, but also learned about their involvement in the Hōkūli'a case, as well as their opinions surrounding the decisions of the judge.

developers.²⁰⁶ As a state employee, an archaeologist and his subsequent survey would still be paid by the developer, but the money would be funneled and the job would be facilitated by the state.²⁰⁷ Therefore, Murakami believes that by framing the survey a certain way, the state archaeologist would not accrue special benefits, but rather, he or she would simply be doing an impartial job. Thus, archaeologists hired by the state would have less incentive to circumvent the law or rather, to fashion the surveys toward the interests of developers.²⁰⁸

Murakami's aforementioned proposed solution is promising, however, although the archaeologists would technically be working for the state, corruption on his or her part (as an individual) is still possible. Because large sums of money are involved in Hawai'i's development industry, surveys would most likely still be fashioned to benefit developers in exchange for more favorable working environments within the state system (even though it may be illegal...money still talks).

²⁰⁶ Ibid.

²⁰⁷ Ibid.

²⁰⁸ Ibid.

CHAPTER IV

BURIAL WRONG NUMBER THREE: FLAWS WITH BURIAL PRESERVATION LAWS' INTERPRETATION

Finally, the different interpretations of Hawai'i's burial laws, such as HRS Chapter 6E, and the associated legal solutions or expected outcomes, help to explain the ineffective actuation of the burial laws in the preservation of native Hawaiian burials and burial practices. These divergent understandings embody differing concepts of native Hawaiian cultural norms, specifically those relating to native Hawaiian burials and burial practices. Thus, these different meanings lend to different interpretations in the legal outcomes or the justice associated with native Hawaiian burial litigation in general.

The various understandings of culture, cultural norms, and more specifically, native Hawaiian cultural norms, help to explain the divergent expectations of legal outcomes in the Hōkūli'a case. Given its various meanings, many scholars have theoretically explored culture in an attempt to answer the quandry, "What is Culture?" Konai Helu Thaman, a Pacific island scholar, views culture as an inclusive concept. According to Konai Thaman, "...[c]ulture is defined as a shared way of living of a group of people, which includes their accumulated knowledge and understandings, skills and values, and which is perceived by them to be unique and meaningful."²⁰⁹ John H. Bodley gives "[a]n Anthropological Perspective"²¹⁰ on culture by stating that "culture involves at least three components: what people think, what they do, and the mental products they

²⁰⁹ Konai Helu Thaman, "Cultural Rights: A Personal Perspective," *Culture, Rights, and Cultural Rights: Perspectives from the South Pacific*, ed. Margaret Wilson and Paul Hunt (Wellington, Aotearoa, New Zealand: Huia Publishers, 2000), 1.

²¹⁰ John H. Bodley, "An Anthropological Perspective," *Cultural Anthropology: Tribes, States, and Global System* (1994), available at <http://www.wsu.edu:8001/vcwsu/commons/topics/culture/culture-definitions/bodley-text.html>.

produce."²¹¹ Similar to Konai Thaman's take on culture, John Bodley also notes that culture is made up of mental processes, values, beliefs, and the knowledge of a collective society.²¹²

Alternatively, legal anthropologist Sally Engle Merry, identifies culture as an exclusive notion. She finds that the concept of culture began as a differentiation marker between moderns and "primitives."²¹³ Accordingly, the notion of the superior over the inferior then evolved, and thus culture, or "kultur became a way of claiming separateness and superiority against a globalizing aristocracy of learning, language, and custom."²¹⁴ Moreover, Merry notes another concept associated with the evolution of culture. She states that there exist "contact zones" whereby different cultures meet and rationalize their differences, differences such as the relationship between the colonizer and the colonized.²¹⁵ Thus, culture reforms through these "contact zones," and as Merry explains, "[c]ulture in contact zones consists of contested and shifting signs and practices."²¹⁶ However, in Merry's aforementioned assessment of culture, there exist issues of bias. More specifically, she finds that the differences between cultures are usually negotiated through colonial perspectives, which are then based (or compared to) "an intolerant European imperialist audience,"²¹⁷ or rather, a Western norm. Therefore, a colonized culture is understood as different from a colonizing culture, however this difference is understood through colonial lenses, making the colonizing culture the norm (that which

²¹¹ Ibid.

²¹² Ibid.

²¹³ Sally Engle Merry, *Colonizing Hawai'i: The Cultural Power of Law* (Princeton, New Jersey: Princeton University Press, 2000), 28.

²¹⁴ Ibid., 29.

²¹⁵ Ibid., 28-29.

to compare all else to). With this follows a skewed understanding of the colonized culture, an understanding that seemingly creates a culture, never really understanding the culture for what it really is. Clifford also notes that this creation phenomenon is based on a Western norm.²¹⁸

Moreover, Clifford finds that not only does the West create the "other" culture, but it also furthers the invention of other cultures through the Western practice of culture collecting.²¹⁹ Accordingly, Clifford notes that the West gathers, owns, classifies, and values other cultures.²²⁰ Thus, through this collection process, real aspects of a culture could be lost because the collector may not deem it to be important enough to keep.²²¹

Scholars differ in their interpretations of culture, however, the consensus is that culture can be both inclusive as well as exclusive in its understanding. To those who interpret culture as their own, it began as a notion of inclusiveness, a way to bond within one's own group.²²² To those who understand culture as belonging to the "other," it became a concept of exclusiveness embodying differentiation, invention, and development. However culture is understood, it is a concept that is not static, it constantly evolves according to its interpreters.

²¹⁶ Ibid.

²¹⁷ Ibid.

²¹⁸ Clifford, 146.

²¹⁹ Ibid., 230-232.

²²⁰ Ibid., 232.

²²¹ Ibid., 231.

²²² Many prior notions of cultural inclusiveness have evolved into modern notions of exclusiveness. Many indigenous groups, for example, now differentiate themselves from others to not only create group bonding, but to also develop "power" within one's own group in order to promote cultural rights within the larger societal framework. As Konai Thaman notes, "[c]ultural rights would refer to the collective rights of people who identify with particular cultural groups, to self-determination, survival, and sustainability in the context of global, political, economic and social realities." Thaman, 4.

Accordingly, differing interpretations of culture sometimes leads to what may be called a culture clash. Moreover, different interpretations of a cultural norm may then translate into different meanings according to these interpretations. For example, adhering to specific cultural norms, such as a prescribed cultural behavior, helps many indigenous people to create a solidarity by which they can find some sense of self-determination in a Western dominant society. Culture in general or specific cultural behaviors can thus be a means to identify or self-determine, establishing a uniqueness through differentiation. Alternatively, Western views or interpretations of the aforementioned culture or cultural norms may have a completely different meaning from that of self-determination. This Western meaning could consist purely of exoticism and entertainment. The culture clash then exists between different meanings: self-determination for indigenous peoples versus entertainment for the Western dominant society.

Following this reasoning, Konai Thaman discusses the different interpretations of identity between Western and Pacific peoples.²²³ According to Thaman, "[w]hereas Western theories of identity emphasize biological descent, innate characteristics and unchanging boundaries, Oceanic theories of cultural identity emphasise environment, behaviour, and (situational) flexibility."²²⁴ E.S. Craighill Handy, an anthropologist, who collaborated with Mary Kawena Pukui, a Native Hawaiian cultural specialist, on a study of the Hawaiian family in Ka'u in the 1930's, similarly find that there are distinct

²²³ Ibid.

