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Emasculated Men, Effeminate Law in the
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I. INTRODUCTION

The gender activists who fill our schools and government agencies will continue with their efforts to make boys more docile and emotional. But fewer and fewer Americans will support them. Maleness is back in fashion. And one reason is that Americans are increasingly aware that traditional male traits such as aggression, competitiveness, risk-taking, and stoicism—constrained by virtues of valor, honor and self-sacrifice—are essential to the well-being and safety of our society.¹

Ideologies of gender remain ascendant throughout the world. For my purposes here ideology might best be understood from the perspective of a community as its “articulated forms of social self-consciousness.”² From the perspective of the individual, ideology most usefully refers not to any “system of political beliefs but rather to refer to the pervasive, often articulated, forms in terms of which people understand what it means to be a person.”³ An ideology of gender might, then, be reduced to a cluster of norms, expectations,

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1. Christina Hoff Sommers, *Men—It's in Their Nature*, 14 AM. ENTERPRISE, Sept. 2003, at 4, 5.

2. SUSAN STAVES, MARRIED WOMEN'S SEPARATE PROPERTY IN ENGLAND, 1660-1833, 6 (1990) (“Ideology, for my purposes here, is people's various ‘articulated forms of social self-consciousness,’ the explicit public ideas they have about human relationships, especially those ideas that serve to justify the power relationships between people, and to explain why it is right and good that different people should have different roles and different entitlements to power, wealth, and other social goods.”).

3. Janet Dolgin, *The Ideological Context of the Disability Rights Critique: Where Modernity and Tradition Meet*, 30 FLA. ST. L. REV. 343, 345 (2003) (citing Janet L. Dolgin & JoAnn Magdoff, *The Invisible Event*, in SYMBOLIC ANTHROPOLOGY 351, 363 n.7 (Janet L. Dolgin et al. eds., 1977)).

cultural context.¹³ The allegations in each case serve to amplify and fix the other allegations of consequentially bad behavior. This process reiterates the deviant nature of homosexuality, and reinforces the association of homosexual behavior with undesirable characteristics. Since proscriptions of "homosexuality" seek to prohibit particular behavior that appears to invert a "natural" order based on conceptions of appropriate male and female sex roles, the reiteration of the "homosexual" accusation further functions to conflate undesirable characteristics such as weakness, illness, corruption, or impurity with defective or incomplete manhood, and thus with the "not-male." Ironically, strengthening this association enables the gendered foundations of behavior regulation to recede while retaining its regulatory power.¹⁴

Such a system of conflation appears to affect only relations between men. In actuality, the power of gendering behavior among men has strong spillover effects on all social ordering. The maintenance of behavior systems that are gendered male necessarily results in the articulation of behaviors that are gendered "not-male" or "female." Though those gendered behaviors apply equally to deviant men and women, gendering effectively assigns a sex, and therefore a social place, to behavior. Since the behavior discouraged in men is "not-male" or "female," such behavior systems tend to reinforce gendered notions of appropriate conduct among women as well as men. The ritual of homosexual accusation functions to narrow the scope of acceptable male behavior, and thus reduce the ideal set of behaviors, to those identified with the non-deviant male. Behavior or expectations unreasonable for men will be generalized for the population as a whole as necessarily undesirable and gendered "not-male" or "female." Gendering male behavior as male (desirable) and "not-male" or "female," what is commonly understood as the "homosexualization" of male behavior, thus contributes to the regulation of women and reinforces a social hierarchy of behaviors in which that gendered "female" is subordinated to that gendered "male."¹⁵ Because each of these episodes takes place on a legal stage, they each give force to a system based on gendered behavior and the association of that gender system with locally powerful logics. This in turn authenticates and legitimizes the resulting conduct system in the neutral terms of the culture in which it is served up. Memorialized as law, the political system can then embrace gendered behavior in culturally acceptable non-gendered terms.

13. In the United States those traits center on illness, see discussion *infra* at Section III.A; in Zimbabwe, on corruption and weakness, see discussion *infra* at Section III.B; and in Malaysia, on impurity, see discussion *infra* at Section III.C.

14. See Part IV, *infra*.

15. I take Catharine MacKinnon's point one step farther. She had posited that theory becomes feminist "to the extent it treats sexuality as a social construct of male power: defined by men, forced on women, and constitutive of the meaning of gender." MACKINNON, *supra* note 4, at 128. Sexuality is a construct of male power veiled in language of apparently neutral systems, defined by men, *forced on men*, and thus constitutive of the meaning of gender, imposed on women.

The study thus exposes more starkly the ways in which conduct norms reinforce and are reinforced in turn by the related binary systems of sex and sexed (that is, gendered) conduct. Clearly, the insights offered here are not meant to "describe the world." They are offered as another layer in the complex of patterns of understanding and conceptualization of the world, and the people in it, scripting coercive normative consequences on the fundamental postulate that humans take one of two forms: male or female.

The Article starts with a focused recounting of the events that will serve as the basis of the analysis. Common practice favors developing theoretical insights before applying them, usually summarily, to some factual pattern or another. I choose a different path here.¹⁶ While a concentration of theory produces elegant explanations with some utility, it sacrifices the nuance that makes socio-cultural difference, especially difference in subtle foundational beliefs and approaches, so important. Theory, especially theory that attempts to overcome the factual contexts from which it derives, so that it will increase its predictive or descriptive power, is far too *ex post* for relevance except at the most general level. That may be of little use where, as here, the object is the very nuance built into the bones of social organization—that is, the construction of meaning around the individuals whose lives collectively define socio-cultural reality as a lived experience. A concentration on theory and generalizations derived there from leads too easily to the temptation to essentialize and decontextualize the analysis. People—cultures—are not theory as lived experience. It would thus be a mistake, at least for my purposes here, to treat it that way.

In Parts II and III, the Article first considers the factual narratives from the perspectives of the structural ideologies through which each of the societies operate. The focus is on an exploration of the narratives for the purpose of deriving a general theoretical framework for the analysis without so decontextualizing and essentializing the narratives that the generalizations lose connection to the situations from which they derive. What emerges is a consistent drive, within each society to create and enforce hierarchies of sex based on meanings ascribed to gender. Each of these local and different frameworks evidence the substantial flexibility of the drive to invest sex with meaning, and the simultaneous consistency of that meaning from system to system.¹⁷ In each case, society extracts a price from men who fail to conform to gender role ideals, and that non-conformity is used both to clarify the

16. I have written elsewhere on the critical importance of distilling narrative before analysis, especially in the context of behavior categorized as sexual and regulated on that basis. See Larry Catá Backer, *Tweaking Facts, Speaking Judgment: Judicial Transmogrification of Case Narrative as Jurisprudence in the United States and Britain*, 6 S. CAL. INTERDISC. L.J. 611 (1998); Larry Catá Backer, *Inventing a "Homosexual" for Constitutional Theory: Sodomy Narrative, Jurisprudence, and Antipathy in U.S. and British Courts*, 71 TUL. L. REV. 529 (1996).

17. See discussion *infra* at Section III.D.

characteristics of the ideal "male" and to distinguish that ideal from lesser "others." From the perspective of theory, what emerges are the shadowy forms of a globalizing, highly flexible ideology of patriarchy, which can insinuate itself as easily in the most progressive communal system as in the most insulated and traditional system.

Part IV then focuses on the relationship between these communal systems and systems of positive law. Gender meanings, so thoroughly bound up in social organization, are also inscribed in law. For the great crimes against any society, however constituted, are invariably *intensified* as they are sexualized. And especially with respect to the disciplining of the most privileged sector of society—its males—the augmentation of criminality invariably involves the sexualization (as deviant) of either the crime or the criminal. For those who find this a congenial state of affairs, there may be some comfort in the conclusion that traditional forms of investing sex with meaning to produce gender and gender role expectations is difficult to eradicate. To those who hope to find in a study such as this a key to change, there may be a small, positive moral. Systems of gender meaning, however constituted and naturalized within indigenous systems of communal organization, are not subject to manipulation like so many inputs in a perfectly working machine. Still, everything is capable of change at some level of particularity. Assimilation is necessary, but change is possible and can to some extent be directed. So it is with culture; and within culture, so it is with the complex of meanings ascribed to gender. The Article ends with a consideration of the possibilities that are available within the realities of assimilation-modification, and the possibilities of creating and implementing conscious strategies to the same effect.

II. THREE SOCIO-LEGAL NARRATIVES OF MASCULINITY AND LAW

The gendering of conduct generates similar sets of institutionalized norms. But the forms of production, articulation and institutionalization of this particular bundle of social and legal gender meaning is as distinctive, in their respective details as are the socio-cultural legal systems within which they are cultivated. In each of these socio-legal systems, the mechanics of gender norms were brought into focus in the context of specific sets of events that occurred at the end of the twentieth century and the beginning of the twenty-first century. The three sets of events were quite dramatic and generated global interest.

A. The United States: Terrorism, Foreign and Domestic

After the September 11, 2001 attacks,¹⁸ American newspapers used rumors of homosexuality to explain the motivation behind the anti-American sentiment that led to the attacks. Another sector of the popular press attempted to establish the homosexuality of Frank Lindh, the father of the so-called "American Taliban" Jonathon Walker Lindh, and debated over whether his homosexuality led the son to join the Taliban, and perhaps engage in "homosexual" acts himself. Yet another segment of the popular press deployed sex as the mechanism through which the crimes of the Washington, D.C. snipers could be amplified. Each is described below.

1. Muhammad Atta—World Trade Center Attack Hijacker

Less than a month after the September 11 attacks, the *Mail on Sunday* broke a story that the publications *Newsweek* and the *National Enquirer* would publish articles accusing the September 11 hijackers of being gay.¹⁹ *Newsweek* did not run the story, but reported that the *National Enquirer* printed an article claiming that Atta was gay.²⁰ The source of the rumors may have been conclusions drawn from interviews with Atta's father who said: "Mohammed. Oh God! He is so decent, so shy and tender . . . He was so gentle. I used to tell him to 'Toughen up, boy!'"²¹ Another commentator suggested that the terrorists' misogyny may have caused them to "turn to homosexual acts."²²

There was little investigation of Atta's conformity with gender roles. There was little evidence offered that Atta was motivated by homosexuality.²³ On the other hand, the press devoted space to what appeared to be the disordered sex lives of all of the September 11 hijackers. The thrust of the reports were very similar: "if we want to understand the terrorists' rabid hatred,

18. On September 11, 2001, terrorists hijacked four American airplanes. The hijackers flew two of the airplanes into the World Trade Center towers in New York City and one into the Pentagon in Washington D.C. Another airplane crashed in rural southwestern Pennsylvania. Thousands of innocent people died in the attacks. For a summary account of the attacks, see *The September 11 Digital Archive*, at <http://www.911digitalarchive.org/> (last visited Aug. 1, 2003).

19. See *Terrorists 'Were Gay'*, *MAIL ON SUNDAY* (London), Nov. 4, 2001, at 13.

20. See Michelangelo Signorile, *The Mohamed Atta Files*, *NEWSWEEK*, Oct. 31, 2001.

21. *Suspect's Father Denies Claims of Son's Role in U.S. Hijacking*, *HOUS. CHRON.*, Sept. 19, 2001, at A10. The elder Atta also claimed that the September 11 attacks were an Israeli conspiracy and the United States is a "tyrant nation" that supports Israel, adultery, and homosexual marriage. See also Neil MacFarquhar, *A Nation Challenged: Disavowal: Father Denies 'Gentle Son' Could Hijack Any Jetliner*, *N.Y. TIMES*, Sept. 19, 2001, at B4.

22. Ian Dempsey, *When Misogyny Turns to Terrorism*, *CAMBRIDGE REP.*, Oct. 22, 2001, at A4 (analyzing Jamie Glazov, *Atta's Rage Rooted in Islam's Misogyny*, *FRONTPAGEMAGAZINE.COM*, Oct. 12, 2001, at <http://www.frontpagemag.com/Articles/Printable.asp?ID=244> (last visited Feb. 23, 2005)).

23. Sociologist Michael Kimmel theorized that Atta was motivated by repressed "manhood" which he was attempting to reclaim. Michael Kimmel, *Gender, Class, and Terrorism*, *CHRON. HIGHER EDUC.*, Feb. 8, 2002, at 11. For criticism of Kimmel's viewpoint, see *Letters to the Editor: Don't Blame Women for Male Terrorism*, *CHRON. HIGHER EDUC.*, Mar. 15, 2002, at 17.

their maniacal anger, we must factor in the element of sexuality as an important part of the story."²⁴ The sexual deviance of the people who harbored the terrorists and adhered to their views was also exposed.²⁵ The terrorists' perceptions of the United States, and the threat posed by America to Islam, were sexualized as well.²⁶

2. John Walker Lindh—"American Taliban."

In Afghanistan in 2002, U.S. troops captured a Taliban unit. Upon interrogation of the surviving prisoners, U.S. officers found a young man who turned out to be an American citizen. John Walker Lindh, later nicknamed the "American Taliban" was a teenage boy who had traveled to Afghanistan and joined the Islamic fundamentalist Taliban. There, Lindh took up arms and fought against American troops.

The American press made much of two allegations circulating about John Walker Lindh. The first allegation is that Lindh was motivated to join the Taliban because Lindh's father, Frank, left the family to live with another man. Lindh's shame over his father's sexuality caused him first to look to Islam and later to the hard-line Taliban to fill the void in his life. The second allegation is that once Lindh declared himself a Muslim and began studying Islam, he had homosexual affairs with his teachers. These supposed affairs drew Lindh into the Taliban. As with Atta, these rumors are difficult to prove. The allegations are based on innuendo derived from interviews published by the mainstream press.

