In 1820, Hiram Bingham, a Connecticut minister on a mission for his god, climbed Punchbowl hill, overlooking the city of Honolulu. He described the scene as follows:

Below us, on the south and west, spread the plain of Honolulu, having its fish-ponds and salt making pools along the sea-shore, the village and fort between us and the harbor, and the valley stretching a few miles north into the interior, which presented its scattered habitations and numerous beds of kalo (*arum esculentum*) in its various stages of growth, with its large green leaves beautifully embossed on the silvery water, in which it flourishes. Through this valley, several streams descending from the mountains in the interior, wind their way, some six or seven miles, watering and overflowing by means of numerous artificial canals, the bottoms of kalo patches, and then, by one mouth, fall into the peaceful harbor.¹

The kinship between the kanaka maoli (Native Hawaiians) and the taro plant infuses the Hawaiian language and family structure. ‘Ohā means “taro growing from the older root, especially from the stalk called kalo.” ‘Ohana means “family, relative, kin group; related.”²

In Hawaiian mythology, the first kanaka maoli, Háloa, was the younger brother of the taro plant. The first child of Wākea, the sky father, and Ho'okū-i-kalani, his daughter by Papa, the earth mother, was stillborn and buried at a corner of Wākea’s hut, where it sprouted into a taro plant. Wākea named the plant bāloa-naka, or “long-stalk-trembling,” for the stirring of the taro leaf on its long slender stalk when the wind blew. A second child was born and named Háloa, after the lengthy (*loa*) stalk (*bā*) of his older sibling.

Bingham had arrived at a propitious moment for his cause. King Kamehameha I had died the year before. His surviving queen, Ka'ahumanu, almost immediately had convinced Kamehameha I’s successor, Liholiho, to
end the centuries of kapu, or forbidden practices, that had ruled Hawaiian society. Among the forbidden practices were men and women eating together and numerous foods that were prohibited to women. The kapu system originated with Wākea, who established the first kapu: nights when husband and wife had to separate, an arrangement suggested to Wākea by his kabuna (priest), Komo'awa, as the excuse that Wākea could give to his wife, Papa, so that he could sleep with their daughter.

As Bingham looked out over Honolulu and Leeward O'ahu, he must have been convinced that his mission was indeed God’s will. The kapu system had been initiated for what to Bingham was unquestionably an incestuous purpose. And God had placed him in Hawai'i just when the kapu system had been ended by the Hawaiian queen, leaving her receptive to a new religion and paving the way for her conversion to Christianity, the adoption of missionary-defined morals, and Western rules of law.

Just a decade later, Prussian botanist Meyen saw the consequences of Bingham’s success. He wrote:

> The observance of Sunday as it has been introduced to the Sandwich Islands by the missionaries would be well recommended for convicts in a public reformatory but not for such good-natured and poor people as the inhabitants of the Sandwich Islands. On this day all pleasures are denied until sundown and the people must go to church morning and afternoon. Even taking a walk or riding is forbidden. . . . After eight o-clock in the evening the kanakas must be off the streets of the city. Those who violate this rule are apprehended by the passing soldiers and, unless they can give them money, are invariably imprisoned in the fort. The whole nation grumbles about these excessive measures. . . . Song and dance, like all lively expression of joy, have disappeared from the huts of these people.3

But the stifling influence of the first missionaries was only momentary, as Meyen was to learn upon his return home.

> The political papers have reported the news that Ka'ahumanu, the old queen and sovereign, passed away in June 1832 and that Kauike'aouli, the young King, was crowned as Kamehameha III and recognized as such by the British and that he has taken over the government alone. Kauike'aouli has lifted several of the bans on luxuries imposed by the old Ka'ahumanu and the dances and the favorite games of the natives—throwing the javelin, etc.—are permitted again. The Indians who wish to continue to attend the Christian services are allowed to do so. Coercion in this respect is no
longer tolerated, however, a matter in which, as in many other things, they say the old queen was too much influenced by the well-meaning but too uncompromising missionaries.⁴

But irreversible changes had taken place: “In the course of our excursions we saw the mountains everywhere covered with grazing horses and horned cattle. . . . [E]very reasonably well-to-do person, man or woman, keeps a riding horse. Yet, as welcome as the increase in this most useful domestic animal is, the joy in it will soon disappear when it is realized that this increase, as well as the expanded cultivation of meadows, is in exact proportion to the decrease in true agriculture.”⁵