²²⁴ Ibid.

identifiers for the Oceanic identity, specifically for native Hawaiians.²²⁵ For Hawaiians, their cultural identity in part corresponds to their connectedness to their land, and Handy and Pukui note that in Ka‘u:

The expanded and all-inclusive family or ‘*ohana*, and the home-land or ‘*aina*, were two complementary factors...The term ‘*aina* represented a concept essentially belonging to an agricultural people, deriving as it did from the verb ‘*ai*, to feed, with the substantive suffix *na* added, so that it signified "that which feeds" or "feeder." Literally, then, a Ka-‘u man in speaking of the locality in which he was born and reared and dwelt, was thinking of this native soil as his feeder. Land of birth was also referred to as *kula iwi* (plain of one's bones) or *one hanau* (sand or soil of birth).²²⁶

The Hawaiian creation story, or Kumulipo, illustrates the Hawaiian-land relationship, which serves as an important cultural norm that contributes to a Hawaiian cultural identity. According to the Kumulipo, Wākea and Papa, the sky-father and earth-mother, were said to be the parents of Hawai‘i, Māui, Kaua‘i, Ni‘ihau, Lehua, and Ka‘ula islands.²²⁷ Wākea and Papa were also considered the ancestors of Kā Lāhui Hawai‘i.²²⁸ Accordingly, their first human offspring was their daughter, Ho‘ohōkūkalani.²²⁹ Wākea felt desire for his daughter (a great beauty), seduced her, and their first child, Hāloa-naka, was an unformed foetus who was born prematurely.²³⁰

They buried Hāloa-naka in the earth, and from that spot grew the first *kalo* plant. The

²²⁵ Handy and Pukui, 2-4. E.S. Craighill Handy and Mary Kawena Pukui collaborated in the 1930s when Mrs. Pukui was working with E.S. Craighill Handy and his wife, Elizabeth Green Handy, in Ka‘u. The three of them collected information from Mrs. Pukui's elder relatives in order to reconstruct an adequate record of native Hawaiian heritage, traditions and culture in Ka‘u. Ibid., ix-x.

²²⁶ Ibid., 3.

²²⁷ Lilikalā Kame‘eleihiwa, *Native Land and Foreign Desires: Pehea lā e Pono Ai? How Shall We Live in Harmony?* (Honolulu: Bishop Museum Press, 1992), 23.

²²⁸ Ibid.

²²⁹ Ibid.

²³⁰ Ibid., 23-24. Furthermore, Kame‘eleihiwa notes that Wākea did not want Papa to know of his desire for their daughter, so a kahuna or priest came up with a religious solution which has come to be known as the ‘Aikapu. Ibid., 23. The kahuna suggested that the ‘Aikapu, or the religion that separates males and females in the act of eating, be coupled with a required monthly four night set-aside for the special worship of male Akua. Ibid. It was kapu for the men to sleep with their women on these four nights, and thus Wākea was able to be alone with his daughter on one of these kapu nights. Ibid., 23-24.

second child, named Hāloa in honor of his elder brother, was the first Hawaiian *Ali'i Nui* and became the ancestor of all the Hawaiian people. Thus the *kalo* plant, which was the main staple of the people of old, is also the elder brother of the Hawaiian race, and as such deserves great respect.²³¹

Lilikalā Kame'eleihiwa also explains Hawaiians' relatedness to their land. In her book, *Native Land and Foreign Desires: Pehea lā e Pono Ai?*, she notes that:

Hawaiian identity is, in fact, derived from the Kumulipo, the great cosmogonic genealogy. Its essential lesson is that every aspect of the Hawaiian conception of the world is related by birth, and as such, all parts of the Hawaiian world are one invisible lineage. Conceived in this way, the genealogy of the Land, the Gods, Chiefs, and people intertwine with one another, and with all the myriad aspects of the universe...Today we Hawaiians use genealogical relationships to establish our collective identity...²³²

Kame'eleihiwa further illustrates the Hawaiian cultural identity as it relates to Hawaiians' coalescence with and duty to their land.²³³ Accordingly, she states that:

...Throughout Polynesia [as in Hawai'i], it is the reciprocal duty of the elder siblings to *hānai* (feed) the younger ones, as well as to love and *ho'omalu* (protect) them. The relationship is thereby further defined: it is the *'Āina*, the *kalo*, and the *Ali'i Nui* who are to feed, clothe, and shelter their younger brothers and sisters, the Hawaiian people. So long as younger Hawaiians love, serve, and honor their elders, the elders will continue to do the same for them, as well as to provide for all their physical needs.²³⁴

Thus, one defining cultural norm for a Hawaiian cultural identity is based upon the familial and nurturing relationship between the Hawaiian people and their land.

Kame'eleihiwa calls this Mālama *'Āina*, and states that "[i]n Hawaiian, this perfect harmony is known as *pono*, which is often translated in English as 'righteous,' but actually denotes a universe in perfect harmony."²³⁵ This land-relationship cultural norm or behavior, as a cultural identifier, not only serves the function or meaning of *pono*, as

²³¹ Ibid., 24.

²³² Ibid., 2.

²³³ Ibid., 25-26.

²³⁴ Ibid., 25.

previously stated, but also is interpreted as the broader meaning of group solidarity and self-determination for native Hawaiians.

Many indigenous people, such as native Hawaiians, adhere to certain cultural norms that create group solidarity, thus differentiating themselves in order to gain some form of self-determination or cultural resistance to colonization within a Western dominant society. Thus, native Hawaiians continue to manipulate their cultural identity in their struggle, and they have used land, or the concept of aloha 'āina, as cultural norm or symbol in their political organizing towards some form of sovereignty or resistance to colonization.²³⁶ According to Noenoe K. Silva, an Associate Professor of Political Science and Hawaiian Language at the University of Hawai'i at Mānoa, as well as the author of *Aloha Betrayed: Native Hawaiian Resistance to American Colonialism*:

...[A]loha 'āina exalts the land. It refers to the appreciation of the beauty of the land, about which both ali'i and maka 'āinana have composed hundreds, perhaps thousands, of songs. Every island, every district, every valley and stream has had songs composed lauding their beauty, but aloha 'āina goes beyond love of beauty as well. The Kanaka Maoli have a genealogical, familial relationship to the land. The islands were said to have been conceived and born like human beings, of the same parents, Papahānaumoku "Papa who gives birth to islands" and Wākea, the sky father, and Ho'ohōkūkālani, "she who creates the stars in the heavens." The po'e aloha 'āina adapted their concept of aloha 'āina to the Euro-American concepts and structures of nationhood and nationalism as resistance to colonization, although they knew that it was those very structures that were overtaking them. They continued to create and recreate the inner domain of spiritual and cultural identity based on their love for the land, even while operating within the U.S. political arena.²³⁷

Thus, the Hawaiian land-relationship has evolved in its meaning and has become a symbol. Although it retains traditional cultural norms of pono, it also maintains a

²³⁵ Ibid.

²³⁶ Noenoe K. Silva, *Aloha Betrayed: Native Hawaiian Resistance to American Colonialism* (Durham and London: Duke University Press, 2004), 11.

²³⁷ Ibid.

Hawaiian cultural identity through group uniqueness, which in turn creates a political foundation that establishes a source of resistance to colonization and thus, some form of sovereignty for native Hawaiians.

Similarly, the preservation of burials and burial practices for native Hawaiians encompasses various meanings. Not only do native Hawaiians interpret preservation as an inherently traditional norm, but preservation has also become a cultural identifier, which differentiates a Hawaiian identity from that of a Western identity. Thus, this identity may then have the ability to engender power, and as Silva notes, the revitalization (or preservation) of

Hula (dance), mo'olelo (history, legend, story) and especially genealogy [which includes the preservation of burials] contributed to that inner domain [of cultural identity], which was carefully guarded and preserved so that the Kanaka Maoli²³⁸ of today have a spiritual/cultural identity of their own on which to base their new anticolonial movement.²³⁹

Native Hawaiian cultural norms have evolved into meaningful symbolism, such as self-determination within an anti-colonial movement towards native sovereignty. However, many non-Hawaiians find that culture and cultural norms in general are "merely an abstraction, not a real entity."²⁴⁰ Moreover, these very same native Hawaiian cultural norms are assigned divergent meanings through Western, or non-Hawaiian interpretations. For example, the West has commercialized native Hawaiian cultural norms, such as hula, mo'olelo, and genealogy. The West, the haole, or the non-Hawaiian

²³⁸ In this paper, instead of the term "Kanaka Maoli," I use the term "native Hawaiian."