The first rumor began when P.J. Corkery of the *San Francisco Examiner* publicly "outed" Frank Lindh and suggested that John Lindh's behavior was influenced by Frank leaving the family to live with a married man.²⁷

24. Carmine Sarracino, *Sexual Hang-Ups May Belie Islamic Terrorists' Motivations*, INSIGHT ON THE NEWS, Nov. 26, 2001, at 45. Atta was said to "perhaps best express the extraordinary—and twisted—sexual repression of fundamentalist Islam. In his will he stipulated that no women were to attend his funeral or to touch his body after his death. Indeed, he further stipulated that should any men, in cleaning his body for burial, need to touch his genitals, they should wear gloves." *Id.*; see also Michael Medved, *That's Entertainment? Hollywood's Contribution to Anti-Americanism Abroad*, NAT. INTEREST (Summer 2002) ("During their months and years in the United States, Mohammed Atta and his colleagues savored the popular culture—renting action videos and visiting bars, peep shows, lap dancing parlors and Las Vegas—immersing themselves in Western degradation to stiffen their own hatred (and self-hatred?) of it.").

25. See Tim Reid, *Kandahar Comes Out of the Closet*, TIMES (London), Jan. 12, 2002, at 16; Maura Reynolds, *Kandahar's Lightly Veiled Homosexual Habit*, L.A. TIMES, Apr. 3, 2002, at A5.

26. One commentator summarized this view:

Islamic fundamentalists such as Osama bin Laden and his followers regard America as the incarnation of Satan. No. She is even more interesting and seductive than Satan. She is more akin to the Whore of Babylon. She has invented a new and more insidious form of colonialism. She is not satisfied with amassing wealth and power. Her goal is to conquer the hearts and minds of Muslim men and women around the globe. She will settle for nothing short of global dominance. She aims to create a global culture.

Shadia Drury, *Terrorism: From Samson to Atta*, 25 ARAB STUD. Q.1 (2003).

27. *Culture Et Cetera*, WASH. TIMES, Dec. 24, 2001, at A2 (quoting P.J. Corkery).

Michelangelo Signorile disagreed with Corkery and suggested that Lindh's actions were grounded in American society's deep hatred of homosexuality, rather than on Lindh's father's actions.²⁸ The American Enterprise Institute for Public Policy Research published an article comparing Jonathan Walker Lindh's upbringing to the upbringing of Chandra Levy and Monica Lewinsky. The article blamed Lindh's turn to the Taliban on liberal parents and a lavish, undisciplined upbringing.²⁹ The article, seemingly out of nowhere, also states that Frank Lindh was gay, implying that this fact explains why John Lindh strayed from societal norms.³⁰ Shelby Steele blamed Lindh's conduct on a "self-hating stream of American life" that was made up of "a much broader post-'60s cultural liberalism (more than political liberalism) that gave his every step toward treason a feel of authenticity and authority."³¹ Taken together, these media reports paint a picture that has some resonance in the United States: the self-hating gay man.

The issue of the media coverage of the sex lives of the Lindh family itself became an object of press attention. Publications lashed out at the press for reporting Frank Lindh's homosexuality and its probability of turning John to the Taliban.³² One publication saluted P.J. Corkery for excellent journalism.³³ In Canada, Robert Russo did not mention Frank Lindh's homosexuality, but did refer to Jonathan's anti-gay messages posted on the internet. As a teenager John Lindh wrote, "It seems quite unusual to have a Muslim convention at a theme park owned by Disney, whose producers are full of kaffir mythology, magic, occultism, sexism, racism, and homosexuality. Isn't this the same theme park that sponsored Gay Day this year."³⁴

The second allegation surfaced in October 2002 after *Time* magazine published an article that included interviews with Khizar Hayat, a Pakistani businessman/missionary, and Mufti Iltimas Khan, a teacher. John Lindh knew both of them personally and spent much of his time learning from them. Hayat said, "He was liking me very much. All the time he wants to be with me . . . I was loving him. Because love begets love, you know." Khan said, "Everyone

28. See Michelangelo Signorile, *Did Homophobia Corrupt John Walker?*, N.Y. PRESS, Jan. 1 2002, at http://www.nypress.com/print.cfm?content_id'5660.

29. *Liberal Parents, Lost Children*, ENTERPRISE, March 1, 2002, at 7.

30. See *id.* For a similar argument, see Steve Dunleavy, *California Airheads Unfit to Raise Lettuce*, N.Y. POST, Jan. 25, 2002, and Kay S. Hymowitz, *Marin County Diarist: Their Own Talib*, CITY J. (Manhattan), Winter 2002.

31. Shelby Steele, *Radical Sheik*, WALL ST. J., Dec. 10, 2001, at A18.

32. See John Elvin, *Washington in Brief*, INSIGHT ON THE NEWS, Feb. 25, 2002, at 34; *Readers Forum; Readers Hot About Charen's Column on Lindh's Parents*, COURIER-JOURNAL (Louisville), Feb. 24, 2002, at 2D; David Reinhard, *What Was Really Bugging Johnny Jihad?*, SUNDAY OREGONIAN, Feb. 10, 2002, at C04; *Tales of a Teenage Taliban*, THE ADVOCATE, Feb. 5, 2002, at 16; and Jonah Goldberg, *Family Trouble*, NAT. REV. ONLINE, Jan. 25, 2002.

33. See Harry Stein, *How the Father Figures; Why Does the Press Ignore the Story of John Walker Lindh's Dad?*, WKLY. STANDARD, Jan. 28, 2002, at 14.

34. Robert Russo, *American Taliban Fighter Faces Federal Charges and Life in Prison (Record in Progress)*, CANADIAN PRESS NEWSWIRE, Jan. 15, 2002.

who saw him wanted to talk to him and to look at him and to look at his face. A very lovely face he had, John Walker." The article reported that the Lindh's attorney denied that John was gay.³⁵ Following the publication of the *Times* article on John Walker Lindh, the *New York Post* and the *New York Daily News* published headlines explicitly stating that John Walker Lindh was gay. The *New York Post* published the story "American Taliban Lindh in Gay Pleasure Triangle"³⁶ and the *New York Daily News* published the story "Bizman: Lindh and I were Gay Lovers."³⁷ Both articles included a denial by Lindh that he is gay, but the headlines do not reveal this. The *New York Post* article declared that "Lindh enjoyed secret gay sex romps with his Muslim mentors."³⁸ The *Daily News* article stated that "Lindh's 'dangerous journey' into Islamic militancy was cemented by a sexual relationship with a Pakistani businessman who guided the American Taliban turncoat toward schools that fueled his hatred for the United States."³⁹

3. John Muhammad and John Lee Malvo—The Washington, D.C. Snipers

John Muhammad and John Lee Malvo are the principal characters in a multi-week spree of serial killing in the Washington, D.C. area that captured media attention worldwide.⁴⁰ They have been accused of murdering ten people in Washington, D.C., Maryland, and Virginia, and have already been convicted for some of these murders. In addition, they are suspected of killing three more people in Washington State, Virginia, and Louisiana.⁴¹

After the capture of the snipers, the popular press scrambled to find a motive for the killings. Psychologists analyzed, commentators hypothesized, and tabloids sensationalized information provided by the snipers' families and police investigators. Explanations of the motives ranged from detailed analyses of the snipers' pasts to pure speculation of homosexual tensions. Police investigated rumors that Muhammad supported Osama Bin Laden or the attacks of September 11.⁴² A national news weekly teased its readers with the notion

35. Timothy Roche et al., *The Making of John Walker Lindh*, TIME, Oct. 7, 2002, at 34.

36. Brad Hunter, *American Taliban Lindh in Gay Pleasure Triangle*, N.Y. POST, Sept. 30, 2002, at 9.

37. Jose Martinez, *Bizman: Lindh and I Were Gay Lovers*, DAILY NEWS (New York) Sept. 30, 2002, at 6.

38. Hunter, *supra* note 36.

39. Martinez, *supra* note 37.

40. "In three weeks, the case elicited 138,000 tip-line calls, seven times the number the Unabomber case yielded over 18 years." Amanda Ripley, *Behind the Killer Smiles Broke and Homeless John Allen Muhammad and Lee Malvo Traveled Together and are Accused of Killing Together Too. The Story of Two Lives Gone Bad*, TIME, Nov. 4, 2002, at 34.

41. See Rebecca Winters, *The Sniper Trail Grows*, TIME (Canada), Nov. 11, 2002, at 11.

42. See Carol Morello et al., *Pair Seized in Sniper Attacks; Gun in Car Tied to 11 Shootings; 2 Arrested After Vehicle is Spotted at Rest Stop*, WASH. POST, Oct. 25, 2002, at A1.

that the relationship between the two killers was a *folie a deux*.⁴³ A national circulation newspaper tantalized its readership with a different scientific explanation. It put forward an expert to suggest that for serial killers, murder is an end, but in the case of the snipers the murder was a means to the end.⁴⁴ Juxtaposing science with religion, that same newspaper also proffered a writing suggesting that the snipers' motivation was pure evil.⁴⁵ Additional speculation about the murders centered on John Muhammad's obsession with control of and loss of his children.⁴⁶

In the weeks after the killing started the popular media was willing to supply its public with increasingly elaborate explanations of the D.C. snipers' motivations—including a sexualized explanation of their motivations. A national circulation periodical briefly ran the most intriguing story: it reported that the snipers were gay.⁴⁷ While no other newspaper reported this story, the idea had an impact on the coverage and proceedings in the trial of Malvo. In September, 2003, mainstream newspapers reported that the police had investigated the possibility that Malvo and Mohammad were engaged in a sexual relationship as well as a 'father-son' relationship.⁴⁸ During Malvo's trial, newspapers again reported the story, with what might appear to be a bit less belief in the face value of the statement.⁴⁹ A month later, the press reported the defense attorney's allusions to Malvo's fear of "homosexual rape"

43. A *folie a deux* refers to a relationship where the psychosis of a controlling individual spreads to a younger and weaker individual. See Marianne Szegedy-Maszak, *Two Troubled Minds, Psychologists Are Probing the Mysteries of John Allen Muhammad and His Teenage Protégée*, US NEWS & WORLD REP., Nov. 4, 2002, at 29; Ripley, *supra* note 40.

44. See Neely Tucker & Serge F. Kovalski, *With Each New Killing, a Stronger Dose of Terror; In a Three-Week Siege that Baffled Experts, A Gunman Kept his Distance and his Power*, WASH. POST, Oct. 25, 2002, at A9.

45. See Richard Leiby, *The Warped Mind or Warped Soul at The Heart of a Killer*, WASH. POST, Oct. 26, 2002, at C1.

46. Mildred Muhammed claimed that her husband committed the murder spree in an attempt to secretly kill her and then reclaim custody of their children. See Marcia Slacum Greene, *"I'm Sure he had me in his Scope"; Muhammad's Ex-Wife Links Killings to Custody Fight*, WASH. POST, Nov. 8, 2002, at A1. It is known that two weeks before the killing spree Muhammad surprised both of his ex-wives with visits. See Amanda Ripley, *supra* note 40. The killing of Keenya Cook in Tacoma, Washington might also be linked to the loss of Muhammad's children. The aunt of the victim assisted police in finding Muhammad's location in Washington. Mildred Muhammad was living with Muhammad's children in Maryland. See Michael Isikoff & Pat Wingert, *A Mounting Toll: The Bloody Trail Left by the Sniper Suspects Lengthens, but the Search for Their True Motives Goes On*, NEWSWEEK, Nov. 11, 2002.

47. See *Snipers: Their Secret Gay Life*, NATIONAL ENQUIRER ONLINE, Nov. 1, 2002, available at <http://www.nationalenquirer.com/stories/feature.cfm?instanceid=50120> (last visited Feb. 21, 2003).

48. "Mr. Malvo referred to Mr. Muhammad as his father, and denied having a homosexual relationship with him, Cpl. Davis said. 'We Jamaicans don't play that,' Cpl. Davis quoted Mr. Malvo as saying." John Ward, *Testimony of Malvo's Guards Admissible*, WASH. TIMES, Sept. 3, 2003, at B1.

49. "Malvo, who has referred to Muhammad as his father and friend, has said he and the man 24 years his senior were not involved in a homosexual relationship. . . . Malvo referred to meeting 'my friend' in a 'search for knowledge,' according to a transcript of a police interview. 'I know when my friend is around; I can feel his energy. I know when he's close,' Malvo allegedly said." Kiran Krishnamurthy, *A Trail of Terror: Suspects' Path Stretched Far, and so Did Fear*, RICHMOND TIMES DISPATCH (Virginia), Oct. 12, 2003, at 1A.

in prison in relating the proceedings in Malvo's trial.⁵⁰ A final reference in December, 2003, appeared in a story about the use of the sketches Malvo made in prison after his capture. This story appears to attempt to refute the allegations.⁵¹

B. Zimbabwe: Post-Colonial Identity Crises

In 1980, after years of warfare against an entrenched ruling elite consisting of the minority of Zimbabweans of European descent, Zimbabwe achieved independence.⁵² At the end of the last century, the Zimbabwean male elites began a large-scale, multi-front campaign to gender and discipline behavior on a culturally vast scale.⁵³ Their principal spokesman was Robert Mugabe, a Catholic,⁵⁴ Shona, and the longtime political head of Zimbabwe. Mugabe's first internationally noticed public move against "homosexuals" occurred in 1995. Mugabe was scheduled to attend the opening of the Harare International Book Fair the theme of which was 'Human Rights and Justice.'⁵⁵ Mugabe refused to participate in the opening unless one of the exhibitors, Gays and Lesbians of Zimbabwe (GALZ) was expelled.⁵⁶ Government spokesmen were quoted as

50. S.A. Miller, *Youngest Victim Leery of Malvo; Takes Seat Near Prosecutors*, WASH. TIMES, Nov. 21, 2003, at B1 ("On cross-examination, defense attorney Thomas Walsh . . . alluded to Mr. Malvo's fear of homosexual rape in prison .").

51. "The sketches and their text reference an array of themes, including Malvo's sense of personal failure and alienation from his mother, anti-gay sentiments, and television—'tel-lie-through-vision'—as a propaganda tool." Serge F. Kovalesski, *Malvo's Drawings Attack U.S., Racial Bias; Other Jailhouse Illustrations Depict Personal Failure, Alienation*, WASH. POST, Dec. 5, 2003, at B1.

