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Article

## Sodomy Laws and Gender Variance in Tahiti and Hawai‘i

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**Abstract:** In both Hawaiian and Tahitian, the central meaning of *mahu* denotes gender-variant individuals, particularly male-bodied persons who have a significant investment in femininity. However, in Hawai‘i, unlike Tahiti, the word *mahu* is now more commonly used as an insult against gay or transgender people. The negative connotation of the term in Hawaiian indexes lower levels of social acceptability for *mahu* identity on O‘ahu (Hawai‘i’s most populous island) as compared to Tahiti. The article argues that these differences are partly due to a historical legacy of sexually repressive laws. The article traces the history of sodomy laws in these two Polynesian societies and argues that this history supports the hypothesis that sodomy laws (in conjunction with such social processes as urbanisation and Christianisation) are partially to blame for the diminished social status of *mahu* on O‘ahu. A different social and legal history in Tahiti accounts for the fact that the loss of social status experienced by Tahitian *mahu* has been lesser than that of their Hawaiian counterparts.

**Keywords:** Hawai‘i; Tahiti; French Polynesia; O‘ahu; sodomy; *mahu*; transgender; gender variance; gender identity; sodomy laws

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### 1. Introduction

Visitors to the Hawaiian island of O‘ahu are likely, sooner or later, to come across the ‘Stones of life’—four large boulders on Kuhio Beach in Waikiki. As the plaque at the site explains, according to legend the boulders were placed there hundreds of years ago, on the occasion of the departure from Hawai‘i of four healers who had come from Raiatea. Raiatea, located several thousand miles south of Hawai‘i and famed as the spiritual centre of Polynesia, is, after nearby Tahiti, the largest among French Polynesia’s Society Islands. Although the plaque at Kuhio Beach omits to state it, according to

oral history the four healers who came to Hawai'i from Raiatea were *māhū* [1]. In other words, they were what we would today call gender-variant.

Although the term *māhū* may be applied to gender-variant female-bodied individuals in Tahitian [2], and to same-sex attracted people (regardless of gender) in Hawaiian [3], in either language the central meaning of the word denotes male-bodied persons of Polynesian descent who have a significant investment in femininity. This may be displayed by such features as the donning of female attire, the preference for consorting with women, the adoption of feminine mannerisms, or the performance of women's work. This terminological commonality, however, is deceiving. For, as Matzner puts it, in Hawai'i the word *māhū* has now 'lost its cultural salience to such an extent that it has become an insult to throw at gay or transgender people' ([1], p. 280).

The different connotations that the word *māhū* has in Tahitian and Hawaiian reflect greater levels of social acceptability accorded to *māhū* identity in Tahiti as compared to O'ahu, despite the fact that Hawai'i is often touted as one of the most liberal of the United States when it comes to attitudes towards sexuality and gender-variance. While even in Tahiti the attitude towards *māhū* is best described as one of ambivalence [4] and while it has been argued that *māhū* are accorded 'apparent relative acceptance' ([5], p. 329) amongst native Hawaiians (and, at any rate, more toleration than trans people enjoy in the Western world) [5], the mainstream visibility of *māhū* in Papeete has no match in Honolulu. As Ellingson and Odo put it, 'postcolonial acculturation has resulted in notable stigma for transgender individuals in Hawai'i today' ([6], p. 558). In this article I propose to analyse the contribution that law has made to bringing about this state of affairs.

The main reason why this question matters should be clear: the diminished social status of *māhū* on O'ahu is a social justice problem that calls for analysis. However, the subject matter of this article is significant also for instrumental reasons: in particular, it provides a compelling case study to investigate the role that law plays in influencing the construction of gender and sexual identities. There is a growing body of work addressing, and sometimes foregrounding, the question of how law is productive of sexual and gender identities, focusing on the historically-situated ways in which particular legal dynamics have precipitated the emergence of, or facilitated changes to, certain sexual or gender subjectivities, particularly homosexuality [7–10]. This article aims to make a contribution to this literature, extending its concerns to Polynesian gender-variant identities, specifically those of Hawaiian and Tahitian *māhū*.

My argument will be that sodomy laws have contributed to the discursive sexualisation of *māhū* identity on O'ahu in a way that has not occurred in Tahiti. I will further argue that this sexualisation, in combination with other factors, has made *māhū* a more socially problematic identity, and probably a more difficult one to inhabit, on contemporary O'ahu than in present-day Tahiti. In other words, the sexualisation of *māhū* identity on O'ahu has resulted in an impairment in *māhū*'s social status. Some of the factors that, together with the discursive sexualisation of *māhū* identity, have brought about this state of affairs on O'ahu include the importation after colonisation of a Christian sexual morality suspicious of all forms of non-procreative sexuality, as well as the larger proportion of non-Polynesian settlers in Hawai'i, who do not share in the pre-colonial indigenous epistemologies accepting of gender-variance and same-sex sexuality.

My argument in this article is that there is a good fit between historical developments and the hypothesis that law is partially to be blamed for the diminished social status of *māhū* on O'ahu via the

discursive sexualisation of their identity. But I want to go further, and claim that an explanation that makes law part of the picture is not only consistent with historical facts, but also highly plausible at the theoretical level. First, as Merry argues and illustrates in the most significant work to date on the role of law in facilitating the colonisation of Hawai‘i, law, as a meaning-making system, is ‘fundamental to understanding the shape of social transformation’, although the latter is also driven by material practices ([11], p. 259). Secondly, law has a peculiar power to effect socio-cultural transformation by creating and redefining social meanings, as it can rely not only on its coercive power, but also on its nature as an authoritative discourse [11].

