Constructing a "Homosexual" for Constitutional Theory: Sodomy Narrative, Jurisprudence, and Antipathy in United States and British Courts

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Constructing a "Homosexual" for Constitutional Theory: Sodomy Narrative, Jurisprudence, and Antipathy in United States and British Courts

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This Article explores the way in which recurring fact patterns drive jurisprudence, especially the jurisprudence of sexual-conduct regulation. It explores the ways in which state high courts have fused the hundreds of reported cases involving constitutional challenges to sodomy laws in the U.S., and the ways in which English courts did the same in the cases involving the interpretation of the Sexual Offenses Act, into a unified vision of what it means to be a gay man. The Article further examines the way in which these courts applied their visions to resist challenges to a severe regulation of (homo)sexual conduct. In considering the relevance of narrative and image to law, the Article suggests that lawmaking (jurisprudence) is driven by the creation of meta-narratives about the objects of the courts' attention (gay men). The Article then begins the examination of the meta-narrative itself, and the effectiveness of this narrative in driving sodomy jurisprudence in the United States and Britain. It concludes with an examination of the four "stock" characters that emerge as sodomy's meta-narrative: the predator (studies in the coercive sexual nonconformity of rape and physical power), the pied piper (studies in pedophilia, seduction, and the recruitment of youth), the Whore of Babylon (the embodiment of promiscuity, addiction, and contagion), and the defiler of the public space (the imperialism of public expressions of sexual nonconformity). Finally, the Article situates constitutional cases like Bowers v. Hardwick *and* R. v. Brown *within this tradition of narrative antipathy.* Bowers *provides an excellent case study of the way in which the narrative antipathy of sodomy jurisprudence blinds courts to even the "best" set of facts, and* Brown *demonstrates the power of narrative to confirm the deviance of gay men and refuse them the solicitude of the law to private sexual conduct.*

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I. INTRODUCTION

> [I]t should be permissible for the General Assembly to find as legislative fact that homosexual sodomy leads to other deviate practices such as sado-masochism, group orgies, or transvestism, to name only a few. Homosexual sodomy is often practiced outside the home such as in public parks, restrooms, "gay baths," and "gay bars" and is marked by the multiplicity and anonymity of sexual partners, a disproportionate involvement with adolescents, and, indeed, a possible relationship to crimes of violence.[1]

The predator . . . the pied piper . . . the Whore of Babylon . . . the defiler of the public space[2]—these are the images of sexual nonconformists[3] which haunt the narratives of popular culture and the courts. These are the prototypes which populate the popularly conceived demimonde of the "typical homosexual." This is what the narratives of hundreds of cases have taught the courts. It is with regard to these powerfully negative mythologized *essences* of the

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1. Brief of Petitioner Michael J. Bowers, Attorney General of Georgia at 36-37, Bowers v. Hardwick, 478 U.S. 186 (1986) (No. 85-140) (citations omitted).

2. Each of these images is examined in the context of judicial opinions in Part III, *infra*.

3. The term "sexual nonconformists" is used throughout this Article to signify people with an affinity for sexual behavior, or people at variance with, traditional heterosexual norms. The term includes principally lesbians, gay men, bisexuals, and transsexual and transgendered persons, but may also include people who do not fit into any of these "categories" (all of which are constructed for some purpose or other) but who deviate from socially accepted norms. By choosing this term, I attempt to find a relatively neutral (if only because rarely used) expression in place of other, more problematical, terms. I agree with Lisa Duggan that we must begin to "think about sexual difference not in terms of naturalized identities but as a form of *dissent*, understood not simply as speech, but as a constellation of nonconforming practices, expressions, and beliefs." Lisa Duggan, *Queering the State*, 39 SOC. TEXT 1, 11 (1994). Others have used different terms for similar purposes. *See, e.g.*, Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of "Sex," "Gender," and "Sexual Orientation" in Euro-American Law and Society*, 83 CAL. L. REV. 1, 8 n.16 (1995) (using the term "sexual minorities" to "reflect[] and include[] the blending of gender atypicality with minority sexualities").

"homosexual" that the courts confront constitutional challenges to the criminal regulation of nonconformist sexual conduct. It is under their spell that the judging in decisions of American courts, such as *Bowers v. Hardwick*[4] and those of English courts, such as *R. v. Brown*[5] and *Masterson v. Holden*,[6] can be understood.

This Article explores the ways in which courts create images—archetypes—of sexual nonconformists to resist legal challenges to the regulation of sexual conduct through the criminal law. Court opinions have spun a succession of narratives which have erected a vision of sexual nonconformists, particularly gay men,[7] as mythological figures of disgust. These mythologies have resonated in the popular culture and have made it easier to affirm the normative status quo in case law and statute.[8] Moreover, this narrative tradition provides another way

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4. 478 U.S. 186 (1986).

5. [1993] 2 All E.R. 75, 77-84 (H.L.). *Brown* involved adult males who engaged in various same-sex sadomasochistic activities, some with much younger men. *See id.* at 82. They were convicted of keeping a disorderly house, and of assault occasioning actual bodily harm and wounding, contrary to the Offences Against the Person Act, 1861, 24 & 25 Vict., ch. 100, §§ 47 & 20 (Eng.). *See id.* at 83-84. The House of Lords determined three to two that consent in such cases could not be a defense to the charge. *See id.* at 75-84.

6. [1986] 1 W.L.R. 1017, 1019, 1024 (Q.B.) (upholding the conviction of two gay men kissing at a bus stop on Oxford Street in London late at night for insulting behavior likely to lead to a breach of the peace).

7. The focus of this Article is on gay men. This is intended strictly as a means of following the information available: courts have spoken most often and have most clearly articulated their images of sexual nonconformity within the context of what they take to be male "homosexuality." I recognize the existence of the many other forms of "nonheterosexuality," both in their differences, and in the consequences of subordination they share with gay men in the United States as well as in Great Britain. For emerging lesbian perspective on the issues I treat, see Ruthann Robson, *Convictions: Theorizing Lesbians and Criminal Justice*, *in* LEGAL INVERSIONS: LESBIANS, GAY MEN, AND THE POLITICS OF LAW 180 (Didi Herman & Carl Stychin eds., 1995). *See generally* RUTHANN ROBSON, LESBIAN (OUT)LAW: SURVIVAL UNDER THE RULE OF LAW (1992); Anne B. Goldstein, *Representing Lesbians*, 1 TEX. J. WOMEN & L. 301 (1992) (suggesting lesbian novelists and the lesbian community can represent lesbianism in positive ways). For a discussion of bisexual theory see Ruth Colker, *Bi: Race, Sexual Orientation, Gender, and Disability*, 56 OHIO ST. L.J. 1, 30-41 (1995). For a discussion of the emerging notion of sexualities in queer legal theory, see Lisa C. Bower, *Queer Acts and the Politics of "Direct Address": Rethinking Law, Culture, and Community*, 28 L. & SOC'Y. REV. 1009, 1015-20 (1994) (discussing emerging queer theory and its attacks on Manichaeian notions of sexuality). But, on the efficacy of queer theory, as meta-theory, see Larry Catá Backer, *Queering Theory: An Essay on the Conceit of Revolution in Law*, (unpublished manuscript, on file with author) and *infra*, Part II. Popular culture may be recognizing this as well, even if begrudgingly so. *See, e.g.*, John Leland et al., *Bisexuality Is the Wild Card of Our Erotic Life; Now It's Coming Out in the Open—in Pop Culture, in Cyberspace and on Campus; but Can You Really Have It Both Ways?*, NEWSWEEK, July 17, 1995, at 44 (discussing the emergence of a bisexual identity).

8. Legislative mythmaking has been explored recently by others. For a discussion of legislative mythmaking in the U.S., see Terry S. Kogan, *Legislative Violence Against*

of understanding the stubbornness of cases such as *Bowers v. Hardwick*.[9] Falsely described as a leading case, in reality *Bowers* follows and consolidates a well-developed empathy (antipathy) which is merely rearticulated in the Court's judgment.

For this examination, I focus on the judicial mythologizing of sexual nonconformists in the United States and Great Britain. For United States cases, I concentrate on what state courts have had to say about gay men and lesbians as, revealed in the roughly 200 opinions of state courts delivered between 1960 and 1996 in cases in which state sodomy (and related) laws were challenged on constitutional grounds.[10]

Lesbians and Gay Men, 1994 UTAH L. REV. 209 (examining the ways legislatures, in this case the Utah legislature, can act to mythologize homosexuals as a class deserving violent treatment). British legislative mythmaking is evidenced by legislation like the Local Government Act, 1988, ch. 9, § 28(1) (Eng.) which prohibits local governments from promoting homosexuality or the teaching of the acceptability of homosexuality as a family relationship. For a discussion, see, e.g., CARL F. STYCHIN, LAW'S DESIRE: SEXUALITY AND THE LIMITS OF JUSTICE 38-49 (1995).

9. 478 U.S. 186 (1986). On the moral and historical underpinnings of *Bowers*, see Mary C. Dunlap, *Gay Men and Lesbians Down by Law in the 1990's USA: The Continuing Toll of* Bowers v. Hardwick, 24 GOLDEN GATE U. L. REV. 1 (1994); Anne B. Goldstein, *History, Homosexuality, and Political Values: Searching for the Hidden Determinants of* Bowers v. Hardwick, 97 YALE L.J. 1073, 1081-87 (1988); John C. Hayes, Note, *The Tradition of Prejudice Versus the Principle of Equality: Homosexuals and Heightened Equal Protection Scrutiny After* Bowers v. Hardwick, 31 B.C. L. REV. 375, 425-75 (discussing Equal Protection Clause challenges to sodomy statutes).

10. I limit my review of the state cases to those in which a constitutional challenge was raised for two reasons. The first is that this limitation reduces the number of cases to a manageable level. The second, and more important reason, is that where constitutional issues are raised courts tend to be more sensitive to doctrine and principle in these cases (people and judges take them more seriously as doctrinal messengers). These cases provide the resonance on which the contours of supra-legal rights are determined both at the state and federal level. I emphasize at the outset that I will not focus on an analysis of the constitutional arguments advanced in those cases. That examination has been attempted on numerous occasions and from numerous perspectives. *See, e.g.*, Janet E. Halley, *Reasoning About Sodomy: Act and Identity in and After* Bowers v. Hardwick, 79 VA. L. REV. 1721, 1726 (1993) (suggesting that *Bowers* placed homosexual plaintiffs in a "vulnerable" position but heterosexuals are "immune" from sodomy stigma); Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men is Sex Discrimination*, 69 N.Y.U. L. REV. 197, 198-204 (1994) (arguing that the "taboo" against homosexuality separates the "dominant from the dominated in social hierarchy" and enforces the subordination of women); Hayes, *supra* note 9, at 425-75; (discussing Equal Protection Clause challenges to sodomy statutes); Heidi A. Sorensen, Note, *A New Gay Rights Agenda? Dynamic Statutory Interpretation and Sexual Orientation Discrimination*, 81 GEO. L.J. 2105, 2107 (1993) (discussing the use of dynamic statutory interpretation to counter legal discrimination against homosexuals). Indeed, the purpose of this Article is to demonstrate that one cannot understand the nature or focus of the constitutional arguments unless one understands how cases like *Bowers* are situated within the traditional juridical narrative of sodomy jurisprudence.

These cases are important for a number of reasons. First, criminal regulation (at least traditionally) has been a matter largely of state law. Moreover, there has been a significant interest, especially in recent years, in resorting to state law to challenge provisions such as sodomy laws as a means of getting around the barrier of *Bowers*.[11] Also, a court's policy regarding social categories and the relationship of those categories to the state tend to be more apparent in cases involving issues of state constitutional jurisprudence. I emphasize that juridical images of sexual nonconformists are not strictly the creature of constitutional jurisprudence. The images in "constitutional" cases reflect and build on the even more substantial number of state appellate cases reviewing convictions under the various criminal statutes regulating sexual behavior. The images created, however, are faithfully distilled in the constitutional cases.

The English cases present a different kind of problem and require a distinctive approach. For all practical purposes, until very recently there was no constitutional jurisprudence in the United Kingdom, at least in the sense in which Americans understand that term as permitting Acts of Parliament to be voided on the basis of "constitutional" principles.[12] What Great Britain has done, since 1967, is to legislate a fairly limited exception to the applicability of the criminal laws of sexual regulation for any adult male consensual "homosexual act in private."[13] For purposes of this Article, then, it makes more sense to examine the language of those cases in which British courts struggle to define the length and extent of this exception.[14]

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11. *See, e.g.*, Paula A. Brantner, Note, *Removing Bricks from a Wall of Discrimination: State Constitutional Challenges to Sodomy Laws*, 19 HASTINGS CONST. L.Q. 495, 497 (1992) (examining how sodomy laws are challenged on state constitutional grounds). Ironically, the state cases themselves provide the backdrop to cases like *Bowers*.

12. For a basic statement of the principle, see, e.g., 8 HALSBURY'S LAWS OF ENGLAND ¶¶ 801-811 (4th ed. 1974). Thus, "the courts recognize no limit to Parliament's legislative power, and will not seriously entertain any attack on the validity of a public or private act." *Id.* at ¶ 811. For a discussion of the effect of Britain's treaty obligations on the power of Parliament to legislate in this field, see *infra* notes 100-103.

13. *See* Sexual Offences Act, 1967, ch. 60, § 1(1), *as amended by* Criminal Justice and Public Order Act, 1994, ch. 33, §§ 143 & 145 (Eng.).

14. The British criminal law proscribed buggery and gross indecency with another man. *See* Sexual Offences Act, 1956, 4 & 5 Eliz. 2, ch. 69, § 12, *as amended by* Criminal Justice and Public Order Act, 1994, ch. 33, § 144 (Eng.); R. v. Courtie, [1984] 1 All E.R. 740, 743 (H.L.) (Lord Diplock). Buggery, generally, is defined as the insertion of a penis in the anus of a man or a woman, or any type of intercourse with an animal. It is limited to intercourse with persons under 16, or men, or animals. *See* Sexual Offences Act, 1956, 4 & 5 Eliz. 2, ch. 69, § 12, *as amended by* Criminal Justice and Public Order Act, 1994, ch. 33,

§ 144 (Eng.); *Courtie*, [1984] 1 All E.R. at 743. It is also an offense to procure the commission of the act of buggery by a man with another. *See* Sexual Offences Act, 1967, ch. 60, § 4(1), *as amended by* Criminal Justice and Public Order Act, 1994, ch. 33, §§ 143 & 145 (Eng.). Most other sexual acts between men are prosecuted, if prosecuted at all, as gross indecency with another man. "Gross indecency" is not defined, thus the determination of the particular actions that may constitute the crime are left to the trier of fact. Gross indecency can be committed by participating in the act, otherwise being a party to it, or by procuring the commission of the act by a man with another. *See* Sexual Offences Act, 1956, 4 & 5 Eliz. 2, ch. 69, § 13, *as amended by* Criminal Justice and Public Order Act, 1994, ch. 33, § 144 (Eng.). The Sexual Offences Act of 1967 decriminalized the commission of acts of gross indecency between men, and buggery when "committed" in private and between (no more than) two adults over twenty-one years of age. *See* Sexual Offences Act, 1967, ch. 60, § 1, *as amended by* Criminal Justice and Public Order Act, 1994, ch. 33, §§ 143 & 145 (Eng.); *see also* Antony Grey, *Sexual Law Reform Society Working Party Report*, 1975 CRIM. L. REV. 323, 330-31 (Eng.) (discussing the limitations of the Sexual Offences Act of 1967 to provide equal treatment for homosexuals and heterosexuals); Roy Walmsley, *Indecency Between Males and the Sexual Offences Act 1967*, 1978 CRIM. L. REV. 400, 400-07 (Eng.) (examining why the recorded incidences of indecency by males has doubled and why the prosecution has tripled since the passage of the Sexual Offences Act of 1967). The age of consent was reduced to 18 by sections 145 and 143 of the Criminal Justice and Public Order Act of 1994. *See* Criminal Justice and Public Order Act, 1994, ch. 33, §§ 143 & 145 (Eng.). However, "[s]o far as it deals with buggery committed with a woman or animal, § 12(1) of the 1956 Act remains unchanged." *Courtie*, [1984] 1 All E.R. at 743.

There are several other provisions (for example, procuring and the corruption of morals statutes) which have traditionally been used to police the public and private conduct of sexual nonconformists in Great Britain. Although many of these are written in general terms, they have been used for the most part to control the activities of gay males. None of these were affected by the "decriminalization" of sodomy under the 1967 Act. Procuring can be charged under the provisions of the Accessories and Abettors Act, 1861, 24 & 25 Vict., ch. 94, § 8, *as amended by* Criminal Law Act, 1977, ch. 45, § 65, sched. 12 (Eng.). Far more used is the statute prohibiting public solicitation included in the Sexual Offences Act, 1956, 4 & 5 Eliz. 2, ch. 69, § 32, *as amended by* Criminal Justice and Public Order Act, 1994, ch. 33, § 144 (Eng.) ("It is an offence for a man persistently to solicit or importune in a public place for immoral purposes."). *See also* Michael Cohen, *Soliciting by Men*, 1982 CRIM. L. REV. 349, 349-62 (Eng.) (examining the legislative history of the Sexual Offences Act of 1956 and the case law to determine the scope of the act). As with gross indecency, it is for the trier of fact to determine if the object of the importuning was immoral. *See, e.g.*, R. v. Goddard, 92 Crim. App. 185, 189-90 (1990) (leaving the jury to decide if a male was soliciting in a public place for sexually immoral purposes).

Conspiracy to corrupt public morals, a common-law crime, has been used to suppress "personals" advertising in a gay magazine. *See* Knuller Ltd. v. Director of Pub. Prosecutions, [1972] 2 All E.R. 898, 899-900 (H.L.).

A number of generally applicable public-order statutes and ordinances are used to prosecute public expression of sexual nonconformity. For example, two men observed kissing at a bus stop in London at about 2:00 A.M. were convicted of the crime of insulting behavior whereby a breach of the peace may be occasioned. *See* Masterson v. Holden, [1986] 1 W.L.R. 1017, 1018-19 (Q.B.). "Outraging public decency" has also been used. *See* R. v. Mayling, [1963] 1 All E.R. 687, 687 (Crim. App.) (Ashworth, J.). The essential elements of the act are (a) that it be indecent and (b) that it be committed in public. *See id.* at 690. The outrage of an observer is not relevant. *See id.*

Many English jurisdictions also enforce ordinances (bylaws) mostly against public indecency, such ordinances permitted under Act of Parliament. *See, e.g.*, Director of Pub. Prosecutions v. Gawecki (Q.B. 1992), *summarized in* 1993 CRIM. L. REV. 202, 202

In Part II, I explain the relevance of narrative and image for law. As part of this explanation, I examine the interrelationship of judgment and popular culture, and the importance of judicial storytelling to each. I then show how the archetypes emerge from this interrelationship.

In Part III, I look at the *mass* of cases, their meaning, and their effect as a body of stories. Think here of the term as it is used in the field of physics—as a measure of a body's resistance to acceleration (*i.e.* changes in position)—a measure proportionate to its weight. Here, the weight of the cases is a function of the quantity of identifiable and predictable narrative-filling space. The greater the weight, the greater the power to resist changes in position. This mass impresses itself, as teacher and force of popular culture, on all litigants seeking a particularized resolution to their complaint, or the complaint lodged against them. The critical point here is that, under the weight of the repetition of "type," the individual story, *i.e.* the singular case which runs against "type," is usually ignored or subsumed within "type," as was the case in *Bowers*. In the face of this massive learning, "aberrational" facts (conforming gay men, for instance) matter little. Mass, then, must be considered in its other contexts as well—burden, oppression, preponderance, influence, authority.

Four characters emerge from this consolidated mass of stories. These form the stock characters (and implies the stock judgments) that populate the juridical demimonde of sexual nonconformity. First is the predator and studies in coercive sexual nonconformity including rape, coercion, and physical power. Next, there is the pied piper, the personification of pedophilia, seduction, and the recruitment of youth. Then the Whore of Babylon, which is sexual nonconformity as embodying promiscuity, addiction, and contagion. Last, there is the defiler of the public space. Here is sexual nonconformity as an imperialist exercise—flouting difference and rewarding nondiscretion. Although there are other archetypes, as the imagery associated with sexual nonconformity is rich, I limit my examination to those archetypes which form a substantial part of the palette of courts when painting in the criminal law.[15]

(charging two adult men under Westminster bylaw with acts of mutual masturbation). For a dated but still useful review of English sex law as applicable to gay men and lesbians, see TONY HONORÉ, SEX LAW IN ENGLAND 89-101 (1978).

15. Consider the effectiveness of the archetype of disease. Professor Strader has examined the ways in which litigants are beginning to use stories of disease in sodomy litigation. *See* J. Kelly Strader, *Constitutional Challenges to the Ciminalization of Same-Sex*

I end in Part IV with an attempt to situate cases such as *Bowers* within the tradition of judicial narrative. *Bowers*, especially, provides an excellent case study of the way in which the narrative of antipathy in sodomy jurisprudence blinds a court to even the "best" set of facts. I argue that the thing most aberrational about Michael Bowers, as far as the Court was concerned, was his ordinariness. Likewise in England, *Brown* remains indecipherable, to some extent, unless understood as informed by and informing this rich and grotesque narrative of the sexual nonconformist as bogeyman.

In the end, juridical storytelling paints a picture of sexual nonconformity which is grim and dirty. The ordinariness of these grotesque images of sexual nonconformists runs through the thirty-five years of sodomy jurisprudence I review. Those images distort and obliterate. Indeed, they suggest that it is the rare gay male who is not a predator, pied piper, Whore of Babylon, or defiler of the public space. This distorting normalization of type makes these juridically sustained narratives dangerous. Judicial storytelling in the cases serve as the training books for judges and lawyers; it is the reality of the images so taught which provide the courts with the necessary jurisprudential absolution for their resistance to alternative sources of "empathy."[16] These images confirm the value of popular folklore about the *essence* of the "average" sexual nonconformist. As products of this (constructed) narrative, sexual nonconformists—objects of revulsion—are not worth judicial effort. So fundamentally disgusting, these images provide the courts with a powerful source of resistance to the decriminalization of (homo)sexual conduct. Courts are certainly empathizing, but the result is the erection of subtle narrative walls of antipathy towards sexual nonconformists.

A final introductory note: I do not mean this to be yet another article about the value of impact litigation, of choosing cases carefully. This Article is not about how "good" facts or a "compelling" case make for a higher probability of success as a result of which our world is changed.[17] Rather, my point is that traditional notions of impact

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Sexual Activities: State Interest in HIV-AIDS Issues, 70 DENVER U. L. REV. 337, 348-51 (1993). I save consideration of other archetypes for another day.

16. I refer here, of course and with a good bit of irony, to the notion of empathy, strongly argued, for example, by Lynne Henderson. *See* Lynne N. Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574, 1577 (1987).

17. For a discussion of the strategic use of litigation, and the importance of selecting "good" or compelling facts, see generally Patricia A. Cain, *Litigating for Lesbian and Gay Rights: A Legal History*, 79 VA. L. REV. 1551 (1993) (examining the historical development of gay-rights litigation); Janet E. Halley, *Sexual Orientation and the Politics of*

litigation do not work in litigation, especially in litigation affecting sexual nonconformists. Multiple generations of facts, digested and interpreted as stories with morals by the courts in written opinions and passed on in that way to the popular culture (thus reflecting that culture as well), have in themselves created a background narrative within which the facts of every new case are read, understood, and measured. This implicates the notion of pre-understanding examined by Marc A. Fajer, and Richard Delgado's and Jean Stefancic's notion of empathic fallacy.[18] Multiple layers of narrative have created an understanding of the "problem" by the courts, which is then used to filter and understand the new stories brought before them.[19] As Anne Goldstein

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Biology: A Critique of the Argument from Immutability, 46 STAN. L. REV. 503 (1994) (arguing that pro-gay litigators should adopt pro-gay essentialism and constructionism rather than litigate biological causation to emphasize political dynamics in equal protection claims); William B. Rubenstein, *We Are Family: A Reflection on the Search for Legal Recognition of Lesbian and Gay Relationships*, 8 J.L. & POL. 89 (1991) (examining the legal strategies homosexuals use in legal claims); Edward V. Sparer, *The Role of the Welfare Client's Lawyer*, 12 UCLA L. REV. 361 (1965) (discussing welfare-rights litigation).

18. For Professor Fajer's discussion of pre-understanding, see Marc A. Fajer, *Authority, Credibility and Pre-Understanding: A Defense of Outsider Narratives in Legal Scholarship*, 82 GEO. L.J. 1845, 1847-49 (1994) [hereinafter Fajer, *Authority, Credibility, and Pre-Understanding*]; Marc A. Fajer, *Can Two Real Men Eat Quiche Together? Storytelling, Gender-Role Stereotypes, and Legal Protection for Lesbians and Gay Men*, 46 U. MIAMI L. REV. 511, 570-91 (1992).

Simply put, pre-understanding relates to the assumptions people make about the characteristics that certain categories of people strongly display. It interferes with discourse about that group because many believe they know important things about members of the group which often are not true. "The pre-understanding of judges and lawyers can infect the legal process and build incorrect or overbroad assumptions into the structure of laws and legal decisions." Fajer, *Authority, Credibility, and Pre-Understanding*, *supra*, at 1847.

Professors Delgado and Stefancic correctly note that "[w]e *are*, in a sense, our current narratives. . . . [N]ot only does our status as situated actors create in judges and other policy-makers a resistance to potentially saving counternarratives, but it limits the very range of counternarratives in the canons from which policy-makers might draw." Richard Delgado & Jean Stefancic, *Norms and Narratives: Can Judges Avoid Serious Moral Error?*, 69 TEX. L. REV. 1929, 1933 (1991). Professor Fajer's judicial infection of pre-understanding of gay men leads inevitably to Professors Delgado and Stefancic's notion of empathic fallacy, which consists of the belief that "through speech and remonstrance we can surmount our limitations of time, place and culture, [we] can transcend our own situatedness." Richard Delgado & Jean Stefancic, *Images of the Outsider in American Law and Culture: Can Free Expression Remedy Systemic Social Ills?*, 77 CORNELL L. REV. 1258, 1281 (1992). My point is that through control of speech and story, through *judicial* narrative as "literature," dominant society can affect this transcendentalist exercise without really getting off the ground. That, perhaps, is the truer fallacy of judicial empathy (to the extent it can be said to exist at all). *See id.* at 1286 ("Elite groups use the supposed existence of a marketplace of ideas to justify their own superior position.").

19. These notions derive from the work of legal sociology, and particularly Pierre Bourdieu. *See generally* PIERRE BOURDIEU, OUTLINE OF A THEORY OF PRACTICE (Richard Nice trans., 1977). Referring specifically to French judging, Bourdieu has noted:

has correctly argued, "a judge's understanding about homosexuality determines to a great extent his or her view of its proper treatment under the law."[20] Judges acquire that understanding, to a significant degree, by the learning embedded in the cases. Thus understood, the problem of litigation strategy, as a case-by-case exercise, entirely misses the point of the means by which courts receive and interpret the facts of a particular case. In this context it demonstrates a blindness to the way courts *judge*. At least with respect to the issue of adult consensual sex crimes, courts will absorb, consider, evaluate the equities of, and decide such cases within a context provided by the multiple of cases, their narratives, and morals which forms the courts' interpretive reality of the world and the way it works. Likewise, the judgment implicit in the accumulated narratives can serve to justify application of personal religious beliefs or to temper the nonapplication of those beliefs. Accumulated narratives provide the best defense to the judgments within any particular narrative context. As I show more fully in Part IV, the *Bowers* majority was not interested in the "nice" facts before it—they had sexual monsters in the backs of their minds. Courts in the future will not act differently.