52. CIA, THE WORLD FACTBOOK: ZIMBABWE, available at <http://www.cia.gov/cia/publications/factbook/geos/zi.html> (last modified Feb. 10, 2005). The great political divisions within Zimbabwe still reflect an intense rivalry and competition for power between the largest ethnic groups in the country—the Shona peoples, who look to Mugabe, and the Ndebele peoples. After independence, revolutionary leaders Joshua Nkomo and Robert Mugabe denounced the tribal system, but the makeup of their political parties represented a split between the two tribes. *Id.* Nkomo's party was the Zimbabwe African People's Union (ZAPU) and Mugabe's party was the Zimbabwe African Nation Union (ZANU). From 1974 to 1976 these parties were combined under Bishop Abel Muzorewa, leader of the Organization of African Unity. Mugabe eventually rose to prominence in the 1980s as the winner of a series of intense inter and intra party strife. *Id.* For a chronicle of the post-Independence struggles between the Shona and Ndebele, and Mugabe's masterful use of rhetoric, intimidation and violence, see DAVID SMITH & COLIN SIMPSON, MUGABE 180-84 (1981).

53. For an interesting discussion of the rift between traditionalists and emancipationists in contemporary Zimbabwe, see Deborah S. Ballard-Reisch et al., *The Paradox of Women in Zimbabwe: Emancipation, Liberation, and Traditional African Values*, 24 WOMEN & LANGUAGE 65, 68 (2001) ("Traditionalists, President Mugabe, and to an increasing extent, the court system have defined emancipation for women as the freedom to return only to those pre-colonial African traditions that sustain male dominance. What makes this definition paradoxical is that Traditionalists are attempting to define emancipation such that men retain the status and power granted to them under British customary law while at the same time liberating Zimbabwe from the influences of British rule. In short, Traditionalists want both liberation from the British and the benefits that British rule had brought to men.").

54. SMITH & SIMPSON, *supra* note 52, at 9-15.

55. MARTIN MEREDITH, MUGABE: POWER AND PLUNDER IN ZIMBABWE 130 (2002).

56. Trevor Grundy, *Mugabe Embarrassed in Special Envoy's Gay Rape Trial*, SCOT. ON SUNDAY, July 13, 1997, at 21.

saying "Zimbabwean society and government do not accept the public display of homosexual literature and material. The trustees of the book fair should not, therefore, force the values of gays and lesbians on to the Zimbabwean culture."⁵⁷ Handsome Gwindi, education secretary of the Association of Traditional Healers, expanded on the statement: "Our president is quite right. In our culture we don't like that. Homosexuals are seen as devils and witches. It is a foreign thing. It encourages evil. It should be punished."⁵⁸ After the expulsion of GALZ from the Book Fair, Mugabe delivered an opening address describing as "outrageous and repugnant to my human conscience that such immoral and repulsive organisations, like those of homosexuals who offend both against the law of nature and the morals and religious beliefs espoused by our society, should have any advocates in our midst or even elsewhere in the world."⁵⁹ Mugabe later told the media that whites introduced homosexuality to Africa and that no black man would ever do such a thing.⁶⁰

Again in 1997, Mugabe prevented GALZ from exhibiting at a book fair and called the group an "association of sodomites and sexual perverts." He continued, "If dogs and pigs don't do it, why must human beings? Can human beings be human beings if they do worse than pigs?"⁶¹ Homosexuals, Mugabe said, were guilty of "sub-human behavior."⁶² Human rights groups believe that Mugabe bashed homosexuals to gain popular support for an upcoming presidential election.⁶³

The United States Congress sent a letter to Mugabe denouncing his remarks, and Mugabe responded by characterizing homosexuality as "Un-African."⁶⁴ He further stated, "Let the American's keep their sodomy, bestiality, stupid and foolish ways to themselves, out of Zimbabwe. We don't want those practices here. Let them be gay in the United States, Europe and elsewhere. They [homosexuals] shall be sad people here."⁶⁵ Mugabe criticized U.S. politicians, "Leaders in the U.S. are scared of losing their positions of power. That's why they give in to homosexuals so they can get their votes."⁶⁶

In 1997, Canaan Banana, president of Zimbabwe from 1980 to 1987 and a high Methodist official,⁶⁷ was charged with sodomy.⁶⁸ The charges grew out of

57. MEREDITH, *supra* note 55, at 130 (quoting an unnamed government spokesperson).

58. Alec Russell, *Attacks on Gays by Mugabe Seen as Political Smokescreen*, DAILY TELEGRAPH, Aug. 25, 1995, at 14.

59. MEREDITH, *supra* note 55, at 130.

60. Grundy, *supra* note 56.

61. James Roberts, *Ex-President's Sex Trial Grips Zimbabwe*, INDEPENDENT (London), June 2, 1998, at 15.

62. MEREDITH, *supra* note 55, at 131 (quoting Robert Mugabe).

63. Russell, *supra* note 58.

64. Grundy, *supra* note 56.

65. Russell, *supra* note 63.

66. Andrew Meldrum, *Mugabe Steps Up Attack on Gays*, GUARDIAN (London), Aug. 19, 1995, at

13.

67. CANAAN SODINDO BANANA, *POLITICS OF REPRESSION AND RESISTANCE: FACE TO FACE WITH COMBAT THEOLOGY* 10 (1996). Mugabe's Catholicism may have played a subtextual role in his

the murder trial of a former body guard, Jefta Dube. Dube's defense was based on gender insult—Dube had murdered a fellow police officer who had taunted him by referring to him as Banana's "wife" because it was well known, and admitted by the defendant, that the former president had repeatedly sodomized Dube over a number of years.⁶⁹ In the resulting political scandal, it was revealed that Banana had engaged in sexual relations with the players of the state soccer team and students at the University of Zimbabwe as well.⁷⁰ Mugabe directed the state attorney general to press charges⁷¹ after the intervention of the Catholic hierarchy.⁷² Banana's intense Methodism, and his mild criticism of Mugabe,⁷³ made him more of a target. As at least one of Mugabe's biographers has noted: "Mugabe recognizes even today that the Church first taught him the equality of man, regardless of race, in the eyes of God. The Catholic Church alone was prepared to speak out for that in the early days of the nationalist struggle."⁷⁴

Banana denied he was gay and condemned homosexuality in Zimbabwe but was ultimately convicted on eleven counts of sodomy, attempted sodomy, and indecent assault in November of 1998.⁷⁵ He fled to South Africa and Botswana before his conviction, but turned himself into authorities on December 17, 1998.⁷⁶ On January 18, 1999, Canaan Banana was sentenced to ten years imprisonment and hard labor.⁷⁷ On May 29, 2000, Banana's sentence was reduced to one year by the Supreme Court. In another ironic twist, Janet

decision to proceed against Banana. The rhetoric of anti-colonialism thus overlays an Africanized and now ancient struggle between two forms of Christianity competing for power. *See infra* note 72.

68. Roberts, *supra* note 61.

69. Angus Shaw, *Zimbabwe Jails Former President on Gay Sex Charges*, OTTAWA CITIZEN, May 30, 2000, at A14.

70. Roberts, *supra* note 61.

71. *See id.*

72. *See* Dean E. Murphy, *Zimbabwe Ex-President Convicted of Sodomy*, L.A. TIMES, Nov. 27, 1998. Mugabe has been described by critiques on the left as a "devout Catholic." PATRICK BOND, *ZIMBABWE'S PLUNGE: EXHAUSTED NATIONALISM, NEOCOLONIALISM AND THE STRUGGLE FOR SOCIAL JUSTICE* 73 (2002). At the time of the prosecution, Mugabe was 71 years of age and had just obtained approval from the Catholic Church for his wedding to his 37-year-old secretary. *See* STEPHEN CHAN, *ROBERT MUGABE: LIFE OF POWER AND VIOLENCE* 123 (2003).

73. *See, e.g.*, BANANA, *supra* note 67, at 226 ("I can only add that any legitimate Government should accept constructive criticism, for after all that is the expression of democracy for which the liberation war was waged."). However, there might have been some initial reluctance to charge the former president, since as late as 1993, Mugabe had praised Banana as an "eminent Zimbabwean." NATHAN M. SHAMUYARIRA ET AL., *MUGABE'S REFLECTIONS: ZIMBABWE AND THE CONTEMPORARY WORLD* 47 (1994) (quoting Robert Mugabe, Address to World Affairs Council, Los Angeles (Sept. 24, 1993)).

74. SMITH & SIMPSON, *supra* note 52, at 39.

75. *See* Christopher Bishop, *Banana Gets 10 Years but Walks Free from Court*, DAILY TELEGRAPH (London), Jan. 19, 1999, at 17.

76. *See* *A Fugitive Zimbabwean Leader Surrenders*, N.Y. TIMES, Dec. 17, 1998, at A3.

77. *See* Bishop, *supra* note 75.

Banana is currently out of contact with Canaan and believes that he may have rejoined Mugabe's forces.⁷⁸

In a decision that raised issues of judicial independence in Zimbabwe,⁷⁹ the Supreme Court of Zimbabwe, in *S. v. Banana*, was squarely presented with the issue of "whether the common law which criminalizes sexual intercourse *per anum* between consenting adult males discriminates against persons of male gender by imposing upon them a restriction to which persons of female gender are not subject."⁸⁰ In a 3-2 decision, the court decided that consensual sodomy should remain illegal because of traditional African attitudes toward homosexuality.⁸¹ Justice McNally, speaking for a majority of the court, reasoned that Zimbabwe's sodomy laws do not discriminate on grounds of gender, that Zimbabwe's social viewpoints on sexual morality are conservative, and that permitting the state the power to criminalize same-sex sexual activity accorded with the jurisprudence of the United States Supreme Court.⁸²

Chief Justice Gubbay, dissenting, reasoned that sex laws which criminalize male but not female activity are discriminatory against men.⁸³ He countered Justice McNally's reliance on American Constitutional case law by giving greater weight to the actions of the UK, Ireland, Canada, Australia, New Zealand, most of Western Europe, and South Africa, all of which had decriminalized sodomy.⁸⁴ Lastly, he argued that the fundamental right to not be discriminated against on the grounds of gender overrides the legislative objective to criminalize sodomy, that the legislative purpose behind sodomy laws is not rationally connected to the measures used, and that means used are more necessary than needed to meet the objective.⁸⁵

The *Banana* trial was only one of a number of actions by the Mugabe government in a campaign which continues. In 2001, Amnesty International reported that "Galz members have faced harassment, including threats of violence and criminal prosecution, for their work in defense of the rights of

78. See Rebecca Taylor, *Real Lives: 'They Say That Power Corrupts - and it Does,'* GUARDIAN (London), Jan. 23, 2002, at 6.

79. There are reasons to suspect that the decision in *Banana* was politically motivated. The independence of the judiciary has increasingly been eroded under the presidency of Mugabe. The regime has demonstrated a taste for both indirect and direct intimidation. Mugabe has not been above suggesting the illegitimacy of certain actions of the Zimbabwean judiciary, especially where it sought to block his confiscations of white-owned farms. SHAMUYARIRA ET AL., *supra* note 73, at 55-56. Direct intimidation has had a more precise effect. Former Supreme Court Chief Justice Anthony Gubbay, who wrote the dissenting opinion in *Banana*, resigned after he was approached by "war veteran" Joseph Chnotimba. See Joseph Winter, *Zimbabwe's Judges Remain Defiant*, BBC NEWS, July 18, 2002, available at <http://news.bbc.co.uk/1/hi/world/africa/1496484.stm>. Seven other justices have resigned from Zimbabwean courts due to intimidation. *Id.*

80. *S. v. Banana*, 1 Zimbabwe 607, 619 (2000).

81. See Shaw, *supra* note 69.

82. See *Banana*, 1 Zimbabwe at 631.

83. *Id.* at 619-20.

84. *Id.* at 620-23.

85. *Id.* at 623-25.

lesbian and gay Zimbabweans."⁸⁶ In 2002, Mugabe ordered the Central Intelligence Organization to compile a list of potentially gay ministers and officials in Zimbabwe's government. Alum Mpfu, former head of Zimbabwe Broadcasting Corporation, resigned after being caught in a compromising position. Zimbabwe's Information Minister, Jonathan Moyo, is also suspected of having an affair with Mpfu.⁸⁷

C. Malaysia: Islam with Malaysian Characteristics

The narrative most directly connecting corruption, male gendered expectations, and law, is that of the rise and fall of Anwar Ibrahim, who on the eve of his expected succession to the office of Prime Minister of Malaysia, found himself arrested, beaten, accused of political and sexual corruption, and sentenced to a long prison term. In Malaysia, Islam provided both the veil and the language through which political acts were sexualized and behaviors at the very highest sectors of the male elite were severely disciplined.⁸⁸ "Accusations of homosexuality have been used as a pre-text to imprison political opponents and torture and ill treatment have been used to extract confessions to make fabricated charges stick."⁸⁹

In a very real sense, however, the sexual politics of Malaysia is played against the larger than life relationship of former Deputy Prime Minister Anwar Ibrahim and Prime Minister Mahathir bin Mohammad.⁹⁰ Malaysia's political structure is divided along ethnic lines and government policies often reflect splits between the ethnic groups. Mahathir headed UMNO, the largest ethnic-Malay political party. Upon becoming the Prime Minister, Mahathir implemented what became known as the New Economic Policy (NEP) to eradicate poverty in Malaysia by restructuring society to achieve inter-ethnic economic parity.⁹¹ In the process of implementing the NEP and consolidating his power, Mahathir became a strong anti-Western voice within Asia. He and a

86. AMNESTY INT'L PUBL'NS, CRIMES OF HATE, CONSPIRACY OF SILENCE: TORTURE AND ILL-TREATMENT BASED ON SEXUAL IDENTITY 57 (2001).

87. See Basildon Peta, *Mugabe Inquisition into Gay Politicians*, INDEPENDENT (London), July 5, 2002.

88. For a concise review of the rise of Islam generally in Southeast Asia, and particularly in Malaysia, see, for example, Vincent J. H. Houben, *Southeast Asia and Islam*, 588 ANNALS AM. ACAD. POL. & SOC. SCI. 149, 159-60 (2003).