## 2. *Māhū* on O‘ahu and in Tahiti

For scholars of gender-variance, Polynesian societies offer particularly rich case studies. In 1994 Besnier published an essay seeking to identify common features in the phenomenology of different instances of what he calls Polynesian (male-bodied) ‘gender liminality’, understood as ‘the adoption by certain individuals of attributes associated with a gender’ other than that most frequently attached to their bodily sex—something that he argues ‘is deeply embedded in dynamics of Polynesian cultures and societies’ ([12], p. 285). According to Besnier, the best understanding ‘posits liminal individuals as men who borrow certain social and cultural attributes and symbols normally associated with women’ ([12], p. 327). He notes that these attributes vary from one individual to the other; that cross-dressing is not a reliable indicator of gender liminality; and that gender liminal individuals in Polynesia typically associate, and are associated, with women and domesticity. He also argues that Polynesian gender liminality is an internally variable category, that it may wax and wane according to context and that gender-liminal individuals may transition to gender non-liminality [12].

In the Tahitian context, Levy suggested that *māhū* enable Polynesian men to consolidate their masculinity in a cultural environment characterized by ‘the absence of strong internal shaping towards the self definition of manhood in its sense of contrast and complementarity to womanhood’ ([13], p. 18). In other words, gender-conforming Polynesian men would be able to shore up a sense of male identity because they can contrast it with the ‘failed’ masculinity of the *māhū*. This functionalist account has been critiqued on the ground, among other things, that it is predicated upon a purported and unproven Tahitian preoccupation with gender deviance and masculinity [14], and that it does not explain why the absence of a strong contrast between male and female identities is a problem in need of a solution [12].

Although sexual relations with men are not an invariable feature of Polynesian gender liminality, sexuality remains, alongside gender, centrally relevant to an accurate understanding of gender liminality. This is because, Besnier argues, gender liminal individuals are always liable to being perceived as ‘potential sexual “fair game”’ of non-liminal males ([12], p. 301). In other words, the social intelligibility of gender liminal individuals in Polynesia rests as much on their gender variance as on an assumption of their participation in same-sex sexual activity. It is worth noting that these understandings are not necessarily at odds with the ways in which Euro-Western dominant epistemologies ‘make sense’ of transgender people. Thus, Sharpe has pointed out that the law tends to render invisible non-normative transgender desire—for example, a transgender woman’s desire for another individual who, whether or not female-bodied, identifies as a woman [15].

At any rate, this slippage from gender to sexuality in the social legibility of Polynesian gender-variance is borne out linguistically in Hawai‘i: not only, as we have seen, on O‘ahu *māhū* is currently used as a disparaging term applied to both trans and gay individuals, but Pukui’s authoritative Hawaiian dictionary translates the term into English as ‘homosexual’ and ‘hermaphrodite’ [3]. Clearly, neither of these English terms accurately captures the distinctiveness of Polynesian gender-variance: they do indicate, however, that *māhū* identity is thought of both in terms of sex/gender hybridity and in terms of same-sex sexual orientation.

While Besnier’s remarks purport to apply to Polynesian gender-variant individuals across the whole of Polynesia, there are important differences in the construction of Polynesian gender variance in different Polynesian societies. In this article I am especially interested in the disparities in social status between Tahitian and Hawaiian *māhū*—disparities that entail different occupational prospects as well as different levels of integration into mainstream kinship structures.

Perhaps one of the most powerful illustrations of the integration of Tahitian *māhū* people into mainstream kinship structures is their involvement as parents in traditional adoption arrangements—something that, although only recently documented, is not an infrequent occurrence [4]. This reflects their relatively full integration into French Polynesian society, including their participation in the mainstream economy—despite the gendered nature of the occupations they tend to take up, which confirms the cultural association of *māhū* with women’s work. In particular, Tahitian *māhū* people often work in the hospitality industry, as social workers and nurses, or as administrators [16].

Anecdotal evidence on Hawaiian *māhū* on O‘ahu—the most developed island in Hawai‘i, and seat of the State capital Honolulu—paints rather a different picture of their role in both the public and private spheres. Consider the following quote from the website of an organisation devoted to improving ‘the quality of life for mahuwahine’ (note that because the term ‘*māhū*’ in Hawai‘i is now often used in a disparaging way, some prefer to it the more recently coined word ‘*mahuwahine*’). In 2009 this is how the website described the living conditions of Hawaiian *māhū*:

Not fully accepted in today's mainstream economy, mahuwahine have maintained a subculture of survival through welfare/SSI supplemented by hustling, drag entertainment, small jobs and care giving for children and the elderly [17].

After the website’s update in 2010, the issues of social disadvantage was put in less stark terms, but the mourning for a loss in social status and familial roles is clearly conveyed:

We had a place in traditional Hawaiian society along with every other Hawaiian... We were judged by how well we served our families and how we lived up to our kuleana (responsibility). In the 21<sup>st</sup> century, we constantly need to reinvent our place... ([17], accessed on 23 October 2012).

While it could be wondered whether the organisation on whose website these statements appeared was forced to paint a particularly bleak picture by the imperative to secure funding for the services it provided to mahuwahine, the organization’s perspective actually accords with other indicators of the diminished opportunities faced by *mahu* on O‘ahu. Thus, in the conclusions of a book that gathers the voices of a number of transgender people living on O‘ahu, Matzner states:

Rather than claiming their places in society as healers, caregivers, or teachers [that is, the occupations traditionally assigned to *māhū* in Hawai‘i], many present-day queens on O‘ahu must work the streets in

order to survive. ... [M]any families in Hawai‘i today fail to recognize the specialness of their transgendered children and instead view them as worthy only of condemnation... Almost all of the locally raised participants in this book worked in sex-work at one time or another... For queens living in a hostile society, sex work ... is oftentimes the only available path to take... In addition to sex work, “traditional” career choices for queens have been in the beauty and entertainment industries ... [although] female impersonation is a sideline rather than a full-time profession ([1], p. 284).