²³⁹ Silva, 7.

²⁴⁰ Bodley, available at <http://www.wsu.edu:8001/vcwsu/commons/topics/culture/culture-definitions/bodley-text.html>.

has profited (with the collaboration and cooperation of native Hawaiians)²⁴¹ from native Hawaiian cultural norms. According to Trask, "[d]espite their real expression of our culture, the hula and Hawaiian language are easily incorporated into, and transformed by, tourist promotions, hotel festivities, and the ideological sea of commercialism that washes over our islands."²⁴² Thus, the current non-Hawaiian interpretation of hula, for example, as an exotic form of entertainment, means commercial gain. The non-Hawaiian or Western view of native Hawaiian culture and cultural norms as commercial gain, or merely as an abstraction, is problematic because "treating culture [this way] may lead one to deny the basic human rights of small-scale societies and ethnic minorities [such as native Hawaiians] to maintain their cultural heritage in the face of threats from dominant societies [such as the West/non-Hawaiians]."²⁴³

Moreover, Western notions of preservation, whether performed through science or through the law, differ from cultural or indigenous native Hawaiian preservation as well. For native Hawaiians, sacred sites, such as heiau, burial mounds, or fishponds, were created within a "Hawaiian cultural values system; their empowerment comes from that culture, its people, and their rituals."²⁴⁴ Native Hawaiians value and respect practices associated with their dead. In fact, "solidarity of living 'ohana, the kupuna (ancestors), and 'aumakua (guardian spirits), were the considerations affecting all family

²⁴¹ Noenoe K. Silva, e-mail correspondence with author, Honolulu, Hawai'i, 13 June 2005. Unfortunately, "...the commercialization of [Hawaiian] culture happened and continues to happen only with the collaboration and cooperation of Hawaiians, not in a vacuum by [the] haole." Ibid.

²⁴² Trask, 116.

²⁴³ Bodley, available at <http://www.wsu.edu:8001/vcwsu/commons/topics/culture/culture-definitions/bodley-text.html>.

²⁴⁴ *Pana O'ahu: Sacred Stones, Sacred Land*, ed. Jan Becket and Joseph Singer (Hawai'i: University of Hawai'i Press, 1999), xxvii.

ceremonials."²⁴⁵ Moreover, native Hawaiians view many acts toward the bones of their ancestors as sacrilegious, and thus, the preservation of these bones are of the utmost importance. For example, Kamakau notes that Hawaiians used to hide the bones of their dead to prevent others from using the bones to make fishhooks or arrows (sacrilegious acts).²⁴⁶ Today, the Western scientific methods that archaeologists and anthropologists employ to preserve and better understand native Hawaiian burials, as interpreted through a Hawaiian cultural perspective, are actually disturbances to the burial areas, as well as desecration in the mishandling and relocation of the bones. Thus, the same aura of disrespect remains in the techniques employed in modern archaeology and anthropology as it existed when bones were desecrated in their use as fishhooks, etc. For instance, bones of ali'i were hidden to prevent desecration, "in order that they not be made into arrows to shoot rats with, into fishhooks, needles for sewing tapa, or kahili handles..."²⁴⁷ Hawaiians understood that acts of desecration were committed in order to heap reproach on the descendants of the dead.²⁴⁸ Similarly, it can be argued that today, the mishandling and relocation of burials associated with various developments (such as Hōkūli'a) are also acts of reproach against the lineal descendants of the aforementioned burials.²⁴⁹

Therefore, for many native Hawaiians, the preservation of a sacred site is not simply a matter of scientific curiosity or a legal experiment, but rather a cultural

²⁴⁵ Handy and Pukui, 75.

²⁴⁶ Samuel M. Kamakau, *Ruling Chiefs of Hawai'i*, rev. ed. (Honolulu: Kamehameha Schools Press, 1961), 215-218.

²⁴⁷ *Ibid.*, 215.

²⁴⁸ *Ibid.*, 217.

²⁴⁹ This is how native Hawaiians culturally understand these actions (archaeological and anthropological surveys) today.

extension of an already existing entity, the Kānaka Maoli, the true people of Hawaii.²⁵⁰

Accordingly, the "[p]reservation of precontact sites assures future generations of Hawaiians the tangible presence of their own history, one that can be experienced as an immediate reality rather than as an abstraction in books. Ideally, more than the physical edifice remains: Its spirit and vitality continue living as well."²⁵¹ Native Hawaiians understand then that preservation as their own cultural norm prevents desecration and disrespect towards their ancestors. Moreover this aforementioned preservation also provides a forum for native Hawaiians to reconnect to their past. Thus preservation, as interpreted through native Hawaiian cultural norms, can be a vehicle to assist in creating a "universe in perfect harmony,"²⁵² or pono.

Kamakau notes that even during Kamehameha's reign, sacred sites such as heiau were preserved.²⁵³ Thus, it can also be argued that in addition to perpetuating a spiritual, as well as a geographical and a familial bond between native Hawaiians, the native Hawaiian restoration and preservation of their culture also embody the notion of pono. When Handy and Pukui describe Kamehameha as a ruler, they describe him as wanting to use a pono [ruling] system because he "had a real feeling for the welfare of his people and [thus] endeavored to ground his new system firmly upon *pono*- "the right."²⁵⁴ Kamehameha may have believed that the preservation of heiau was not merely the

²⁵⁰ *Pana O'ahu: Sacred Stones, Sacred Land*, viii.

²⁵¹ *Ibid.*, xxix.

²⁵² Kame'eleihiwa, 25.

²⁵³ Kamakau, *Ruling Chiefs of Hawai'i*, 183.

²⁵⁴ *Ibid.*, 233.

restoration of an ancient and cultural entity, but also stood for a larger ideal; to maintain power, but more importantly, to establish pono in his land.²⁵⁵

Just as native Hawaiians understand their culture, their cultural norms, and all of the associated meanings differently from that of a Western interpretation, native Hawaiians interpret the application of Western law to their culture and cultural issues differently as well. Merry notes that Hawaiians in the early to mid-1800s interpreted Western law in various ways.²⁵⁶ Some Hawaiians believed that since Western law mirrored Christianity, the law would serve as a means to return their troubled Hawaiian Kingdom back to a flourishing nation in a state of pono.²⁵⁷ Others believed that Western law would specifically give them "greater control over the unruly sailors and resident foreigners in the booming port towns."²⁵⁸ Yet others believed that Western law would help them establish a more civilized identity so that they could easily navigate their way through a new emerging world.²⁵⁹

As seen through the eyes of Kamakau, early Western law in Hawai'i was understood as a positive addition to the Hawaiian government. In his writings, Kamakau seems to humanize the law. He refers to the early legislature in Hawai'i as a "parent."²⁶⁰ Kamakau notes that:

The legislature is the parent; it considers in advance what will be for the success, comfort, and progress of the race in just dealing and in developing sources of wealth and increase of population...Under a constitutional government complaints by the

²⁵⁵ Kamakau, *Ruling Chiefs of Hawai'i*, caption under picture of Pu'ukoholā heiau, Kawaihae, Hawai'i, c. 1890.

²⁵⁶ Merry, 63-70.

²⁵⁷ Ibid.

²⁵⁸ Ibid., 67

²⁵⁹ Ibid., 260.