II. ON THE COUPLING OF JURIDICAL IMAGEMAKING AND POPULAR CULTURE

> The relation of the sexes is so closely allied to all that mankind holds dearest that it is very difficult to get men to think and act with judicial calmness in cases where that relation is violated or debauched. Judges themselves are but human beings . . . and this largely accounts

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> [O]rdinary judges and legal practitioners more concerned with the application of this system in specific instances, orient it toward a sort of casuistry of concrete situations. Rather than resorting to theoretical treatises of pure law, they employ a set of professional tools developed in response to the requirements and the *urgency* of practice—form books, digests, dictionaries, and now legal databases.

Pierre Bourdieu, *The Force of Law: Toward a Sociology of the Juridical Field*, 38 HASTINGS L.J. 805, 824 (1987). Bourdieu refers here to juridical codification by publication "of the decisions of the French Cour de Cassation (Supreme Court) and the selection, normalization, and distribution which, beginning with a body of decisions chosen by the presiding judges for their 'legal interest,' produces a body of rationalized and normalized rules." *Id.* at 824 n.32. This tendency is applied with far greater force in a jurisprudentially case-driven system such as the Anglo-American common-law system.

20. Anne B. Goldstein, *Reasoning About Homosexuality: A Commentary on Janet Halley's "Reasoning About Sodomy: Act and Identity in and After* Bowers v. Hardwick," 79 VA. L. REV. 1781, 1794 (1993) (citing Goldstein, *supra* note 9, at 1099-1100).

> for the exceptions that have been ingrafted upon the law in respect to sexual crimes.[21]

Traditionally, courts in the United States and Great Britain have had an extraordinarily difficult time dealing empathetically or intelligently with issues relating to the criminal regulation of sexual nonconformity (particularly adult, noncoercive sexual activity).[22] The tendency, with exceptions, has been to be dismissive at best and hostile at worst.[23] These tendencies have been especially acute whenever courts have been called on to consider such issues in cases which directly involve those quintessential sexual nonconformists—gay men and lesbians.[24] They are most particularly evidenced by the

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21. State v. Start, 132 P. 512, 516 (Or. 1913) (reversing conviction for sodomy where evidence was improperly introduced with respect to sexual activity between accused and other parties).

22. Thus, Judge Richard Posner could embark on his exploration of sex from the perspective of an unconsciously postmodernist law and economics in order to help overcome what he saw as the dominant judicial attitude "toward the study of sex . . . that 'I know what I like' and therefore research is superfluous." RICHARD A. POSNER, SEX AND REASON 2 (1992). I have elsewhere chronicled the sociocultural evolution of the courts' rationales for sexual conduct regulation in the context of challenges to the sodomy statutes of Oklahoma between 1917 and 1992. *See* Larry Catá Backer, *Raping Sodomy and Sodomizing Rape: A Morality Tale about the Transformation of Modern Sodomy Jurisprudence*, 21 AM. J. CRIM. L. 37 (1993).

23. There is a significant resonance here with what commentators have noted in the construction of the relationship between majority and minority races:

> Because judges are well socialized before they assume office, they will also have internalized the biases and predispositions that enable the majoritarian branches to view undervaluation of minority interests as acceptable governmental behavior .... It is true that in extreme cases, this tendency may result from malice or xenophobic dislike of minority groups. In the more typical case, however, the majoritarian tendency to discount minority interests will result in more subtle causes.

GIRARDEAU A. SPANN, RACE AGAINST THE COURT 22 (1993). This resonance has been the source of some discomfort, especially within the African-American community. *See, e.g.*, Angela Gilmore, *They're Just Funny That Way: Lesbians, Gay Men and African American Communities as Viewed Through the Privacy Prism*, 38 HOWARD L.J. 231, 236-38 (1994) (explaining the tensions between the homosexual community and the African-American community); Margaret M. Russell, *Lesbian, Gay and Bisexual Rights and "The Civil Rights Agenda,"* 1 AFR.-AM. L. & POL'Y REP. 33, 38 (1994) (discussing resistance in the African-American community to analogies between racism and homophobia).

24. I do not deal here with the fight over essentialism in the context of "sexual orientation." *See, e.g.*, Patricia A. Cain, *Lesbian Perspective, Lesbian Experience, and the Risk of Essentialism*, 2 VA. J. SOC. POL'Y & L. 43, 46-73 (1994) (recognizing the problem of essentialism but also recognizing its political necessity); Halley, *supra* note 17, at 507-16, 546-67 (arguing for the use of essentialism and constructivism rather than immutability to advance homosexual rights); Michael S. Kimmel, *Sexual Balkanization: Gender and Sexuality as the New Ethnicities*, 60 SOC. RESEARCH 571 (1993) (arguing against the promotion of gay essentialism); Daniel R. Ortiz, *Creating Controversy: Essentialism and Constructivism and the Politics of Gay Identity*, 79 VA. L. REV. 1833, 1836-46 (1993)

history of sodomy jurisprudence in the United States[25] and in the interpretation of the sex laws in England after the 1967 decriminalization of certain forms of sexual acts between people of the same sex.[26]

And it is no wonder. To many there always seems to be something wrong, unseemly, or repulsive about the people clamoring for "favors" from the court. Facts are usually unsavory; the accused always seem to be looking for ways to "twist" the law to their benefit to avoid the consequences of their norm-exploding breaches of the public space. In so doing, they subvert the foundations of our society as we now know it, undermining the undergirding of popular culture "so that we will accept and equate homosexuality on a par with heterosexual life."[27]

(examining the differences between essentialism and constructivism); Carl F. Stychin, *Essential Rights and Contested Identities: Sexual Orientation and Equality Rights Jurisprudence in Canada*, 8 CAN. J.L. & JURISPRUDENCE 49, 56-64 (1995) (discussing the problem of essentialism in the area of sexual orientation and sexual rights). On the problem of essentialism and social reform, see Richard Delgado, *Rodrigo's Sixth Chronicle: Intersections, Essences, and the Dilemma of Social Reform*, 68 N.Y.U. L. REV. 639 (1993). For an interesting critique regarding the ways in which both essentialism and social constructionism miss the point, see John R. Quinn, *The Lost Language of the Irishgaymale: Textualization in Ireland's Law and Literature (or The Most Hidden Ireland)*, 26 COLUM. HUM. RTS. L. REV. 553, 571-79 (1995) (reviewing Elaine Showalter, *Feminist Criticism in the Wilderness*, 8 CRITICAL INQUIRY 179 (1981)). Quinn argues that his understanding of Elaine Showalter's hybridization of constructionism and essentialism better accounts for the nuance of minority group identity and discourse. *See id.*

25. Over the last 30 years, of the hundreds of constitutional challenges to state statutes proscribing same-sex sexual conduct, about 20 have been wholly or partially successful at the state level while none have been successful at the federal level. *See infra* notes 106-121 and accompanying text. Sodomy, of course, is not the only area in which this appears. Solicitation for "sex" is similarly treated. *See, e.g.*, Commonwealth v. Sefranka, 414 N.E.2d 602, 608 (Mass. 1980) (voiding "the 'lewd, wanton and lascivious' provision" in statute as unconstitutionally vague); *see also* Joseph J. Bell, *Public Manifestations of Personal Morality: Limitations on the Use of Solicitation Statutes to Control Homosexual Cruising*, *in* HOMOSEXUALITY & THE LAW 97-114 (Donald C. Knutson ed., 1980) (discussing homosexual "cruising" in a heterosexual American society); Thomas E. Lodge, Note, *There May Be Harm in Asking: Homosexual Solicitations and the Fighting Words Doctrine*, 30 CASE W. RES. L. REV. 461, 462-63 (1980) (examining the constitutional challenges to solicitation statutes); *cf.* Lore A. Rogers, *Challenging Solicitation Statutes as Unconstitutional: Appellate Brief in Support of Defendant-Appellant in* Ypsilanti v. Patterson, 1 MICH. J. GENDER & L. 135, 138-161 (1993) (examining the constitutional challenges to solicitation statutes).

26. *See supra* note 14, and *infra* notes 91-93, 100-105, and accompanying text.

27. CARL F. STYCHIN, LAW'S DESIRE: SEXUALITY AND THE LIMITS OF JUSTICE 50 (1995) (quoting 133 CONG. REC. H8800 (daily ed. Oct. 20, 1987) (statement of Rep. Dannemeyer) during the course of the debate on the "Helms Amendment" which prohibited the provision of federal funds to produce AIDS information promoting homosexual sexual activities). This fear of the general and sly social agenda of "homosexuals" was also clearly brought out in the legislative context in Terry Kogan's discussion of the history of the

To understand this predominant attitude, it is necessary to appreciate the position of courts both within law (understood as a kind of systematizing of social (hortatory) reality) and within the popular culture which gives both courts and law their form and function. This position becomes most apparent in the context of formal social control of sexual practice. It is especially acute when courts are confronted with the task of delineating the relationship of law (as formalized hortatory reality) to social sexual practices (as temporal popular reality) because courts serve as both a source and reflection of the popular culture in which they reside. Popular culture feeds the courts with the materials ("real life situations") through which courts can engage in the constant telling and retelling of these stories through "cases."

I have been speaking about popular culture. Let me here begin the task of defining that term and giving it context within the framework of judicial decisionmaking. Popular[28] culture is the way in which we selectively and collectively evidence culture in practice.[29] It is selective because popular expression cannot at any one time reflect all of the possible forms of expression of culture; we necessarily discriminate among the possibilities. In this sense the possibilities of culture are evidenced over generations.[30] It is collective because it necessarily expresses the domination of a particular way of practicing culture. In this sense I read ironically and broadly Bourdieu's notion of induced misunderstanding, "miscognition [which] is structurally

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passage of the Utah Hate Crimes Statistics Act: "Their social agendas, speaking of homosexuals, is clear. Destigmatize, legitimize and gain privilege. They say they seek equality, but the very nature of their existence only lends itself to contention as they move their way into the value system of middle America." Kogan, *supra* note 8, at 223 n.83 (quoting Rep. Merrill Nelson, February 11, 1992, reading the quoted passage taken from the floor debate over the Utah legislation).

28. I mean to emphasize the etymological origins of the word "popular"—*popularis* (of the people)—as well as all of its uses in English. I use it to mean widely liked, carried on by people at large, accepted or prevalent among people at large, suited to or within the means of ordinary people, and originating among the people.

29. Popular culture is thus always in conflict with its alternative forms, and its iterations and reiterations depend on the power of norm-influencing groups to impose a particular order of things. In the context of alternative visions of the welfare state within the confines of American political "culture," Herbert McClosky and John Zaller have made the point that "[w]hen the norms are contested, individuals adopt, from the range of alternatives being argued among opinion leaders, those attitudes that best reflect their own ideological tendencies." HERBERT MCCLOSKY & JOHN ZALLER, THE AMERICAN ETHOS 262 (1984); *see also id.* at 161-88 (suggesting that the conflict between the core parameters of "democracy" and "capitalism" shapes and reshapes the optimal American system of political economy).

30. I do not here suggest that culture progresses. I leave Enlightenment, Hegelian, and Marxist notions of progress (and paradise/repose) to others.

necessary for the reproduction of the social order, [and] which would become intolerably conflicted without it."[31]

Popular culture is the way in which we replicate culture. In this sense, culture serves as a meta-system, immutable in its totality, yet preserving a certain indeterminacy and fluidity, a certain "play" in its expression.[32] As such in its temporal expression, popular culture represents merely an implementation of the possibilities inherent within culture, not the totality of the possibilities of culture itself (an impossibility), and we practice culture individually and collectively through an endless attempt at replication.[33]

> Thus, we constantly constitute and reconstitute our tradition, our culture, and our community as we engage in hermeneutic actions. This constant reconstitution always is simultaneously constructive and destructive. On the one hand, it is constructive because we constantly build new traditions and communities, constantly adding to our already existing traditions and communities through interpretation and understanding. Through hermeneutic actions, we include new concepts, interests, prejudices and significantly, participants in our traditions and communities. On the other hand, this reconstitution is also destructive—distortive and exclusive—insofar as we weaken or

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31. Richard Terdiman, *Translator's Introduction* to Pierre Bourdieu, *The Force of Law: Toward A Sociology of the Juridical Field*, 38 HASTINGS L.J. 805, 813 (1987).

32. Culture acts as meta-system by containing within it all possibilities, all combinations, possible given the set of basic assumptions which define a group as "distinct." The possibilities are not limitless, but they are not reducible to a handful of forms. Culture is the box within which its expression is implemented, and reimplemented, as popular culture over and over again. Beyond culture is "outside"—the inconceivable. Within culture is an infinite variation. In this sense, Derrida's "Other" can exist both within culture and outside of it. Derrida's notion that the "other" provides the definition or marks the space of the outside is perhaps far too limiting. *See* JACQUES DERRIDA, OF GRAMMATOLOGY 30 (Gayatri Chakravorty Spivak trans., 1976) (describing writing as the "outside"). "Outside" carries multiple meanings—it can describe *alternatives*, and it can define the *inconceivable*. Each iteration of culture negates the other possibilities—in this sense, each of them is outside the "other." Yet all are possible at some time or other, and in some form or other without compromising the culture from which all spring. None of the iterations implicate the "other" as outside culture—not culture. That possibility remains excluded, denied, and concealed. We can choose to persecute or ignore sexual nonconformists *within* our culture—either will do. We suppress and deny the choice to base significant social activity on the sacrifice of virgin children and the consumption of their body parts. *That* is outside.

33. In this sense, popular culture can be understood as the "prejudices" (what I would characterize as value choices) of the extant communal tradition. *See* HANS-GEORG GADAMER, TRUTH AND METHOD 302, 306 (Joel Weinsheimer & Donald G. Marshall trans., 2d ed. 1989). This is the fundamental nature of our interpretive community. *See* STANLEY FISH, *Is There a Text in This Class?*, *in* IS THERE A TEXT IN THIS CLASS? 303-04 (1980).

> eliminate previously existing traditions and communities and exclude concepts, interests, and participants.[34]

It is in this sense, precisely that of temporal fluidity within the undergirding meta-system, that I speak of popular culture.

Juridical imagemaking is a species of (within) our popular culture. It is part of a self-reinforcing system of formal and informal voices which give form to every iteration of the culture. It is inexorably tied to popular culture in its multiple iterations, even as it contributes to the forms which it takes. In this sense the imagemaking which I expose in this Article is constant and inescapable. Courts must tell stories; that is how they instruct. It is through stories that courts connect with popular culture, and are then fed by it. Juridical narrative does more than teach right and wrong, good and evil; it is their guardian. This role is a fundamental part of our cultural unconscious. The Biblical resonance is inescapable:

> And when the Lord raised them up judges, then the Lord was with the judge, and delivered them out of the hand of their enemies all the days of the judge: for it repented the Lord because of their groanings by reason of them that oppressed them and vexed them.[35]

Each story also instructs and reconfirms the characteristics and qualities of right and wrong, good and evil: "they shall justify the righteous, and condemn the wicked."[36] Judgment involves speaking the consequences of a characteristic. Characteristics are bundled, personified, and anthropomorphized into a "type."[37] Together, these

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34. Stephen M. Feldman, *The Politics of Postmodern Jurisprudence*, 95 MICH. L. REV. 166, 188 (1996).

35. *Judges* 2:18 (King James).

36. *Deuteronomy* 25:1 (King James).

37. *See, e.g.*, Neil Gotanda, *A Critique of "Our Constitution is Color-Blind"*, 44 STAN. L. REV. 1, 23-36 (1991) (examining the sociocultural packaging of race). On the way in which this packaging is constructed and used by the courts, see Aviam Soifer, *On Being Overly Discrete and Insular: Involuntary Groups and the Anglo-American Judicial Tradition*, 20 ISR. Y.B. HUM. RTS. 243, 248-64 (1990). For a discussion of the judicial construction of involuntary groups, see Soifer, *supra*, at 264-84. Group status and membership confers privileges as well as burdens. *See generally* Ellen Vagelos, Comment, *The Social Group that Dare Not Speak Its Name: Should Homosexuals Constitute a Particular Social Group for Purposes of Obtaining Refugee Status? Comment on* Re: Inaudi, 17 FORDHAM INT'L L.J. 229 (1993) (discussing the grouping of homosexuals for the legal purpose of determining refugee status). Nor is the inclination to categorize, and the problems such an inclination creates, limited to the United States and Great Britain. *See generally* Christopher A. Ford, *Administering Identity: The Determination of "Race" in Race-Conscious Law*, 82 CAL. L. REV. 1231 (1994) (commenting on the indeterminacy of racial and ethnic classification and the methods used to avoid that indeterminacy in race or ethnicity conscious laws in the U.S., India, and South Africa).

"types" form the pantheon of modern lesser divinities. In this Article, I am concerned principally with the dark gods, our gorgons and titans, our medusas and minataurs—the predator, the pied piper, the Whore of Babylon, and the defiler of the public space. These stories, bundled judgments of characteristics, constitute the basis of the courts' role in the regulation of sexual nonconformity.[38]

Juridical stories provide the answer to the question—how are we to deal with the sexual nonconformist? Opera suggests familiar resolution. Consider Don Basilio in *The Barber of Seville*: he is a doctor of medicine, who seeks to wed his ward, Rosina, who has been courted by and wants to marry the Count of Almaviva, a grandee of Spain. This poses a problem for Don Basilio, the solution to which is explained by his friend Dr. Bartolo, a music teacher. That solution requires narrative, an imagemaking exercise to recast reality and occasion its real consequences on the object of the imagemaking:

Cosi, con buona grazia	Just this, that plausibly,
bisogna principiare	we must begin
a inventare qualche	to invent a story
che al pubblico lo	which will put him
metta in mala vista,	in a bad light
che comparir lo faccia	with the public, making him seem
un uomo infame, un'	a man of infamy, a doomed soul. . .
anima perduta . . .	
Io, io vi servirò;	I shall attend to this;
fra quattro giorni,	within four days,
credete a me,	
Basilio ve lo giura	on the word of Basilio,
noi lo farem sloggiar	we will have him thrown out
da queste mura.	of this town.[39]

Society has consciously understood the answer for a long time. Popular, and especially high, culture reflects this understanding of

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38. The courts are well aware of their role on the same level:

> Just as the professional bank robber uses habitually certain methods in his course of criminal conduct, so the sexual pervert, as a general rule, confines himself to a certain limited line, a certain habitual form of sexual degeneracy, from which he rarely, if ever, departs; and those methods that he habitually employs leave their indicia, their footprints or fingernails, their traces, in one form or another, of his personal criminal identity.

Barnett v. Ohio, 135 N.E. 647, 649 (Ohio 1922). For a discussion of the essential propensity of law to categorize sexual conduct and the indeterminacy of such categorization, see Bower, *supra* note 7, at 1009.

39. Cesare Sterbini, Il Barbiere di Siviglia (music by Gioacchino Rossini (1816)).

the dynamics of reality created through image. The courts have applied no different a system. But what may be humorous in an opera, ostensibly concerned with contests for love, has painful consequences, socially and politically. Sexual nonconformists can attest to that. Clothed in infamy, they have traditionally been "thrown out of town."

Basilio boasts, "È il mio sistema, e non sbaglia,"[40] and our courts have been proof of that. Constitutional adjudication in the United States and interpretive adjudication in Great Britain have helped create and perpetuate images of gay men for the consumption of the courts as well as legislatures and, ultimately, the public. As part of a self-perpetuating and self-reflective cycle, legal narrative assumes an autopoietic quality.[41] Adjudication elevates narratives which, in turn, are shaped by the context in which an offense[42] has arisen. The offense itself arises from the law as written and interpreted, which is in turn a consequence of popular conceptions (images) of the people to whom the law is addressed.

Confinement, process, and system exist even within an institution as mythically passive as the courts.[43] To the objection that courts are passive creatures, which must await the cases they are to try, the answer is that appearances can be deceiving. Archetypes have

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40. "I have my own system, and it is foolproof." *Id.*

41. Autopoiesis refers to systems, and particularly legal and social systems, which "produce[] and reproduce[] [their] own elements by the interaction of [their] elements." Gunther Teubner, *Introduction to Autopoietic Law*, *in* AUTOPOIETIC LAW: A NEW APPROACH TO LAW AND SOCIETY 1, 3 (Gunther Teubner ed., 1988). Such systems take on a life of their own. *See* Niklas Luhmann, *Law as a Social System*, 83 NW. U. L. REV. 136, 138-48 (1989). Poor relief systems operate as an organism, one which must ask "how do we know," and can answer that question only in relation to itself. *See* Heinz von Foerster, *Notes on an Epistemology for Living Things*, *in* OBSERVING SYSTEMS 258 (1981). Its reality has become circularly structured. But it is important to note that closure does not imply insularity. As the discussion that follows makes clear, there is a significant difference between autopoiesis and strictly formalist theories which argue that law and its systems are absolutely autonomous. To this extent at least, legal sociologists misconstrue the nature and flexibility of autopoiesis, and its difference from the rigidity of strict formalism.

42. Think of the word here in its multiple meanings: at once an infraction and an affront. *See, e.g.*, Masterson v. Holden, [1986] 1 W.L.R. 1017, 1019 (Q.B.) (upholding the conviction of two gay men kissing at a bus stop on Oxford Street in London late at night for insulting behavior likely to lead to a breach of the peace).

43. For a glimpse at the nature of the mythology of the courts as passive entities, and the destruction of that myth, see E. Donald Elliott, *Managerial Judging and the Evolution of Procedure*, 53 U. CHI. L. REV. 306, 307 (1986) (examining the development of managerial judges and arguing that such judges reflect the "evolutionary process in the law which adapts existing structures to perform new functions"); Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 376-80 (1982) (commenting on how judges are taking a more active role in the cases that come before them).

meaning within the system; each is inherently consequential. Courts, through their storytelling, the images they create, and the repercussions of those creations, provide strong but indirect signals to those outside of their system.[44] For instance, if the consequence of falling within the archetype is criminal penalty, these archetypal images indirectly affect police, prosecutors, and the construction of the population they serve. To those in the business of securing such penalties, archetypal descriptions serve as a guide to performance. Consider that the courts penalize the predator.[45] The predator provides the model of an anti-norm. That model is used by those whose function is to preserve the norm (police and prosecutors). Police and prosecutors, in turn, provide the court with others who conform to the model anti-norm. That, in turn generates more stories, a greater descriptive range for the archetype, and a fleshing out of archetypal definitions to be used over and over, back and forth.[46] The stories invite and justify judicial

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44. Law in this sense is discursive. *See* Antonie A.G. Peters, *Law as Critical Discussion*, *in* DILEMMAS OF LAW IN THE WELFARE STATE 250 (Gunther Teubner ed., 1986) (discussing two polarized views of law and how operative reality lies in between the extremes); Richard Münch, *The Law as a Medium of Communication*, 13 CARDOZO L. REV. 1655, 1663-70 (1992) (discussing the law as a symbolic mode of communication).

45. *See infra* notes 121-138 and accompanying text.

46. This interior communication is also highly resistant to facts which contradict the reality this communication paints. This is only rarely recognized. A recent rare example occurred in Montana, where a district court declared the state sodomy statute inapplicable to consensual, adult, private, homosexual conduct on the basis of its conclusion that "society is, in fact, willing to recognize as reasonable the expectations of privacy in adult, private, consensual, same-sex relations. The most persuasive argument in this regard is the fact that this statute has never been enforced against such activity." Gryczan v. Montana, No. BDV-93-1869, slip op. at 9-10 (Mont. Dist. Ct. Feb. 16, 1996).

The anti-norm has a general indirect effect as well; that is the nature of the reflecting communications between law-as-system and culture. Judicial imagery, and its consequences, are absorbed by others—psychiatrists, social workers, employers, landlords—who also police against the anti-norm in their own way—a way that reflects their power in the social order. The means by which they accomplish this policing is beyond the scope of this Article, but has, to some extent been treated elsewhere. For a more thorough discussion of the policing mechanisms, see COMMITTEE ON SEXUAL ORIENTATION DISCRIMINATION, HUMAN RIGHTS COMMISSION OF THE CITY OF TULSA, OKLAHOMA, REPORT AND RECOMMENDATIONS (1994). *See generally* David E. Morrison, Comment, *You've Built the Bridge, Why Don't You Cross It? A Call for State Labor Laws Prohibiting Private Employment Discrimination on the Basis of Sexual Orientation*, 26 MICH. J.L. REFORM 245 (1992) (discussing methods of policing against the anti-norm); Thomas Weathers, Comment, *Gay Civil Rights: Are Homosexuals Adequately Protected from Discrimination in Housing and Employment?*, 24 PAC. L.J. 541, 545-89 (1993)(discussing the protection offered homosexuals in housing and employment discrimination).

For the European analogue, see Andrew Clapham & J.H.H. Weiler, *A Call for a Nine Point Community Action Plan to Combat Discrimination Against Lesbians and Gay Men*, *in* HOMOSEXUALITY: A EUROPEAN COMMUNITY ISSUE 395 (Kees Waaldijk & Andrew Clapham eds., 1993).

replication of judgment which, in turn, replicates popular cultural conceptions of just outcomes.

The hypercycle of law and the image of sexual nonconformity animates and constantly revivifies the images created.[47] The cycle of juridical narrative has mythologized gay men in a way that easily (and perhaps conveniently) permits courts to deflect serious consideration of constitutional challenges to the criminal regulation of sexually nonconformist conduct in the United States and interpretive challenges in Great Britain. It has popularized and given concrete form to a closed loop of images of gay men which have contributed to their continued legal and social subordination and to the trivialization of issues of importance to them as something odd or exotic.[48] The narrative cycle has done so within the confines and process of the law

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47. Hypercycle refers to the interlinking of reproduction and observation in a system; it is the linking of the constitutive components of law as a system that creates hypercycle. *See* GUNTHER TEUBNER, LAW AS AN AUTOPOIETIC SYSTEM 23, 25-46 (Zenon Bankowski ed., Anne Bankowska & Ruth Adler trans., 1993). As Teubner emphasizes, "self-reference and autopoiesis establish a high degree of legal autonomy based upon the constitution of circular relationships. This new kind of autonomy does not exclude causal interdependencies in the relationship between law and society. Quite the reverse!" *Id.* at 26.

48. Consider in this light the circumstances of sexual nonconformists in the European Community. *See, e.g.*, Evert van der Veen & Adrianne Dercksen, *The Social Situation in the Member States*, *in* HOMOSEXUALITY: A EUROPEAN COMMUNITY ISSUE 131 (Kees Waaldijk & Andrew Clapham eds., 1993) (providing a general overview of social discrimination against lesbians and gay men). *But see* P. v. S. & Cornwall, County Council, No. 13194 (Apr. 30, 1996) (containing an extension of protection by the European Court of Justice to sex discrimination against transsexuals).