It bears emphasising that different *māhū* on O‘ahu have diverse experiences and clearly not *all* *māhū* are employed in sex work or even confined to low-paying occupations. Furthermore, where Matzner argues that for many *māhū* on O‘ahu sex work ‘is the only available path to take’ he may be overstating the point: for the interviewees in his own book convey a clear sense of agency, variously accounting for their participation in sex-work as stemming, for example, from a desire to get the sexual attentions of boys, or as a strategic choice to make money fast so as to be able to afford the hormones that they want to take [1]. What is clear, however, is that these choices are constrained by a context—whose nature is not only material, but also discursive—that the agents themselves had no hand in producing.

Even with these qualifications in mind, Matzner’s account points to a significant difference in the social status generally enjoyed by *māhū* on O‘ahu as compared to Tahiti. In the last decade or so, some studies have begun to document more systematically the diminished opportunities and challenges Hawai‘ian *māhū* face [5]. These include: high levels of violence in schools [18]; the fact that *māhū* ‘are routinely underemployed; are at risk for HIV, incarceration and substance abuse; experience severe stigmatisation and harassment; generally lack access to healthcare; and are at exceptional risk for early mortality’ [19]. Socio-linguistic evidence confirms this difference in the social status of *māhū* in Tahiti and on O‘ahu: as we have seen, in Tahiti ‘*māhū*’ has retained its original meaning, while on O‘ahu it has acquired a pejorative connotation.

At one level, the contemporary marginality of *māhū* on O‘ahu is productive of rich counter-normative practices, including performative kinship structures: for example, more experienced *māhū* who have been out for longer play the role of ‘queen mothers’ towards newcomers. As a young *māhū* explained: ‘A queen mother is someone who is there for you in your time of need’ ([1], p. 264). Nonetheless, the marginality of Hawaiian *māhū* remains a social justice problem that calls for interrogation.

### 3. Methodological Notes

There is no doubt that a complex set of factors accounts for the different trajectory taken by Polynesian gender variance on O‘ahu and in Tahiti. Indeed, it may well be that those differences are overdetermined: more than one factor is likely to be implicated in their production, and each, or at least some, of these factors may well in and of itself have been sufficient to produce the outcome. I am interested in the question of whether law was one of these factors.

While it is impossible to empirically demonstrate a causal correlation between the law and the impaired social status of *māhū* on O‘ahu, in this article I raise that correlation as a hypothesis that can be ‘deepened and broadened’ ([20], p. 12) (if not irrefutably tested) by undertaking a comparative analysis between the sociolegal history of Tahiti and O‘ahu. Two objections might be raised to this analysis.

First, one could wonder whether the differences in the level of acceptance experienced by *māhū* in Tahiti and on O‘ahu might be largely due to the fact that O‘ahu has undergone a process of modernisation and a correlative loss of traditional values which is unparalleled in Tahiti, whose population is six times smaller than O‘ahu. One could then go on to wonder if it might be more appropriate to compare Tahiti with the whole of Hawaii, including the more rural and less densely populated islands, where pre-colonial Hawaiian values sympathetic to gender-variance are more likely to have survived.

I think this way of proceeding would be less promising than a comparison between specifically O‘ahu and Tahiti. Despite the difference in overall population numbers between Tahiti and O‘ahu, the population and infrastructure in Papeete, though admittedly not as large as those of Honolulu, reach the critical mass point that make the city feel and function as a thoroughly urban, modern and cosmopolitan environment. This makes Tahiti stand into considerable contrast to the rest of French Polynesia: consistent with this, in the local imagination Papeete no less than Honolulu functions as the main referent for a metropolitan environment.

In this respect, the relationship between Tahiti ‘and her islands’ is largely analogous to that between O‘ahu and the rest of Hawaii: in either case, we have an island dominated by a city with all the trappings of modern life, standing out from the other islands where life has a largely more slow-paced, rural and traditional quality. In sum, it seems to me that the similar structure/function of O‘ahu/Honolulu and Tahiti/Papeete are more important than the sheer numbers of their respective populations in determining the appropriate terms of comparison for the study.

A second objection runs as follows. The majority of the population of French Polynesia is of Polynesian descent, while native Hawaiians are a minority in Hawai‘i. Even if in Tahiti the proportion of non-Polynesians is considerably greater than in the rest of French Polynesia [21], Polynesians remain a majority in Tahiti and a minority on O‘ahu [22]. This makes a comparison between the two ill-conceived.

The problem with this line of argument is that it is built on the assumption that the *only* factor that explains the diminished opportunities of *māhū* on O‘ahu are the transphobic attitudes held by non-Polynesians. While it seems highly plausible that these attitudes are a major contributing cause of anti-*māhū* stigma, assuming at the outset that they are *all* that matters disables us from even considering whether other factors may be involved, and hence obscures the role that these factors may have played.

If we resist the temptation to assume that the differences in ethnic composition of O‘ahu’s and Tahiti’s populations explain everything (and they do not explain, for example, the reports of some Hawaiian *māhū* that they experience abuse within their families [5]), then these differences need not be seen as fatal to the potential usefulness of a comparative analysis between the two societies.

#### **4. *Māhū*, Same-Sex Sexuality, and Sodomy Laws**

The laws of some Polynesian societies specifically target gender-variance: in particular, Farran and Su’a report that in both Samoa and Tonga female impersonation is criminalized, although Tongan law expressly limits this to situations where the impersonation is for the purpose of soliciting [23].