²⁶⁰ Kamakau, *Ruling Chiefs of Hawai'i*, 370-371.

people may be brought before the legislature as to a parent, where the question can be considered and settled according to its merits."²⁶¹

What is interesting about the description of the legislature as a parent surrounds the application of human concepts to the law. For example, Kamakau mentions that the legislature will consider "success, comfort, and progress of the race" as its responsibilities as a Hawaiian governing entity.²⁶² However, these notions are usually connected to human feelings and dealings, not necessarily concepts within Western legal theory. Thus, Kamakau humanizes the law, possibly to understand it through Hawaiian concepts, such as a parent-child relationship, wherein the parent (the law) nurtures and loves his/her child (the Hawaiian people). According to Handy and Pukui, Hawaiians placed great importance upon the parent-child relationship within families.²⁶³ For example, Hawaiians loved and cherished their children, and in view of that;

The following saying shows that the well and happy child is one who is cared for: **He keiki mea makua** (or **mea kupuna**) – A child who has a parent (or grandparent). Said of a child whose parents, uncles, aunts or grandparents show affection by making beautiful things for his use or composing songs and chants in his honour. It is said in respect and admiration, for, to Hawaiians, it was a great thing to show love for their children.²⁶⁴

The Hawaiian cultural notion of the nurturing parent-child relationship is also conceptualized through pono. As a pono chief would nurture his or her people, or as a parent would nurture his or her child, a pono law (Western law) would nurture Hawaiians. Perhaps the parent-child relationship was the only way Kamakau could

²⁶¹ Ibid.

²⁶² Ibid.

²⁶³ Handy and Pukui, 164-168.

²⁶⁴ Ibid., 166.

conceptualize and accept Western law as applied to governmental dealings within his beloved land.

Regardless of the ways in which Hawaiians interpreted Western law in the 1800s, their views were based upon their own cultural understandings. These cultural conceptions revolved around the cultural norm of pono, a concept that does not factor into Western legal theory. Although Western law is grounded in principles such as justice and fairness, these principles differ greatly from the Hawaiian cultural understanding of pono within Western legal thought.

Similarly, "the customs of New Zealand Maori offer an alternative philosophy of law"²⁶⁵ that is based on values maintaining familial connections, respect and maintenance of mana, generosity, etc.²⁶⁶ Thus, just as Kamakau may have humanized Western law in order to understand it, New Zealand Maori also consider human concepts and actions within the law; a Maori thought process which departs substantially from the national norm concerning legal principles. For example, in general, when contractual disputes are resolved in New Zealand;

Lawyers are accustomed to contracts where the terms are settled in advance or are adjusted by contract laws, and where the focus, in the event of dispute, is on the terms of the contract and the applicable law. Maori however look not to the precise terms that were agreed nor to preconceived laws but to the conduct of the parties. The essential question is whether they acted towards each other in an honourable way and whether any particular party is the sort of person with whom one would do business in the future. It is not the contract that is important but the ongoing relationship one expects with the person with whom one is contracting.²⁶⁷

²⁶⁵ Eddie Durie, "Te Hono ki Hawai'iki," *Culture, Rights, and Cultural Rights: Perspectives from the South Pacific*, ed. Margaret Wilson and Paul Hunt (Wellington, Aotearoa, New Zealand: Huia Publishers, 2000), 48.

²⁶⁶ Ibid.

²⁶⁷ Ibid.

Although it could be argued that native Hawaiians today accept and understand Western law through Western lenses, ignoring previous cultural understandings of pono, given the weighted cultural significance of native Hawaiian burial preservation, substantially different interpretations (between native Hawaiians and Westerners or non-Hawaiians) of legal outcomes still remain. More specifically, native Hawaiians expect the law to preserve their burials in a culturally Hawaiian way, absent of disrespect and desecration. Thus, in the end for native Hawaiians today, justice in the Western legal system would still mirror the Hawaiian cultural concept of pono.

For example, although HRS Chapter 6E-43(b) and (d) specifically allow the lineal descendants of associated burials to be involved in the preservation process,²⁶⁸ given the weight of preservation's cultural meaning for native Hawaiians, many native Hawaiians feel akin to current preservation issues, such as those surrounding the Hōkūliʻa development project regardless of familial relations. Moreover, many Hawaiians feel that although the West interprets relatedness only as lineal descent, the Kumulipo, or Hawaiian creation story designates an intertwined *relatedness* between *all Hawaiians*, as well as the *Land and the Gods*.²⁶⁹ Following this reasoning, all native Hawaiians are related to one another and therefore feel they have a right to participate in the law's preservation process regardless of what burial or burials may be at issue. In any event, native Hawaiians interpret the legal preservation of native Hawaiian burials and burial

²⁶⁸ Hawaiʻi, *Hawaiʻi Revised Statutes* (2002), ch. 6E-43(b), (d). According to HRS Chapter 6E-43(b): All burial sites are significant and shall be preserved in place...The appropriate island burial council shall determine whether preservation in place...is warranted, following criteria which shall include...recognition that burial sites...have known lineal descendants, shall receive greater consideration for preservation in place. Ibid., ch. 6E-43(b).

Moreover, HRS Chapter 6E-43(d) states that "a preservation or mitigation plan shall be approved by the

practices as a cultural norm that perpetuates the ideal of pono, nurturing Hawaiian relationships which then create a universe in perfect harmony.²⁷⁰

However, non-Hawaiians expect the law to preserve native Hawaiian burials according to the particulars of the law. More specifically, as long as a developer (with a non-Hawaiian view of native Hawaiian culture and cultural norms), for example, follows the minimum requirements that the letter of the law mandates, then justice is served, regardless if native Hawaiian cultural desecration has occurred in the process.

The aforementioned non-Hawaiian legal interpretation is illustrated by the Hōkūli‘a legal dispute. Although Judge Ibarra ordered the Hōkūli‘a developers to halt further development,²⁷¹ and the developers have thus far abided by the order, the fact remains that the developers are still fighting the order in court,²⁷² and Hōkūli‘a's previous damage and desecration to native Hawaiian burials cannot be reversed.

Thus, the ineffective actuation of HRS Chapter 6E as it pertains to the preservation of native Hawaiian burials and burial practices may lie within its divergent interpretations. For native Hawaiians, interpretation is based on cultural meanings, many of which are conceptualized through the notion of pono. Although meanings have evolved throughout Hawai‘i's history, meanings surrounding native Hawaiian burial preservation have relatively remained constant. Moreover, native Hawaiians expect pono legal outcomes regarding native Hawaiian burial preservation whereas non-Hawaiians simply seek minimal preservation efforts that lack any semblance of pono. When

department [DLNR] in consultation with any lineal descendants..." Ibid., ch. 6E-43(d).

²⁶⁹ Kame‘eleihiwa, 2-3.

²⁷⁰ Ibid., 25.

²⁷¹ Kelly, Civ. No. 00-1-0192K.

Hawai'i's burial laws simply adhere to non-Hawaiian legal expectations (usually fraught with cultural disrespect and desecration) in the preservation of native Hawaiian burials and burial practices, native Hawaiians view the laws to be ineffectively actuated.

Perhaps by participating in a Western legal system, native Hawaiians have unconsciously acquiesced to the iniquitous treatment of their beloved dead by non-Hawaiians. According to Trask, by allowing the application of Western legal theory to Hawaiian cultural issues, native Hawaiians have created their own cultural subjugation.²⁷³

Trask believes that:

...By entering legalistic discussions wholly internal to the American system, Natives participate in their own mental colonization. Once indigenous peoples begin to use terms like language "rights" and burial "rights," they are moving away from their cultural universe, from the understanding that language and burial places come out of our ancestral association with our lands of origin. These indigenous, Native practices are not "rights" which are given as the largesse of colonial governments. These practices are, instead, part of who we are, where we live, and how we feel."²⁷⁴

Moreover, it may be that the native Hawaiian cultural interpretation or understanding of burial preservation will never be properly actuated because non-Hawaiians will never understand native Hawaiians or their culture. Because of this, Kame'eleihiwa notes that the future for native Hawaiians and their culture may be dismal until native Hawaiians are able to regain some form of sovereignty.²⁷⁵ Kame'eleihiwa states that:

Perhaps the day has come for Hawaiians to decide if our *aloha* can be wasted on foreigners who find our culture "ignorant" and "good for nothing." Perhaps there can be no *pono* in the Hawaiian universe so long as Hawaiians expect to live in harmony with foreigners, because *pono* and *aloha* may be Hawaiian metaphors that do not cross the cultural beach to be understood in a Western model. Certainly there can be no

²⁷² Advertiser staff, B2.

