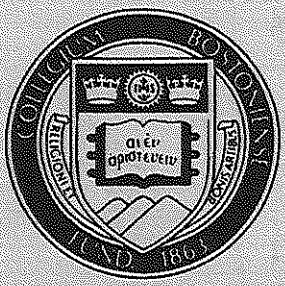

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CHRONICLERS IN THE FIELD OF CULTURAL PRODUCTION: COURTS, LAW AND THE INTERPRETIVE PROCESS

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This paper unearths the cultural basis of judicial authority in the project of producing and reproducing cultural norms, that is, the unconscious "common sense" of "things" from which we draw all rules of social conduct. It does so from two perspectives. The first considers authority from the perspective of the sorts of pronouncements of "law" that judges purport to make. The second looks to ingrained and submerged cultural patterns of "hearing" for the model by which individuals and societies in the West submit to and obey the judicial voice. Identification and memorialization provide the key to understanding the weightiness with which judicial speaking is heard. Courts act judicially, and therefore say something worth hearing, only when they engage in acts of identifying and articulating points of social consensus. The very act of pronouncement serves to reinforce and memorialize the consensus articulated. But the weight given to judicial pronouncements also engages the hearer in the more subtle act of repeating and reinforcing basic cultural patterns of speaking and hearing. Courts pronounce in three different cultural voices: the Homeric, the Delphic, and the voices of Job's companions. The two Greek voices speak with measured tones and single-minded linear confidence; they are transmissions from the divine which must be obeyed. The voices of Job's companions adds a layer of messiness and conflict to the authority of judicial pronouncement. Biblical patterns of cultural speaking also create within the court the possibility of change. The courts provide a site for the articulation of prophetic voices. These are the voices, within and without the law, that are the harbingers of change.

INTRODUCTION

My purpose here is to explore the nature and process of norm making within culture as it is expressed through what we identify as "law." I do so by focusing both on law as an expression of cultural

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standards/models/patterns regarded as mandatory, as well as on courts as a place from which these standards are articulated. My objective is twofold. First, I question the commonplace notion that law is something that "acts on" culture, i.e., that law disciplines culture. Second, I show that, contrary to a most cherished late twentieth century Western delusion, neither our common law, our courts, nor our legislatures can serve as the engine that produces any sort of coercive law capable of transforming these standards/models/patterns.

The construction of social norms is not a function of law. Nor does law create rules by which society governs itself. Law may confirm; it does not initiate.[1] Law does not exist as an autonomous "legal" person, independent of the social hegemonics from out of which it is produced. Law and social hegemonies are strategies by which power takes effect; each is the embodiment of a general design or institutional crystallization of power.[2] Law exists within and reflects the culture from which it operates. As Girardeau Spann suggests, "[T]he Court is institutionally incapable of doing anything other than reflecting the very majoritarian preference that the traditional model requires the Court to resist."[3] It is, therefore, with some irony of reinterpretation that I subscribe to Foucault's observation of legal discourse as "essentially politico-historical, an indeterminately critical and, at the same time, extremely mythical discourse in which truth functions as a weapon to gain partisan victory."[4]

I propose a different way of understanding both law and the nature of the authority with which courts pronounce law. Courts function as chroniclers of the norms through which people sharing a common culture understand themselves. The primary functions of courts are to identify cultural practice and then to memorialize that practice as law. Juridical expressions of law are essentially descriptive; standing alone, their pronouncements cannot coerce cultural practices. As such, law is an enterprise of affirmation.

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[1] These notions are explored in more detail from the perspective of racial equity in Larry Catá Backer, *Culturally Significant Speech: Law, Courts, Society and Achieve Racial Equity*, 21 U. Ark. Little Rock L.J. 845 (1999) (1999 Altheimer Symposium on Racial Equity in the 21st Century) and from the perspective of sexual non-conformity in Larry Catá Backer, *Queering Theory: An Essay on the Conceit of Revolution in Law*, *in* Legal Queeries: Lesbian, Gay and Transgender Legal Studies 185 (Leslie J. Moran et al. eds., 1998).

[2] See Michel Foucault, The History of Sexuality: An Introduction 92–93 (Robert Hurley trans., Vintage Books 1990) (1976).

[3] Girardeau A. Spann, Race Against the Court: The Supreme Court and Minorities in Contemporary America 19 (1995).

[4] Michel Foucault, Résumé des Cours, 1970–1982 91 (1989).

Yet the juridical serves as an important site for the production and affirmation of culture. Courts are the great vehicle for the institutionalization of cultural aesthetics on a perpetually grand scale. Courts speak authoritatively only in this sense, but the authority of the juridical in this enterprise of cultural aesthetics is both messy and complex. Society listens and learns because—and only when—it chooses to do so. Society internalizes what it hears to the extent it feels it must. The dynamics of this relationship between speaker and audience are deeply ingrained within ancient cultural patterns of the aesthetics of authoritative voice. To understand the function of law, one must first understand the cultural basis of juridical authority.[5]

Courts engage in authoritatively cultural production using one of three voices: one of two Greek voices, the Homeric or the Delphic, or the Hebrew voice of the Biblical Job's companions. The two Greek voices speak with measured tones and single-minded linear confidence. The Homeric voice articulates tradition: it is the voice of repetition and reminder, the voice of our oral tradition. The Delphic voice speaks with the authority of the seeress touched by the divine. This voice articulates "that which is becoming," thus illuminating value-movement within culture. The Biblical voice adds a layer of messiness and conflict to the authority of judicial pronouncements. The voices of Job's companions are always incomplete, flawed, or misdirected. We might listen to these voices with half an ear, and we might successfully rebel against it under the right circumstances. Stripping the divine from the voice that articulates, these Biblical voices provide a societal exit from the duty to obey and submit

Each of these voices serves as a metaphor for deeply ingrained cultural patterns of speaking authoritatively. The voices are neither complementary nor reconcilable. The invocation of these deeply embedded forms of authoritative voice confirms the authority of the courts to speak. Yet, embedded as well in the very form of voice through which the courts speak are the clearly drawn limitations of that authority.

However, the authority of courts does not lie merely in their authority to pronounce. The courts themselves also function as a space in which the non-juridical may speak with authority, for courts provide a site for the articulation of the Biblical voices of the proph-

[5] "So, too, can we judge law aesthetically, according to the society it forms, the identities it defines, the preferences it encourages, and the subjective experience it enables. We can 'read' and criticize law as part of the making of a culture." Guyor Binder and Robert Weisberg, *Cultural Criticism of Law*, 49 STAN. L. REV. 1149, 1152 (1997).

ets. The courts are the platforms, their opinions the microphones through which voices such as those of Jeremiah, Isaiah, and Ezekiel speak to the people. Society has been culturally trained to respect, if not always to harken to the prophetic voice. For every moment when society acts like the cultural Hezekiah,[6] there will be countless times when society listens to the prophetic like the Biblical Jezebel.[7]

It is only in this culturally prophetic sense that courts exist as the place for the struggles and contestations which may produce cultural movement. In this arena, "losing" arguments are also articulated and memorialized. Thus produced, the prophetic find their way back into non-judicial social discourse. In this function, and in this function only, might courts *indirectly* serve as a means of cultural movement. A good American example is Justice Harlan's voice of dissent in *Plessy v. Ferguson*.[8] Once articulated, this argument became a part of the cultural dialogue suggesting an alternative vision of "what is." When that vision changed, the problem of the articulation of accepted social norms of race relations returned to the Court in *Brown v. Board of Education*.[9] This time, however, the Court invoked its oracular voice to identify as the norm the cultural construct rejected in *Plessy*. It did so not because the *Plessy* dissent won the day as a matter of logic or jurisprudence, but because the popular culture had embraced the notions articulated in that dissent.[10] Thus, the *Plessy* dissent produced culture which produced law.

Neither courts nor laws function as we have been taught to expect. An understanding of courts as chroniclers in the field of cultural production, as well as the site for the struggle over that production, tells us why. Once we understand courts as part of the process of cultural production—that is, as the site for the identification and memorialization of culture norms—we can focus more consciously on using them to engage in culture dialogue.

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[6] For the story of Hezekiah, who was among the last of the obedient kings of Judah, see 2 *Chron.* 29:1–32:33.

[7] Jezebel has assumed meta-Biblical proportions. She is part of the pantheon of our Biblical archetypes, though most of us no longer understand the origins of the story. For the original, see 1 *Kings* 16:31 (leading Israel to sin by worshiping Baal); 2 *Kings* 9:30–37 (life of treachery and ignominious death).

[8] 163 U.S. 537 (1896) (arguing against the affirmation of the racial separate but equal doctrine.

[9] *See* 347 U.S. 483, 495 (1954) (rejecting constitutional protection for doctrine of separate but equal treatment of races).

[10] For a description of the changes, see Michael J. Klarman, "*Brown*, Racial Change, and the Civil Rights Movement," 80 VA. L. REV. 7, 13–75 (1994).

I begin by discussing the role of courts as the institution that identifies and memorializes norms in the form of law. I then explore the identification-memorialization process in two contexts. The first context is that of the European Court of Human Rights' margin of appreciation jurisprudence, and the second is that of the construction of general principles of community law by the European Court of Justice. Identification-memorialization engages the courts in the process of cultural production to the extent that courts speak or provide a site for authoritative articulation.

I then explore the culturally evocative voices that courts use. These voices—the Homeric, Delphic, and Jobian cacophony—describe the complex and dynamic interactions between law, courts, and culture. Our judges function as a discordant and polyphonic cultural choir. From this choir will come articulations of cultural reality—more or less authoritative, more or less temporary, and more or less clear—in the form of rules and consequences for breaking taboos. Courts also and simultaneously serve as a site for challenging the authority to voice and patrol social and political space. To the victor of these struggles belongs a greater authority to pronounce convincingly those standards/patterns/models of the normal which may be enforced by the countless disciplines marshaled by society for that purpose.

I end by suggesting some complexity in this seemingly simple aesthetics of norm and authority. Complexity and ambiguity follow from our understanding that courts may speak simultaneously in multiple voices. Neither society nor "law" provides an unimpeachable arbiter of these voices. Society can never know for sure which voice speaks "truth," even momentary "truth." At the most general level of complexity, I eliminate the simplifying constraint that culture exists in unique spaces. Culture itself must be understood in the plural, even when the institutions of cultural production are conceived in the singular. The culture in which courts operate shares space with multiple competing cultures. The struggle over the authority of one culture to speak for the others in its midst through the institutions of formalized power suggests a complex and dynamic interaction that, in turn, affects the authority of courts to speak.

I. The Methodology of Chronicling: Identification and Memorialization of the Cultural Present

Culture functions "as a meta-system by containing within it all possibilities, all combinations, possible given the set of basic assumptions which define a group as 'distinct.'"[11] Popular culture is the way in which we selectively and collectively evidence culture in practice. Popular culture represents the production of culture at any particular time; it represents merely an implementation of the possibilities inherent in culture, not the totality of the possibilities of culture itself. We implement culture individually and collectively through an endless attempt at replication. In this sense, popular culture can be understood as the "prejudices," or what I would characterize as value choices, of the extant communal tradition.[12] Such is the fundamental nature of our interpretive community.[13]

Courts and law participate in the production and replication of popular culture. However, neither courts nor law participate as one would expect—as the engine through which popular culture can be directed and transformed. We now understand better what Gerald Rosenberg meant when he said that "the conditions enabling courts to produce significant social reform will seldom be present because courts are limited by . . . constraints built into the structure of the . . . political system."[14] The Courts are "institutionally incapable of doing anything other than reflecting the very majoritarian preferences that the traditional model requires the court to resist."[15] Instead, courts

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[11] Larry Catá Backer, *Constructing a "Homosexual" for Constitutional Theory: Sodomy Narrative, Jurisprudence, and Antipathy in the United States and British Courts*, 71 Tul. L. Rev. 529, 542 n.32 (1996).

[12] *See* Hans-Georg Gadamer, Truth and Method 302, 305–07 (Joel Weinsheimer & Donald G. Marshall trans., 2d ed. 1989).

[13] *See* Stanley Fish, *Is There a Text in This Class? in* Is There a Text in This Class? 303–04 (1980).

[14] Gerald N. Rosenberg, The Hollow Hope: Can Courts Bring About Social Change? 35 (1991); Larry Catá Backer, *Tweaking Facts, Speaking Judgment: Judicial Transmogrification of Case Narrative as Jurisprudence in the United States and Britain*, 6 S. Cal. Interdisc. L.J. 611, 657 n.169, 658 n.174.

[15] Spann, *supra* note 3, at 19 (1995); *see* Richard Delgado, *Rodrigo's Eleventh Chronicle: Empathy and False Empathy*, 84 Cal. L. Rev. 61, 93–94 (1996); Rosenberg, *supra* note 14, at 35. For Professor Rosenberg, the American judicial system is constrained by its limited constitutional rights, lack of (true) judicial independence, and lack of judicial power to implement decisions. *See* Rosenberg, *supra* note 14, at 35. As such, significant social reform is possible only when there is ample legal precedent for change, where there is explicit or implicit substantial support for change within the other branches of government, *and* where there is general citizen support or the lack of effective citizen opposition to the change. *See id.* However, even when all these conditions are met, judicial social change is

engage in the field of cultural production as chroniclers. Their function is to declare and preserve culture. They do not function to create or transform. Theirs is a passive function—to provide a *post facto* imprimatur to the current iteration of popular culture. The courts' contribution to the production of culture is thus the very declaration "what is," or "what is becoming." Except in the popular imagination, courts do not engage in the struggle over "what might be."

Thus, one of the primary *post facto* functions of the court is to identify the current normative framework of popular culture. This normative framework is at once "law" and the basis on which "law" can be "named." It is the process of becoming conscious of "what is" as opposed to a process of imposing "that which was not."[16] Law, as the description of existing social norms identified by courts, is something very different from our popular conception of law as the *creation* of courts which make law for the purpose of *changing* conduct.

The notion of courts as some sort of agent for social change has developed a certain currency among so-called traditionalists in the United States. In a well-known book, former judge and failed Supreme Court nominee, Robert Bork, bitterly attacks the notion of courts as a "legislative" power, one that imposes its personal views on an unwilling population.[17] Of course, this argument draws much from liberal criticism during the 1960s of the process-oriented theories of the 1940s and 1950s.[18] At the same time, several generations of social

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not possible unless there exist positive incentives for change, costs can be imposed for non-compliance, market implementation is possible, *or* the other branches of government are willing to implement judicially mandated reform. *See id.* at 35–36.

[16] There is some value to the concepts inherent in "speech act theory" in this notion of identification. It is not necessarily that one makes things true simply by saying them, as J.L. Austin might suggest. *See generally, e.g.*, J.L. AUSTIN; HOW TO DO THINGS WITH WORDS (1962); JOHN R. SEARLE, SPEECH ACTS: AN ESSAY IN THE PHILOSOPHY OF LANGUAGE (1969). In this form the notion of the significance of the attributes of judges and judicial decisions is made too independent of the norm matrix within which they operate. I believe it is more accurate to suggest that one becomes more conscious of a thing, that one heightens its reality, simply by uttering it. This is the difference between *acknowledgment* as a conscious act and *creation* as a conscious act.

[17] *See generally* ROBERT BORK, THE TEMPTING OF AMERICA (1990).