Of course, the changes in the Hawaiian Islands were not solely brought about by the missionaries. Hawai‘i had been found in the Age of Discovery, one of the primary purposes of which was enriching the discovering nations. At the same time, the Western nations were convinced of their duty to “civilize” these “heathen” lands. Civilizing the heathens also meant changing these Islands by introducing familiar flora and fauna. Almost no explorer or visitor came without some plant or animal to deposit. Vancouver, who had been a lieutenant with Cook in 1778, returned in 1793 as captain of his own ship, bringing the first cattle that were to overrun the Islands, as described by Meyen in the 1830s. And by the 1860s, Isabella Bird would describe with an unintended irony the beautiful flora of Honolulu, all of which had been introduced:

The air was heavy with odors of gardenia, tuberose, oleanders, roses, lilies, and the great white trumpetflower, and myriads of others whose names I do not know, and verandahs were festooned with a gorgeous trailer with magenta blossoms, passion-flowers, and a vine with masses of trumpet-shaped, yellow, waxy flowers. The delicate tamarind and the feathery algaroba intermingled their fragile grace with the dark, shiny foliage of the South Sea exotics, and the deep red, solitary flowers of the hibiscus rioted among familiar fuchsias and geraniums, which here attain the height and size of large rhododendrons.⁶

Nor were the Hawaiians themselves blameless. Kamehameha I was able to consolidate his rule over the Islands with the help of foreigners and their weapons; once successful, he redistributed much of the land as spoils of war among his followers, diminishing the power of the kapu system’s kābuna (priests) in the process. Forty years of foreign influence and the success of Kamehameha I in becoming the first sole ruler of all of the islands had fatally
disrupted the rigid kapu system that had dominated Hawai‘i for so many centuries. So when Kamehameha I died, it should not be surprising that his surviving queen, Ka‘ahumanu, would end the kapu system’s social prohibitions that particularly affected women—even the queen.

Nor, perhaps, was it surprising that Ka‘ahumanu embraced Christianity and that her subjects acquiesced. A religious void had been created by the abolition of the old system; Bingham and his colleagues had just arrived and were ready with another system to take its place. And despite the observations of early visitors of the stifling effect of the missionaries’ brand of Christianity on the Hawaiians, these early visitors had not observed the extensive restrictions under which the common Hawaiian lived. The restrictions imposed by the Christian missionaries might have been part of any new religion that was not unexpected to the Hawaiian commoner. For example, under the kapu system, five days and nine nights of each month were devoted to the gods Kāne, Kanaloa, Kū, and Lono, spent in utter silence and potential death to those who uttered even just an involuntary cough.7 And one historian states that a kapu “might last as long as thirty years in the old days.”8

Hawaiian mythology and Hawaiian social structure and practices in pre-discovery Hawai‘i are more than historic curiosities; they are integral to current freshwater (wai) policies in Hawai‘i. The social structure of prediscvery Hawai‘i was based on this mythology, and wai’s primacy in the Hawaiian economy and society was rooted in its mythological origins.

As elsewhere in the nation and the world, fresh water is becoming the limiting factor in the future development of this multi-island state. Nowhere is that more imminent than in O‘ahu’s City and County of Honolulu, where three-quarters of the state’s population reside.

At the same time that demands on our water resources are highlighting their limits, the value of these resources as they were used and preserved in old Hawai‘i are now being reincorporated into the state’s freshwater policies and laws. This renewed focus has increased the complexity of determining what are the “best” uses of the state’s freshwater resources. The development-oriented policies and laws that prevailed earlier in the twentieth century, which viewed water in aquifers and streams as “wasted” if not extracted and diverted, have been replaced by the view that there is a dual “public trust” duty in preserving these resources for their inherent values and that any uses must be reasonable and beneficial.

This reorientation is not limited to Hawai‘i. For example, under the California State Constitution, Article 10, Section 2 prevents “waste of waters of the state resulting from an interpretation of our law which permits them to flow unused, unrestrained and undiminished to the sea.” In other words,
the California Constitution officially labels unused water as “wasted” water. But the California Supreme Court nevertheless found that “this taking [of water for offstream uses] does not promote, and may unavoidably harm, the trust uses at the source stream. . . . [T]he state must bear in mind its duty as trustee to consider the effect of the taking on the public trust and to preserve, so far as consistent with the public interest, the uses protected by the trust [citation omitted].” So the California Supreme Court, even when faced with a state constitution that views unused water as wasted, nevertheless determined that any “taking” must be balanced by a duty to preserve.