Similarly, for some time after the mid-sixties, Honolulu City Council required trans women in an area of town frequented by *māhū* to wear a badge identifying their male sex [1,24]. It seems clear that this requirement, and the police's violent enforcement of it [24], contributed to anti-*māhū* stigma on O'ahu. Not only was the requirement hostile to the self-understanding of those on whom it was imposed, but it also socially stigmatised *māhū* as dangerous bearers of an inauthentic gender identity. There were also racist undercurrents to the requirement, pitting as it did the supposedly devious and predatory *māhū* sex-workers (in all likelihood the principal target of the provision, even if this was on its face race- and profession-neutral) to their 'innocent' and 'unsuspecting' customers—the non-Polynesian soldiers or tourists unfamiliar with Hawaiian gender-variance, whom the *māhū* were supposedly intent on deceiving and taking advantage of.

I want to concentrate, however, on a less obvious legal contributor to the diminished social status of *mahu* on O'ahu: Hawai'i's (now repealed) sodomy laws. Sodomy laws spring naturally to mind as one of the symbolically most powerful contributors to stigma against LGBT people. While some scholars (Calhoun) have questioned that sexually repressive laws (as opposed to, for example, marriage laws) are *mainly* responsible for the disempowerment of non-heterosexual or gender-nonconforming people, the claim that sexually repressive laws socially stigmatise sexual minorities has a simplicity that it is profoundly counterintuitive to argue with. Furthermore, it fits the post-Foucauldian theoretical argument, made most famously by Smart [25]—and, in the queer context, by Moran [9]—that much of the power of law is exercised through its ability to make authoritative claims to truth.

While gender rather than sexuality is seen as the main defining feature of *māhū*, I have pointed out above that, as Wallace clearly puts it, in Polynesia gender variance 'announces the availability of gender-liminal subjects for same-sex sexual acts whether or not they participate in them' ([26], p. 26). As such, one would expect sodomy laws to have played some role in socially de-legitimising *māhū* identity. The legal history of sodomy in Hawai'i and Tahiti fits this hypothesis.

Two disclaimers are in order. First, at no point will I claim that law is solely responsible for the diminished social status of *māhū* on O'ahu. However, as Matsuda puts it, '[o]f the many economic, political, and social effects that were destructive of Hawaiian culture, the law, with its official institutional presence, was surely one of those forces. It was not possible for Hawaiians to use Western law instrumentally while resisting Western law ideologically' ([27], p. 37). Secondly, I will not venture an opinion about whether law alone—in absence, that is, of any other concurring factor—could have been enough to produce the outcome. That question would be of purely theoretical interest, for, as matter of fact, other relevant factors appear to have played a role.

## 5. Sodomy Laws on O'ahu

The existence and acceptability of same-sex relationships and sexual activities between males is well documented in pre-Christian Hawaii [11]. In particular, early European accounts testify to the presence of male companions (*aikane*) of chiefs who, unlike *māhū*, appear to have had a standard masculine gender presentation, and who had sexual as well as important political roles [28]. *Aikane* relationships, however, were frowned upon by the missionaries [29], and same-sex intimacy was largely clouded in invisibility after Western contact [30].

As Hawai'i gradually lost its independence, going from sovereign Kingdom to Republic (1894) to US Territory (1898–1900) to US State (1959), its laws became progressively imbued with 'non-Hawaiian ways' ([30], p. 113). The history of sodomy laws on the islands, reconstructed by Painter [31] and Morris [30], illustrates this trajectory.

Merry argues that the management of sexuality was a central concern of the ruling elites in XIX century Hawai'i and that it was 'driven by Christian demands for conversion' ([11], p. 16); but such demands should themselves be placed in the context of the ruling elite's attempt at forging a 'civilised' Hawaiian nation that would be taken seriously in the international arena, dominated by Euro-American powers. The Hawaiian political leadership was also under pressure to manage these cultural changes specifically using the medium of law, for the acquisition of a system of rules that Euro-American observers could apprehend as 'law' was seen as a mark of a mature civilization. Thus, the 'adoption of Anglo-American law was inextricably joined with the adoption of ... a severe Calvinist version of Protestant Christianity brought by stern, impassioned, and ethnocentric missionaries from New England' ([11], p. 63). Indeed, in the 1820s the Ten Commandments were adopted as the law of the land. As a result of this and subsequent initiatives, laws criminalized sexual practices that had hitherto been legally and socially acceptable, and people started being prosecuted for engaging in such practices [11].

Sodomy laws as such (incorporating the common law definition) were not introduced until 1850 [32]. At first blush, the timing may seem ironic, as by this time the Hawaiian political leadership had started replacing the missionary-inspired theocratic legal system with a secular legal system. However, the timing of the introduction of the sodomy law can be explained by the fact that it is precisely during this phase of secularisation of the legal system (1844–1852) that many radical changes were introduced into Hawaiian law [11].

Importantly, the secularisation of the legal system during this period, and the considerable substantive normative changes that it brought in its wake (including in the realm of sexual practices), were partly introduced in a bid to continue shoring up the Kingdom's political independence in the face of imperialist threats. However, the strategy backfired, for the numerous prosecutions for sexual crimes that followed the introduction of sexually repressive laws created the image of a nation whose members were incapable of self-restraint and hence self-government [11].

The sodomy law was introduced as part of a Criminal Code whose provisions, albeit intended to be tailored to fit Hawaiian needs and conditions, were merely a simplified version of those contained in a Code that had been proposed for Massachusetts a few years before [11]. The English text of the 1850 law referred to sodomy, as 'the crime against nature, either with mankind or any beast'. To render the first part of this expression ('the crime against nature ... with mankind'), the Hawaiian text used the expression '*moe aikane*', translated by Morris as 'one who sleeps with a lover of the same sex' ([30], p. 114): the idea that by engaging in sodomy one commits a crime against nature was not linguistically representable in Hawaiian and alien to indigenous epistemologies.

The discrepancy between the wording of the English and Hawaiian versions of the statute raises interesting questions about the law's purpose and exactly which conduct it was meant to proscribe: the Hawaiian wording (*moe aikane*) here seems crucial, for case law from the 1850s through to the 1890s established the principle that in case of conflict between two versions of a law, the Hawaiian version would prevail [30].