[18] *See generally, e.g.*, C. WRIGHT MILLS, THE POWER ELITE (1956) (military and business elites are the only groups effectively participating in governance); HENRY S. KARIEL, THE DECLINE OF AMERICAN PLURALISM (1961) (organized labor and management hijacked governance, capturing the agencies designed to regulate them); GRANT MCCONNELL, PRIVATE POWER AND AMERICAN DEMOCRACY (1966) (powerful interest groups captured the administrative mechanisms of government and imposed their will on the "people"); GABRIEL KOLKO, THE TRIUMPH OF CONSERVATISM (1963) (the entire administrative state was designed not to regulate, but to be the means by which the "regulated" could maximize their positions in society).

activists, composed mostly of the traditional "left," as well as identity and interest groups, have also come to believe that courts are a viable means of radical social change.[19] Indeed, the seeming ability of African-Americans to use the courts in the United States to win equal treatment and coerce integration has assumed archetypical proportion.

Despite the hopes of these groups, and the fears of conservatives, most attempts to *impose* judicially ordered changes in social norms have been miserably unsuccessful. For instance, judicial activism has yet to coerce Americans into recognizing that citizens have a fundamental right to social benefits.[20] The courts have yet to impose an obligation on Americans to accept gay men and lesbians as citizens.[21] Similarly, American courts have shied away from strictly rationing economic benefits or business benefits on the basis of race.[22] Some American critical race theorists have come to accept the notion, if somewhat reluctantly, that the judiciary cannot successfully compel radical change.[23]

Even those decisions advertised as models of successful judicial social compulsion—for example, abortion rights, gender equality in the workplace and school, and workplace integration—confirmed, but did not change, whatever emerging social consensus there might have been at the time of the decisions. Thus, such "successes" were not really successes at all. School desegregation, it is true, has been compelled by *Brown v. Board of Education*.[24] *Brown* did articulate a so-

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[19] *See* MARGARET WIER ET AL., THE POLITICS OF SOCIAL POLICY IN THE UNITED STATES 4–5 (1988); *see also* Edward V. Sparer, *The Right to Welfare, in* THE RIGHTS OF AMERICANS: WHAT THEY ARE—WHAT THEY SHOULD BE 65–67 (Norman Dorsen ed., 1971) ("Suppose a welfare system offered an adequate grant to all those in need (with income below it), and a right to refuse work which paid less than the welfare grant. If, as a result, private business and government were forced to reorganize the economy to ensure that it provided purposeful and well-paying work, would not this be desirable?"); Edward V. Sparer, *The Role of the Welfare Client's Lawyer,* 12 U.C.L.A. L. REV. 361, 366–67 (1965).

[20] *See* Dandridge v. Williams, 397 U.S. 471, 455–87 (1970) (rejecting argument that constitution guarantees right to welfare benefits); *see generally* Larry Catá Backer, *Poor Relief, Welfare Paralysis, and Assimilation,* 1996 UTAH L. REV. 1.

[21] *See* Bowers v. Hardwick, 478 U.S. 186, 190–94 (1986).

[22] *See* Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 237–39 (1995) (questioning constitutionality of federal minority set aside programs for contracts questioned and remanding for further consideration).

[23] *See, e.g.,* SPANN, *supra* note 3, at 19. *See generally* Richard Delgado, *Rodrigo's Second Chronicle: The Economics and Politics of Race,* 91 MICH. L. REV. 1183 (1993).

[24] 347 U.S. 483 (1954).

cial consensus of the highest aspirations of American society.[25] Yet, almost fifty years after that decision, American society continues to resist the coercive power of *Brown*. The decision has altered residential patterns and rates of private school attendance, and increased the allure of "states rights" politics. The decision has substantially failed to force integration of American public schools. The courts appear ready to abandon that effort.[26] Likewise, *Roe v. Wade*[27] permitted women the right to an abortion. However, twenty-five years after the decision, changing patterns of social organization and norms have significantly increased the difficulty of obtaining even a "legal" abortion. Medical schools do not emphasize instruction in abortion procedures, hospitals do not permit the procedure, and fewer doctors perform the service for fear of retaliation.[28]

Indeed, a great sin of modernist liberal theory is to confuse the identification of law with the creation of law. Our modernist commonplace is that courts "create" law. This lazy commonplace misunderstands the very real differences between identification and creation. *Identification* postulates the existence a priori of the conduct norm encompassed by judicial law-making. As such, the act of cultural production by courts is in the naming of the norm identified. This identification is significant but of a vastly different order than that of the wholesale creation of law. *Creation,* in contrast, assumes the independence of law and its power to assert independent coercive effects on society and social behavior. In this guise, law, like corporations, becomes something apart from the society that created it, and it affects society as an embedded but independent entity. However, there is also a touch of the divine in this anthropomorphized conception of law. For having achieved a status outside of the body of the society on which it acts, this conceptualization of law also assumes a primary place in the social hierarchy. Law assumes the place once held in traditional societies by God or the sovereign. In the West, this sort of

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[25] "We might understand *Brown* as designed not to accomplish actual integration, but to establish a fundamental principle of constitutional law." Mark Tushnet, *The Significance of* Brown v. Board of Education, 80 VA. L. REV. 123, 176 (1994).

[26] *See generally, e.g.,* Bradley W. Joondeph, Missouri v. Jenkins *and the De Facto Abandonment of Court-Enforced Desegregation,* 71 WASH. L. REV. 597 (1996); KENNETH T. JACKSON, CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES (1985).

[27] 410 U.S. 113 (1973).

[28] The popular press is full of stories of this social regulation—strangulation—of abortion. *See, e.g.,* Michael Remez, *Abortion: The Enduring Debate,* HARTFORD COURANT, Jan. 18, 1998, at A1.

transformation of the law into divinity has been hailed as good—the "rule of law" is God.[29]

Thus, courts created neither *Plessy v. Ferguson*[30] nor *Brown v. Board of Education*[31] half a century later. Each decision was heavily embedded in the popular culture of the time. Yet because the courts articulated the norms giving rise to the rulings in those cases, we have tended to treat the norms as having been created by the courts. These ways of perceiving law-making implicate Pierre Bourdieu's concept of the "power of naming" in the juridical field.[32]

> Symbolic acts of naming achieve their power of creative utterance to the extent, and only to the extent, that they propose principles of vision and division objectively adapted to the pre-existing divisions of which they are the products. . . . In other words, the specific symbolic effect of the representations, which are produced according to schemas adapted to the structures of the world which produce them, is to confirm the established order.[33]

The civil law does not escape the bifurcation. It is true enough that civil law courts have only admitted to functioning as interpreters of the law created by the sovereign. However, even here, civil courts identify and memorialize social common understandings. The interpretive power of the civil courts is never as innocent as it might sound in theory. Interpretation provides an excellent vehicle for conforming the word of the sovereign to the common practice of the citizen.[34]

> In other words, the judge will have to conform his decisional output to election-day results. This criterion implies that, al-

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[29] The "rule of law" concept, though venerated as a means of protecting people against the whims of individuals with power, has also been attacked as a falsely neutral and universal construct used by dominant society to oppress other groups. *See generally* Richard Delgado, *Rodgrigo's Ninth Chronicle: Race, Legal Instrumentalism, and the Rule of Law,* 143 U. PA. L. REV. 379 (1994). The irony, of course, is that a concept bound up in the social consensus which rose up after World War II and had as its aim the reduction of individual discretion, has been attacked as a means of subordinating groups which now resist the universalism of law and demand exemption from its strictures for them (but not for those who would otherwise be bound).

[30] 163 U.S. 537 (1896).

[31] 347 U.S. 483 (1954).

[32] *See* Pierre Bourdieu, *The Force of Law: Toward a Sociology of the Juridical Field,* 38 HASTINGS L.J. 814, 837–39 (1987).

[33] *Id.* at 839.

[34] *See generally* Mitchel de S.-O.-l'E. Lasser, *Judicial (Self-)Portraits: Judicial Discourse in the French Legal System,* 104 YALE L.J. 1325 (1995).

> though a judge should never act as the red-robed puppet of the powerful, it is equally indisputable that judicial authority and legitimacy will erode if, for lengthy periods of time, the judge pursues policies which fly in the face of some prevailing value-consensus in society.[35]

Moreover, as in common law countries, the sovereign, that is, those institutions with the theoretical authority to "pronounce the law," are subject to the same constraint—the practical authority of social practice. The Roman Catholic Church, the quintessential civilian jurisdiction, may well have commanded priestly celibacy from the time of the collapse of the Western Roman Empire, yet for centuries the power of that enactment extended no further than the codices on which it was written.[36] The former codices of Spain and France are littered with the detritus of commandments of the sovereign which were dead letter from the date of enactment.[37]

The second primary *post facto* function of courts is to memorialize the norms identified as law. Memorialization serves several important functions. On one level, the project of memorialization stabilizes the court's message and makes it appear immutable. On another level, memorialization provides a place through which identification can be transmitted. This process, however, also creates another significant confusion of liberal modernist theory: the fact of memorializing does *not* make more solid or enduring that which was memorialized. Though judicial pronouncement once made may be "etched in stone," the cultural matrix that gives it immediacy of meaning is "sand in the wind."[38] Memorialization cannot slow the process of the pro-

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[35] Hjalte Rasmussen, *Between Self-Restraint and Activism: A Judicial Policy for the European Court*, 13 EUR. L. REV. 28, 37 (1988).

[36] On the slow enforcement of priestly celibacy in the Middle Ages, see generally JAMES A. BRUNDAGE, LAW, SEX, AND CHRISTIAN SOCIETY IN MEDIEVAL EUROPE (1987).

[37] Indeed, social scientists sometimes use the rate of reenactment of pre-Revolutionary statutes as an indication of the continued existence and intractability of the "problems" the statutes were enacted to "correct" without considering seriously that such laws were either enforceable or did much to change social behavior. *See generally* LINDA MARTZ, POVERTY AND WELFARE IN HABSBURG SPAIN: THE EXAMPLE OF TOLEDO (1983).

[38] The problem of memorialization is especially acute with words first uttered in languages no longer used or now changed beyond recognition. Consider the problem of Biblical hermeneutics in the context of a long dead world the hand of which reaches to the present. This problem is especially acute with respect to text with attempts to mediate between our Greek and Semitic selves. *See generally* DANIEL BOYARIN, A RADICAL JEW: PAUL AND THE POLITICS OF IDENTITY (1997). Even "modern" translations are prone to this effect. The King James translation of the Bible no longer reflects common English usage or

duction and reproduction of culture. The modernist suggests that law freezes culture.

Memorialization preserves a record of shared norms at the time of their making. Reuel Schiller has demonstrated well the process of identification and memorialization in the context of labor law.[39] During the period after World War II, the Supreme Court applied the norms flowing from notions of group pluralist process to construct a system of labor management interaction within the parameters of the labor laws. A social consensus had developed during that time which reflected a common understanding that "democratic politics were driven by interest group interactions, with the government as a passive agent, responding to their desires."[40] As a result, the Supreme Court constructed rules of exclusive representation,[41] a very limited approach to fair representation,[42] and a concentration on the free speech rights of unions over the speech rights of union members.[43] By the 1960s, social consensus had shifted. A participatory rights based policy-making ideal had replaced the group pluralist ideal. Many of the constructions of the basic rules of labor-management engagement formulated in the period before 1960 were reformulated in light of the new ideal.[44] In neither case, though, did the Supreme Court attempt to coerce from labor or management a way of understanding the norms of such relationships at odds with their conception of how such relationships ought to work.

Memorialization touches on what Bourdieu describes as "this special linguistic and social power of the law 'to do things with words'":[45]

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the social habits that inform them. It thus becomes increasingly irrelevant because it cannot speak to the reader.

[39] *See generally* Reuel E. Schiller, *From Group Rights to Individual Liberties: Post-War Labor Law, Liberalism, and the Waning of Union Strength*, 20 BERKELEY J. EMP. & LAB. L. 1 (1999).

[40] *Id.* at 15. "It also harmonized with many basic values of American democracy such as self-determination, limited government, and Madisonian liberal group pluralism." *Id.* at 29.

[41] *See* J.I. Case Co. v. NLRB, 321 U.S. 332, 341–42 (1944) (workers do not have right to advance their interests independent of the union which represents them).

[42] *See* Steele v. Louisville N. R. Co., 323 U.S. 192, 207–08 (1944); Schiller, *supra* note 39, at 34–44.

[43] *See, e.g.*, Thornhill v. Alabama, 310 U.S. 88 (1940); Thomas v. Collins, 323 U.S. 516 (1945); Schiller, *supra* note 39, at 34–44.

[44] *See* Schiller, *supra* note 39, at 75–112.

[45] Richard Terdiman, *Translator's Introduction to Pierre Bourdieu, The Force of Law: Toward a Sociology of the Juridical Field*, 38 HASTINGS L.J. 805, 809 (1987).

> This power inheres in the law's constitutive tendency to *formalize* and to *codify* everything which enters its field of vision. . . . [Bourdieu] argues that this formalization is a crucial element in the ability of the law to obtain and sustain general social consent, for it is taken (however illogically) as a *sign* of the law's impartiality and neutrality, and hence of the intrinsic correctness of its determinations.[46]

However, impartiality and neutrality are functions as much of the court's limited *purpose* or competence to declare as it is of the court's *task* of memorialization. There is much truth to Bourdieu's insight on legal formalization:

> There is no doubt that the law possesses a specific efficacy, particularly attributable to the work of *codification,* of formulation and formalization, of neutralization and systematization, which all professionals at symbolic work produce according to the laws of their own universe. Nevertheless, this efficacy, defined by its opposition both to pure and simple impotence and to effectiveness based only on naked force, is exercised only to the extent that the law is socially recognized and meets with agreement, even if only tacit and partial, because it corresponds, at least apparently, to real needs and interests.[47]

Yet, I think this insight better serves when it is turned on its head. Because legal text must correspond to "real needs and interests," it is perceived as socially productive: The formalization—the memorialization of its social text—becomes efficacious within the field of cultural production.

Chronicling, then, in the form of the identification-memorialization methodologies of courts in the production of law, suggests that the cultural product of courts is both socially produced and socially productive.[48] Yet, the "magisterial discourse"[49] of the courts at least appears to be the opposite of what Jean-Francois Lyotard has posited for this core institution of the Western Enlighten-

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[46] *Id.* at 809–10.

[47] Bourdieu, *supra* note 32, at 840.

[48] For a discussion of the way in which courts produce culture through law, and law produces culture through courts, see generally Backer, *supra* note 11.

[49] Jean François Lyotard, *On the Strength of the Weak,* 3 SEMIOTEXTE 204, 205 (1978). Lyotard, of course, refers to philosophy—but what more systematic philosophy than the jurisprudence of a cohesive system of courts?

ment modernist project. For Lyotard, this magisterial discourse of the courts concocts those socially coercive stories which have passed for western foundationalist reality since the time of the French Revolution. Worse, the stories are false—at least to the extent they evidence more the power of the story teller to define the parameters of the narrative than the reality of the narrative's object(s). Mirroring the pattern of imposition established by the master narratives of Western thought, the magisterial narratives uttered by courts are authoritative because courts take on the power not only to utter narrative, but also to determine "the conditions of truth" against which these narratives are to be tested.[50]

Authoritative utterances, including judicial utterances, then serve to limit and coerce. These utterances are unproblematic as such but for the fact that they bear no relationship to the "will of the coerced." It follows, for those who adhere to this view, that this form of postmodernist project constructs authoritative utterances as an imperial and colonizing evil. Consequently, the authority of the magisterial voice must be rejected, or at least resisted, as an excluding voice. An inversion of voices should follow, perhaps investing the weak with the mantle of authority of the magistrate.[51] Ironically, this sort of argument minimizes the postmodernist project to the role of cultural prophet. As such, postmodernism becomes an actor within culture rather than a site for creation of an alternative meta-narrative.

