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LARRY CATÁ BACKER*

ABSTRACT

Judging is a process of narrative transmogrification: Courts hear the stories of litigants and transform them into something digestible. Courts accomplish this transformation by retelling stories to express conformity with what our society believes and what society "knows." In this sense, the stories themselves embody the rules by which we come to know and discipline our social selves. Story becomes counter story which in turn becomes the basis for the rules that explain the way in which the story must be retold. The *judgment* is in the retelling of the story and not in the articulation of the rule itself. Jurisprudence, conventionally understood as the science of the rules applied by the courts, becomes an empty and backwards science.

The process of narrative transformation is subconscious. The courts rarely "turn to the audience" and explain the process underlying its performance. It did so recently, though, in *Romer v. Evans*, 116 S.Ct. 1620 (1996). I begin by laying the basis and focus of judicial

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narrative transmogrification through the "eyes" of the opinions in *Romer*. I then examine the way courts transmogrify narrative in the construction of judgments that serve to regulate the sexual conduct of sexual minorities. For that purpose I look at a singular story, a story of the public expression of sexual desire by gay men which is meant to be privately consummated. This story forms the core of five cases, three from the United States and two from the United Kingdom. I demonstrate the process of narrative reconstruction through these cases: how the original story, the story input into the courts, is lost and distorted in the service of the abstract normative vision of the particular court. Courts invoke this transformative mechanism either in the service of the status quo or in the crafting of a different vision of that status quo. And so, out of one story will emerge five very different events, or rather five different tellings of law.

I then consider the consequences of the analysis of the cases. I explore the necessity and relevance of a politics of assimilation within litigation-based "liberation" strategies. Ironically, though the courts serve to perpetuate the suffocation of sexual non-conformity as an instrument of the enforcement of culture norms, they do not provide the best site for contesting those images. The unavoidability of assimilation strategies in litigation again emphasizes the irrelevance of courts as instruments of change. But it also demonstrates another, and important, purpose of such strategy: the use of the judicial process as a platform for the communication and wide dissemination of ideas. Other than as a form of confabulation, courts remain largely irrelevant to the enterprise of cultural redeployment.

> I was not born in Sunny Hispania; My father came from Rovno Gubernya; But now I'm here, I'm dancing a tango; Di dee di! Dee di dee di!; I'm easily assimilated; I'm so easily assimilated.
>
> I never learned a human language; My father spoke a High Middle Polish; In one half-hour I'm talking in Spanish: *Por favor! Toreador!*; I'm easily assimilated; I'm so easily assimilated.
>
> It's easy, it's ever so easy!; I'm Spanish, I'm suddenly Spanish!; And you must be Spanish, too; Do like the natives do; These days you have to be in the majority.[1]

1. RICHARD WILBUR, CANDIDE (music by Leonard Bernstein, final revised version, 1989) (based on the book by Voltaire), act I, no. 14 ("I am Easily Assimilated" (Old Lady's Tango)).

I. INTRODUCTION

When we consider the functions of courts, we rank among the most important of their functions the task of judgment—courts make law.[2] We think about the rules that are crafted, standards imposed, and tests applied. We study this as a scientific discipline. Indeed, we have even named this science of the rules we create; we call it jurisprudence. We believe this rule crafting is the most important thing that courts do. We devote most of our teaching time at the law schools to the teaching of this science of rules, standards, and tests.

But this dead science of jurisprudence is wrongheaded. It isolates one aspect of the process of court judgment, elevates it to Olympian heights, and obliterates all other aspects of judging and of lawmaking. Sadly, our construction of this lifeless science has marginalized an important foundation of judging: the crafting of official narrative, the creation of the story of the people and events to be judged. Traditional jurisprudence is dead because it is utterly disconnected from the narratives in which are wrapped our judgments about the truth or fairness of those disputes of which the state has been asked to take notice. Thus free-floating, this form of jurisprudence is useless as a vehicle for understanding the way in which conduct norms are juridically applied.

Instead of focusing on this pseudo-science of legal rules, I will focus on the "jurisprudence" of transformative narrative. I will show how narrative serves as important a function as formally crafted rules in the creation and enforcement of those standards of conduct by which we are expected to live. Ultimately, courts tell stories. These stories serve the same purpose as the fairy tales our parents told us. But these are not ordinary stories or stories which merely *report* the actions of people who come before the courts. Courts take the stories they receive as raw material. In their hands, this raw material is transmogrified into something very different. The stories, recreated, *become* the judgment, the rule, and the standard. Thus transformed,

2. Or, at least, when interpreting statutes, they give "life" to law by interpreting the text in the context of the action required. Though we lose sight of this notion from time to time as we contemplate our apparently more complicated world, our understanding of this interpretive mission of the courts and approaches to such interpretation is at least a century old. *See, e.g.*, Oliver W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1897) (law as prediction of what courts will say law is); LON L. FULLER, THE LAW IN QUEST OF ITSELF 8-10 (1940) (law as prediction with a socio-cultural purpose). On the notion that courts act strategically in fashioning this interpretation in the context of institutional power battles with the other two branches of the (federal) government, see William N. Eskridge & Philip P. Frickey, *Forward: Law as Equilibrium*, 108 HARV. L. REV. 27 (1994).

the stories told by the courts illustrate for us what is good and bad, what works and what doesn't, and what are the consequences of our actions. *That* is the essence of narrative jurisprudence. As thus crafted, these judicial stories are spread among the general population and are absorbed as part of our popular culture.[3]

We are well aware of the notorious stories. Celebrated or infamous stories tend to consciously transcend the judgments through which they were created. Thus, for example, the story of the murders of Ronald Goldman and Nicole Brown Simpson teaches us far more about the relationships among races, the social code of violence between the sexes, and perhaps even the power of juries than they might teach us about the jurisprudence of murder. Likewise, the stories about Michael Hardwick teach us more about the informal and formal boundaries of sex and identity than they might about the jurisprudence of the interpretation of our basic law. Most judicial stories, however, remain little known in popular culture. Yet, these stories also register in the socio-cultural unconscious. In this sense, these obscure stories become notorious as well.

I concentrate my study of the way narrative transformation occurs on one of these little known stories, a story represented by five cases, three from the United States[4] and two from the United Kingdom.[5] Each is a story of the solicitation of sexual conduct—the expression is publicly articulated and is meant to be privately consummated.[6] Each version of the story implicates a criminal act.[7] Each

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3. For the way in which judicial narrative and culture intersect, see Larry Catá Backer, *Constructing a 'Homosexual' for Constitutional Theory: Sodomy Narrative, Jurisprudence, and Antipathy in United States and British Courts*, 71 TUL. L. REV. 529, 538-54 (1996).

4. Christensen v. State, 468 S.E.2d 188 (Ga. 1996); Commonwealth v. Wasson, 842 S.W.2d 487, 489 (Ky. 1992); Sawatzky v. City of Oklahoma City, 906 P.2d 785 (Okla. Crim. App. 1995).

5. R. v. Ford, 1 All E.R. 1129 (1978); R. v. Gray, 74 Crim. App. 324 (1981). *Ford* and *Gray* were followed in 1992 by *R. v. Kirkup*, 2 All E.R. 802 (1993) and *R. v. Goddard*, 92 Crim. App. 185 (1991) (per Hirst, J.). Though I discuss the *law* of solicitation in *Kirkup* and *Goddard*, I believe both are distinguishable from *Ford* and *Gray*. *Kirkup* did not involve solicitation in the form of private *conversation* in a public place. In *Kirkup*, the defendant was arrested after approaching a plain clothes police officer in a bathroom in Victoria Station, the jury accepting the officer's testimony that this approach consisted of standing at a nearby urinal, smiling, and masturbating. *Goddard* involved heterosexual solicitation and the solicitation of a female child.

6. I will not consider cases in which the sexual conduct was arguably to take place in a public place. For that reason, I will not consider the stories implicit in cases like *Baluyut v. Superior Court*, 911 P.2d 1 (Cal. 1996). These stories differ in some respects from those treated in more detail in this essay. In *Baluyut*, the police reports:

> described officers' arrests of men in and outside an adult bookstore in Mountain View for violations of the [California solicitation statute]. The arrests involved a decoy officer who had engaged a person in small talk. In five of the arrests, after the person

story is representative of stories repeated over and over in our courts. Each version is well known to our judges. As transmogrified, each version of the story that emerges from the courts is different. The stories are no longer tied to the litigant. Instead, each of the stories serves to confirm a social judgment of the behavior type to which the litigant has been reduced.

Still, a reading of the cases suggests that the discussion of law and its application to the facts are paramount. That discussion certainly takes up most of the space in the opinions of the cases I consider. Despite this use of space in the reporters, I argue that the jurisprudence underlying these narratives is incidental. Why? Law flows naturally from the stories crafted from out of the "facts" submitted to the courts. The critical function for the courts is to devise an official story. In that process, the court renders judgment. The judgment guides the determination of how the story is to be told. Judging by the way in which the narrative is rendered, the law naturally follows. As such, jurisprudence as a driving force does not exist. Law follows from narrative. There is no such thing as objective narrative. Nor is judgment determined by the application of law to such objective narrative. Rather, once narrative is structured and judgment is made, law will follow. Law serves as explanation. Law does not drive narrative; narrative drives law. Legal rules and standards are secondary. "[T]his

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> eventually made it clear that he was interested in a sexual encounter the officer suggested that the person accompany the officer to the officer's car. Once at the officer's car, the person was arrested for soliciting a lewd act to be performed in a public place. In the remainder, the person suggested going to a place which, while public or open to the public, was not clearly one at which the person knew or should have known there would be other persons who might observe and be offended by the suggested conduct. . . . Other evidence was offered that the modus operandi of the decoy officers was typical of a "cruising" pattern of homosexual men and that it invited homosexual men to make contact with the decoy officer.

Id. at 4. I do not concentrate on these stories because, for purposes of this essay, I want to clearly avoid the public/private argument as applied to conduct (not words). While I am troubled by this categorization, my purpose is to explore how even words that are not conduct can be used to invoke the regimentation of the closet. For a discussion of the private/public divide, see Larry Catá Backer, *Exposing the Perversions of Toleration: The Decriminalization of Private Sexual Conduct, the Model Penal Code, and the Oxymoron of Liberal Toleration*, 45 FLA. L. REV. 755 (1993).

7. A number of states have criminalized the public solicitation of private sexual expression. *See, e.g.*, GA. CODE ANN. § 16-6-15 (a) (1996) ("A person commits the offense of solicitation of sodomy when he solicits another to perform or submit to an act of sodomy. Except as provided in subsection (b) of this Code section [which pertains to solicitation of a person under the age of 17 to perform sodomy for money], a person convicted of solicitation of sodomy shall be punished as for a misdemeanor."); KEN. REV. STAT. ANN. § 506.030 (1996) (covering solicitation to commit any criminal offense). Some states have also permitted the criminalization of this conduct by municipalities. *See, e.g.*, OKLA. CITY, OKLA. MUN. CODE ORDINANCE 20114, §§ 30-151, 30-152 (1996).

fight is about forcing the state to speak one's own view of gays and lesbians, as the state's construction of gays and lesbians informs and is inextricably part of the judicial exercise of the force of law"[8] and culture.[9] The most important thing a court does is spin stories for the edification of the populace and the preservation of the popular culture.

Judging is a process of narrative transmogrification: courts hear the stories of litigants and transform them into something juridically digestible. Our society uses these transformed stories in a way that conforms to what society wants to know.[10] Story becomes counter-story, which in turn becomes the basis for the rules which explains the way in which the story is retold. The *judgment* is in the manner of the retelling of the story and not in the articulation of the rule itself. Thus, jurisprudence is a backwards science. It looks to rules when it ought to be concentrating on the basis of judgment subsumed within the laundered "facts" of a case.

Narrative transmogrification is also a subconscious process. The courts rarely "turn to the audience" and explain the process underlying their performance. Recently, though, it did so in *Romer v. Evans*.[11] I thus begin my examination of judicial narrative transformation by looking at the process and its implications through the "eyes" of the opinions in *Romer*. I then turn to the five sex solicitation cases to explore the way courts transmogrify narrative in the construction of judgments that serve to regulate the sexual conduct of sexual minorities. I will show the process of narrative reconstruction

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8. Andrew M. Jacobs, Romer *Wasn't Built in a Day: The Subtle Transformation in Judicial Argument Over Gay Rights*, 1996 WIS. L. REV. 893, 908-09.

9. *See* Larry Catá Backer, *Queering Theory: An Essay on the Conceit of Revolution in Law, in* LEGAL QUEERIES (Sarah Beresford et al. eds., forthcoming 1998) (manuscript at 1, on file with author) ("Change in social practice is internalized within dominant norm-setting institutions through its assimilation of cultural minorities.").

10. Story transformation provides reassurance that what we believe *is*, in fact, true. Critical race theory has examined the notion of empathic fallacy. *See* Richard Delgado & Jean Stefancic, *Norms and Narratives: Can Judges Avoid Serious Moral Error?*, 69 TEX. L. REV. 1929 (1991).

11. Romer v. Evans, 116 S.Ct. 1620 (1996). I do not attempt a detailed *legal* analysis of the case here. I focus here on the rhetorical value of the case, that is, the literary value of *Romer*. For a discussion of the construction of the law of *Romer* as black latter, see, e.g., ROBERT H. BORK, SLOUCHING TOWARDS GOMORRAH: MODERN LIBERALISM AND THE AMERICAN DECLINE (1996); Akhil Reed Amar, *Attainder and Amendment 2:* Romer's *Rightness*, 95 MICH. L. REV. 203 (1996); Larry Catá Backer, *Reading Entrails:* Romer, VMI *and the Art of Divining Equal Protection*, 32 TULSA L. J. 361 (1997); Daniel Farber & Suzanna Sherry, *The Pariah Principle*, 13 CONST. COMMENT. 257 (1996); Jacobs, *supra* note 8, at 893; Cass R. Sunstein, *The Supreme Court, 1995 Term - Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4 (1996); Tobias Barrington Wolff, Note, *Principled Silence*, 106 YALE L.J. 247 (1996).

obliterates the original story, the story input into the courts, in the service of the abstract normative vision of the particular court which vision, in turn, is represented by the story as retold. Courts invoke this transformative mechanism in the service of the status quo[12] or in the crafting of a different vision of that status quo.[13] And so, out of one story will emerge five very different events, or rather five different tellings of the law.

I then consider the consequences of the analysis of the cases. The courts serve to perpetuate the suffocation of sexual non-conformity in the course of the enforcement of culture norms. As such, courts cannot provide the best site for contesting those images.[14] It follows that we must heed the warning in the lyrics of the song that always plays in the background as we struggle with the dialogue of litigation-generated narrative:

> It's easy, it's ever so easy! I'm Spanish, I'm suddenly Spanish! And you must be Spanish, too. Do like the natives do. These days you have to be in the majority.[15]

I thus suggest the necessity and relevance of a politics of assimilation within litigation-based "liberation" strategies. The unavoidability of assimilation strategies in litigation emphasizes the irrelevance of courts as instruments of change. It also demonstrates another, and important, purpose of such strategy: the use of the judicial process as a platform for the communication and wide dissemination of ideas. Other than as an instrument of confabulation, courts remain largely irrelevant to the enterprise of cultural redeployment.

The real tale of judicial narrative is the story of the assertion of a collective will. In the instance of the five cases considered, it is the will to obliterate from social consciousness particular expressions of sexual desire. This is the story of *judgment*, of the narratives spun by

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12. Thus, story transformation provides the court with the mechanism for the rejection of challenges to the statutes criminalizing their conduct in *Christensen v. State*, 468 S.E.2d 188 (Ga. 1996), and *Sawatzky v. City of Oklahoma City*, 906 P.2d 785 (Okla. Crim. App. 1995). It provides the basis for justifying the interpretation of a current morality in *R. v. Ford*, 1 All E.R. 1129 (1978), and *R. v. Gray*, 74 Crim. App. Rep. 324 (1981). *See* discussion *infra* notes 54-84.

13. That was the project of the majority in *Commonwealth v. Wasson*, 842 S.W.2d 487, 489 (Ky. 1992), where the story of sexual solicitation became a tale of the abstract pursuit of private love. *See* discussion *infra* notes 55-61.

14. *Compare* Patricia A. Cain, *Litigating for Lesbian and Gay Rights: A Legal History*, 79 VA. L. REV. 1551 (1993), *with* Mary Ann Case, *Couples and Coupling in the Public Sphere: A Comment on the Legal History of Litigating for Lesbian and Gay Rights*, 79 VA. L. REV. 1643 (1993).