Morris points out that the word '*aikane*' describes people, not acts and 'marks persons of any gender in a homogamous relationship' ([30], p. 128). '*Moe*' does refer to an act—that of lying (as in mating) with another—but, unlike the English idea of 'unnatural crime' does not necessarily index anal (or oral) intercourse [30]. So, potentially, the Hawaiian expression *moe aikane* was broader than the English idea of sodomy, as it could be seen as encompassing acts between women (as well as between men), and as applying to a greater variety of sexual acts than sodomy as conventionally understood. In terms of its enforcement, however, all of the 7 prosecutions relating to cases not involving intercourse with animals that took place in the second half of the XIX century were in fact for male-to-male (forcible) sodomy [30].

Interestingly, neither as written nor as applied did the law formally prohibit one from becoming a same-sex lover: rather, it targeted sexual acts between such lovers. Indeed, as the case law on forcible sodomy shows, the law in practice was used to prohibit sexual acts between people of the same-sex whether or not they were intimate companions or lovers (*aikane*). In other words, despite the wording of the Hawaiian version, in practice the law formally operated like other sodomy laws, remaining tied to particular acts, rather than specific identities or relationships.

There is evidence that after Euro-Americans settled on the islands, Hawaiians no longer openly engaged in same-sex sexual activity [30]. *Aikane* could then become, at least ostensibly, a de-sexualised category—something akin to a bosom or best friend. The fact that, at the same time as sodomy laws proscribed lying with an *aikane*, *aikane* were recognised as members of family in probate proceedings [30] was possible, I suggest, precisely to the extent that the category *aikane* was discursively de-sexualised. In turn, this de-sexualisation was possible inasmuch as Hawaiians responded to Euro-American and Christian condemnation of same-sex sexual activity and relationships by something akin to closeting—which, as we have seen above, is just what *aikane* did. This closeting strategy however, as I will argue below, was not available to *māhū*, if Besnier is right in arguing that their very gender presentation in and of itself triggers the social assumption that they engage in same-sex sexual activity [12].

In 1887 the sodomy law was entrenched in the so-called 'Bayonet Constitution' [30], which was forcibly imposed on King Kalakaua by the Hawaiian League, a secret society made up mainly of foreign residents who aspired for the Kingdom of Hawai'i's to be annexed to the United States. The Hawai'i Supreme Court took a particularly hard stance on sodomy in two cases from the 1920s [31]: against the authority of English law, it held that emission of semen need not be proven in sodomy cases [33] and that fellatio amounted to sodomy [34].

Preoccupations with deviant sexual conduct intensified in the 1940s, with the introduction in the Hawaiian Senate of two Bills aiming at creating a 'psychopathic offender law', intended to target, amongst others, sexual psychopaths (although the Bills were eventually rejected). Furthermore, in 1949 a provision outlawing solicitation 'for the purpose of committing a crime against nature' was adopted (*Laws of Hawai'i 1949*, ch 139, §1, enacted 4 May, 1949) [31].

In 1972 the 1850 sodomy law and the 1949 solicitation provision were finally repealed on the ground that they served 'no social function' ([31], p. 116). As late as 1982, however, the Hawai'i Supreme Court stated in *State v Mueller* [35] that same-sex sexual activity was not protected conduct under the 1978 right to privacy amendment to the Hawai'i Constitution. This meant that the legislature could re-introduce sodomy laws without violating the State Constitution [31]—or indeed the US

Constitution, under which, according to the infamous 1986 case *Bowers v Hardwick* [36], there was no right to engage in same-sex sexual activity.

All this does not necessarily mean that sodomy laws were frequently enforced. Although in the 1850s and 1860s Hawaiian courts ‘were full of cases concerning sexual conduct, particularly adultery and fornication’ ([11], p. 221), the records indicate that prosecutions for sodomy were infrequent at the time of the Kingdom of Hawai‘i—as we have seen above, only seven cases are recorded. Additionally, to the extent that prosecutions occurred in this period, all except one were concentrated after 1875, ‘the era when sexual repression of Hawai‘i under foreign influence, particularly anti-sodomy sentiment, was most severe’ ([30], p. 131). Nor do we know that the sodomy laws were necessarily used to disproportionately target *māhū*, although we do have evidence of the Police using them to arrest *māhū* in the decade prior to their repeal [1].

Whatever the extent of their enforcement, these laws contributed to the creation and consolidation of particular social meanings around same-sex sexual activity. They did so because of law’s nature as an authoritative discourse making claims to truth, and its ability to shape our apprehension of the social and inflect our value judgments about it [11,25]. I am not appealing here to an understanding of formal law as structuring our worldview in some simple or irresistible way, but to an idea of enacted law as productive of ‘legal consciousness’ [37], by which I mean the *constrained* ways in which actors *engage with* law and its legal categories, including beyond the courtroom and police station, and including at the psychic and inter-subjective level of identity construction.

It seems more than accident, in this connection, that in the 1860s—the decade following that during which the first sodomy law was introduced—*The Hawaiian flag* ran articles condemning historical Hawaiian figures known for their same-sex sexual activity or preference, and blaming them for all manner of disturbances and ill-consequences befalling the Kingdom (although, as Silva’s work demonstrates, it does not follow that the law and the imported Christian morality succeeded in altogether monopolising the terms of discourses surrounding same-sex desire) [38].

Sodomy laws, understood in this way (that is not necessarily as practically enforced by legal officials but as constitutive of legal consciousness), are likely to have had a disproportionate stigmatising effect on *māhū*. For, unlike gender-conforming males who have sex with males, the gender presentation of *māhū*, as we have seen above, automatically triggers the social assumption (which may in fact be unfounded) of their engaging in same-sex (albeit different-gender) sexual activity.