89. AMNESTY INT'L PUBL'NS, *supra* note 86, at 18.

90. This was particularly powerful in the ways the formal face of their personal relationship was communicated in political, religious and gendered terms. See IAN STEWART, *THE MAHATHIR LEGACY: A NATION DIVIDED, A REGION AT RISK* (2003).

91. Before Mahathir became prime minister, the private sector was dominated by ethnic Chinese. The NEP nationalized many industries to redistribute productive wealth on an ethnically equitable basis. See EDMUND TERRENCE GOMEZ, *MALAYSIA'S POLITICAL ECONOMY: POLITICS, PATRONAGE, PROFITS* 24-39 (1999).

conservative Japanese politician became somewhat notorious in the West for a strongly polemical anti-Western tract.⁹²

Mahathir employed issues of race, class and ethnicity,⁹³ and effectively played the anti-West culture card. But Islam, and Islamic political discourse was also becoming more important within Malaysia. Enter Anwar Ibrahim.

In 1972, Anwar founded the Islamic Youth Movement of Malaysia—known by its Malaysian acronym as Abim—and became its first president. Abim, . . . was launched with the stated aim of promoting Islam as a way of life and extending spiritual and material support to needy Malay Muslims.⁹⁴

Many members of Abim joined the Parti Islam se-Malaysia (PAS) the largest opposition party. But at Mahathir's invitation, Anwar joined Mahathir's party, UNMO.

Mahathir served as Anwar's patron and protector.⁹⁵ To some extent, the booming economy of the 1990's and Mahathir's political skills provided security, and Mahathir did not see Anwar as a threat.⁹⁶ This all changed in 1997 when the Asian financial crisis threatened to destroy Malaysia's economy. Anwar publicly recommended a monetary policy aimed at reforming corrupt government and business practices, and began openly challenging Mahathir's response to the crisis.⁹⁷ Mahathir's response was gendered. A booklet entitled *Fifty Reasons Why Anwar Cannot Become Prime Minister*, was recirculated amongst Malay politicians, despite a court order prohibiting its release.⁹⁸ The book accused Anwar of committing acts of sodomy.⁹⁹ In response, Anwar's advocates circulated news about him both in print and through various internet sites.¹⁰⁰

92. See MAHATHIR MOHAMAD & SHINTARO ISHIHARA, *THE VOICE OF ASIA: TWO LEADERS DISCUSS THE COMING CENTURY* (Frank Baldwin trans., 1995).

93. "Dr Mahathir's race-based politics have calmed anger towards the Chinese but planted the seeds of opposition. Over the years, he rationalized tight controls by reminding people that political chaos could lead to race riots between Malays and Chinese, like those that gripped Malaysia in 1969." Tey Tsun Hang, *Malaysia: The Fierce Politico-Legal Backlash*, 3 SING. J. INT'L & COMP. L. 1, 13 (1999).

94. STEWART, *supra* note 90, at 12.

95. See JOHN HILLEY, *MALAYSIA: MAHATHIRISM, HEGEMONY AND THE NEW OPPOSITION* 94-97 (2001); STEWART, *supra* note 94, at 14 ("Anwar rose rapidly in UMNO and in the government with Dr Mahathir's patronage.").

96. See HILLEY, *supra* note 95, at 94.

97. These ideas were reflected in his book. See ANWAR IBRAHIM, *ASIAN RENAISSANCE* 124-130 (1996).

98. See HILLEY, *supra* note 95, at 106. See also *Anwar bin Ibrahim v. Abudul Khalid & Kalid Jafri bin Bakar Shah*, 6 MALAYAN L. J. 365 (High Ct. Kuala Lumpur 1998).

99. See Dorinda Elliott, *The Rebel Son*, NEWSWEEK (Pacific Ed.), Dec. 28, 1998/Jan. 4, 1999, at 32. Another writer suggested that this publication had been "used extensively against Anwar in the 1996 General Assembly." James Chin, *Mahathir's Black Eye*, 25 N.Z. INT'L L. REV. 19 (2000).

100. See HILLEY, *supra* note 95, at 163. One site, 'Anwar Online,' included messages and speeches written by Anwar while in prison and were freely circulated. http://members.tripod.com/~Anwar_Ibrahim (last visited Feb. 23, 2005).

The battle came to a head on September 2, 1998, when Anwar Ibrahim was dismissed by Mahathir. No official reason for the firing was given.¹⁰¹ Malaysian and international news sources had reported charges of corruption and sexual deviance.¹⁰² Anwar began to campaign across Malaysia calling for Mahathir to resign and professing his innocence.¹⁰³ On September 20, 1998, Anwar was arrested at his home on charges of corruption and sodomy.¹⁰⁴

Following Anwar's arrest, Mahathir held a press conference in the course of which he described the accusations against Anwar—attempting to suppress an investigation relating to numerous acts of sexual activity, including sodomy, Anwar was said to have committed.¹⁰⁵ Mahathir said he believed that the charges must be true; after all, he supposed, no one would confess to the acts unless he did them.¹⁰⁶ Mahathir essentially sought to discredit Anwar within the context of his greatest political strength—the moral authority of his traditional Islamic stance.¹⁰⁷ In response to a question from a reporter, Mahathir found an opportunity to conflate religion, and sexual and political corruption:

I found it hard to believe of a man who projects himself as a religious man. . . . I could have found some of other reason of getting rid of him

101. See *Malaysia's Deputy Prime Minister Fired*, BBC NEWS, Sept. 2, 1998, at <http://news.bbc.co.uk/1/hi/world/asia-pacific/163200.stm> (last visited Feb. 23, 2005); Richard Lloyd Parry, *Mahathir's 'Heir' Sacked over Crisis*, INDEPENDENT (London), Sept. 3, 1998.

102. See Azmi M. Anshar and Terence Fernandez, *Foreign Press in Feeding Frenzy*, MALAY MAIL, Sept. 5, 1998; Douglas Wong, *Fall of Anwar Ibrahim: Papers Having a Field Day*, NEW STRAITS TIMES (Singapore), Sept. 5, 1998.

103. See Hang, *supra* note 93. For some local press accounts, see, for example, *Malaysian PM 'Paranoid'*, BBC NEWS, Sept. 4, 1998 at <http://news.bbc.co.uk/1/hi/world/asia-pacific/164504.stm> (last visited Feb. 23, 2005); *Malaysia Minister's Wife Continues Fight*, BBC NEWS, Sept. 21, 1998, at <http://news.bbc.co.uk/1/hi/world/asia-pacific/176168.stm> (last visited Feb. 23, 2005); *Thousands Join Malaysian Reform Rally*, BBC NEWS, Sept. 13, 1998 at <http://news.bbc.co.uk/1/hi/world/asia-pacific/170625.stm> (last visited Feb. 23, 2005); *Anwar Denounces Malaysian Police Violence*, BBC NEWS, Oct. 27, 1998, at <http://news.bbc.co.uk/1/hi/world/asia-pacific/202102.stm> (last visited Feb. 23, 2005); and *Anwar's Message for Justice*, BBC NEWS, Dec. 25, 1998, at <http://news.bbc.co.uk/1/hi/world/asia-pacific/242182.stm> (last visited Feb. 23, 2005).

104. See *Anwar Arrested Amid Kuala Lumpur Protests*, BBC NEWS, Sept. 20, 1998, at <http://news.bbc.co.uk/1/hi/world/asia-pacific/175896.stm> (last visited Feb. 23, 2005).

105. See Simon Ingram, *Sex, Lies and Videotape in Malaysia*, BBC NEWS, Dec. 1, 1998, at <http://news.bbc.co.uk/1/hi/world/asia-pacific/182999.stm> (last visited Feb. 23, 2005). The original corruption charges focused Anwar's attempt to make witnesses retract statements which accused him of sodomizing them, so as to avoid criminal prosecution—and later amended to include Anwar's desire to avoid embarrassment. The amended charges did not require proof of sodomy. For a list of the original and amended charges see *Anwar: The rewritten charges*, BBC NEWS, Jan. 13, 1999, at http://news.bbc.co.uk/1/hi/special_report/1998/10/98/malaysia_crisis/254565.stm (last visited Feb. 23, 2005).

106. See *Anwar Sues Mahathir*, BBC NEWS, Nov. 13, 1998, at <http://news.bbc.co.uk/1/hi/world/asia-pacific/213711.stm> (last visited Feb. 23, 2005). Mahathir's stance resonated within the Malay community because of the great stigma attached to confessions of activities like these. See *supra* Section III.C.

107. See *Reasons for ex-DPM's Arrest under ISA*, NEW STRAITS TIMES (Malaysia), Sept. 23, 1998, at 2 (transcript of remarks by Mahathir Mohammad).

(Anwar) if it is political. But it is unfortunate that this turns out to be as it is.¹⁰⁸

Anwar's trial for corruption began on November 2, 1998.¹⁰⁹ The first witness was Mohamad Said Awang, former head of the special investigations department of the Malaysian police. He testified that Anwar had been under special investigation for sexual deviance since 1992.¹¹⁰ The next witness in the corruption trial was Amir Junus, former Deputy Chief of Police Intelligence, who testified that Anwar forced him to rewrite retraction letters by Anwar accusers Azizan Abu Bakar and Ummi Hafilda Ali because the letters were not strong enough.¹¹¹ The state's star witness was Azizan Abu Bakar, the former chauffeur of Anwar. He repeated charges made in a letter purportedly sent to Mahathir in 1997 which read in part:

In the name of Allah, I have become a victim of homosexual acts by Anwar Ibrahim, who now holds the position of deputy prime minister. This heinous act was committed several times in 1992 against my will. It regularly took place in luxury hotels without the knowledge of the public and his wife.¹¹²

Yet, on cross examination, Azizan said that Anwar never sodomized him.¹¹³

The most spectacular testimony was elicited from Assistant Commissioner of Police Musa Hassan Musa, who testified that, as Deputy Prime Minister, Anwar had intercourse with married women. Evidence of this conduct was contained in a semen stained mattress found at the flat of Anwar's tennis partner Solaimalai Nallakaruppan.¹¹⁴ The second day of Musa's testimony was a press circus. Pictures of the mattress being carried into court were printed in the Malaysian press and broadcast around the world. Government chemist Lim Kong Boon testified that thirteen of the stains on the mattress belonged to

108. *Id.*

109. See Hang, *supra* note 93, at 3. Anwar "faced charges of obstruction of justice and abuse of power, under section 2(1) of the Emergency (Essential Powers) Ordinance No 22 of 1970. Section 2(1) of Ordinance 22 carried the maximum sentence of 14 years' jail or RM20,000 fine or both." *Id.*

110. See *New Sex Claims at Anwar Trial*, BBC NEWS, Nov. 3, 1998, at <http://news.bbc.co.uk/1/hi/world/asia-pacific/206866.stm> (last visited Feb. 23, 2005). His cross examination revealed that interest in this examination extended to the Prime Minister himself. *Id.*

111. See *Witness Says Anwar Doctored Sex Statements*, BBC NEWS, Nov. 27, 1998, at <http://news.bbc.co.uk/1/hi/world/asia-pacific/222921.stm> (last visited Feb. 23, 2005).

112. *Anwar driver tells of sex "slavery,"* BBC NEWS, Dec. 2, 1998, at <http://news.bbc.co.uk/1/hi/world/asia-pacific/226285.stm> (last visited Feb. 23, 2005).

113. See *Witness Throws Anwar Trial into Confusion*, BBC NEWS, Dec. 7, 1998, at <http://news.bbc.co.uk/1/hi/world/asia-pacific/229342.stm> (last visited Feb. 23, 2005). But Azizan later retracted this denial, saying he did not understand defense counsel's question. See *Double blow for Anwar team*, BBC NEWS, Dec. 10, 1998, at <http://news.bbc.co.uk/1/hi/world/asia-pacific/232199.stm> (last visited Feb. 23, 2005).

114. Musa claimed to have stumbled on to the mattress during the course of an investigation of the claims made in the book *Fifty Reasons Why Anwar Cannot Become Prime Minister*. Musa could not testify about the identity of the person whose semen was found on the mattress, but said that police were checking to see if the semen matched Anwar's DNA. See *'Mistress' Claim in Anwar Trial*, BBC NEWS, Dec. 14, 1998, at <http://news.bbc.co.uk/1/hi/world/asia-pacific/234697.stm> (last visited Feb. 23, 2005).

Anwar Ibrahim and the wife of Anwar's former secretary.¹¹⁵ Additional stains remained unidentified.¹¹⁶

On April 14, 1999 Anwar was convicted on all five counts of corruption and was sentenced to six years in jail.¹¹⁷ Riots broke out in Kuala Lumpur when the sentence was announced.¹¹⁸ Anwar's lawyers immediately filed an appeal with the High Court,¹¹⁹ where a three judge panel dismissed Anwar's appeal in April of 2000.¹²⁰

The government then brought charges against Anwar based on the underlying acts of sodomy. Strict limits were now imposed on public discussion of trial matters.¹²¹ The sodomy trial, which began on June 7, 1999, centered on allegations that Anwar sodomized his former driver, Azizan Abu Bakar;¹²² his adopted brother, Sukma Dermawan; and his close friend and advisor, Munawar Anees. Sukma and Munawar pled guilty to "committing acts of gross indecency by permitting Anwar to sodomise them."¹²³ Sukma testified that police forced a confession out of him by physically assaulting him, detaining him in an unlit, damp cell, and threatening to frame him for a capital offense.¹²⁴ Malaysian papers reported that Sukma testified he had sex with Anwar because he was indebted to him.¹²⁵ The defense sought to show that the charges were fabricated by the government.¹²⁶

115. On cross examination by the defense, Dr. Lim testified that he had no experience working with pathologists, geneticists, or forensic experts, and that he never published any of his work in any scientific journals. He further testified that he did not remember what the phrase "stochastic effect" meant. Finally, defense asked to examine the slides with Anwar's semen, and Dr Lim testified, "They've been destroyed. It was not our practice to preserve slides." See *Heads Roll over Anwar Beating*, BBC NEWS, Jan. 7, 1999, at <http://news.bbc.co.uk/1/hi/world/asia-pacific/250318.stm> (last visited Feb. 23, 2005).