The United States is not immune. The writing in this area is substantial. For example, issues of the participation of sexual nonconformists in the military and the extension of the "sacrament" of marriage to same-sex couples currently occupy an important place for sexual nonconformists, and are given much shorter shrift in a dominant society whose popular culture is wedded to images of gay men as monsters. *Compare* RICHARD D. MOHR, GAYS/JUSTICE: A STUDY OF ETHICS, SOCIETY, AND LAW (1988) (seeking to fill the void of ideas in both the social policies on gay issues and the gay rights movement), *with* ROGER J. MAGNUSON, ARE GAY RIGHTS RIGHT?: MAKING SENSE OF THE CONTROVERSY (1990) (providing a framework for organizing against and defeating the perceived "homosexualization" of America), *and* Tawnia Wheeler, *America the Sexual: The Downward Spiral of a Culture Preoccupied with Sex*, RUTHERFORD, Feb. 1994, at 3 (suggesting that today's generation, "Generation Sex," is suffering from rampant promiscuity in part because popular culture encourages it). For a summary of the nature of the social effects of the categorization of sexual nonconformists, see Harris M. Miller, II, Note, *An Argument for the Application of Equal Protection Heightened Scrutiny to Classifications Based on Homosexuality*, 57 S. CAL. L. REV. 797, 824-25 (1984). For the same on gay marriage, see William N. Eskridge, Jr., *A History of Same-Sex Marriage*, 79 VA. L. REV. 1419 (1993). On military policy toward the retention of gay service personnel and its trivialization, see Malinda S. Cooper, Comment, *Equal Protection and Sexual Orientation in Military and Security Contexts: An Analysis of Recent Federal Decisions*, 3 L. & SEXUALITY 201 (1993); Chandler Burr, *Friendly Fire: How Politics Shaped Policy on Gays in the Military*, CAL. LAW., June 1994, at 54-61.

as a system. This closed loop also serves to perpetuate the narrative images created and used, and acts as a vehicle for the facilitation of the consequences of such images in the popular culture—disgust and punishment—which fall outside the interior dialogue of courts and law.[49] These images have remarkable powers of endurance. Their endurance is a function of the deliberate "deafness" of the system to external changes in direction—to revolution.[50] Endurance is also a function of the legitimating ideology, the "legal dogmatics" underlying the system.[51] In our popular culture, that legitimating ideology is the traditional culture of heterosexual patriarchy.[52]

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49. On the ways in which the law permits the perpetuation of state violence on gay men, see ANDREW SULLIVAN, VIRTUALLY NORMAL: AN ARGUMENT ABOUT HOMOSEXUALITY (1995); Kendall Thomas, *Beyond the Privacy Principle*, 92 COLUM. L. REV. 1431, 1462-92 (1992) (suggesting that anti-gay violence in the United States is supported by the law and popular culture); van der Veen & Dercksen, *supra* note 48, at 141-42 (commenting on anti-gay violence in Europe).

50. Note, again, that deafness and resistance do not imply eternal effectiveness. We *know* that paradigms shift, that systems of concepts, even if self-referential, explode from time to time. *Cf.* THOMAS S. KUHN, THE COPERNICAN REVOLUTION: PLANETARY ASTRONOMY IN THE DEVELOPMENT OF WESTERN THOUGHT (1957) (using the history of science and intellectual thought to understand the structure and function of scientific research); Richard Rorty, *Method, Social Science, and Social Hope*, *in* CONSEQUENCES OF PRAGMATISM (ESSAYS: 1972-1980) 191 (1982) (discussing the trend against "value-neutral" social science research as the only methodology that is "scientific"). A number of commentators have discussed the possibility of explosion in the context of sexual regulation. *See, e.g.*, Bower, *supra* note 7, at 1019-20 (discussing the use of normative categories to aid in their self destruction); Francisco Valdes, *Coming Out and Stepping Out: Queer Legal Theory and Connectivity*, 1 NAT. J. SEXUAL ORIENTATION 1, 5-10 (1994). Its *plausibility* is another matter.

51. *See* TEUBNER, *supra* note 47, at 42.

52. I don't speak of the positive effects of such ideology. That discussion I leave to others. *See e.g.*, John J. Conley, *Family, Tradition, Papacy: Papal Encyclical: "Evangelium Vitae,"* AMERICA, Apr. 29, 1995, at 18 (discussing Pope John Paul II's defense and critique of family mores present in Western society until the 1960s). My point here is that, like most things, even divinely inspired legitimating ideology can have serious negative consequences when applied unreflexively to those for whom that ideology serves little positive purpose.

> The distinctions drawn between homosexuality and heterosexual sodomy, and between identities and acts, are productive in the Foucauldian sense because they (re)affirm the patriarchal family, the institution of marriage, and the hom(m)o-sociality of the public sphere that is glossed over by "the thin veneer of family life as the sole domain of sexual behavior."

Bower, *supra* note 7, at 1014 n.4 (quoting JONATHAN GOLDBERG, SODOMETRIES: RENAISSANCE TEXTS MODERN SEXUALITIES 17 (1992)). For examples of ways in which the ideology is legitimized by communities of color, see Ann Louise Bardach, *The White Cloud: Latino America's Stealth Virus: AIDS*, NEW REPUBLIC, June 5, 1995, at 27; Farai Chideya, *How the Right Stirs Black Homophobia*, NEWSWEEK, Oct. 18, 1993, at 73.

Thus understood, popular culture and court narrative work off each other, each facilitating their own interior communication. Their interconnection is an example of the methods by which law and culture speak to each other indirectly.[53] Inputs from outside the system must be digested and translated into a form which can be utilized by the system as system. Within law as system, communication is necessarily indirect because systems within culture (our meta-system) essentially exist to replicate and practice culture. For law, the translation works as the succession of facts which serve as the excuse for narrative and norm affirmation; for culture the translation works as story, as parable and drama. Inputs are received by the popular culture through written opinion, and the popularization of opinion through press and book accounts. Inputs from the popular culture are received through the judge, and, more importantly, through the jury. Each serves as the personification of the outside culture within the process of the law. This relationship is particularly apparent in the British law of sexual regulation. Thus, homosexual conduct is not criminal if performed by (no more than) two people in private,[54] but the jury determines whether or not an act took place in "private."[55] Similarly, "[i]t is an offence for a man persistently to solicit or importune in a public place for immoral purposes"[56] and the determination of the immorality of the purpose is left to the jury.[57] The same relationship between law and culture exists under the common-law offense of conspiracy to corrupt public morals, where it is for the jury to

53. Thus, the simultaneous independence and dependence of law. *See* Luhmann, *supra* note 41, at 139-40. The autonomy of these systems, however, permits indirect communication with other systems of society and culture. *See id.*; *see also* Heinz von Foerster, *On Constructing a Reality*, *in* OBSERVING SYSTEMS 288, 306 (1981).

54. *See* Criminal Justice and Public Order Act, 1994, ch. 33, §§ 143 & 145 (Eng.).

55. *See* R. v. Reakes (C.A. 1974), *summarized in* 1974 CRIM. L. REV. 615, 615-16 (declaring sexual activity in an unlit private yard at 1:00 A.M. is not per se private; the jury must look at all surrounding circumstances, and consider the likelihood of a third person coming on the scene).

The courts of the United States have been bedeviled by this notion as well, the outcome, to some extent, depending on the reason the court wants to know. For an overview of this issue, see Joel E. Smith, Annotation, *What Constitutes "Public Place" within the Meaning of Statutes Prohibiting Commission of Sexual Act in Public Place*, 96 A.L.R.3d 692 (1980 & Supp. 1996).

56. Sexual Offences Act, 1956, 4 & 5 Eliz. 2, ch. 69, § 32, *as amended by* Criminal Justice and Public Order Act, 1994, ch. 33, § 144 (Eng.).

57. *See* R. v. Ford, [1978] 1 All E.R. 1129, 1130-31 (C.A. 1977) (Lord Widgery, C.J.); *see also* R. v. Goddard, 92 Crim. App. 185, 189-90 (1990).

determine whether encouraging people to have sex with people of the same sex would corrupt them within the meaning of this crime.[58]

Thus, popular culture is not solely a creature of the musings of the courts, nor are courts the conscious and direct handmaidens of culture. Courts frame issues deemed important to society, and describe and categorize people seeking resolution of issues of importance to them. As such, courts play a significant role in shaping the manner in which society, and future courts and legislatures, conceive of the problem, its existence, and the nature, agenda, and habits of those seeking such resolution. In effect, courts tell stories about people, and especially about groups of people; they are a significant vehicle for the introduction of anecdotal information about the group and individual components of society. They are the mills from which cultural morality plays are ceaselessly ground for popular consumption. This supremely definitional storytelling, in turn, becomes an element of internalized popular culture: the autopoiesis of hermeneutics.

There is tremendous power in institutional hermeneutics, in the position of authoritative interpreter. This is not the power of "an institution, and not [of] a structure; neither is it a certain strength we are endowed with; it is the name one attributes to a complex strategical [sic] situation in a particular society."[59] Courts have used this power, consciously or unconsciously, to distort, and by distorting, to prejudge.[60] This power to define issues, and the people seeking resolution of them, shapes and legitimates the way in which the dominant culture thinks about the issue of the regulation of the sexual conduct of sexual nonconformists, and the manner in which such people are characterized. It is against this body of accumulated judgment, encapsulated within the stories of hundreds of defendants, that every accused person must battle. Worse, perhaps, is that this body of judgment defines and constrains every nondefendant sexual nonconformist within systems of law and culture.

This power of institutional interpretation, of presumption by type, is used to shape and legitimize without the participation of those being shaped and (de)legitimized. Understand, of course, that this omission does not trouble the storyteller. Why should it? After all, narrative in

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58. *See* Shaw v. Director of Pub. Prosecutions, [1961] 2 All E.R. 446, 453 (H.L.); Knuller Ltd. v. Director of Pub. Prosecutions, [1972] 2 All E.R. 898, 899-900 (H.L.).

59. 1 MICHEL FOUCAULT, THE HISTORY OF SEXUALITY: AN INTRODUCTION 93 (Robert Hurley trans. 1984). For a discussion of power generally, see *id.* at 93-102.

60. *See* Lawrence Goldyn, *Gratuitous Language in Appellate Cases Involving Gay People: "Queer Baiting" from the Bench*, 3 POL. BEHAV. 31, 33-36 (1981).

this situation is not about the object of the story, but about the storyteller itself. Indeed, its purpose may well be to obliterate the reality of those being delegitimized and to substitute the reality of myth. It is narrative in the service of a preexisting and imperial foundationalism, which (wisely) uses social institutions in its service. And so it succumbs to the temptation to employ the state to realize the expression of the popular mythology.[61] "The American mind, like any other, will always be closed, and the only question is whether we find the form of closure it currently assumes answerable to our present urgencies."[62]

For those who find the tenor of these myths disturbing, this Article should serve as a cautionary tale. Juridical narrative has been used to create images of sexual nonconformists which are intended to revolt the dominant culture by perversion, distorting images of sexual nonconformists with the aim of satisfying the need of preconceived societal notions for "proof" of the veracity of society's views. This process has been abetted, willingly or unwillingly, by sexual nonconformists, as well as by those who seek their eradication. It is abetted by the disproportionate publicity that accompanies revelations of archetypal behavior in contrast to that following other sexual misadventures.

Legitimization through narrative has, in turn, created reality out of myth. The images through which the law works become part of our collective reality. Just as narrative creates personifications of evil (which is punished), it creates hope and repose (which can be rewarded). For sexual nonconformists, hope and repose lie in obliteration of a public self, in "behaving." The "good" nonconformist is quiet, appears to the outside world to be a member of the dominant culture, and reserves his nonconformity for the privacy of a locked and sealed bedroom. The "bad" nonconformist is any other.

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61. I am referring, for example, to the recent efforts by segments of the American polity to impose its will through the initiative process. *See, e.g.*, Bettina Boxall, *Anti-Gay Rights Measures Ignite Aggressive Battles in States: Proposed Ballot Initiatives in Washington, Oregon, Nevada, Arizona, Idaho, Missouri and Michigan Have Rallied Forces on Both Sides*, L.A. TIMES, June 9, 1994, at A5. *But see* Romer v. Evans, 116 S. Ct. 1620 (1996) (invalidating Colorado ballot initiative repealing prohibition of discrimination against homosexuals).

62. STANLEY FISH, *Being Interdisciplinary Is So Very Hard to Do*, *in* THERE'S NO SUCH THING AS FREE SPEECH AND IT'S A GOOD THING, TOO 231, 242 (1994).

The "good" nonconformist achieves a (very) limited arena in which to pursue his perversions.[63] It is in this sense that Lord Devlin had the right of it in criticizing the *Wolfenden Report*.[64] "In truth, the [Wolfenden] Report takes it for granted that there is in existence a public morality which condemns homosexuality and prostitution. What the Report seems to mean by private morality might perhaps be better described as private behavior in matters of morals."[65] The British courts certainly seem to have incorporated this view into their reading of the decriminalization of "homosexual" conduct.[66] Even where the law does not permit such a small private space for such acts, as in states with sodomy laws, the police have stepped in with selective enforcement and the public prosecutors have filled the void by declining prosecutions for conduct by "good" nonconformists.[67] For the others there is social as well as legal opprobrium.

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63. I have elsewhere examined the perversity of this "reward." *See* Larry Catá Backer, *Exposing the Perversions of Toleration: The Decriminalization of Private Sexual Conduct, the Model Penal Code, and the Oxymoron of Liberal Toleration*, 45 FLA. L. REV. 755 (1993).

64. The Committee on Homosexual Offences and Prostitution was created in Great Britain on August 24, 1954 to consider the law and practice relating to homosexual offenses, prostitution, and solicitation for immoral purposes. *See* THE WOLFENDEN REPORT: REPORT OF THE COMMITTEE ON HOMOSEXUAL OFFENSES AND PROSTITUTION ¶ 1 (1963) [hereinafter WOLFENDEN REPORT]. The *Wolfenden Report* is a report to the British Parliament, dated August 12, 1957, that recommended, among other things, that private, consensual homosexual conduct (but not the crime of gross indecency between males) be decriminalized. *See id.* ¶¶ 62, 355. Parliament received the *Wolfenden Report* formally in 1958 and declined to take action for want of additional research on the matter. *See The Wolfenden Report in Parliament*, 1959 CRIM. L. REV. 38, 40 (Eng.).

65. Patrick Devlin, *The Enforcement of Morals*, *in* MORALITY AND THE LAW 15, 19-20 (Robert M. Baird & Stuart E. Rosenbaum eds., 1988). Lord Devlin took the position that society has the right to protect its own existence, and that society, as conceptualized by a majority of its members, has the right to follow its own moral convictions in defending its social environment from changes it opposes. The same point was made somewhat more crudely by Justice White in *Bowers* when he wrote: "[R]espondent . . . insists that majority sentiments about the morality of homosexuality should be declared inadequate. We do not agree, and are unpersuaded that the sodomy laws of some 25 States should be invalidated on this basis." Bowers v. Hardwick, 478 U.S. 186, 196 (1986). For a critical discussion of Lord Devlin's argument, see RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 240-58 (1977); BASIL MITCHELL, LAW, MORALITY, AND RELIGION IN A SECULAR SOCIETY 1-17 (1967). For a discussion of the manner in which disgust and the suppression of immorality are intertwined, see Harlon L. Dalton, *"Disgust" and Punishment*, 96 YALE L.J. 881, 906-09 (1987) (reviewing 2 JOEL FEINBERG, OFFENSE TO OTHERS: THE MORAL LIMITS OF THE CRIMINAL LAW (1985)).

66. *See, e.g.*, R. v. Kirkup, [1993] 2 All E.R. 802, 808 (C.A. 1992); R. v. Gray, 74 Crim. App. 324, 327 (1981) (Lord Lane, C.J.).

67. For empirical studies of the way in which enforcement and administration conform to this pattern, see Justice Stanley Mosk, *The Consenting Adult Homosexual and the Law: An Empirical Study of Enforcement and Administration in Los Angeles County*,

The lesson is clear, if not cheerful, for those with a taste for challenging the application of sexual conduct laws and, especially in the United States, the sodomy laws. Success will require overcoming an accrued and complex judicial mythology congruent with the foundationalist vision of dominant culture. This burden will not change even if the goal is as limited as permitting nonconformist sexual activity in the closet.[68] For others, the lessons of our foundationalism are also clear and increasingly evident in practical ways. Success belongs to those who control the devices for the creation of myth.[69] "The creation of categories is a means whereby groups that deviate from the background norm are inscribed with a characteristic which 'regulates, contains, and constitutes them.'"[70] England has implemented this lesson well;[71] the United States is catching up.[72]

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13 UCLA L. REV. 643 (1966); Larry Catá Backer, Consenting Sexual Nonconformists and the Law: An Empirical Study of Enforcement and Administration (1995) (unpublished manuscript, on file with author). For a survey of British police practices, see Mike Seabrook, *Homosexuality and the Police*, 142 NEW L.J. 325 (1992) (Eng.); and Helen Power, *Entrapment and Gay Rights*, 143 NEW L.J. 47 (1993) (Eng.); *see also* LESLIE J. MORAN, THE HOMOSEXUAL(ITY) OF LAW 118-69 (1996) (discussing the available information in police enforcement techniques). On Canadian enforcement patterns, see Frederick J. Desroches, *Tearoom Trade: A Law Enforcement Problem*, 33 CAN. J. CRIMINOLOGY 1 (1991).

68. *See, e.g.*, James Darsey, *Die Non: Gay Liberation and the Rhetoric of Pure Tolerance*, *in* QUEER WORDS, QUEER IMAGES: COMMUNICATION AND THE CONSTRUCTION OF HOMOSEXUALITY 45, 60-68 (R. Jeffrey Ringer ed., 1994) (discussing the allure of the toleration of the closet and arguing that its attainment is specious); Arthur A. Murphy, *Homosexuality and the Law: Tolerance and Containment II*, 97 DICK. L. REV. 693, 695-717 (1993) (arguing that public policy concerning homosexuality should be made by state legislatures and that congressional authority should be limited).

69. It has caused one commentator to conclude that "[i]f the images are powerful and pervasive, they can act on the things they supposedly represent by transforming them to make them conform to the prevalent images of those things." Michael Ryan, *Social Violence and Political Representation*, 43 VAND. L. REV. 1771, 1774 (1990).

70. STYCHIN, *supra* note 27, at 56 (quoting Didi Herman, *The Politics of Law Reform: Lesbian and Gay Rights Struggles in the 1990s*, *in* ACTIVATING THEORY: LESBIAN, GAY, BISEXUAL POLITICS 246, 250 (Joseph Bristow & Angelia R. Wilson eds., 1993)).

71. *See* The Local Government Act, 1988, ch. 9, § 28(1) (Eng.), *discussed in* STYCHIN, *supra* note 27, at 38-49.

72. *See, e.g.*, the "Helms Amendment," discussed in STYCHIN, *supra* note 27, at 49-51; *see also* Evans v. Romer, 882 P.2d 1335, 1350 (Colo. 1995) (holding amendment to state constitution prohibiting laws protecting homosexuals as a group violated the Equal Protection Clause of the United States Constitution), *aff'd on other grounds*, 116 S. Ct. 1620 (1996). *Compare* John M. Finnis, *Law, Morality, and "Sexual Orientation,"* 69 NOTRE DAME L. REV. 1049, 1055-69 (1994) (discussing what is "wrong" with homosexual conduct), *with* Martha C. Nussbaum, *Platonic Love and Colorado Law: The Relevance of Ancient Greek Norms to Modern Sexual Controversies*, 80 VA. L. REV. 1515 (1994)

In the sections which follow, I turn to the examination of the current imagery. Courts know the characteristics of the average "homosexual"—predator, pedophile, whore, and defiler. As we will see, judges conform their judgment to this reality. What follows is a stark example of the nature of control and its juridical politics.

III. THE IMAGERY OF JURIDICAL DISCOURSE: CREATING THE COMMONPLACE

The public creation of gay males has occurred case by case over a very long time. The narrative of each case is added to those which came before, and all of these together fashion that which comes after. This is not mere stare decisis—I speak here of the binding effect of narrative. The mass of narrative embodies the judgment which is rationalized post facto through legalist discourse. Narrative identifies the type, and type invariably invokes legalist discourse of an automatic kind. It is the mass of narrative, its aggregate knowledge and judgment which makes doctrine-as-law. Thus, the fact-driven reality of stare decisis has little to do with the notion of stare decisis as commonly understood. Law does not accumulate judgment; narrative wags the dog.

The effectiveness of the judgment of narrative, and its endurance, was clearly articulated by the courts as they faced increasing numbers of challenges to sodomy statutes in the United States and assaults on a narrow interpretation of the "liberalization" of the sex laws in England. With thirty-five years of perspective, and with a great deal of irony, we can easily see that it was "activist" courts in the United States, and "docile" courts in Great Britain, that were at the forefront of resistance to change, far more than our overtly political bodies, both legislative and executive.

The courts entered the second half of the twentieth century with a substantial body of narrative and a fairly well defined structure for enforcement of sex-crimes laws. Born of the self-assured and internalized morality of an earlier age,[73] the modern juridical construction began in earnest after the end of the Second World War. By the 1950s it was clear enough that criminal, consensual, adult

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(discussing Plato's contribution to an understanding of the "morality" of homosexual conduct).

73. *See* Backer, *supra* note 22, at 77-81 (noting the religious morality that the courts accepted and practiced to condemn sodomy as unnatural and disgusting).

sexual conduct included genital-anal, genital-oral, and oral-anal contact,[74] whether performed by same or opposite sex couples.[75]

Moreover, in an age when it was undisputed, for the most part, that the criminal law must be placed at the service of the state to suppress sexual nonconformity, courts faced with challenges to sodomy statutes also increasingly resorted to the language of medicine and sociopsychology to define sexual nonconformists and, on that basis, to reject all such challenges.[76] During that period, there was a:

> tendency, noticeably increasing in strength over recent years, to label homosexuality as a "disease" or "illness." This may be no more than a particular manifestation of a general tendency discernible in modern society by which, as one leading sociologist puts it, "the concept of illness expands continually at the expense of the concept of moral failure."[77]

An exemplary case is *Woody v. State*, in which an adult male was convicted of fellating a fifteen-year-old male.[78] The act was committed without threat of force.[79] The *Woody* court called for prompt action from the "officers, parents and the moral forces of the State and Nation ... if a Sodom and Gomorrah is to be

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74. As the Oklahoma Court of Criminal Appeals summarized, the crime-against-nature-statutes "have been applied only to cases in which the defendant performed fellatio on the victim." Virgin v. State, 792 P.2d 1186, 1188 (Okla. Crim. App. 1990). The court goes on to cite numerous and supporting examples. *See id.* For a history of the evolution of "sodomy," see Goldstein, *supra* note 9, at 1081-87.

75. *See* Daniels v. State, 205 A.2d 295, 296 (Md. 1964); People v. Askar, 153 N.W.2d 888, 891 (Mich. Ct. App. 1967); Roberts v. State, 47 P.2d 607, 612 (Okla. Crim. App. 1935); Adams v. State, 86 S.W. 334, 334 (Tex. Crim. App. 1905); Lewis v. State, 35 S.W. 372, 372 (Tex. Crim. App. 1896).

76. For a history of the evolution of judicial responses to challenges to the sodomy laws, see Backer, *supra* note 22, at 81-86; William E. Nelson, *Criminality and Sexual Morality in New York, 1920-1980*, 5 YALE J.L. & HUMAN. 265, 280-283, 335-38 (1993).

77. WOLFENDEN REPORT, *supra* note 64, ¶ 25 (citation omitted). For the discussion of homosexuality as disease, see *id.* at 30-36. For a discussion and survey of the medical literature, see EDMUND BERGLER, HOMOSEXUALITY: DISEASE OR WAY OF LIFE? 28-29 (1956); CHARLES W. SOCARIDES, THE OVERT HOMOSEXUAL 90-102 (1968); Karl M. Bowman & Bernice Engle, *The Problem of Homosexuality*, 39 J. SOC. HYGIENE 2 (1953); Bernard Glueck, Sr., *Sex Offenses: A Clinical Approach*, 25 COLUM. J.L. & CONTEMP. PROBS. 279 (1960). Mr. Socarides has not had a change of views, even after more than twenty-five years. *See* Charles W. Socarides, Book Review, 60 PSYCHOANALYTIC Q. 686 (1991) (reviewing RICHARD C. FRIEDMAN, MALE HOMOSEXUALITY: A CONTEMPORARY PSYCHOANALYTIC PERSPECTIVE (1988) and criticizing Friedman's suggestion that homosexuality is the result of a biological predisposition). On the medicalization of deviance generally, see Joseph W. Schneider, *Social Problems Theory: The Constructionist View*, 11 AM. REV. SOC. 209, 219-21 (1985) (drawing on social constructionist work).

78. *See* Woody v. State, 238 P.2d 367, 369 (Okla. Crim. App. 1951).

79. *See id.* at 369-72.

forestalled."[80] Sexual nonconformity reflected an illness of addictive potential, much like drug addiction, to which it was tied.[81] Considerable effort was made during this period to find a "cure" for sexual nonconformity, and especially homosexuality.[82]

It was with this accumulated knowledge about people who engaged in acts of sexual nonconformity that courts were confronted with Millian experiments of the next thirty-five years.[83] In the United States, the 1960s and 1970s saw challenges on two fronts to the earlier assumption that a state could regulate the sexual conduct of its citizens. On one front was the erection of privacy jurisprudence at the federal constitutional level, announced in *Griswold v. Connecticut* and its progeny.[84] It was not clear how far the courts would take privacy jurisprudence or other newly empowered federal constitutional

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80. *Id.* at 371.

81. *See id.*

> The early training and active interest of parents in the child's activities and associates are the deterring influence. Too many innocent youths are unconsciously led into trying a "red bird" or "reefer," and easily follow persuasion, and then we have a likely recruit for organized crime. After a time the pervert becomes callous, may no longer recognize the criminal act as wrong, and the debauchery may even be practiced in view of the public.

Id. This notion of sex and addiction remains vibrantly alive in the courts. *See* Carl F. Stychin, *Unmanly Diversions: The Construction of the Homosexual Body (Politic) in English Law*, 32 OSGOODE HALL L.J. 503, 510-28 (1994).

82. *See, e.g.*, RICHARD GREEN, SEXUAL SCIENCE AND THE LAW 77-84 (1992) (considering various approaches to the "treatment" of homosexual orientation). For an example of a modern religious version of the notion that homosexuality can be "cured," see ELIZABETH R. MOBERLY, HOMOSEXUALITY: A NEW CHRISTIAN ETHIC (1983).

83. *See* JOHN STUART MILL, ON LIBERTY (David Spitz ed., 1975). Mill argued that "the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant." *Id.* at 10-11. This was the fundamental notion picked up by the Wolfenden Commission:

> There remains one additional counter-argument which we believe to be decisive, namely, the importance which society and the law ought to give to individual freedom of choice and action in matters of private morality. Unless a deliberate attempt is to be made by society, acting through the agency of the law, to equate the sphere of crime with that of sin, there must remain a realm of private morality and immorality which is, in brief and crude terms, not the law's business.

WOLFENDEN REPORT, *supra* note 64, ¶ 61; *cf.* Cain, *supra* note 17, at 1552 (providing a history of gay-rights litigation). For an excellent study of the legal state of sexual nonconformists at the end of this era, see Rhonda R. Rivera, *Our Straight-Laced Judges: The Legal Position of Homosexual Persons in the United States*, 30 HASTINGS L.J. 799 (1979).

84. *See* Griswold v. Connecticut, 381 U.S. 479, 483-86 (1965), *as discussed in* Eisenstadt v. Baird, 405 U.S. 438, 443 (1972), *and* Carey v. Population Servs. Int'l, 431 U.S. 678, 684-86 (1977).

provisions, but many commentators assumed a broad view, for good or ill.[85] The second front was the approval of model legislation by the influential American Law Institute substantially deregulating sexual conduct. That legislation, the Model Penal Code, decriminalized consensual sexual acts between people of the same sex.[86] Indeed, the Model Penal Code approach to the criminalization of private conduct and the continued suppression of public expression of a preference for that conduct spurred a tremendous amount of debate at the state level.[87] A number of states followed the lead of the Model Penal Code

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85. The concept of privacy took on a life of its own in the Academy. *See generally* Charles Fried, *Privacy*, 77 YALE L.J. 475 (1968) (discussing the meaning of privacy); Louis Henkin, *Privacy and Autonomy*, 74 COLUM. L. REV. 1410 (1974) (arguing that notions of personal autonomy better capture the expansive notion of the right); Richard B. Parker, *A Definition of Privacy*, 27 RUTGERS L. REV. 275 (1974) (defining privacy and linking it to the Fourth Amendment). One can get a good sense of the ferment caused by the notion of privacy after *Griswold* in numerous articles. *See* Clark C. Havighurst, *Forward* to Symposium, *Privacy*, 31 L. & CONTEMP. PROBS. 251-435 (1966). Its motives and methods were also criticized. *See, e.g.*, Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 7-11 (1971) (criticizing *Griswold* for having failed to justify creation of privacy right); John Hart Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920, 947-49 (1973) (criticizing *Roe* as a political decision).