²⁷³ Trask, 113.

²⁷⁴ Ibid.

²⁷⁵ Kame'eleihiwa, 318.

pono in Hawai‘i until we Hawaiians regain control of our ancestor's ‘*Āina*.²⁷⁶

²⁷⁶ Ibid.

CHAPTER V CONCLUSION

Hawai'i's preservation laws, laws intended (in the public interest) to preserve and protect cultural and historic entities, such as native Hawaiian burials,²⁷⁷ thus enabling burial rights, have been ineffectively actuated in the preservation of native Hawaiian burials and burial practices. The ineffective actuation or burial wrongs occurred on Hawai'i island at the development project called Hōkūli'a. Hundreds of native Hawaiian burials were dug up, misplaced and generally desecrated when construction began in areas allegedly deemed free and clear of historic and cultural entities (such as burials) by an archaeological survey done by a private company. Unfortunately, the areas bulldozed, etc. *were saturated* with native Hawaiian burials.²⁷⁸

Not only was the archaeological survey poorly done, and more probable, done in an unethical manner, but the enforcement agency, DLNR/SHPD, responsible for administering Hawai'i's preservation laws, did not correct the shoddy archaeological work. DLNR/SHPD also inappropriately, as well as unethically, relied upon the substandard archaeological survey.

Consequently, Hōkūli'a developers, as well as homeowners, are fighting a legal battle against complainants, such as native Hawaiian lineal descendants of the dead or buried, in the Kona court surrounding the native Hawaiian burials issue. Although Hōkūli'a construction has disturbed and denigrated the cultural site and hundreds of burials, Hōkūli'a homeowners and developers feel that construction should continue, or

²⁷⁷ Hawai'i, *Hawai'i Revised Statutes* (2002), ch. 6E-1.

²⁷⁸ Moreover, and even more disturbing, is that (ancient) Hawaiians were *historically known* to have previously occupied a large portion of the development site.

rather, the development should be completed. Hōkūli‘a developers and homeowners believe that justice surrounding the Hōkūli‘a dispute means *only* following Judge Ibarra's court order to reassess the native Hawaiian cultural significance of the area. For them, construction must continue even if it means further desecration (as long as that desecration does not violate Judge Ibarra's court order). However, justice for the plaintiffs, native Hawaiian lineal descendants, as well as many others (native Hawaiians not related to the buried or dead, as well as concerned non-Hawaiians), means halting development altogether, thus establishing pono and enabling peace upon the native Hawaiians who were originally laid there to rest and bond with their visiting Hawaiian descendants.

Why did these burial wrongs occur at Hōkūli‘a? One reason for the aforementioned ineffective actuation is based upon the failure of DLNR/SHPD, the department given the primary responsibility for the implementation of the burial laws, in its enforcement responsibilities. For example, the department's draft rules, which govern preservation procedures within the Archaeology division of DLNR/SHPD, were not formally adopted during the course of development at Hōkūli‘a. Thus, these rules were always arbitrary and Judge Ibarra found in 2002 that DLNR/SHPD violated section 13-300-11 of the Hawai‘i Administrative Rules. More importantly, the failure to adopt formal archaeological rules meant that the legality and force of DLNR/SHPD's decisions could be questioned as to the archaeological work done within the division (from 1976, when the draft rules were promulgated, until 2002, when Judge Ibarra made his findings), especially pertaining to the Hōkūli‘a development project. Thus, the result has been

inconsistencies among different development projects as to the archaeological requirements within the historic preservation process. It has also created ethical concerns among DLNR/SHPD's staff; are they doing their jobs or simply letting things go? These ethical issues were also raised within the Hōkūli'a dispute. Moreover, DLNR/SHPD has also showed careless working and mismanagement amongst its staff. Although there may be adequate reasons for DLNR/SHPD's failures, the bottom line is that the *law's intent is clear*, even if the law's provisions are misdirected or funding is insufficient to properly implement the law. DLNR/SHPD failed to follow the intent of Hawai'i's preservation laws, and thus, violated Art. 12, sec. 7's and HRS Chapter 6E's purpose to preserve and protect native Hawaiian burials, burial sites, and burial practices. According to a December 22, 2002 *Starbulletin* editorial:

Poor management of employees, inconsistent review standards for historic and cultural sites as well as disorganized record-keeping of artifacts and human remains place the State Historic Preservation Division at the top of the list of agencies for long-overdue overhaul by the new administration. Governor Lingle should intervene to assure the division improves its operations and eliminates questionable practices.²⁷⁹

The ineffective actuation of Hawai'i's preservation laws is also due to the misapplication of the laws. Flaws within the laws' application surround contract archaeology. Contract archaeologists may not be as accurate and thorough in their surveys because their livelihood depends on their developer-employers. This is a built-in conflict of interest flaw in the law. Thus many contract archaeologists are driven by the pressures of today's development woes, instead of the desire to culturally preserve archaeological treasures, when they apply Hawai'i's burial preservation laws to their archaeological endeavors.

²⁷⁹ Editorial, "Historic Preservation Office Needs Good Cleaning," 22 December 2002, *available at* <http://starbulletin.com/2002/12/22/editorial/editorials.html>.

Finally, one last explanation for the ineffective actuation of Hawai'i's preservation laws encompasses differing cultural interpretations of legal solutions or expected outcomes, based on divergent conceptions or meanings surrounding native Hawaiian cultural norms, specifically those associated with native Hawaiian burials and burial practices. When Hawai'i's burial laws simply adhere to non-Hawaiian legal expectations (usually fraught with cultural disrespect and desecration) in the preservation of native Hawaiian burials and burial practices, native Hawaiians view the laws to be ineffectively actuated because there is a lack of pono.

Although, as previously mentioned, many believe that Hawai'i's burial issues will never be addressed or solved given the problematic colonial history of Hawai'i (the consequent predominance of Western or non-Hawaiian culture), I prefer to be more optimistic. While one possible solution to the preservation of native Hawaiian burials and burial practices within the purview of DLNR is the involvement of the Governor in the department's affairs, I believe that an independent review/critique (and enforcement of subsequent findings) of DLNR/SHPD, by an objective outside agency (not state-affiliated), made up of native Hawaiian cultural specialists from the associated communities (communities that are directly affected by development projects), would be a good start. Hopefully, the review/critique and enforcement would encompass issues (similar to those confronted by the State Audit) surrounding: 1) The adoption by DLNR/SHPD of archaeological procedural rules regarding burials protection, 2) The updating of procedures and methods of preservation, and 3) The supplementation of every action taken by the department with burial council consultation coupled with public

involvement. However, the independent review/critique and enforcement would differ from the State Audit in that it would give a native Hawaiian perspective on the aforementioned issues.