116. See *Anwar Trial Hears DNA Evidence*, BBC NEWS, Dec. 30, 1998, at <http://news.bbc.co.uk/1/hi/world/asia-pacific/244570.stm> (last visited Feb. 23, 2005).

117. The case is reported at, *Public Prosecutor v. Dato' Seri Anwar bin Ibrahim* (no 3), 2 MALAYAN L.J. 1 (High Ct. 1999).

118. See *Anwar Sentence Sparks Riots*, BBC NEWS, Apr. 14, 1999, at <http://news.bbc.co.uk/1/hi/world/asia-pacific/318677.stm> (last visited Feb. 23, 2005).

119. See *Lawyers Appeal Anwar conviction*, BBC NEWS, Apr. 26, 1999, at <http://news.bbc.co.uk/1/hi/world/asia-pacific/328904.stm> (last visited Feb. 23, 2005).

120. See *Dato' Seri Anwar bin Ibrahim v Public Prosecutor*, 2 MALAYAN L.J. 486, 488 (2000).

121. Before the trial began, Judge Abdul Wahab-Patail restricted Malaysian public opinion and press with the following statement: "No comment, interview or statement, other than a factual report of evidence or submissions in relation to the proceedings before the court or any matter related to it, is permitted to be published in any form." See *Anwar Judge Gags Press*, BBC NEWS, May 14, 1999, at <http://news.bbc.co.uk/1/hi/world/asia-pacific/334657.stm> (last visited Feb. 23, 2005).

122. See *Anwar Sex Trial Begins*, BBC NEWS, June 7, 1999, at <http://news.bbc.co.uk/1/hi/world/asia-pacific/362733.stm> (last visited Feb. 23, 2005).

123. *Sodomy Charges Turn up Heat on Anwar*, BBC NEWS, Sept. 19, 1998, at <http://news.bbc.co.uk/1/hi/world/asia-pacific/175339.stm> (last visited Feb. 23, 2005).

124. See *Anwar's Brother: Threats Forced Sex Confession*, BBC NEWS, June 30, 1999, at <http://news.bbc.co.uk/1/hi/world/asia-pacific/382110.stm> (last visited Feb. 23, 2005).

125. See *Sukma Had Sex With Anwar Because He Was Indebted, Court Told*, MALAYAN GENERAL NEWS, Sep. 19, 1998.

126. Defense attorneys called Jamal Amro, a US citizen of Lebanese origin. Amro testified that Malaysian diplomat Mustaffa Ong asked him to fabricate a story about a sexual misconduct involving Anwar. Amro said that Ong offered him \$200,000 and asked, "why don't you say you brought some

In October 1999 Anwar attempted to call Prime Minister Mahathir to the witness stand during the sodomy trial. His purpose was to prove that the government had engaged in a conspiracy to trump up the charges against him. Judge Arifin Jaka issued a subpoena for the testimony of Mahathir, but the Judge also ordered that Anwar must answer the sodomy charges before he could cross-examine Mahathir.¹²⁷ The judge then reversed himself and ruled that Mahathir did not have to testify in Anwar's trial.¹²⁸ During suspension of the trial from November 1999 to January 2000,¹²⁹ the government brought pressure to bear on the defense team.¹³⁰ The trial ended after Anwar delivered a fiery speech in which he sought to accuse the government of a form of the corruption with which he had been charged.¹³¹ On August 8, 2000 Judge Arifin found Anwar guilty of sodomy and sentenced him to nine years in prison, to be served after he serves his six year sentence for corruption.¹³² He also prohibited Anwar from serving in a political office for five years after his release from prison.¹³³

The importance of gender as an element of the campaigns against Anwar is revealed in a set of proceedings instituted by Anwar against Mahathir during the pendency of his sodomy trial. On November 13, 1999 Anwar filed suit against Prime Minister Mahathir, charging that Mahathir defamed him at a press conference in September 1998 and requesting \$26 million in damages.¹³⁴ Mahathir asserted that he spoke only in his capacity as prime minister and that

girls and boys for him?" Defense lawyers argued that this incident showed the "level and intensity of efforts" to destroy Anwar's career and reputation. See *Diplomat "Tried to Frame Anwar,"* BBC NEWS, Apr. 21, 2000, at <http://news.bbc.co.uk/1/hi/world/asia-pacific/699873.stm> (last visited Feb. 23, 2005).

127. See *Court Summons for Mahathir*, BBC NEWS, Oct. 21, 1999, at <http://news.bbc.co.uk/1/hi/world/asia-pacific/481283.stm> (last visited Feb. 23, 2005).

128. See *Mahathir will not Testify*, BBC NEWS, Apr. 21, 2000, at <http://news.bbc.co.uk/1/hi/world/asia-pacific/721374.stm> (last visited Feb. 23, 2005).

129. See *Anwar Trial Postponed 'Indefinitely'*, BBC NEWS, Nov. 15, 1999, at <http://news.bbc.co.uk/1/hi/world/asia-pacific/520871.stm> (last visited Feb. 23, 2005). The trial was suspended while Malaysia held a general election. Anwar's wife suggested that the postponement was politically motivated to keep Anwar "out of the way during the elections." *Id.* The campaign was marked by the suggestion that Anwar's followers would bring violence and corruption to government. See *Malaysia Campaign Off to a Stormy Start*, BBC NEWS, Nov. 21, 1999, at <http://news.bbc.co.uk/1/hi/world/asia-pacific/530778.stm> (last visited Feb. 23, 2005).

130. Karpal Singh, defense attorney for Anwar, was charged with sedition over the break. Karpal replied that "[t]he attorney-general is in contempt of this court for having set in motion my prosecution. As a lawyer I am duty bound to stand up in defense of my client without fear or favour." See *Anwar Trial Resumes Amid Protests*, BBC NEWS, Jan. 25, 2000, at <http://news.bbc.co.uk/1/hi/world/asia-pacific/616984.stm> (last visited Feb. 23, 2005).

131. See *Anwar Dismisses Defense Team*, BBC NEWS, Apr. 29, 2000, at <http://news.bbc.co.uk/1/hi/world/asia-pacific/836946.stm> (last visited Feb. 23, 2005).

132. See STEWART, *supra* note 90, at 176 (2003). For contemporary press reaction from the West, see *Anwar Guilty on Sex Charge*, BBC NEWS, Aug. 8, 2000, at http://news.bbc.co.uk/1/hi/world/asia-pacific/hi/english/world/asia-pacific/newsid_870000/870595.stm (last visited Feb. 23, 2005).

133. See STEWART, *supra* note 90, at 177.

134. See *Anwar Sues Mahathir*, BBC NEWS, Nov. 13, 1998, at <http://news.bbc.co.uk/1/hi/world/asia-pacific/213711.stm> (last visited Feb. 23, 2005).

he wanted the reasons for his decision to dismiss Anwar known.¹³⁵ The High Court rejected Anwar's suit in August 1999, concluding that the suit was "frivolous, vexatious, and an abuse of court process."¹³⁶ The High Court found that Mahathir's press conference statements were "statements of fact,"¹³⁷ even though no judgment had yet been rendered in Anwar's sodomy trial.

III. DIFFERENT EXPRESSIONS OF SIMILAR NORMS

From these three very different cultures, three very similar results. Societies give meaning to gender through those mechanisms consonant with the normative structure internalized by the community.¹³⁸ In this Part, the previously discussed narratives serve as a basis for exploring the structural ideologies through which gender ordering among males finds expression. The focus will be on difference.

Each society arrives at the incorporation of the idealized male at the apex of social ordering in different ways. In the case of the United States, scientism and religion provide the framework within which the mechanics of gender normativity operate. In the case of Zimbabwe, nationalism and cultural cleansing provide a very different context within which meaning is given to gender, and enforced against individuals. In the case of Malaysia, religion provides the primary socio-cultural setting within which gender meaning operates. Science brands men with feminine traits as disturbed, disordered, and given to acts of criminality on a vast and immoral scale. Nationalism brands men with feminine traits as foreign, alien, and corrupting: a danger to the state and the political order. Religion brands men with feminine traits as in the thrall of an incarnation of evil and thus both sinful in their relationship with God and corrupt in their relationship with humans. Men, by defining masculinity as the opposite of 'femininity' and by controlling (policing) the masculinity of other males, define and control what it means to be female and thus define and control women's behavior.

135. See *Mahathir Lodges Slander Defense*, BBC NEWS, Apr. 2, 1999, at <http://news.bbc.co.uk/1/hi/world/asia-pacific/310499.stm> (last visited Feb. 23, 2005).

136. See *Dato' Seri Anwar bin Ibrahim v. Dato' Seri Dr Mahathir bin Mohammad*, 4 MALAYAN L.J. 58 (High Ct. Kuala Lumpur 1999).

137. See *Anwar Loses Defamation Suit*, BBC NEWS, Aug. 30, 1999, at <http://news.bbc.co.uk/1/hi/world/asia-pacific/433538.stm> (last visited Feb. 23, 2005).

138. Norma Alarcón, *Introduction: Between Woman and Nation*, in BETWEEN WOMAN AND NATION: NATIONALISMS, TRANSNATIONAL FEMINISMS, AND THE STATE 1 (Norma Alarcón, et al. eds., 1999) (The "nation-state sharpens the defining lines of citizenship for women, racialized ethnicities, and sexualities in the construction of a socially stratified society").

A. An American Vice: Conflating Crime, Gender, Science, and Law

Portraying Muhammad Atta as a repressed homosexual permits a gendered rationalization of Atta's criminal behavior. Atta is not a political warrior but a sexual psychopath acting out. Likewise, recasting the odyssey of John Walker Lindh in sexual-psychological terms situates political criminality within the realm of the degrees of madness. Lindh is not a religious convert fighting for his new faith but a son acting out against his father's decision to abandon the family for another man. The madness is in the blood as well—for John Walker is in turn recast as a sodomite within Islam, son imitating father. The same pattern is followed with John Mohammed and Lee (John) Malvo. These males are not cold blooded serial killers. Instead they personify a complex mix of the gay pedophile (Mohammed)—the gay man as Rasputin—and the power of deviance to change the innocent (Malvo) into a sexual and social outlaw.¹³⁹ Law here reinforces the science of deviance and the construction of social hierarchy based on the normal—the male—against the anomaly represented by the female.¹⁴⁰ It suggests little success in any movement away from a male gendered foundational norm is possible while ignoring the persistence of traditional gender hierarchies within the male and the female.¹⁴¹

In the United States, the homosexual serves as an incarnation of the socio-cultural evils attendant on any departure from rigid gender role expectations. The homosexual represents the evil of mongrelization—of the mixing of the male and the female—which produces madness and social disorder or anarchy. In a way that mimics the nineteenth century fears of race mixing, the sexualization of the conduct of Muhammad Atta, John Walker Lindh and John Malvo demonstrate how the metaphorical pollution of the male by even one drop of the female creates huge pathologies and a danger to society.¹⁴² Though I focus here on the sexualization of conduct characterized as pathological, the necessary demonization of Atta, Lindh, Muhammad and Malvo also touch on

139. This echoes older sodomy cases in which this sort of corruption was a theme. See, e.g., *Tuggle v. State*, 119 P.2d 857 (Okla. Crim. App. 1941). For a discussion of the ways in which American courts contributed to the common knowledge of a demonized and dangerously sexually disordered set of homosexual archetypes, 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 (1996).

140. See Larry Catá Backer, *Raping Sodomy and Sodomizing Rape: A Morality Tale About the Transformation of Modern Sodomy Jurisprudence*, 21 AM. J. CRIM. L. 37 (1993).

141. Cf. KATHLEEN DALY, *GENDER, CRIME AND PUNISHMENT* (1994).

142. An example of this sort of pathologizing of the female can be found in the work of the American Enterprise Institute. See *Liberal Parents, Lost Children*, AMERICAN ENTERPRISE INSTITUTE FOR PUBLIC POLICY RESEARCH, March 1, 2002 available at http://www.taemag.com/issues/articleID.17258/article_detail.asp (last visited Feb. 25 2005) (comparing the upbringing of John Walker Lindh with that of Chandra Levy and Monica Lewinsky as examples of gender treason and the resulting ruin of the parties).

race, class, and other hierarchies that determine status and the value of certain behaviors.¹⁴³

In the United States, criminality is often reduced to a medical condition requiring extreme measures for the protection of society.¹⁴⁴ In the American therapeutic state, gender boundaries are defined by a sexualized pathology which hardwires gender.¹⁴⁵ The American Taliban's political choices were dictated by his father's sexual choices. John Malvo's embrace of murder was an acting out of a sexualized desire for a father/lover. Muhammad Atta's attack was the fulfillment of a desire to effect to castration of a global symbol of maleness in an enemy—the American Twin Towers—to substitute for his own gendered castration and inability to function fully as a gendered male. This gendered therapeutic vision of pathology pairs the sexual with the pathological. The homosexual is sick and sickness contributes to anti-social behavior. This pairing reinforces the impulse of religion and tradition, which pairs a gendered morality and pathology with the same effect.

This finds peculiar expression in the American proclivity towards a totalizing pathology of anti-social behavior. The homosexualization of the anti-social and violent criminality of Mohammed Atta, Johnathon Walker Lindh, John Mohammed and John Malvo expresses a need to recast these men as “un-men,” as driven by a deviance that resulted in absolute and total corruption which compels rebellion against gender, order, society and the state. In religious terms familiar to Americans, the journeys of each of these men is similar to that of Lucifer, the “morning star,” whose corruption was so basic and total that rebellion became the only option and a desire to reign in Hell rather than serve in heaven became his motivation.

There is a long American tradition of demonizing sexual deviance through the discourse of medicine (and especially psychiatry).¹⁴⁶ The 1980s witnessed

143. While beyond the scope of this article, the observation of one commentator is worth noting: “The defense of male honor represented by post-September 11th hate violence, and writ large in the form of the government’s war on terrorism, does not exist within a purely gendered ecosystem. Rather, race, sexuality, and class permeate it as well, such that the exercise of any one form of subordination is likely to be inflected by all others.” Muneer I. Ahmad, *A Rage Shared by Law: Post September 11 Racial Violence as Crimes of Passion*, 92 CAL. L. REV. 1259, 1310 (2004) (citing Nancy Ehrenreich, *Subordination and Symbiosis: Systems of Mutual Support Between Subordinating Systems*, 71 UMKC L. REV. 251 (2002)).