Moreover, if the mechanics of the exercise of the magisterial voice I have outlined above are correct, then perhaps we must problematize this postmodernist notion of "master narrative." It is far too easy to demonize this Western foundationalism in a simplistic manner.[52] It is wrong to consider this narrative as both fundamentally

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[50] *See id.* Lyotard posits that such master narratives can be subverted through the critique within philosophical discourse of the foundationalisms of philosophy "in order to impart a stronger sense of the unpresentable." JEAN FRANÇOIS LYOTARD, THE POSTMODERN CONSTITUTION: A REPORT ON KNOWLEDGE 81 (1984).

[51] *See* Lyotard, *supra* note 49, at 207.

[52] Indeed, it has become common to construct out of Western foundationalism a master narrative which, it is asserted, is somehow imposed from the outside on willing and unwilling alike. We are all, in effect, prisoners of a totalizing world view which is neither ours nor good for us. This meta-narrative is then invested with extreme power; it is constructed as the primary source of what is perceived to be evil in the world. Consider the way master narrative is used to explain race relations among "minorities" within the United States. *See generally* Lisa C. Ikemoto, *Traces of the Master Narrative in the Story of African American/Korean American Conflict: How We Constructed "Los Angeles,"* 66 S. CAL. L. REV. 1581 (1993) (describing tensions between the African-American and Korean-American communities in Los Angeles before the 1992 riots in the context of majority notions of race

"false" and "imposed" on the social consciousness by the conscious design of some cabal privileged by the web of social relations, which uses narrative to maintain its privilege within the web by the manipulation of truth and the "foundations of social organization." As the sections which follow demonstrate, the reality may be more subtle and less binary, less gnostically Christian, than what postmodern theory would have us accept.

II. Contextualizing the Identification-Memorialization Project of the Courts: Understanding What We Do

The process of identification-memorialization by which courts participate in the field of cultural production can be appreciated more fully in context. For that purpose, I propose looking briefly at two clear manifestations of this process:[53] the "margin of appreciation" jurisprudence of the European Court of Human Rights and the construction of general principles of community law by the European Court of Justice.

A. *Margins of Appreciation in the Construction of European Human Rights*

Europe has invested a great deal of effort in the creation of a supra-national system for the protection of fundamental rights of individuals. These protections are memorialized in a Convention for the Protection of Human Rights and Fundamental Freedoms (Convention).[54] The guardian and oracle of this system is ultimately the European Court of Human Rights (ECHR). The recent "transsexual cases" of the ECHR[55] illuminate the ways in which the ECHR has incorpo-

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and place); Anthony E. Cook, *Reflections on Postmodernism*, 26 New Eng. L. Rev. 751, 754 (1992) ("Postmodern critique might be thought of as a strategy for bringing to the surface suppressed narratives and voices drowned out by the univocal projection of master narratives.").

[53] American courts also manifest this process of identification-memorialization, especially in the interpretation of our Constitution, but the process is more subtle. *See generally* Larry Catá Backer, *Fairness as a General Principle of American Constitutional Law: Applying Extra-Constitutional Principles to Constitutional Cases in* Hendrick *and* M.L.B., 33 Tulsa L.J. 135 (1997) [hereinafter *Fairness as a General Principle*].

[54] Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221.

[55] *See generally* Cossey v. United Kingdom, 13 Eur. H.R. Rep. 622 (1990); Rees v. United Kingdom, 9 Eur. H.R. Rep. 56 (1987). In *Cossey*, a person born male, who underwent gender reassignment surgery and lived as a woman, challenged the denial by the United Kingdom of her request to obtain both a birth certificate indicating she was female and a

rated the basic principle of identification within its decision-making process. Fundamental to the interpretive project of the ECHR is the "margin of appreciation" doctrine.[56] The ECHR has explained that where there exists "little common ground between the Contracting States," national entities enjoy "a wide margin of appreciation."[57] The ECHR, in effect, will interpret the actual content of the fundamental rights guaranteed under the Convention principally on the basis of the norms common to the peoples bound by the Convention. Where no such common understanding exists, the ECHR will not strain to impose an interpretation which compels substantial change of social habit. Change must come first; law follows. "Although some contracting States would now regard as valid a marriage between a person in Miss Cossey's situation and a man, the developments which have occurred to date cannot be said to evidence any general abandonment of the traditional concepts of marriage."[58] Thus, "margin of appreciation" works as a limiting principle on the European supra-national human rights regime. The limit, in this case, is common understanding of what is generally accepted among those bound by law. The primary function of the ECHR is to confirm social behavioral norms "which are."

Yet, the very lack of nation-state consensus, which gives the margin of appreciation its widest power to limit the interpretive power of the ECHR, can sometimes serve as a vehicle to overcome the domination of that principle—especially where consensus, while divided, is interpreted to be changing in a particular direction. In this role, and in this role only, does the ECHR exercise a power to identify "what is becoming." For example, in the transsexual cases, the consensus gap transformed itself into something problematic when the European

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repeal of the legal restriction on her ability to marry a man. *See* 13 Eur. H.R. Rep. 622. The European Court of Human Rights held over vigorous dissent that there had been no violation of either Articles 8 or 12. *See id.* at 641–42. In *Rees*, a person born female, who underwent medical treatment and lived as a man, challenged the denial by the United Kingdom of his request to obtain a birth certificate indicating he was male. *See generally* 9 Eur. H.R. Rep. 56. The European Court of Human Rights held over vigorous dissent that there had been no violation of either Article 8 or 12. *See id.* at 68.

[56] On the margin of appreciation doctrine generally, see, e.g., Pieter van Dijk, *The Treatment of Homosexuals Under the European Convention on Human Rights, in* HOMOSEXUALITY: A EUROPEAN COMMUNITY ISSUE: ESSAYS ON LESBIAN AND GAY RIGHTS IN EUROPEAN LAW AND POLICY 179 (1993); Joxerramon Bengoetxea & Heike Jung, *Towards a European Criminal Jurisprudence? The Justification of Criminal Law by the Strasbourg Court*, 11 LEGAL STUD. 239–80 (1991).

[57] *Cossey*, 13 Eur. H.R. Rep. at 641; *Rees*, 9 Eur. H.R. Rep. at 64.

[58] *Cossey*, 13 Eur. H.R. Rep. at 642 (discussing the Article 12 challenge).

Court of Human Rights became "conscious of the seriousness of the problems facing transsexuals and the distress they suffer. Since the Convention always has to be interpreted and applied in the light of current circumstances, it is important that the need for appropriate legal measures in this area should be kept under review."[59] "Current circumstances" analysis permits the European Court of Justice some discretion to balance the interests of the community and the individual, "the search for which balance is inherent in the whole of the Convention."[60] However, when the balance tilts in favor of the individual, the margin of appreciation disappears. Essentially this "current circumstances" analysis permits the ECHR the ability to reinterpret the bare words of the rights inscribed in otherwise immutable statutes in light of emerging social mores. A consensus gap pointing the way to a particular new social consensus, of course, was also what the dissenting judges argued in *Cossey*.[61]

The power to reinterpret the immutable, to articulate the emerging consensus, was the essence of the ECHR's interpretive odyssey in the "homosexual sodomy" cases.[62] During the first ten years of the Convention, several applications were filed against the Federal Republic of Germany challenging Article 175 of its penal code, which prohibited adult homosexual sodomy. Until recently, the Strasbourg tribunals rejected all of these applications because the laws were deemed necessary for the protection of morals.[63] The ECHR also took comfort in the sanitizing language of medicine.[64]

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[59] *Id.* at 641; *see Rees*, 9 Eur. H.R. Rep. at 68.

[60] *Rees*, 9 Eur. H.R. Rep. at 64.

[61] *See Cossey*, 13 Eur. H.R. Rep. 622 at 648 (Martens, J., dissenting). The "current circumstances" approach is never exact. A determination of consensus is always tentative. From this weakness, a number of criticisms of the margin of appreciation doctrine have emerged. Most of the criticisms have centered on the arbitrariness of the principle, at least in its application. *See* Larry Catá Backer, *Inscribing Judicial Preferences into Our Fundamental Law: On the Incorporation European Principle of Margins of Appreciation as Constitutional Jurisprudence in the U.S.*, 7 TULSA COMP. & INT'L L.J. (forthcoming 2000). For a discussion of the criticisms and defenses of margin of appreciation theory, see *id.* at n.98–106.

[62] *See generally* Dudgeon v. United Kingdom, 4 Eur. H.R. Rep. 149 (1981); Norris v. Ireland, 13 Eur. H.R. Rep. 186 (1988); Modinos v. Cyprus, 16 Eur. H.R. Rep. 485 (1993). For a discussion of the political nature of the determination of the limitations of "human rights" in this context, see generally Backer, *supra* note 61.

[63] *See, e.g.*, App. No. 1307/61, 1962 Y.B. Eur. Conv. on Hum. Rts. 230, 234 (Eur. Comm'n on Human Rts.); App. No. 530/59, 1960 Y.B. Eur. Conv. on Hum. Rts. 184, 194 (Eur. Comm'n on Human Rts.); App. No. 104/55, 1955–57 Y.B. Eur. Conv. on Hum. Rts. 228, 229 (Eur. Comm'n on Human Rts.).

[64] *See, e.g.*, App. No. 5935/72, 1976 3 Eur. Comm'n H.R. Dec. & Rep. 46 (esp. 153–56) (1976). For a discussion of the cases, see, e.g., Laurence R. Helfer, Note, *Finding a Consen-*

Norris v. Ireland defined the parameters of the newly recognized political reality.[65] Thereafter, the cases were not hard. In Europe, popular cultural norms, the habits of ordinary *European* citizens, make it exceedingly difficult to find particularly serious reasons that create a pressing social need to criminalize sexual activity between men. Before the court, the government argued that the "moral fibre of a democratic nation is a matter for its own institutions and the Government should be allowed a degree of tolerance, . . . a margin of appreciation that would allow the democratic legislature to deal with this problem in the manner which it sees best."[66] The court rejected this argument, stating that to make such a determination, "the reality of the pressing social need must be proportionate to the legitimate aim pursued."[67] The court rebuffed the government's attempt to preclude it from review of Ireland's obligation not to interfere with an Article 8 right when it deals with the "protection of morals." The Court also noted that serious reasons must exist before government interference can be legitimate for purposes of Article 8. Once again, citing a portion from *Dudgeon v. United Kingdom* regarding the lack of evidence showing that the non-enforcement of Northern Ireland's relevant law had been detrimental to the moral standards of its people or that there was public demand for stricter enforcement of the law, the court held that "it cannot be maintained that there is a 'pressing social need' to make such [homosexual] acts criminal offenses."[68]

Yet in none of these cases did the ECHR attempt an "empty" interpretation of the relevant provisions of the Convention. Each of the cases provided the usual context for interpretation: the European Court of Human Rights constructed a context for interpretation based on the social customs and understandings of the people on whom the interpretation falls. Interpretation in the context of margin of appreciation analysis is little more than identification and memorialization of current practice. More than that, however, it amounts to a conscious assurance that the "law" applied will always be contextualized within current social habits; the law will "evolve."

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sus on Equality: The Homosexual Age of Consent and the European Convention of Human Rights, 65 N.Y.U. L. Rev. 1044, 1079 (1990).

[65] *See generally* 13 Eur. Ct. H.R. (ser. A) (1988).

[66] *Id.* ¶ 42.

[67] *Id.* ¶ 44.

[68] *Id.* ¶ 46.

B. *General Principles of Community Law*

The European Court of Justice (ECJ) has established the practice of fashioning substantially extra-constitutional principles, which it then applies to its interpretation of the "quasi-constitution" of the European Union (EU) as "General Principles of Community Law."[69] Principles of law are rules of conduct "prescribed in the given circumstances and carrying a sanction for noncompliance."[70] General rules or principles work like doctrine "though they can be vindicated like any particular rule, they serve a dual purpose: as pointers to interpretation by the courts and as indication of policy to legislators."[71] As such, "new principles are adopted into law through judicial decision making."[72]

Of course, the primary sources of European law may appear to provide at least some small theoretical opening through which the

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[69] The issues of the origin, use, and limitations of the concept "general principles of Community law" remain controversial in Europe. I do not discuss those questions here. For a general discussion of the genesis of principles of Community law, see, e.g., D. LASOK & J.W. BRIDGE, LAW & INSTITUTIONS OF THE EUROPEAN COMMUNITIES 179–208 (5th ed., 1991); NICHOLAS EMILIOU, THE PRINCIPLE OF PROPORTIONALITY IN EUROPEAN LAW: A COMPARATIVE STUDY 115–33 (1996); JOXERRAMON BENGOETXEA, THE LEGAL REASONING OF THE EUROPEAN COURT OF JUSTICE: TOWARDS A EUROPEAN JURISPRUDENCE 71–79 (1993); *see generally* 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).

[70] For the difference between general principles of law and legal doctrines, see LASOK & BRIDGE, *supra* note 69, at 179 (doctrine encompasses general propositions or guidance of a general nature).

[71] *Id.* On the interpretive and supra-constitutional utility of principles in continental (and especially European) law, see, e.g., J. Iguartua, *Sobre "Principios" y "Positivismo Legalista"*, 14 REVISTA VASCA DE LA ADMINISTRACIÓN PÚBLICA (1986); *cf. generally* LON L. FULLER, THE MORALITY OF LAW (1969). Emiliou suggests four applications of general principles in constitutional interpretation: to guide to interpretation of primary law, to guide to the exercise of power under the primary law, to provide criteria for determining the legality of acts, and to fill in gaps in primary or secondary law to prevent injustice. *See* EMILIOU, *supra* note 69, at 121.

[72] NEIL MACCORMICK, LEGAL REASONING AND LEGAL THEORY 236–37 (1978). Taking his cue from MacCormick, Joxerramon Bengoetxea suggests that general principles, in the form of norms, assume supra-constitutional dimension:

> Political or ethical principles sometimes enter into the legal system disguised as supra-systemic principles allegedly referred to or implied by valid norms of the system or by formal interpretive consequences of these. If such principles are incorporated into the legal system, e.g. through a court decision, they might be considered as reasons guiding further decisions, for principles are regarded as general norms having an explanatory and justificatory force in relation to particular decisions or to particular rules for decisions.

BENGOETXEA, *supra* note 69, at 75, citing MACCORMICK, *supra*, at 260.

ECJ can justify the articulation and application of "general principles."[73] The ECJ has used this mechanism to articulate and apply consciously and deliberately a number of general principles of Community law.[74] These general principles include fundamental principles of human rights, which have been read into the jurisprudence of the European Union,[75] as well as principles of equality of treatment and a number of principles derived from continental law.[76]

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[73] There is only one reference to "general principles" in the primary law. Article 215(2) of the E.C. Treaty provides for E.C. liability in non-contractual matters, "in accordance with the general principles common to the laws of the Member States." E.C. Treaty art. 215(2). *See* JEAN VICTOR LOUIS, THE COMMUNITY LEGAL ORDER 68 (1980) (suggesting that this is a specific reference to a term of general applicability). However, the ECJ may have taken inspiration from other sources. *See, e.g.*, LASOK & BRIDGE, *supra* note 69, at 180 (Art. 173 permits the ECJ to annul an act of the Community which infringes "the Treaty or any rule of law relating to its application.").

[74] *See generally* Internationale Handelsgesellschaft mbH v. Einfuhr-und Vorratsstelle fur Getreide un Futtermittel 11/70, (1970) ECR 1125, (1972) CMLR 255. In *Internationale Handelsgesellschaft*, the ECJ rejected the notion that the validity of Community measures could be judged by applying the fundamental or constitutional rules of any of the Member States. Instead, the ECJ suggested:

> However, an examination should be made as to whether some analogous guarantee inherent in Community law has been disregarded. In fact, respect for fundamental rights has an integral part of the general principles of law protected by the Court of Justice. The protection of such rights, while inspired by the constitutional principles common to the Member-States, must be ensured within the framework of the Community's structure and objective of the Community.

Id. at 1134.