However, in my opinion, a even more effective means to solving the problems associated with Hawai'i's burial laws in the preservation of native Hawaiian burials and burial practices would be to *criminalize* any disturbances of native Hawaiian burials and artifacts.²⁸⁰ The people targeted would be those "who knowingly damage burial sites or who discover remains and then fail to stop work and report their findings."²⁸¹ Criminal penalties would consist of a \$25,000 fine and a year in jail.²⁸² Criminal action may then deter people from disrespecting and desecrating native Hawaiian burials. The State House has passed a bill that would criminalize the aforementioned actions, however, the State Senate, as of April 2005, was still considering the change.²⁸³

According to Punahale Lerma of Hilo, "[i]f there is anything Native Hawaiians will come to know, it's eviction...They evict us when we're alive, they evict us when we're dead. We are never safe. Our responsibility is to protect our sense of place."²⁸⁴ I believe that native Hawaiian culture must be preserved for future generations of native Hawaiians. Native Hawaiian burials, burial practices, and burial sites are integral parts of native Hawaiian culture. Both the Hawai'i Constitution and statutory law mandate the protection and preservation of native Hawaiian culture, including the conservation and

²⁸⁰ Derrick DePledge, "Tougher Laws Sought on Iwi," *Honolulu Advertiser*, 4 April 2005, B1, B5.

²⁸¹ Ibid.

²⁸² Ibid.

²⁸³ Ibid.

²⁸⁴ Jack and Gretchen Kelly, "Historic Preservation in Hawai'i, Part One: Caring for the Ancestors," 2001, available at <http://www.Greenhawaii.org/kelly/articles/2001/ancestor.html>.

maintenance of native Hawaiian burials. The agency responsible for implementing these laws has failed to assume its preservation duties toward native Hawaiian burials because of various problems within the agency, primarily within DLNR/SHPD's Archaeology division. If the agency designated by law to protect native Hawaiian burials fails in its preservation responsibilities, what alternatives do native Hawaiians have in order to perpetuate their culture?

The ultimate answer may lie within the native Hawaiian community itself. As protectors of native Hawaiian culture, native Hawaiians must recognize the Western legal system's shortcomings, and thus must be culturally involved within the legal sphere. Although cultural desecration occurred to many burials at Hōkūliʻa, because native Hawaiians (and others) publicly and legally challenged Hōkūliʻa, as well as DLNR/SHPD's role within the development's progress, many people have been made aware of the problems associated with development in Hawaiʻi. More specifically, the public has been alerted to the destruction that development has on native Hawaiian culture. In fact, this thesis paper was conceived out of the legal dispute resulting from the native Hawaiian opposition to the Hōkūliʻa development project. Thus, native Hawaiian community involvement has beneficial effects on the public. With continued community involvement, cultural desecration and disrespect towards native Hawaiian burials and burial practices may even be criminalized in the near future.

APPENDIX
A LEGAL ANALYSIS OF ARTICLE 12, SECTION 7 AND HAWAII REVISED
STATUTES CHAPTER 6E (Hawai'i's Burial Laws)

Constitutional Protection

Art. 12, sec. 7 of the HI CON was added during the 1978 Constitutional Convention. It protects native Hawaiian burials and burial practices because these are traditional and religious rights firmly rooted in native Hawaiian culture. The HI CON states that:

The State reaffirms and *shall protect all rights, customarily and traditionally exercised* for subsistence, *cultural and religious purposes* and possessed by ahupua'a tenants who are the descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778, subject to the right of the state to regulate such rights.²⁸⁵

Moreover, the legislative history of the HI CON reveals that one purpose of Art. 12, sec. 7 is to protect native Hawaiian burials and burial practices. The Standing Committee Report Number 57 indicated that the Committee on Hawaiian Affairs proposed the new section to the Constitution to protect and affirm native Hawaiian rights.²⁸⁶ Additionally, the Debates in Committee of the Whole on Hawaiian Affairs on Committee Proposal 12 reflected the desire to "recognize, reaffirm and protect those traditional and customary rights of native Hawaiians,"²⁸⁷ which would include native Hawaiian burial sites. One Committee member furthered this notion by stating, "[w]hat are we to say to the Hawaiian children who wish to visit the burial grounds of their kupuna? Do we tell them to visit Bishop Museum or see a tourist show if they want to learn about their Hawaiian

²⁸⁵ Hawai'i Constitution, art. 12, sec. 7.

²⁸⁶ Hawai'i, *Standing Committee Report No. 57, reprinted in 1 Proceedings of the Constitutional Convention of Hawai'i of 1978* (Hawai'i, 1980), 639.

culture, values and identity? Or are we going to allow them to become part of their culture?"²⁸⁸

In the examination of constitutionally protected native Hawaiian rights, the court refers to the legislative history of Art. 12, sec. 7 of the HI CON.²⁸⁹ In *Pele Defense Fund v. Paty*, Pele Defense Fund ("PDF") challenged the State of Hawai'i's decision to exchange public lands for privately owned lands.²⁹⁰ PDF brought the suit in order to preserve continued access to public lands by native Hawaiians.²⁹¹ PDF relied on the constitutional provision of Art. 12, sec. 7,²⁹² which protects the native Hawaiian right to gather, as well as other native Hawaiian practices.²⁹³ More importantly, PDF made the claim that Art. 12, sec.7 extends "beyond the *ahupua'a* in which a Native Hawaiian resides where such rights have been customarily and traditionally exercised in this manner."²⁹⁴ Consequently, in *Pele*, the court noted that Art. 12, sec. 7 was intended "to protect the broadest possible spectrum of native rights."²⁹⁵ The court further stated that "[t]he drafters of the constitutional amendment emphasized that *all* such rights were reaffirmed and that they did not intend for the provision to be narrowly construed."²⁹⁶

The court also reviewed the extent of constitutional protection afforded for native Hawaiian rights in *Public Access Shoreline Hawai'i v. Hawai'i County Planning*

²⁸⁷ Hawai'i, *Debates in Committee of the Whole on Hawaiian Affairs, Comm. P. No. 12, reprinted in 2 Proceedings of the Constitutional Convention of Hawai'i of 1978* (Hawai'i, 1980), 425-27, 432-37.

²⁸⁸ *Ibid.*, 426.

²⁸⁹ *Pele Defense Fund v. Paty*, 73 Haw. 578, 590 (Haw. 1992).

²⁹⁰ *Ibid.*

²⁹¹ *Ibid.*

²⁹² *Ibid.*

²⁹³ Hawai'i Constitution, art. 12, sec. 7.

²⁹⁴ *Pele*, 73 Haw. 578, 620.

²⁹⁵ *Ibid.*, 619.

²⁹⁶ *Ibid.*, 620.

*Commission ("PASH").*²⁹⁷ The *PASH* court held that Hawai'i's land titles are a "limited property interest as compared with typical land patents governed by Western concepts of property," and thus, native Hawaiian rights incorporating traditional and customary activities may extend to undeveloped lands held by private parties.²⁹⁸ The *PASH* court also ruled that Art. 12, sec. 7 is binding on administrative agencies and requires those agencies to protect and preserve traditional and customary native Hawaiian rights.²⁹⁹ Similarly, in *Ka Pa'akai o Ka 'Āina v. Land Use Commission ("Ka Pa'akai")*, the court also ruled that Art. 12, sec. 7 is binding on administrative agencies of the State.³⁰⁰ Following constitutional provisions, the *Ka Pa'akai* court required the Land Use Commission "to preserve and protect customary and traditional practices of native Hawaiians."³⁰¹

For example (when applying the constitutional law to the Hōkūli'a Development project), the Pu'u Ohau burial mound holds the remains of high-ranking ali'i. Native Hawaiians consider the burial mound sacred.³⁰² Thus, in the Hōkūli'a case, there is adequate foundation in the record connecting burial rights to a firmly rooted traditional and customary practice, because Art. 12, sec. 7 of the HI CON protects *all* native Hawaiian rights and practices.³⁰³ It was the intent of the framers to include burials and burial practices within the provision's protections.³⁰⁴ The framers' intent to protect native

²⁹⁷ *Public Access Shoreline Hawaii v. Hawaii County Planning Commission*, 79 Haw. 425, 437 (Haw. 1995).

²⁹⁸ *Ibid.*, 447.

²⁹⁹ *Ibid.*, 437.

³⁰⁰ *Ka Pa'akai o Ka 'Āina v. Land Use Commission*, 94 Haw. 31, 41-46 (Haw. 2000).