86. The Model Penal Code is a project of the American Law Institute, an organization devoted to the reformulation and modernization of law. *See* MODEL PENAL CODE at xi (1980) [hereinafter MODEL PENAL CODE]. The American Law Institute develops uniform codes representing their view of the best approach to a particular body of law. It is then hoped that state legislatures will use the laws developed by the model rules in reformulating their own law. The drafting of the Model Penal Code was commenced in 1952. *See id.* The proposed official draft of the Model Penal Code was adopted on May 24, 1962. *See id.* The revision of the commentaries began in 1976. Unless otherwise noted I use the Model Penal Code comments as revised after 1976. For a then contemporary discussion of the Model Penal Code provisions, see Louis B. Schwartz, *Morals Offenses and the Model Penal Code*, 63 COLUM. L. REV. 669 (1963). For a discussion of the Model Penal Code approach to liberalization of the sexual conduct laws, see Backer, *supra* note 63.

87. *See, e.g.*, Gordon B. Fields, *Privacy "Rights" and the New Oregon Criminal Code*, 51 OR. L. REV. 494 (1972) (discussing the privacy principle and how it should be applied to the revision of the Oregon Criminal Code); Robert G. Fisher, *The Sex Offender Provisions of the Proposed New Maryland Criminal Code: Should Private, Consenting Adult Homosexual Behavior Be Excluded?*, 30 MD. L. REV. 91, (1970) (proposing new sections of criminal code for inclusion in Maryland's revised code decriminalizing consensual homosexual conduct in private); Victor S. Johnson, III, *Crimes Against Nature in Tennessee: Out of the Dark and into the Light?*, 5 MEM. ST. U. L. REV. 319 (1975); Morris Ploscowe, *Sex Offenses in the New Penal Law*, 32 BROOK. L. REV. 274 (1966) (discussing sex offenses in New York's Revised Penal Law of 1965); Judy R. Potter, *Sex Offenses*, 28 ME. L. REV. 65 (1976); Schwartz, *supra* note 86, at 669 (discussing treatment of sodomy in the *Model Penal Code*); Ralph Slovenko, *Sex Mores and the Enforcement of the Law on Sex Crimes: A Study of the Status Quo*, 15 U. KAN. L. REV. 265 (1967) (arguing that only public homosexual conduct should be criminal); Don P. Stimmel, *Criminality of Voluntary Sexual Acts in Colorado*, 40 U. COLO. L. REV. 268 (1968) (discussing recent developments in Colorado's sex laws); Randy Von Beitel, *The Criminalization of Private Homosexual Acts: A Jurisprudential Case Study of a Decision by the Texas Bar Code*

and "decriminalized" sodomy.[88] However, like its British counterpart, the *Wolfenden Report*,[89] the authors of the Model Penal Code refused an extension of decriminalization to solicitation or other *public* demonstrations of sexual nonconformity.[90]

In Great Britain, the 1960s and 1970s saw, long after the recommendations in the *Wolfenden Report* were transmitted to government, the enactment of a limited decriminalization of sexual conduct between men. The real question, after the adoption of the Sexual Offences Act of 1967, was one of interpretation.[91] The more narrowly the 1967 Act was interpreted, the more ephemeral the "right" granted under the decriminalization decree. Interpretation was based, to some measure, on the judiciary's notion of homosexuality, and "its" habits, a notion instructed to some significant measure by existing

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Revision Committee, 6 HUM. RTS. 23 (1977); Irv S. Goodman, Comment, *The Bedroom Should Not Be Within the Province of the Law*, 4 CAL. W. L. REV. 115 (1968) (arguing that the existing criminal laws in 49 states criminalizing sodomy should be repealed).

88. Illinois was the first in 1961, followed by Connecticut in 1969. During the 1970s another 18 states decriminalized private consensual adult sexual practices—Alaska, California, Colorado, Delaware, Hawaii, Indiana, Iowa, Maine, Nebraska, New Hampshire, New Jersey, Ohio, Oregon, Pennsylvania, South Dakota, Washington, West Virginia, and Wyoming. Wisconsin followed suit in 1982. *See* Schochet v. State, 541 A.2d 183, 201 (Md. Ct. Spec. App. 1988), *rev'd*, 580 A.2d 176 (Md. 1990); *see also* Rivera, *supra* note 83, at 942-47, 949-51 (discussing the criminalization of homosexual behavior). In 1993, Nevada repealed its crimes-against-nature statute, substituting a prohibition against public acts of anal intercourse, cunnilingus, and fellatio. *See* NEV. REV. STAT. § 201.190 (1995) (imposing a one- to four-year prison term for violation). In 1995 the District of Columbia repealed its sodomy proscription. *See* 22 D.C. CODE ANN. § 4101 (Supp. 1995).

89. For the genesis of the *Wolfenden Report*, see *supra* note 64.

90. The authors of the Model Penal Code went to great lengths to strengthen the authority of the state to control public nonconformist sexual expression. They were quick to reassure that "the exclusion [of criminal liability for consensual adults acts of sodomy] does not reach open display, which is covered by Section 251.1 . . . nor public solicitation, which is proscribed by Section 251.3." MODEL PENAL CODE, *supra* note 86, § 213.2, cmt. at 363. Interesting to note, in this respect, is the almost casual basis on which these prohibitions, ancient in origin, and closely related to the proscriptions of the crime of sodomy, survived at the time that the Model Penal Code reporters were self-consciously taking the "radical" step of decriminalizing private acts of sodomy. The comments to the Model Penal Code explained that this provision had originally been part of a comprehensive provision on sodomy and related offenses. *See supra* note 86, § 251.3, at 474-75. But even after the decision to decriminalize private acts of sodomy, the reporters determined that the public nuisance rationale was sufficiently persuasive to retain the prohibition on public acts of solicitation. *See id.* at 476. In the event there was any misunderstanding, they explicitly retained the ancient equating of public nonconformist sexual expression with public nuisance. *See id.* § 251.3. The rationale for retaining the criminal offense of public solicitation of deviate sexual relations was "the suppression of public nuisance." *Id.* at § 251.3, cmt. at 476. For a discussion of the origins of the relationship between nuisance and sexual expression in the law, see 720 ILL. COMP. STAT. ANN. § 5/11-9 cmt. (West 1993).

91. *See* Sexual Offences Act, 1967, ch. 60, § 1 (1967), *as amended by* Criminal Justice and Public Order Act, 1994, ch. 33, §§ 143, 145 (Eng.); *see also supra* note 14.

cases.[92] Its notions were reflected in the comments of the *Wolfenden Report* on the nature of the limits of decriminalization of "homosexual" conduct.[93]

In contrast to the prior twenty years, the United States in the 1980s and 1990s experienced what appeared to be a reversal and redirection of the expansive trends of prior years. This reversal was epitomized by the Supreme Court's decision in *Bowers*,[94] and the refusal of the federal courts to force the military to reverse its homosexual-exclusion policy,[95] and to require the states to recognize legal unions (such as marriages) between people of the same sex.[96] Redirection was epitomized by a search for new constitutional bases for expanding the political and social rights of sexual nonconformists at the federal level,[97] and by concentrating on the invalidation of state sodomy legislation on state-law grounds, or by legislation.[98]

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92. As noted at *supra* note 14, British law is rich with proscriptions of sexual conduct, especially as applied to conduct between people of the same sex.

93. The authors of the *Wolfenden Report* followed the same line of reasoning as the authors of the Model Penal Code: "To say [that some conduct is beyond the criminal law] is not to condone or encourage private immorality." WOLFENDEN REPORT, *supra* note 64, ¶ 61. Through the criminal law, the state retains the power to regulate public expression of this immoral conduct. *See id.* ¶ 64 (explaining the difference between public and private conduct). "[The] function [of the criminal law], as we see it, is to preserve public order and decency, to protect the citizen from what is offensive or injurious, and to provide sufficient safeguards against exploitation and corruption of others . . . ." *Id.* ¶ 13; *see also id.* ¶ 257 (noting males should be punished for prostitution for moral reasons but prostitutes pose a greater nuisance which the law should correct). As such, according to the *Wolfenden Report*, the state should retain the traditional power to define and defend public morality: "It is also part of the function of the law to preserve public order and decency. We therefore hold that when homosexual behavior between males takes place in public it should continue to be dealt with by the criminal law." *Id.* ¶ 49. And British law, as ultimately enacted, followed this legislative program. *See supra* note 14.

94. *See* Bowers v. Hardwick, 478 U.S. 186, 189 (1986); *see generally* Dunlap, *supra* note 9 (discussing the effect of *Bowers* on homosexuality).

95. *See* Steffan v. Perry, 41 F.3d 677, 692-93 (D.C. Cir. 1994) (en banc). *But see* Watkins v. United States Army, 847 F.2d 1329 (9th Cir. 1988), *aff'd en banc*, 875 F.2d 699 (9th Cir. 1989).

96. *See* Dean v. District of Columbia, 653 A.2d 307, 307 (D.C. 1995). This may be changing, however. *See, e.g.*, Baehr v. Lewin, 852 P.2d 44, 57 (Haw. 1993). In December, 1996, the Hawaii district court issued a decision prohibiting the denial of marriage rights to people of the same sex. *See* Baehr v. Miike, 1996 WL 694235 (Haw. Cir. Ct. Dec. 6, 1996).

97. *See, e.g.*, Janet E. Halley, *The Politics of the Closet: Towards Equal Protection for Gay, Lesbian, and Bisexual Identity*, 36 UCLA L. REV. 915, 915-76 (1989) (discussing the Court's refusal to extend substantive due process rights to homosexuals in *Bowers* and the future of other constitutional claims); Thomas, *supra* note 49, at 1431-1516 (discussing same).

98. *See, e.g.*, Catherine Albisa, *The Last Line of Defense: The Tennessee Constitution and the Right to Privacy*, 25 U. MEM. L. REV. 3 (1994) (discussing the right to privacy under the Tennessee Constitution); Elizabeth A. Leveno, Comment, *New Hope for*

Moreover, "[d]espite evidence that homosexuality is not an illness, many psychoanalysts are still convinced that homosexuality is pathological."[99] All of this is reflected in the nature and extent of sodomy challenges, especially after 1986.

In Great Britain, the 1980s and 1990s saw increasingly strident battles over the limitations of the "private homosexual conduct" exception to the criminal law, and perhaps the beginnings of the intrusion of supranational principles on British law and lawmaking. The intrusion of "privacy" principles made its first real (if tentative) appearance in Great Britain indirectly and in faint echoes through its quasi-constitutional treaty obligations as a member of the European Union.[100] Quasi-constitutional constraints on the power of Parliament

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the New Federalism: State Constitutional Challenges to Sodomy Statutes, 62 U. CIN. L. REV. 1029, 1036-54 (1994) (discussing state constitutional challenges to sodomy laws); Brantner, *supra* note 11, at 509-33 (discussing same); Mark Curriden, *Sodomy Laws Challenged: Gay Activists Find Successes in Some State Courts, Legislatures*, 79 A.B.A. J., June 1993, at 38 (discussing gay-rights advocates' legal strategies in state courts and legislatures).

99. SUNE M. INNALA, STRUCTURE AND DEVELOPMENT OF HOMOPHOBIA 17-18 (1995) (citing RICHARD A. ISAY, BEING HOMOSEXUAL: GAY MEN AND THEIR DEVELOPMENT (1989)); Bernard F. Riess, *Psychological Tests in Homosexuality*, *in* HOMOSEXUAL BEHAVIOR: A MODERN REAPPRAISAL 296 (Judd Marmor ed., 1980); C. Silverstein, *Psychological and Medical Treatments of Homosexuality*, *in* HOMOSEXUALITY: RESEARCH IMPLICATIONS FOR PUBLIC POLICY 101 (J.C. Gonsiorek & J.D. Weinrich eds., 1991).

100. British courts do not generally perform the same oversight of legislation as American courts do. There is no general notion of "unconstitutionality," and therefore, there is no British analogue to American constitutional challenges to sodomy statutes. Indeed, there are "no comprehensive . . . documents of particular sanctity that might be said to embody 'the constitution.'" 8 HALSBURY'S LAWS OF ENGLAND, *supra* note 12, at ¶ 811. However, as a member of the European Union, and a signatory of the Human Rights Convention, see *infra* note 101, British law has felt the tug of the overarching quasi-constitutional principles of the European Union Treaties. *See, e.g.*, Equal Opportunities Comm'n v. Secretary of State for Employment, [1994] 1 All E.R. 910, 923-24 (H.L.) (voiding provision of English Employment Protection Act making it more difficult for parttime workers to receive benefits than fulltime workers on basis of European Union directive); R. v. Secretary of State for Transport, [1991] 1 A.C. 603, 644-45 (E.J.C. 1990) (voiding Merchant Shipping Act of 1988 and regulations thereunder that imposed restrictions on Spanish fishing vessels as contrary to European Union law); J.W. Bridge, *The European Communities and the Criminal Law*, 1976 CRIM. L. REV. 88, 88-90 (Eng.) (discussing the effect of Community treaties on criminal law); Bernard Schwartz, *Wade's Seventh Edition and Recent English Administrative Law*, 48 ADMIN. L. REV. 175, 176-78 (1996) (discussing the effect of joining the European Community on English law). To some extent British courts will now assert the oversight role common to American courts, but only to the extent required under its European Union obligations. *But see* Macarthys Ltd. v. Smith, [1979] 3 All E.R. 325, 329 (C.A.) ("If the time should come when our Parliament deliberately passes an Act with the intention of repudiating the Treaty or any provision in it or intentionally of acting inconsistently with it and says so in express terms then I should have thought that it would be the duty of our courts to follow the statute of our Parliament.").

to regulate sexual conduct have appeared rather more directly through Great Britain's obligations as a signatory of the European Convention for the Protection of Human Rights and Fundamental Freedoms (Human Rights Convention).[101] Both the Treaty on European Union, which effected substantial changes in the governance and aims of the European Union, and the decisions of the European Court of Justice have moved to incorporate the human rights principles of the Human Rights Convention into the "law" of the European Union applicable to all member states.[102] The effect has been substantial in connection

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101. *See* Convention for the Protection of Human Rights and Fundamental Freedoms, November 4, 1950, 213 U.N.T.S. 222. Among other things, the Human Rights Convention protects the right to respect for private and family life, *see id.* at 230, and the freedom to enjoy protected rights without discrimination, *see id.* at 232. The enforcement proceedings can be complex. The Human Rights Convention permits a state to limit protected rights under a number of circumstances. Article-eight rights may be limited in the interest of public safety, public order, national security, the protection of health or morals, or the protection of the rights of others, but only if such limitations are "in accordance with the law" and "necessary in a democratic society." *Id.* at 230. Article 14, by contrast, supplements the substantive rights accorded by the Human Rights Convention and has no independent existence. *See* N. v. Sweden, App. No. 10410/83, 40 Eur. Comm'n H.R. Dec. & Rep. 203, 206 (1985). Complaints are first reviewed by the European Commission of Human Rights. Complaints not resolved by that body are usually (but not always) referred to the European Court of Human Rights. Sometimes complaints may be referred to the Committee of Ministers (although decisions of this body may also be appealed to the European Court of Human Rights). Decisions of these bodies are usually (but not always) given specific effect. *See* Laurence R. Helfer, Note, *Finding a Consensus on Equality: The Homosexual Age of Consent and the European Convention on Human Rights*, 65 N.Y.U. L. REV. 1044, 1047-53 (1990). By March of 1994, all but one of the signatories of the Human Rights Convention had signed Protocol Number 11, pursuant to which the present system of enforcement will be replaced by a single permanent court modeled on the European Court of Justice. *See generally* Pieter van Dijk, *The Treatment of Homosexuals under the European Convention on Human Rights*, *in* HOMOSEXUALITY: A EUROPEAN COMMUNITY ISSUE 179 (Kees Waaldijk & Andrew Clapham eds., 1993); Andrew Drzemczewski & Jens Meyer-Ludwig, *Principal Characteristics of the New ECHR Control Mechanism as Established by Protocol No. 11*, 15 HUM. RTS. L.J. 81 (1994); Markus Dirk Dubber, Note, *Homosexual Privacy Rights Before the United States Supreme Court and the European Court of Human Rights: A Comparison of Methodologies*, 27 STAN. J. INT'L L. 189 (1990); Andrea Woelke, Good as You: Inequality for Same-Sex Contact in the Criminal Law in England and Wales and Possibilities for Change 19 (1995) (unpublished manuscript, on file with author). English courts have stated that they would refuse to countenance behavior that threatens either human rights or the rule of law. *See* R. v. Horseferry Road Magistrates' Ct., [1993] 3 All E.R. 138, 141-56 (H.L.) (Lord Griffiths) (discussing the propriety of extradition to Great Britain). *But see* R. v. Brown, [1993] 2 All E.R. 75, 84 (H.L.) (Lord Templeman) (rejecting the claim that the same-sex sado-masochistic activity between older males and young men was an exercise of the right in respect of private and family life protected under Article eight of the Human Rights Convention).

102. *See* TREATY ON EUROPEAN UNION, Feb. 7, 1992, 31 I.L.M. 247 [hereinafter E.U. TREATY]. The E.U. Treaty obligates the European Union to "respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms . . . and as they result from the constitutional traditions common to

with the regulation of sexual conduct in the United Kingdom, where it has been used to extend the decriminalization of private homosexual conduct to a part of the United Kingdom to which the Sexual Offences Act of 1967 did not apply.[103] On the other hand, the courts did not

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the Member States, as general principles of Community law." *Id.* at 256. There is some pressure to have the European Union actually sign the Human Rights Convention. *See* Parliament Resolution on Community Accession to the European Convention on Human Rights, 1994 O.J. (C 44) 14.2. (The Council has asked the Court of Justice whether the Union's accession to the Human Rights Convention would be permitted under the terms of the Community treaties). The Court of Justice, however, has recently ruled that accession to the Human Rights Convention will require amendment of the E.U. Treaty itself. *See* Case 2/94, Re the Accession of the Community to the European Human Rights Convention, 2 C.M.L.R. 265 (H.L. 1996), *available in* LEXIS, Intlaw Library, ECCASE File.

To a large extent, though, the provisions of the E.U. Treaty appear to formalize the longstanding position of the European Court of Justice. That Court has long recognized that fundamental human rights are "enshrined in the general principles of Community law and protected by the Court." Case 29/69, Stauder v. City of Ulm, Sozialamt, 1970 C.M.L.R. 112. The European Court of Justice has also explained:

> In safeguarding these rights, the Court is bound to draw inspiration from constitutional traditions common to Member States, and it cannot therefore uphold measures which are incompatible with fundamental rights recognized and protected by the Constitutions of those States.

Case 4/73, Nold v. Commission, [1974] E.C.R. 491 at ¶ 13.

Similarly, international treaties for the protection of human rights on which the Member States have collaborated, or of which they are signatories, can supply guidelines which should be followed within the framework of Community law. *See* Case 4/73, Nold v. Commission, 1974 E.C.R. 491. Among the treaties on which the European Court of Justice relies is the European Convention for the Protection of Human Rights and Fundamental Freedoms, November 4, 1950, 213 U.N.T.S. 222. The Court of Justice has specifically indicated that Article eight of the Human Rights Convention (respect for private life) is a fundamental right protected under the Community legal order. *See* Case C-62/90, Commission v. Germany, 1992 E.C.R. I-2575. For a discussion of the authority of the judicial organs of the European Union to entertain human rights issues, see Joseph H.H. Weiler, *Eurocracy and Distrust: Some Questions Concerning the Role of the European Court of Justice in the Protection of Fundamental Human Rights within the Legal Order of the European Communities*, 61 WASH. L. REV. 1103 (1986) (describing the basis of European Union control over the determination of human rights issues within the European Union and the constitutional and statutory bases thereof). On the notion of European citizenship and the rights of lesbians and gay men, see Antonio Tanca, *European Citizenship and the Rights of Lesbians and Gay Men*, *in* HOMOSEXUALITY: A EUROPEAN COMMUNITY ISSUE 267 (Kees Waaldijk & Andrew Clapham eds., 1993).

103. *See* Dudgeon v. United Kingdom, App. No. 7525/76, 3 Eur. H.R. Rep. 40, 59 (1981) (holding Northern Ireland's buggery and gross indecency laws violated the right to respect for private life articulated in Article 8(2) of the Human Rights Convention as applied to adult private consensual activities). And it is becoming a more significant approach to litigating power in Great Britain. *See, e.g.*, R. v. Admiralty Board of the Defense Council, (Q.B.), THE TIMES, June 13, 1995, *available in* LEXIS, Intlaw Library, Engcas File (Simon Brown, L.J.) (rejecting arguments based on European Union Directive barring sex discrimination (equal treatment) as the terms were interpreted under the Human Rights Convention, as well as an argument based directly on the Human Rights Convention in appeal of administrative dismissal of three gay men and one lesbian from the British

appear inclined to read the Sexual Offences Act of 1967 with any particular broadness. The battles, for the most part, were based on images of gay men, their sexual habits, and "public" proclivities and on the preservation of the determination of conduct standards by the people, as represented by a jury.[104] Of particular concern in Great Britain was the sexual nonconformist as defiler of the public space and child abuser.[105]

Particularly in the United States, judicial activity reflected the tenor of the social and intellectual movements of this period. The period from 1960 through 1995 has been marked by a substantial amount of constitutional jurisprudence in which the validity of sodomy (and related) statutes have been attacked. In fact, the issue was raised in over 200 cases.[106] Given all this activity, one might have expected some noticeable rate of success on the theory that they all could not have been wrong. Reality, however, paints a very different picture. During a period in the United States when state legislatures, or the people by initiative referendum, decriminalized sodomy in over half the states,[107] and in Great Britain when Parliament enacted the Sexual

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military, but simultaneously accepting the argument that the case was justiciable, based in part on the United Kingdom's treaty obligations). By the time of the decision in *Dudgeon*, Scotland, the other part of the United Kingdom to which the Sexual Offences Act of 1967 did not apply, had adopted legislation by which it joined England and Wales in providing the limited exception to criminal buggery and gross indecency.

104. This should come as no surprise, perhaps, in an era marked by the passage of the Local Government Act, 1988, ch. 9, § 28(1) (Eng.), which required government generally to condemn homosexuality as a matter of official government policy. On the use of the jury as an instrument of social judgment, see *supra* notes 54-58.

105. The cases bear this out. These cases are discussed in some detail at Parts III.A-D, *infra*. *Cf.* Moran, *supra* note 68 at 134-68 (discussing the "somatic techniques of policing").

106. Between 1960 and 1996, courts confronted vagueness challenges to state statutes in about 130 cases; privacy challenges in 89 cases; equal protection, due process and overbreadth challenges in 53 cases; Eighth Amendment challenges in 20 cases; and state constitutional challenges (explicitly treated as such) in 10 cases. Challenges on multiple grounds were raised in 60 cases during this period. The bulk of the judicial activity occurred between 1966 and 1976, with a steady drop in cases in which constitutional issues have been raised since. That can be explained, at least in part, because many states decriminalized consensual same-sex activity in the 1970s or reduced the "crimes" from felonies to misdemeanors, and in very few states, the courts struck the statutes on constitutional grounds.

107. By June, 1996, only 23 states arguably continue to proscribe "sodomy" (broadly defined) in one form or another. *See infra*. Of these, consensual same-sex activity remains a felony in 13 states. *See* D.C. CODE ANN. § 22-3502 (1989); GA. CODE ANN. § 16-6-2 (1992); IDAHO CODE § 18-6605 (1987); LA. REV. STAT. ANN. § 14:89 (West 1986); MASS. GEN. LAWS ANN. ch. 272, §§ 34, 35 (West 1990). *But see* Commonwealth v. Balthazar, 318 N.E.2d 478, 481 (Mass. 1974); MD. CODE ANN. Crimes & Punishments art. 27, §§ 553-554 (1992); MICH. COMP. LAWS ANN. §§ 750.158, 750.338, 750.338(b) (West 1991); MISS.

Offences Act of 1967, the courts remained substantially as immune to the blandishments of jurisprudential argument as they had in the period ending in the early 1960s when jurisprudence weighed heavily in favor of the regulation of sexual conduct through the criminal law. In all of the constitutional challenges to the sodomy statutes over the thirty-six years since 1960, the courts arguably have held the statutes unconstitutional in only twenty cases, or about eight percent. While this statistic is important in and of itself, as evidence that past imagery contributed to the deafness of the judiciary to later actions, the grounds on which the statutes are invalidated are even more revealing. Of these cases, five convictions for crimes against nature were overturned on vagueness grounds, one of which was later reversed on appeal, and another of which was a federal case.[108] In some of these jurisdictions, the conduct continued to be proscribed on some other basis (and in that sense the decision was easy because it changed nothing in a practical sense).[109] Florida provides a good example.[110] Of the other

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CODE ANN. § 97-29-59 (1979); MONT. CODE ANN. §§ 45-2-101, 45-5-505 (1991); N.C. GEN. STAT. § 14-177 (1995); OKLA. STAT. tit. 21, § 886 (Supp. 1992); R.I. GEN. LAWS § 11-10-1 (1992); S.C. CODE ANN. § 16-15-120 (Law. Co-op. 1985); VA. CODE ANN. § 18.2-361 (Michie 1988). In the other 10 states consensual same-sex activity is a misdemeanor. *See* ALA. CODE § 13A-6-65(a)(3) (1991); ARIZ. REV. STAT. ANN. §§ 13-1411, 13-1412 (1991); ARK. CODE ANN. § 5-14-122 (Michie 1991); FLA. STAT. ANN. § 800.02 (West 1992); KAN. STAT. ANN. § 21-3505 (1988); MINN. STAT. ANN. § 609.293 (West 1987); MO. ANN. STAT. § 566.090 (West 1972); TENN. CODE ANN. § 39-13-510 (1991); TEX. PENAL CODE ANN. §§ 21.01(1), 21.06 (West 1989); UTAH CODE ANN. § 76-5-403 (1990).

108. *See* Harris v. State, 457 P.2d 638, 640 (Alaska 1969); Franklin v. State, 257 So. 2d 21, 23 (Fla. 1971); State v. Sharpe, 205 N.E.2d 113, 115 (Ohio Ct. App. 1965). In *Jellum v. Cupp*, 475 F.2d 829 (9th Cir. 1973), the federal court voided an Oregon statute proscribing acts of sexual perversity on vagueness grounds in a case in which an adult male accosted a woman in a shopping center parking lot, knocked her down and urinated on her. The court noted that the conduct "admitted an episode of socially obnoxious behavior which indicates the need for the State of Oregon to seek institutional care for him." *Id.* at 832. However, a New Mexico appellate court voided a similar statute for vagueness only to have its decision reversed. *See* State v. Elliott, 551 P.2d 1352, 1353 (N.M. 1976), *rev'g* 539 P.2d 207 (N.M. Ct. App. 1975).

109. *See Harris*, 457 P.2d at 640; *Franklin*, 257 So. 2d at 23-24; State v. Bonanno, 245 La. 1117, 1123-24, 163 So. 2d 72, 74 (1964).