[75] *See, e.g.*, Nold v. Commission, case 4/73 919740 ECR 491, 508 (stating that the ECJ could draw on international instruments as sources for general principles of human rights against which Community law could be measured); *see also* Weiler, *supra* note 69, at 1113–21. Weiler notes that there will be an element of constitutional politics at play in the crafting of this general principle of Community law; the incorporation of fundamental human rights into the Community legal order might be characterized as "an attempt to protect the concept of supremacy which was threatened because of the inadequate protection of human rights in the original Treaty system." *See id.* at 1119.

[76] Equality of treatment has been deduced from a small number of provisions in the E.C. Treaty that proscribe discrimination on the basis of nationality (art. 7), sex (art. 119) and production (art. 40(3)). It has been applied to great effect in the area of gender equality. Council Directive 75/117, 1975 O.J. (L.45/19) (the Equal Pay Directive); Council Directive 76/207, 19 O.J. (L.39)40 (1976) (Equal Treatment Directive).

> Perhaps EU law has been as successful as possible in creating equality within a society where men have traditionally dominated the best paying and most rewarding jobs, and have had more status than women. Women within the EU will now strive to challenge their historical role, knowing they have the Equal Pay and Equal Treatment Directives behind them in support of their efforts to obtain more prestigious and better paying jobs.

The process of identifying and interpreting general principles of community law by the ECJ, like the ECHR's interpretive project with respect to the Convention, is based on the identification of behavioral consensus and the memorialization of such consensus in the interpretation of the basic documents of the EU in the context of the matters that come before the court. Both implicate the need for inherent normative consistency based on cultural consensus in the emerging meta-system of human rights. This normative consistency is simultaneously superior to and in opposition to the meta-systems of self-determination and respect for cultural and national difference.[77]

The ECJ sex discrimination cases *Puk v. S. & Cornwall County Council*[78] and *Grant v. South-West Trains, Ltd.*[79] vividly demonstrate this opposition principle within the European Union. The former case represents the juridical role of identifying "that which is becoming;" the latter case represents the juridical role of identifying "that which is."[80] In *Cornwall County Council,* the ECJ relied on its expansive interpretation of "one of the fundamental principles of Community law" to determine that this fundamental principle prohibited employment discrimination against a transsexual.[81] The ECJ rejected Britain's argument that termination of employment "because he or she is a transsexual or because he or she has undergone a gender reassignment operation does not constitute sex discrimination for the purposes of

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Elena Noel, Prevention of Gender Discrimination Within the European Union, 9 N.Y. INT'L. L. REV. 77, 91–92 (1996); see generally, Ruth A. Harvey, Equal Treatment of Men and Women in the Work Place: The Implementation of the European Community's Equal Treatment Legislation in the Federal Republic of Germany, 38 AM. J. COMP. L. 31 (1990).

Principles derived from continental law include the principle of proportionality, which is akin to U.S. notions of the interpretive constitutional doctrine of "least restrictive means." *See, e.g.,* EMILIOU, *supra* note 69, at 115–33

[77] "I hope to demonstrate that a cross-fertilization process is well underway, one that ultimately may lead to more harmonization of the law in . . . human rights areas." Richard B. Lillich, *Harmonizing Human Rights Law Nationally and Internationally: The Death Row Phenomenon as a Case Study,* 40 ST. LOUIS U. L.J. 699, 702 (1996) (footnotes omitted) (arguing for the need for the harmonization of international human rights law). Note, however, that recent voices have begun to sense that there is a "declining consensus on the role that the system established by the European Convention plays for the protection of human rights." Giorgio Gaja, *Case Law: Court of Justice, Opinion 2/94, Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms,* 33 COMMON MKT. L. REV. 973, 989 (1996).

[78] Case C-13/94, 2 C.M.L.R. 247 (1996).

[79] Southampton Indust. Tribunal, Case C-249/96, (1998) All ER (EC) 193.

[80] *See Cornwall County Council,* Case C-13/94, 2 C.M.L.R. at 247; *Grant,* Case C-249/96 at 193.

[81] *See Cornwall County Council,* Case C-13/94, 2 C.M.L.R. at 263.

the directive."[82] The British, of course, were right in a way; discrimination applied equally to men becoming women, as well as to women becoming men. Instead, the ECJ accepted the finding of the ECHR that transsexuals "form a fairly well defined and identifiable group."[83] As such, discrimination against transsexuals could fall within the generous ambit of fundamental interdiction of sex discrimination.[84] "To tolerate such discrimination would be tantamount, as regards such person, to a failure to respect the dignity and freedom to which he or she is entitled, and which the Court has a duty to safeguard."[85] Here, the ECJ determined that transsexuals had become generally accepted as a sex. On that basis, it was neither new nor odd for the ECJ to apply the law of sex discrimination to them.

The ECJ did not glean any such duty to safeguard when the discrimination complained of was based on the complainant's sexual orientation. In *Grant,* a female public employee sought to challenge a rule denying her partner, also a woman, travel concessions that the employer made available to unmarried couples of the opposite sex who were in a meaningful relationship. The ECJ could not here bring itself to apply the expansive interpretation of fundamental law it had recently articulated because that would have required the articulation of a standard of acceptable norm which it did not believe was yet either a *norm* or *generally acceptable.* In the space between transsexual and sexual orientation, the ECJ marked the boundary between identification and creation. Thus the arguments, which the court swept aside as ineffectual in *Cornwall County Council,* became compelling in *Grant.* Britain made the same argument it had made in *Cornwall County Council*—that the regulations do not constitute discrimination on the basis of sex. This time the ECJ agreed. Orientation is not gender; "[s]ince the condition imposed by the undertaking's regulations applies in the same way to female and male workers, it cannot be regarded as constituting discrimination *directly* based on sex."[86] This language differs from that in *Cornwall County Council,* in which the same court declared such "discrimination [against transsexuals]

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[82] *Id.* at 262, 263.

[83] *Id.* at 262–63.

[84] *Cornwall County Council,* Case C-13/94, 2 C.M.L.R. at 262–63.

[85] *Id.*

[86] *Grant,* Tribunal, Case C-249/96 at ¶ 28 (emphasis added).

based, *essentially if not exclusively,* on the sex of the person concerned."[87]

More importantly, the ECJ refused to determine whether there was an equivalence between relationships among people of different sexes and those between people of the same sex. First, the Community had not specifically legislated this equivalence, and, therefore, it was not the ECJ's place to do it for them.[88] Second, none of the Member States had yet recognized the equivalence: "in most of them it is treated as equivalent to a stable heterosexual relationship outside of marriage only with respect to a limited number of rights, or else is not recognised in any particular way."[89] Third, even the ECHR had refused to recognize the equivalence.[90] Indeed, the ECHR had refused to extend the rights of transsexuals to marriage.[91] Ms. Grant fared no better in her attempt to draw a direct equivalence between sex and sexual orientation. The ECJ just would not push European norms when facing what it determined, through its political or social organs, to be the reluctance of society to practice those norms as a matter of course. Thus, even though the ECJ traditionally has been aggressive in applying international human rights instruments in its interpretations of Community fundamental principles, it chose to resist such expansion in a fairly uncharacteristic way for the ECJ—it relied on the limitation of the competence of the Community! The general principle of equality, at the heart of the expansive language of *Cornwall County Council,* crashes on the shoals of a limited view of Article 199's prohibition of sex discrimination.[92] The ECJ ended by tossing the issue

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[87] *Cornwall County Council,* Case C-13/94, 2 C.M.L.R. at ¶ 21 (emphasis added). The *Grant* court was not unaware of the distinct use of language. *See Grant,* Tribunal, Case C-249/96 at ¶ 42. However, the court implied that the difference in focus was the result of the difference in discrimination—orientation in *Grant,* gender in *Cornwall County Council.*

[88] *See Grant,* Tribunal, Case C-249/96 at ¶ 31.

[89] *See id.* at ¶ 32.

[90] *See id.* at ¶ 33 (citing a number of ECHR cases, including X v. UK (1983) 32 D & R 220, S v. UK (1986) D & R 274, B v. UK (1990) 64 D & R 278).

[91] *See id.* at ¶ 34 (citing Cossey v. United Kingdom, 13 Eur. H.R. Rep. 622 (1990); Rees v. United Kingdom, 9 Eur. H.R. Rep. 56 (1987)).

[92] *See id.* at ¶¶ 43–47. Thus, the reading of the International Covenant on Civil and Political Rights (New York, 16 December 1966; TS 6 (1977); Cmnd 6702) by the Human Rights Committee, established to interpret its provisions that sex includes sexual orientation, was dismissed as irrelevant because Article 119 was limited to "sex" and because the opinions of the Human Rights Committee ought not be accorded much dignity. *See id.* Rather, Article 119 must be read solely within the four corners of the Community Treaties. *See id.*

Of course the ECJ could not have meant what it said. To do so would be to retreat from twenty years of interpretation of the scope and means of incorporating the principles

back to the overtly political process: The Treaty of Amsterdam[93] provided for the political resolution of the issue of discrimination on the basis of sexual orientation. It was, therefore, no business of the courts to resolve the issue before the political process had worked things out.[94] This opinion is worthy of its American parallel, *Bowers v. Hardwick*.[95]

Thus, general principles of Community law serve as a meta-principle limiting the autonomy of law, even with respect to areas where the state has legislative authority. The U.S. equivalent is the enunciation of federal constitutional principles against the power of both federal and state political units. General federal constitutional principles supply the interpretative norms with which we understand our legislation.[96] Constitutional principles, like general principles of Community law, are examples of the ways in which even the fundamental law of multi-state systems are bent to the will of contemporary common understandings of social norms. The European Court of Justice, like the U.S. Supreme Court, interprets the will of the sovereign as set forth in legislation through the lens of identification of common understandings. Each court memorializes "what is" or "what is becoming" through the act of interpretation. In this sense *Cornwall County Council* and *Grant*, essentially civil law cases, function much like U.S. federal constitutional cases, each wrestling with principles of interpretation in the service of the current sense of good practice.

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of human rights within the Treaty framework. Instead, the ECJ was inartfully suggesting in the context of the transposition of human rights into the Community Treaties, the limitation of Member State consensus. Since no European body had assented to this expansive reading of the rights of sexual minorities, and since the common practices of the people of the Member States did not show a patten or practice of acceptance of the state of affairs sought by Ms. Grant, then the ECJ was in no position to impose that social norm.

[93] O.J. 1997 C340.

[94] *See Grant*, Tribunal, Case C-249/96 at ¶ 48.

[95] 478 U.S. 186 (1986); *see* Larry Catá Backer, *Reading Entrails:* Romer, VMI *and the Art of Diving Equal Protection*, 32 TULSA L.J. 361, 385–88 (1997).

[96] *See generally Fairness as a General Principle, supra* note 53. For example, consider *Romer v. Evans*, 517 U.S. 620 (1996), from the analytical perspective of the European Union. In *Romer*, the U.S. Supreme Court held that an amendment to the Colorado state constitution violated the Equal Protection Clause of the federal Constitution. *Id.* at 635–36. The amendment, through a statewide voter referendum, precluded all legislative, executive, or judicial action at any level of state or local government designed to protect the status of persons based on their "homosexual, lesbian or bisexual orientation, conduct, practices or relationships." *Id.* at 624. Colorado has the legislative authority to amend its constitution by popular referendum. *See id.* at 623. However, general principles of Constitutional law foreclosed the use of that power in ways that violated the harmonizing norms of the principle of "equal protection." For a discussion of *Romer*, see Backer, *supra* note 95, at 376–88.

III. The Process of Identification-Memorialization by Courts in the Field of Cultural Production

Courts speak authoritatively when they identify and memorialize. Whether identification is focused on Logos (the so-called "rule of law") or *vox populi* (the will of the people), such pronouncements are accorded a certain amount of respect and, therefore, autonomy. It is this authority that stays the hand of those with the power to resist. The authority is so great that even Presidents of the United States will comply in the face of decisions reached by a furiously divided Supreme Court. President Truman, who had ordered the seizure of steel mills in the United States during the Korean War to secure the production of war material, ordered the mills returned to their owners on the strength of an order of the Supreme Court,[97] even though he bitterly disagreed with the judgment of the Court.[98]

To understand why society defers to the pronouncements of judges, we must understand how courts are understood when they speak, that is, we must give cultural context to the voices of the court. This exploration implicates the way in which the act of identification-memorialization itself forms part of the core aesthetics of Western culture. This aesthetic involvement is neither linear, nor "clean." As the Biblical author Paul suggested, the way we have mediated this aesthetic conflict within the dominant culture is through a religiously aesthetic device: "there is neither Jew nor Greek, there is neither slave nor free, there is no male and female, for ye are all one in Christ Jesus."[99] But of course, here again, saying it does not make it so.

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[97] Harry S. Truman, 2 Memoirs (1956) 476. The Supreme Court decision *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), involved the powers of the President under the federal Constitution and produced opinions by six justices.

[98] President Truman, in his memoirs, thus complained of the decision:

> I would, of course, never conceal the fact that the Supreme Court's decision, announced on June 2, was a deep disappointment to me. . . . I am not a lawyer, and I leave the legal arguments to others. But as a layman, as an official of the government, and as a citizen, I have always found it difficult to understand how the Court could take the affidavits of . . . all who testified in great detail to the grave dangers that a steel shutdown would bring to the nation . . . and ignore them entirely. I could not help but wonder what the decision would have been had there been on the Court a Holmes, a Hughes, a Brandeis, a Stone.

Truman, *supra* note 97, at 476.

[99] *Gal.* 3:26. Indeed Christian theologians and commentators have understood the power of the divine to provide an arguably neutral site for the mediation of social disputes and to provide a point of fundamentalist stability to the way society approaches such questions. "The Christian God has been a breaker of barriers from the first. All who have a

Judges derive authority from speaking the divine. Only when judges lose their individual humanity, when they become the conduit for the vocalization of the voice of God, can we say that judges speak with authority. Judges speaking personally, no matter how chic today, carry no authority. Such speaking is as powerful as the physical power of the speaker. Therefore, this power is never very great or durable. The nature of the voice with which the U.S. Supreme Court speaks has become a lively topic of debate within the opinions of the Court itself.[100] Yet when judges transcend the individual, when they serve as the vocal chords of the divine, then they speak with authority. Even the reluctant submit to such voices, whether the divine resides within Logos or as the common law of a fickle society.

Identification-memorialization implicates four constructs of basic engagements between institutions and society in the struggle to produce and reproduce popular culture. Two of these cultural patterns of authority are Greek and two are Hebrew. These constructs reflect the basic tension at our cultural bedrock between the Greek and the Hebrew. Their relationship is simultaneous and complex. They exist tightly bundled in the modern West. By unraveling them, we can begin to appreciate the pulsating and contradictory impulses out of which our engagement with the authority of the judge is crafted. We can also begin to appreciate why judges are not priests, and why priests are not God.

The two Greek constructs of authority are oracular and immanent engagements. The divine here routinely intervenes and explains. This judicial voice is singular and uncontestable. It is the authority of Teiresias, "whose soul grasps all things, the lore that may be told and

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distinctively Christian experience of God are committed to the expansion of human fellowship and to the overthrow of barriers." WALTER RAUSCHENBUSCH, A THEOLOGY FOR THE SOCIAL GOSPEL 186–87 (1917).