15. WILBUR, *supra* note 1, at act I, no. 14.

the courts to suffocate and obliterate the reality of the desire confronting them. The recrafted stories replace the realities of the litigants' view of the "facts" with an assimilated reality more congenial to the dominant culture or with a distorted reality so repulsive to that culture that condemnation as a matter of law is the only reasonable course open to the court. It is the story of mythology as jurisprudence.

II. NORMALIZING DISAPPROBATION

Why transmogrification? What does moral and social disapprobation have to do with law and judgment? *Romer v. Evans* provides the underlying rationale for the exercise. The story of *Romer* is bound up in the constitutional provision at the center of the case:

> Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt, or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination.[16]

In *Romer v. Evans*, a majority of the Supreme Court declared the quoted provision invalid because it violated constitutional limitations, resting somewhat loosely on the Equal Protection Clause of the Federal Constitution. People of "homosexual, lesbian or bisexual orientation" can not be excluded "from the almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society."[17] Actually, such exclusion is possible, but requires as justification something more than "animosity toward the class affected;"[18] something more than a "bare . . . desire to harm a politically unpopular group [would be necessary to advance] a *legitimate* governmental interest."[19]

This opinion has generated much heat (if somewhat less light) as commentators seek to divine the meaning (and uses) of the majority

16. COLO. CONST. art. II, § 30b, *quoted in* Romer v. Evans, 116 S.Ct. 1620 (1996).

17. *Romer*, 116 S. Ct. at 1627.

18. *Id.* at 1628.

19. Id. (quoting Department of Agric. v. Moreno, 413 U.S. 528, 534 (1973)).

opinion and the dissent. We are free now to wave *Romer's* new verities of equal protection as we prance around like so many juristic shamans in the dark of the law. Thus, to some of us, *Romer* encapsulates and confirms the fatuousness of *Bowers v. Hardwick*.[20] To others, it can be used to anoint some other fetish of "constitutional" interpretive principles.[21]

Narrative transmogrification is one of the strands of the hermeneutics of *Romer v. Evans*. Indeed, such transmogrification is the hermeneutical underbelly of *Romer*. To understand this hermeneutical imperative of *Romer*, we must consider the "truths" of that case through the lens of an(other) apocryphal story, a story which lurks barely beneath the surface of the dry language of COLO. CONST. art. II, § 30b,[22] of the opinion of the Colorado Supreme Court,[23] and of the Supreme Court opinions. The reality of the story we will consider is embedded in the dark side of cases like *Romer*. That reality is based on the ineffectualness of the majority opinion to force law onto the unwilling. except where the pronouncement describes existing cultural reality.

This underbelly was most clearly articulated by the dissent. Justice Scalia explains that the "society that eliminates criminal punishment for homosexual acts does not necessarily abandon the view that homosexuality is morally wrong and socially harmful."[24] This hermeneutical strand finds significant resonance in the project of liberal toleration for sexual non-conformists undertaken in the United States and Britain since the 1950s.[25] Thus, Justice Scalia's conflation of toleration and disapprobation finds earlier expression in the very influential writing of the *Wolfenden Report*.[26] The *Wolfenden Report*, like

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20. 478 U.S. 186 (1986).

21. *See, e.g.*, Backer, *supra* note 11, at 361, 380-384.

22. *See infra* Part II. The Problem in Jurisprudential Context.

23. Evans v. Romer, 882 P.2d 1335 (Colo. 1994).

24. *Romer*, 116 S.Ct. at 1633 (Scalia, J., dissenting).

25. For a discussion of the liberal toleration project—a project which offers decriminalization of "acts" in return for complete negation of any sort of public existence for the "homosexual," see Backer, *supra* note 6, at 755.

26. COMMITTEE ON HOMOSEXUAL OFFENSES AND PROSTITUTION, THE WOLFENDEN REPORT (Auth. American ed. 1963) [hereinafter THE WOLFENDEN REPORT]. The Committee on Homosexual Offenses and Prostitution was created on August 24, 1954, to consider the law and practice relating to homosexual offenses, prostitution, and solicitation for immoral purposes. *See id.* ¶ 5. Its report to the British Parliament, dated August 12, 1957, recommended, among other things, that private consensual homosexual conduct (but not the crime of gross indecency between males) be decriminalized. *Id.* ¶ 355. Interestingly, its recommendations were largely rejected by British lawmakers for nearly a decade. For a discussion of the *Wolfenden Report* and

Justice Scalia, understood that "To say [that some conduct is beyond the criminal law] is not to condone or encourage private immorality."[27]

There is truth embedded in the observations of Justice Scalia and the *Wolfenden Report*: we create an unresolvable problem when conduct is decriminalized but retains a strong social and moral taint. Decriminalization within the context of social and moral condemnation has created a means for regularizing the status of sexual minorities. It provides a judicially tolerated basis for creating a "model" homosexual in context.[28] This ultimately implicates the hermeneutics of the necessary conformity of *politically successful* sexual minorities in our culture. The lyrics with which I began illustrate this point well.

> I was not born in Sunny Hispania; My father came from Rovno Gubernya; But now I'm here, I'm dancing a tango; Di dee di! Dee di dee di!; I'm easily assimilated.[29]

The public/private conduct boundaries for the tolerated (assimilated) homosexual were expressed in the *Wolfenden Report* in the United Kingdom[30] and the Model Penal Code in the United States.[31] The *Wolfenden Report* was quick to disabuse those who feared that decriminalization of private conduct implied any sort of public expression of toleration of the conduct decriminalized. "It seems to us that the law itself probably makes little difference to the amount of homosexual behavior which actually occurs; whatever the law may be there

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its effects, see, e.g., J.È. Hall Williams, *Sex Offenses: The British Experience*, 25 COLUM. J.L. & CONTEMP. PROBS. 334 (1960). On the ways in which the *Wolfenden Report* created and regularized the model "homosexual" who could be liberated from the confines of criminal law, see LESLIE MORAN, THE HOMOSEXUALITY OF LAW (1996).

27. THE WOLFENDEN REPORT, *supra* note 24, ¶ 61.

28. *See* Backer, *supra* note 6, at 755, 787-94.

29. WILBUR, *supra* note 1, at act I, no. 14.

30. *See supra* note 24.

31. The Model Penal Code is a project of the American Law Institute, an organization devoted to the reformulation and modernization of law. The American Law Institute develops uniform codes representing its view of the best approach to a particular body of law. It is then hoped that state legislatures use the laws developed by the model rules in reformulating their own law. The drafting of the Model Penal Code was commenced in 1952. The proposed official draft of the Model Penal Code was adopted on May 4, 1962. The revision of the Commentaries began in 1976. *See* MODEL PENAL CODE AND COMMENTARIES (Official Draft and Revised Comments 1980) [hereinafter MODEL PENAL CODE]. Unless otherwise noted, I use the Model Penal Code Comments as revised after 1976.

will always be strong social forces opposed to homosexual behavior."[32] Justice Scalia echoed this understanding almost forty years later when he suggested that

> [t]here is a problem, however, which arises when criminal sanction of homosexuality is eliminated but moral and social disapprobation of homosexuality is meant to be retained. . . . The problem (a problem, that is, for those who wish to retain social disapprobation of homosexuality) is that, . . . those who engage in homosexual conduct . . . [seek to use their political power] to achiev[e] not merely a grudging social toleration, but full social acceptance, of homosexuality.[33]

We do not expect the state to expend any effort to corral the strong social forces opposed to homosexual behavior.[34] The Wolfenden Committee agreed that the state ought to retain the power to regulate public expression of this immoral conduct.[35] "[The] function [of the criminal law], as we see it, is to preserve public order and decency, to protect the citizen from what is offensive or injurious, and to provide sufficient safeguards against exploitation and corruption of others. . . ."[36] The authors of the *Wolfenden Report* saw no reason to interrogate the state's traditional power to define and defend public morality. "It is also the function of the law to preserve public order

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32. THE WOLFENDEN REPORT, *supra* note 24, ¶ 58. This is echoed in the commentary to the revisions of the Model Penal Code in the United States. *See* Backer, *supra* note 6, at 755, 774-80. For a discussion of the manner in which negative social and legal attitudes towards sexual non-conformity are best understood as preserving traditional gender roles and the social meaning attached to these roles, see Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187.

33. Romer v. Evans, 116 S. Ct. 1620, 1633-1634 (1996) (Scalia, J., dissenting). The focus, of course, was on what Justice Scalia characterized as the fruits of a political battle, that is, legislation benefitting one group at the expense of its political enemies and done within the basic process guaranteed under our republican form of government. In this case, the spoils of the democratic process were the elimination of a political rival from the field through the enactment of an amendment. COLO. CONST. art. II, § 30b, after all, had been adopted by popular referendum. The Colorado Supreme Court struck down the amendment. *See id.* The U.S. Supreme Court granted certiorari, *see* 115 S.Ct. 1092 (1995), and affirmed under the name *Romer v. Evans*. For a critical discussion of the use of initiatives as a means of expressing the popular will, see, e.g., William R. Adams, *Pre-Election Anti-Gay Ballot Initiative Challenges: Issues of Electoral Fairness, Majoritarian Tyranny and Direct Democracy*, 55 OHIO ST. L.J. 583 (1994).

34. THE WOLFENDEN REPORT, *supra* note 24, ¶ 58 (discussing the control of the "proselytizing" homosexual).

35. THE WOLFENDEN REPORT, *supra* note 24, ¶ 64 (concerning the conception of the difference between public and private conduct). This notion reflects the traditional understanding of the regulatory role of law. *See* Louis Henkin, *Privacy and Autonomy*, 74 COLUM. L. REV. 1410, 1430-32 (1974).

36. THE WOLFENDEN REPORT, *supra* note 24, ¶ 13; *see also id.* ¶ 257.

and decency. We therefore hold that when homosexual behavior between males takes place in public it should continue to be dealt with by the criminal law."[37] The *Romer* majority appears to agree, if only passively.[38]

True to this long-standing narrative and normative vision rearticulated in *Romer*, sexual solicitation cases are not decided by the application of a neutral jurisprudence to the facts of a particular case thrown out of the world context in which it might have arisen. Courts create images, archetypes, of sexual non-conformists and then use these images to resist attempts to challenge the regulation of sexual conduct through the criminal law[39] and to suppress the public expression of non-conformist sexual desire or attraction.[40] Court opinions have spun a succession of narratives which have erected a vision of sexual non-conformists as mythological figures of disgust. These mythologies have resonated in the popular culture and have made it easier to affirm the normative status quo in case law and statutes.

Much like the storytellers of cultures based on oral traditions, like a mythical Homer, our judges preserve stories through the medium of "facts" which are digested and preserved in written opinions. So preserved, these stories are passed to the popular culture (thus reflecting that culture as well).[41] These stories create our foundation, the background narrative *within which* the facts of every new case are read and understood. We understand this notion by its commonly used terms: *"tradition"* or *original intent* or the like.[42] This process of narrative

37. THE WOLFENDEN REPORT, *supra* note 24, at ¶ 49.

38. Consider, for example, the potential narrowness of this explanation for the constitutional infirmity of the provision at issue in *Romer*.

First, the amendment has the peculiar property of imposing a broad and undifferentiated disability on a single named group, an exceptional and, as we shall explain, invalid form of legislation. Second, its sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class it affects; it lacks a rational relationship to legitimate state interests. *Romer*, 116 S.Ct. at 1627.

39. I have explored the way in which courts use stories to resist change and to build caricature into its constitutional jurisprudence in Backer, *supra* note 3, at 529.

40. I have explored the way in which liberal notions of tolerance of sexual non-conformity have worked to deepen the "closet" in which non-conformist sexual expression is placed in order to be protected from suppression by the state. *See* Backer, *supra*, note 6, at 755.

41. I have previously discussed the way in which law and popular culture communicate. *See* Backer, *supra* note 9, at 549-51.

42. Thus, consider Justice Scalia's characterization of COLO. CONST. art. II, § 30b in *Romer* as "a modest attempt by seemingly tolerant Coloradans to preserve traditional sexual mores," Romer v. Evans, 116 S. Ct. at 1629 (Scalia, J., dissenting), and as a means to "prevent piecemeal deterioration of the sexual morality favored by a majority of Coloradans," *id.* at 1637.

transformation is the tradition which informs the judging of both liberal and conservative judges. These notions affect not only the cases which I discuss here, where "sexual orientation" is central to the case, but more perniciously affect every case in which sexual minorities may be involved.[43] All stories, in effect, are variants on the 'homeric' epic which has become the core story of sexual judgment.

This applies with great force to the cases of sexual solicitation. All of these cases are virtually identical to each other. In a sense, they express the basic form of the expression of sexual desire in public. The reality, as input in judicial proceedings, repeatedly takes the following form.[44] Because the myth invariably takes the following form, I will deliberately and salaciously employ the techniques of cheap romance novels to hone the sensitivity to the judgment effect of the story.

> In Common City, everyone knows that the 'homos' hang out at a part of the local lake. Sometimes, but not always, local law enforcement receives complaints about this part of the lake because of the faggots "hanging around" and soliciting others (for sex?). With the intention of making this problem once again "disappear," the police yet again decide it is time to step up "vice" operations at the lake to make a stronger show of enforcing the town's sex crime laws. So, on a muggy August evening, Officer Studd Lee (among the "prettiest" on the force, decked out in suggestive lake attire sometimes accented with a hidden microphone) swishes along the banks of the lake. Officer Lee is waiting for someone to want to come up and chat with him. His plan is to flirt, entice, and appear receptive to a sexual proposition without appearing to make one himself. Enter Randy Manne. As Randy passes Officer Lee, they momentarily exchange glances. Randy returns and asks Officer Lee

43. This notion is well explored in Eric Heinze, *Gay and Poor*, 38 HOWARD L.J. 433, 434 (1995). See especially the story retold at *id.* at 437-39.

44. This composite story was suggested to me by my research assistant in a moment of exasperation. It nicely summarizes the sameness with which the problem presents itself in the courts. Understand that the details leading to the end of the story always vary depending on the ways in which the criminal prohibitions are articulated in a particular jurisdiction. Also, the stories take place in different locales, from the innocuous public parks and streets to the more stereotypically notorious, in court culture, public toilets. Further, the "level" of suggestiveness which must be articulated varies from jurisdiction to jurisdiction. However, the targets are invariably gay men. *See* Baluyut v. Superior Court, 911 P.2d 1 (Cal. 1996) (involving an assertion that California solicitation statute was used to target gay men in a California city and holding that proof of specific intent to discriminatorily target a specific group need not be proven in order to prevail). I explore this in the sections which follow.

the time, or for a match, or for the time of night. With this introduction, Officer Lee encourages further conversation. As their relatively short and pleasant conversation flows from topic to topic, Officer Lee subtly drops innuendoes and double entendres, each designed to mislead Randy into believing he is also gay and interested. His body language is *hot* and suggestive. As Randy begins to feel more comfortable with the undercover Officer, he invites Officer Lee to accompany him back to his apartment where they could talk some more. Officer Lee presses for details. Randy suggests perhaps a late dinner and drinks, perhaps a bath, perhaps another activity. Not getting the 'magic' invitation, Officer Lee presses for yet more detail. Eventually, Randy suggests that he enjoys sex and wouldn't mind having sex with Officer Lee. Perhaps he even brushes against the Officer. Officer Lee identifies himself and arrests Randy for solicitation of a criminally prohibited sexual act. Or he might arrest Randy for sexual battery, or even for the suggestion of the commission of a sexual act in public.

And the aftermath? Among other things, Randy is humiliated and annoyed. He is not stupid or uneducated. He goes to a lawyer, perhaps even lawyers for the American Civil Liberties Union or the Lambda Legal Defense and Education Fund. The lawyers greet his tale with excitement. Here is another great case for the advancement of the social and legal rights of sexual minorities.[45] And so they mount a vigorous defense. Should the litigators win, the decision will be hailed as the harbinger, or confirmation, of a great transformation of socio-cultural judgements about the defendant. Consider a case like *Romer v. Evans*.[46] Should the litigators lose,

45. The term "sexual non-conformists" is used throughout this article to signify all people with an affinity for sexual behavior or being at variance with traditional heterosexual norms and includes principally lesbians, gay men, bisexuals, and transsexual and transgendered persons, but can include also people who do not fit into any of these "categories" (all of which are constructed for some purpose or other) but who deviate from socially accepted norms. By choosing this term, I attempt to find a relatively neutral term (neutral, if only because rarely used) in place of other, more problematic, terms. My choice is also meant to connote another species of nonconformists: modern day American Protestants, originally viewed as heretics by the dominant European Catholic majority and despised and suppressed as such, who came to this country in search of the right to affirm their religious identity in public. I agree with Lisa Duggan that we must begin to "think about sexual difference not in terms of naturalized identities but as a form of *dissent*, understood not simply as speech, but as a constellation of nonconforming practices, expressions and beliefs." Lisa Duggan, *Queering the State*, 39 SOCIAL TEXT 1, 11 (1994). Others have used different terms for similar purposes. *See, e.g.*, Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of "Sex," "Gender," and "Sexual Orientation" in Euro-American Law and Society*, 83 CAL. L. REV. 1, 8 n.16 (1995) (using the term sexual minorities to "reflect[ ] and include[ ] the blending of gender atypicality with minority sexualities.").