110. In voiding Florida's crime against nature statute on vagueness grounds, the Florida Supreme Court emphasized that it did not "sanction historically forbidden sexual acts, homosexuality or bestiality." *Franklin*, 257 So. 2d at 23. More importantly, the court announced that "pending further legislation in the matter, society will continue to be protected from this sort of reprehensible act under [a statute prohibiting unnatural and lascivious acts, a misdemeanor]." *Id.* at 24; *accord* Murray v. State, 297 So. 2d 568, 568 (Fla. 1974); Vina v. State, 265 So. 2d 367, 367 (Fla. 1972) (per curiam); Morris v. State, 261 So. 2d 563, 564-65 (Fla. Dist. Ct. App. 1972) (per curiam). Thereafter, the Florida Supreme Court rejected challenges on vagueness grounds to the misdemeanor statute. *See* Witherspoon v. State, 278 So. 2d 611, 612 (Fla. 1973); *see also* Thomas v. State, 326 So. 2d

cases, the statutes were struck down as to *heterosexual* sodomy in seven cases, one of which was later reversed, and three of which (including the one reversed) were limited to conduct between husband and wife.[111] Of the remaining eight cases, a small handful, the courts struck the statutes down on substantive grounds and the proscriptions were not preserved in other form. In those cases, the courts struck down the statutes on changing-community-standards grounds,[112] rational basis grounds,[113] state or federal privacy-rights principles,[114] or state constitutional grounds (one of which was reversed on appeal).[115]

This evidence of judicial immunity to emerging privacy doctrine and Millian libertarianism should come as no surprise. The *narrative judgment* of the cases stands in the way. The judgment implicit in the juridical definition of sexual nonconformists overcomes any jurisprudential principle—narrative and persona are its substitute. Over and over again courts considering the validity of sodomy proscriptions in the United States or the broadness of the exception to proscription distinguish between the jurisprudence of broad principle untethered by "fact" on one hand and what can only be characterized as the *legal jurisprudence of permission* on the other. It was the unpalatable character of those seeking to come under its umbrella which always seemed to get in the way. These supplicants were

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413, 415-16 (Fla. 1975); Bell v. State, 289 So. 2d 388, 389-90 (Fla. 1973); State v. Fasano, 284 So. 2d 683, 683 (Fla. 1973). Ultimately, it seems the most important effect of *Franklin* was to reduce the *severity* of the punishment of the offense from a felony to a misdemeanor.

111. *See* Cotner v. Henry, 394 F.2d 873, 876 (7th Cir. 1968); State v. Pilcher, 242 N.W.2d 348, 359 (Iowa 1976); State v. Lair, 301 A.2d 748, 753-54 (N.J. 1973), *overruled by* State v. Ciuffini, 395 A.2d 904 (N.J. 1978); *see also* State v. Bateman, 547 P.2d 6, 8-10 (Ariz. 1976); State v. Holden, 890 P.2d 341, 346 (Idaho Ct. App. 1995); Schochet v. State, 580 A.2d 176, 184 (Md. 1990); Post v. State, 715 P.2d 1105, 1109-10 (Okla. Crim. App. 1986).

112. *See* Commonwealth v. Balthazar, 318 N.E.2d 478, 401 (Mass. 1974). Neither the Massachusetts courts nor its legislature has tested the strength of this dicta since *Balthazar*. Moreover, *Balthazar* might be inapplicable to MASS. GEN. LAWS ANN. ch. 272, § 34 (sodomy) because the statute at issue was one proscribing unnatural and lascivious acts. *See* Commonwealth v. Marshall, 253 N.E.2d 333, 333 (Mass. 1969).

113. *See* Commonwealth v. Bonadio, 415 A.2d 47, 51 (Pa. 1980).

114. *See* State v. Ciuffini, 395 A.2d 904, 907 (N.J. 1978); People v. Onofre, 415 N.E.2d 936, 937-39 (N.Y. 1980); People v. Uplinger, 447 N.E.2d 62, 62-63 (N.Y. 1983). An interesting contrast to *Uplinger* is evidenced in People v. Liberta, 474 N.E.2d 567, 573 (N.Y. 1984) (voiding marital exception to rape and forcible sodomy laws on equal protection grounds).

115. *See* Williams v. State, 494 So. 2d 819, 830 (Ala. Crim. App. 1986) (voiding marital exception to forcible sodomy statute on Fourteenth Amendment grounds); *see also* State v. Wasson, 842 S.W.2d 487, 491-92 (Ky. 1992). The Texas Supreme Court recently *reversed* the voiding of the Texas statute but only on narrow jurisdictional grounds. *See* State v. Morales, 869 S.W.2d 941, 942-45 (Tex. 1994).

looking to the courts for permission to prey on children; to exhibit their sexual prowess before passersby; to force women to submit to sex; to force other men to submit to their sexual desires in jail cells; or to engage in careless promiscuity ultimately at the (medical) expense of the state. The rejection of their legal arguments was implicit in the description of their character.

Indeed, in those few cases where the criminal proscription of sodomy was only partially voided, the courts have had to struggle against narrative type. In *Commonwealth v. Bonadio*, the Pennsylvania Supreme Court voided the proscription against voluntary deviate sexual intercourse in a case in which the defendants, female "exotic" dancers, had engaged in sexual acts with patrons of the Penthouse Theater.[116] The Oklahoma Court of Criminal Appeals, the Iowa Supreme Court, the New Jersey Supreme Court, the Maryland Court of Appeals, and the Idaho Supreme Court decriminalized heterosexual acts of consensual sodomy in cases where it was not clear that the females consented to the sexual acts.[117] The New Jersey Supreme Court decriminalized adult same-sex consensual sexual activity in like circumstances.[118] The Kentucky Supreme Court ignored the public solicitation of that act while the New York Court of Appeals noted, without discussion, that the sexual activity of one of the defendants occurred in a parked car, and the other arguably involved a minor.[119] It is through these cases that one can better

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116. *See* 415 A.2d 47, 52 (Pa. 1980). Indeed, the majority omits almost entirely reference to the facts in order to reach the constitutional issues. *See id.* at 49 & n.2.

117. *See* State v. Pilcher, 242 N.W.2d 348, 350-51 (Iowa 1976); State v. Schochet, 580 A.2d 176 (Md. 1990); State v. Lair, 301 A.2d 748, 750-53 (N.J. 1973); Post v. State, 715 P.2d 1105, 1106 (Okla. Crim. App. 1986). The Idaho Court of Appeals in *State v. Holden*, 890 P.2d 341 (Idaho Ct. App. 1995), held proscription of private consensual acts of sodomy was unconstitutional in a case involving a husband and wife, where coercion was charged and proved. *See id.* at 347. However, because its ruling did not affect the length of the sentence imposed (all sentences were to run concurrently), the defendant gained nothing by the court's holding. *See id.* The Massachusetts example is somewhat more peculiar. The Massachusetts Supreme Judicial Court, while stating that the proscription of lascivious and unnatural acts does not apply to consensual private adult conduct, affirmed the conviction of an adult defendant because the jury determined that his acts had been coercive. *See* Commonwealth v. Balthazar, 318 N.E.2d 478, 482 (Mass. 1974). In a subsequent habeas proceeding, the United States Court of Appeals affirmed the issuance of the writ vacating *Balthazar*. *See* Balthazar v. Superior Court, 573 F.2d 698, 699 (1st Cir. 1978). The Arizona Supreme Court eliminated the applicability of such a statute to private activities of husband and wife, but only in dicta. *See* State v. Bateman 547 P.2d 6, 10 (Ariz. 1976).

118. *See* State v. Ciuffini, 395 A.2d 904, 907 (N.J. 1978).

119. *See* State v. Wasson, 842 S.W.2d 487 (Ky. 1992); People v. Onofre, 415 N.E.2d 936, 937-39 (N.Y. 1980). The New Jersey Supreme Court limited the applicability of

understand the "conservative" position that the courts had no business intruding in this area. What the dissenters severely criticized, in effect, was that in going beyond the narrative, the majorities (in cases voiding such state laws) appeared to issue opinions in hypothetical cases; they appeared to legislate.[120] The easy cases were the vagueness challenges where alternative criminal statutes were available to preserve the criminal character of the conduct.[121] A jurisprudence of broad principle goes against the grain of common-law courts.

In the end, the courts have presented us with a world of sexual nonconformity emerging from the cases is grim, unpleasant, and often dirty. But it is a description constructed by years and years of sodomy jurisprudence. For judges telling stories, and hearing stories in cases on a daily basis and over a number of years, the mass of this narrative makes it easy to believe that sexual nonconformists are almost invariably disgusting in some basic way. The ordinary sexual nonconformist is invariably linked to predator, pied piper, whore, and defiler.[122] To permit these types any public space would amount to an invasion of the privacy of the rest of society. A sexual nonconformist who does not fit the narrative pattern does not exist, except as an abberation of an abberation.

This, more than anything else, makes the judicial narrative of sodomy dangerous. The danger of this narrative lies in the distortion carried into the picture of the "ordinary" lives of sexual nonconformists by the stories in the cases. The danger is increased because of the difficulty of determining the falsity of the picture painted by the cases. It is easy to dismiss the argument that most people in our society murder or steal, for instance, because the lives of

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private lewdness in similar circumstances; *see also* State v. O., 355 A.2d 195, 196 (N.J. 1976). *But see* Christensen v. State, 468 S.E.2d 188 (Ga. 1996) (upholding sodomy statute).

120. *See Pilcher*, 242 N.W. 2d at 360-67 (Reynoldson, J., dissenting); *Onofre*, 415 N.E.2d at 954-61 (Gabrielli, J., dissenting); *Post*, 715 P.2d at 1110-11 (Bussey, J., dissenting); State v. Bonadio, 415 A.2d 47, 52-53 (Pa. 1980) (Roberts, Nix, J.J., dissenting); *Wasson*, 842 S.W.2d at 509-20 (Wintersheimber, J., dissenting). The only real exception may be New Jersey, whose courts acted in anticipation of legislation decriminalizing private consensual sexual conduct. *See Ciuffini*, 395 A.2d at 908-09. The usual approach is that used in *Christensen*.

121. *See, e.g.*, Harris v. State, 457 P.2d 638, 649 (Alaska 1969) ; Franklin v. State, 257 So. 2d 21, 23 (Fla. 1971).

122. I emphasize that the courts did not create these images after the 1950s. These images all were implicit or explicit in prior cases as well as in the medical observations of the prior period and can be traced back to the nineteenth-century creation of the cultural homosexual. *See* MICHEL FOUCAULT, THE HISTORY OF SEXUALITY: AN INTRODUCTION (Robert Hurley trans., 1978).

most citizens in these regards are public. We see our neighbors, we observe their conduct in our community, we are able to fairly accurately determine that only a small minority of our fellow citizens are antisocial in these ways, and we can make judgments of aggregate social character accordingly. But the lives of sexual nonconformists are essentially hidden, private, closeted, closed from view. And we want it that way. As I have elsewhere argued, that is ultimately the thrust of early decriminalization.[123] But one of the prices we force sexual nonconformists to pay for this closeting is evidenced by the rise and endurance of the archetypal visions of their character, which substitute for the reality public lives would permit. Judicial narrative in this case supplies a "pre-understanding" of sexual nonconformity that paints a whole class of people as the trolls of a modern age.[124] It is perhaps the best evidence of the need for storytelling, for publicizing the ordinary lives of sexual nonconformists, for gay-legal narrative which "outs" the different, yet ordinary, lives of those whom judicial narrative has demonized by the accidental and selective public storytelling of an otherwise hidden group.

The ordinariness of sexual nonconformist as predator, pied piper, whore, and defiler of the public space runs through the thirty-six years of sodomy jurisprudence I have reviewed. These character types were already dominant in the cases at the time of the emergence of privacy "rights" and libertarian notions; the later cases merely sharpened these images. Thus sharpened, they serve as a bulwark against change. I turn to a closer examination of these archetypes to illuminate the pervasiveness of distortion and the power of the jurisprudence of narrative, and the way in which, on that basis, cloaked in reasonableness and disgust, distortion can drive the language of law. The power of these stories is best understood in their telling, and I will tell them in the manner in which the courts construct them.

A. The Predator: Rape, Coercion, and Physical Power

> It is more or less a matter of common knowledge, among those who have made a study of sexual perversion as it manifests itself in human degenerates, that each sexual pervert follows some habitual, unnatural method of gratifying his perverted passion. It may be unnatural commerce with one class of beasts or another class of beasts; it may be by one mature male upon another mature male; and it may be, which is

123. *See* Backer, *supra* note 63, at 764-802.

124. *See supra* note 14 and accompanying text.

> to-day of too frequent occurrence, a degenerate sexual commerce with little boys or little girls.[125]

Among the images, based in fact but expanded far beyond factual prevalence—images whose horror overwhelms other definitions of sexual nonconformity—is the predator. Sexual nonconformists, especially gay men, are thought of as predators. Theirs is an unsavory life spent at the margins of the acceptable. Their innate understanding of the depravity of their actions is evidenced by their need to force themselves on those who know no better or who cannot defend themselves. This is the sexual nonconformist as the bogeyman, the vampire,[126] the sociocultural violator. The predator is at once the imitator and the parody of the rapist. The rapist violently imitates a norm-affirming act—that is one of his many horrors; the predator parodies the same act, and in so doing, creates a double horror. Sometimes the predator even conflates rape and sodomy.[127]

The sexual nonconformist as predator feeds on the helpless and need not act alone. Thus, the predator may hold the object of his passion, a developmentally disabled adult man, on a bed and sexually assault him while one of the predator's friends holds down the victim and others watch.[128] The predator is a trickster and a thief (or worse), and over and over again he (it is usually he) preys on members of the opposite sex as well.[129] The predator is an opportunist. Sometimes he

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125. Barnett v. State, 135 N.E. 647, 649 (Ohio 1922).

126. Consider, for example, the troubled homoeroticism of the popular novel, by Anne Rice. *See* ANNE RICE, INTERVIEW WITH THE VAMPIRE (1976).

127. *See, e.g.*, State v. Dale, 550 P.2d 83, 87 (Ariz. 1976); People v. Sharpe, 514 P.2d 1138, 1140-41 (Colo. 1973); Wanzer v. State, 207 S.E.2d 466, 468 (Ga. 1974); Dixon v. State, 268 N.E.2d 84, 85-87 (Ind. 1971); Miller v. State, 268 N.E.2d 299, 302 (Ind. 1971); Twomey v. State, 267 N.E.2d 176, 180 (Ind. 1971); Arnett v. State, 291 N.E.2d 376, 379 (Ind. Ct. App. 1973).

128. Harris v. State, 457 P.2d 638, 640 (Alaska 1969). Interestingly enough, in this case the court determined that the "crime against nature" was unconstitutionally vague. *See id.* at 647. However, the charge of sodomy was not subject to the same defect, and, on that basis, the Alaska Supreme Court affirmed the conviction. *See id.* at 649.

129. *See* State v. Pickett, 589 P.2d 16, 20 (Ariz. 1978); State v. Bateman, 547 P.2d 6, 8-10 (Ariz. 1976); State v. Dale, 550 P.2d 83, 85 (Ariz. 1976); People v. Sharpe, 514 P.2d 1138, 1140-41 (Colo. 1973); Smashum v. State, 403 S.E.2d 797, 798 (Ga. 1991); Wanzer v. State, 207 S.E.2d 466, 468 (Ga. 1974); State v. Goodrick, 641 P.2d 998, 999 (Idaho 1982); State v. McCoy, 337 So. 2d 192, 196 (La. 1976); State v. Bluain, 315 So. 2d 749, 752 (La. 1975); State v. Mills, 505 So. 2d 933, 939 (La. Ct. App. 2d Cir. 1987); Commonwealth v. Leroux, 421 N.E.2d 1255, 1256 (Mass. App. Ct. 1981); Commonwealth v. Martin, 381 N.E.2d 1114, 1118 (Mass. App. Ct. 1978); Commonwealth v. Gonzales, 369 N.E.2d 1038, 1039 (Mass. App. Ct. 1977); Commonwealth v. Deschamps, 294 N.E.2d 426, 428-29 (Mass. App. Ct. 1972); Anderson v. State, 544 P.2d 1200, 1202 (Nev. 1976); State v. Helker,

uses the power of the state, even that of a police officer.[130] Even his wife is not immune.[131]

Courts are less inclined to vaunt doctrine over archetype in these cases at times because predators are sick (and they sometimes know it)[132] or are otherwise developmentally impaired.[133] Predators are cruel and use their power to their advantage.[134] This is particularly true in jails.[135] These incidents are particularly detestable.[136] It is no surprise,

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545 P.2d 1028, 1031 (N.M. Ct. App. 1975); State v. Armstrong, 511 P.2d 560, 563 (N.M. Ct. App. 1973); State v. Kasakoff, 503 P.2d 1182, 1183 (N.M. Ct. App. 1972); State v. Adams, 264 S.E.2d 46, 48-50 (N.C. 1980); State v. Webb, 216 S.E.2d 382, 382 (N.C. Ct. App. 1975); State v. Crouse, 205 S.E.2d 361, 362 (N.C. Ct. App. 1974); Carson v. State, 529 P.2d 499, 508 (Okla. Crim. App. 1974); State v. Santos, 413 A.2d 58, 61 (R.I. 1980); State v. Levitt, 371 A.2d 596, 598-99 (R.I. 1977); Lee v. State, 505 S.W.2d 816, 818 (Tex. Crim. App. 1974).

130. *See, e.g.*, Thomas v. State, 326 So. 2d 413, 415-16 (Fla. 1975); Johnsen v. State, 332 So. 2d 69, 70 (Fla. 1976).

131. *See, e.g.*, State v. Bateman, 540 P.2d 732 (Ariz. Ct. App. 1975); Warren v. State, 336 S.E.2d 221, 225 (Ga. 1985). However, the result is different when the acts are not coercive. *See, e.g.*, Cotner v. Henry, 394 F.2d 873, 876 (7th Cir. 1968); Towler v. Peyton, 303 F. Supp. 581, 582-83 (W.D. Va. 1969); People v. Liberta, 474 N.E.2d 567, 573 (N.Y. 1984).

132. *See e.g.*, Gilmore v. People, 467 P.2d 828, 828 (Colo. 1970). In *Gilmore* the court accepted, as statements against interest, defendant's exclamation: "'I have to be sick or I wouldn't have done these things.'" *Id.* at 830; *see also* Jellum v. Cupp, 475 F.2d 829, 832 (9th Cir. 1973); *Towler*, 303 F. Supp. at 582-83; Commonwealth v. Deschamps, 294 N.E.2d 426, 427 (Mass. 1972); People v. Beam, 441 N.E.2d 1093, 1095-96 (N.Y. 1982); *cf.* State v. Hodges, No. 01-C-019212-C1200382, 1995 WL 301443, at *3 (Tenn. Crim. App. May 18, 1995).

133. *See, e.g.*, State v. Thompson, 558 P.2d 1079, 1083 (Kan. 1976).

134. *See, e.g.*, Stevens v. State, 266 S.E.2d 194, 197 (Ga. 1980); State v. Mills, 505 So. 2d 933, 939 (La. Ct. App. 2d Cir. 1987); Commonwealth v. Hill, 385 N.E.2d 253, 255 (Mass. 1979); Commonwealth v. Hanscomb, 328 N.E.2d 880, 884 (Mass. 1975); Commonwealth v. Morgan, 339 N.E.2d 723, 731 (Mass. 1975) (same); Commonwealth v. Brown, 373 N.E.2d 982, 982-83 (Mass. App. Ct. 1978); Commonwealth v. Martin, 381 N.E.2d 1114, 1118 (Mass. App. Ct. 1978); State v. Lemire, 345 A.2d 906, 908-12 (N.H. 1975); Newsom v. State, 763 P.2d 135, 139 (Okla. Crim. App. 1988); Plotner v. State, 762 P.2d 936, 944 (Okla. Crim. App. 1988), *overruled by* Parker v. State, 917 P.2d 980 (Okla. Crim. App. 1996); Harris v. State, 713 P.2d 601, 602 (Okla. Crim. App. 1986); Hicks v. State, 713 P.2d 18, 19-21 (Okla. Crim. App. 1986); Glass v. State, 701 P.2d 765, 769-70 (Okla. Crim. App. 1985); Clayton v. State, 695 P.2d 3, 6 (Okla. Crim. App. 1984); State v. Gibbons, 418 A.2d 830, 834 (R.I. 1980); Locke v. State, 501 S.W.2d 826, 828 (Tenn. Crim. App. 1973).

135. *See* People v. Madden, 171 Cal. Rptr. 897, 898 (Cal. Ct. App. 1981); People v. Cortez, 171 Cal. Rptr. 418, 424 (Cal. Ct. App. 1981); State v. Carringer, 523 P.2d 532, 533 (Idaho 1974); State v. Langley, 265 N.W.2d 718, 719-20 (Iowa 1978); People v. Penn, 247 N.W.2d 575, 577-78 (Mich. Ct. App. 1976); People v. Green, 165 N.W.2d 270, 271 (Mich. Ct. App. 1968); Griffith v. State, 504 S.W.2d 324, 326 (Mo. Ct. App. 1974); State v. Leadinghorse, 222 N.W.2d 573, 576 (Neb. 1974); State v. Sanchez, 512 P.2d 696, 699 (N.M. Ct. App. 1973); Stephens v. State, 489 S.W.2d 542, 543 (Tenn. Crim. App. 1972); Jones v. State, 200 N.W.2d 587, 590 (Wis. 1972).

then, that under these circumstances courts resist the invitation "to judicially repeal laws on purely sociological consideration—[it] would do better to address . . . the General Assembly for it to determine if modern mores require the alteration or expunction of sodomy statutes."[137] The sexual nonconformist as predator lies beyond the reach of law-as-doctrine; principle is not imposed on facts, facts *dominate* principle.[138]

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136. *See Green*, 165 N.W.2d at 271. The problem of prison rape is minimized by prison officials and those connected with them. *See* Helen Eigenberg, *Male Rape: An Empirical Examination of Correctional Officers' Attitudes Toward Rape in Prison*, 69 PRISON J. 39 (1989). However, it is not minimized by the prisoners. *See* Richard S. Jones & Thomas J. Schmid, *Inmates' Conceptions of Prison Sexual Assault*, 69 PRISON J. 53, 55-60 (1989). This issue has recently begun receiving more attention in the popular press. *See, e.g.*, Stephen Donaldson, *Can We Put an End to Inmate Rape*, USA TODAY (MAGAZINE), May 1995, at 40. Donaldson is the president of Stop Prison Rape, Inc., and in 1973, while in jail after a Quaker pray-in Washington, D.C., he was gang-raped for two days.

137. *Griffith*, 504 S.W.2d at 326 (seeking to introduce 13 "sociosexual articles" in support of his constitutional argument where defendant, with another adult male, committed three acts of coercive sodomy while in county jail).

138. Note the language of *Harris*:

> If the case at bar concerned private, consensual conduct with no visible impact upon other persons, at least some of us might perceive a right to privacy claim as one of the penumbral emanations of the Bill of Rights and the 14th Amendment due process clause, or simply as one of the unenumerated rights guaranteed by the 9th Amendment. But the case at bar concerns an unconsented to penetration of the male anus by a male penis.

Harris v. State, 452 P.2d 638, 648 (Alaska 1969) (citations omitted). The predator, even the heterosexual predator, may not be used as a vehicle for the approbation of coercive sexual acts. Consider in this light the jurisprudential analysis of "privacy" in the Arizona Supreme Court's decision in *Bateman*. *See* State v. Bateman, 547 P.2d 6, 9-10 (Ariz. 1976). The Arizona Supreme Court noted that the federal right-of-privacy cases are concerned with contraceptive devices between consenting adults. *See id.* Since the cases before it involved coercive conduct, the legislature was free to regulate sexual misconduct, even between married people. *See id.* But the court went further. It also opined that "[t]he State may also regulate other sexual misconduct in its rightful concern for the moral welfare of its people." *Id.* at 9-10. Thus, the court held that the legislature could properly regulate the moral welfare of its people by prohibiting sodomy and oral-genital contact. *See id.* This opinion is in marked contrast to the appellate court's opinion. *See* State v. Bateman, 540 P.2d 732, 735-36 (Ariz. Ct. App. 1975), *vacated*, 547 P.2d 6 (Ariz. 1976); *see also* People v. Sharpe, 514 P.2d 1138, 1141 (Colo. 1973); Smashum v. State, 403 S.E.2d 797, 798 (Ga. 1991); Warren v. State, 336 S.E.2d 221, 226 (Ga. 1985); State v. Goodrick, 641 P.2d 998, 999 (Idaho 1982); *Thompson*, 558 P.2d at 1083 (Kan. 1976); Commonwealth v. Balthazar, 318 N.E.2d 478, 481 (Mass. 1974). But even in cases like *Balthazar*, the court was careful to note that "[w]e do not decide whether a statute which explicitly prohibits specific sexual conduct, even if consensual and private, would be constitutionally infirm." *Id.* Interestingly enough, Balthazar was freed on a writ of habeas corpus after the federal court of appeals determined that the statute under which he was convicted was unconstitutionally vague. *See* Balthazar v. Superior Court, 573 F.2d 698, 698 (1st Cir. 1978). The appeals court, however, indicated that the statute was not unconstitutionally vague after the Massachusetts court narrowed its construction in subsequent cases. *See id.* at 702.

B. *The Pied Piper: Pedophilia, Seduction, and Youth*

> We are of the opinion that the right of the State of Oklahoma to regulate sexual promiscuity and sexual misconduct between non-married persons to be far superior to defendant's right to express sexual unity by performing an unnatural sex act with a young male child.[139]

Judges quickly learn from the narratives of their courts that the sodomite loves children. Unwilling to breed any for himself, he recruits them from among otherwise innocent children. We commonly believe that sexual nonconformists try to get sexually involved with children.[140] Sodomites target both the willing and the unwilling, boys and girls. Further, the belief feeds commonly held fears that young people become lifelong homosexuals after being "recruited" by adults.[141]

> It provides a recurring image of child molestation, which helps facilitate the social construction of homosexuality as "intrinsically monstrous within the entire system of heavily over-determined images inside which notions of 'decency,' 'human nature' and so on are mobilised and relayed throughout the internal circuitry of the mass media marketplace."[142]

Often indirectly expressed by the courts, this view of piedpiper-as-monster finds direct expression from time to time. "[M]en of

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139. Moore v. State, 501 P.2d 529, 532 (Okla. Crim. App. 1972).

140. This is a common conception. *See, e.g.*, ALBERT D. KLASSEN ET AL., SEX AND MORALITY IN THE U.S. 171-73, 179-83 (1989) (reporting belief of many that gay men are dangerous and want to seduce children and colleagues); M.J. Eliason & C.E. Randall, *Lesbian Phobia in Nursing Students*, 13 W.J. NURSING RES. 363-74 (1991); J.W. Plasek & J. Allard, *Misconceptions of Homophobia*, 10 J. HOMOSEXUALITY 23-37 (1984). It is common in Great Britain as well. Take, for example, this statement from a British case: "I hate the dirty bastards. I've got three children and the next step that these bastards do is to mess with kids." R. v. Chief Constable of West Midlands Police, CO/2501/92 (Q.B. May 12, 1993) (LEXIS, Intlaw Library, Engcas File) (quoting James Caroll, a discharged probationary constable, in a case involving his termination, and noting that the transcript revealed, among other things, that he had gone to a public toilet on his day off "with thoughts of assaulting perverts").