The Hawai‘i Supreme Court has made a similar finding of the state’s public trust duty, although in Hawai‘i the public trust is “a state constitutional doctrine,” in direct opposition to the situation in California. Article 11, Section 1 of the Hawai‘i Constitution states that “All public natural resources [including water] are held in trust by the State for the benefit of the people.”

Hawaiian mythology has many variations, as does Hawaiian history. The mythology and history of old Hawai‘i were preserved orally and only some time after the arrival of Captain Cook were they written down. Even the “hard” sciences of water storage and recharge in aquifers and of stream flows and their impact on the aquatic life that dwells within them are evolving and uncertain. Furthermore, legal doctrines that have evolved from these multiple sources have been made in the confines of legal proceedings, where the “facts” are limited to testimony and evidence submitted by the contesting parties. The role of opposing parties in litigation is not to provide a balanced view; they are advocates, leaving it up to the trier of fact to reach that balance within the boundaries of the law. But the trier of fact cannot look outside of the evidence that has been introduced in the formal litigation, no matter how relevant such unintroduced information may be.

Interestingly, the Hawai‘i Supreme Court has explicitly taken notice of this deficiency, stating that the State Commission on Water Resource Management “must not relegate itself to the role of a mere ‘umpire passively calling balls and strikes for adversaries appearing before it,’ but instead must take the initiative in considering, protecting, and advancing public rights in the resource at every stage of the planning and decisionmaking process.”

Hawaiian history and its mythological base, particularly pertaining to the wai; the geology of freshwater storage in islands created by lava; the biology of the handful of indigenous fish, crustaceans, and shellfish that stumbled upon and colonized the islands’ streams millennia ago; and the “reasonable and beneficial” uses to which specific freshwater sources should be allocated —these are some of the factors on which competing “experts” opine in sup-
port of the interests of the parties who have hired them, and therefore they are usually if not invariably at odds with each other. Out of this somewhat controlled chaos, decision makers are expected to reach reasonable conclusions.

In the legal system, the triers of facts—those responsible to hear the detailed evidence—must sort through the tangle of information and competing arguments and conclude what best represents the facts. The rules of law that the trier of facts determines are relevant to the particular dispute are then applied to this evidence, and the decision is made. On water issues in Hawai‘i, the State Commission on Water Resource Management is the trier of fact. The State Water Code authorizes appeals of Commission decisions to be made directly to the state’s highest Court. On appeal, the Hawai‘i Supreme Court defers to the Commission on its evidentiary findings (what the Commission has determined are the actual facts after considering competing versions of the “facts”) and concentrates its efforts on the rules of law that had been applied by the Commission. But the Supreme Court is the final arbiter and sets—and may even break—its own rules; it can call a strike a ball and vice versa (questioning the judgment of the trier of fact), and it can even call a spade a heart (concluding that it prefers its own version of the facts). Its decisions, including its mistakes, can be changed or corrected, if at all, only by itself. (There are Court rulings that might be corrected or reversed by legislative action, but there are other rulings from which the Court can isolate itself from reversal/correction by the legislative branch. The “public trust” doctrine is one such example, as is interpretation of the State Constitution.)

The written decisions issued by the Commission and the Court, the reviews and commentaries published in scholarly journals, and even the media coverage of highly visible controversies never reveal or uncover the real stories behind these decisions. Coherence and rationality are the objectives of the decision makers, not the underlying inconsistencies and chaos. Reviewers and commentators are interested in dissecting the groundbreaking characteristics of the decisions; their interest in the underlying reasons is in relationship to past legal rulings and seldom to the facts of the immediate case. And the media is interested only in the quick read, trying to capture what they believe is the essence of the decision in a headline or, at most, a few paragraphs.

The underlying story is much richer and interesting and leads hopefully to an appreciation of what the Hawai‘i Supreme Court has characterized as “weighing competing public and private water uses,” or how we try and why we need to strike a balance between preserving and using the wai in Hawai‘i.13