46. 116 S. Ct. 1620 (1996). As an example of the reaction, consider the press release issued by Lambda Legal Defense and Education Fund ("LLDEF") four days after the announcement

> well, then, the decision was aberrational, can be confined to its facts, or was bad law which must be overcome somehow. Consider a case like *Bowers v. Hardwick*.[47] The consequence is that whether or not the litigators succeed in having the charges dropped or the defendant released in that particular case, the lawyers win. In contrast,

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of the decision in *Romer*. Press Release from the Lambda Legal Defense and Education Fund (May 21, 1996) (on file with author). LLDEF's Legal Director, Beatrice Dohrn, is quoted as opining that *Romer* will "affect all cases involving discrimination against lesbians and gay men." *Id.* It then listed a number of areas in which the case would have a significant impact, including the right of states to criminalize same-sex sexual activity, the power of the military to exclude "homosexuals," the power of the federal government (or that of the states) to prohibit or refuse to recognize marriages between people of the same sex, and AIDs-related discrimination. *See id.* While it is true that press releases by significant actors in the struggle for gay rights will tend to be somewhat self-serving and be designed to put the most positive spin on a decision such as *Romer*, the release reflects the general view that favorable decisions create significantly rising expectations of more to come. For a critique of this sort of false hope in the context of U.S. race cases, see Girardeau A. Spann, *Pure Politics, in* CRITICAL RACE THEORY: THE CUTTING EDGE 21-34 (Richard Delgado ed., 1995) (arguing that the Supreme Court retards rather than enhances the ability of subordinated groups to advance their rights-based agendas).

47. Consider the reactions to Bowers v. Hardwick, 478 U.S. 186 (1986). *See, e.g.*, NAN D. HUNTER ET AL., THE RIGHTS OF LESBIANS AND GAY MEN (1992). After giving a synopsis of the *Bowers* case, the authors state that the decision there makes further progress with respect to the overturning of states' sodomy laws "more arduous": "[i]n essence, . . . render[ing] futile any future judicial challenges to a sodomy statute under the *Federal* constitution." *Id.* at 122. This is followed by a declaration that three states have found their sodomy prohibitions to be unconstitutional on state constitutional grounds. These are Kentucky, *see* Commonwealth v. Wasson, 842 S.W. 2d 487 (Ky. 1992), Texas, *see* State v. Morales, 826 S.W.2d 201 (Tex. 1992), and Michigan, *see* Michigan Org. for Human Rights v. Kelly, No. 88-815820 CZ (Wayne County Cir. Ct. July 9 1990). "These bold rulings furnish the best proof that Hardwick will not be the final word on sodomy statutes." HUNTER ET AL., *supra*, at 122. In the same vein, Elizabeth Leveno, speaking about statute challenges to sodomy statutes, individual autonomy, and the right of privacy, concluded that if states want to challenge *Bowers* and "truly take part in the privacy debate," Elizabeth A. Leveno, *New Hope for the New Federalism: State Constitutional Challenges to Sodomy Statutes*, 62 U. CIN. L. REV. 1029, 1030 (1994), "[s]tate courts must commit to challenge the [Bowers] Court openly and to explain carefully the rationale for any divergence," *id.* at 1054. For example, Wasson and Morales challenged the *Bowers* decision, "[c]learly using an analysis distinct from that of the Bowers court." *Id.* at 1046 (noting that their privacy rights were broader than what the Federal Constitution provided). Leveno expressed several times her feelings that the states offer a "good illustration," *id.* at 1035, or "fertile ground," *id.* at 1036, for challenging sodomy statutes. *See also*, Arthur S. Leonard, *Lesbian and Gay Families and the Law: A Progress Report*, 21 FORDHAM URB. L.J. 927, 972 (1994) (The trend towards decriminalization of sodomy statutes continues although, "receiv[ing] a temporary setback in 1986 in Bowers v. Hardwick," with "state appellate courts in Kentucky and Texas . . . recently invalidat[ing] sodomy laws using state constitutional theories." (citing *Wasson*, 842 S.W.2d 487, and City of Dallas v. England, 846 S.W.2d 957 (Tex. Ct. App. 1993)); J. Kelly Strader, *Constitutional challenges to the Criminalization of Same-Sex Sexual Activities: State Interest in HIV-AIDS Issues*, 70 DENV. U. L. REV. 337, 339 (1993) ("[I]n the years since Hardwick, challengers to sodomy laws have shifted their efforts from federal to state courts. These efforts produced substantial recent success, most notably the 1992 Kentucky Supreme Court decision Commonwealth v. Wasson."); Evan Wolfson & Robert Mower, *When the Police Are in Our Bedrooms, Shouldn't the Court Go in After Them? An Update on the Fight Against 'Sodomy' Laws*, 21 FORDHAM URB. L.J. 997, 1001 (1994) ("[W]e're on a roll, with powerful decisions from the Supreme Court of Kentucky [Wasson].").

Randy loses as a matter of law,[48] or as a matter of culture,[49] or both.

Juridical storytelling molds this story into other stories: stories which distort the input but which serve the cause of moral approbation. Usually morality requires disapprobation, and the story as output is changed into something which is grim and dirty. The *ordinariness* of these grotesque images of sexual non-conformists runs throughout sodomy jurisprudence in particular.[50] Such is the stuff from which "morality" of a sort is forged. Those images distort and obliterate. Indeed, they suggest that it is the rare gay male who is not a predator, pied piper, Whore of Babylon, and defiler of the public space.[51] This makes these juridically sustained narratives dangerous. It is in this sense that courts embark on the 'morals' battles decried so loudly by Justice Scalia. It evidences a certain strong empathy by judges in the stories they tell, clothed as it usually is in the language of jurisprudence. Except the courts are using empathy to create the demons against which they deploy the "law" they have created. This is the role of the Supreme Court in *Bowers* and of Justice Scalia's dissent in *Romer.*

On the other hand, where courts seek a "positive" result, they tend to ignore the narrative context in which the case was presented for decision. Once the story is desexualized, judges like those in the *Romer* majority are free to state the "law." Either way, cases involving the public expression of a privately consummated act of love/sex are powerful proofs of the distortive power of fact in the service of a particular expression of our popular culture.[52]

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48. In the United States, see, e.g., Bowers v. Hardwick, 478 U.S. 186 (1986). In Britain, see, e.g., Sexual Offenses Act of 1956, 4 & 5 Eliz. 2, ch. 69, § 32 (Eng.) ("It is an offense for a man persistently to solicit or importune in a public place for immoral purposes.").

49. In the United States, see, e.g., Romer v. Evans, 116 S. Ct. 1620 (1996), and the cases discussed *infra* Part III. In Britain, see, e.g. Patrick Devlin, *The Enforcement of Morals*, *in* MORALITY AND THE LAW 15, 32 (Robert M. Baird & Stuart E. Rosenbaum eds., 1988) (reprinting in edited form from PATRICK DEVLIN, THE ENFORCEMENT OF MORALS (1965)) (discussing the notion of law as expression of common cultural norms).

50. For a detailed exploration of the images of 'sodomites' in state court constitutional jurisprudence since the 1960s, see Backer, *supra* note 3, at 529.

51. I discuss the nature of these images of the (especially) gay male as sexual non-conformist in Backer, *supra* note 3, at 529.

52. As I have explained elsewhere, culture is, itself, a meta-system, encompassing all of the possible ways of implementing (or living, if you like) the core norms of parameters which make the culture distinct. Popular culture represents a shifting and temporal manifestation of the possibilities in culture at any moment. Popular culture is an expression of group understandings of the way culture ought to be lived at any particular time and also an act of individual expression of those possibilities. Each is mutable; each is recreated in every generation. Each iteration

But these are words — pretty words to be sure and no doubt true. But what of relevance? Theory divorced from the world remains words, sounds, noise.

> If you want to know a certain thing or a certain class of things directly, you must personally participate in the practical struggle to change reality, to change that thing or class of things, for only thus can you come into contact with them as phenomena; only through personal participation in the practical struggle to change reality can you uncover the essence of that thing or class of things and comprehend them. . . . If you want to know the taste of a pear, you must change the pear by eating it yourself.[53]

We look at the objective world of courts judging within the constraints of popular cultural norms. We look closely at the stories of the cases as they are received by the courts. That is, we examine the occurrences giving rise to the need for judging within the confines of a court. We then look at the transmogrification of those stories as they are retold by the courts. These are the stories of jurisprudence which have as their starting points the stories received by the litigants, but which have little practical connection to those stories as individual expression. Rather, the transforming judicial stories are expressions of predigested judgment based on a determination of the characterization of the individual story as one of a number of story "types" with different rights-bearing potential. We deepen the perceptual knowledge of stories as law in the case law presented in the succeeding sections.[54]

III. THE STORIES REVEALED

> The objection [of men who are disgusted by homosexuals] is to an entire homosexual life-style, involving what are believed to be characteristic demeanors, behaviors, attitudes, destinies that the heterosexual . . . abhors: a life-style believed to be pervaded with effeminacy . . . ; with promiscuity and intrigue, prominently including seduction of the young; with concentration in a handful of unmanly occupations centered on fashion, entertainment, decoration and culture . . . ; with furtiveness and concealment; with a bitchy, gossipy, histrionic, finicky, even hysterical manner; with a

tends to be guarded by those who practice a particular sort of expression. The guarding becomes more intense the more closely deviation comes within what meta-culture may not be. On the difference between culture and popular culture, see Backer, *supra* note 9, at 541-48.

53. MAO TSE-TUNG, ON PRACTICE: ON THE RELATION BETWEEN KNOWLEDGE AND PRACTICE, BETWEEN KNOWING AND DOING 9-10 (Foreign Language Press trans., 1968) (1937).

54. *See id.* at 16-17.

> concern with externals (physical appearance, youth, dress); with bad health, physical and mental. . . ; with a wretched old age; with general immorality and unreliability; with above-average IQ, education, and income (qualities that make homosexuals even more threatening, more insidious, more seductive and manipulative); and, of course, with narcissism.[55]

A. JEFFREY WASSON'S STORY

In 1985, Lexington police were conducting an undercover operation for the purpose of enforcing the state's sodomy statute. Wearing plain-clothes and hidden microphones, the officers drove to an area frequented by gay men and engaged in suggestive conversations[56] with persons passing by to see if they would be solicited for sex.[57] The conversations averaged twenty minutes or until the "suspect" described the type of activity that would take place if the officer accompanied him. At this point, the suspect likely would be arrested for solicitation to commit sodomy.[58] On one particular night, an officer spoke with Jeffrey Wasson in a parking lot in an area known to be frequented by gay men.[59] After about twenty to twenty-five minutes, Wasson invited the undercover officer to accompany him to his residence. The officer asked for details and Wasson "suggested sexual activity that violated KRS 510.100."[60] Kentucky Revised Statute section 510.100 punishes deviate sexual intercourse with another person of the same sex.[61] Wasson was then arrested. He was one of five individuals arrested under similar circumstances that night.[62] He was charged with solicitation of deviate sexual intercourse in violation of Kentucky Revised Statute section 506.030 (which covers solicitation to commit any criminal offense).

Ignoring the public nature of the solicitation, in 1992 a majority of the Supreme Court of Kentucky reversed Jeffrey Wasson's conviction. By doing so, the Supreme Court of Kentucky ultimately

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55. RICHARD POSNER, SEX AND REASON 300-01 (1992).

56. *See* Shirley A. Wiegand & Sara Farr, *Part of the Moving Stream: State Constitutional Law, Sodomy, and Beyond*, 81 KY. L.J. 449 (1993).

57. *See* Commonwealth v. Wasson, 842 S.W.2d 487, 489 (Ky. 1992).

58. *See* Wiegand & Farr, *supra* note 56, at 449.

59. *See Wasson*, 842 S.W.2d at 509.

60. *Id.* at 489.

61. KY. REV. STAT. ANN. § 510.010(1) (Michie 1990) (defining "deviate sexual intercourse" as any act of sexual gratification involving the sex organs of one person and the mouth or anus of another).

62. *See Wasson*, 842 S.W.2d at 510.

affirmed the lower court's finding that the state statute proscribing consensual homosexual sodomy violates privacy and equal protection guarantees of the Kentucky Constitution, and as such the solicitation statute could not be enforced.

B. Brian Sawatzky's Story

Nine years later, on the streets of a different American city, a curious thing happened. On July 6, 1994, Oklahoma City police officers were also engaging in undercover work investigating "morals violations."[63] In a section of a public park known to be a meeting place for gay men, Officer Ledford, dressed in blue jeans and a tank top, was leaning against a car holding a package of cigarettes.[64] Brian Sawatzky was walking through the park when he passed Officer Ledford. The two exchanged glances and smiles, but Sawatzky continued on his way. Moments later, Sawatzky returned and requested a cigarette. Officer Ledford complied with the request and initiated innocent conversation with Sawatzky, intentionally designed to put him "at ease."[65] Ledford told Sawatzky that he "had heard about the area, and that it was a good area, that [he] had heard about it at a bar on 39th and Penn" (an area well known as a meeting place for homosexuals in the community).[66] He informed Sawatzky that he was a businessman from out of town and was staying at the Holiday Inn on 39th Avenue.[67] In the course of the conversation, the officer insinuated that he was open to a homosexual proposal. At least twice during the conversation, the officer asked Sawatzky about what sexual practices Sawatzky liked. Sawatzky finally indicated that he enjoyed oral sex and might be willing to engage in such activity with another adult who seemed eager for the same.[68] Explaining that he had a "dick for him," the officer reached into his pocket, pulled out a badge, and arrested Sawatzky. Sawatzky was charged with offering to engage in an act of lewdness in violation of sections 30-151 and 30-152, Ordinance 20114 of the Oklahoma City Municipal Code.[69]

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63. Brief on Behalf of Appellant at 2, Sawatzky v. City of Oklahoma City, 906 P.2d 785 (Okla. App. Crim. 1995) (No. M-94-1309).

64. *See id.* at 1.

65. *Id.* at 2.

66. *Id.*

67. *Id.*

68. *See id.* at 2, 3.

69. *See id.* at 2.

In November, 1995, a divided Oklahoma Court of Criminal Appeals[70] rebuffed Sawatzky's attempt to rewrite the criminal law of consensual sodomy in Oklahoma. Refusing to consider Sawatzky's privacy and equal protection attacks on the criminal prohibition of sexual acts between people of the same sex, the Court of Criminal Appeals affirmed the power of Oklahoma cities to prohibit public solicitation of private "homosexual" acts.[71]

C. Chris Christensen's Story

The Rockdale County Sheriff's Department was conducting an undercover operation at a rest area along Interstate 20 after citizens had complained that they had been solicited for sex and sodomy. "Their modus operandi was to approach men at the rest area, and engage them in conversation to see whether they would express an interest in sexual activity."[72] A male undercover officer, wearing a hidden tape-recorder, observed Christensen in the picnic area of the rest stop. When the officer saw Christensen nod his head, he interpreted this as an invitation to come closer. The officer stepped out of his car and approached Christensen. After some brief conversation, Christensen asked the officer either "what are you looking for" or "looking for anything particular?"[73] The officer replied he was open-minded but careful. When Christensen failed to solicit sex, the officer started to walk away. At that point, Christensen said that he was interested in oral sex. The two agreed to go to a nearby hotel where the undercover officer stated he had a room. As Christensen followed the officer, they drove past the hotel. He was then pulled over, arrested, and charged with solicitation of sodomy in violation of

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70. The Court of Criminal Appeals was established by the Oklahoma Constitution, Okla. Const. art. VII, § 1, and has exclusive appellate jurisdiction in criminal cases, *see* Okla. Stat. tit. 20, § 40 (1991). Effective November 1, 1987, the Court of Criminal Appeals has been divided into five districts (prior to that time the state had been divided into three districts) with one judge of the Court of Criminal Appeals elected from each district. *See* Okla. Stat. tit. 20, §§ 33, 35 (1991). Since 1968, each judge is appointed by the Governor from a list of three candidates submitted by a Judicial Nominating Commission, Okla. Const. art. VII-B, § 4, and serves a six year term. *See* Okla. Stat. tit. 20, § 35 (1991). Each judge of the Court of Criminal Appeals is required to seek re-election on a state-wide (not district) non-partisan retention ballot, *see* Okla. Const. art. VII, § 3; Okla. Const. art. VII-B, § 5; Okla. Stat. tit. 20, § 33 (1991); Okla. Stat. tit. 26, §§ 11-101 to 11-108 (1991) (relating to the election of judges). If a judge is not retained by voters, the resulting vacancy is filled by the Governor. *See* Okla. Const. art. VII, § 3; Okla. Const. art. VII-B, § 4; Okla. Stat. tit. 20, § 33 (1991).