144. The courts have been deferential to state efforts to pathologize and treat, by coercive means if necessary, criminal behavior. See, e.g., *Kansas v. Hendricks*, 521 U.S. 346 (1997) (upholding statute permitting commitment of ‘sexually violent predator’ within meaning of statute after completion of sentence for criminal offense).

145. “Male dominance is sexual. Meaning: men in particular, if not men alone, sexualize hierarchy. . . .” Catharine A. MacKinnon, *A Feminist/Political Approach: Pleasure Under Patriarchy*, in *THEORIES OF HUMAN SEXUALITY* 65 (James H. Geer & William T. O’Donohue eds., 1987).

146. The preeminence of the conceptualization of sexual “crimes” as medical problems gave rise to “sexual psychopath” statutes in the 1940s and 1950s. By the early 1950s, about 23 states and the District of Columbia had enacted such statutes. See Domenico Caporale & Deryl F. Hamann, Comment, *Identifying the Sexual Psychopath*, 36 NEB. L. REV. 322, 322 n.2 (1957) (evaluating critically Nebraska’s then new Sexual Psychopath Law). These statutes were enacted on the theory that a sex

the rise of the next generation of medically enhanced sexual criminality. From the early 1980s, the United States popular imagination indulged in a medicalized gender-bending hysteria that started with a series of scandals involving alleged abuse at daycare centers.¹⁴⁷ By 2004, the hysteria produced a popular certainty that a number of categories of sexually disordered males constituted a grave threat to children and women—principally pedophiles and internet predators preying on young adults.¹⁴⁸ The result has been the reintroduction of laws severely disciplining predatory males engaging in disordered sexual lives—at least those presumed to constitute a threat to women and children¹⁴⁹—and enhanced enforcement of suppression of certain categories of predators by both state and federal law enforcement agencies.¹⁵⁰ In addition, states like Kansas resurrected sexual psychopath type laws by broadening the rules under which the state could seek a civil commitment of indefinite length for individuals (mostly males) found to suffer from sexual psychosis.¹⁵¹ In this context, it does not seem odd at all, for the *New York Times* to publish a letter to the editor by Lawrence Fishberg observing that, “[i]f Atta was homosexual, especially in a culture where homosexuality is scorned, I think that certainly would have been a major factor in shaping ‘what drove

offender, however defined, could be recognized and treated. As such, every effort ought to be made to identify such offenders and place them in mental institutions rather than prisons. Early on, these statutes were limited in application to those who might pose a danger to the community. *See, e.g., Ex rel. Pearson v. Probate Court*, 309 U.S. 270, 275 (1940). In some states, however, this category included adults found to have engaged in consensual homosexual activity. *See Caporale & Hamann, supra*, at 325 (Nebraska). The pseudo-medical hysteria of the times is well captured in James M. Reinhardt & Edward C. Fisher, *The Sexual Psychopath and the Law*, 39 J. CRIM. L. & CRIMINOLOGY 734 (1949). Sexual Psychopath laws were roundly criticized by a number of commentators, and eventually fell in to disuse in the 1960s. For a particularly influential critique, see PAUL W. TAPPAN & THE NEW JERSEY COMMISSION ON THE HABITUAL SEX OFFENDER, *THE HABITUAL SEX OFFENDER: REPORT AND RECOMMENDATIONS OF THE COMMISSION ON THE HABITUAL SEX OFFENDER AS FORMULATED BY PAUL W. TAPPAN, TECHNICAL CONSULTANT* (1950).

147. Among the most destructive was the scandal of the McMartin day care center in California. For a discussion, see EDGAR W. BUTLER ET AL., *ANATOMY OF THE MCMARTIN CHILD MOLESTATION CASE* (2001); PAUL EBERLE & SHIRLEY EBERLE, *THE ABUSE OF INNOCENCE: THE MCMARTIN PRESCHOOL TRIAL* (1993).

148. *See, e.g.,* Margaret Mannix et al., *The Web's Dark Side*, U.S. NEWS & WORLD REPORT, Aug. 28, 2000, at 36; Rod Norland & Jeffrey Bartholet, *The Web's Dark Secret*, NEWSWEEK, Mar. 19, 2001, at 44; Edward C. Baig, *Shielding Your Children from Cyber Perils*, BUSINESS WK., Aug. 16, 1999, at 117.

149. For a critical discussion of sexual predator laws, see John Q. La Fond, *Can Therapeutic Jurisprudence be Normatively Neutral? Sexual Predator Laws: Their Impact on Participants and Policy*, 41 ARIZ. L. REV. 375 (1999) (description of Sexual Predator laws at Part III). A majority of states have adopted law that require sexual predator to register with the state government. This information is then disseminated within the community where the sexual predator resides. *See, e.g.,* CAL. PENAL CODE '290 (2003); KAN. STAT. ANN. '22-49 (2003); MINN. STAT. ANN. '244.052 (2003); MISS. CODE ANN. '45-33 (2003).

150. The Supreme Court emphasized this legal turn in its discussion of the rationale for overturning, on federal Constitutional grounds, the authority of states to criminalize same-sex intimate conduct. *Lawrence v. Texas*, 539 U.S. 558, 574-75 (2003); *id.* at 599, 602-03 (Scalia, J., dissenting).

151. *See* Sexually Violent Predator Act, KAN. STAT. ANN. § 59-29 (1994). The constitutionality of this provision was affirmed by the Supreme Court in *Kansas v. Hendricks*, 117 S. Ct 2072 (1997).

him,' and maybe more so than Al Qaeda's party line."¹⁵² This is the common understanding in the United States—criminality, or even political activity in the form of terrorism, as the sum of psychological imperatives only waiting to be understood through the arcane arts of the social scientist.

The judiciary has also actively participated in this social movement by indulging the taste for 'science' as a buttress for legal conclusions. State sodomy jurisprudence of the 1940s and 1950s firmly grounded punishment in a sense that the deviance punished was a medically treatable condition.¹⁵³ Disordered gender roles leading to gross anti-social behavior was not confined by any means to feminized men.¹⁵⁴ The same could be "caused by the association with prostitutes and whoremongers; the result of this association produced evidence of insanity. The modern transformation . . . is represented by the actions of the trial judge, who . . . insisted on independently satisfying himself that the defendant was sane before pronouncing sentence."¹⁵⁵

This view of gender deviation as a medical disorder in the United States sits atop an older tradition, one that mimics modern Malaysia in fundamental respects, but with a strong religious, primarily Christian, gloss.¹⁵⁶ There is a certain relationship between the new techniques of medicine in ordering gender and the older techniques of religion. Michel Foucault astutely described the relationships between the *forms* of the older, sectarian ordering language of gender, and its successor, medicine.¹⁵⁷

152. Lawrence Fishberg, *Closet-Case Studies*, N.Y. TIMES, Jan. 6, 2002, Sec. 6 (magazine), at 6.

153. For a discussion, see Backer, *supra* note 140, at 81-86.

154. The courts were quick to draw a connection between sexual and social delinquency. These cases evidence the ways in which the courts used "pervert" and "perversion" to refer to both sexual and social deviance. *Woody v. State*, 238 P.2d 367, 371 (Okla. Crim. App. 1951). There is a substantial echo between the comments of the court in this case and those of the court in *Tuggle v. State*, 119 P.2d 857, 863 (Okla. Crim. App. 1941).

155. Backer, *supra* note 140, at 84. The reference was to *Tuggle*. 119 P.2d at 863 (affirming a sentence of death for murder committed in an effort to prevent discovery of defendant's engaging in sexual activity with his half-sister); *see also* *Adams v. State*, 40 TEX. CRIM. 90, 92 (Tex. Crim. App. 1905) (reversing conviction for sodomy between two males on other grounds and recommending "that a charge be given on the question of permanent as well as temporary insanity"). Courts also tended to emphasize the importance of rehabilitation for practicing adult deviants "in view of the demoralization and moral decay brought about by such persons and where the condition with which they may be afflicted is by many becoming recognized as a form of mental disease." *Berryman v. State*, 283 P.2d 558, 566 (Okla. Crim. App. 1955) (Powell, J., on rehearing). For then contemporary academic commentary on this point, see MORRIS PLOSCOWE, *SEX AND THE LAW* (1951) (*passim*); IRVING BEIBER ET AL., *HOMOSEXUALITY: A PSYCHOANALYTIC STUDY* 44-84, 119-25 (2d prtg. 1962).

156. Critics of the medicalization approach to sexual deviance noted that: "There is a tendency, noticeably increasing in strength over recent years, to label homosexuality as a 'disease' or 'illness.' This may be no more than a particular manifestation of a general tendency discernable in modern society by which, as one leading sociologist puts it, 'the concept of illness expands continually at the expense of the concept of moral failure'" REPORT OF THE COMMITTEE ON HOMOSEXUAL OFFENSE AND PROSTITUTION 30 (Auth. Am. ed. 1963) (quoting in part, Barbara Wootton, *Sickness or Sin*, in *THE TWENTIETH CENTURY* (1956)).

157. 1 MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY: AN INTRODUCTION* 42-43, 65-72 (Robert Hurley, trans. 1978) (1976). Foucault explained that the science of sexuality "has pursued the task of producing true discourses concerning sex, and this by adapting—not without difficulty—the ancient procedure of confession to the rules of scientific discourse." *Id.* at 67. There is a certain relationship

The various communities who established the colonies in what was to become the United States brought with them the legal and moral structures of their places of origin, primarily, those of England and its various Protestant communities.¹⁵⁸ As a result, the colonies adopted laws that were meant to reflect and enforce the moral order and structure dictated by their religious beliefs. Legislating in this way was natural, and no secular rationale was needed to support legislation.

The relationship between American scientism and religion is both unstable and contentious. The shift from science to morality as the rhetorical (or policy) basis for the establishment and policing of gendered conduct norms reflects the great socio-cultural uncertainties of identity in the West. In the absence of normative equilibrium, American socio-legal discourse is marked by what academics characterize as the "postmodern," in which everything is contested.¹⁵⁹

The early twentieth-century desire to establish truth was an outcome of the Scientific Revolution and the Enlightenment, which led into modern times. But today, echoing Roman sentiment, morality is the watchword. . . . However, since we have no universally accepted notions of goodness, we are surrounded by an appeal to eclectic principles and credos. . . . The evidence suggests that we have gone beyond the modern.¹⁶⁰

The disorder of the postmodern is well evidenced in the narratives of Atta, Lindh, and Muhammed/Malvo. Atta, Lindh, Muhammed, and Malvo did not engage in their anti-social activities because they were gay, but American society is ready to believe that disordered sexuality can follow from disordered social/moral/political lives. Charges of homosexuality thus can serve to further demonize the demon. Sexual "disorder" serves to better separate these people from "the rest of us." But the methodology of separation requires the male "disorder" to be gendered female. Thus gendered and applied to these men, it can serve to reinforce the negative qualities associated with the "female"

between gender performance within the confessional before a priest who mediates between the individual and the divine source of gender behavior, on the one hand, and gender performance within the medical clinic before the doctor (or other medical professional) who mediates between the individual and those binding rules of pathology.

158. See Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 WM. & MARY L. REV. 2105, 2115-31 (2003).

159. This enterprise is both frustrating and fruitless. Contesting old categories and old forms of subordination built into legal and social structures does not guarantee liberation from either categorization or subordination. My earlier critique of one strain within Queer theory can be generalized in the American context. "Queer theorists . . . thirst for . . . control of the instruments of truth, thus defined, for the construction of a new cultural stasis. Any queer theory which seeks to create a new, or overlapping, or independent, regime of truth suffers from the same disease which has poisoned dominant discourse." Larry Catá Backer, *Queering Theory: An Essay on the Conceit of Revolution in Law*, in LEGAL QUEERIES: LESBIAN, GAY, AND TRANSGENDER LEGAL STUDIES 185 (Leslie J. Moran et al. eds., 1998).

160. LEWIS PYENSON & SUSAN SHEETS-PYENSON, *SERVANTS OF NATURE: A HISTORY OF SCIENTIFIC INSTITUTIONS, ENTERPRISES AND SENSIBILITIES* 16 (1999).

generally. The social discourse is outwardly sexualized—it speaks the language of the old moral/religious discourse memorialized in law. The legal discourse is inwardly sexualized, looking to science and truth to explain and enforce judgments about conduct deemed fundamentally threatening to the social, sexual, and political order.

Thus, the American experience draws strongly from both science and religion. Indeed, religion and morality intersect where science is leveraged in support of religious moral judgments.¹⁶¹ This tends increasingly to strengthen the religious community's arguments for using the power of the state to enforce (a now scientifically proven) good moral order.¹⁶² In this well-established context, it comes as no surprise that the "American Taliban" could evoke some sympathy. Given the disordered sexual life of his father, his conversion to Islam and his actions in Afghanistan can be understood in medical terms as a hysterical reaction to his father's gender betrayal and the resulting dissolution of his family.¹⁶³ In this context, medicine provides a window not only to family dysfunction, but also to the connection between family dysfunction and the state; so too does the older notion of immorality leading to the weakening of the moral fiber of the state. Under both views, the way the basic gender betrayal by the father could produce the treason of the son becomes readily understandable. And while the son must be punished, there is space for rehabilitating the son as well (and perhaps even the father).¹⁶⁴ But Mohammad Atta evokes fear, not sympathy, as the person who masks his gender disorder and chooses to pursue a political act affecting the well being of a broader community instead of a merely self destructive act (suicide). Personal immorality, in this case unresolved, led to gross immorality affecting the human community itself. John Mohammad, on the other hand, represents the ultimate sexual predator. He is the *bête noir* of the American dreamscape, preying on vulnerable young men and turning them to moral and sexual

161. For an excellent example from out of the Catholic tradition, see *Letter to the Bishops of the Catholic Church on the Pastoral Care of Homosexual Persons*, in THE VATICAN AND HOMOSEXUALITY: REACTIONS TO THE "LETTER TO THE BISHOPS OF THE CATHOLIC CHURCH ON THE PASTORAL CARE OF HOMOSEXUAL PERSONS" 1-2 (Jeannine Gramick & Pat Furey eds., 1988) ("[T]he Catholic moral perspective. . . finds support in the more secure findings of the natural sciences, which have their own legitimate and proper methodology and field of inquiry.").