141. *See, e.g.*, E.E. Levitt & A.D. Klassen, *Public Attitudes Toward Homosexuality: Part of the 1970 National Survey by the Institute for Sex Research*, 1 J. HOMOSEXUALITY 29-43 (1974). This is discussed at some length in the *Wolfenden Report*. *See* WOLFENDEN REPORT, *supra* note 64, ¶ 71 (stating that fixing the age of consent at 18 "would lay them open to attentions and pressures of an undesirable kind from which the adoption of the later age would help to protect them, and from which they ought, in view of their special vulnerability, to be protected").

142. STYCHIN, *supra* note 81, at 527 (quoting S. WATNEY, POLICING DESIRE: PORNOGRAPHY, AIDS AND THE MEDIA 42 (2d ed. 1989)).

common understanding would certainly agree that homosexual activity among young boys in their formative years would easily cause them to become delinquent children."[143] Another court states:

> There is a widely held opinion that homosexual offences involving boys lead to the corruption of the boys and cause them severe emotional damage. Judges of experience are often of this opinion because when considering homosexual offences they are frequently told in pleas of mitigation that the accused was made an homosexual as a result of being involved when a boy in homosexual acts by a man.[144]

We uniformly proscribe acts likely to debauch or impair the morals of minors.[145] It comes as no surprise that courts have taken charges involving children seriously and evidenced a great interest in hearing these cases, developing the power of their narrative, and swelling the

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143. Murray v. Florida, 384 F. Supp. 574, 579 (S.D. Fla. 1974). The state unsuccessfully made this argument in *State v. Wasson*, 842 S.W.2d 487, 501 (Ky. 1992). There is a whiff of this in *Ray* where the Georgia Supreme Court noted that the 14-year-old boy agreed to have sex for money in a residence after liquor (and possibly marijuana) had been provided to him. *See* Ray v. State, 389 S.E.2d 326, 328 (Ga. 1990); *see also* State v. Temple, 222 N.W.2d 356, 358 (Neb. 1974). One instructive British case is *R. v. Crow*, 16 Crim. App. R(S) 409, *summarized in* 1994 CRIM. L. REV. 958 (Eng.); *see also* R. v. Brown, [1993] 2 All E.R. 75, 84 (H.L.). In *Brown*, the Law Lords noted that the defendants had been in the habit of corrupting men as young as 15, and that "the possibility of proselytisation and corruption of young men is a real danger." *Id.* at 92. Both Lords Templeman and Jauncey quoted from the opinion below concerning the corruption of the "victims" of these peradventures. Another case is *R. v. Moulder*, 12 Crim. App. 391 (July 24, 1990) (LEXIS, Intlaw Library, Engcas File). In *Moulder* a 20-year-old male's friendship with 14-year-old male turned into a sexual relationship until the 20-year-old refused to be buggered. The 14-year-old then attempted suicide. At trial the evidence showed that the 20-year-old had himself been sexually abused at the hands of an older schoolboy. *See id.* Yet another instructive case is *R. v. Wright*, 90 Crim. App. 325 (1989). In *Wright*, an adult male and headmaster of a school was charged with having indulged in homosexual activities with a number of his pupils. *See id.* at 326. The defendant claimed that a group of boys had been engaging in these practices, and, fearing discovery, they concocted a story in which defendant played the part of ringleader and seducer. *See id.* The convictions were quashed, for a variety of irregularities, including issues of severance and of the introduction of evidence tending to show defendant's "homosexual" tendencies but not with the boys. *See id.* at 340.

144. R. v. Willis, [1975] 1 All E.R. 620, 621-22 (C.A.) (Auld., J.); *see also* R. v. Pearce, 10 Crim. App. R(S) 331 (July 25, 1988) (LEXIS, Intlaw Library, Engcas File). For an especially chilling narrative, see State v. Hodges, No. 01-C-019212-CR00382, 1995 WL 301443, at *3 (Tenn. Crim. App. May 18, 1995).

145. *See, e.g.*, N.J. STAT. ANN. § 2C:24-4(a) (West 1995). There are counterparts in all 50 states and in Great Britain. *But see*, State v. Hodges, 457 P.2d 491, 492-94 (Or. 1969) (declaring statute proscribing conduct which manifestly tends to cause a minor to become delinquent unconstitutionally vague because of a lack of standards as to the causes of delinquency).

significance of the pied piper as a representative of (homo)sexual gratification.[146]

Indeed, the fact that children, or teenagers, may be willing lends greater weight to the negative power of the offense.[147] This, however, has proven problematic for the Europeans, in particular, who have had a difficult time determining at what age youths can be permitted to make sexually nonconforming decisions for themselves.[148] In the seduction of youth lies the greatest threat of sexual nonconformity to the community. In such cases both parties may well need the correction which can be provided by the punitive forces of the state. Thus, the willingness of even the young adult minor is immaterial—it is the antisocial nature of the act of the adult that is a serious threat to

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146. Oklahoma provides a good, although by no means solitary, example. Of all of the sodomy cases reported by the Oklahoma Court of Criminal Appeals (Oklahoma's highest court in criminal matters) between 1946 and 1966, all but two involved convictions of homosexual sodomy involving adolescents. *See, e.g.*, Cole v. State, 175 P.2d 376 (Okla. Crim. App. 1946); Cole v. State, 179 P.2d 176 (Okla. Crim. App. 1947); *see also* LeFavour v. State, 142 P.2d 132 (Okla. Crim. App. 1943); Woody v. State, 238 P.2d 367 (Okla. Crim. App. 1951); Berryman v. State, 283 P.2d 558 (Okla. Crim. App. 1955); Hopper v. State, 302 P.2d 162 (Okla. Crim. App. 1956); *In re* O'Neill, 359 P.2d 619 (Okla. Crim. App. 1961); Johnson v. State, 380 P.2d 284 (Okla. Crim. App. 1963). Of the cases heard by the Oklahoma Court of Criminals Appeals that did not involve sexual conduct with adolescent boys, one, *Crain v. State*, 410 P.2d 84 (Okla. Crim. App. 1966), involved conviction for homosexual sodomy between males of indeterminate age. *See id.* at 85. The other, *Hill v. State*, 368 P.2d 669 (Okla. Crim. App. 1962), involved forcible anal intercourse between two adult male inmates in a county jail. *See id.* at 670.

147. It does, however, implicate the strong caution courts have sometimes articulated against conviction for such crimes on the word of the child alone, at least in heterosexual contexts. *See, e.g.*, Roberts v. State, 47 P.2d 607, 612 (Okla. Crim. App. 1935). For such a case in Great Britain, see *R. v. H.*, [1995] 2 All E.R. 865, 868-79 (H.L.) (Lord MacKay).

Alternatively, some jurisdictions have eliminated the need to corroborate the evidence of a willing participant who is a minor on the theory that since minors cannot, as a matter of law, consent to acts of a sexual nature, no corroborating evidence is necessary and the defendant can be convicted on the testimony of the minor alone. *See, e.g.*, Martin v. State, 747 P.2d 316, 317-18 (Okla. Crim. App. 1987); *see also* R v. Goss, 90 Crim. App. 400, 406 (1989) (Saville, J.); R. v. May, 91 Crim. App. 157, 159 (1989) (Lord Lane).

148. *See e.g.*, X v. United Kingdom, 3 Eur. Ct. H.R. at 69-70 (1981); *see also* Helfer, *supra* note 101, at 1079-87 (reviewing European Court of Human Rights decisions holding that homosexual conduct is protected from criminalization by the European Convention for the Protection of Human Rights and Fundamental Freedoms). Occasionally, this difficulty evidences itself in the sentencing of the offender. *See* R. v. Fisher, 9 Crim. App. R(S) 462 (Nov. 5, 1987) (LEXIS, Intlaw Library, Engcas File). In *Fisher*, an adult male was convicted of engaging in a variety of sexual acts with a 15-year-old male student over time. The court reduced the three-year sentence imposed to two years, based on the weighing by the court. The court balanced the need to protect the young in the charge of teachers on the one hand, with the testimonials submitted on the appellant's behalf, the knowledge of the personal and financial disgrace of the conviction, and the fact that the minor male was mature, fully consented to the relationship, and did not suffer academically from it. *See id.*

the state. The courts spin narratives of the corruption of youth[149] and applaud resistance.[150]

For the unwilling child, the pied piper's deviousness seems to be the defining factor for the courts. Children are offered money or other things of value to accompany the perpetrator,[151] or to engage in sexual acts with him.[152] The pied piper relies on the comfort of family or personal friendship.[153] The pied piper takes advantage of family

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149. *See, e.g.*, Connor v. State, 490 S.W.2d 114, 115-16 (Ark. 1973); Bell v. State, 289 So. 2d 388, 389-90 (Fla. 1973); Gordon v. State, 360 S.E.2d 253, 253-54 (Ga. 1987); Phillips v. State, 222 N.E.2d 821, 822 (Ind. 1967); Davis v. State, 367 So. 2d 445, 446 (Miss. 1979); State v. Howell, 546 P.2d 858, 858-59 (N.M. Ct. App. 1976); State v. Rhinehart, 424 P.2d 906, 909-10 (Wash. 1967).

For a representative British case, see *R. v. Moulder*, 12 Crim. App. 391 R(S) (July 24, 1990) (LEXIS, Intlaw Library, Engcas File). The court in *Moulder* noted:

> The [trial] judge was not much impressed with the fact that the appellant had himself experienced sexual abuse as a mitigating factor. He said that that was a familiar pattern, as indeed it is. That is one of the reasons why the courts treat this offense as such a serious one.

Id. Consider in this light the *Crow* case. *See* R. v. Crow, 16 Crim. App. R(5) 409, *summarized in* 1994 CRIM. L. REV. 958 (Eng.); *see also* R. v. B, 15 Crim. App. R(S) 815 (Feb. 18, 1994), (LEXIS, Intlaw Library, Engcas File); R. v. Norris, 11 Crim. App. R(S) 69 (Feb. 7, 1989), (LEXIS, Intlaw Library, Engcas File) ("Here we have a confessed homosexual who, years ago, had the convictions for behaving indecently . . . and who over a period of a couple of years undoubtedly corrupted youngsters who deserved to have his protection.").

150. Pictures showing bruises of seven-year-old girl received in the course of resisting sexual advances of her stepfather "show the natural revulsion of the child to the defendant's perverted acts." State v. Beishir, 646 S.W.2d 74, 79 (Mo. 1983) (en banc).

151. *See, e.g.*, Horn v. State, 273 So. 2d 249, 249-50 (Ala. Crim. App. 1973); State v. Harmon, 685 P.2d 814, 819 (Idaho 1984); Bowen v. State, 334 N.E.2d 691, 692-93 (Ind. 1975); Golden v. State, 695 P.2d 6, 7 (Okla. Crim. App. 1985).

For a British case, see *R. v. Rowley*, [1991] 4 All E.R. 649, 652 (C.A.) In *Rowley*, the court quashed the conviction of an adult male for outraging public decency and attempting to incite the commission of an act of gross indecency for leaving notes in various public places seeking to pay minor males to be his "pretend" son because, while the notes were "pregnant with possibilit[ies] . . . on their face they were not within the scope of the offence," and even though his diary indicated desire for sexual activity with boys. *Id.*

152. *See, e.g.*, Ray v. State, 389 S.E.2d 326, 328 (Ga. 1990); McDonald v. State, 513 S.W.2d 44, 47 (Tex. Crim. App. 1974), *overruled by* Boutwell v. State, 719 S.W.2d 164 (Tex. Crim. App. 1985), *and* McGlothlin v. State, 866 S.W.2d 70 (Tex. Crim. App. 1993).

For similar British cases, see *R. v. Orriss*, 15 Crim. App. R(S) 185 (June 21, 1993), (LEXIS, Intlaw Library, Engcas File); *R. v. Baird*, 97 Crim. App. 308 (1992); and *R. v. Norris*, 11 Crim. App. R(S) 69 (Feb. 7, 1989) (LEXIS, Intlaw Library, Engcas File).

153. *See, e.g.*, People v. Gann, 66 Cal. Rptr. 508, 512 (Cal. Ct. App. 1968); Nelson v. State, 274 S.E.2d 317, 319-20, 323 (Ga. 1981); State v. Thompson, 574 S.W.2d. 432, 433 (Mo. Ct. App. 1977); State v. Johnson, 379 N.W.2d 291, 293 (N.D. 1986); State v. Fawn, 465 N.E.2d 896, 899-900 (Ohio Ct. App. 1983); State v. Sawyer, 532 P.2d 654, 656 (Wash. Ct. App. 1975). For a similar example in Great Britain, see *R. v. Wyatt*, (C.A. 1990), *summarized in* 1990 Crim. L. Rev. 343, 343 (Eng.).

relationships as well.[154] He also takes advantage of positions of trust, for instance as a teacher or child activity leader,[155] or as a house guest,[156] or trust given because of the physical or mental disability of the youth.[157] He can be a pastor.[158] He can be an employer.[159] She can be your mother.[160] When all else fails, the pied piper employs alcohol or hallucinogens,[161] deception,[162] or violence or its threat.[163]

The sexual nonconformist as pied piper is also psychologically sick.[164] It "naturally" follows that courts will permit examination of

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154. *See, e.g.*, King v. State, 458 S.E.2d 98, 99 (Ga. 1995); Richardson v. State, 353 S.E.2d 342, 343 (Ga. 1987); State v. Harmon, 685 P.2d 814, 816 (Idaho 1984); State v. Bland, 419 So. 2d 1227, 1231 (La. 1982); Contreras v. State, 445 So. 2d 543, 545 (Miss. 1984); State v. Silvey, 894 S.W.2d 662, 664 (Mo. 1995) (en banc); State v. Beishir, 646 S.W.2d 74, 75 (Mo. 1983) (en banc); State v. Hermanns, 641 S.W.2d 768, 768 (Mo. 1982) (en banc); Moore v. State, 501 P.2d 529, 532 (Okla. Crim. App. 1972). For British cases, see *R. v. O'Brien*, (C.A. June 30, 1994), THE TIMES, July 21, 1994, *available in* LEXIS, News Library, Times File; and *R. v. C.*, 16 Crim. App. R(S) 246 (June 29, 1994) (LEXIS, Intlaw Library, Engcas File).

155. *See, e.g.*, Rodgers v. State, 401 S.E.2d 735, 735-36 (Ga. 1991). For British cases, see *R. v. Walters*, 15 Crim. App. R(S) 690 (Jan. 14, 1994) (LEXIS, Intlaw Library, Engcas File); and *R. v. Pearce*, 10 Crim. App. R(S) 331 (July 25, 1988), (LEXIS, Intlaw Library, Engcas File).

156. *See, e.g.*, Commonwealth v. Gallant, 369 N.E.2d 707, 715-16 (Mass. 1977).

157. *See, e.g.*, *Rodgers*, 401 S.E.2d at 736; Blake v. State, 124 A.2d 273, 274 (Md. 1956); State v. Crawford, 478 S.W.2d 314, 319 (Mo. 1972). For an instructive British case, see *Pearce*, 10 Crim. App. R(S), at 331.

158. *See, e.g.*, State v. Bernard, 849 S.W.2d 10, 12 (Mo. 1993).

159. *See, e.g.*, Miller v. State, 636 So. 2d 391, 394-95 (Miss. 1994); State v. Worthington, 582 S.W.2d 286, 289-90 (Mo. Ct. App. 1979); State v. Souza, 456 A.2d 775, 777 (R.I. 1983).

160. *See, e.g.*, Salyers v. State, 755 P.2d 97, 99 (Okla. Crim. App. 1988). For a similar British case, see *R. v. B.*, 15 Crim. App. R(S) 815 (Feb. 18, 1994), (LEXIS, Intlaw Library, Engcas File).

161. *See, e.g.*, *Miller*, 636 So. 2d at 393; People v. Beam, 441 N.E.2d 1093, 1097 (N.Y. 1982); People v. Lipinski, 553 N.Y.S.2d 509, 511 (N.Y. App. Div. 1990).

For a similar British case, see *R. v. Smith*, 13 Crim. App. R(S) 461 (Nov. 8, 1991) (LEXIS, Intlaw Library, Engcas File).

162. *See, e.g.*, State v. Dayton, 535 S.W.2d 479, 482-83 (Mo. Ct. App. 1976); State v. Ballew, 532 P.2d 407, 409-10 (Mont. 1975).

For a similar British case, see *R. v. Scott*, 13 Crim. App. R(S) 173 (June 24, 1991), (LEXIS, Intlaw Library, Engcas File).

163. *See, e.g.*, Robinson v. Berman, 594 F.2d 1, 3 (1st Cir. 1979); Commonwealth v. Duarte, 320 N.E.2d 834, 835-36 (Mass. App. Ct. 1974); State v. Jeffrey, 515 P.2d 364, 365 (Mont. 1973); Dinkens v. State, 546 P.2d 228, 230-31 (Nev. 1976); McBrain v. State, 763 P.2d 121, 123 (Okla. Crim. App. 1988); Warner v. State, 489 P.2d 526, 528 (Okla. Crim. App. 1971), *overruled by* Post v. State, 715 P.2d 1105 (Okla. Crim. App. 1986); Young v. State, 531 S.W.2d 560, 563 (Tenn. 1975); Cook v. State, 506 S.W.2d 955, 958 (Tenn. Crim. App. 1973); Pruett v. State, 463 S.W.2d 191, 193 (Tex. Crim. App. 1970).

164. *See, e.g.*, Murray v. Florida, 384 F. Supp. 574, 579 (S.D. Fla. 1974); People v. Gann, 66 Cal. Rptr. 508, 514 (Cal. Ct. App. 1968); Twomey v. State, 267 N.E.2d 176, 177-78 (Ind. 1971); Hughes v. State, 287 A.2d 299, 301 & n.1 (Md. Ct. Spec. App. 1972);

evidence of his depraved sexual instinct.[165] He also lies beyond the reach of law-as-doctrine. "A fourteen-year-old-boy is not legally able to consent to sexual relations with an adult male. Moreover, sodomy for pay amounts to prostitution, to which the right of privacy indisputably does not attach."[166] The narrative of the pied piper is its own barrier to relief.[167] It is at him that the state must aim the criminal law.[168]

There is a certain impatience when litigants who have been convicted of engaging in sexual acts with minors challenge the vagueness of the statutes under which they have been convicted. Constitutional challenges to such acts are usually given short shrift—

Contreras v. State, 445 So. 2d 543, 544 (Miss. 1984); State v. Leadinghorse, 22 N.W.2d 573, 576 (Neb. 1974); Allan v. State, 541 P.2d 656, 656 (Nev. 1975); State v. Bishop, 717 P.2d 261, 263 (Utah 1986); State v. Daggett, 280 S.E.2d 545, 550-52 (W. Va. 1981). *Cf.* State v. Alden, No. 01C01-9309-CC-00299, 1995 LEXIS 402, at *1 (Tenn. Crim. App. May 12, 1995).

For a British case, see *R. v. Liddle*, 7 Crim. App. R(S) 59 (Mar. 4, 1985) (LEXIS, Intlaw Library, Engcas File).

165. *See* Miller v. State, 268 N.E.2d 299, 302 (Ind. 1971). *But see* State v. Bernard, 849 S.W.2d 10, 12-13 (Mo. 1993); State v. Ballew, 532 P.2d 407, 409 (Mont. 1975). For British cases, see *R. v. Apelt*, 15 Crim. App. R(S) 420 (1993), *summarized in* 1994 CRIM. L. REV. 75, 75-76 (Eng.). Describing an adult male's thinking after being convicted of various sexual offenses against minor females, the *Apelt* court said, "He uses a peculiarly dictated form of thinking (that touching their genitals would make them feel safe). This form of thinking in which sexual contact with children is directly linked to thoughts about emotional closeness is commonly seen in pedophiles." *Id.*; *see also* R. v. Meikle, 15 Crim. App. R(S) 311 (Aug. 17, 1993) (LEXIS, Intlaw Library, Engas File); R. v. Wright, 90 Crim. App. 325, 326-40 (1989).

166. Ray v. State, 389 S.E.2d 326, 328 (Ga. 1990) (citation omitted); *see also* Gordon v. State, 360 S.E.2d 253 (Ga. 1987). The *Gordon* court stated:

> Gordon contends he has been denied equal protection of the law because officials actually enforce the sodomy law only against offending homosexuals and not against others who violate the sodomy law. But he has not proved his contention. The manner of enforcement of the sodomy law was not established in the record.

Id. at 253-54; *accord* King v. State, 458 S.E.2d 98, 99 (Ga. 1995); Richardson v. State, 353 S.E.2d 342, 343 (Ga. 1987); Miller v. State, 636 So. 2d 391, 394-95 (Miss. 1994). For similar notions expressed in a British case, see *R. v. Norris*, 11 Crim. App. R(S) 69 (Feb. 7, 1989) (LEXIS, Intlaw Library, Engcas File). The *Norris* court stated, "Albeit they went willingly to him and were paid for, so to speak, their services, that can provide him with no excuse for behaving as he did." *Id.*

167. "There is no fundamental right to commit sexual acts upon children . . . ." State v. Harmon, 685 P.2d 814, 818 (Idaho 1984); *see also* Jones v. State, 456 P.2d 429, 430 (Nev. 1969).

168. *See* People v. Gonzalez, 146 Cal. Rptr. 417, 419 (Cal. Ct. App. 1978); State v. Phillips, 365 So. 2d 1304, 1306 (La. 1978); People v. Mancusi, 335 N.Y.S.2d 161, 163 (N.Y. Sup. Ct. 1972); Commonwealth v. Waters, 483 A.2d 855, 860-61 (Pa. Super. Ct. 1984).

they are technical (legal) challenges to gross and dangerous actions. The perpetrator archetype supplies enough evidence to support a judgment.[169] In vagueness challenges, conclusory statements such as "[p]ublic and legal history is replete with knowledge of this criminal offense" are deemed sufficient.[170] Even if the statutes might be constitutionally suspect, the courts' judgments about the conduct of the accused will not interfere with the disposition of the cases.[171] Their sentences rarely shock our conscience.[172] British courts take a somewhat more moderate view, currently reviewing enhanced custodial sentencing on their assessment of the likelihood of re-offending.[173]

C. *The Whore of Babylon: Promiscuity, Addiction, and Contagion*

> And upon her forehead *was* a name written, MYSTERY, BABYLON THE GREAT, THE MOTHER OF HARLOTS AND ABOMINATIONS OF THE EARTH.[174]

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169. *See, e.g.*, Twomey v. State, 267 N.E.2d 176, 177 (Ind. 1971); Phillips v. State, 222 N.E.2d 821, 822 (Ind. 1967); State v. Bland, 419 So. 2d 1227, 1231 (La. 1982); State v. Worthington, 582 S.W.2d 286, 289 (Mo. 1979); State v. Church, 313 A.2d 727, 727-28 (N.H. 1973).

170. Horn v. State, 273 So. 2d 249, 250 (Ala. Crim. App. 1973). *See, e.g., id.* at 250; State v. Bateman, 547 P.2d 6, 8-9 (Ariz. 1976); Delaney v. State, 190 So. 2d 578, 582 (Fla. 1966); Estes v. State, 195 N.E.2d 471, 473 (Ind. 1964); Davis v. State, 367 So. 2d 445, 446 (Miss. 1979).

171. This is especially true in cases criminalizing lewd and lascivious conduct. *See, e.g.*, State v. Herr, 554 P.2d 961, 966-67 (Idaho 1976); *see also* State v. Schwartzmiller, 576 P.2d 1052, 1054-55 (Idaho 1978); State v. Shannon 507 P.2d 808, 810 (Idaho 1973) (same).

172. *See, e.g.*, Schwartzmiller v. Gardner, 567 F. Supp. 1371, 1381-82 (D. Idaho 1983); King v. State, 458 S.E.2d 98, 99 (Ga. 1995); Rodgers v. State, 401 S.E.2d 735, 735-36 (Ga. 1991); Gordon v. State, 360 S.E.2d 253, 254 (Ga. 1987); State v. Leadinghorse, 222 N.W.2d 573, 576-78 (Neb. 1974).

173. *See, e.g.*, R. v. Fisher, 16 Crim. App. R(S) 643 (1995) (LEXIS, Intlaw Library, Engcas File) (Garland, J.). Balancing the need to protect the public against the need for sentences proportional to the nature of the offense as was thought to be necessary under section 2(2)(b) of the Criminal Justice Act of 1991, the court reduced an eight-year sentence to six for an adult male who had a record of prior convictions for sexual acts against children and adult females and had been convicted of gross indecency with a minor female. *See id.*; *see also* R. v. Crow, 16 Crim. App. R(S) 409, *summarized in* 1994 Crim. L. Rev. 958 (Eng.); R. v. O'Brien, (C.A.) (June 30, 1994), THE TIMES, July 21, 1994, *available in* LEXIS News Library, Times File; R. v. C., 16 Crim. App. R(S) 246 (June 29, 1994) (LEXIS, Intlaw Library, Engcas File); R. v. Mansell, 15 Crim. App. R(S) 771, *summarized in* 1994 CRIM. L. REV. 460 (Eng.); R. v. Scott, 13 Crim. App. R(S) 173 (June 2, 1991) (LEXIS, Intlaw Library, Engcas File); R. v. Radcliffe, (C.A.) (Feb. 2, 1990), *summarized in* 1990 CRIM. L. REV. 524 (Eng.) (Lord Lane).

174. *Revelations* 17:5 (King James).

Sexual nonconformists are both sick and dangerous, and the whore-type reaffirms this definition.[175] "While homosexuals often invoke the 'right of privacy,' these acts are often done in public parks, restrooms and bus stations. Many homosexuals practice oral-anal sex, group orgies, bondage, transvestitism, or sado-masochism or engage in fisting, rimming, bestiality, and ingesting urine and feces and gerbling."[176] It is this negative judgment that animates the reluctance of courts to consider seriously any legal argument limiting a power asserted by the state. "'In the admission of evidence and the weight to be given the same courts and juries must use common sense, common reason, and common observation as well as a common knowledge of the usual acts of men and women under the circumstances.'"[177] We understand the power of the whore image. It is tied to Armageddon, the last judgment, those last perverse, corrupted acts of humankind in the service of absolute evil which will bring many to eternal ruin before the ultimate triumph of divine Go[o]dness. We worry here about the corruption of morals in general.[178] "Such acts are acts of darkness."[179] It is a contagion in both metaphysical and physical senses.

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175. *See* Darrell Steffensmeier & Renee Steffensmeier, *Sex Differences in Reactions to Homosexuals: Research Continues and Further Developments*, 10 J. SEX RES. 52, 54, 57-60 (1974) (reporting on the strongly felt impressions that "homosexuals" were sick, dangerous, and easy to identify).

176. Citizens for Responsible Behavior, Notice of Intent to Circulate Petition, *reproduced in* Citizens for Responsible Behavior v. Superior Court, 2 Cal. Rptr.2d 648, 662 (Cal. Ct. App. 1991); *see also* JUDITH A. BAER, EQUALITY UNDER THE CONSTITUTION: RECLAIMING THE FOURTEENTH AMENDMENT 226-28 (1983) (asserting that the commonly advanced stereotype of gay men and lesbians is that they are sexually promiscuous and do not want to settle down in longterm, false-family relationships); ALAN P. BELL & MARTIN S. WEINBERG, HOMOSEXUALITIES: A STUDY OF DIVERSITY AMONG MEN AND WOMEN 81-84 (1978) (commenting on the promiscuity of gay males).

177. Short v. City of Birmingham, 393 So. 2d 518, 523 (Ala. Crim. App. 1981) (quoting Thompson v. State, 109 So. 557, 557 (Ala. Crim. App. 1926)).