71. *See* Sawatzky v. City of Oklahoma City, 906 P.2d 785 (Okla. Crim. App. 1995).

72. Christensen v. State, 468 S.E.2d 188, 191 (Ga. 1996).

73. *Id.* There were conflicting accounts as to what was actually said. This appears not at all to be unusual. *See, e.g., infra Mr. Gray's Story.*

OCGA § 16-6-15(a). Chris Christensen was convicted by a jury of solicitation of sodomy and sentenced to twelve months probation.

On March 11, 1996, a divided Georgia Supreme Court rebuffed Chris Christensen's attempt to invalidate the Georgia solicitation statute and the underlying criminal sodomy statute on privacy and free speech grounds. Most of the members of the majority determined that it was for the people of Georgia, through its legislature, to regulate the morals of the citizens of Georgia.

D. Mr. Ford's Story

"The facts of the case were that the applicant had stood outside a public lavatory in Bournmouth persistently suggesting to another man, who in fact was a police officer in plain clothes, that he should go back with the applicant to his flat for homosexual purposes. Both parties were over 21 and it is implicit that the homosexual conduct would take place in private."[74]

On June 16, 1977, Lord Widgery, speaking for the Court of Appeal, determined that the fact that acts of buggery[75] and gross indecency[76] between two men in private was no longer subject to criminal penalty in England[77] did not make the slightest difference for the offense of soliciting such conduct. It was still for the jury to decide whether public solicitation for such purposes was "immoral" in the particular circumstances of the case.[78]

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74. R. v. Ford, 1 All E.R. 1129, 1130 (1978).

75. The British criminal law proscribed buggery and gross indecency with another man. Buggery, generally, is defined as the insertion of a penis in the anus of a man or a woman or the insertion of a penis in the anus or vagina of an animal. It is limited to intercourse with persons under 16, or men, or animals. *See* Sexual Offenses Act of 1956, 4 & 5 Eliz. 2, ch. 69, § 12 (Eng.), *amnended by* the Criminal Justice and Public Order Act of 1994, 43 & 44 Eliz. 2, ch. 33, § 144 (Eng.); R. v. Courtie, 1 All E.R. 740 (1984) (per Lord Diplock). It is also an offense to procure the commission of the act of buggery by a man with another. *See* Sexual Offenses Act of 1967, 15 & 16 Eliz. 2, ch. 60, § 4(1) (Eng.).

76. Most sexual acts between men (other than buggery) are prosecuted, if prosecuted at all, as gross indecency with another man. "Gross indecency" is not defined; such actions as may constitute the crime are left to the trier of fact. Gross indecency can be committed by participating in the act, otherwise being a party to it, or by procuring the commission of the act by a man with another. *See* Sexual Offenses Act of 1956, 4 & 5 Eliz. 2, ch. 69, § 13 (Eng.). *See, e.g.*, Roy Walmsley, *Indecency Between Men and the Sexual Offenses Act 1967*, 1978 Crim. L. Rev. 400.

77. *See* Sexual Offenses Act of 1967, 15 & 16 Eliz. 2, ch. 60, § 1(1) (Eng.), *amended by* the Criminal Justice and Public Order Act of 1994, 43 & 44 Eliz. 2, ch. 33, §§ 143, 145 (Eng.).

78. *See Ford*, 1 All E.R. at 1131 (per Lord Widgery, C.J.).

E. Mr. Gray's Story

Mr. Gray actually has two stories: one which Mr. Gray himself articulated, and the other which the plainclothes policeman with whom Mr. Gray conversed articulated. The jury accepted as "true" only the story told by the arresting officer. I relate them both.

Mr. Gray: Mr. Gray was a thirty-year-old self-professed "homosexual" male. He had gone to get cat food at about 11:30 p.m. one evening near a place generally known to be a congregating point for gay men. He went there, in part, because "he liked to look at those who gathered outside the public house; they were a 'spectacle' and their behavior and dress amused and interested him."[79] He neither spoke to or touched anyone other than the police officer in plain clothes. The officer seemed part of the scene. After some conversation, Mr. Gray eventually invited the officer back to his apartment for a drink of whiskey. He had invited the officer back in order to cheer him up. Mr. Gray testified that the invitation came because he had been a member of a gay outreach group and the officer appeared somewhat glum, apparently, "and out of place, as if he was a homosexual who was having difficulty in coming to terms with his condition."[80] Mr. Gray also stated that one of the rules of the organization was not to engage in sex with people the member was advising. "He denied having said anything about staying the night. He denied that his purpose had been to have homosexual relations."[81]

The police officer: A police officer, in street clothes, was assigned to wait in the doorway in the Earl's Court district of London at about 11:30 p.m., a time when it was known that "homosexuals" congregated outside a nearby "public house." The police officer testified that he observed Mr. Gray "sauntering around and smiling at people outside the public house; then he crossed the road and spoke to a man with fair hair, then to a black man, touching him on the hand or arm, then smiled and stared at other men."[82] Mr. Gray then smiled at the police officer and after a short conversation invited him back to his apartment where, Mr. Gray said, there was whiskey and where they both could spend the night. Shortly afterwards, the police officer identified himself and arrested Mr. Gray for persistent importuning.

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79. R. v. Gray, 74 Crim. App. 324, 326 (1981) (per Lord Lane).
80. *Id.*
81. *Id.*
82. *Id.*

On November 26, 1981, Lord Lane, for the Criminal Court of Appeal, held that while it is for the jury to determine if the purpose was immoral, in a case where a jury accepted as fact evidence that the defendant invited another male to go to his home for drinks and to spend the night, the jury would inevitably have determined that the invitation was for immoral purposes.[83]

IV. THE STORIES OBLITERATED: MYTHOLOGY AS JURISPRUDENCE

The stories of flesh and blood and the judicial incantations of rules seem oddly disjointed in the sexual solicitation stories told by the defendants and by the courts. Stories and rules exist side by side but do not interact. There *is* no relationship between the stories of flesh and blood which created the opportunity for juridical storytelling and that story-telling itself. Law as judgment and jurisprudence as norm-affirming teaching have little to do with the stories presented. This is as true for the *positive* story, that of Jeffrey Wasson, as it is for the others. In all the cases, the courts appear to go on auto-pilot. The "facts" of each case merely provide a point of departure for the expression of judgments and theories pre-understood and pre-digested. The relationship can only be understood by taking into account the critical mediating role played by the stories as restructured by the courts. The *particular* stories themselves become an object of law-making as they are reconstituted to serve as a vehicle for the expression of judgment.

In each case, the defendant acts by speaking. He does not touch. He does not poke. He does not gesture. He does not make a "public spectacle" of himself. Rather, in each, the defendant creates a private spectacle in a public place. However, the spectacle remains public for jurisprudential purposes. The sin is the public expression of desire, tolerated, but substantially suppressed. Thus, it is to the continued suppression of public *expression* that the jurisprudence of the courts—their story-telling and judging—is directed.

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83. *See Gray*, 74 Crim. App. 324 (Nov. 1981) (per Lord Lane) (finding adult male convicted for importuning for immoral purposes (inviting undercover male officer to go to his home for drinks and to spend the night)). The *Gray* case was not the last important word on these issues by English courts. *Ford* and *Gray* were followed in 1992 by *R. v. Kirkup*, 2 All E.R. 802 (1993). While I discuss the *law* of this case in this article, I have chosen not to treat it with *Ford* and *Gray* because the case did not involve solicitation in the form of private *conversation* in a public place because the *Kirkup* defendant was arrested after standing at a urinal, smiling, and masturbating in the presence of a plainclothes police officer.

A. The American Cases

The jurisprudence of the American cases is rigid and rights-bound. Like some sort of Procrustean bed, stories of sexual non-conformity must be made to fit within the unbending framework of these "rights." And like most of the visits to that bed, the stories never fit. This is just as well for the courts. These ill-fitting stories allow the courts a great freedom to craft retrofitted stories on which an appropriate "moral" may be fit. The stories of sexual non-conformity offered by litigants are expunged. In its place, the court offers its own stories, stories which we treat as jurisprudence. They are essentialized stories into which all deviants *must be made to fit.* Thus redrawn and decided, the courts are free to devote the remainder of their opinions to the recitation of the rights to which the litigants, now obliterated and reconstructed, are unworthy.[84] Their unworthiness, then, derives from a judgment of what courts understand the story *should* be. Their stories become both cautionary tales and judgment.

Consider the importance of the stories of the litigants in the cases discussed here.

In none of the cases do the stories play a critical role. Each case is reduced to little more than a catechism of the rights-based rhetoric within which dominant norms are safeguarded. In complete disregard of the facts of the case, the majority in *Wasson* speaks of the rights of privacy[85] and equal protection,[86] and notes (but does not pass on) the

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84. On the obliteration of the stories of sexual non-conformists in courts, and of the ways in which courts substitute their own stories, grotesque and ugly stories, for those of the litigants, see Backer, *supra* note 3, at 529.

85. The court analyzed similar situations dealing with tobacco and alcohol. Citing Commonwealth v. Campbell, 117 S.W. 383 (Ky. 1909), the court commented on the private possession and use of alcohol saying that "[i]t is *not within the competency of government to invade the privacy of a citizens life and to regulate his conduct in matters in which he alone is concerned*, or to prohibit him any liberty the exercise of which will not directly injure society." Commonwealth v. Wasson, 842 S.W.2d 487, 494 (Ky. 1992).

86. After identifying that such deviate sexual intercourse, when committed by heterosexuals is not a crime, the court enunciated the bottom line. "The issue here is not whether sexual activity traditionally viewed as immoral can be punished by society, but whether it can be punished solely on the basis of sexual preference". *Id.* at 499. They later identify that "[s]exual preference, and not the act committed, determines criminality, and is being punished. Simply because the majority, speaking through the General Assembly, finds one type of extramarital intercourse more offensive than another, does not provide a rational basis for criminalizing the sexual preference of homosexuals." *Id.* at 502.

right to protection from cruel and unusual punishment.[87] The concurrence, in turn, waves the constitutional fetishes of privacy and separation of powers.[88] With only a passing glance at the voices of the litigants before them, the courts in *Sawatzky* and *Christensen* recite the catechisms of privacy,[89] freedom of expression,[90] separation of powers,[91] establishment of religion,[92] and equal protection.[93]

Detached from the stories out of which the cases arose, the courts became free to fashion stories based on the mythical "homosexual" litigant—whore, defiler of the public space, predator, pedophile. Chris Christensen was a man on the prowl, publicly displaying his *lust*. He was not looking for love, but for a place on which to place this free-form sexual hunger. He is a monster of sexuality unleashed and uncontrolled. In this context and battling these monsters, the majority

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87. *See id.* at 489.

88. Speaking about privacy, Justice Combs states "[w]here one seeks happiness in private, removed from others (indeed unknown to others, absent prying), and where the conduct is not relational to the rights of another, state interference is per se overweening, arbitrary and unconstitutional." *Id.* at 502. Justice Combs later addressees the idea that morality is a private matter and "no particular morality, however popular" will be promoted by the state's constitution. *Id.* at 503.

89. The Christensen court found that the Due Process clause was not to be used to thwart the power of the state "to enact laws to promote the public health, safety, morals and welfare of its citizens" as well as its interest in curtailing criminal activity. Christensen v. State, 468 S.E.2d 188, 190 (Ga. 1996). Sawatzky's court declined to address the issue of whether sections 30-151 and 30-152 violated his right to privacy because the case involved a solicitation in public. *See* Sawatzky v. City of Oklahoma City, 906 P.2d 785, 786 (Okla. Crim. App. 1995).

90. "First Amendment protection does not extend to statements made in solicitation of criminal acts." The Christensen majority goes on to say that "[s]peech which advocates violation of the law is not protected 'where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.'" Christensen v. State, 468 S.E.2d 188, 190 (Ga. 1996) (quoting Branderberg v. Ohio, 395 U.S. 444, 447 (1969)). After identifying that protecting citizens from solicitation for sexual acts is a legitimate governmental interest, the court in *Sawatzky* stated it's view that "reasonable prohibitions against soliciting sexual acts do not violate the First Amendment whether the underlying conduct is lawful or unlawful." *Sawatzky*, 906 P.2d at 787 n.7. As such, Sawatzky's First Amendment rights were not violated.

91. Recognizing that other states have decriminalized consensual sodomy, the majority in Christensen steadfastly refused to venture into the same territory, ultimately stating that it is up to the legislature to determine "what is harmful to the health and morals or what is criminal to the public welfare." *Christensen*, 468 S.E.2d at 190.

92. Sawatzky contended that sections 30-151 and 30-152 were founded on religious beliefs that violated his rights under the Oklahoma Constitution. The court denied this, citing that such a claim was unsupported by the record. *Sawatzky*, 906 P.2d at 787.

93. Sawatzky also challenged the court to find that Oklahoma's statutes did not afford him equal protection. Much to his dismay however, they determined that the facts of Mr. Sawatzky's case "[did] not warrant a determination of this issue and [they did] not address it." *Id.* at 786. Rather, they decided to defend the statute's exception for married persons in relation to public solicitation of lewd acts because they "may be a consequence of the marital relationship." *Id.* at 787.

in *Christensen* can be lavish with their disembodied pronouncements: "We hold that the proscription against sodomy is a legitimate and valid exercise of state power in furtherance of the moral welfare of the public."[94] Such language is not connected to any litigant in particular; it assumes a particular bent to the stories which the court hears and judges.

This is not unusual. American courts have a long history of gratuitous pronouncements in hypothetical cases concerning (homo)sexual conduct. Donald Dripps has argued that the anti-homosexual "big bang" of federal constitutional hermeneutics was no more than an advisory opinion. As such, it was used by the Court to indulge its taste for condemning sexual "bogeymen."[95] Professor Dripps argues that in *Bowers* "[t]he Court denied the equal liberty of gay citizens as an abstract proposition, but would not have done so in a concrete case in which an individual suffered actual injury solely on account of private consensual sexual behavior."[96]

I believe that Professor Dripps is right about the ease of making rights denying statements about marginalized people in the abstract. However, the American state court cases demonstrate that even when cases of concrete injury are presented, the same result will be obtained. Courts will obliterate and reconstruct facts to the extent they might stand in the way of the abstract proposition. But the abstract proposition is always embedded in the facts recreated as part of the official story of the events leading to judgment.

It may well be true that the state is free to protect us from whores and defilers. But were these men the monsters implicit in the rhetoric of the courts' judgment in these cases? In *Christensen*, the majority certainly thought so. Christensen's public sexualism was a tiger on the

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94. *Christensen*, 468 S.E.2d at 190.

95. *See* Donald A. Dripps, Bowers v. Hardwick *and the Law of Standing: Noncases Make Bad Law*, 44 EMORY L.J. 1417 (1995) (arguing that Hardwick had no standing to bring the case, that the court had previously shown some sympathy in cases where there was injury in fact, and that had there been injury in fact in *Bowers* the result might have been different). Moreover, "[a]rrayed against Michael [Hardwick] in his representational quest for constitutional dignity were several generations worth of judicial narrative reinforcing a myth of degeneracy and subversion." Backer, *supra* note 3, at 592.

96. Dripps, *supra* note 95, at 1418. David Garrow reported that Justice Powell, who cast the critical vote in *Bowers*, expressed the view after he resigned from the Court that "while *Bowers* was a 'close call' and 'not very important,' he nonetheless had concluded that '[he] probably made a mistake' in voting to uphold the law. *Bowers* 'was not a major case, and one of the reasons [he] voted the way [he] did was the case was a frivolous case' which had been brought 'just to see what the Court would do,' Powell recalled." DAVID J. GARROW, LIBERTY AND SEXUALITY: THE RIGHT TO PRIVACY AND THE MAKING OF *Roe v. Wade* 667 (1994).

loose. Indeed, according to the story fashioned by that majority, Christensen's words, uttered privately in a public place to a person apparently quite willing to listen, "were [instead] used in such circumstances and were of such a nature as to create a clear and present danger that they will bring about" a violation of the state sodomy statute.[97] Arguably, perhaps, these words might amount to nuisance. Yet our culture has been highly tolerant of the nuisance caused by public heterosexual solicitations.[98] Do the words exude "clear and present danger"? Preposterous histrionics in the service of another story!