³⁰¹ *Ibid.*, 45.

³⁰² Hurley, "Hōkūli'a Foes Take Stand Over Burial Site," A1, A4.

³⁰³ Hawai'i Constitution, art. 12, sec. 7.

³⁰⁴ Hawai'i, *Debates*, 425-27, 432-37.

Hawaiian burials and burial practices is also highlighted through case law.³⁰⁵

Additionally, both *PASH* and *Ka Pa'akai* reveal that another purpose of Art. 12, sec. 7 is its binding effect upon state agencies in that these entities must further the constitutional mandate to preserve and protect native Hawaiian customary and traditional rights.

DLNR, a state agency bound by the HI CON, *shall* preserve and protect native Hawaiian burials and practices as protected by the HI CON, Art. 12, sec. 7.³⁰⁶ Thus, the HI CON and case law supports the protection of Pu'u Ohau's native Hawaiian burials and burial practices. Furthermore, and most importantly, although Judge Ibarra did not make a final decision as to Pu'u Ohau in the December order, he did rule that the Constitution protects native Hawaiian burials and burial practices, and thus protects the burials and associated burial practices at Hōkūli'a.³⁰⁷ According to Judge Ibarra's ruling, "[t]he State Constitution protects traditional and customary rights of native Hawaiians..."³⁰⁸

Additionally, Judge Ibarra noted that "[t]raditional worshipping at Native Hawaiian burial sites is a constitutionally protected traditional and religious practice."³⁰⁹ In the aforementioned case, Judge Ibarra also found that "[t]he state or county agencies did not attempt to identify whether any of these traditional Hawaiian cultural practices [were] practiced" by any native Hawaiian residents at Hōkūli'a.³¹⁰ Thus, Judge Ibarra clearly found that the Constitution protects the burials and burial practices at Hōkūli'a, however the agencies involved in implementing the constitutional provision failed.

³⁰⁵ Pele, 73 Haw. 578, 620.

³⁰⁶ *PASH*, 79 Haw. 425, 437., *Ka Pa'akai*, 94 Haw. 31, 41-46.

³⁰⁷ Kelly, Civ. No. 00-1-0192K, 17.

³⁰⁸ *Ibid.*

³⁰⁹ *Ibid.*

³¹⁰ *Ibid.*, 18.

Statutory Protection

HRS Chapter 6E protects historic and cultural "vestiges." These vestiges include native Hawaiian burials and burial sites.³¹¹ HRS Chapter 6E expressly provides for the protection of burial sites located "[a]t any site, other than a known, maintained, actively used cemetery where human skeletal remains are discovered or are known to be buried and appear to be over fifty years old," and if such burials are found, then "the remains and their associated burial goods *shall* not be moved without the department's approval."³¹² Thus, if native Hawaiian burials are found on private property during an archaeological assessment of the area, HRS Chapter 6E provides special protection that includes determinations as to the fate of the burials by an appropriate burial council within about a month's window period.³¹³ The Legislature has established burial councils for Hawai'i, Maui and Lana'i, Moloka'i, O'ahu, Kaua'i and Ni'ihau.³¹⁴ The purpose of the burial councils is to decide on the place of preservation of previously identified native Hawaiian burial sites, to make recommendations as to the appropriate (cultural) treatment of native Hawaiian burials, as well as assisting DLNR/SHPD in the inventory and identification of native Hawaiian burials and burial sites. Members of each council must live within their respective areas and must represent native Hawaiian interests as well as land owner interests.³¹⁵ The regional representatives of the burial councils must have a strong background in native Hawaiian culture, and specifically must be well informed

³¹¹ Hawai'i, *Hawai'i Revised Statutes* (2002), ch. 6E.

³¹² *Ibid.*, ch. 6E-43(a).

³¹³ *Ibid.*, ch. 6E-43(b).

³¹⁴ *Ibid.*, ch. 6E-43.5(a).

³¹⁵ *Ibid.*, ch. 6E-43.5(b).

concerning native Hawaiian traditions regarding burials and burial practices.³¹⁶ The appropriate burial council makes determinations based on whether relocation is warranted using criteria centered on the importance of the burial or burials.³¹⁷ Such criteria include whether the burials are of high preservation value (high concentration of remains), or if the burial or burials are of high-ranking ali'i.³¹⁸ After the appropriate burial council has made a final determination, there is a ninety-day window period to draw up a mitigation plan that "*shall be approved by the department (DLNR) in consultation with any lineal descendants, the respective council, other appropriate Hawaiian organizations, and any affected property owner.*"³¹⁹

If native Hawaiian burials are inadvertently found (an unanticipated human remain discovery) during construction or development, HRS Chapter 6E explicitly provides protection as well.³²⁰ Once remains are discovered, the discovery must be reported as soon as possible to DLNR and any activity in the immediate area that could potentially damage the remains must cease until final determinations are made.³²¹ DLNR's determination as to the burial's or burials' future includes: 1) an examination by a medical examiner or coroner and a qualified archaeologist, and if the remain or remains are found to be prehistoric, then 2) a gathering of sufficient information documenting the context and importance of the burial/burials.³²² According to the law, these determinations must

³¹⁶ Ibid.

³¹⁷ Ibid., ch. 6E-43(b).

³¹⁸ Ibid.

³¹⁹ Ibid., ch. 6E-43(d).

³²⁰ Ibid., ch. 6E-43.6.

³²¹ Ibid., ch. 6E-43.6(b).

³²² Ibid., ch. 6E-43.6(c).

be done within two to three working days (depending on location of the discovery).³²³

DLNR must also notify the appropriate burial council in making final determinations.³²⁴

After these determinations are made, a mitigation plan is drawn up accordingly.³²⁵

When HRS Chapter 6E was first enacted in 1976, there was no specific language defining burials or the subsequent protection thereof.³²⁶ However, nothing in HRS Chapter 6E's legislative history suggests that it was not the intent of the framers to include the preservation of burials and burial sites. In fact, the language clearly states that the purpose of the statute "is to provide for historic preservation."³²⁷ Moreover, since HRS Chapter 6E's original enactment, various amendments to the statute were implemented to provide "enhanced current procedures relating to the proper care and protection of burial sites and enforcement thereof."³²⁸

In 1988, at Honokahua on Maui, the Ritz-Carlton hotel sought to develop a hotel to be called Kapalua.³²⁹ It was to be built on a bluff that overlooked an expanse of beach. Upon development, burials were inadvertently found, and in the end, over 1100 individuals were eventually disinterred from the Kapalua site.³³⁰ Desecration stopped as Governor John Waihe'e approved a settlement which moved the development project inland away from the burial site, returned the burials to their original resting place, and

³²³ Ibid.

³²⁴ Ibid., ch. 6E-43.6(a)-(b).

³²⁵ Ibid., ch. 6E-43.6(c).

³²⁶ Hawai'i, *Standing Committee Report No. 490-76*, reprinted in *Journal of the Senate of the Eighth Legislature of the State of Hawai'i of 1978* (Hawai'i, 1976), 1096.

³²⁷ Ibid.

³²⁸ Hawai'i, *Standing Committee Report No. 2795*, reprinted in *Journal of the Senate of the Fifteenth Legislature of the State of Hawai'i of 1990* (Hawai'i, 1990), 1159.

³²⁹ Kelly, "Historic Preservation in Hawai'i, Part One: Caring for the Ancestors," available at <http://www.Greenhawaii.org/kelly/articles/2001/ancestor.html>.