The fact that *māhū*’s gender presentation signals a putative participation in same-sex sexual activity, coupled with the fact that sodomy laws for 120 years made such activity an ‘infamous crime’ [39], is likely to have resulted, over time, in *māhū* subjectivity becoming socially intelligible largely in terms of sexual deviance. This is especially likely to have occurred on O‘ahu, where urbanisation and westernisation created the conditions for the increased juridification of social and psychic life (although Merry points out that even in urban areas the old tended to interact with, rather than simply being replaced by, the new [11]).

In a society in which since the early XIX century the missionaries had made it their business to introduce and popularise Christian sexual morality—a morality whose value-judgements also inevitably informed the outlook of much of the expanding Euro-American population of the island through the XIX and XX centuries—the sexualisation of *māhū* identity cannot fail to have contracted the social opportunities previously afforded to *māhū*. To the extent that this was so, and to the extent

that the sexualisation of *māhū* identity may have been internalised or deliberately drawn upon as a resource by *māhū* themselves, it is little wonder that ‘prostitution [became] a dominant way of life within local transgender communities’ on O‘ahu ([1], p. 283), where tourism, the military bases, and the trappings of urban life ensured a steady supply of customers.

The urban and cosmopolitan environment of Honolulu, coupled with *māhū* people’s reduced opportunities for full social participation, also brought *māhū* into direct contact with gender and sexual sub-cultures from the mainland. This, while providing opportunities for alliances, may have precipitated more or less subtle shifts and realignments in *māhū* identity and practices—signalled, for example, by the use of hormones on the part of some *māhū* [1]. I hypothesise that this adoption of ‘alien’ gender identity practices may have resulted in a social reappraisal, by some, of the Hawaiian character of *māhū* identity, contributing to its social de-legitimisation as ‘inauthentic’ within Hawaiian communities.

While gender-normative same-sex attracted people no doubt also felt the sting of the sodomy statutes, many of them would have been able to escape the associated pressures to a greater extent than *māhū* did. This is precisely on account of their conventional gender presentation. Consistent with this, and on the assumption that participation in mainstream kinship practices is an indicator of social integration, we have contemporary anecdotal evidence of gender-normative same-sex lovers raising children in the context of traditional adoption [40].

## 6. Sodomy Laws in Tahiti

If Hawai‘i, before the 1972 repeal, had a long-term relationship with sodomy laws, by comparison Tahiti had merely a fleeting affair. Prior to Western contact, Tahitians, like Hawaiians, engaged freely in same-sex sexual practices. In particular, Oliver reports from sources speaking of sexual relations between boys and older males of higher status [41]. Furthermore, the missionaries decried the pervasiveness of sexual activities between young boys [12]. Levy has also reported from a document in the archives of the London Missionary Society, describing how in 1801 the Chief Hapi-ano was found fellating another man [42]. Oliver also states that ‘there is evidence that males in general indulged occasionally in homosexual practices including mutual masturbation and other unspecified acts’ ([41], p. 373). Finally, commentators agree that although *taio* (friendship) contracts between males in ancient Tahiti were probably not entered into with a view to establishing same-sex sexually intimate relationships (however much they may have resembled marriage ceremonies), contract-friends, as well as many other males, may well have engaged in same-sex sexual activity [43].

The first set of written laws in Tahiti was promulgated in 1819 by King Pomare II. According to Bouge, the Pomare Code of 1819, drafted by the King and chiefs in consultation with members of the London Missionary Society (the first organised European presence in Tahiti), was the result of a converge of wills—one Tahitian and one English [44]. Campbell emphasises King Pomare II’s motivations in this process: having recently defeated his opponents and gained control of the Island, he saw a code of law as instrumental to retaining and effectively exercising power [45]. The King, having converted to Christianity in 1812 [46] and wishing to use it as a basis for a new social order, sought the advice of the missionaries [45]. According to Campbell the missionaries were less than enthusiastic about becoming involved in lawmaking, even as simple advisers, and ‘insisted that the King make his

own laws' ([45], p. 76). According to other accounts, however, it was the missionaries themselves that instigated the drafting and promulgation of the Code [47,48], which they thought could serve as a means of moral reform [44].

While the missionaries' influence on the content of the Code is undeniable—indeed, some have argued, greater than they were prepared to concede [47]—the Code was, in the words of Reverend William Ellis from the London Missionary Society, 'not altogether such as the Missionaries would have wished the nation to adopt' ([46], p. 137). In fact, the King did not always follow the missionaries' advice, giving them reason to lament the narrow scope of the laws introduced [45].

In this regard, the absence of an offence targeting same-sex sexuality in the 1819 Pomare Code seems telling, particularly in light of the fact that other sexual or sexualised conduct to which the new Christian morality objected was outlawed: this included adultery and the provocative gesture of striking one's thigh—apparently an indecent behaviour condemned by the new religion [44].

The absence of an anti-sodomy law from the Pomare Code of 1819 is even more striking in light of the fact that same-sex sexual activity was almost certainly prohibited in the Code of laws promulgated in the 1820s in another island in the archipelago of the Society Islands—Huahine. The Huahine Code contained a provision prescribing 7 years of incessant hard labour or perpetual banishment for those who committed an unspecified 'unnatural crime' ([47], p. 182).

Under these circumstances, the simplest explanation for the absence of a sodomy provision from the 1819 Pomare Code is that the criminalization of same-sex sexual activity was one of those issues on which Pomare II deliberately failed to heed the missionaries' advice. I suggest that one of the reasons Pomare may have had for choosing not to prohibit sodomy is that he himself had sexual relations with other males: in the words of the missionaries, King Pomare was 'addicted to ... debasing vices' ([47], p. 258) and Oliver reports that the missionaries were first-hand and unwilling witnesses to the same-sex relationship between the King and one Toetoe [41].