The court in *Sawatzky* was also concerned with crafting a story of culturally appropriate sexual conduct. It was far less interested in the story of the quiet and private conversation in a public place between Sawatzky and the police officer.[99] That story disappeared.[100] In its place, the court constructs another story about lust. What the Court is concerned about is the appropriateness of overt sexual conduct—including solicitations for sex—in public places.[101] But that has little to do with a conversation between two adults in a public park where there was no evidence that the conversation could have been overheard by passersby.[102] For the Court (and the dissent), the subtextual issue is the promiscuous whorishness implicit in the private conversation. Mr. Sawatzky was preparing to engage in sex with anyone available. The preparation took place in public. *That*, the court tells us, is wrong. The moral of the story, then, is that society must mean to regulate private conversations because we mean to regulate the lust articulated in those verbal interactions.[103]

In each of the cases, one, and only one, facet of the stories becomes a point of departure for the stories narrated by the courts in the form of their opinions. What animates the courts is the fact of the

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97. *Christensen*, 468 S.E.2d at 190.

98. The tie in, of course, is to the promiscuity of prostitution, for which our society has somewhat less tolerance (in its public manifestations). This connection is made more explicit in the English cases. *See* discussion *infra* notes 126-29, 134-35.

99. Sawatzky v. City of Oklahoma City, 906 P.2d 785, 787 n.7 (Okla. Crim. App. 1995).

100. Interestingly, Sawatzky's lawyers attempted to make the facts reappear as critical to the determination of the case. Their point, well raised, was that the effort to make the facts of the case disappear had significant constitutional (in this case, First Amendment) implications which the state court could not avoid. Sex is not so much the issue in these cases as is speech. *See* Petition for Certiorari to the United States Supreme Court at 7-18, Sawatzky v. City of Oklahoma City, 906 P.2d 785 (Okla. Crim. App. 1995) (February 12, 1996).

101. *Sawatzky*, 906 P.2d at 787 n.1.

102. Indeed, the dissent was quick to pick up on this theme, alas to no avail. *See id.* at 787-88 (Strubhar, J., dissenting).

103. *Id.* at 788.

public expression of (in the American cases at least) forbidden but not suppressed[104] private desire between strangers. Consider *Sawatzky* and *Christensen* in this light. In each case, the courts determined that the catechism of recited rights was not available and could not even be considered. There are two reasons. The first was because the expression of the private act was made "public." It was made public, not because it was communicated to masses of people, but because its expression was not *totally* hidden from view. Made in private conversations between seemingly consenting people, the conversations occurred in a parking lot, in a park, or in a rest area of an interstate highway. These private conversations in public places were *public* enough to deny these conversants entry into the right-based catechisms of dominant discourse.[105] The second was because the conversations implicated sex between strangers.

> This is an archetype created out of images of what Carl Stychin has called the language of addiction. In this regard, the homosexual possesses the same attributes as others who are portrayed as unregulated and devoid of self-control: "Gays, prostitutes, and addicts are not in control of their desires or do not allow their desires to be controlled, and this makes them perverse and threatening agents of pathology."[106]

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104. I have earlier written about the ways in which the state, quite jealous of its right to proscribe the private sexual activity of sexual non-conformists, has spent little time and effort enforcing the prohibitions created as long as the conduct is private and consensual. See my study of the development of the jurisprudence of Oklahoma, Larry Catá Backer, *Raping Sodomy and Sodomizing Rape: A Morality Tale About the Transformation of Modern Sodomy Jurisprudence*, 21 AM. J. CRIM. L. 37 (1993).

105. Thus, for example, the cases speak dismissively of these cases on the basis of a general principle that privacy rights in the home do not extend to protect solicitation of explicit sexual acts from total strangers in public rest areas. *See, e.g.,* Christensen v. State, 468 S.E.2d 188, 190 (Ga. 1996). The majority in *Sawatzky* did not give it much thought. Conflating prostitution and "homosexual" solicitation, the fact that the conversation occurred in a public area was enough to remove all constitutional protection from the speakers. *Sawatzky*, 906 P.2d 785.

106. *See* Backer, *supra* note 3, at 584 (quoting in part Carl F. Stychin, *Unmanly Diversions: The Construction of the Homosexual Body (Politic) in English Law*, 32 OSGOODE HALL L.J. 503, 520-21 (1994) (quoting in part J.W. Jones, *Discourses on and of AIDS in West Germany, 1986-90, in* FORBIDDEN HISTORY: THE STATES, SOCIETY AND REGULATION OF SEXUALITY IN MODERN EUROPE 361, 364-65 (J.C. Fout ed., 1992)). That pathologizing mythology has directed politics as well. "While homosexuals often invoke the 'right of privacy,' these acts are often done in public parks, restrooms and bus stations. Many homosexuals practice oral-anal sex, group orgies, bondage, transvestitism, or sado-masochism or engage in fisting, rimming, bestiality, and ingesting urine and feces and gerbling." Citizens for Responsible Behavior, Notice of Intent to Circulate Petition, *reprinted in* Citizens for Responsible Behavior v. Superior Court, 2 Cal. Rptr.2d 648, 662 (Cal. App. 1991). *See, e.g.*, JUDITH A. BAER, EQUALITY UNDER THE CONSTITUTION: RECLAIMING THE FOURTEENTH AMENDMENT 226-228 (1983) (commonly advanced stereotype of gay men and Lesbians is that they are sexually promiscuous and do not want to settle down in

What, then, of the "progressive" case, *Wasson*? In that case, too, there is a jurisprudence substantially divorced from the story giving rise to the need for *judgment*. The majority opinion was quite careful to ignore the context in which the private consummation of sexual desire arose. Having carefully described the context of the litigation, it then consigns this context to jurisprudential oblivion.[107] Nowhere in the majority opinion do we confront the issue of the place in which the expression of desire was communicated. Nowhere in that opinion does the court confront the issue of the relevance of that venue, except perhaps by implication. Instead, the *Wasson* majority relies on resort to the same tactics used by the majorities in the other cases to opposite effect. The story of Jeffrey Wasson is lost in the quest for group rights, just like the stories of Brian Sawatzky and Chris Christensen were lost in what Justice Scalia referred to in *Romer* as the rush "to preserve traditional American moral values."[108]

In our effort to get to the "issue," courts and litigators forge facts. It's easier that way, especially because the project of judging requires a platform from which to articulate the personal expression of social opinion. That articulation is what animates the stories of cases as construed by the courts. Judges transform stories to aid in the social enterprise of "discourag[ing] a socially stigmatized lifestyle which leads to higher rates of suicide, depression and substance abuse."[109] That is the story of the state court cases I have reviewed here. But, ironically, it works the same way in cases where the courts "vindicate" the rights of sexual minorities. Consider not only *Wasson* but also *Campbell v. Sundquist*,[110] and *Gryczan v. State*.[111] In both *Campbell* and *Gryczan*, courts considered challenges in the form of a declaratory judgment. The issue of sexual expression and conduct was raised, sanitized, and denatured.[112] The plaintiffs in both cases appear as

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long term false family relationships); ALLEN P. BELL & MARTIN S. WEINBERG, HOMOSEXUALITIES: A STUDY OF DIVERSITY AMONG MEN AND WOMEN 81-84 (1978) (discussing the promiscuity of gay males).

107. *See* Commonwealth v. Wasson, 842 S.W.2d 487, 492 (Ky. 1992).

108. Romer v. Evans, 116 S. Ct. 1620, 1636 (Scalia, J., dissenting).

109. Campbell v. Sundquist, 926 S.W.2d 250, 263 (Tenn. Ct. App. 1996)(finding that state Homosexual Practices Act violates state constitution in a declaratory judgment action and describing an argument propounded by the state in support of the continued criminalization of private sexual conduct between people of the same sex).

110. *Id.*

111. 942 P.2d 112 (Mont. 1997) (concerning declaratory judgment action brought by three gay men and three lesbians).

112. The courts in both cases were well aware of the prudential problems raised by their determination to re-construct the interpretation of legal rules, that is norm-morals, in the

archetypal people, much like the characters in an Aeschylus play. They are symbols, ciphers for that which must occur. Here we have litigants appearing as "nouns." The "verbs" are missing. The courts are judging status, though, they craft their opinions to suggest that they are judging conduct instead.

Consider why the *Wasson* majority might have limited its exploration of the story of the particular litigant before it. The majority *had* good reason. To have explored far would have led the majority onto dangerous ground. It would have transformed the majority's story of Wasson the "innocent' man into the story of Wasson the "whore." Thus, transformed, the results reached in the other cases would have been hard to resist. Indeed, it is for this reason that the dissenting judicial voices in *Wasson* struck hard with an emphasis on the place where the arrest was made.[113] For instance, the bitter dissenting opinion of Justice Wintersheimer asserted that Wasson had no reasonable expectation of privacy for an act made to a *total stranger* on a *public street* in downtown Lexington.[114] It appears that Justice Wintersheimer was fighting prostitutes and whores, generally. What is not clear is whether his personal jurisprudential battle had anything to do with the reality of a long private conversation between two people during which the possibility of private sexual desire was broached. In this context, the story Justice Wintersheimer tells amounts to an act of distortion. Particularly interesting was Justice Wintersheimer's conflation of common criminality with the expression of "homosexual" desire *and* with the public/private divide.[115] Moreover, for Justice Wintersheimer, Jeffrey Wasson's story of his arrest on that particular night disappears into the collective story of the general promiscuity of

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absence of narrative. Both courts spent a considerable amount of time arguing that the absence of real narrative was no bar to the actions. Ironically, both courts then constructed a series of "virtual stories" out of whole cloth which approximated the *Wasson* story. They then used these constructed stories, free of the restraints of the reality of any particular actions of the litigants before them, to support the huge super-structure of "law interpretation" from which they reconstructed the law of sodomy in their respective states. *Id.*; *Campbell*, 926 S.W.2d 250. Indeed, the *Campbell* court used the opportunity presented by the hypothetical nature of the case to embark on a fairly long abstract discussion of legal sociology based on hypotheticals. *Campbell*, 926 S.W.2d at 264-66.

113. *See* Commonwealth v. Wasson, 842 S.W.2d 487, 503, 511-19 (Wintersheimer, J., dissenting).

114. *See id.* at 509.

115. Thus, Justice Wintersheimer argued that solicitation to commit a crime on a public street isn't a private matter. The public, after all, has every right to be free of the solicitation of all criminal acts. To except "homosexual" solicitation would amount to the succoring of modern hedonism. *See id.* at 509.

"homosexuals," who are efficient agents for the transmission of infectious diseases.[116] The general need to protect society against "homosexuals" as whores will trump any constitutional niceties.[117]

So at last we have come full circle. From the litigant's story emerge the judicial stories. Judicial stories are derived from and confirm popular understandings of the sexual non-conformist. This popular understanding of the way things are, in turn, shapes jurisprudential catechisms (even constitutional catechisms). These catechisms are then employed to confirm the soundness of judicial stories and the illegitimacy of litigants' stories. Contrary to what we teach, then, judging as the art of applying rules does not seem to exist here.

It should be somewhat disquieting that judicial opinions serve as a means of creating story mythologies in aid of a rules-bound jurisprudence disconnected from any "reality" other than that constructed specifically in support of that jurisprudence. This disquiet is not ideologically driven. It applies as much to *Christensen* as it does to *Wasson*. Jurisprudential non-connectivity afflicts all sides of the judicial "debate."

B. The English Cases

With the English cases we see a jurisprudential conflation of fact and judgment at once similar to and yet different from that of the American cases. The similarities lie in the judgment which attaches to the public expression of sexual desire. Once public, that expression becomes official and, therefore, real. Once real, the public expression must be judged as either licit or illicit. In this judging, public expression is confronted by the dominant culture. Confronted, it can no longer be ignored, and ignorance serves as the basis for the decriminalization (and limited licitness) of the expression in the first place.[118] Whether English or American, courts have always

116. *Id.* at 511.

117. *See id.*

118. As I have earlier explained in connection with the passage of the decriminalizing statutes in England and the United States:

> the Wolfenden Report's brand of toleration has brought a large measure of protection against direct coercion by the criminal law, but it has done so at an extraordinary price. It cripples the ability of people who do not identify with the sexual moral traditions of the majority of Americans (and whose conduct may violate the conduct taboos of this group) to enjoy something even approaching equivalent status. In the guise of limiting the reach of the criminal law in matters of certain forms of overt sexual conduct regarded as private, the (so-called) liberal state of the last several generations continues to use its power, overtly and covertly, to enforce the notion that the conduct protected (in private) is wrong, awful, disgusting, and not indulged in by normal people.

"remembered that these provisions are aimed at the importuning, rather than at the contemplated acts, and that importuning for acts which are to take place in private may be as offensive to the public at large as importuning for acts which are to take place in public. . . ."[119]

The differences lie in the forthrightness with which the English express the interrelatedness of popular culture and the strictures of the criminal law. That is expressed by the English in the notion that the jury determines what "morality" is and the state imposes criminal penalties for its violation. Thus, the English courts have made clear that "immoral conduct" can be anything in respect of sexual conduct.[120] As such, immoral purposes include those sexual acts that are criminalized by the state, including buggery and gross indecency between men. But criminal immorality also includes conduct leading to acts of gross indecency and buggery between men in private, which had been decriminalized in 1967. Lord Widgery was quite clear about the possible criminality of the expression of a desire to engage even in non-criminal sexual acts.

> So far as one can see, the only relevant effect of the 1967 Act is to prevent this homosexual conduct in private from being an offense against the law. . . . Therefore, . . . it seems to us that the only possible way in which this appeal can be put is that by virtue of the 1967 Act the contemplated act has ceased to be a criminal offense

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> The contradiction, the dysfunction, the power to give with one hand (and feel good about it) and take away with the other (and feel safe) is all too clear. The contradiction permits consensual sexual activity between people irrespective of the sex or marital status of the participants, but punishes, in a sometimes severe and humiliating way, any public expression of even the most benign form of same sex conduct. Thus, the liberal canon would permit private consensual sexual activity between people of the same sex, but would suppress the open display of any physical attachment between people of the same sex as well as the solicitation of any such consensual activity in a public place or the mere public congregation of people who may be amenable to such conduct in any public place, such as a park or a bar. Having given sexual non-conformists some private space, the dominant culture has defined its opposite, public space, so broadly as to substantially preserve its power to control non-conformist sexual expression. Non-majority sexual conduct of certain types may occur indulged, we are happily reassured, but only in private, and only if the acts—including their solicitation—can literally and figuratively be hidden from view (so that the rest of us can pretend that they do not exist).

Backer, *supra* note 6, at 796-97. On the public-private distinction, see generally *id.*

119. R. v. Gray, 74 Crim. App. 324, 328 (1981) (per Lord Lane). Compare this with the quite similar language of the dissent in *Wasson* and the majority opinions in *Sawatzky* and *Christensen*, discussed *supra*. Each of them confirms the necessity of public oblivion. Sexual desire is not so much the crime; it is public acknowledgment of sexual difference that is subversive and must be suppressed.

120. *See, e.g.*, Crook v. Edmundson, 1 All E.R. 833 (1966) (*cited with approval in* R. v. Ford, 1 All E.R. 1129 (1978)).

> and therefore for that reason has ceased to be an "immoral purpose" within § 32. We do not think much of this argument. *It seems to us that the phrases "immoral purposes" and "offense against the law" or "criminal offense" cover entirely different areas. It may be that the areas overlap, but they are different, and the fact that the conduct contemplated by the accused has now itself ceased to have the stamp of a criminal offense does not seem to us to make the slightest difference.*[121]

Thus, popular culture as articulated by a representative sample of dominant society *makes* law.[122] "[F]or the moral judgments of society must be something about which any twelve men or women, drawn at random, might after discussion be expected to be unanimous. . . . They did not think of themselves as making law but simply as stating principles which every right-minded person would accept as valid."[123] The difference between the English and their American counterparts on this score is that the English have been far more open about that reality than have the Americans. The Americans, in doing the same thing, constantly hide behind the skirts of their legislatures. Put differently, Americans prefer that their legislatures make laws in general terms that are then applied through the crafting of judicial stories. Americans are uncomfortable with juries expressing law within the particularities of a single litigation.