[100] Thus, for example, in *U.S. v. Virginia*, 518 U.S. 515 (1996), a dissenting Justice Scalia scolded his colleagues for their constitutionalization of proscriptions of previously lawful single-sex state-supported educational institutions: "The people may decide to change the one tradition, like the other, through democratic processes; but the assertion that either tradition has been unconstitutional through the centuries is not law, but politics-smuggled-into-law." *Id.* at 569 (Scalia, J. dissenting); *see also* Lee v. Weisman, 505 U.S. 577, 597 (1992) (religious invocations at school ceremonies prohibited under First Amendment). In *Lee v. Weisman*, Justice Scalia in dissent scolded the majority for a decision based on their "changeable philosophical predilections." *Id.* at 632 (Scalia, J., dissenting). On occasion, though, Justice Scalia is able to weave his own "changeable philosophical predilection" into the fabric of the constitutional jurisprudence of the Court itself. *See* Employment Div., Dep't of Human Resources v. Smith, 494 U.S. 872, 890 (1990) (examining the use of peyote in ceremonial, native religious practice).

the unspeakable, the secrets of heaven and the low things of earth."[101] It is also a voice to which society grudgingly submits, though submit it will—and by its own hand. There is also a bit of Cassandra in all such speech.[102] The Greek engagements in identification-memorialization suggest the culturally expected pattern of *pronouncement.* Pronouncement, in this sense, is both orderly and ordered. Control and moderation, observation and detachment, are the metaphors of this force of pronouncement. The implication is one of perfect sight—either perfect vision of the past or of the present. These suggest place and stasis; there is no place to go. Within this voice is the culturally significant authority which must be obeyed.

The two Hebrew constructs are cacophonous and tumultuous. The divine is present here but ultimately unknowable. All authority represents a striving to recapture the divine voice, which is both necessary and doomed to at least partial failure. Here, drawing on the cultural power of Job's companions, the judicial voice is tentative and open to challenge. In the cultural form of the prophetic voice, authority moves from the court to the dissenting voices within the court. The Hebrew engagements suggest the culturally expected pattern of engagement and hierarchy of truth. Humankind attempts to seek the way to the divine, comply with the law, or know the word of God: "Yet Thou hast cast off, and brought us to confusion. . . . Wherefore hidest Thou Thy face And forgettest our affliction and our oppression?"[103] These engagements acknowledge the inevitability of always failing to attain complete and immutable truth or knowledge. Pronouncement, in this sense, is, by definition, incomplete and always potentially incorrect. Moreover, the process of arriving at pronouncement will always contain within it its antithesis, the seeds of that pronouncement's own doom. These voices suggest a journey to perfection back to the place from which we came. With this voice is the culturally significant authority to disobey.

Judges act within the context of the Greek construct when they engage in the field of cultural production in their roles as "Homer"

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[101] Sophocles, *Œdipus the King, in* THE COMPLETE PLAYS OF SOPHOCLES 77, 84 (Sir Richard Claverhouse Jebb, trans., Bantam Books, 1982).

[102] *"Tunc etiam fatis aperit Cassandra futuris ora dei iussu non umquam credita Teucris. Nos deluba deum miseri, quibus ultimus esset ille dies, festa valmus fronde per urbem."* ["Then to cap all, Cassandra opened her mouth for prophecy—she whom her god had doomed never to be believed by the Trojans. But we poor fools, whose very last day it was, festooned the shrines of the gods with holiday foliage all over the city."], VERGIL, THE AENID 42, Book II, lines 246–49 (C. Day Lewis, trans., Doubleday Anchor Books 1953) (19 B.C.).

[103] *Psalms* 44:10; 44:25.

and as "Delphic Apollo." The court acts within the context of its Hebrew construct when it engages in the field of cultural production in its role as "The Friends of the Job" and in its role as site of the articulation of the Prophetic voice—of dissonance in the field of cultural production. Each of these constructs originates within our culture. Each is patterned after a process of cultural communication whose signifiers are so well understood that they form part of our unconscious foundation of communication. Thus, in using these voices, courts need not affirm or define either their authority or their role. At the same time each voice carries with it the limits of its authority—the extent of its competence within the field of cultural or normative production. I will speak to each of these roles in turn.

A. *The Greek Voices*

1. Court as the Stage for the Homeric

When courts speak with the Homeric voice, they chronicle "what is." They speak here with the voice of the preserver—of the identifier and memorializer of our common traditions. This voice has thoroughly internalized the past.[104] It is the voice of reassurance, the voice that reminds us that what we know "is." It is the storyteller of our oral tradition. Here we find ourselves at the core of the identification-memorialization matrix, the competence of the Homeric courts limited to retelling the old stories and reassuring us of the continued power of these retold stories.

The Homeric is the voice of our parents whom we beg to retell us the story we heard a hundred times before.[105] Like that particular parental voice, the voice of the Homeric court is a voice that we demand perform in a very particular and limiting way. The story must be retold exactly as it was told before, and the context must remain unchanged. If we hear the story in bed before we fall asleep we demand the story be told always when we are in bed before we fall asleep. The

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[104] The Homeric voice I describe here has a Germanic counterpart, the saga society which existed among pre-Christian Germanic peoples. For an interesting view, see WILLIAM IAN MILLER, BLOODTAKING AND PEACEMAKING: FEUD, LAW, AND SOCIETY IN SAGA ICELAND (U. Chi. Press 1990). For a perceptive commentary on Miller's work, see generally Richard A. Posner, *Medieval Iceland and Modern Legal Scholarship*, 90 MICH. L. REV. 1495 (1990).

[105] Recall that both the *Odyssey* and the *Iliad* began as oral works, and they were not reduced to writing until at least the sixth century B.C. Richard Lattimore, *Foreword*, *in* HOMER, THE ILIAD OF HOMER 13 (Richard Lattimore trans., U.Chi. Press 1951).

recitation itself becomes fetish and assumes a divinity of its own, sanctified in tradition.

The language of American judges is full of the Homeric. While examples of the Homeric voice of courts are numerous, I content myself here with examples of just a few. The voice of Justice Scalia assumes the Homeric with some regularity. In *Romer v. Evans*,[106] the justices of the Supreme Court all spoke Homerically, but focused on different and conflicting strands of the common social understanding of the way things ought to be. On the one side stood Justice Scalia, fiercely reciting the story of the defense of common understanding of morality. On the other side stood Justice Kennedy, equally fierce in his defense of the bedrock understanding of American republicanism. I have suggested that:

> *Romer* illustrates the power of decisions which recognize at some subliminal level that sex is politics. In a sense, the Court merely confirmed what our political society had long held true—that everyone should be allowed to "play" the game of republican politics. . . .[107] "Homosexuals are forbidden the safeguards that others enjoy or may seek without constraint. They can obtain specific protection against discrimination only by enlisting the citizenry of Colorado to amend the state constitution."[108] The majority sought to do little more than to identify the basic rules within which republican principles of politics works [sic] in this country. These are not new rules, or rules with no connection to ac-

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[106] 517 U.S. 620 (1996).

[107] Backer, *supra* note 95, at 384–85. In a recently published article, Michael Mannheimer refers generally to the Equal Protection Clause's "equal citizenship principle." *See* Michael J. Mannheimer, *Equal Protection Principles and the Establishment Clause: Equal Participation in the Community as the Central Link*, 69 TEMPLE L. REV. 95, 114–17 (1996).

[108] Backer, *supra* note 95, at 384 (citing Romer v. Evans, 517 U.S. 620, 631 (1996)). Justice Scalia, in dissent, had a far narrower view of what sort of political participation would be enough. Homosexual political advances are subject "to being countered by lawful, democratic countermeasures as well," including "the democratic adoption of provisions in state constitutions." *Romer*, 517 U.S. at 646, 647 (Scalia, J., dissenting). The problem, of course, as the majority saw, and as Justice Scalia's ideology could not fathom, is that our popular political culture does not permit the use of the democratic process to push any participant *out of the game*. And that is what the amendment at issue in *Romer* effectively did. The Justices spent some time considering this point at oral argument where the issue was crystallized. *See* Official Transcript of Oral Argument, Oct. 10, 1995, at 51–56, Romer v. Evans, 517 U.S. 620 (No. 94-1039) [hereinafter *Romer* Oral Argument], *available in* 1995 WL 605822. As Jean E. Dubofsky argued on behalf of respondents, the question was whether the referendum process constituted a prohibited "restructuring of the political process." *Id.* at 51.

> tual practice. The majority directed its inquiry to understanding the way in which Americans played the political game of republicanism in this century.[109] Indeed, the majority relies on tradition to support their [sic] decision.[110]

Justice Scalia, in his dissent, correctly states—though he seems to fail to understand—the strength of that argument.[111] Scalia's dissent, ironically, is also based on tradition, but of a different kind.[112] In the end, Justice Scalia's traditional values had to give way to those championed by the majority, and sensibly so—Colorado's legislature is as capable of protecting traditional moral values as is the population it represents. In the end, our founders chose for our political home republican Rome, not democratic Athens.[113] That choice imports with it a sense of the dignity of each of the citizens of that polity. *Romer* is a case in sync with that core social reality.

Social policy is also an area ripe for the Homeric voice, especially in the United States. Consider the reasons a reputedly very liberal Court refused to construe the American Constitution as imposing on

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[109] Backer, *supra* note 95, at 384. This characterization was especially true at oral argument. Thus, for instance, Justice Ginsburg drew analogies to the political give and take of the suffragists at the turn of the twentieth century. *See Romer* Oral Argument, *supra* note 109, at 14 ("I was trying to think of something comparable to this, and what occurred to me is that this political means of going at the local level first is familiar in American politics.").

[110] Backer, *supra* note 95, at 384 (citing *Romer*, 517 U.S. at 634–35). "It is not within our constitutional tradition to enact laws of this sort. Central both to the idea of the rule of law and our own Constitution's guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance." *Romer*, 517 U.S. at 634.

[111] "Lacking any cases to establish that facially absurd proposition [of the sort of statewide constitutional amendment through referendum at issue in the case], it simply asserts that it *must* be unconstitutional, because it has never happened before." *Romer*, 517 U.S. at 647 (Scalia, J., dissenting) (emphasis added). That is precisely the point. Tradition militates against this sort of fundamental wrenching of political culture in the absence of evidence of a substantial amount of acceptance of these rules *in fact*.

[112] "The Court today . . . employs a constitutional theory heretofore unknown to frustrate Colorado's reasonable effort to preserve traditional American moral values." *Id.* at 651. Indeed, the essence of Justice Scalia's textualist project is essentially Homeric—the retelling of law as it was heard the first time. "But the Great Divide with regard to constitutional interpretation is not that between Framers' intent and objective meaning, but rather that between *original* meaning (whether derived from Framers' intent or not) and *current* meaning." Antonin Scalia, *Common-Law Courts in a Civil Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 38 (Amy Gutmann ed., 1997).

[113] *See* THE FEDERALIST Nos. 10, 39, 63 (Alexander Hamilton).

the state the fundamental obligation to provide social welfare benefits to all of its people:

> For here we deal with state regulation in the social and economic field, not affecting the freedoms guaranteed by the Bill of Rights, and claimed to violate the Fourteenth Amendment only because the regulation results in some disparity in grants of welfare payments to the largest AFDC families. For this Court to approve the invalidation of state economic or social regulation as "overreaching" would be far too reminiscent of an era when the Court thought the Fourteenth Amendment gave it power to strike down state laws "because they may be unwise, improvident, or out of harmony with a particular school of thought."[114]

Sex tends to bring out the Homeric in the European courts. The European Court of Justice attempted the Homeric voice in *Grant*.[115] The ECJ patiently explained the reality of social norms for those who would attempt to legislate social equality between heterosexual coupling and homosexual coupling where no such social equality existed in fact within Europe.[116] Ironically, both the House of Lords and the European Court of Human Rights spoke Homerically in *R. v. Brown*,[117] though each emphasized a different common understanding. In the former case, the House of Lords took a very traditional view of sex play, and determined that what the defendants in that case engaged in was anything but sex: "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."[118] Having attempted an encyclopedic explanation

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[114] Dandridge v. Williams, 397 U.S. 471, 484 (1970).

[115] Southampton Indust. Tribunal, Case C-249/96, (1998) All ER (EC) 193.

[116] *See generally id.* For a discussion of the rationale of the *Grant* court, see *supra* Part II.B.

[117] House of Lords, (1994) 1 AC 212, (1993) 2 All ER 75, 124 (1993) 2 WLR 556, 157 JP 337, 97 Cr App Rep 44, 11 March 1993 (adult males who engaged in various same sex sado-masochistic activities with much younger men convicted of keeping a disorderly house, and of assault occasioning actual bodily harm and wounding, contrary to the Offenses Against the Person Act of 1861, §§ 47 and 20, respectively; the House of Lords, by a 3 to 2 split, determined that consent in such cases could not be a defense to the charge). This case substantially restated the law in this area and has resulted in a tremendous amount of commentary. *See generally, e.g.*, THE LAW COMMISSION, CONSULTATION PAPER NO. 134, CRIMINAL LAW: CONSENT AND OFFENSES AGAINST THE PERSON (1994) (U.K.); Carl F. Stychin, *Unmanly Diversions: The Construction of the Homosexual Body (Politic) in English Law*, 32 OSGOODE HALL L. REV. 503 (1994).

[118] *See* Backer, *supra* note 11, at 594. On the construction of the "sado-masochistic homosexual" by the House of Lords opinions, see Sangeetha Chandra-Shekeran, *Critique and*

of the traditional boundaries of permissible sadism and masochism, as it apples to sporting events and body mutilation, the Law Lords then distinguished unlawful sex play from other forms of sadism and masochism as a function of the common practices of British society.[119] The European Court of Human Rights, in contrast, spoke Homerically about the traditional boundaries of sex play. While sado-masochistic sexual practices may well be "sex," it is the sort of violent activity which a state may suppress.[120] This sort of sex can be suppressed because, frankly, it terrifies and disgusts according to the common understanding of European society.[121] Because a European consensus seemed to permit suppression of such conduct, the "margin of appreciation" built into the European right of sex "free" of interference could be limited.[122]

Common law courts have internalized the Homeric voice in the concept of *stare decisis*. Here we confront the lingering authority of past recitations of "what is." Such prior recitations are now invested with omniscience, clarity and unity. That which is "must be" continues unless something fundamental changes. Thus, *stare decisis*, as a Homeric device of authority, played a critical role in the determination

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Comment: Theorising the Limits of the "Sadomasochistic Homosexual" Identity in R. v. Brown, 21 MELBOURNE U. L. REV. 584 (1997). The "problem" of conduct and sex, that is, of defining and redefining conduct as sexual for purposes of regulating "sex" or conduct outside of sex, see Nicola Lacey, *Unspeakable Subjects, Impossible Rights: Sexuality, Integrity and Criminal Law*, 11 CAN. J. L. & JUR. 47 (1998). This "problem" has proven pivotal in the investigation of the criminal activities of President Clinton. If what the President is described as doing is not considered "sex" by him, then it might well be hard to prove that he perjured himself, whatever Prosecutor Starr says falls within the definition of sexual activity.

[119] For an American critique of the decision as bad common law, see generally Brian Bix, *Consent, Sado-Masochism and the English Common Law*, 17 QUINNIPIAC L. REV. 157 (1997). On the problem of sex as object and descriptor, see generally JUDITH BUTLER, BODIES THAT MATTER: ON THE DISCURSIVE LIMITS OF SEX (1993). On the general context of (homo)sexual discourse in law, and its relationship to social norm(ality), see generally LESLIE J. MORAN, THE (HOMO)SEXUALITY OF LAW (1996).

[120] The ECHR was willing to concede that the activity was sex, but also shared a common view that this sort of sex was dangerous and revolting. *See Brown*, House of Lords, (1994) 1 AC 212, (1993) 2 All ER 75, 124 (1993) 2 WLR 556, 157 JP 337, 97 Cr App Rep 44, 11 March 1993. Moreover, it fell outside even the limits of toleration which Europeans had crafted for "normal" homosexual activity in cases like *Norris v. Ireland*, 13 Eur. Ct. H.R. (ser. A) No. 142 (1988). Instead, *Brown* centered on an orgy in which the participants included men barely old enough to legally consent, if that. More than one socio-cultural taboo was trampled in that case. It is no wonder that the ECHR chose the easy route there.