178. *See* Dixon v. State, 268 N.E.2d 84, 89 (Ind. 1971) (DeBruler, J., dissenting) (stating that the statutes "'*have a wider meaning—the corruption of morals, the disgrace of human nature by an unnatural sexual gratification*'" (quoting Young v. State, 141 N.E. 309, 311 (Ind. 1923))); *see also* State v. Mays, 329 So. 2d 65, 65 (Miss. 1976); State v. Stubbs, 145 S.E.2d 899, 902 (N.C. 1966). Even in states in which courts strike down criminal proscriptions of sexual conduct, there remains an awareness that the courts should interfere in the battle for society's "soul." *See, e.g.*, State v. Ciuffini, 395 A.2d 904, 908 (N.J. 1978):

> Private personal acts between two consenting adults are not to be lightly meddled with by the State. The right of personal autonomy is fundamental to a free society. Persons who view fornication as opprobrious conduct may seek strenuously to dissuade people from engaging in it. However, they may not inhibit such conduct through the coercive power of the criminal law.

Id.

> When considering the danger of infection, with its inevitable threat of AIDS, I am not impressed by the argument that this threat can be discounted on the ground that, as long ago as 1967, Parliament, subject to conditions, legalised buggery, now a well-known vehicle for the transmission of AIDS.[180]

As such, its proscription naturally "finds its sanction in the broader basis of the settled mores of our western civilization."[181]

Sexual nonconformists are whores, the epitome of promiscuity.[182] Courts note this even in cases in which promiscuity is not a primary issue.[183] Promiscuity alone is revolting; "the act, which appeared so revolting to one of the two deputies [sic] sheriff, who stated they observed it while patrolling the area, that he vomited thrice during the evening."[184] Whores ought not be accorded the dignity of the marital relationship, even when limiting sexual activity to members of the opposite sex—the courts show reluctance to dignify even the

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The British have been just as explicit. For example, referring to the Sexual Offences Act of 1967, which decriminalized private adult consensual acts of homosexual conduct, the House of Lords (Lord Reid), explained that there was nothing in the Act

> to indicate that Parliament thought or intended to lay down that indulgence in these practices is not corrupting. I read the Act as saying that, even though it may be corrupting, if people choose to corrupt themselves in this way that is their affair and the law will not interfere. But no license is given to others to encourage the practice.

Knuller v. Director of Pub. Prosecutions, [1972] 2 All E.R. 898, 899-900 (H.L.).

179. State v. White, 217 A.2d 212, 217 (Me. 1966).

180. R. v. Brown, [1993] 2 All E.R. 75, 100 (H.L.) (Lord Lowry). On the metaphor of homosexuality as contagion, see STYCHIN, *supra* note 81, at 528-35.

181. People v. Ragsdale, 2 Cal. Rptr. 640, 640-42 (Cal. Dist. Ct. App. 1960); *see also* Post v. State, 715 P.2d 1105, 1109 (Okla. Crim. App. 1986).

182. *See, e.g.*, Carter v. State, 500 S.W.2d 368, 372 (Ark. 1973); *see also* Franklin v. State, 257 So. 2d 21, 24 (Fla. 1971); Neville v. State, 430 A.2d 570, 573 (Md. 1981); Buchanan v. State, 471 S.W.2d 401, 404 (Tex. Crim. App. 1971).

183. "This promiscuity appears both in the numerous instances of sexual activity and the frequency with which homosexuals are known to use new and anonymous partners." State v. Walsh, 713 S.W.2d 508, 513 n.4 (Mo. 1986) (citing BELL & WEINBERG, *supra* note 176, at 85 (indicating that many males in their study had over 500 sexual partners)). The court used this data to support its determination that the statute was rationally related to its purposes. *See Walsh*, 713 S.W.2d at 512. What makes the *Walsh* court's citation to social science studies ironic is that a few pages earlier in its opinion the court had rejected amici ACLU's arguments based on social science data because "the weighing of such social science data is better left to the legislative department and [we] will defer to its determinations." *See id.* at 510; *see also* Perkins v. North Carolina, 234 F. Supp. 333, 339 (W.D.N.C. 1964); People v. Baldwin, 112 Cal. Rptr. 290, 291 (Cal. Ct. App. 1974); People v. Roberts, 64 Cal. Rptr. 70, 71 (Cal. Ct. App. 1967); Sears v. State, 287 N.W.2d 785, 786-89 (Wis. 1980).

184. Carter v. State, 500 S.W.2d 368, 370 (Ark. 1973).

heterosexual one-night stand.[185] That is a function for the legislature.[186]

> The fact that the democratic process does not respond to those who violate its ordinances is no source of condemnation. Are we to say that drug addicts or pedophiliacs are a powerless class because the democratic process has refused to sanction the activity they seek to have sanctioned? . . . We think not. To hold that the losers in a public policy determination constitute a powerless class for purposes of determining the suspectness of the resulting classification is ludicrous upon its face.[187]
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> If it is to be decided that [nonconforming sexual] activities are injurious neither to [the participants] nor to the public interest then it

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185. *See, e.g.*, Dixon v. State, 268 N.E.2d 84, 85-87 (Ind. 1971); Neville v. State, 430 A.2d 570, 573 (Md. 1981); State v. Lemire, 345 A.2d 906, 908, 912 (N.H. 1975); State v. Elliott, 551 P.2d 1352, 1352 (N.M. 1976); State v. Poe, 252 S.E.2d 843, 844 (N.C. Ct. App. 1979). *But see* State v. Pilcher, 242 N.W.2d 348, 359 (Iowa 1976); Post v. State, 715 P.2d 1105, 1109-10 (Okla. Crim. App. 1986); State v. Lopes, 660 A.2d 707, 709-10 (R.I. 1995), *cert. denied*, 116 S. Ct. 934 (1996); State v. Santos, 413 A.2d 58, 61 (R.I. 1980).

186. *See* Schochet v. State, 580 A.2d 176, 183-84 (Md. 1990) (rejecting privacy challenge for heterosexual vaginal intercourse and fellatio); *see also* Baker v. Wade, 774 F.2d 1285, 1286-87 (5th Cir. 1985) (rejecting challenge to Texas' "deviate sexual intercourse" statute and emphasizing: "The appeal put forth in the petition, however sincere and deserving of response, is directed to the wrong audience. It is not the role or authority of this federal court to decide the morality of sexual conduct for the people of the state of Texas."); People v. Ragsdale, 2 Cal. Rptr. 640, 641-42 (Cal. Dist. Ct. App. 1960) (commenting on a case of consensual fellatio between two San Quentin inmates, the court noted: "There is a considerable body of opinion that as between willing adults the question should be left to moral sanctions alone and eliminated from the criminal law. That however presents a legislative question and not one for the courts." (citing People v. Massey, 290 P.2d 906 (Cal. Ct. App. 1955))); People v. Roberts, 64 Cal. Rptr. 70, 74 (Cal. Ct. App. 1967); *cf.* Young v. State, 531 S.W.2d 560 (Tenn. 1975); State v. Morales, 869 S.W.2d 941, 942 (Tex. 1994). *But see* State v. Wasson, 842 S.W.2d 487, 491-92 (Ky. 1992); Commonwealth v. Balthazar, 318 N.E.2d 478, 481 (Mass. 1974); State v. Ciuffini, 395 A.2d 904, 907 (N.J. 1978); People v. Onofre, 415 N.E.2d 936, 937-39 (N.Y. 1980); Commonwealth v. Bonadio, 415 A.2d 47, 50 (Pa. 1980).

187. State v. Walsh, 713 S.W.2d 508, 511 (Mo. 1986); *see also* People v. Baldwin, 112 Cal. Rptr. 290, 296-97 (Cal. Ct. App. 1974). Discussing the privacy rights of two adult male defendants, one fellating the other in public toilet, who were observed by a plainclothes police officer in plain sight of the defendants, the court stated:

> When, therefore, they speak of a constitutional right to privacy or a right to be protected from an unconstitutional deprivation of their right to liberty, they seek, in effect, judicial repeal, actually, for social reasons, but under the handy guise of a vaguely defined constitutional right, of a law the repeal of which by the Legislature on social grounds has not been brought about.

Id. at 296.

is for Parliament with its accumulated wisdom and sources of information to declare them to be lawful.[188]

Sexual nonconformists are chameleons, using disguise to effect their conduct. They blur gender roles.[189] They prostitute themselves in the archetypal manner of "woman," sometimes even adopting their dress.[190] They assume the habits of prostitutes and their clients in the manner in which they procure sexual partners.[191] They practice their craft.[192] Indeed, their narratives conflate from time to time around the criminality of sexual activity.[193] "[T]here is no protected privacy interest in public, commercial sexual conduct."[194]

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188. R. v. Brown, [1993] 2 All E.R. 75, 92 (H.L.) (Lord Jauncey). In *Brown*, adult males engaged in various same-sex sadomasochistic activities with much younger men and were convicted of keeping a disorderly house and assault occasioning actual bodily harm and wounding, contrary to the Offences Against the Person Act, 1861, 24 & 25 Vict., ch. 100, §§ 20 & 47 (Eng.). *See id.* at 75. The House of Lords, by a three-to-two split determined that consent in such cases could not be a defense to the charge. *See id.* This case substantially restated the law in this area and has resulted in a tremendous amount of commentary. *See, e.g.*, THE LAW COMMISSION, CONSULTATION PAPER NO. 134, CRIMINAL LAW: CONSENT AND OFFENSES AGAINST THE PERSON (1994) (U.K.); STYCHIN, *supra* note 80. *Brown* is currently before the European Commission on Human Rights. *See European Rights Panel to Hear Masochists' Complaint*, The Reuter European Community Report, Jan. 19, 1995, *available in* LEXIS, Intlaw Library, ECNews File.

189. *See, e.g.*, State v. Faber, 499 S.W.2d 790, 793 (Mo. 1973).

190. *See, e.g.*, Short v. City of Birmingham, 393 So. 2d 518, 522 (Ala. Crim. App. 1981); Rose v. United States, 535 A.2d 849, 850 (D.C. 1987); People v. Lino, 527 N.W.2d 434, 436 (Mich. 1994); Sears v. State, 287 N.W.2d 785, 786-89 (Wis. 1980).

191. Consider the way in which the New York Court of Appeals considered the constitutionality of the state solicitation statute. *See* People v. Uplinger, 447 N.E.2d 62, 62-63 (N.Y. 1983). In *Uplinger*, the court heard two cases, treated as indistinct for purposes of the appeal. *See id.* In one, the defendant Susan Butler "was flagging down cars while making loud and overt offers to sell sexual favors." *Id.* at 65. In the other, defendant Robert Uplinger was arrested after offering to take an undercover police officer to his apartment for fellatio. *See* People v. Uplinger, 444 N.Y.S.2d 373 (N.Y. City Ct. 1981), *aff'd*, 449 N.Y.S.2d 916 (N.Y. Co. Ct. 1982), *rev'd*, 447 N.E.2d 62 (N.Y. 1983). On the conflation of the Whore of Babylon archetype and garden-variety prostitution, see *State v. Baxley*, 633 So. 2d 142, 146 (La. 1994). *See also* People v. Masten, 292 N.W.2d 171, 173 (Mich. Ct. App.), *rev'd on other grounds*, 322 N.W.2d 547 (Mich. 1980); State v. Rhinehart, 424 P.2d 906, 909-10 (Wash. 1967). For British exemplars, see *R. v. Hemans*, 9 Crim. App. R(S) 25 (Jan. 22, 1987) (LEXIS, Intlaw library, Engcas File); and *R. v. Windle*, 7 Crim. App. R(S) 31 (Feb. 21, 1985) (LEXIS, Intlaw Library, Engcas File).

192. *See* Hughes v. State, 287 A.2d 299, 307 (Md. Ct. Spec. App. 1972).

193. *See, e.g.*, United States v. Moses, 339 F.2d 46 (D.C. 1975); State v. Mueller, 671 P.2d 1351, 1353-54 (Haw. 1991); State v. Baxley, 656 So. 2d 973, 976-80 (La. 1995); State v. Woljar, 477 So. 2d 80, 82-83 (La. 1985); State v. Lindsey, 310 So. 2d 89, 91 (La. 1975); State v. Picchini, 463 So. 2d 714, 719 (La. Ct. App. 4th Cir. 1985); State v. Gray, 413 N.W.2d 107, 114 (Minn. 1987); Commonwealth v. Piper, 328 A.2d 845, 846 (Pa. 1974); Commonwealth v. Waters, 422 A.2d 598, 599 (Pa. Super. Ct. 1980).

This conflation is also made explicit in the British cases. *See infra.* It is interesting, in that regard, to note that the cases interpreting the solicitation and corruption of morals

> Once a married couple admits strangers as onlookers, federal protection of privacy dissolves. It matters not whether the audience is composed of one, fifty, or one hundred, or whether the onlookers pay for their titillation. If the couple performs sexual acts for the excitation or gratification of welcome onlookers, they cannot selectively claim that the state is an intruder.[195]

The reckless promiscuity of sexual nonconformists make them dangerous, antisocial criminals. The criminality of their sexual conduct is but the end result of a general tendency toward amorality. Thus, for instance, it is no surprise that the sodomizer of a ten-year-old boy also testifies "to a number of other charges against him in various places."[196] Courts often go out of their way to evidence the uncontrollable promiscuity of sexual nonconformist conduct to show that what we have here is bad character.[197] And worse, the virtuosity of the sexual practices of the Whore of Babylon exceeds even the imagination of the law to contain it. So with sadomasochistic practices,

> the prosecuting authorities could find no statutory prohibition apt to cover this conduct . . . the choice of the the [sic] [Offence Against the

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crimes rely explicitly, in part, on prostitution cases, especially *Crook v. Edmondson*, [1966] 2 Q.B. 81, 93 (Winn, L.J.). *See also* R. v. Ford, [1978] 1 All E.R. 1129, 1131 (C.A.) (Lord Widgery, C.J.); R. v. Kirkup, [1993] 2 All E.R. 802, 808 (C.A.) (Staughton, L.J.) (same).

194. *Baxley*, 633 So. 2d at 145.

195. Lovisi v. Slayton, 539 F.2d 349, 351 (4th Cir. 1976).

196. Horn v. State, 273 So. 2d 249, 250 (Ala. Crim. App. 1973); *see also* Pratt v. Parratt, 615 F.2d 486, 488 (8th Cir. 1980); State v. White, 217 A.2d 212, 215 (Me. 1966); Contreras v. State, 445 So. 2d 543, 545 (Miss. 1984); State v. Leadinghorse, 222 N.W.2d 573, 576 (Neb. 1974); Washington v. Rodriguez, 483 P.2d 309, 311 (N.M. Ct. App. 1971); State v. Adams, 264 S.E.2d 46, 48-50 (N.C. 1980); State v. Moles, 195 S.E.2d 352, 354 (N.C. App. 1973); Canfield v. State, 506 P.2d 987, 989-90 (Okla. Crim. App. 1973).

197. *See, e.g.*, Rodgers v. State, 401 S.E.2d 735, 735-36 (Ga. 1991). In *Rodgers*, the appellant was convicted of grabbing a 12-year-old boy's penis while rubbing dirt off him and engaging in oral sex with the boy's 16-year-old brother. *See id.* In affirming two 20-year sentences (to run consecutively), the court approved the consideration by the jury of evidence that appellant had engaged in the same actions on two other occasions with the 12-year-old boy and that while in jail he offered to engage in sexual acts with a cellmate and attempted to touch the genitals of another. *See id.* at 736-37; *see also* Bowen v. State, 334 N.E.2d 691, 692-95 (Ind. 1975); Blake v. State, 124 A.2d 273, 274-75 (Md. 1956); Hughes v. State, 287 A.2d 299, 303 (Md. Ct. Spec. App. 1972); State v. Worthington, 582 S.W.2d 286, 291 (Mo. 1979); People v. Beam, 441 N.E.2d 1093, 1097-98 (N.Y. 1982); Turner v. State, 497 S.W.2d 593, 594 (Tex. Crim. App. 1973); McDonald v. State, 513 S.W.2d 44, 47 (Tex. Crim. App. 1974). For some similar British cases, see *R. v. Fisher*, 16 Crim. App. R (S) 643 (1995) (LEXIS, Intlaw Library, Engcas File); *R. v. Mansell*, 15 Crim. App. R(S) 771 (1994), *summarized in* 1994 CRIM. L. REV. 460 (Eng.); *R. v. Harper*, 14 Crim. App. R(S) 678 (1993) (LEXIS, Intlaw Library, Engcas File); *R. v. Smith*, 13 Crim. App. R(S) 461 (Nov. 8, 1991) (LEXIS, Intlaw Library, Engcas File); and *R. v. Scott*, 13 Crim. App. R(S) 173 (June 24, 1991) (LEXIS, Intlaw Library, Engcas File).

> Person Act of 1861] as the basis for the relevant counts in the indictment was made only because no other statute was found which could conceivably be brought to bear upon them.[198]

This is an archetype created out of images of what Carl Stychin has called the language of addiction.

> In this regard, the homosexual possesses the same attributes as others who are portrayed as unregulated and devoid of self-control: "Gays, prostitutes, and addicts are not in control of their desires or do not allow their desires to be controlled, and this makes them perverse and threatening agents of pathology."[199]

As such, even where state courts have overturned a sexual-conduct proscription, they have been careful to avoid any implication of approval of the conduct "decriminalized"; such conduct may well remain immoral if not criminal.[200]

> Absent is the factor of commercialization with the attendant evils commonly attached to the retailing of sexual pleasures; absent the elements of force or of involvement of minors which might constitute compulsion of unwilling participants or of those too young to make an informed choice, and absent too intrusion on the sensibilities of members of the public, many of whom would be offended by being exposed to the intimacies of others.[201]

British law seems especially sensitive to the negativity of whoring among sexual nonconformists. Its approach turns on leaving the content of critical terms to the jury to interpret and reinterpret as it will from time to time. This is in marked contrast to most American states, which would be troubled, on constitutional vagueness principles, by this approach.[202] Michigan was an exception for a time; it adopted, but not without some unease, the British approach in the definition of its own "gross indecency" statute, and then rejected the approach on the basis of its sense that a

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198. R. v. Brown, [1993] 2 All E.R. 75, 101-02 (H.L.); *see also* People v. Brashier, 496 N.W.2d 385 (Mich. Ct. App. 1992), *aff'd in part and rev'd in part sub nom.* People v. Lino, 527 N.W.2d 434, 437 (Mich. 1994); Virgin v. State, 792 P.2d 1186, 1187 (Okla. Crim. App. 1990); State v. Boyd, 925 S.W.2d 237, 244 (Tenn. Crim. App. 1995).

199. Stychin, *supra* note 81, at 520-21 (quoting James W. Jones, *Discourses on and of AIDS in West Germany, 1986-90*, *in* FORBIDDEN HISTORY: THE STATE, SOCIETY, AND THE REGULATION OF SEXUALITY IN MODERN EUROPE 361, 364-65 (John C. Fout ed., 1992)).

200. *See, e.g.*, State v. Wasson, 842 S.W.2d 487, 501 (Ky. 1992); State v. Ciuffini, 395 A.2d 904, 907-08 (N.J. 1978); Hinkle v. State, 771 P.2d 232, 233 (Okla. Crim. App. 1989); Post v. State, 715 P.2d 1105, 1109-10 (Okla. Crim. App. 1986).

201. People v. Onofre, 415 N.E.2d 936, 941 (N.Y. 1980).

202. *See supra* note 108. On the question of vagueness in the context of sodomy cases, see Backer, *supra* note 22, at 63-68.

jury could not be trusted with this determination.[203] The issues left to a jury under British law include determining what conduct actually constitutes "immoral" conduct under the solicitation statute, or corruption under the corruption-of-public-morals statute, or whether conduct took place in private under the exception to the proscription for male homosexual conduct.[204] "In my judgment, the words 'immoral purposes' in their ordinary meaning connote in a wide and general sense all purposes involving conduct which has the property of being wrong rather than right in the judgment of the majority of contemporary fellow citizens."[205] Here is boldly outlined the conscious intersection of popular culture and law as self-reinforcing mechanisms of imagemaking.

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203. For a case in which the question of the propriety of a jury determining the context of "gross indecency" is addressed, see *People v. Austin*, 460 N.W.2d 607, 609 (Mich. Ct. App. 1990) ("The question whether acts violate the gross indecency statute should be determined by a jury employing the 'common sense of society' standard."). *Accord* People v. Masten, 292 N.W.2d 171, 174 (Mich. Ct. App. 1980), *rev'd*, 323 N.W.2d 547 (Mich. 1982). A different panel of the Michigan Court of Appeals, on the basis of its reading of the cases, took a different approach. *See* People v. Lynch, 445 N.W.2d 803, 805-07 (Mich. Ct. App. 1989) (stating that permitting the jury to determine the content of gross indecency "would leave the statute unconstitutionally vague because it leaves the trier of fact free to decide, without any legally fixed standard, both what the prohibited act is and whether it has been committed"); *accord* People v. Lino, 476 N.W.2d 654, 656-57 (Mich. Ct. App. 1991), *rev'd*, 527 N.W.2d 434 (Mich. 1994). A special panel of the Michigan Court of Appeals was convened in 1992 to resolve the split, and in *People v. Brashier*, the court adopted the "common sense of society" standard. *See* 496 N.W.2d 385, 386 (Mich. Ct. App. 1992), *aff'd in part and rev'd in part sub nom.* People v. Lino, 527 N.W.2d 434 (Mich. 1994). In *Brashier*, the defendant approached juvenile males and asked if they wanted to earn money by beating up codefendant, another adult male. *See id.* at 382. The juveniles agreed and accompanied the defendant to a hotel room where they physically and verbally abused the codefendant, including urinating, vomiting, and pouring syrup on the codefendant while the defendant masturbated. *See id.*

In December, 1994, both *Lino* and *Brashier* were reversed by the Michigan Supreme Court. *See* People v. Lino, 527 N.W.2d 434, 436 (Mich. 1994). That decision is noteworthy because it resolved the splits among the court. In the majority opinion, the court summarily reversed *Brashier* to the extent it relied on the "common sense of society" standard as established by the jury. *See id.* at 437-38. Defendants in both cases could be convicted, according to the Michigan Supreme Court, because they were on notice that their conduct came within the proscriptions of the statute. *See id.* at 439.

204. *See supra* notes 54-58. The House of Lords has described the jury as "that microcosm of democratic society." Knuller v. Director of Pub. Prosecutions, [1972] 2 All E.R. 898, 931 (H.L.) (Lord Simon of Glaisdale).

205. Crook v. Edmondson, [1966] 2 Q.B. 81, 93 (C.A.) (Winn, L.J.). But British courts are sensitive to conviction merely for being homosexual. The British courts seem to understand the power of the judgment implicit in this admission to a jury hearing a case based on proscribed conduct. *See, e.g.*, R. v. Horwood, [1969] 3 All E.R. 1156, 1157 (C.A.); R. v. Church, (C.A.) (Dec. 10, 1984) (LEXIS, Intlaw Library, Engcas File).

The Human Rights Convention has only just recently become a vehicle for the legislative overturning of criminal proscriptions to private, consensual, nonconformist sexual activity. During the first ten years of the Convention, several applications were filed against the Federal Republic of Germany challenging Article 175 of the penal code, which prohibited adult homosexual sodomy. Until recently, the Commission rejected all of these applications because the laws were deemed necessary for the protection of morals.[206] Like its American counterparts of a slightly earlier age, the human-rights tribunals took comfort in the sanitizing language of medicine, though, especially since 1981, the Human Rights Court has taken a position more in line with the British cases.[207]

D. The Defiler of the Public Space: Flouting and the Closet

Overlaying the other archetypes, providing a particularly compelling narrative for judgment, is the public nature of nonconformist sexual conduct. The predator, the pedophile, and the Whore of Babylon display an exhibitionism which at once repels dominant society and confirms the judgment of deviance (as pejoratively intended). But this is not just deviance, it is a deviance at once defiant and subversive. Public acts force society's hand—either the conduct is accepted (normalized) or it must be driven underground. Closeting is the price society has chosen to extract from sexual nonconformists in exchange for even limited decriminalization.[208] But sexual nonconformists will not recede into the background. This refusal exists at a number of levels: refusal to hide one's affective

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206. *See* App. No. 1307/61, 1962 Y.B. Eur. Conv. on H.R. 230, 234; App. No. 530/59, 1960 Y.B. Eur. Conv. on H. R. 184, 194; App. No. 104/55, 1955-57 Y.B. Eur. Conv. on H.R. 228, 229; *see generally* Helfer, *supra* note 101, at 1059 & n.105.

207. On the earlier cases, see, e.g., App. No. 5935/72, 3 Eur. Comm'n H.R. Dec. & Rep. 46, 53-56 (1976). For a good discussion of the cases, see Andrea Woelke, Good as You: Inequality for Same-Sex Contact in the Criminal Law in England and Wales and Possibilities for Change 23-24 (1995) (unpublished dissertation, University of Durham (U.K.)) (on file with author), and Helfer, *supra* note 101, at 1079. All of that changed with the decision in *Dudgeon v. United Kingdom*, App. No. 7525/76, 3 Eur. H.R. Rep. 40, 60-61 (1981). The limiting principles for the Human Rights Court appears to be the same as that animating the English decriminalization statute—private consensual adult conduct. *See, e.g.*, Modinos v. Cyprus, App. No. 15070/89, 16 Eur. H.R. Rep. 485, 494 (1993); Norris v. Ireland, App. No. 10581/83, 13 Eur. H.R. Rep. 186, 200-01 (1988) (same). For a discussion of the jurisprudence of the Human Rights Court in this regard, see Larry Catà Backer, Reflections on the Law of "Moral and Social Disapprobation" in *Romer v. Evans*: Conformity and the Political Functions of Courts in the U.S. and U.K., (unpublished manuscript on file with the author).

208. *See generally* Backer, *supra* note 63.

inclinations, public displays of affection, public discussion of the possibility of private sexual activity, and public sexual activity. Society imposes social and criminal consequences on all of these acts.[209]

Sexual nonconformists evidence their lack of moral self-control every time they engage in sexual acts in inappropriate places. "The facts of [these cases] are such that this Court is familiar with their nature."[210] The fact that heterosexuals engage in the same public conduct makes no difference. In the case of sexual nonconformists the public nature of the act serves to augment the deviance of the conduct itself, and on that basis mute the effectiveness of legal jurisprudence which might otherwise shield their conduct or ameliorate the punishment.[211] Sexual nonconformists engage in consensual sexual acts in cars,[212] in public toilets,[213] in secluded areas,[214] in health and

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209. The social, affective, and political rationales for these actions are outside the scope of this Article. Understand, of course, that public displays can be political and social acts, the carving out of public spaces for use by an otherwise invisible community. *See, e.g.*, Benny Henriksson, *The Geography and Choreography of Desire: Erotic Oases in Post-Modern Cities, A Struggle over Urban Space*, *in* RISK FACTOR LOVE: HOMOSEXUALITY, SEXUAL INTERACTION AND HIV PREVENTION 175 (Benny Henriksson ed., 1995) (discussing the use of toilets, parks, and video clubs for sexual encounters). The classic work is LAUD HUMPHRIES, TEAROOM TRADE: IMPERSONAL SEX IN PUBLIC PLACES (1970).

210. R. v. Batton, (C.A.), THE TIMES, March 16, 1990, *available in* LEXIS, Intlaw Library, Engcas File.

211. *See* Carter v. State, 500 S.W.2d 368, 370 (Ark. 1973). In *Carter*, the court dismissed out of hand the argument that the conduct for which defendants received a eight-year prison sentence would have amounted to disorderly conduct if engaged in by a man and his wife. *See id.* at 373. This disparity did not "shock the moral sense of the community" or the court. *See id.*; *see also* People v. Roberts, 64 Cal. Rptr. 70, 74 (Cal. Ct. App. 1967); State v. Leadinghorse, 222 N.W.2d 573, 576 (Neb. 1974).