³³⁰ Ibid.

preserved the burial site in perpetuity.³³¹ According to Jack and Gretchen Kelly, Plaintiffs in the Hōkūli‘a case, "[o]ut of the Honokahua tragedy was born the first legislation enacted to protect Hawaiian burials and burial sites, enacted in July 1990. That legislation established the burials program within the State Historic Preservation Division and the formation of Burial Councils, made up primarily of Native Hawaiians, on each island."³³² Thus, Honokahua fashioned the 1990 amendment that created a more stringent program to protect native Hawaiian burials and burial sites. Additionally, the Honokahua incident spawned the interest group Hui Mālama I Na Kupuna O Hawai‘i Nei.³³³ This interest group, along with OHA, is specified within the 1990 amendment to play a consulting role within the preservation and protection of native Hawaiian burials, burial sites, and burial practices.³³⁴ According to HRS Chapter 6E-43(b), the preservation criteria surrounding burials must be developed by DLNR/SHPD, "*in consultation with the [burial] councils, Office of Hawaiian Affairs, representatives of development and large property owner interests, and appropriate Hawaiian organizations, such as Hui Malama I Na Kupuna O Hawai‘i Nei.*"³³⁵

HRS Chapter 6E specifically protects and preserves native Hawaiian burials and burial sites through various provisions governing various agencies.³³⁶ Thus, the native Hawaiian burials and burial sites should have been protected and preserved at the Hōkūli‘a development. This preservation and protection should have occurred prior to

³³¹ Ibid.

³³² Ibid.

³³³ Ibid.

³³⁴ Ibid.

³³⁵ Hawai‘i, *Hawai‘i Revised Statutes* (2002), ch. 6E-43(b).

³³⁶ Ibid., ch. 6E.

the litigation that began in October 2000, relative to the development project. For example, according to HRS Chapter 6E, even though Pu'u Ohau is located on private property (Hökuli'a development), it is still afforded special protection. Thus, many protective determinations made by the appropriate burial council regarding the fate of the burials and burial sites should be employed. These include looking at the remains' importance and the sites' significance to native Hawaiian culture.³³⁷ In the case of Pu'u Ohau, very important ali'i are buried within the mound, and oral tradition reveals the mound's sacredness to native Hawaiian culture.³³⁸ HRS Chapter 6E also provides for consultation with lineal descendants and native Hawaiian organizations, such as Protect Keopuka 'Ohana.³³⁹ Therefore, HRS Chapter 6E should protect Pu'u Ohau from the destruction and the removal of burials and should preserve Pu'u Ohau in its entirety as a burial mound. Judge Ibarra stated in his December 26, 2002 order that "Haw. Rev. Stat. Sec. 6E-1 protects historic and cultural properties."³⁴⁰ He further noted that:

In view of the state constitution and the legislative intent of Haw. Rev. Stat. Chapter 6E, the effective enforcement of the constitution, statute and regulations by this Court is in the public interest. The public interest would be promoted by the continued ability to exercise constitutional rights involving traditional and customary practices and preservation of historic sites on the Hökuli'a project.³⁴¹

Although Judge Ibarra's order did not make a final determination as to the status of Pu'u Ohau, it clearly indicated that the native Hawaiian burials and burial sites should be afforded protection by DLNR/SHPD.³⁴² Most importantly, the order noted that the state

³³⁷ Ibid., ch.6E-43(b).

³³⁸ Hurley, "Hökuli'a Foes Take Stand Over Burial Site," A4.

³³⁹ Hawai'i, *Hawai'i Revised Statutes* (2002), ch. 6E-43(b).

³⁴⁰ Kelly, Civ. No. 00-1-0192K, 17.

³⁴¹ Ibid., 18.

³⁴² Ibid., 16-17.

agency, such as DLNR/SHPD failed in its protective duties as required by both the constitution³⁴³ and statutory provisions relative to native Hawaiian burials, burial sites, and practices.³⁴⁴ Furthermore, the HI CON requires statutory protection (via HRS Chapter 6E) of native Hawaiian burials, burial practices and sites.

The framers of the HI CON Art. 12, sec. 7 wanted both the constitutional provision and state regulation to work together to promote the protection of native Hawaiian rights.³⁴⁵ The Committee of the Whole Report Number 12 reflects the framers' desire to preserve native Hawaiian culture, and that Art. 12, sec. 7 works as the "gas" for the state's vehicle of "protection."³⁴⁶ In fact, Delegate Waihe'e explained that the HI CON would provide a forum for the protection of native rights and that the "State would regulate the *reasonable* exercise of these rights."³⁴⁷ Thus, Art. 12, sec. 7 furthers its inherent protection of native Hawaiian rights by binding state agencies to promote the same preservation goal through various techniques. An example of this is found within HRS Chapter 6E's guidelines that specify that DLNR/SHPD must actively participate in the protection of native Hawaiian burials and burial sites.³⁴⁸ Similarly, case law indicates that Art. 12, sec. 7 is binding on administrative agencies of the state.³⁴⁹ The *PASH* court noted that state can regulate, but not to the point of extinguishing native Hawaiian rights.

³⁴³ Ibid.

³⁴⁴ Ibid., 14-30.

³⁴⁵ Hawai'i, *Committee Whole Report No. 12, reprinted in 1 Proceedings of the Constitutional Convention of Hawai'i of 1978* (Hawai'i, 1980), 275.

³⁴⁶ Ibid.

³⁴⁷ Ibid.

³⁴⁸ Hawai'i, *Hawai'i Revised Statutes* (2002), ch. 6E-43(b), 43.6.

³⁴⁹ *Ka Pa'akai*, 94 Haw. 31, 41-46., *PASH*, 79 Haw. 425, 437.

The *PASH* court stated that "the regulatory power provided in article XII, section 7 [Art. 12, sec. 7] does not justify summary extinguishment of such rights by the State..."³⁵⁰

Additionally, HRS Chapter 6E explicitly acknowledges the HI CON's goal of conserving and developing the historic and cultural properties in Hawai'i, "[t]he Constitution of the State of Hawai'i recognizes the value of conserving and developing the historic and cultural property within the State..." and furthers that goal by establishing "a spirit of stewardship and trusteeship for future generations...to conduct activities, plans, and programs in a manner consistent with the preservation and enhancement of historic and cultural property."³⁵¹ HRS Chapter 6E does not limit or restrict the HI CON protective provisions of Art. 12, sec. 7. Moreover, Judge Ibarra stated in his December 26, 2002 order that Art. 12, sec. 7 protects and preserves native Hawaiian traditions and culture, and that the constitutional provision "imposes a duty on all state and county agencies to protect and to reasonably accommodate the exercise of traditional and customary rights of Hawaiians when issuing any permits or approvals of activities that could adversely impact those rights."³⁵² HRS Chapter 6E *further*s the constitutionally mandated goal of preserving native Hawaiian rights, which include native Hawaiian burials, burial sites, and burial practices, and thus, the provisions of the HI CON and HRS Chapter 6E harmonize to protect these aforementioned rights.

In the Hōkūli'a case, Judge Ibarra noted in his December order that DLNR/SHPD failed to protect native Hawaiian rights as proscribed by Art. 12, sec. 7 through statutory regulations. He stated that "[t]raditional worshipping at Native Hawaiian burial sites is a

³⁵⁰ *PASH*, 79 Haw. 425, 442.

³⁵¹ Hawai'i, *Hawai'i Revised Statutes* (2002), ch. 6E-1.

constitutionally protected traditional and religious practice. The state or county agencies [DLNR/SHPD] did not attempt to identify whether any of these traditional Hawaiian cultural practices [were being practiced at Hōkūli‘a].”³⁵³ How did DLNR/SHPD fail to implement constitutional and statutory guarantees of protection at Hōkūli‘a given HRS Chapter 6E's specificity towards native Hawaiian burials and burial sites, coupled with the statute's furtherance of a constitutionally mandated goal of preserving native Hawaiian rights?

³⁵² PASH, 79 Haw. 425, 451 (quoted in Kelly, Civ. No. 00-1-0192K, 16-17.).

³⁵³ Kelly, Civ. No. 00-1-0192K, 18.

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