On the other hand it appears that the missionaries' influence on the Huahine Code was greater, which explains its inclusion of the 'unnatural crime' offence: one Mr Barff prided himself to have devoted 'a greater degree of ... attention' to the Huahine Code than to any of the other laws enacted in the Society Islands at the time ([46], p. 193).

Even after the death of Pomare II, it seems that no sodomy/'unnatural crime' offence was introduced in Tahiti for quite some time. In their discussion of the innovations of the 1824 Code—which revised and added to the provisions of the 1819 Code [49]—Tyerman and Bennett make no mention of such an offence being introduced [50].

In 1842, however—the same year Tahiti became a French Protectorate—a new Code [51] was promulgated. The missionaries themselves were charged with drawing it up [48]. Unsurprisingly, the 1842 Pomare Code did proscribe same-sex sexual activity [49]. The missionaries went further and even tried to partially entrench this provision, and the 1842 Code as a whole, by shielding it from repeal other than by the Tahitian Legislative Assembly: 'If the Queen or any other powerful person repeals a law, that is in itself a violation of the law' ([48], p. 83).

The last session of the Tahitian Legislative Assembly, which had begun its meetings in 1824, was in 1866 [48]. That year French laws replaced Tahitian laws except in the area of land law [52]. This means that the biblically-inspired legal proscription of same-sex sexuality instigated by the missionaries gave way, a mere 24 years later, to the secular liberal approach of the 1810 French

Criminal Code (sodomy laws had been repealed in France in 1791 and the 1810 Code had not re-introduce them).

In sum, any legal preoccupation with male-to-male sexual activity, such as there was in Tahiti, was only short-lived, if not altogether lacking. I want to suggest that this fact may have resulted in lower levels of collective concern with male same-sex sexual activity in Tahiti compared to O‘ahu: for if it is true that male-bodied gender variance in Polynesia is discursively predicated on the putative sexual availability of gender-variant people for the enjoyment of non-variant males, it is also true that in Tahiti this putative sexual availability has not carried with it criminal connotations. This in itself is likely to have resulted in greater social acceptability of *māhū* in Tahiti than on O‘ahu, for, as Merry argues, law’s power as a social discourse is largely about constructing (and effacing) social identities, and the ‘most fundamental distinction legal systems draw is that between the criminal and the non-criminal’ ([11], p. 262).

But the lack of crimino-legal salience of the putative sexuality of *māhū* in Tahiti also means that this putative sexuality has not marked their identity to the same extent as that of Hawaiian *māhū*. To put it differently, the fact that law has been for the most part uninterested in the sexual activities of Tahitian *māhū* has contributed to preventing the emergence or consolidation of social perceptions about their sexual exceptionalism. Thus, law has made it easier in Tahiti than on O‘ahu to come to see something other than a particular kind of sexual activity as wholly or mainly definitional of *māhū*. This argument accords with Lacombe’s observation that the integration of *māhū* into Tahitian society appears contingent upon their sexual discretion and indeed a degree of societal reluctance to discuss or profess any knowledge about their sexual practices and preferences [16].

Indeed, in contemporary Tahitian there is a different term—*rae-rae*—for gender-variant biological males whose identity is seen as centred on sexual activity. As a self-identified *māhū* puts it:

Mahu are effeminate in a man’s body. I hate the term *rae-rae*, which appeared in the 1960s, because it makes all that we are turn on the idea of sexuality. For mahu, sexuality is by no means the most important thing. Our role is another: we bring a little sweetness around us, as a woman would do ([53], my translation).

The term ‘*rae-rae*’ had recently entered common parlance when Levy conducted his seminal fieldwork in Tahiti in the late 1960s, and seemed to be synonymous with western-style gay identity [42]. But, as Elliston clarifies, currently the term designates transgender identities which are seen as centred on sexual activity, including prostitution, and western ideas of transsexualism and white femininity [2].

Elliston argues that Tahitians’ dislike for *rae-rae* can be explained by the fact that *rae-rae* subjectivity is at odds with Polynesian sex/gender epistemology. This would be so for two reasons. In the first place, Elliston argues that gender rather than sexuality is the main organizing principle of *māhū* identity, adding—controversially [14]—that, according to Polynesian understandings, identity is first defined in relation to gender and sexual desires are then aligned in accordance with one’s gender identity. The conspicuous sexuality of *rae-rae* would violate this Tahitian epistemological tenet that gender is prior to sexuality. Secondly, Elliston argues, in claiming to ‘choose’ a *rae-rae* gender identity, *rae-rae* discredit the idea, to which Polynesian epistemologies are equally committed, of the embeddedness of one’s gender in one’s life history. In short, for Elliston, the subjectivity of *rae-rae* is socially problematic in Tahiti because of its incompatibility with the Polynesian world-view [2].

It seems at least as likely, however, that in contemporary Tahiti the unapologetic style of sexuality of *rae-rae* is objectionable because it conflicts with certain aspects of the assimilated Christian sexual morality emphasizing sexual modesty and propriety [16].

## 7. Conclusions

In Tahiti, French law, in conjunction with certain social processes (modernisation, urbanisation, tourism, the assimilation of Christian values), created the conditions of possibility for a reorganization of Polynesian male-bodied gender-variance into two distinct identities—*māhū* and *rae-rae*—each affording a different set of social options. On O‘ahu, on the other and, a more sexually repressive legal history, in conjunction with broadly similar social processes to those at play in Tahiti, precipitated an understanding of *māhū* subjectivity centred on ideas of sexual deviance. This has restricted the range of opportunities for social participation afforded to Hawaiian *māhū* on O‘ahu, all but propelling many of them into marginality.