212. *See Carter*, 500 S.W.2d at 370; Connor v. State, 490 S.W.2d 114, 115-16 (Ark. 1973); Franklin v. State, 257 So. 2d 21, 24 (Fla. 1971); Lambeth v. State, 354 S.E.2d 144, 145 (Ga. 1987) (involving fellatio in auto); Stover v. State, 350 S.E.2d 577, 578 (Ga. 1986); People v. L., 417 N.Y.S.2d 655, 658 (N.Y. City Ct. 1979); Canfield v. State, 506 P.2d 987, 990 (Okla. Crim. App. 1973). *But see* State v. J.O., 355 A.2d 195, 196 (N.J. 1976); People v. McNamara, 585 N.E.2d 788, 789 (N.Y. 1991); People v. Onofre, 415 N.E.2d 936, 936 (N.Y. 1980).

213. *See, e.g.*, People v. Superior Court, 758 P.2d 1046, 1050 (Cal. 1988); People v. Baldwin, 112 Cal. Rptr. 290, 291 (Cal. Ct. App. 1974); People v. Roberts, 64 Cal. Rptr. 70, 74 (Cal. Ct. App. 1967); Knowlton v. State, 382 N.E.2d 1004, 1006-07 (Ind. Ct. App. 1978); People v. Austin, 460 N.W.2d 607, 608 (Mich. Ct. App. 1990); People v. Lynch, 445 N.W.2d 803, 805 (Mich. Ct. App. 1989); People v. Kalchik, 407 N.W.2d 627, 630 (Mich. Ct. App. 1987); State v. Anonymous, 415 N.Y.S.2d 921, 922-24 (N.Y. Jus. Ct. 1979); State v. Jarrell, 211 S.E.2d 837, 838 (N.C. Ct. App. 1975); Hogan v. State, 441 P.2d 620, 620-22 (Nev. 1968). *But see* Bielicki v. Superior Ct., 371 P.2d 288, 290 (Cal. 1962); People v. Crafts, 91 Cal. Rptr. 563, 563-65 (Cal. Ct. App. 1970); Buchanan v. State, 471 S.W.2d 401, 404 (Tex. Crim. App. 1971); State v. Bryant, 177 N.W.2d 800, 801, 804 (Minn. 1970) (same). For the British analogue, see *Owen v. Director of Pub. Prosecutions*, (Q.B. Oct. 22,

bath clubs,[215] while performing,[216] where they work,[217] at parties,[218] and even in a jail (although this is less common than coercive acts in the reported cases).[219] They solicit sex anywhere and from anyone; they even seek sex with strangers![220] "That any of the accused ultimately may have contemplated a private and consensual act is of no legal significance."[221] The public nature of the acts is sometimes evidence of the loss of self-control resulting from general dissoluteness, and particularly the consumption of alcohol and other

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1993), *summarized in* 1994 CRIM. L. REV. 192, 192 (Eng.). *See also* R. v. Kirkup, [1993] 2 All E.R. 802, 803 (C.A.) (Staughton, L.J.); R. v. Ford, [1978] 1 All E.R. 1129, 1130-31 (C.A.) (Lord Widgery, C.J.); R. v. Gibson, 93 Crim. App. 9, 12 (1991) (Lord Lane); R. v. Mattison, (C.A.) (Oct. 5, 1989), *summarized in* 1990 CRIM. L. REV. 117 (Eng.).

214. *See, e.g.*, Stewart v. United States, 364 A.2d 1205, 1206-08 (D.C. 1976); United States v. Buck, 342 A.2d 48, 48-49 (D.C. 1975); Neville v. State, 430 A.2d 570, 571-73 (Md. 1981); People v. Dexter, 148 N.W.2d 915, 918 (Mich. Ct. App. 1967); People v. Livermore, 155 N.W.2d 711, 712 (Mich. Ct. App. 1967). For the British cases, see *Blake v. Director of Pub. Prosecutions*, 97 Crim. App. 169 (1992); and *R. v. Church*, (C.A.) (Dec. 10, 1984) (LEXIS, Intlaw Library, Engcas File).

215. *See* Benny Henriksson & Sven-Axel Månsson, *Sexual Negotiations: An Ethnographic Study of Men Who Have Sex with Men*, *in* RISK FACTOR LOVE: HOMOSEXUALITY, SEXUAL INTERACTION AND HIV PREVENTION (Benny Henriksson ed., 1995). For some examples in cases, see *United States v. McKean*, 338 A.2d 439, 439-41 (D.C. 1975); and *Harris v. United States*, 315 A.2d 569, 570-75 (D.C. 1974) (en banc).

216. *See, e.g.*, People v. Parker, 109 Cal. Rptr. 354, 355-59 (Cal. Ct. App. 1973); People v. Drolet, 105 Cal. Rptr. 824, 825-31 (Cal. Ct. App. 1973); *cf.* Raphael v. Hogan, 305 F. Supp. 749, 751, 754-56 (S.D.N.Y. 1969); People v. Freeman, 250 Cal. Rptr. 598, 598-604 (Cal. 1988). *But see* Commonwealth v. Bonadio, 415 A.2d 47, 51 (Pa. 1980).

217. *See, e.g.*, Miller v. State, 636 So. 2d 391, 393 (Miss. 1994); State v. Collins, 587 S.W.2d 303, 305 (Mo. Ct. App. 1979); State v. Worthington, 582 S.W.2d 286, 287-88 (Mo. Ct. App. 1979).

218. *See, e.g.*, State v. Chiaradio, 660 A.2d 276, 277-78 (R.I. 1995).

219. *See, e.g.*, United States v. Brewer, 363 F. Supp. 606, 607 (M.D. Pa.), *aff'd*, 491 F.2d 751 (3d Cir. 1973); People v. Santibanez, 154 Cal. Rptr. 74, 75 (Cal. Ct. App. 1979); People v. Frazier, 64 Cal. Rptr. 447, 447-48 (Cal. Ct. App. 1967); People v. Ragsdale, 2 Cal. Rptr. 640, 640-42 (Cal. Dist Ct. App. 1960); State v. Black, 545 S.W.2d 617, 618 (Ark. 1977); People v, Coulter, 288 N.W.2d 448, 449-51 (Mich. Ct. App. 1980); Washington v. Rodriguez, 483 P.2d 309, 311-12 (N.M. Ct. App. 1971); Bishoff v. State, 531 S.W.2d 346, 347 (Tex. Crim. App. 1976).

220. *See, e.g.*, Christensen v. State, 468 S.E.2d 188, 190 (Ga. 1996); U.S. v. Cozart, 321 A.2d 342, 343-44 (D.C. 1974); Riley v. U.S., 298 A.2d 228, 231 (D.C. 1972); Silva v. Municipal Ct., 115 Cal. Rptr. 479, 480-84 (Cal. Ct. App. 1974); State v. Baxley, 633 So. 2d 142, 143 (La. 1994); People v. Masten, 292 N.W.2d 171, 172 (Mich. Ct. App.), *rev'd on other grounds*, 322 N.W.2d 547 (Mich. 1980); State v. Walsh, 713 S.W.2d 508, 509 (Mo. 1986); State v. Milne, 187 A.2d 136, 140-41 (R.I. 1962). For a British case, see *Dale v. Smith*, [1967] 2 All E.R. 1133, 1134-35 (Q.B.). *But see* R. v. Preece, [1976] 2 All E.R. 690, 695 (C.A.) (Scarman, L.J.).

221. United States v. Carson, 319 A.2d 329, 331 (D.C. 1974) (consolidating the appeals of 15 cases dealing with solicitation of police officers); *see also* District of Columbia v. Garcia, 335 A.2d 217, 223-24 (D.C. 1975).

substances—drinking and whoring.[222] These public acts are neither "noble" or "basic;" the best society ought to offer is the "cloak of privacy in life outside prison walls."[223]

The sexual nonconformist as defiler of the public space, like the archetypal sexual predator and pied piper, lies beyond the reach of law-as-doctrine. The condemnation of facts gets in the way.

> That question [whether the statute violates the defendant's right of privacy] is not before us because the act was not committed in privacy. It occurred between the adult appellant and a fourteen year old boy, seated in an automobile on a public road adjacent to Interstate 30.[224]

This obstacle arises in connection with sexual nonconformity between people of opposite sex as well as with same-sex couples.[225] Even states which have decriminalized "sodomy," continue the criminal proscriptions of sexual solicitation or sexual acts in any public place.[226] Public solicitation of even private acts "carries with it a significant danger of offending the sensibilities of unwilling recipients."[227]

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222. *See, e.g.*, Stover v. State, 350 S.E.2d 577, 578 (Ga. 1986); Warner v. State, 489 P.2d 526, 528 (Okla. Crim. App. 1971), *overruled by* Post v. State, 715 P.2d 1105 (Okla. Crim. App. 1986).

223. People v. Frazier, 256 Cal. App. 2d 630, 631 (Cal. Ct. App. 1967).

224. Connor v. State, 490 S.W.2d 114, 115-16 (Ark. 1973). In subsequent federal proceedings, the court emphasized the public nature of the conduct in dismissing the claim for federal relief. *See* Connor v. Hutto, 516 F.2d 853, 855 (8th Cir. 1975); *see also Christensen*, 468 S.E.2d at 188; Carter v. State, 500 S.W.2d 368, 370 (Ark. 1973); *Stover*, 350 S.E.2d at 578; Sawatzky v. City of Oklahoma City, 906 P.2d 785, 786 (Okla. Crim. App. 1995).

225. For example, in *Neville v. State*, 430 A.2d 570 (Md. 1981), the court consolidated two appeals which presented issues of the applicability of the Maryland "sodomy" statute to consensual adult heterosexual acts of fellatio. *See id.* at 571. The Maryland Supreme Court rejected all constitutional challenges because "[e]ach petitioner engaged in this intimate sexual activity during daylight hours in a place which was out of doors, which was in a well populated community, and which was equally as accessible to uninvited other persons as it was to petitioner." *Id.* at 577.

226. *See, e.g.*, People v. Superior Court, 758 P.2d 1046 (Cal. 1988); Pryor v. Municipal Ct., 599 P.2d 636, 647 (Cal. 1979); People v. Uplinger, 447 N.E.2d 62 (N.Y. 1983). These cases are discussed more thoroughly in Backer, *supra* note 63, at 782-87. *Cf.* State v. Sharpe, 205 N.E.2d 113, 115 (Ohio Ct. App. 1965) (voiding statute proscribing solicitation of unnatural sex act for vagueness and explaining that the concern was with clarity and not the evils of proscription: "There is no doubt that legislation in this general area of human behavior can be wholly legitimate and is probably needed.").

227. *Sawatzky*, 906 P.2d at 786 (convicting adult male under municipal ordinance for soliciting an undercover officer and noting "[p]rotecting citizens from solicitations for sexual acts is a legitimate governmental interest"); *see also Pryor*, 599 P.2d at 646 ("The statute thus serves the primary purpose of protecting onlookers who might be offended by the proscribed conduct."); Silva v. Municipal Ct., 115 Cal. Rptr. 479, 482 (Cal. Ct. App. 1974) (involving public solicitation to engage in "lewd and dissolute conduct"). The British

These public violations represent a sort of social subversion, one implicit in the United States case law, but made quite explicit in British law. Even the act of public kissing has been characterized by the courts, as "law-sayers," as carrying within it the potential for significant socially disruptive effect.[228] I have spoken already of the manner in which Great Britain leaves the law to the people in a jury assembled. Note, however, that the subversion implicit in the immorality of sexual nonconformity requires imposition of limitations even to this. Thus, for example, solicitation for sexual activity in a public toilet, whether to be accomplished in public or in private, is an immoral purpose, as a matter of law.[229] Excessive sentences can be understood "in punishing this man for this very sordid business. It is disfiguring the streets of this country and other public places where it is conducted."[230]

IV. SUMMING UP AND FITTING IN: *BOWERS* AND JUDICIAL ANTIPATHY

Judicial production of official stories of sexual nonconformity (in the context of institutional punishment) has produced the kind of empathy commentators have urged for years.[231] The results, however, have been perverse—empathy through narrative has produced antipathy, with disastrous results for those interested in dismantling criminal proscriptions to being what one is.[232] Thus the irony

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cases are in accord. *See, e.g.*, R. v. Ford, [1978] 1 All E.R. 1129, 1131 (C.A.) (Lord Widgery, C.J.); R. v. Gray, 3 Crim. App. R(S) 363 (1981) (LEXIS, Intlaw Library, Engcas File) (Lord Lane). The approach of some United States courts is different. *See, e.g.*, State v. Wasson, 842 S.W.2d 487, 491-92 (Ky. 1992); People v. Uplinger, 447 N.E.2d 62, 62-63 (N.Y. 1983).

228. *See* Masterson v. Holden, [1986] 1 W.L.R. 1017, 1024 (Q.B.).

229. *See* R. v. Kirkup, [1993] 2 All E.R. 802, 805-08 (C.A.); *see also Gray*, 74 Crim. App. at 330. This is in line with some American decisions. *See, e.g.*, People v. Superior Court, 758 P.2d 1046, 1058 (Cal. 1988). *But see Wasson*, 842 S.W.2d at 502; State v. Sharpe, 205 N.E.2d 113, 115 (Ohio Ct. App. 1965).

230. R. v. Puckerin, 12 Crim. App. R(S) 602 (Dec. 18, 1990) (LEXIS, Intlaw Library, Engcas File).

231. Lynne Henderson defines "empathy" as involving three basic phenomena: "(1) feeling the emotion of another; (2)understanding the experience or situation of another . . . and (3) action brought about by experiencing the distress of another." Henderson, *supra* note 16, at 1579. On the use of empathy in welfare-law scholarship, see Lucie E. White, *No Exit: Rethinking "Welfare Dependency" from a Different Ground*, 81 GEO. L.J. 1961 (1993). *Cf.* Duncan Kennedy, *Distributive and Paternalistic Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563, 638-49 (1982) (arguing against anti-paternalism and for an ad hoc approach).

232. This is something more than the "unreflective" empathy that Professor Henderson identifies. *See* Henderson, *supra* note 16, at 1584. What the courts have done is not merely empathize with people similar to themselves, they have de-empathized with

produced by thirty or so years of sustained juridical sodomy jurisprudence. Judicial entanglement with sexual nonconformity essentially has existed as an exercise in empathy, surprising empathy. The surprise comes to those who believe that empathy can be used only to remake that culture (or at least its formal legal doctrine). Empathy can be used to disconnect. It can be used to perceive "the emotion or experience of another"[233] as horror, evil, or emptiness. Empathy can be as readily employed in the service of traditional culture "both to empathize with the suffering that often produces the sociopath and to accept the necessity of removing him or her from society."[234] From a different perspective empathy carries with it the power of judgment, and that judgment in the context of sexual nonconformists is antipathy. That is the critical reality of the sexual sociopaths constructed from the cases through sensitive use of empathic narratives of the courts. That is what thirty-six years of sodomy jurisprudence at the state level has shown us.

This mythological demimonde of disgust has resonated in the popular culture and has made it easier to affirm the normative status quo in case law and statutes. The facts of these hundreds of cases have merged, creating a synergy of antipathy far stronger than anything possible through a single case story. Digested and interpreted as stories-with-morals by the courts in written opinions, and passed on in that way to the popular culture (thus reflecting that culture as well), the stories have become meta-narrative, creating a super background narrative within which the facts of every new case are read and understood. Courts come to every case of sexual nonconformity with a substantial pre-understanding, a juridical antipathy built up over several generations and several hundred cases. The teachings of these cases will not be lightly overcome. A multiple layer of narrative has created an understanding of the "problem" by the courts which is then used to filter, categorize, and judge the new stories brought before them.

The greatest irony, perhaps, is the way in which our failure to understand how narrative works within traditionalist jurisprudence limits our ability to fully appreciate all of the implications of cases like *Bowers*. For example, commentators and lawyers tend to view

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people whom they have constructed as a danger to themselves. This is not just a case of refusing to empathize with a criminal; it is a case of *creating* antipathy by an act of will.

233. *See id.* at 1651.

234. *Id.* at 1584.

Bowers v. Hardwick in isolation as an aberrational juridical moment. But, considered in the context of the meta-narrative set forth in this Article, *Bowers* was not an isolated phenomenon.[235] Arrayed against Michael Bowers in his representational quest for constitutional dignity were several generations worth of judicial narrative reinforcing a myth of degeneracy and subversion.

Indeed, *Bowers* provides an excellent example of the corrosive effect of the ghoulification of "ordinary" sexual nonconformity. The Supreme Court was presented with an arguably factually clean case as Michael Bowers had been engaging in an act of consensual sodomy (as defined by Georgia law) with an adult male in the privacy of his home. At oral argument, however, the Court appeared almost oblivious to these facts.[236] What they had before them were images of predators and pedophiles, of whores and defilers. Members of the Court appeared most concerned with the possibility that affirmance of the Eleventh Circuit could loosen social control over these sexual monsters. Indeed, the first question to Professor Tribe was "is there a limiting principle to your argument?"[237] Justice Powell almost casually dismissed the facts of the case in his line of questioning. Indeed, what emerges is the sense that the Court is not concerned with Michael Bowers' private conduct, but with the sexual monsters which might be unleashed by a change in the rules. Justice Powell continued after the initial question by asking, "You emphasize the home and so would I if I were arguing this case, but what about—take an easier one, a motel room or the back of an automobile or toilet or wherever. What are the limiting principles?"[238] Justice Powell and several of the other members of the Court appeared deeply concerned about this aspect of the case.[239] This concern was certainly exploited by the State of Georgia during its oral argument. Michael Hobbs, arguing for Georgia, emphasized that "the liberty that exists under our Constitution is not unrestrained. It is ordered liberty, it is not

235. *See supra* Part III.

236. That was not for lack of trying by Laurence Tribe, who appeared at oral argument on behalf of Michael Bowers. Indeed, he began his argument with a recitation of these facts, presumably in an effort to establish Mr. Bowers as a nonaberrational person. *See* Official Transcript of Oral Argument at 17-18, Bowers v. Hardwick, 478 U.S. 186 (1986) (No. 85-140) (opening remarks of Laurence Tribe).

237. *Id.* at 18 (Powell, J.).

238. *Id.* (Powell, J.).

239. *See id.* at 19, 21-25, 32.

licentiousness."[240] Even before oral argument, an explicit attempt was made in the briefs to connect Michael Bowers private conduct with contagion,[241] "[t]he unanimous verdict of American history,"[242] American popular culture,[243] and, of course, as the opening quote of this Article evidences, the specter of the monsters of sexual nonconformity running loose throughout the nation.[244] In this context, Justice White's opinion ought to come as no surprise.

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240. *Id.* at 42 (remarks of Michael Hobbs in rebuttal). Earlier, in his argument-in-chief, Mr. Hobbs clearly raised the specter of many of our American sexual nightmares and connected them directly to Michael Bower's case:

> [I]t is submitted that this crack-in-the-door argument is truly a Pandora's Box for I believe that if the Eleventh Circuit's decision is affirmed that this Court will quite soon be confronted with questions concerning the legitimacy of statutes which prohibit polygamy, homosexual, same-sex marriage, consensual incest, prostitution, fornication, adultery, and possibly even personal possession in private of illegal drugs.

Id. at 16. (remarks of Michael Hobbs).

241. *See* Brief of Professor David Robinson, Jr., as Amicus Curiae in Support of Petitioners at 33, *Bowers*, (No. 85-140) (arguing "[c]reation of constitutional protection for sodomy would also make subsidiary strategies to reduce the spread of the [HIV] virus more difficult"). *But see* Brief of American Psychological Association and American Public Health Association, as Amici Curiae in Support of Respondents at pt. 2, *Bowers*, (No. 85-140) (arguing that sodomy statute does not prevent HIV infection and may adversely affect public health).

242. Brief of Concerned Women for American Education and Legal Defense Foundation, as Amicus Curiae in Support of Petitioners, at 19, *Bowers*, (No. 85-140).

243. *See* Brief of the Rutherford Institute and the Rutherford Institutes of Alabama, Connecticut, Delaware, Georgia, Minnesota, Montana, Tennessee, and Virginia, as Amici Curiae in Support of Petitioner at 17-18, *Bowers*, (No. 85-140). The efforts to belittle the rationality of some of the bases of popular cultural beliefs by amici for Bowers sometimes ironically served as arguments in support of these very bases. Consider the argument made by Lambda Legal Defense and Education Fund against the historical argument supporting sodomy laws: "In its invocation of 'traditional' condemnation as a support for its position, the state fails to complete the historical picture. For example, the original edicts against same-sex activity declared that such behavior was the cause of earthquakes, floods, and plague." Brief of Lambda Legal Defense and Education Fund, Inc.; Gay and Lesbian Advocates and Defenders; the Bar Association for Human Rights of Greater New York; The Massachusetts Lesbian and Gay Bar Association; and the Gay & Lesbian Alliance Against Defamation, Inc., as Amicus Curiae on Behalf of the Respondents at 15 n.11, *Bowers*, (No. 85-140). But popular culture continues to suggest that same-sex activity *does* spread plague. And in that belief it is supported by members of the sociocultural elite. *See* Brief of David Robinson, Jr., as Amicus Curiae in Support of Petitioners, *Bowers*, (No. 85-140); *see also* Brief of Petitioner Michael J. Bowers, Attorney General of Georgia at 36-37, *Bowers*, (No. 85-140) (arguing that morality is the province of the legislature and it should be permitted to find that homosexual practices lead to other forms of deviance, and similarly, the spread of sexually transmitted diseases.

244. *See* Brief of Petitioner Michael J. Bowers, Attorney General of Georgia at 36-37, *Bowers*, (No. 85-140).

In contrast to *Bowers*, the *Brown* case illustrates the power of repetitive myth. *Brown* is a confirming case; it confirms the efficacy of the pathological images created—here the Whore of Babylon. More importantly, it serves as a vehicle for distancing sex (reserved for heterosexual coupling) and the sexual acts engaged in by sexual nonconformists. They may be playing with the private parts of others, but they are not engaging in sex as the courts are willing to define it. The sadomasochistic gay male "has transgressed the boundaries not only of the sexual, but also of the civilised, through acts of depravity that require reaffirmation of social norms. The events are symbolic in that they reaffirm definitions of normalcy, and are designed to expunge the gay man from the realm of the social to a pathologised sphere. . . ."[245] It should come as no surprise, then, that, at least for three of the Law Lords, coercion was irrelevant because the law would not recognize the activity of these men as sex. Reducing the actions of these men to engagements in violence and not sex, the court then had to remake the jurisprudence of assault in order to accommodate the need to punish the men.[246] The European Commission of Human Rights, to which the House of Lords decision was appealed, reached the same result but for different reasons.[247] *Brown* demonstrates the

245. Stychin, *supra* note 81, at 503.

246. The House of Lords' determination to separate sex from the conduct described in *Brown* was widely appreciated in Europe. The European Commission of Human Rights understood, quite clearly, "that the interference in this case concerns conduct with the applicants describe as consensual sexual behavior and which the majority of the judges in the House of Lords and the Government have emphasized as being characterised by violence." Laskey v. United Kingdom, Eur. Comm'n H.R. Dec. & Rep. at ¶ 55 (App. Nos. 21627/93; 21826/93 and 21974/93) (slip op. Oct. 26, 1995) (copy on file with author).

247. The defendants in *Brown* applied to the European Commission on Human Rights arguing that the decision violated their rights under the Human Rights Treaty. In considering these arguments, the European Human Rights Commission disagreed with the characterization given the acts by a majority of the House of Lords. "The Commission considers that it cannot be disputed that the applicants pursued mutual sexual gratification through their activities." *Laskey*, Eur. Comm'n H.R. Dec. & Rep. at ¶ 55. Applying the strict standard for interferences with private life prohibited under Article 8 of the Human Rights Convention, the Commission nevertheless recoiled from extending to this sort of activity the protection of the Human Rights Convention. It determined that the state should be accorded a significant margin of appreciation with respect to activities causing physical injury which the state may prohibit. Moreover, while the activity in question was "sexual," it did not fall within that category of nonconformist sexual activity which must be tolerated. In this instance the activities were not between two people and in private (the touchstone for toleration). Rather, and over strong dissent, a majority of the Commission went to some pains to point out, these were organized group activities of "an extreme nature" which "while the conduct was private in essence, it came to light through videos which were being disseminated. It was not a question of the state trespassing into a private bedroom." *Id.* at

power of narrative to confirm the deviance of gay men and refuse them the solicitude of the law to private sexual conduct. Like *Bowers*, *Brown* deals with the gay man as a symbol from almost opposite angles. In the American case, as an abstraction devoid of individuality. In the British case, as a concrete factual representation of the normality of extreme and threatening behavior applicable to the entire body of the abstraction—gay man. Perversely enough, in both cases, the meta-narrative works to deal with individuals as abstractions to which judgment has already attached. Courts are certainly empathizing, but, as cases like *Bowers* continue to illustrate, they are using empathy against the demons they have created.

The moral for people looking to engage in impact litigation is bleak. At least with respect to litigation involving sexual nonconformity, finding the perfect set of facts through which to litigate an issue provides little comfort; in every case involving sexual nonconformity, litigants will have to fight the sexual ghouls created by the courts. However, bleakness does not imply hopelessness. Rather, knowledge of the anti-empathic impediments can better direct the efforts of those seeking a change in judicial (and, slowly, popular) culture. With knowledge of these demons, it is possible for litigants to wean courts from their old learning. That hope is reflected in cases like *Wassen*,[248] and even *Bowers*, at least as it manifested itself at the court of appeals level. But the real lesson is that impact litigation requires *quantity* as well as quality. One set of facts, such as that presented in *Bowers*, does not a cultural revolution make! If new meta-narratives are to be created, they will require more than a handful of "good facts" paraded before the public and the courts. That requires creation of a new meta-narrative.[249]

Properly contextualized, *Bowers* reflects not merely the expression of a judgment of traditional morality. Rather, it reflects a

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¶ 62. As such the conviction was lawful and the punishment proportionate to the act. *See id.*

248. Wassen v. Commonwealth, 842 S.E.2d 487, 502 (Ky. 1992) (overturning sodomy statute on state constitutional grounds). It is also reflected in the recognition of the reality that a lack of enforcement is better evidence of the reality of contextual homosexuality than are the stories in the related cases. *See supra* note 46.

249. This, certainly, is one of the lessons that gay and lesbian civil rights litigators can learn from their Africa-American counterparts. *See, e.g.*, Odeana R. Neal, *The Limits of Legal Discourse: Learning from the Civil Rights Movement in the Quest for Gay and Lesbian Civil Rights*, 40 N.Y.L. SCH. L. REV. 679, 679 ("What this may mean is that gays, lesbians, and bisexuals have to accept that legal victories may not allow them the privilege of straight white men."). On the construction of new narratives, see generally Backer, *supra* note 7.

significant empathy for the population of sexual conformists. What emerges as a (perhaps) neglected teaching of the "empathy" literature, and what the sodomy cases demonstrate so clearly, is that antipathy is as easy as empathy for conformity. The use of storytelling and narrative in the service of affirmative antipathy is a constant. The meta-narrative is powerful. It pervades as well as provides a foundation for our jurisprudence, or our demography. It crafts through the stories which are presented to it by the State as regulator of sexual activity, not only what is deviant, but also the characteristics of its own demographics of deviance. What requires nurture, what is difficult and must be attempted consciously and in a sustained manner, is storytelling in the service of *nonconformity*. Deviance may well be a function of majorities—the care and nurture of its mythology, its reality, must not be.[250]

250. For a discussion of approaches to altering the credibility of stories, especially stories authored by the majority about its sociocultural deviants, see Larry Catá Backer, Storytelling, Deviance and Revolution in Law (1996) (unpublished manuscript, on file with the author).