[121] *See, e.g.*, Backer, note 11, at 594; *see generally* Stychin, *supra* note 117.

[122] This was the essence of the ECHR judgement. No nation/people really likes sado-masochistic conduct. No nation/people officially permits such conduct as specified in the *Brown* case. No nation/people fails to enforce the laws against such practices. Consequently, the ECHR could use *Brown* to construct the reverse mirror image of *Norris*.

that abortion remained a fundamental right of American women.[123] In this case, the act of judges transcending themselves to make a pronouncement of the divine is clearly visible. Had the justices voted their personal beliefs, the result might have been quite different.[124]

2. Court as Delphic Apollo

When courts speak as the Delphic Apollo they chronicle "what has become." They speak with the voice of the seer—not the seer into the future, but rather the seer of the *present.* This voice appears to create through the act of speaking; this voice is that of Justice Cardozo in *Ultramarine Corp. v. Touche,*[125] which appears to create a new reality from out of the rubble of the old.

This voice of the courts seems to transform things: legislators in judicial drag according to so-called conservative pundits. Of course, it is no such thing. What courts create in their role as Delphic Apollo is *awareness* of a thing. This is the Delphic form of identification. The Delphic Apollo does not, by giving voice to it, create the thing voiced. Yet it is this critical distinction between the creation of awareness through the identification of "what has become" and the creation of the norms themselves to which liberal modernism remains oblivious.

Awareness is a powerful form of identification, especially as expressed in the language of the juridical. It becomes all the more powerful with the Delphic when awareness comes for the first time. In this form, the memorialization of the identified norm or rule functions as the means for definition and articulation of "that which has become." Memorialization in the Delphic context serves to make that which was identified more "real." It conforms and propagates the awareness attained through the Delphic pronouncement of that "which has become." The creation of the shareable norms function of memorialization assumes great significance in this context. Unlike the context of the Homeric voice, there is no history of similar pronouncements on

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[123] *See* Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 899 (1992).

[124] *See, e.g.,* Susan M. Halatyn, Note and Comment, *Sandra Day O'Connor, Abortion and Compromise for the Court,* 5 TOURO L. REV. 327, 331 (1989) (recounting testimony at Justice O'Connor's confirmation hearings).

[125] 255 N.Y. 170, 174 N.E. 441 (1931) (action for damages against accountant for negligent misrepresentation). Justice Cardozo begins the analysis of this famous opinion thusly: "The assault upon the citadel of privity is proceeding in these days apace. How far the inroads shall extend is now a favorite subject of juridical discourse." *Id.,* 255 N.Y. at 180, 174 N.E. at 445.

which memorialization can rest. Thus, here we find identification-memorialization at its most fluid.

In the United States, *Roe v. Wade*[126] provides an archetypical example of Delphic pronouncement. *Brown v. Board of Education*[127] provides another. In each of these cases, the justice speaking for the majority of the Court chose the moment to articulate consciously, and as persuasively as possible, the changed social landscape as seen by the Court. In one, the Court attempts to identify, and to memorialize, the new social consensus on the power of a woman to determine the fate of her fetus. In the other, the Court speaks of a new social understanding of the nature of the relationship between races in the United States. In both cases, the articulation of "what is becoming" aroused a tremendous reaction among those who would compel the State to continue to enforce "that which was."

The reinvention of fairness as a general principle of the American constitutional law of procedure provides another view of the Delphic. The definition of fairness, "meaningful notice and meaningful opportunity to be heard," was not changed. However, the common understanding of what those words meant in context changed radically. What had been the traditional means of depriving people of property pending suit through *ex parte* proceedings in replevin was found to violate basic principles of fairness.[128] Now, after two hundred years, common social consensus had changed; fear of unjust deprivations had become more important. As a consequence, the Supreme Court determined that fairness required notice and a hearing prior to the deprivation.[129] Though the Supreme Court modified this bright

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[126] *See* 410 U.S. 113, 164–65 (1973).

[127] *See* 347 U.S. 483, 495–96 (1954). Even this long after the decision in *Brown*, legal academics continue to argue over the significance of the decision. Yet, though then is great disagreement over the nature of the significance of the decision and its cultural effects after its rendering, there is little disagreement that the *Brown* court sought to articulate the parameters of a changed social landscape. An excellent articulation of these different views of *Brown's* significance can be found in Vol. 80, No. 1 of the *Virginia Law Review*. *See* Klarman, *supra* note 10; David J. Garrow, *Hopelessly Hololow History: Revisionist Devaluing of* Brown v. Board of Education, 80 VA. L. REV. 151 (1994); Gerald N. Rosenberg, Brown *Is Dead! Long Live* Brown*!: The Endless Attempt to Canonize a Case*, 80 VA. L. REV. 161 (1994); Mark Tushnet, *The Significance of* Brown v. Board of Education, 80 VA. L. REV. 173 (1994).

[128] *See* Fuentes v. Shevin, 407 U.S. 67, 96 (1972).

[129] *See* Sniadach v. Family Finance Corp. of Bay View, 395 U.S. 337, 343–44 (1969) (prejudgement garnishment of wages); Goldberg v. Kelly, 397 U.S. 254, 271 (1970) (deprivation of welfare benefits). Justice Brennan explores the interest of the recipient in the stream of payments the state is obligated to provide to the eligible, much the way one would look at a retirement annuity for a retired person, or the wages of a poor worker. The

line definition in subsequent cases,[130] its initial pronouncement announced a sea change in the understanding of fairness, and, in that sense, it was Delphic.

The human rights cases of the ECJ provide a catalog of Delphic utterances. For example, prohibitions of discrimination on the basis of sex have taken on a life of their own in the ECJ and have become more normalized within western European society.[131] Law, long dormant on the books of the European Communities, suddenly has come to life. It is unlikely that sufficient social consensus existed to support the great crusade against sex discrimination until the 1970s in Europe. The ECJ's extension of this principle to transsexuals, discussed above, was also Delphic. Unthinkable in the 1970s, transsexual rights became acceptable enough twenty years later.

The ECHR's project of distilling European standards of moral conduct and imposing those standards throughout Europe evidences the Delphic project:

> In those matters where there has been a given legislative trend in several Member States of the Council of Europe it might seem possible to try to distill certain European standards. This is the case regarding the trend of decriminalizing homosexual conduct between consenting adults in private or, as in the recent *Soering* case, the practical abolition of the death penalty.[132]

B. *The Hebrew Voices*

1. Court as Friends of Job: The Impossibility of Perfection of Knowledge

The first of the Hebrew voices is a cacophony that introduces us to the collective voices of courts, none of which can speak with total

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reference, quite conscious, is to *Sniadach*. At the end of the analysis is Justice Brennan's conclusion that the consequences of erroneous deprivation is great: "His need to concentrate upon finding the means for daily subsistence, in turn, adversely affects his ability to seek redress from the welfare bureaucracy." Goldberg v. Kelly, 397 U.S. at 264.

[130] *See* Mitchell v. W.T. Grant Co., 416 U.S. 600, 619–20 (1974); North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601, 619 (1975); Connecticut v. Doehr, 501 U.S. 1, 22 (1991).

[131] *See, e.g.*, Defrenne v. Sabena (1976) ECR 455; Chris Docksey, *The Principles of Equality Between Women and Men as a Fundamental Right Under Community Law*, 20 INDUS. L.J. 258–80 (1991).

[132] Bengoetxea & Jung, *supra* note 56, at 239.

clarity or coherence, and all of which grasp the object of cultural production—but only imperfectly, incompletely, and temporally.[133] Here the quality of the voice of the courts stands in contrast to the "Greek" voices of the court. The Hebrew voice is a non-linear voice, a human voice, rather than a divine voice. It is a shaky voice, confident but without the ability to rely on a direct connection to the divine.

The Greek voice of Homer is confident in its recollection of historical norms. The Delphic voice is confident in its ability to see "that which has become" amid the swirls of culture. However, the Hebrew voices operate without the patina of certainty. These voices are as confident as those of the Greeks, but they are also voices consciously in a world of imperfect knowledge.

Who are these friends of Job?[134] As you might recall, after Job had been afflicted by God for the purpose of seeing if Job would curse God, three of his friends came to comfort him and help him understand the reasons for his condition. Each of them sought to identify the cause of Job's afflictions and to suggest the means by which such affliction could be overcome. A fourth friend then reviewed the efforts of the first three friends, found the answers advanced unsatisfactory, and attempted a better understanding of the reasons for his suffering. Let us examine each in turn:

a. *Eliphaz the Temanite*

Job was suffering because he had sinned. To ameliorate the suffering, Job would have to go to God and lay his cause before Him. "Blessed is the man whom God corrects; so do not despise the discipline of the Almighty."[135] But of course, Eliphaz misread what he saw, as Job had not sinned.

b. *Bildad the Shuhite*

Job was suffering because he would not admit that he had sinned—Job suffers for a failure to acknowledge wrongdoing (as opposed to suffering solely for the wrongdoing). To ameliorate the suffering, Job must admit the offense and then plead with the Almighty.

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[133] The best aural/visual image of this is the famous debate scene between the Jewish scholars in Strauss' opera, *Salome.* HEDWIG LACHMANN, SALOME (music by Richard Strauss, Dresden, 1905) (based on the play by Oscar Wilde (orig. in French)), Scene 4a (Jews and Nazarenes) [hereinafter SALOME].

[134] *See generally Job.*

[135] *Id.* at 5:17.

"Does God pervert Justice; Does the Almighty pervert what is just?"[136] But of course Bildad also misperceives, for Job has no sin to acknowledge. To acknowledge sin where none exists is to engage in empty gestures.

c. *Zophar the Naamathite*

Job was suffering not merely because he sinned or failed to acknowledge such a possibility, but because he knew he sinned, refused to acknowledge it, and, when confronted with the reality that the sin was observed, sought to hide it. Job thus suffers for covering up the sin. "Surely he recognizes deceitful men; and when he sees evil, does he not take note?"[137] Zophar was wrong, however; Job has no sin to cover up or confess.

d. *Elihu the Buzite*

He rejects the counsel of the other friends as partially correct and suggests that Job was suffering to be trained and molded by God. Job must be satisfied to take instruction and learn what he can from the experience.

The story of Job ends with a twist that we find unable to replicate within culture. God interrupts the great cacophony of argument among the friends of Job. He delivers the "right" answer which the friends attempted to identify and memorialize as "written" on the body of Job. The right answer is that there is no answer that we are capable of identifying or understanding. "Where were you when I laid the earth's foundation?"[138] "Would you discredit my justice? Would you condemn me to justify yourself? Do you have an arm like God's and can your voice thunder like His?"[139]

Our Jobian voices of authority bring us face to face with the juridical as human, stumbling to understand the divine. These are the "feet of clay" of our Greek perfection. For courts can approach identification; they may memorialize their understanding of "what is" or "what is in the becoming," yet both enterprises remain incomplete and, therefore, deceptive, if only by omission. Utterances in the Greek voices are comforting because they speak to us in a single voice about a single perspective. We can understand these and act accordingly, if

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[136] *Id.* at 8:3.
[137] *Id.* at 11:11.
[138] *Id.* at 38:4.
[139] *Job* at 40:8–9.

we are of such a mind. Or we can rebel, understanding the object and nature of our rebellion. But Eliphaz, Bildad, Zophar, or Elihu remind us that the juridical (and even the legislative) voice can also be polytonal. What is implicit in the cultural undergirding of our Greek voices—the gods each speak with a singular voice, but there are many gods working at cross purposes—is at the heart of the authority of the Biblical voices of the juridical.

Polytonality in authority is so ingrained in law-making within common law systems that we are no longer even conscious of its fundamental influence in shaping the way in which society hears and processes the voices of authority. Still, we understand its dynamics. Who but a person steeped in common law traditions can see its workings so brilliantly portrayed in the disputation scene of the learned doctors of Jewish Church law in the Strauss opera *Salome*.[140] Who has not heard this scene repeated in any of the multiple opinions common to the British tradition? Who has not heard the American analogue in the multiple opinions common in the most contentious cases before the U.S. Supreme Court?

Yet, it is not enough that the Biblical voices are polytonal; the Hebrew voices evidence transitoriness as well. Culture has attributes of the divine; it is dynamic. Its presence can be felt, and it provides force and structure, but it cannot be contained within any system of

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[140] SALOME, *supra* note 133. The legal question facing Herod was the jurisdiction of Jewish Church officials, and whether the Church had authority over John the Baptist. Five doctors of Jewish law come to make their case before Herod:

> First Jewish Official: Truly, my lord, it were better to deliver him into our hands.
> Herod: Enough of this! I will not deliver him into your hands. He is a holy man. He is a man who has seen God.
> First Jewish Official: That cannot be. Since the prophet Elias no man has seen God. He was the last man who has seen God face to face. In these our days God doth not show himself. God Hideth himself. Therefore great evils have come upon the country, great evil.
> Second Jewish Official: Verily, no man doth know if Elias indeed saw God. Per adventure it was but the shadow of God the he saw.
> Third Jewish Official: God is at no time hidden. He showed himself at all times and in all places. God is in what is evil even as He is in what is good.
> Fourth Jewish Official: Thou shouldst not say that, it is a very dangerous doctrine that cometh from Alexandria. And the Greeks are Gentiles.
> Fifth Jewish Official: Thou speakest truly. O yes, God is terrible. But as for this man, he hath never seen God. Since the prophet Elias no man has seen God.

Id. And so we begin again, through another set or perambulations, this time speaking simultaneously, until in frustration, Herodias commands them to be still and the Nazarenes provide yet another view.

pronouncement and systemization. This description is as true of unitary systems of pronouncements as it is of polytonal systems. All such systems, all such pronouncements, will necessarily be contingent and partial. However, the process of identification-memorialization remains a static enterprise. It captures a moment's pause in the relationship between people; it also captures the momentary consensus in the engagement of groups with the social text that defines the behavioral rules governing their interaction.

The polytonality of the courts reminds those who listen that no pronouncement of the present is either stable or comprehensive. Likewise, the voice of perfection—the voice of Homer or the Delphic Apollo—can serve only as a temporally limited stopping place. They are markers within a dynamic system that point to their own obsolescence. They provide comfort—the understanding of the place "where we have been" or "where we have arrived"—but they cannot provide either repose or tranquility. The cacophony of the juridical provides the imperfect noise within which we can engage in cultural hermeneutics. Within the juridical we are all Eliphaz, Bildad, Zophar, or Elihu. We are sure of our knowledge of what we see and confident of our authority to *declare* and impose.

Consequently, our courts declare in the "perfect" tense of our Greek voices. The courts rely on their ability to Hellenize their voices to assert a perfect authority for the acceptance of their particular pronouncement. Yet this perfect tense can be heard in the "imperfect" tense of Hebrew challenge. Behind these Hellenized voices are the uncertainties, the blindness to the divine, at the core of our Hebrew voices. The four friends of Job also provide our foundational metaphor for the necessary uncertainty and, therefore, the cacophony of the juridical voice. American postmodernists might describe this uncertainty as the limitations arising from the "situatedness" of juridical analysis.[141] The divine has drawn a curtain separating itself from humanity, yet leaves it to humankind to reach the divine without the benefit of divine knowledge. We may witness, we must accept, but we can never really know that we are right. Consider that not one of the friends of Job is possessed of the whole of wisdom; each can see only as far as the wisdom accorded him permits, but lacking the whole of wisdom, none can speak entirely authoritatively.

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[141] *See generally* STANLEY FISH, THERE'S NO SUCH THING AS FREE SPEECH AND IT'S A GOOD THING, TOO (1994).