162. In 2005, for example, the popular press began carrying reports of a trend among forensic scientists to think of predatory killers as evil. See, e.g., Benedict Carey, *For the Worst of Us, the Diagnosis May be 'Evil'*, N.Y. TIMES, Feb. 8, 2005 at F1.

163. See discussion *supra* Section II.A.

164. Thus social science researchers have identified two sorts of legal-moral conservatism in the United States. One group is composed of people who do approve of "legislating morality." Those in this group who would not have problems with "immoral" friends may feel that if an act is defined as wrong both morally and legally, people who engage in it need the compassion, guidance, guidance and good example a friend could provide. (Or it could be that they cannot conceive of their friends as behaving in such a way.)

ALBERT D. KLASSEN, ET AL., SEX AND MORALITY IN THE U.S.: AN EMPIRICAL ENQUIRY UNDER THE AUSPICES OF THE KINSEY INSTITUTE 265 (Hubert J. O'Gorman, ed., 1989).

depravity. Malvo is the modern version of the apocryphal story of *Tuggle*—the prodigal son beyond redemption.¹⁶⁵

Whether couched in the ordering language of science or religion/morality, what is striking in the coverage of Atta, John Walker Lindh, and the alleged D.C. snipers is the extent to which a desire is manifested to recast all of them as sexually disordered—as homosexual. That sort of deviation/depravity/disorder would have confirmed the belief in their bad character and thus in their guilt. Whether any of them were *actually* members of a sexual minority was less important than the belief in the possibility of their disorder. There was no need for extensive coverage of the issue in the elite media: it was sufficient for the issue to be raised in media targeted toward the most traditionalist segment of society.¹⁶⁶

The American reliance on the language of science/morality is consistent with practice in the West. Zimbabwe and Malaysia serve as examples of different, and perhaps fundamentally different starting points for infusing gender with meaning. However, though different sets of normative rules are used in Zimbabwe and Malaysia, the socio-political communities in each have produced effects which in many respects mirror those in the West.

B. Post-Colonialism in the Service of Subordination: Homosexuality as Un-African

Manipulating the formalities of law as codex to reconstruct sodomy as foreign and corrupting demonstrates the gendering potential of law at the intersection of race and ethnicity.¹⁶⁷ Zimbabwean elites have been able to exploit quite adroitly a kernel of truth about the relationship of European colonialism and Europeans seeking same-sex sexual experiences with non-

165. The press and institutional focus on Malvo's "struggle" with allegations of "homosexuality" and the legitimization of his 'anti-gay' feelings becomes more understandable in this light. See Serge F. Kovalski, *Malvo's Drawings Attack U.S., Racial Bias; Other Jailhouse Illustrations Depict Personal Failure, Alienation*, WASH. POST, Dec. 5, 2003, at B1. Already depicted as motivated by racial and religious hatred, the additional demonification of Malvo as a homosexual engaged in an intergenerational sexual relationship fueled by blood lust might have been thought enough to push a jury to impose the death penalty.

166. Most of the coverage of this issue was in the so-called tabloids. For example, *The Mail on Sunday* reported that *Newsweek* was going to print that the September 11th terrorists were motivated by homosexuality, although *Newsweek* ultimately did not publish the article. See *Terrorists 'Were Gay'*, MAIL ON SUNDAY, Nov. 4, 2001, at 13. The *New York Post* and *New York Daily News* articles "outing" John Lindh were based on excerpts from a *Time* magazine article, although the *Time* article did not itself state that Lindh was homosexual. See discussion *infra* Subsection III.A.2 and accompanying footnotes. Further, the *National Enquirer* was the only newspaper that reported the possibility of a homosexual relationship between the D.C. snipers. See *Snipers: Their Secret Gay Life*, NAT'L ENQUIRER ONLINE, Nov. 1 2002, available at <http://www.nationalenquirer.com/stories/feature.cfm?instanceid=50120> (last visited Feb. 23, 2005).

167. See generally Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990).

Europeans.¹⁶⁸ The experience in Zimbabwe evidences a way in which post-colonial discourse, ostensibly progressive, can be used as a veil behind which gender hierarchies and subordination can be reinstituted with an indigenous face.¹⁶⁹ In Zimbabwe both the political and judicial sectors have actively participated in this discursive strategy.

Zimbabwe has begun creating a myth of a pre-colonial pure African state that in some respect may not be historically or culturally accurate or even capable of reproduction now.¹⁷⁰ In Zimbabwe, the fight to recapture a pre-colonial past provides a veil difficult to pierce. Race in this case becomes privileged over gender for the benefit of men, and as protection against a neo-colonialism in the form of international human rights. Race is gendered as a foundational matter through the deployment of tradition. But tradition is as malleable an object in Zimbabwe, as it has become in the United States.¹⁷¹ Tradition as the basis for a system of coercive law, when that tradition has a decreasing connection with current or accepted social practice, is a highly problematic device for the construction of binding legal systems.

First, customary law, as a system of resurrected beliefs and practices bound to a pre-colonial past, is fundamentally anti-democratic. Membership in an ethnic community subjects an individual to a set of rules she has no power to change. In Zimbabwe, customary law is presented as a *fait accompli*, not only binding, but extremely difficult to overcome.¹⁷² The official Code is binding even if societal practices have changed significantly. It is hard to argue that even traditional societies have not changed since pre-colonial days. Indeed, much of the commentary about the value of the old codes has, in addition to the patina of post-colonial rhetoric, a touch of nostalgia.¹⁷³

168. "The links between colonialism and homosexuality often seem a paradigm of European men taking advantage of the colonial situation, and the benefits of foreign status, to extract sexual favours from foreign men or subaltern Europeans. Homosexuals thus appear complicit with the imperial order." ROBERT ALDRICH, *COLONIALISM AND HOMOSEXUALITY* 367 (2003).

169. Mugabe, of course, was not engaging in tactics unique to Zimbabwe. Across Africa in the 1990s, leaders representing various and disparate socio-cultural communities engaged in similar practices. See generally INT'L GAY & LESBIAN HUMAN RIGHTS COMM'N AND THE CTR. FOR WOMEN'S GLOBAL LEADERSHIP, *WRITTEN OUT: HOW SEXUALITY IS USED TO ATTACK WOMEN'S ORGANIZING* (2000), available at <http://www.iglhrc.org/files/iglhrc/reports/Written%20Out.pdf> [hereinafter HUMAN RIGHTS COMM'N, *WRITTEN OUT*]. For example, in 1995 Kenyan President Daniel arap Moi attacked the 1995 Fourth U.N. World Conference on Women in Beijing as a gigantic gathering of lesbians. *Moi Says No to UnAfrican Sins*, THE NATION (Kenya), Sept. 24, 1995, at 28.

170. Marc Epprecht, "Good God Almighty, What's This!": Homosexual "Crime" in Early Colonial Zimbabwe, in BOY-WIVES AND FEMALE HUSBANDS: STUDIES IN AFRICAN HOMOSEXUALITIES 197 (Stephen O. Murray & Will Roscoe eds., 1998) (documenting historical and cultural aspects of sexuality and gender in African societies).

171. See, e.g., *Lee v. Weisman*, 505 U.S. 577 (1992) (Souter, J., concurring) (interpreting traditional understandings of religious coercion significantly differently than does Justice Scalia, in dissent).

172. See T.W. BENNETT, *HUMAN RIGHTS AND AFRICAN CUSTOMARY LAW: UNDER THE SOUTH AFRICAN CONSTITUTION* 64-65 (2d ed. 1999).

173. See, e.g., GEORGE B.N. AYITTEY, *INDIGENOUS AFRICAN INSTITUTIONS* xxxv-xxxvi (1991).

Second, so much customary law is of dubious origin that the term is regularly accompanied by a qualifying adjective. "Living" customary law can be relied upon, since it refers to the law actually observed by African communities; "official" customary law, the corpus of rules used by the legal profession, must be treated with circumspection, for it may have no genuine social basis.¹⁷⁴ This is particularly true in Zimbabwe. Zimbabwean feminists have been vocal in exposing the "modernity" of custom and its "interpretation" in contemporary Zimbabwe for the benefit of men.¹⁷⁵ In their analysis of *Magaya*,¹⁷⁶ for example, David Bigge and Amalie von Briesen make a strong case for the conclusion that in Zimbabwe customary law is not a true reflection of African traditions.¹⁷⁷ Customary laws were for the most part memorializations of a part of African tradition determined by white settlers who interviewed male (but not female) tribal authorities.¹⁷⁸ The "customary laws" of the colonial period could not replicate the inherent flexibility of traditional African law, but instead acted, in African clothing, as a rigid companion to the strict civil code.¹⁷⁹ "Customary law" is thus a hybrid reflecting colonial needs as much as actual custom.¹⁸⁰ It also serves significant post-colonial agendas of male privilege that benefit the emerging African elite to an extent impossible without the boost from the Europeanization of customary law. In Zimbabwe's case, this institutionalized product of the English colonizer was used to impose an un-African gender hierarchy satisfactory to the post-independence African male elite. Ironically, this reconstruction of customary law, to better fit a new gendered dynamic in Zimbabwe (under the guise of recreating good old-fashioned values) was possible by applying colonial interpretive techniques.¹⁸¹

174. BENNETT, *supra* note 172, at 60.

175. See ZIMBABWE WOMEN'S RESOURCE CTR. & NETWORK, THE GENDER DIMENSION OF ACCESS AND LAND USE RIGHTS IN ZIMBABWE: EVIDENCE OF THE LAND COMMISSION 3, 15-16 (1994). They note that while different ethnic groups within Zimbabwe have different customary law with respect to women and inheritance, the Zimbabwean government has "misinterpreted and applied [it] uniformly . . . throughout Zimbabwe disregarding the practices of the ethnic groups, communities and family interests." *Id.* at 16.

176. *Magaya v. Magaya*, SC No.210-98 (Zimbabwe, Feb. 16, 1999).

177. David M. Bigge & Amalie von Briesen, *Conflict in Zimbabwean Courts: Women's Rights and Indigenous Self Determination in Magaya v. Magaya*, 13 HARV. HUM. RTS. J. 289, 300 (2000).

178. *Id.* For similar examples from elsewhere in Africa, see also BENNETT *supra* note 172, at 61-63; M.L. CHANOCK, LAW, CUSTOM AND SOCIAL ORDER: THE COLONIAL EXPERIENCE IN MALAWI AND ZAMBIA (1985) (especially chapters 9-10).

179. Bigge & Briesen, *supra* note 177, at 301.

180. *Id.* at 301-302. For experiences in other African states, see, for example, S.E. Merry, *Law and Colonialism*, 25 LAW & SOC'Y REV. 889 (1991). See generally LAW IN COLONIAL AFRICA (K. Mann & R. Roberts eds., 1991).

181. Traditional law was restricted by "repugnancy clauses" that allowed Europeans to change laws which they found in conflict with "universal standards." Although rarely used, these repugnancy clause allowed Europeans to impose external, Western values, into translation of customary law. Thus, on the eve of independence in 1980, women stood as minors in the eyes of the law. Women could not leave home, seek work, marry, or open a bank account without permission of a guardian. Women were not

Third, customary law—divorced from the matrix of traditional cultural organization from which it was derived—becomes an empty thing, or worse, a contradiction of itself. Law separated from the context in which it was created becomes by necessity inauthentic. Zimbabwe's experience in this regard is telling. In a great ironic turn, Zimbabwe has applied its customary law, at least as official codex, as a legal transplant among the very people from which it was ostensibly derived. Power over customary law now lies outside the community from which it derives. The community cannot alter it.¹⁸² Neither can the community administer it. Instead, the interpretation of customary law is now in the hands of the Zimbabwean judiciary.¹⁸³ But consider the irony: a legal construct of English common law tradition now performs the task originally organically integrated into the governance of the community from which it sprang. A judicial structure, itself the creature of colonialism, has now usurped, in the name of tradition, control over tradition. It comes as no surprise, then, that this alien institution could, for purposes other than those organically tied to the welfare of the community, usurp and distort interpretation for aims which may have little to do with either the customary law or the ethnic communities from which they sprang.

Thus, this myth-making serves a neo-colonialist project through which the formerly oppressed reclaim their masculinities and secure their power as a post-colonial elite, by usurping and then ossifying a customary law which can be interpreted for the benefit of current gender and political hierarchies—starting with the dictator and his cronies. “‘There is an element of backlash,’ agrees Rudo Kwaramba, director of the Harare based women’s group the Musasa Project People are saying . . . ‘we want to hold onto our culture,’ but its not culture. It’s the power that comes with culture that they feel they are losing,’ she says.”¹⁸⁴ The price of post-colonial independence is exacted on the bodies of re-gendered subordinates.¹⁸⁵ The attraction of policing society and politics through the creation and imposition of gender hierarchies is so strong that societies are even willing to remake their history in an effort to create and enforce them.

Ironically mimicking the worst of colonialism, customary law and the methods of its implementation also provide an efficient point of resistance to international norms. Perversely, the rhetoric of post-colonialism is turned against its own for the purpose of constructing subordination hierarchies based

permitted status of legal guardian for their children; rather the father’s family was vested with this status. See CHRISTOPHER HITCHENS AND DAVID STEPHEN, *INEQUALITIES IN ZIMBABWE* 14 (1981 ed.).

182. See discussion *supra* Section II.B, at notes 81-82.

183. See discussion *supra*, Section II.B, at notes 81-85.

184. Sue Njanji Matetakufa, *Women’s Rights Gone Wrong*, DEV.: INT’L DEV. MAGAZINE, no. 8, Nov. 12, 1999, available at http://www.developments.org.uk/data/08/womens_r.htm (last visited Feb. 23, 2005) (discussing reaction to the *Magaya* case).