In England, then, juries become the *vehicle* of the expression of popular culture as judgment. Lord Lane well summed up this notion in *Gray*:

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121. *Ford*, 1 All E.R. at 1131 (per Lord Widgery) (emphasis added).

122. Judge Morland, the trial judge in *R. v. Goddard*, 92 Crim. App. 185 (1990) (per Hirst, J.) (concerning an adult male charged with importuning for immoral purpose by soliciting sexual activity from a 28 year old woman and a 14 year old girl), charged the jury: "In deciding whether it was for sexually immoral purposes as a matter of law you should apply the standards of ordinary right-thinking men and women living in England in 1989 and 1990, considering all the circumstances in which the overtures were made and the nature of those overtures." *Id.* Lord Staughton, in *R. v. Kirkup*, 2 All E.R. 802 (1993), after reviewing *Ford*, *Gray*, and *Goddard* with approval, explained that "it is for the judge to rule whether a particular purpose is capable of being immoral, and for the jury to decide whether it is." *Id.*

123. Devlin, *supra* note 48, at 25. Note, though, that even Devlin admitted that the initial choice of moral orderings was not pre-ordained; it "is something about which every society has to make up its mind one way or the other." *Id.* at 20. He also understood that the "limits of toleration shift." *Id.* at 27. The implication, though one Devlin would be unlikely to acknowledge, is that societal judgments of what constitutes deviance and of what sorts of deviance will be tolerated shift over time. They are implicated in Devlin's attempted explanation of the reasons juries routinely ignore Parliament and judge in the enforcement of the criminal rules of fornication. *See id.* at 30-31.

> It is plain from their verdict that the jury rejected the appellant's evidence and accepted that of the police officer. That being so, we have to ask ourselves whether we think it possible that . . . they could have done other than convict. In asking ourselves this question we are conscious of the fact that in the field of contemporary morals Judges may not be best fitted to assess the attitudes of the mass of right thinking members of society. But the views of Parliament may be regarded as reflective of such opinion, and taking them into account, . . . and making, we hope, due allowance for the passage of the years since 1967, we find strong confirmation of our own belief as to the attitude of society in general.[124]

Indeed, as Lord Staughton later (and somewhat circularly) explained in *Kirkup*, even though it is the court that must determine whether a particular form of conduct may be engaged in for an immoral purpose and for the jury to determine whether the particular events at issue were immoral in fact, the jury's determination serves to justify the court's determination. Thus, the trial court's determination in *Kirkup* that the conduct in that case (importuning of a police officer at Victoria Station restroom while smiling and masturbating in a nearby urinal) could be found to be an immoral purpose; "we have, as [the *Gray* court] had, the support of the unanimous verdict of the jury in Reg. v. Ford 16 years before. We do not know and cannot discover how many juries, if any, have since reached a different conclusion."[125]

Despite the fact that the jury, rather than the court, becomes a principal agent of story-crafting in Britain, the judicial process, nevertheless, serves as a site for narrative transmogrification. The individual stories, the voices of the persons brought for judging before the instruments of social control, are obliterated and transformed. This suppression and transformation mirrors the way in which the public acknowledgment of private passions is suppressed by the *law*. The individual stories merge into the mass of pre-judgments and story *types* from which morality—moral judgments—is ascertained. The *Gray* case brings this obliteration and transformation into sharper focus. There were two stories in *Gray*. One story was told by a person in disguise: a person pretending and appearing to be something contrary to his "nature." The other story was that of the defendant.

124. R. v. Gray, 74 Crim. App. 324, 329 (1981) (per Lord Lane).
125. R. v. Kirkup, 2 All E.R. 802 (1993).

The recitation of the facts of that case by Lord Lane makes plain a presumption of truth to the pretender's rendition, and that a presumption of fabrication cloaks Mr. Gray's story. How could we possibly believe that Mr. Gray engaged in conversation with another (to all appearances gay) male and did *not* want to engage him in sex?[126] The dominant culture conflates stories of "gayness" into a story about the adventures of the gay male as whore.[127] Thus, no conversation between gay men can be far from indiscriminate sex, even sex with strangers.[128] This is immoral. Mr. Gray's story is a joke.[129] It cannot be true. Our understanding of the "homosexual" *modus operandi* tells us it cannot be true absent proof beyond the mere word of the defendant. In this sense, moral and legal judgments—popular and legal culture—merge.

Specifically, it is expressed as a matter of *cultural truth*; there is a conflation of homosexuality and prostitution. And I speak here not primarily of prostitution as a business enterprise, but as the proxy for promiscuity of a most cynical kind.[130] This conflation is not new. It

126. Notice the way in which Mr. Gray's story is recited by Lord Lane. The police officer's story was straightforward and positive. The story related by Mr. Gray was related in a negative and defensive way, almost with a sneer of disbelief. "He denied having spoken to anyone before he spoke to the officer; he denied having touched anyone. . . . He denied having said anything about staying the night. He denied that his purpose had been to have homosexual relations." R. v. Gray, 74 Crim. App. 324, 326 (1981) (per Lord Lane). Each of the denials sounds in social guilt. There is guilt to touching, to smiling, to looking, to conversing, to inviting, . . . and to sex. Not unlawful individually, together the acts amount to public immorality and lawlessness.

127. The gay male naturally inhabits that world commonly associated with the friends of Moll Flanders, lifelong thieves and prostitutes. *See* DANIEL DEFOE, MOLL FLANDERS (Edward Kelly ed., W.W. Norton & Co. 1973) (1722).

128. For a detailed discussion of gay men as "whores of Babylon," see Backer, *supra* note 3.

129. The immorality of the conduct and the "joke" of defendant's story was replayed again in R. v. Kirkup, 2 All E.R. 802 (1993) (per Lord Staughton). In *Kirkup*, the plainclothes police officer testified that, in the men's bathroom at Victoria Station, the defendant stood in front of urinals for several minutes at a time without urinating, smiled at other men, finally stopped at the urinal next to that at which the police officer stood, "and looked and smiled at the officer while masturbating his own erect penis." *Id.* The defendant testified that he was only in the urinal for two or three minutes, urinated, washed and dried his hands, and then stood two or three stalls from the officer and looked at him out of sexual curiosity. He denied the rest of the story. *See id.* The jury accepted the officer's version of the facts and convicted defendant of importuning. Here again, there is the sneer of disbelief. Defendant's story is evoked in a series of denials: a denial of the masturbation, of the walking around, and of the rest of the prosecution story. The denials were sensible—he saw that the bathroom was well lit, and he knew that the bathroom was fitted with video cameras (though it does not appear from the opinion that any video tape of the events leading to the arrest were introduced by the prosecutors). *See id.*

130. This is an old story. Traditionally in Spain, a woman who had more than 5 lovers was classified a prostitute. The acceptance of money alone was not sufficient to classify a woman a prostitute. The critical element of prostitution was promiscuity. *See* JAMES A. BRUNDAGE, LAW, SEX, AND CHRISTIAN SOCIETY IN MEDIEVAL EUROPE 389-390 (1987). This view of prostitution

was inherent in the study from which modern English notions of tolerance for sexual minorities emerged from the *Wolfenden Report*.[131] The members of the Committee were quite conscious of this as well. Consider the comments of Dr. Karl Menninger that served as the introduction to the *Wolfenden Report*:

> Prostitution and homosexuality rank high in the kingdom of evils. They have in common the fact that they exist illegally to provide relief for physiological and emotional tensions which, in theory, could and should find other outlets. . . . From the standpoint of the psychiatrist, both homosexuality and prostitution—and add to this the *use* of prostitutes—constitute evidence of immature sexuality and either arrested psychological development or regression.[132]

The purpose of the Wolfenden Committee was to decouple crime from both sin and sickness. The authors of the *Wolfenden Report* did not mean to challenge the conclusions of medicine that homosexuality and prostitution were medical deviances. Nor did the *Wolfenden Report* doubt the conclusions of religion that homosexuality and prostitution existed as violations of the law of God. The Wolfenden Committee left unchallenged the traditional notion of law that homosexuality and prostitution each, in turn, are but different aspects of a common nuisance against dominant society. "We clearly recognize that the laws of any society must be acceptable to the general moral sense of the community if they are to be respected and enforced. But we are not charged to enter into matters of private moral conduct *except in so far as they directly affect the public good. . . .*"[133]

For the courts, there is no question of the relationship between the solicitation of private sexual expression between men and the kind of commercial solicitation of a business transaction inherent in traditional notions of prostitution. There is also no question as to its public character, even when the conversations evidencing intent are private. The stories constructed out of the testimony of the witnesses serve to

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has survived in modern American definitions of prostitution. A familiar traditional definition of prostitution in the criminal law of the American states explicitly recognized the conflation between promiscuity and prostitution. *See, e.g.*, OKLA. STAT. ANN. tit. 21, § 1030 (West 1983) (defining the term 'prostitution' as including the 'giving or receiving of the body for indiscriminate sexual intercourse without hire'). This provision was amended after 1992 and now defines prostitution as the giving or receiving of the body "in exchange for money or any other thing of value." OKLA. STAT. ANN. tit. 21, § 1030 (West Supp. 1998).

131. *See* THE WOLFENDEN REPORT, *supra* note 24.

132. *Id.* at 5-6.

133. *Id.* ¶ 12 (emphasis added).

prove this relationship over and over again. For Lord Lane, looking for guidance on the proper approach to the construction of the narrative of male sexual conversation, the basis for constructing these stories lay in the stories of female prostitutes. It is in this sense that the law of solicitation of acts of prostitution offered the best analogy.

> Prostitution, itself, is not unlawful. Acts of prostitution commonly, though by no means always, take place in private. Yet all soliciting in public places for such purposes is proscribed. It cannot be that from 1967 onwards it was the intention of Parliament (or even within its contemplation) that, whereas soliciting in public for the purpose of heterosexual prostitution was to remain unlawful, it would (or might) henceforth be lawful for some homosexuals, and even for homosexual prostitutes, to solicit in public.[134]

Notice what happened to Mr. Gray's story. That tale is largely irrelevant. It has disappeared within the larger and apocryphally mythical story of the homosexual prostitute. It is for protection against this prostitute of mythology that Mr. Gray must be swept in his net.

And what of other laws protecting the public against the "business" of sex? Well, such laws do not apply to homosexuals because the laws of criminal importuning do! That is the import of the recent case *Director of Public Prosecutions v. Bull.*[135] The Court determined that the term "common prostitute" against which the criminal proscriptions of Section 1(1) of the Sexual Offenses Act of 1959 were directed was limited to *women.* This conclusion was supported, in part, by Lord Mann's notion that "it seems improbable that Parliament intended to create a new male offense which was but subtly different from the extant § 32 of the Sexual Offenses Act of 1956."[136] The public sexual practices of prostitutes and all "homosexual" men are similar. And it is irrelevant to law whether men seeking each other sexually are prostitutes or "fornicators." In either case they require the same certain degree of tolerance and the same approach to suppression of public expression of private desire the state reserves

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134. R. v. Gray, 74 Crim. App. 324, 329 (1981) (per Lord Lane).

135. 4 All E.R. 411 (1994) (per Mann, L.J.). This case involved the prosecution of a male prostitute under section 1(1) of the Sexual Offenses Act of 1959 ("It shall be an offense for a common prostitute to loiter or solicit in a street or public place for the purpose of prostitution.").

136. *Bull*, 4 All E.R. 411. Earlier in his opinion, Lord Mann had noted the extremely limited differences between homosexual and heterosexual commercial solicitation: "There are differences between the components of an offense under § 32 and those of an offense under § 1(1) of the 1959 Act. Thus: (i) § 32 requires actual soliciting or importuning, § 1(1)requires either actual soliciting or loitering; (ii) § 32 requires persistence, § 1(1) does not; and § 32 requires an immoral purpose, § 1(1) requires a prostitutional purpose." *Id.*

for heterosexual (female) prostitutes. All "homosexual" men are prostitutes when they go public with their sexual desires.

There is, however, *some* broad difference between homosexual and commercially-driven heterosexual solicitation and the equivalent non-commercial heterosexual expression of sexual desire. Thus, underlying the cases is the understanding of the unevenness of the social effect of the conduct as between heterosexual and "homosexual" importuning. This was most recently brought out in the *Goddard* case.[137] In this case a man, driving along the roads of rural Dorset on a warm July day, stopped to aid a twenty-eight year old woman having trouble with her bicycle, asked her if she was married, told her she had sexy legs, and asked her out. She declined. He drove off, then came back, and asked if she would have time for a quick tryst then, frightening the woman. She declined and he drove off. He then drove back again, apologized if he had upset her, and drove off for the third time. A short time later, he approached a fourteen year old girl and asked if she wanted to earn a little money by joining him in the fields for some fun. She told him to get lost, and he departed. In both cases, the court stressed that the females were left frightened and distressed by the conduct.[138] The court, per Judge Hirst, applied the rule of *Ford* and *Gray*, to the horror of the defendant, who, after all, had been soliciting sex from females. The Court was not impressed, but not because what is good enough for "homosexual" men is good enough for men desiring women.

> We would only add that we were unimpressed by Mr. Aspinall's [appellant's counsel] argument that such a ruling would open the door to a flood of cases involving innocuous invitations, even between friends or acquaintances, as he put it, for consensual sexual intercourse. The section applies only to persistent conduct in a public place. Thus, save in a case such as the present where the appellant's public and persistent conduct was unpleasant, offensive and disturbing to the victims, we do not think a prosecution would be brought let alone have any prospect of success.[139]

Outrageous. It's hard to believe that the judges in *Goddard* read the same *Ford* and *Gray* cases. Appellants in neither *Ford* nor *Gray* believed that their "public and persistent conduct was unpleasant,

137. R. v. Goddard, 92 Crim. App. 185 (1990) (per Hirst, J.).

138. The 28 year old woman "was very frightened. . . . She was shaking so much that she could not write the [license] number properly." *Id.* The 14 year old was frightened and started crying as she had never been propositioned in this manner before. *See id.*

139. *Id.*

offensive and disturbing to the victims."[140] Each was in a place frequented by gay men, all of whom were there for the purpose of soliciting the acts with which they were charged. Both Mr. Ford and Mr. Gray assumed (and were not disabused of the assumption until the time of their arrests) that they were conversing with someone who welcomed the overture. None of this mattered in either case. As far as the courts seem concerned, there is no difference at law between *Ford*, *Gray*, and *Goddard*. Every act of "homosexual" solicitation is a species of cases like *Hemlock*, the apocryphal solicitation.[141] Apparently, other than in the case of a man soliciting another man, "we do not think a prosecution would be brought let alone have any prospect of success."[142]

C. The Nature of Obliteration

What, then, *is* relevant to lawmaking, and particularly to lawmaking in this context?

> The social effects of . . . criminalization are far reaching. . . . [H]omosexuality becomes largely invisible for the general public: if one does not have personal knowledge of homosexual lifestyles . . . the major impression one gets of homosexuality is one of perversion and crime. The media reinforces this negative image by reporting almost exclusively when something bad happens. . . . We see homosexuality connected to extortion, dishonourable discharge, violence

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140. *Id.*

141. Director of Pub. Prosecutions v. Hemlock, CO/1412/95 (Q.B. Div. June 22, 1995) (Crown Office List) (Transcript: John Larking), *available in* LEXIS, Intlaw Lib., Engcas File. As the court described it:

> the defendant was seen in the public lavatory of a caravan park at Porthcawl in the early hours of 9 August 1994. The complainant, Mr. Lloyd, left his caravan in order to visit those toilets. Then, putting it briefly, he saw the Appellant looking directly at him and making masturbatory gestures towards him. Apparently and understandably displeased by that act on Appellant's part, Mr. Lloyd ran out of the toilet block and returned to his caravan. When he looked out of that caravan shortly after he arrived there, he saw the appellant standing outside the door. Mr. Lloyd shut the door and then looked out the window. The Appellant then walked around the caravan and then shortly thereafter left.

Id. Treating the actions in the toilet and the "encounter" at the caravan as two separate "incidents" the court was then able to conclude that the importuning complained of was persistent within the meaning of section 32 of the Sexual Offenses Act of 1952.