Each of the friends of Job possesses a part of what makes wisdom complete; that is, each holds a partial key to divine wisdom. For Eliphaz, the key to wisdom and divine authority is observation and experience of life; empirical data provides authority to declare.[142] Bildad finds wisdom complete in history: knowledge and understanding inherited from the past provide the key to authority for future action; tradition provides its own authority.[143] Zophar demonstrates the way in which intuitive understanding provides authority; logic and inspiration provides its own authority.[144] Elihu finds that with authority comes acceptance of "that which is": authority comes from obedience: "I get my knowledge from afar; I will ascribe justice to my Maker. Be assured that my words are not false; one perfect in knowledge is with you."[145] The ECHR's long struggle with the age of consent for consensual sexual relations between people of the same sex contains flashes of the imperfect wisdom of the friends of Job.[146]

Possession of only a part of divine wisdom permits our judges to be completely wrong. The only source of unsituated or complete wisdom in the story of Job is God. But God alone, of all of the participants in the Jobian story, will not speak. The juridical voices aspire to divinity—absolute authoritativeness. However, the Jobian story makes clear that such authoritativeness is to be denied us.[147] When judges are perceived to speak with the voices of any friends of Job, such pronouncements made in those voices lose much of their authority. These are judicial voices which cannot be ignored, but which can be discounted. An alternative is available; it is humankind speaking, not the divine.

At first blush, this might appear to be a tragic moral. But the opposite is true. For the Biblical voice confirms our liberation from the absolute tyranny of human authority. The Jobian voice is a liberating voice by its very marginality. For in this story, all of us are outside the juridical; we are Job himself. We overrule or ignore the declarations

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[142] *See Job* 4:7–8; 5:3, 27.

[143] *See id.* at 8:8–9; 18:5–21.

[144] *See id.* at 11:6; 20:1–29.

[145] *Id.* at 36:3–4.

[146] *See* Helfer, *supra* note 64, at 1059, 1059 n.105.

[147] Justice Scalia's observation in *Oncale v. Sundower Offshore Services, Inc.* is most pertinent here: "The real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed." 523 U.S. 75, 82 (1998) (finding same-sex sexual harassment cognizable under statute at issue and rejecting blanket rule excluding this form of harassment from statute).

made on our behalf. We are well used to the art of limiting cases to their facts. We are also well versed in the art of ignoring declarations and pronouncements we find "unhelpful." Even courts will act like Job from time to time. *Romer v. Evans* provides a wonderful example of this art. In a case about the power of the state to limit the availability of the political process to sexual non-conformists, the majority ignored the most significant case declaring "what is"—*Bowers v. Hardwick*[148]—in favor of a different declaration.[149]

Indeed, because Jobian voices limit authority, there is a significant likelihood that Jobian pronouncements will be tested and re-tested. Until there is social consensus and juridical articulation of that consensus, the issue will continue to plague the courts. Thus, race relations, homosexuality, and abortion, to name only a few issues in the English-speaking world, remain problematic in society and before the courts. Examples of the voices of the friends of Job abound. Moreover, many common law multi-judge courts appear to operate like the friends of Job. When all judges speak, and they say different things, they may appear as the friends of Job, though each of the judges speaking assumes the voice of Homer or that of the Delphic oracle.

The six opinions filed in *Adarand Constructors, Inc. v. Peña*[150] provide a striking example of the Jobian paradigm in American constitutional jurisprudence. In that case, the U.S. Supreme Court determined that all racial classifications imposed by the state must be analyzed under the strict scrutiny standard, virtually assuring that no such classification program would survive.[151] Together, the opinions overlap like a complex, intertwined coiling ball of snakes. Justice O'Connor:

> announced the judgement of the Court and delivered an opinion with respect to Parts I, II, III-A, III-B, III-D, and IV, which was for the Court except insofar as it might be inconsistent with the views expressed in the concurrence of [Justice] Scalia . . . and an opinion with respect to Part III-C. Parts I, II, III-A, III-B, III-D, and IV of that opinion were joined by [Chief Justice] Rehnquist, and [Justices] Kennedy

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[148] *See* 478 U.S. 186, 196 (1986).

[149] *See generally* Romer v. Evans, 517 U.S. 620 (1996); Backer, *supra* note 95, at 384–85.

[150] 515 U.S. 200 (1995) (examining constitutionality of federal minority set aside programs for contracts).

[151] *Id.* at 202.

> and Thomas, . . . and by [Justice] Scalia . . . to the extent heretofore indicated; and Part III-C was joined by [Justice] Kennedy. [Justices] Scalia . . . and Thomas . . . filed opinions concurring in part and concurring in the judgment. [Justice] Stevens filed a dissenting opinion, in which [Justice] Ginsburg joined. . . . [Justice Souter filed a dissenting opinion, in which [Justices] Ginsburg and Breyer joined. . . . [Justice] Ginsburg filed a dissenting opinion in which [Justice] Breyer joined . . . .[152]

Each of the judges sought to speak with a Greek voice. Taken together, however, the voices blend together into a Jobian cacophany. The polyphony itself steals the divine fire from the court's pronouncement. The effect, of course, is to lessen the impact of the formal decision.[153] The only decision of the *Adarand* court that is likely to survive is that society is in transition and critically undecided about the value of minority preference programs because they violate certain economic core taboos. The *Adarand* problem will be raised again

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[152] *Id.*

[153] At least one current member of the Supreme Court, Ruth Bader Ginsburg, when she was sitting on the D.C. Circuit Court of Appeals, expressed some tentative criticism of multiple opinions, if only when a justice is moved to write for the "wrong" reasons. Among the "wrong" reasons identified, following Richard Posner, were to register a minor reservation, suggest an additional reason for the result, criticize a dissenting opinion, or set out the writer's own interpretation of a majority opinion. Ruth Bader Ginsburg, *Remarks on Writing Separately*, 65 WASH. L. REV. 133, 149 (1990) (citing, in part, RICHARD POSNER, THE FEDERAL COURTS: CRISIS AND REFORM 233, 239–41 (1985)). However, Ginsburg notes, "Hard cases do not inevitably make bad law, but too often they produce multiple opinions." *Id.* at 148 (citing in part POSNER, *supra*, 233, 239–41). The result of opinion proliferation, for then Judge Ginsburg, would be a movement "toward the Law Lords' pattern of seriatim opinions, each carrying equal weight, and under which 'the English lawyer has often to pick his way through as many as five judgements to find the highest common factor binding on the lower courts.'" *Id.* at 149 (citing, in part, L. BLOM-COOPER & G. DREWRY, FINAL APPEAL: A STUDY OF THE HOUSE OF LORDS IN ITS JUDICIAL CAPACITY 90, 523 (1972)).

For an academic critique of multiple opinions, see, e.g., Paul M. Bator, *What is Wrong with the Supreme Court*, 51 U. PITT. L. REV. 673, 686 (1990). Bator states:

> Most important and most distressing is that they are addicted, too, to the multiplication of individual opinions. Nobody seems to take seriously the notion that the Court should try very hard to speak with a single intelligible voice. The endless proliferation of independent opinions is, in my opinion and with all due respect, a disgrace. . . . And the sad result is that, all too often, when the Supreme Court decides a case, instability and uncertainty and confusion are not alleviated, but, rather, reinforced.

Id.

and again.[154] When the court babbles like the friends of Job, society is free, like Job, to reject the authority of the pronouncements.

Yet even civil law-based courts without true multiple opinions, like the ECJ, will sometimes show the faces of the friends of Job. A recent case, interesting in this regard, was *Grant*, in which the ECJ departed from the recommendation of the advocate general.[155] That fissure has not been closed by the magisterial and somewhat patronizing tone of the ECJ opinion. A careful reader of both advocate general and court will clearly see where the consensus has unraveled with respect to the ambit of tolerance allowable to sexual non-conformists. The old consensus, that gay men and lesbians should be grateful that they are left alone, is under attack. The new consensus, that the relationships of gay men and lesbians should be treated with a dignity equal to relationships between men and women, is subject to ferocious resistance. Neither side won a clear-cut victory in *Grant*. Uniformity would have been impossible in a society which has not made up its mind on the matter. Only time will tell whether the court or the advocate general spoke with the more authoritative voice.[156]

The *Brown* case suggests patterns of engagement and conflict within English society.[157] The old social consensus on the boundaries of sex are being tested. The results so far are inconclusive even within British society.[158] The final result in Britain and, thereafter, within the ECHR, though reflecting a conclusion with binding effect, more read-

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[154] The same result is observable in cases such as *Roe v. Wade*, 410 U.S. 113 (1973), and *Bowers v. Hardwick*, 478 U.S. 186 (1986). In each case, society took the juridical voices for Jobian disputation. What followed in each case was constant retesting of the norms affirmed in each case. *Roe v. Wade* has almost thirty years of juridical and legislative attacks at the federal level. *Bowers v. Hardwick* has seen the same level of attack, but with a strong focus on the states and state normative law making.

[155] *See generally* Grant v. South-West Trains, Ltd., Southampton Indust. Tribunal, Case C-249/96, (1998) All ER (EC) 193.

[156] The ECJ chose not to adopt the advocate general's aggressive approach to the coverage of the fundamental principle of equality articulated in *Cornwall County Council*, nor the actual advocate general opinion in *Grant*, itself. For a discussion of the advocate general's opinion in *Cornwall County Council*, see generally Larry Catá Backer, *Harmonization, Subsidiarity and Cultural Difference: An Essay on the Dynamics of Opposition Within Federative and International Legal Systems*, 4 TULSA J. COMP. & INT'L L. 185 (1997). For an American's description of the advocate general's opinion in *Grant*, see generally, e.g., Paul L. Spackman, Note & Comment, Grant v. South-West Trains: *Equality for Same-Sex Partners in the European Community*, 12 AM. U. J. INT'L L. & POL'Y 1063 (1997).

[157] For a perceptive analysis, see generally Stychin, *supra* note 117.

[158] The divergent opinions in *Brown* plainly attest to the uncertainty of the pronouncement. One might even argue that the need to "restate" the law and to devote a substantial amount of space to proof of the verities of the revision is strong evidence of the sense that "someone" needs convincing.

ily demonstrates the fissures in the old consensus within Europe as well. The divergence between the House of Lords and ECHR at the margins of the opinions attests to the fact that the boundaries of sex and violence have been significantly problematized. No adequate substitute has been proposed. Litigants will surely press the courts to revisit this issue again and again until a new social consensus is established. The fissures reveal the Jobian in the process of European norm-making through law.

2. Court as Old Testament "Prophet": A Site for Struggle

With the prophetic voice, we confront a different kind of court in the field of cultural production. The voice that becomes paramount in this form of juridical cultural production, or norm-setting, is not the "voice" of the court. Beneath the outward formal product of the court—the opinion of the court, or the statement of the "law"—is a most significant byproduct of the production of juridical declarations. The court, in producing the official identification of "law" also identifies those voices that may have challenged the view officially adopted. This identification of rejected views may simultaneously create "byproducts" as important for the production of cultural "truth" as the formal opinion itself. As such, the act of identifying and memorializing provides a site for the expression of "rejected" visions of "what is" or "what has become." The courts provide a site for contestation of our interpretation of "what is." It is here that the voices of the prophetic may speak.

Consider the nature of the prophetic—voices raised against the current iteration of behavioral norms:[159] "And I will turn My hand upon thee, And purge away thy dross as with lye, And will take away thine alloy; And I will restore thy judges as at the first, And thy counselors as at the beginning."[160] These voices are of transformation; they compel change. These voices reject the act of identification in favor of creation. The prophetic compels; law exists apart from, yet acts on, society. Social custom and general agreement do not constitute law;

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[159] *Isaiah* 1, 25–26. "Thy princes are rebellious, and companions of thieves; Every one loveth bribes, and followeth after rewards; they judge not the fatherless, Neither doth the cause of the widow come unto them." Isaiah 1:23. Isaiah lived during the time of the destruction of the Kingdom of Israel by the Assyrians in 721 B.C. SAMUEL SANDMEL, THE HEBREW SCRIPTURES 83–84 (1978). For a standard history of Ancient Israel, see H.M. ORLINSKY, ANCIENT ISRAEL (1960). For a study of the historical value of the Bible, see generally SANDMEL, *supra, passim.*

[160] *Id.* at 1:25–26.

law descends from a greater source, already constituted and requiring obedience.[161] This voice punishes; it is the voice of Ezekiel—stern, uncompromising, promising punishment for failure to conform conduct to the vision of the prophet. This voice is that of norms unadopted. The prophetic holds the promise of the future; yet at the same time, the prophetic holds the danger of oblivion for those who enjoy the present. "And I will scatter thee among the nations, and disperse thee through the countries; and I will consume thy filthiness out of thee. And thou shalt be profaned in thyself, in the sight of the nations; and thou shalt know that I am the Lord."[162]

For the prophetic speaker, the cultural imperative of the prophetic is judgment. Social customs are judged deficient. The community is given a choice: conform to a different standard of conduct or suffer the consequences. The cultural imperative of the prophetic is also punishment. We are well aware of the destruction of Sodom, the Kingdom of Israel, and the Kingdom of Judea for failure to conform to "law." Layered above judgment and punishment is the cultural imperative redemption. Had God but found ten righteous people, Sodom would have been spared.[163] Yet for the listener, for society and culture, the cultural imperative of the prophetic is that it must be ignored and reviled, at least for a time. For good or ill, our cultural practice compels the marginalization of the voices of prophets. After all, these are the voices which would make over social practice, the voice of deluded romantics. The abolition of slavery, the prohibition of alcohol consumption, equality between the sexes, universal suffrage, respect for the rights of animals, marital rights between men or between women—all of these have been or are romantic vision, and

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[161] A passage from Jeremiah states:

> Thou therefore gird up thy loins, and arise, and speak unto them all that I command thee; be not dismayed at them, lest I dismay thee before them. For, behold, I have made thee this day a fortified city, and an iron pillar, and brazen walls, against the whole land, against the kings of Judah, against the princes thereof, and against the people of the land. And they shall fight against thee; but they shall not prevail against thee; For I am with thee, saith the Lord, to deliver thee.

Jeremiah 1:17–19. Jeremiah lived through the final religious revival of the Kingdom of Israel immediately before its destruction by Babylon in 586 B.C. This period witnessed significant international convulsions, e.g., the fall of Assyria and the rise of Babylon and Egypt. *See* SANDMEL, *supra* note 159, at 139–40.

[162] *Ezekiel* 22:15–16. Ezekiel, the protégé of Jeremiah, was among those carried off into exile in Babylonia after the destruction of the Kingdom of Judea in 586 B.C. *See* SANDMEL, *supra* note 159, at 160.

[163] *See Genesis* 18:32.

those who give them voice are considered crazy for a time.[164] Some of these voices are still considered crazy today.

The prophetic are therefore the popularly rejected voices chronicling "what should be." By custom, we reject this voice on first hearing. So rejected, the prophetic should have little effect in the work of producing culture, but the opposite is true. It is true that this construction of the culturally expected pattern of the prophetic—providing a site for the expression of the currently unattainable—creates a source for the expression of normative possibilities which can then be digested by the culture or not. Had Israel and Judea but conformed to the "law" rather than to the evolving consensus of acceptable social practices, then they too would have been spared.[165]

Yet there is a cultural positive to the voice of the prophetic. In our cultural bones we have been taught to regard the prophetic as divine communication. This voice must be heeded eventually; we have been well-taught to heed the words of the prophetic. We may not come around to it in the lifetime of any set of listeners, but we have been taught to listen. The penalty for extended deafness is severe.