My argument in this article is not that Tahiti’s legal history since European contact can be credited for producing a society that is particularly tolerant of, or even indifferent to, same-sex sexuality. To begin with, while it is plausible to assume that law, as an authoritative discourse purporting to express the general will, plays an important role in legitimising and de-legitimising particular social identities, it goes without saying that it interacts with other competing discourses and dynamics, which may pull in opposite directions. Furthermore, I did not argue that Tahitian society is considerably more liberal towards same-sex sexual activity than Hawaiian society: rather, I have tried to make the different point that the law is likely to have contributed to the sexualisation of *māhū* identity on O‘ahu in a way that it has not in Tahiti.

Indeed, although there is significant evidence of the acceptability of same-sex sexual activity and relationships in both ancient Tahiti and Hawai‘i, to claim that contemporary Tahitian society is especially welcoming of, or unconcerned with, same-sex sexuality runs counter to socio-linguistic evidence. In particular, it runs counter to the coinage (at some point after the first occurrence of the neologism *rae-rae* in the 1960s) of the disparaging term *petea*, which refers to male-bodied individuals having sex with, or sexually desiring, each other. Elliston argues that this linguistic development must be read partly in light of a politics of Polynesian self-determination, as the term applies mainly to gay men, whose identity is seen as a French import [2].

A similar dynamic is at play in respect of *rae-rae*: the ‘purity’ of *māhū* identity, in the sense of it being untouched by western sexual identities and forms, appears to be a mainstay of French Polynesian discourse about *māhū*, partly accounting for the social respect that *māhū*, unlike *rae-rae*, command. Yet it is unlikely that Tahitian *māhū* identity has not, at least in part, been reworked as a result of Tahitian society becoming exposed to Western gender norms.

Consider the quote reported above, by a Tahitian *māhū*, to the effect that the role of *māhū* is to bring with them the sweetness of a woman’s touch [53]. While the association between women and sweetness conforms to still current western understandings of femininity, it is unclear that it reflects traditional Tahitian understandings of gender. For example, Oliver, in his study of ancient Tahitian society, did note that apparently women ‘were attributed with stronger and more sensitive “internal” reactions to felicity and tragedy’, and that in stories they were more likely to show ‘tender-



heartedness’, while men “were provided with more violent and picturesque conventions for expressing “anger” and “rage”” ([41], p. 598). However, he also qualifies these claims in several and significant ways, for instance by describing Tahitian men as free to indulge in ‘tears and raptures’ ([41], p. 599); by noting that Tahitian tales also knew ‘many malicious female spirits’ ([41], p. 1134); and by pointing out that ‘there is no indication that [females] were permitted conventionally any more display of fear than were males’, nor expected any more display of stoicism ([41], p. 599). In the 1890s US historian Henry Adams similarly de-emphasised temperamental gender differences between French Polynesian men and women, writing that ‘the Polynesian woman seems to me much like the Polynesian man; the difference is not great enough to admit of sentiment, only of physical divergence’ ([42], p. 232). And forty years ago Levy, while noting differences in gender roles among Tahitians, wrote that the gender differences in behaviour or temperament that we are accustomed to thinking of as natural in the West did not seem salient in Tahitian society: ‘Men, for example, are not particularly more aggressive than women. Women do not seem to be much “softer” or more “maternal” than men’ ([42], p. 234).

In short, the sweetness that (some) Tahitian *māhū* claim as their own distinctive trait may not necessarily have been a historical attribute of *māhū* identity. If Tahitian *māhū* identity has been undergoing a process of change, partially in response to the circulation of western gender norms, then this may explain why the benign way in which Tahitians have traditionally looked upon *māhū* identity is currently shifting towards greater ambivalence [4]. Furthermore, Elliston reports that the disparaging term *petea* is now occasionally applied to *māhū* [2], revealing the existence of a new framework of intelligibility that conflates Polynesian gender-variance and gay identity, in ways apparently similar to those signalled by the insulting use of the term ‘*māhū*’ on O‘ahu.

In both Hawaii and French Polynesia a complex set of factors has been implicated in producing the challenges faced by *māhū* following colonization. This article’s limited ambition has been to foreground one such factor—sodomy laws—in the context of O‘ahu, where these challenge appear greater than in Tahiti. In this connection, I have argued that sodomy laws, in conjunction with other social processes, resulted in the sexualisation of *māhū* identity on O‘ahu; and that this sexualisation is part of the context against which many *māhū* people’s choice to enter sex-work on O‘ahu becomes intelligible.

A promising line of inquiry for future research may include an examination of the impact on *māhū* of the erosion of Hawaiian women’s rights following colonization—although this will require a nuanced examination of the extent to which *māhū*’s and cisgender women’s rights, interests, and prerogatives, as well as the ways in which they were socially regarded, coincided or diverged in Hawaiian society prior to and following colonization.

The final point I want to emphasise is that my argument that sodomy laws have been one of the social determinants of the diminished social status of *māhū* on O‘ahu should not be taken to mean that law seeps into individual consciousness making its value judgements all but irresistible for the recipient. Individuals retain agency in engaging with the discourses that constitute them and it is in this that the possibility of effective resistance resides. In this respect, it is interesting that, as Murray notes, *māhū* have taken a central role in the movement for the revival of Hawaiian culture [54]. No doubt, this is partly because, as the legend associated with the Stones of Life on Kuhio Beach illustrates, pre-colonial Polynesian epistemologies offer a formidable discursive resource against transphobia and a source of positive empowerment, assisting *māhū* people in the project of self-definition and in negotiating their social participation in contemporary O‘ahu.

However, law too, as a socially authoritative discourse capable of making successful claims to truth, has an important role to play in undoing the damage wrought upon gender-variant individuals on O‘ahu since colonial times. The recent introduction in Hawai‘i of laws prohibiting workplace discrimination on the ground of gender identity [55]—premised as it is on the idea of the equal dignity of trans and *māhū* people—is a promising start.

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