142. *Id.*

> and perversion. Because of negative images of homosexual lifestyles, homosexuality is often, therefore, associated with criminality.[143]

Thus, the "Catch-22" of homosexuality: it is a crime necessitating police action, and enforcement multiplies the number of times the people against whom criminal statutes are enforced appear in court. The stories generated to support the judgment against the accused, as well as of the propriety of the law that criminalizes the acts of which the defendant stands accused, can then be used to obliterate all of the otherwise non-criminal aspects of their lives.[144] These are the methods by which courts aid in the censorship of that which is defined as deviant. And the censorship, though accomplished through the act of judicial narrative, carries with it the active complicity of the lawyers who act as the funnels for the stories to be transmitted.[145] Jurisprudence, then, is accomplished through the stories prepared for judgment. In that preparation, mythology in the service of the culture replaces any litigant-specific reality.

Foucault described the logic of the sequence of censorship well:

> [I]t links the inexistent, the illicit, and the inexpressible in such a way that each is at the same time the principle and the effect of the others: one must not talk about what is forbidden until it is annulled in reality; what is inexistent has no right to show itself, even in the order of speech where its inexistence is declared; and

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143. Evert van der Veen & Adrianne Dercksen, *The Social Situation in the Member States, in* HOMOSEXUALITY: A EUROPEAN COMMUNITY ISSUE: ESSAYS ON LESBIAN AND GAY RIGHTS IN EUROPEAN LAW AND POLICY, 131, 139 (Kees Waaldijk & Andrew Clapham eds., 1993).

144. As the European Court of Human Rights noted, "A primary purpose of any such laws is to prevent the conduct it proscribes, by persuasion or deterrence. It also stigmatises the conduct as unlawful and undesirable." Modinos v. Cyprus, 16 Eur. Ct. H.R. 485 (ser. A) at 485 (1993) (concerning a self-described practicing "homosexual" who complained that a Cypriot statute criminalising sexual acts in private between men violated his rights under the Human Rights Convention, even though the Cypriot attorney general had a no-prosecution policy; the Court determined that the statute violated art. 8 of the Human Rights Convention).

145. There is growing literature on the ways in which lawyers disempower their clients, especially when their clients belong to marginalized groups, such as the poor (and especially the poor of color). *See* GERALD P. LOPEZ, REBELLIOUS LAWYERING: ONE CHICANO'S VISION OF PROGRESSIVE LAW PRACTICE (1992). But sometimes even lawyers who try to break this mold are silenced by the courts. *Bowers* provides a particularly telling example. Laurence Tribe, who appeared at oral argument on behalf of Michael Hardwick, began his argument with a recitation of these facts, presumably in an effort to establish the factual context in which the case arose. He was quickly cut off. *See* Official Transcript of Oral Argument, Mar. 31, 1986, Opening Remarks of Laurence Tribe at 17-18, Bowers v. Hardwick, 478 U.S. 186 (1986) (No. 85-140) (copy on file with the author).

> that which one must keep silent about is banished from reality as the thing that is tabooed above all else.[146]

But false empathy, pre-understanding, cultural censorship, and the juridical erection of grotesque images merely provide backdrop. These help us understand why things are so and why "our reaction to another person in distress varies according to the normalcy or abnormalcy of his or her plight in our eyes."[147]

> Courts are bound by precedents, which may contain bad stories. If the only narrative law recognizes is a bad one—one that requires that you demean yourself or tell your story in a strange or contorted way, or jump through some very high hoops even to be heard at all—you will not choose to tell your story there very often. Judges' experiences and life perspectives are those of a certain class. There are very few African American, lesbian, or disabled judges, or ones from working class backgrounds. Since their experience is limited, judges may be ill-equipped to understand your plea.[148]

The cases illustrate the power of this backdrop well. The cases also suggest that a reason for the need to transform litigants' stories is embedded in our judgment of gay men as a class. The essence of the "homosexual" man involves the constant active or passive commission of two obscenities. One is prostitution; that is the seeking of random assignations with total strangers. The other is related to the first. It is the role of "Syphilis Mary," the carrier of infectious diseases. These obscenities are a public nuisance, driving "decent" folk from such innocuous places as rest stops on a public interstate highway. They also threaten the general social welfare by passing on their disease both metaphorically (their degeneracy) and physically (sexually transmitted disease). As the *Goddard* court was at some pains to note, "homosexual" whores, unlike their heterosexual counterparts, are beyond excuse.

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146. MICHEL FOUCAULT, THE HISTORY OF SEXUALITY, AN INTRODUCTION 84 (Robert Hurley trans., 1990) (1976).

147. Richard Delgado, *Rodrigo's Eleventh Chronicle: Empathy and False Empathy*, 84 CALIF. L. REV. 61, 76 (1996) (describing "norm theory").

148. *Id.* at 93. Professor Delgado's solution, in part, is group rights. *See id.* I would disagree, if only because it seems to me that ultimately one substitutes one group of subordinators for another by concentrating on one group's collective for that of another. Each suffocates. *See* Backer, *supra* note 9.

Myth is particularly important in this context because of the traditional sense that the conduct of these men lies beyond redemption. This stands in contradistinction to the gay man's female counterpart. In the female prostitute/whore/nymphomaniac (and her heterosexual counterpart), there lurks Mary Magdalene, a person whom many people's incarnation of God has suggested can be redeemed. She is ultimately good—just gone bad, "from whom seven demons had gone out."[149] She is the embodiment of New Testament forgiveness and redemption—an example of the power of divine love.[150] The "homosexual," on the other hand, is bound up in the churlishness, danger, and eternal evil of Sodom. He is the person who, like the citizens of Sodom, repeatedly rejects God. In him, there is the embodiment of Old Testament punishment and eternal damnation—the absence of divine love.[151] Absent a sustained and successful hermeneutical exercise (a project that is ongoing within and outside our Christian religions),[152] the undergirding of our religion makes it extremely difficult to come at these cases without these cultural presumptions.

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149. Luke 8:2.

150. For an example, see *Luke* 7:36-50, on the forgiveness of the sinning woman who washed Jesus' feet with her tears, dried them with her hair, and anointed them with oil in the house of the less hospitable Pharisee. On Mary Magdalene, see, e.g., 2 MARIA VALTORTA, THE POEM OF THE MAN-GOD 476-528 (Nicandro Picozzi trans., 1987).

151. The story of Sodom and Gomorrah is recounted in Genesis 18:16-33; 19:1-29. I owe these insights to Marty Belsky. Compare John Boswell's observations on the reasons why Jews have become "distinguishable insiders," and therefore tolerated, and gay people have not. John Eastburn Boswell, *Jews, Bicycle Riders, and Gay People: The Determination of Social Consensus and its Impact on Minorities*, 1 YALE J.L. & HUMAN. 205 (1989).

152. Thus, Boswell attempted a rereading of the Sodom and Gomorrah story, as well as the interdictions of "homosexual" acts in Leviticus, with a more sympathetic bent. *See* JOHN BOSWELL, CHRISTIANITY, SOCIAL TOLERANCE AND HOMOSEXUALITY: GAY PEOPLE IN WESTERN EUROPE FROM THE BEGINNING OF THE CHRISTIAN ERA TO THE FOURTEENTH CENTURY 92-98 (1980) (asserting that the punishment of Sodom was for violation of ancient hospitality codes). *But see* DAVID F. GREENBERG, THE CONSTRUCTION OF HOMOSEXUALITY 135-141, 195-202 (1988). Some Protestant writers have recently attempted to soften the story of Sodom as well. Thus, for example, rather than dealing with homosexual rape or the "sin" of the homosexual, Sodom and Gomorrah represent an abuse of hospitality. "[T]he evil which Lot suspects of the men of Sodom and for which God punishes them is not a perverted sexual appetite, but rather a breach of the rules of hospitality." H. KIMBALL JONES, UNDERSTANDING OF THE HOMOSEXUAL 67 (1966). Walter Brueggemann, in his commentary on *Genesis*, also suggests that Sodom's sin was not exclusively sexual in nature, "but a general disorder of a society organized against God." WALTER BRUEGGEMANN, GENESIS: A BIBLE COMMENTARY FOR TEACHING AND PREACHING 164 (1982). *See also* DERRICK SHERWIN BAILEY, HOMOSEXUALITY AND THE WESTERN CHRISTIAN TRADITION 2-9 (Archon Books 1975) (1955); JAMES P. HANNIGAN, HOMOSEXUALITY: THE TEST CASE FOR CHRISTIAN SEXUAL ETHICS 37-40 (1988). For a radical (re)vision of Biblical references to homosexuality, see ROBERT GOSS, JESUS ACTED UP: A GAY AND LESBIAN MANIFESTO 90-97 (1993).

Stripped to their essence, these cases also illustrate the ways in which all sides attempt to use the courts as vehicles for the approval of lifestyle.[153] In this enterprise, particular facts make no difference—cultural facts are the real issue, facts completely disembodied from the concrete. Thus, a common activity in the world of expressive sexual affection—the invitation to sexual activity itself—serves as a prism through which to observe the way in which false empathy, pre-understood, and grotesque imagery work against sexual non-conformists as individuals. Starting with the telling of the stories of sexual non-conformity through which dominant society judges, judging is cloaked with the language of "rules" and "theory" through which the stories are distorted and obliterated for the purpose of judgment. And we are most comfortable judging well what we know well.

This provides the basis for a discussion of the consequences of this reality which flow to sexual non-conformists in the world in which people play the game of moral politics through the courts, using the language of law. The cases here illustrate these consequences as well. A *necessarily* successful stratagem in court involves assimilation.[154] This poses a question for both dominant society and its sexual non-conformists. If assimilation is a necessary prerequisite to the acquisition of voice within courts, is change through the courts generally worth the effort? I will try to show in the section that follows that the answer is a qualified yes, but not for the purpose of directly effecting change through law.

V. ASSIMILATION, CHANGE AND LITIGATION?

Courts have proven to be dangerous sites for sexual non-conformists, even when courts appear sympathetic. The danger lies in the role of the court as perpetuator of the distortion inherent in the picture of the "ordinary" lives of sexual non-conformists painted by the stories in the cases.[155] The danger is increased because of the difficulty of determining the falsity of the picture painted by the cases and

153. Donald Dripps specifically and tellingly criticizes *Bowers* for this. *See* Dripps, *supra* note 95, at 1439.

154. This accords with Mary Ann Case's conclusion about cases in which lesbian and gay couples are prominent. *See* Case, *supra* note 14, at 1643, 1664-1665. *See also* Darren Rosenblum, *Queer Intersectionality and the Failure of Recent Lesbian and Gay 'Victories'*, 4 L. & SEXUALITY 83, 102-122 (1994) (noting that "[l]itigation also prioritizes the conformist parts of the queer continuum").

155. *See, e.g.*, Backer, *supra* note 3; Valdes, *supra* note 45, at 36-118 (discussing the conflation of sex, gender, and sexual orientation and the creation of "queer" stereotyping as cultural constructs).

because of the habit of courts to repaint the picture presented by the facts of a case to suit the court's fancy.[156]

It is easy to dismiss the argument that most people in our society murder or steal, for instance, because the lives of most citizens in these regards are *public*. We see our neighbors, we observe the conduct in our community, and we are able to determine fairly accurately that a small minority of our fellow citizens are anti-social in these ways and can make judgments of aggregate social character accordingly.

But the lives of sexual non-conformists are essentially *hidden*, private, closeted, and closed from view. *And we want it that way*. As I have previously argued, that is the thrust of our decriminalization.[157] But society forces sexual non-conformists to pay for this freedom within the closet. Having placed sexual non-conformists in this hidden space, society is free to construct and maintain monstruous archetypal visions of their character. These visions substitute for the reality otherwise revealed by lives publicly manifested.

Here are exemplified the ways in which mass-level preferences are constructed by means of communication with the public by those who can obtain control and ownership rights of the issue or the topic of communication.[158] This is especially so with respect to issues "which resonate with larger cultural themes."[159] These cultural

156. As *Wasson* teaches us, the only effective technique involves ignoring the problematic facts. In the *Wasson* case, the problematic fact was not the expression of sexual desire nor the intention to act on that desire in private, but the occurrence of that essentially private conversation in a public place. *See* discussion *supra* notes 55-61.

157. *See, e.g.*, Backer, *supra* note 6, at 755.

158. *See generally* ELIHU KATZ & PAUL F. LAZARSFELD, PERSONAL INFLUENCE (1955) (discussing the ways in which elites confer meaning on issues then communicate them to the public); Joseph W. Schneider, *Social Problems Theory: The Constructionist View*, 11 ANN. REV. SOC. 209, 214-19 (1985) (describing the ways in which elites compete for ownership of issues and how those issues are shaped as a result).

159. William A. Gamson & Andre Modigliani, *Political Discourse and Collective Action, in* 1 INTERNATIONAL SOCIAL MOVEMENT RESEARCH 219 (Bert Klandermans et al. eds., 1988); *see also* Stanley Feldman, *Structure and Consistency in Public Opinion: The Role of Core Beliefs and Values*, 32 AM. J. POL. SCI. 416 (1988) (asserting that the ability to link issues with core values provides a basis for the formation of public opinion as well as its direction).

themes operate at the level of "ethos,"[160] which I believe, in our culture, may be reduced to moral traditionalism and economic (process) egalitarianism.[161]

Judicial narrative in this case supplies a "pre-understanding" of sexual non-conformity that paints a whole class of people as the trolls of a modern age. It is perhaps the best evidence of the need for story-telling, for publicizing the *ordinary* lives of sexual non-conformists, and for gay-legal narrative which "outs" the *different* yet *ordinary* lives of those that judicial narrative has demonized through the accident-selective, public story-telling of an otherwise hidden group. In this sense, Patricia Cain is right in insisting on a litigation strategy which reveals the reality of the lives of the sexual minorities.[162] But I am not sure the courts are the most effective forum for this essentially political strategy.[163] As Anthony Alfieri notes in his perceptive review of Gerald Lopez's reservations about lawyering for poor people:

> Lopez hears the heroic campaigns of progressive lawyers trumpeted in the formal discourse of litigation, either narrowly asserted in providing direct service or broadly stated in devising law reform. Progressive lawyers claim the authority to command this discourse, "to make statements through *their* (more than their clients') cases, about society's injustices." (p.24). Consistent with the maxim of lawyer heroism, clients are only nominally involved in the discourse.[164]

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160. *See* HERBERT MCCLOSKY & JOHN ZALLER, THE AMERICAN ETHOS (1984) (arguing that the often conflicting core notions of capitalism and democracy undergird the political life of the United States).

161. This point has been made quite lucidly in Britain by Richard Topf. *See, e.g.*, Richard Topf, *Political Change and Political Culture in Britain, 1959-1987*, *in* CONTEMPORARY POLITICAL CULTURE 52, 69 (John R. Gibbons ed., 1989). On the ways in which this may work in the social construction of AIDS, see John B. Pryor et al., *The Instrumental and Symbolic Functions of Attitudes Towards Persons with AIDS*, 19 J. APPLIED SOC. PSYCHOL. 377, 396-401 (1989) (asserting that negative reactions to persons with AIDS represents in part a symbolic expression of "anti-homosexual" values); Philip H. Pollock, III et al., *On the Nature and Dynamics of Social Construction: The Case of AIDS*, 74 SOC. SCI. Q. 123 (1993).

162. *See* Cain, *supra* note 14, at 1551, 1624-36.

163. That this is essentially and necessarily a political strategy has been recognized both by jurists within the dominant culture—Justice Scalia's dissent in *Romer* is testimony to that—but also among the proponents of "liberation" agendas for sexual minorities. *See, e.g.*, Rosenblum, *supra* note 154.

164. Anthony V. Alfieri, *Practicing Community*, 107 HARV. L. REV. 1747, 1754 (1994) (reviewing LOPEZ, *supra* note 145).

That is equally applicable to the litigation campaigns for the "rights" of sexual minorities. The cases we have reviewed have made that abundantly clear.

Making positive stories is difficult. Giving voice to such stories becomes more difficult when the state, through its courts, can supply a constant stream of stories of the marginal and masquerade these as the totality of reality, in an effort to suppress a despised group. What requires nurturing and what is difficult and must be attempted consciously and in a sustained manner is storytelling in the service of *non*-conformity. Deviance may well be a function of majorities—the care and nurture of its *mythology*, its *reality*, must not be. But this is a political process in which the courts may serve as a recorder of chronicles, but in which the courts will have no active role of any substance.

The English courts, to a greater extent than their American counterparts, have been quite explicit about this relationship. The construction of immorality as a question of *fact*, the animating substance of the *Ford* and *Gray* cases, cannot make this point clearer. In order to succeed (to avoid the censure of the criminal law), the litigant will have to show conformity to popular cultural norms to the extent necessary to avoid the judgment of "immorality" and, therefore, guilt. This relationship is more subtle in the American cases and less democratic. In the American cases, the judgment of the standards of immorality (and criminality) implicit in the popular culture is not for the populace to make from case to case and with reference to a shifting notion of the limits of this morality. Rather, that power has been taken from the people and transferred to their government. What in England is a malleable (at least in theory) question of *fact*, is, in America, a question of *law*. In America, the legislature has made that determination, and it is to the legislature that litigants must appeal.