Indeed, the lesson of listening and the fear of the consequences of heedlessness are built into the structure of our memorialization of the formal expressions of norm identification by the courts. Consider the function of opinions in the United States. In a sense they serve to chronicle the declaration of the authority, but, at the same time, they serve as a record of the expressions of the Prophets. So memorialized, they may work within culture as it seeks to interpret and reinterpret itself. Within the narratives that courts spin as jurisprudence is precisely the place where the rhetoric of transformation may be most effective at what it can do best—pursuing the public good. Professor Lobel has the right of it in his very interesting study of famous cases in which the Supreme Court refused the invitation to "transform" the

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[164] "Learn to do well; seek justice, relieve the oppressed, Judge the fatherless, plead for the widow." *Isaiah* 1:17.

[165] A careful reading of Prophets highlights this point. Each spoke of the catastrophe waiting for Israel for its social intransigence. This point is made explicit in Chronicles. One example will suffice:

> And Manesseh made Judah and the inhabitants of Jerusalem to err, so that they did evil more than did the nations whom the Lord destroyed before the children of Israel. And the Lord spoke to Manesseh, and to his people; but they gave no heed. Wherefore the Lord brought upon them the captains of the host of the king of Assyria, who took Manesseh with hooks and bound him with fetters, and carried him to Babylon.

2 *Chron.* 33:9–10.

law.[166] He argues that losing cases, arguments made and rejected in the courts, "represent a prophetic vision of law, stemming from the Old Testament prophets such as Amos who viewed justice as 'a fighting challenge, a restless drive.'"[167] Unlike Professor Lobel, I believe that the "prophets" theory applies both to cases in which the court rejected the invitation to "transform" society and those in which it did not. Both *Bowers* and *Romer* serve the same purpose. Both will be equally effective in changing social mores (which is to say, hardly at all).

The importance of the juridically prophetic within the production of culture, and then through the production of culture, back to the juridical identification of culture, is archetypically exemplified by the odyssey from *Plessy* to *Brown*. The Court in *Plessy* acted as the Homeric voice, expressing the reality of social convention with respect to the construction of boundaries between peoples classified in accordance to this thing we named "race." The Court rejected out of hand the prophetic voice of Justice Harlan, who in dissent eloquently pleaded for the adoption of a different vision of "what ought to be." Yet the prophetic voice was not suppressed. It was accorded a dignity equal to that of the Homeric expression of the majority in the process of memorialization. Thus memorialized along with the majority expression of "what is," the prophetic vision coursed back into the non-juridical (social) fields of cultural production, there to provide guidance to individuals and groups attempting the process of applying and reapplying, interpreting and reinterpreting, the working rules of popular culture.[168] Fifty years later, the prophetic reappeared before

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[166] *See generally* Jules Lobel, *Losers, Fools & Prophets: Justice as Struggle*, 80 CORNELL L. REV. 1331 (1995).

[167] *Id.* at 1333. Certainly, at a minimum, such cases begin the long and painful process of educating judges about the existence of alternative realities. *See, e.g.*, Campbell v. Sundquist, 926 S.W. 2d 250, 266 (Tenn. App. 1996) (finding state Homosexual Practices Act in violation of state constitution and describing argument propounded by state in support of continued criminalization of private sexual conduct between people of same sex). Justice Sears' dissent in *Christensen v. State*, 468 S.E.2d 188, 191 (Ga. 1996) is also instructive.

[168] *See generally, e.g.*, Michael J. Klarman, *supra* note 10. Professor Klarman notes:

> There exists a widespread tendency to treat *Brown* as the inaugural event of the modern civil rights movement. Nothing could be further from the truth. The reason the Supreme Court could unanimously invalidate public school segregation in 1954, while unanimously declining to do so just twenty-seven years earlier was that deep seated social, political, and economic forces had already begun to undermine traditional American racial attitudes.

Id. at 13–14; *see also id.* at 13–75 (describing the socio-cultural changes preceding *Brown*).

the Court. However, in *Brown*, the Court identified what had been the prophetic voice in *Plessy* as the "what is" of *Brown*.

IV. Situating Juridical Voices Within the Context of Cultural Production

I have developed the notion of the limits of the competence of a court's role in the field of cultural production within the concept of identification-memorialization. I have then addressed the issue of communication within the identification-memorialization matrix by positing that the courts use language models drawn from the deepest recesses of our culture. These models are the basis of the authority to pronounce and contain within them the limits of the power of the pronouncement. I have also suggested that these communicative roles are not neat, and they make flesh one of the more interesting tensions within Western Christian culture—a tension which has been unresolvable for the last 2000 or so years, the tension between our Greek and Hebrew constructs. I have also attempted to identify the potentially conflicting and cacophonous voices and to demonstrate their limitations in the production of the culturally identifiable and its memorialization.

I want now to place this model in the context of the messiness which is our cultural engagement. This messiness suggests Panu Minkkinen's reading of Foucault's examination of "law as matrix."[169] Minkkinen seeks an understanding of the juridical within the domain of power-knowledge. The structural regularity of diverse social practices reveals the epochal matrices that Foucault understands as law, and law, in turn, designates the way in which the matrical framework of the visible domain of an *epistēmē* both forms the discursive domain and enables its dissemination. Law is, then, not a practice, be it discursive or non-discursive, but the 'juridico-epistemological' matrix of a given epoch through which the social world penetrates language. Through its formative or ordering aspect, law enables the recognition of the social in language, but, at the same time, its disjunctive or conflictive aspect accounts for the dissemination of a discursive corpus into new utterances of a second order.[170]

However, these interactions also proceed internally, within the juridical. In particular, the dialogue within the juridical reflects the

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[169] *See* Panu Minkkinen, *The Juridical Matrix*, 6 Social & Legal Studies 425, 433–36 (1997).

[170] *See id.* at 441.

complexities, the nonfixitivity, within the juridical matrix which mirrors the dialogue between law, the speakers of law, and the social domain. There is as much structural regularity within the juridical as within the object of juridical mediation, that is, between law and the social domain.[171]

I suggest that juridical voices within cultural communication exist as a series of contingencies which defy the power to draw lasting comfort from the process of juridical pronouncement. Juridical speaking is a complex act. The simple model for judicial authority based on culturally significant Greek and Hebrew voices represents the weave of our cultural conversations unraveled. I want to consider the nature of the complexities of such speaking by reweaving these strands of cultural authority.

First, courts are not unitary actors; they are not monolithic entities. Courts are multi-voiced, and multi-sited. Any particular pronouncement may well be in multiple voices. Courts may speak as the Delphic Apollo, while providing the site for the prophetic and slipping into the voices of the friends of Job. The juridical matrix is multi-headed. Each judge is permitted an independence that belies the unity of the discourse *about* the juridical. Though we choose to speak of the juridical the way we speak of the Divine, the juridical is not a singularity. Most judges tend to attempt the Homeric or Delphic voice. Those voices, after all, provide the most commanding posture for a judge seeking to maximize the authority of his or her pronouncement. Ironically, many such speakings tend to become more Jobian than Greek. Once uttered, judicial pronouncements are characterizable primarily by the audience of people who must determine the quantum of authority they wish to confer on such pronouncement.

Second, all combinations are possible. The process of pronouncement is messy. There is no rule book for limiting voice or interpreting discourse. Sites for the pronouncement of law are neither conscious of the voice of authority on which they rely, nor can they control a shifting of that voice even within any particular panel of authority. Just as there is no singularity within the juridical, so there is no predictable singularity within the juridical. Multi-judge courts, like most appellate and high courts, become sites for simultaneous speak-

[171] Leslie Moran has argued eloquently about the relationship of juridical and legislative speech to the articulation of a constructed "homosexual" body. *See generally* LESLIE J. MORAN, THE HOMOSEXUAL(ITY) OF LAW (London: Routledge 1996). Indeed, the articulation of the body serves also as the identification and coalescing of a common social norm.

ing in all possible voices. Recall that in *Romer,* both Justices Scalia and Kennedy spoke Homerically, yet each drew on very different traditions to come to opposite conclusions. Both the Law Lords and the judges of the ECHR spoke of traditional common understanding, yet one was convinced that no sex had occurred and the other that the state was free to regulate the sex that took place.

Third, no culture "speaking," and especially no juridical "speaking," comes with its own definitive evaluation. There is no "God" or arbiter to tell us when courts speak in which voice or how long culture stops to affirm and practice what has been identified as "law." The collective "we" are, in this sense, as a group, always in the place of Job or perhaps in the place of the suppliant before the Delphic Apollo. We are audience and not arbiter in a large sense. We are deluged with conflicting voices of the juridical, all pronouncing, all definitive, all deficient. One can really understand the frustration of Herod in that famous disputation from the opera *Salome* or the anger of Job.

Yet we must all also perform the role of arbiter on a personal level. As we attempt to internalize pronouncement, or understand the application of norms in our practice of culture, we do interpret, accept, reject, and apply, in individual ways, that which may be identified to us by these voices of authority. Here is the form of the dialogue between practice and pronouncement. Authority is measured by compliance.

Fourth, there is no one "culture" to which the juridical speaks. We may speak of "dominant culture," that is, coercive culture or disciplinary culture, as the primary target of the identification-memorialization process of the juridical. For that purpose, we must accept the notion of the juridical as a site for discipline. In this sense, one can understand the identification-memorialization process as one of protecting or projecting hegemony. It is a popularizer and socializer of acceptable conduct and acceptable thought.

However, the juridical permits the expression of the prophetic as well. The prophetic works against the present; to the extent it exists, it represents the potential for modulation of culture. Here, I conceive of culture as the collective of behavioral or thought taboos. But the prophetic may speak to non-dominant hegemonies as well. It provides a basis for resisting the colonization and harmonization implicit in the *dominance* of dominant culture.

Most importantly, dominant culture rarely stands alone. The voices of the juridical speak with far less authority to sub-dominant culture. Sub-dominant culture has its own voices for identifying and policing the current iterations of the form of its hegemonies. These

may well be impervious to the voices of the instrumentalities of the dominant group. Consider the ability of the people of Israel to insulate themselves from some (but not all) of the disciplining effects of dominant Christian culture from the beginning of the common era to the present. Resistance, of course, is never complete—how can it be? We understand the power of colonization and normalization of the dominant. Where a minimum of necessary harmonization is unachievable—in the eyes of the group with the greatest coercive power—then rejection and expulsion become the means of dealing with fundamental difference.

Complexity comes to those who may belong to multiple hegemonies. How does the devout Muslim in America interpret, with what authority does he hear, the pronouncements of the juridical on the status of women? With what ears does the devout Catholic hear the Delphic voice of the court identify the reality of the cultural acceptance of reproductive autonomy for women? Within this complexity, the authority of the juridical may be softened through the trope of "interpretive mistake."[172] As products in the field of cultural production, the judicial voice may be discounted as speaking on issues of cultural interpretations outside the field of the juridical. We accept the notion of the possibility of mistake, even from the divine Greek voices of the court. Indeed, the friends of Job provide a deeply embedded cultural form of processing mistake.

Moreover, culture does not provide a group or individual guide for interpreting mistake. We may measure obedience, but we are leery of gauging interpretive mistake within culture. The limiting case is the overthrowing of the core taboo itself, but the power to conclude that an interpretive mistake is possible is also the power to limit the authority of those products of the juridical production of culture.[173] In this enterprise we are permitted a substantial amount of individual space in our private affairs. We are given substantially less space within the cultural public space.[174]

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[172] I will contrast the notion of interpretive mistake with the notion of violation of basic behavioral taboos. While the ambit of interpretation may be wide, there are, within any temporal expression of popular culture, interpretations so basically "off" that they violate the taboo and are beyond the pale of interpretation. On the matrix of the interpretively possible and that which lies beyond, see Backer, *supra* note 11, at 16–18.

[173] For an interesting example, involving the litigation over the identity of the Mashpee Tribe, see Guyora Binder & Robert Weisberg, *Cultural Criticism of Law*, 49 STAN. L. REV. 1149, 1180–87 (1997).

[174] For a discussion of the way in which culture talks publicly and privately, to different effect, see generally Larry Catá Backer, *Exposing the Perversions of Toleration: The Decriminali-*

V. Holding Back on Itself: Litigation and Cultural Consciousness Within the Juridical Field of Cultural Production

I have posited a complex model of juridical speaking within the context of the production of culture norms-behavior models. The model posits that there is no "production" of law; rather, law and juridical pronouncements are part of the production of culture. This model views the juridical enterprise in a manner fundamentally different from that which has come to be accepted as "truth" within the Anglo-American West. The modernist model with which we have been raised misunderstands both courts and the litigation processes they oversee in its attempt to separate law and juridical pronouncement from the cultural fields in which they are embedded. Modernism also errs by investing them with powers and qualities that are alien to their structure as well as to their siting within society.

Both lawyers and non-lawyers have been raised, especially as participants within the juridical field, on the notion of juridical speech in the *messianic voice*.[175] The juridical process and, especially, its formalization in the "litigation process," as well as the "product" of that process—"law"—have been given positive functions. Law transforms; it moves society in peculiar and predictable ways—as long as we can get courts or legislatures to "go along." Law and the process of pronouncement by courts become autonomous functions. When coupled with the unquestioned authority of the judicial voice (though why the voice is unquestioned defies explanation other than one deriving from the strength of force of arms), juridical cultural production is assertively transformative. It works on this other autonomous "thing" (culture), forces it to accept its prescriptions for conduct, and then uses the culture so domesticated to force compliance by the obedient populace.

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zation of Private Sexual Conduct, the Model Penal Code, and the Oxymoron of Liberal Toleration, 45 Fla. L. Rev. 755 (1993).

[175] What applies to modern scholarship applies with even more force to the nature of the voice of judicial authority: "Thus, to a certain degree, critical theorists can sometimes fall into the very old Marxist-Leninist trap: it is one thing to identify racism and patriarchy (just as it was to identify capitalism) as an evil; it is quite another to assume or argue that it inevitably follows that *naming the evil* will result in its destruction or transmorgrification. It is error to assume that something like the normative substructure of our law and society is weak, unsupported, decrepit, decadent, or inevitably (and quickly) doomed to oblivion, only to be replaced by a new world order." Larry Catá Backer, *By Hook or By Crook: Conformity, Assimilation and Liberal and Conservative Poor Relief Theory*, 7 Hastings Women's L.J. 391, 434–35 (1996).

In place of that model, I have offered something considerably more passive and complex. It is messy and hard to gauge, even as a matter of history. In this sense, we will always be the creatures of our own interpretive limitations or matrices. It is a model which makes it more difficult to commit the modernist sin of essentialism—"courts are always this" or "courts are invariably that."

Yet this model I have described here *does* contain within it the possibilities of manipulation, though of a vastly different order from that assumed possible under our current modernist conceptualizations. Litigation and law, understood as part of the process of cultural production, *can* be mobilized consciously in the production of popular culture. Litigation is an excellent site for the articulation of different interpretive visions *within* culture, which, when freed, can work in society to modulate the ways in which cultural rules are interpreted.

I leave you with examples to which I have already referred. *Plessy* was not overturned in an act of imperial will by the court in *Brown*. Rather, the interpretive, if prophetic, possibilities, inherent even in the days of *Plessy*, were freed to roam and percolate through society for several generations, to come back triumphally as the formal voice of "that which is becoming" when the court was confronted fifty years after *Plessy*, with the need to acknowledge the ways in which culture had modulated. Likewise, the ECHR could not force the societies under its jurisdiction to tolerate gay men to an extent greater than they desire, nor was it willing to compel such a action by bringing the age of consent into parity. Neither the English nor the European courts would impose on their societies an acceptance of practices generally considered disgusting, especially when compounded by the fact that the activity was engaged in by gay men, a group just barely tolerated. The prophetic voices generated by those cases will need to roam within our culture for a while. Should the day come when that prophetic vision embraces "that which is becoming," then will the courts identify and memorialize the change.