The differences are both great and small. The division is great because of the locus of the power to modulate. In America, the focus of change comes through a *political* process—control of the machinery of government. "The right to determine what is harmful to health or morals or what is criminal to the public welfare belongs to the people through their elected representatives."[165] In England, the process is

165. Christensen v. State, 468 S.E.2d 188, 190 (Ga. 1996). This notion is expressed again in the dissenting opinion in *Wasson*. Commonwealth v. Wasson, 842 S.W.2d 487, 515 (Ky. 1992) (Wintersheimer, J., dissenting).

more suffuse and subtle. The focus of change is directly *within* popular culture.[166] The deconstructive potential of the common law is far more available.[167] But the courts have freely restrained the deconstructive potential of the jury in matters of sexual non-conformity.[168] Indeed, in cases after *Gray*, the courts have spoken longingly of the day Parliament might "assume the task of deciding what is immoral in sexual activity" precisely because "what was unnecessary in 1898 and 1956 may now be desirable. Otherwise in a time of changing moral views, juries and justice may reach different conclusions."[169] The difference is also small because in both contexts, the courts must make reference to the same set of popular conceptions of the litigant as an essentialized class. In both cases, the focus is the same; the context in which decisions are made is marked by references to similar cultural demons.

Most importantly, *in both contexts, the courts are substantially irrelevant as instruments of change.*[170] This is what Foucault had in

166. This may well minimize the problem with the American *legal* approach which was discussed by Justice Hunstein in his dissent in Christensen: where the legislature retains for itself the power of directing popular culture, it may find itself and its constructions ignored by the very people it was empowered to represent. The power, in that sense, is as ephemeral as the legislature's faulty interpretations. *See* Christensen v. State, 468 S.E.2d 188 (Hunstein, J., dissenting).

167. Indeed, that is hinted at by Judge Hirst, who notes with approval Judge Morland's charge to the jury. That charge directed the jury to apply contemporary standards, not standards otherwise frozen in time. *See* R. v. Goddard, 92 Crim. App. 185 (1990).

168. Thus, Lord Lane in the *Gray* case noted, "[W]e are in no doubt that whether in 1896, 1956 or 1967, Parliament, in using the phrase 'importuning for immoral purposes' had no intention of excluding importuning by males for the purpose of engaging in homosexual activity." R. v. Gray, 74 Crim. App. 324, 329 (1981) (per Lord Lane). *Accord* R. v. Kirkup, 2 All E.R. 802 (1993) (per Slaughton, L.J.).

169. *Kirkup*, 2 All E.R. at 802.

170. I am not suggesting merely a dissatisfaction with Anglo-American judicial systems. This dissatisfaction has infected commentators on the political "right" and "left" primarily because the courts do not seem to do what the commentators think the court's ought to do and because we do not do what we are supposed to with the courts. For a perceptive comparison of the judicial dissatisfaction of traditionalist and "critical" scholars, see Bonnie Kae Grover, *Left-Right Critiques of the American Judicial System: Resetting the Social Agenda*, 3 VA. J. SOC. POL'Y & L. 371 (1996) (reviewing RICHARD DELGADO, THE RODRIGO CHRONICLES: CONVERSATIONS ABOUT AMERICA AND RACE (1995); CRITICAL RACE THEORY: THE CUTTING EDGE (Richard Delgado ed., 1995); ROBERT F. NAGEL, CONSTITUTIONAL CULTURES: THE MENTALITY AND CONSEQUENCES OF JUDICIAL REVIEW (1989); and CONTRACT WITH AMERICA: THE BOLD PLAN BY REP. NEWT GINGRICH, REP. DICK ARMEY AND THE HOUSE OF REPUBLICANS TO CHANGE THE NATION (Ed Gillespie & Bob Schellhas eds., 1994). *But see* Cain, *supra* note 14, at 1551, 1624-36. My conclusion runs deeper than that. Courts have not been ineffective instruments of change because of some structural or cultural problem or impediment. They are ineffective because they are *meant* to be. To abandon the courts, therefore, as a primary vehicle for social change is not so much an acknowledgement of the failure of courts, but the realization that courts are capable only of acting like courts and no more.

mind when he reminded us that, especially in matters of sexuality, "we must construct an analytics of power that no longer takes law as a model and a code."[171] Courts are at their most effective when *declaring* that change has occurred. The construction of social norms is not a function of the courts. Courts follow culture, even in America (despite the liberal/conservative myths to the contrary!). This model is explicit in England. It is implicit in the United States.[172] To this extent, I subscribe to Professor Delgado's notion of "reconstructive paradox"[173] and to Professor Spann's notion (although not his disappointment in the notion nor his sense of futility with the present core socio-political ordering) that "the Court is institutionally incapable of doing anything other than reflecting the very majoritarian preferences that the traditional model requires the Court to resist."[174]

But of course they do; ours is a *political* union. Professor Rosenberg summed up the overlying fact of judicial passivity nicely in concluding 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."[175]

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171. MICHEL FOUCAULT, THE HISTORY OF SEXUALITY, AN INTRODUCTION 90 (Robert Hurley trans., Random House 1990) (1976). The juridical notion of power is a mask which hides the true mechanisms by which power is exercised in culture. *See id.* at 86-91. Law and social hegemonies are the strategies in which power takes effect; they are the embodiment of the general design or institutional crystallization of power. *See id.* at 92-93.

172. But, you might ask, is *Wasson*, then, aberrational? The short answer is no. *See supra* notes 107-111 and accompanying text. Here abstraction hid the contrary judgment implicit in the narrative of the facts of the case, a point the dissent was at pains to trumpet.

173. Delgado, *supra* note 147, at 93-94 ("It begins by observing that the greater the evil—say black or female subjugation—the more entrenched it will be. The more entrenched any evil, the more massive the social effort that will be required to dislodge it. . . . [Courts are] ill equipped to hear and act on the stories many in our society most urgently need to tell.").

174. GIRARDEAU A. SPANN, RACE AGAINST THE COURT: THE SUPREME COURT AND MINORITIES IN CONTEMPORARY AMERICA 19 (1995).

175. GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 35 (1991). For Professor Rosenberg, the American judicial system is constrained by its: (i) limited constitutional rights; (ii) lack of (true) judicial independence; and (iii) lack of judicial power to implement decisions. As such, significant social reform is possible only when three conditions are met: (i) there is ample legal precedent for change; (ii) there is explicit or implicit substantial support for change within the other branches of government; *and* (iii) there is general citizen support or the lack of effective citizen opposition to the change. But even when all these conditions are met, judicial social change is not possible unless: (i) positive incentives for change exist; (ii) costs can be imposed for non-compliance; (iii) market implementation is possible; *or* (iv) the other branches of government are willing to implement judicially mandated reform. *See id.* at 5-6. What I emphasize in this paper is the nature of what Professor Rosenberg identifies as his second constraint—judicial independence. While Professor Rosenberg speaks specifically about courts in the United States, I believe that his notions go far to explain the practice of British courts as well, although the details will, of course, differ.

There is culture and there is law, and jurisprudence provides the hermeneutical vehicle through which law expresses culture and mirrors its dynamism. "Transformation," "reform," and "progress" are bridging words—a biblical overlay of pseudo-messianism on an endlessly revolving process.[176]

The ways in which the courts responded to the story of sexual solicitation highlights both the curse and the potential of assimilation. For dominant culture, the only stories of the "other" that it will tolerate are stories of assimilation. An assimilated "other"—a substantially invisible other—is the only non-conformist to which courts will extend the toleration of "rights" otherwise accorded to the majority.[177] And, indeed, what emerges from *Wasson*, *Sawatzky*, and *Christensen* in the United States, and *Ford* and *Gray* in England, is that the politics of assimilation, marketed as such, hold the key for the success of any political strategy involving the active intervention of the courts. It is also clear that the political strategy of choice for most of the life of the "gay-rights" movement has been litigation oriented.[178]

But then, do these cases have any long term value? The answer must be yes, but not directly. 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: perform the function of public goad. Professor Lobel has it right in his very interesting study of famous cases in which the Supreme Court refused the invitation to "transform" the law.[179] He claims that the arguments made in losing cases and rejected by 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.'"[180] 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. Both *Bowers* and *Romer* serve the same

176. For an interesting interpretation of the biblical overlay of our approach to "law," see Jules Lobel, *Losers, Fools & Prophets: Justice As Struggle*, 80 CORNELL L. REV. 1331 (1995).

177. For a discussion of the interplay of imagery and judgment in the context of constitutional challenges to state sodomy laws, see Backer, *supra* note 3.

178. *See, e.g.*, Cain, *supra* note 14, at 1551.

179. Lobel, *supra* note 176, at 1331.

180. *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, No. 01A01-9507-CV-00321, 1996 WL 29326, at *11 (Tenn. Ct. App. Jan. 26, 1996) (finding that state Homosexual Practices Act violates state constitution in a declaratory judgment action and describing an argument propounded by the state in support of the continued criminalization of private sexual conduct between people of the same sex). The dissent in *Christensen v. State*, 468 S.E.2d 188 (Ga. 1996), is also instructive.

purpose. Both will be equally effective in changing social *mores* (which is to say, hardly at all).

Emerging critical theory, especially critical queer theory, also presents the flaws and the promise of the prophetic vision.[181] The transformative religio-ideological postmodernist discourse of strains of queer theory tied to God (as they understand the immutable, the *Logos*) offers a rhetoric of doom and disaster to those who reject their vision of *Logos*.[182] But it also offers the possibility of redemption. This is not necessarily redemption as they see it (for I have argued that transformation of the sort for which they struggle is impossible), but rather the redemption offered by making it possible for culture to awaken to the possibilities of modulation, to a new way of conceiving the *possible* within core cultural parameters.[183] Think of them as one of the many jurisprudential Mutts of our cultural Mutts and Jeffs.[184]

VI. CONCLUSION

Stories provide us with a way to examine the nature of the multiple meanings of narrative and judgment, and what they suggest about the relationship of jurisprudence, popular culture, and judging. More importantly, stories provide a means to begin an inquiry into an increasingly sensitive subject: the necessity of assimilation as the price of a rights-based strategy for legal dignity. This rights-based approach has, at least in this century and within our socio-legal culture, found expression in the pronouncements of our courts. This has been particularly true in the context of the politics of reproductive and racial rights law, and of greatest significance for this essay, in the context of sexual non-conformity.

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181. I more fully treat these notions in Backer, *supra* note 9.

182. See Lobel, *supra* note 176, at 1418-19, on what, for Professor Lobel, amounts to the Prophetic-Sisyphean struggle of law.

183. On the importance of the project of cultural subversive calumny both within and outside the courts, see *id.*

184. *Mr. A. Mutt*, predecessor of the *Mutt and Jeff* comic strip, first appeared in November 1907 in the *San Francisco Chronicle*. Augustus Mutt, illustrated as having a compulsion for gambling, eventually met Jeff in an insane asylum. The two starred in the comic strip together from 1908 until the early 1980s. Mutt's never-ending quest to make money was continuously "frustrated by Jeff's benign and well-intentioned ignorance." ENCYCLOPEDIA OF AMERICAN COMICS 270 (Ron Goulart ed., 1990). Mutt represented the eternal loser, "the humble, anonymous man of the masses," REINHOLD REITBERGER & WOLFGANG FUCHS, COMICS ANATOMY OF A MASS MEDIUM 30 (1972), and yet, one compelled never to give in. A part of, and yet apart from, a society whose only face was ever present in the form of Jeff—asylum dweller and continual bumbler.

I have considered the meaning of and the indeterminacy of the meaning of jurisprudence and conformity, within the confines of court-constructed realities. The stories I started this essay with serve as the basis for this exploration. In the world of the courts, popular cultural constructions of sexual non-conformists reign. This is a world where the individual stories of the litigants are reduced to insignificance, where homosexuality and prostitution are conflated, and where the judgment of particular desires publicly expressed are suppressed. It is also a world in which the rules for tolerance are confirmed: private expression and public oblivion, *even* as to the public expression of private desire. These are jurisprudential realities driven by the constraints of the normative basis of popular culture which supply the courts with their pre-understanding[185] of and "false empathy"[186] for the extent of the applicability of rights-based notions to sexual non-conformists.

What the cases teach us is that, within the reality of law as spoken by the courts, a jurisprudence of court "made/confirmed" rights can only be successful when the mythology of sub-group norms can permit a court to say—"You are just like us (more or less)." When courts take cognizance of difference, and especially defiant difference, the cases also teach us that courts retreat to the safety of the mythologies dominant discourse has created to suppress the "other." Revolution and transformation is not within the reality of courts as *law-sayers*. Assimilation provides the vehicle for modulating societal judgments of those it has caricatured as deviant. It empowers the deviant to speak and be *heard*. And it is only when voices are heard within dominant discourse that calumny can be used to reshape the mythologies of suppression built into the current discourse of law. That is the positive essence of the lesson of cases such as *Wasson*.[187]

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185. For a discussion of pre-understanding or the way in which dominant discourse approaches and understands non-dominant subgroups on the basis of dominant mythologies about these groups, see Marc A. Fajer, *Authority, Credibility and Pre-Understanding: A Defense of Outsider Narratives in Legal Scholarship*, 82 GEO. L.J. 1845, 1847-1849 (1994); Marc A. Fajer, *Can Two Real Men Eat Quiche Together?: Storytelling, Gender-Role Stereotypes, and Legal Protection for Lesbians and Gay Men*, 46 U. MIAMI L. REV. 511, 571-91 (1992).

186. I refer here to the concept developed by Professors Delgado and Stefancic. They have explained that "[w]e *are*, in a sense, our current narratives. . . . [N]ot only does our status as situated actors create in judges and other policy-makers a resistance to potentially saving counternarratives, but it limits the very range of counternarratives in the canons from which policymakers might draw." *See* Delgado & Stefancic, *supra* note 10, at 1933. These notions of false empathy, as well as a series of suggestions for overcoming the falsity of empathy by "progressive" members of the dominant group, is explored further in Delgado, *supra* note 147.

187. Commonwealth v. Wasson, 842 S.W.2d 487, 489 (Ky. 1992).

But there is also a negative lesson in *Wasson*, that of false hope. This lesson of is also illustrated in *Christensen*,[188] *Sawatzky*,[189] *Ford*,[190] and *Gray*.[191] Courts cannot be the vehicle of choice for transforming popular culture. That is the greatest lesson Justice Scalia can teach us when he reminds us of the core jurisprudential problem posed by *Romer*—what do you do when conduct is decriminalized, but society remains free to vent its prejudices. Moral and social opprobrium carry far more weight than *law*. The cases teach us that. It is the lesson that those who place tremendous value on *Romer* as a liberating force ought to remember.

Because law is a new and fickle friend (and in many places still the enemy), we must keep pushing forward with well chosen lawsuits and lobbying efforts. The principle [*Romer*] represents must be reaffirmed in daily personal insurrections at the supermarket and in the schoolyard and on the assembly line—the true birthplaces of legal change.[192]

Paradoxically, the final lesson may be that, though generally doomed to failure in the courts, social and moral modulation requires repeated involvement within the courts. The courts represent one of the marketplaces in which modern cultural prophets *must* preach. Though doomed to failure in the sense that courts will rarely take up the invitation to transform, litigation serves as a means of "talking" to society at large. That is the most useful purpose of litigation. Although such efforts carry with it tremendous peril (they can, as I have previously shown, serve as a forum for perpetuation),[193] they contain tremendous opportunity as well. That is the ultimate lesson of this essay: sex, culture, law, regulation, and morality are parts of the Sysiphean drama we play out each day in our society. The trouble is, though, that there is more than one Sisyphus, that there are many boulders, and that the position of the top of the hill keeps changing.

188. Christensen v. State, 468 S.E.2d 188 (Ga. 1996).
189. Sawatzky v. City of Oklahoma City, 906 P.2d 785 (Okla. Crim. App. 1995).
190. R. v. Ford, 1 All E.R. 1129 (1978) (per Lord Widgery, C.J.).
191. R. v. Gray, 74 Crim. App. 324 (1981)
192. William Rubenstein, *Staring Down 2000: Law*, OUT, Feb. 1997, at 71.
193. *See* Backer, *supra* note 3.