185. Cf. CARL F. STYCHIN, *A NATION BY RIGHTS: NATIONAL CULTURES, SEXUAL IDENTITY POLITICS, AND THE DISCOURSE OF RIGHTS* (1998).

on gender. This perversity is possible in part because of the essentializing power of post-colonial discourse. To paraphrase Dorothy Roberts, by focusing on a racialized colonialism as the primary locus of oppression, mainstream legal thought often forces African women to fragment their experiences in a way that does not reflect the reality of their lives.¹⁸⁶ Modern international human rights standards are foreign, corrupting, and a threat to traditional Zimbabwean culture. Modern human rights internationalism is characterized as another, and better disguised, attempt by white European states to dominate African peoples. Slavery, this time, is characterized as cultural—effected by means of a loss of the uniqueness that animates ethnic indigenous communities within Zimbabwe—Zimbabwe's cultural soul. Liberation, ironically, then requires a firm embrace of an unchanging indigenous past, a past which modern (male) jurists can enforce.¹⁸⁷ This is most evident in a series of cases from the 1990s which substantially eroded the position of women under customary law, at least as interpreted by the (Western) Zimbabwean courts. *Magaya* is particularly rich in this respect. In the opinion, which hinges on interpretation of customary law, the court was initially confronted with a fundamental problem: there was no written custom.¹⁸⁸ Justice Muchechete, faced with the difficulty of finding written Zimbabwean or Shona customs, turns to nontraditional secondary sources—texts written by European observers—to determine that the male is the rightful heir.¹⁸⁹ Moreover, Justice Muchechete substitutes South African customary law in the absence of Zimbabwean precedent.¹⁹⁰ This case makes evident the manner in which the corpus of customary law is stretched on a European framework to intensify gender hierarchy, purportedly required by tradition but in reality imposed from an institutionalized nontraditional source of power (the Courts) without regard to the practice of the people. The judge's great discretion over what sources to use when determining customary law¹⁹¹ effectively breaks the ties that bind customary law to its necessary moorings in the political structures of ethnic communities. The institutionalization of customary law effectively transfers authority over customary law to a Western-style centralized and

186. See Dorothy E. Roberts, *Racism and Patriarchy in the Meaning of Motherhood*, 1 AM. U. J. GENDER & L. 1, 2 (1993) ("By focusing on gender as the primary locus of oppression, mainstream feminist legal thought often forces women of color to fragment their experience in a way that does not reflect the reality of their lives").

187. The *Magaya* case, discussed below, is an especially telling example of this approach. It was reported, after the decision, by Justice Gibson Muchechete that he had deliberately rewritten the law to characterize females as 'junior males' under customary law because previous rulings had given women "rights they never had under customary law." Matetakufa, *supra* note 184 (quoting Justice Muchechete).

188. Bigge & Briesen, *supra* note 177, at 303-04.

189. Bigge & Briesen, *supra* note 177.

190. See discussion, *id.* at 303.

191. *Id.* at 304.

institutionalized body, whose organization is fundamentally at odds with the framework within which customary law lives.¹⁹²

In addition to *Magaya*, the Zimbabwean courts have interpreted customary law to dispossess widows of any marital estate. The intersections in *Mahureva* are particularly acute. The son, who chose to rely on customary law to disinherit his mother, was an active Christian pastor.¹⁹³ In the son we have a male who is privileged to reject and invoke customary "law" as he wills, and to impose those episodic invocations on others. The son retains a footing in modern international legal norms in his own life, as an individual who is also a Christian pastor, and invokes against his mother a tradition he himself has abandoned only when the result favors him economically.¹⁹⁴ The court is blind to the distortions created thereby.

The selectively applied ossification of culture thus memorialized creates a cultural monster of its own.

First, the very act of *preserving* cultures unmodified and unchanging is an effective means of perpetuating hegemonies and hierarchies which might be better discarded. Preservation eliminates the possibility of growth or modulation, it becomes a trap. It is the cage within which we can perform historically accurate roles for the enjoyment of the outsider. This is the exercise of raw power without contact with the regulated—the power to define and the power to regulate.

Second, the resulting culture will inevitably be an artificial construct. It is derivative of something that no longer exists. The artificiality results from the maintenance of cultural norms from the outside, rather than from the exercise of free cultural practice from within.¹⁹⁵

In the case of Zimbabwe, this customary law is invoked to augment the gender privilege of an emerging indigenous male elite, *and* to preserve the resulting gender privilege against attack.¹⁹⁶ In Zimbabwe, customary law as lived practice exists side-by-side with customary law as codex received from the old colonial masters. This codex is meant to serve as some sort of post-colonial shield deployed against the invasion of foreign international law norms—especially those that might affect settled patterns of gender normativity.

192. *Id.*

193. See, e.g., Corinna Schuler, *For African Women, Rights Come Slowly*, CHRISTIAN SCIENCE MONITOR March 9, 2000, available at <http://www.csmonitor.com/atcsmonitor/specials/women/rights/rights030900.html> ("In the absence of a legal document, African customary law kicked into effect, and the house automatically became property of the eldest son, a local pastor.").

194. Indeed, this case in particular highlights the dilemma of customary law, which traditionally relied on the intervention of families against straying members such as this son, and now must rely on the kindness of strangers dressed as European judges. See ALICE ARMSTRONG, *CULTURE AND CHOICE: LESSONS FROM SURVIVORS OF GENDER VIOLENCE IN ZIMBABWE* 60-61 (1998).

195. Larry Catá Backer, *Not a Zookeeper's Culture: LatCrit Theory and the Search for Latino/a Authenticity in the U.S.*, 4 TEXAS HISP. J. L. & POL'Y 7, 18 (1998).

196. See ARMSTRONG, *supra* note 194, at 135-43.

The Banana trial is particularly revealing both in the way law provides a rationalization of gendering conduct, and in the language within which the gendering can be veiled beneath the apparent neutrality of analogy and logic.¹⁹⁷ The subtext of the trial was suffused with violation intensified by gender. The violation mimicked and perverted the forms and expressions of gendered hierarchy. The idea that a predatory male would penetrate more vulnerable men was a threat of a considerably different order than penetrative acts of men against women, the latter merely "an excess of sexual experimentation" or "drunken mistake" and on that basis hardly worth the law's time.¹⁹⁸ On the other hand, Banana's conduct threatened the masculine identity of all of Banana's partners, and thus constituted a danger to the social order. Banana was reconstituted as an agent for the feminization of Zimbabwe. His threat was made more imminent in the face of agitation from women and sexual minorities for a place within an ostensibly traditional Zimbabwean society. That the form of gender violation might be characterized as foreign made Banana's actions doubly threatening, bringing with it the fears of re-colonization and dominance, again, by something foreign to Zimbabwean traditional communal organization. Banana symbolized the metastasizing effects of corruption; Banana's abuse of office had significant collateral socio-cultural effect.

For Mugabe, the deployment of the imagery of socio-sexual transgression, made possible by the Banana and the women's rights cases, provided a means to shore up his power. By politically harnessing the gender panic inherent in *Banana* and *Magaya*, Mugabe was able to conflate threats to his power with threats to the social order. Mugabe's regime could then restrict the legal rights of both groups as a means of cementing his power.

Mugabe was not the only actor in Zimbabwean society to understand this dynamic. The Zimbabwean gay rights movement itself has been described as only one of many points of opposition to Mugabe.¹⁹⁹ That restriction of rights, ironically enough, could also be read in gendered terms. Mugabe's control of

197. Thus, Justice McNally could explain away the gendering in the *Banana* case:

I confess that I regard this argument as a kind of "chop logic," entirely lacking in commonsense and real substance. Of course it is technically correct. But realistically, and without going into sordid detail, how often does it happen that men penetrate women *per anum*? How often, it does happen, as it is the result of a drunken mistake? Or an excess of sexual experimentation in an otherwise acceptable relationship? And, most importantly, how can it be proved? I refrain from further analysis. In my view, the law has properly decided that it is unrealistic to try to penalize such contact between a man and a woman. I do not accept that that fact should lead us to the conclusion that it is discriminating to penalize it when it is between two men. The real discrimination, as I have said earlier, is against homosexual men in favour of heterosexual men—and that is not discrimination on the ground of gender.

S. v. Banana, 1 Zimbabwe 607, at 634-35 (2000).

198. *S. v. Banana*, 1 Zimbabwe 607, at 634-35 (2000).

199. Indeed, given Mugabe's "energetic, internationally renowned homophobia and the oppressive conservatism of Zimbabwe's white/black petit-bourgeois and black traditional societies," the gay rights movement in Zimbabwe might have been possible only in the context of the rise of a large and multifaceted societal opposition to Mugabe. See PATRICK BOND, ZIMBABWE'S PLUNGE: EXHAUSTED NATIONALISM, NEOCOLONIALISM AND THE STRUGGLE FOR SOCIAL JUSTICE 73, 73-74 (2002).

women and sexual minorities through law replicated the phallocentric ordering principles of Zimbabwean society. Just as women and feminized men were assumed to hold a subordinate position to the controlling male of a household, so the government (male) would be expected to control and discipline the female or feminized parts of the Zimbabwean community.

Indeed, much of Mugabe's rhetoric is geared in just this manner. A spokesman for Mugabe recently dramatized the way post-colonialist dialogue can be deployed to reinforce gender hierarchies. "I find homosexuality, I find lesbianism as repugnant to me as (Americans) would find polygamy. . . . To try and suggest that the president is a violator of human rights because of the gays, you forget that there's a popular feeling against the gays in this country because it is outside our cultural experience."²⁰⁰ Mugabe has linked national decline with the sexual corruption represented by neo-colonialism in the form of sexual perversion.²⁰¹ In response to pressure by the United Kingdom over human rights policies and especially the land transfer issue, Mugabe responded (for domestic and international consumption) with an attack that conflated sexual and post-colonial rhetorical techniques.

"The British government is seeking to promote homosexuality. . . . We as chiefs should fight against such western practices and respect our culture. . . . British homosexuals are worse than dogs and pigs because [they] do not differentiate between males and females." Opponents of the regime thus faced a double stigma: as sexual deviants, and as agents of the corrupting former colonial power.²⁰²

With these comments, and in a single stroke, Mugabe was able to weave together two strands of deviance and cultural corruption. With an extraordinary resonance in sub-Saharan Africa, Mugabe was able to represent homosexuality as a corruption originating outside of Africa. Simultaneously, the homosexual could represent corruption from within. Finally, both forms of corruption could be conflated, leaving Mugabe's form of traditionalist vision as the only normality possible within Zimbabwe.

In Zimbabwe, the homosexual embodies, within a male body, the cardinal aspects of the female—passivity, weakness, and disease. Gay men are commonly mocked as "Banana's wife."²⁰³ Reinforced thus within the context of abnormal male behavior is the construction of the foundational female behavior norm, given legal as well as cultural effect—marriage. The 'nature' of woman informs views of female consent to sexual activity, and of female rights

200. Julie Goodman, *Passport Dispatch: Zimbabwe*, PASSPORT MAGAZINE (Nov. 17, 2002) (on file with author) (quoting George Charamba).

201. See Tee Kgugi, *The Fall and Fall of Robert Mugabe*, THE NAMIBIAN (Namibia), March 2, 2000.

202. HUMAN RIGHTS COMM'N, WRITTEN OUT, *supra* note 169, at 15.

203. Goodman, *supra* note 200.

to property.²⁰⁴ "Mugabe's comments have rarely targeted women specifically: yet they foment a climate of distrust and fear towards lesbians and other women who engage in political advocacy on sexuality issues."²⁰⁵

In addition, this is a construct that also links custom with religion the way science and religion are linked through the homosexual in the United States. The homosexual is a man possessed by female demons that must be exorcized.²⁰⁶ Indeed, within Zimbabwean culture, it would be error to ignore the powerful conflation of possession, corruption and spiritualism. "Recent African scholarship has come to insist upon the foundational importance of spiritual linkages with the everyday workings of Africa, and to say that Africa cannot be otherwise understood."²⁰⁷

With Zimbabwe's experience, we have added to the techniques of science and religion, those of the politics of cultural purity coupled with a fear of the foreign as corrupting. Inappropriate gender behavior constitutes violence not only to the gender order, but also to the foundational task of nation building. The political is sexualized in Zimbabwe in a way that mimics the sexualization of medicine in the United States. In the example of Malaysia, we add a vibrant religious tradition as a primary ingredient in this mix. As will become apparent below, the combination of moral and physical corruption makes a powerful brew for effective control of gender norms and political conformity.

C. Guarding Against Corruption: An Ideal Male in an Ideal State

In Malaysia, behavior gendered female occupies a subordinate place because of its weakness. The exhibition of the characteristics of the feminine in a man requires both discipline (as a warning to others) and excision (to avoid corruption of the state). Mahathir's government consciously replicated the phallocentrism of the Qing Dynasty and thereafter Communist China in its prosecution of Anwar Ibrahim.²⁰⁸ Telling in this respect are the government's actions with respect to two of the principal witnesses against Anwar: Munawar Anees, a former speech writer, and Sukma Darmawan, Anwar's adopted brother. Both, according to Amnesty International, were brutalized by the police to "confess to having 'allowed themselves to be sodomized' by Anwar Ibrahim. They were forced to undergo various forms of humiliating and sexual ill-treatment, such as being stripped naked and forced to simulate the sexual

204. See ARMSTRONG, *supra* note 194, at 140-42.

205. HUMAN RIGHTS COMM'N, WRITTEN OUT, *supra* note 169, at 17.

206. One member of the organization Gays and Lesbians of Zimbabwe (GALZ) recounted how his mother had taken "him to a traditional faith healer to chase away the 'female demon' which possessed him." Goodman, *supra* note 200.

207. CHAN, *supra* note 72, at 182.

208. See MATTHEW H. SOMMER, SEX, LAW AND SOCIETY IN LATE IMPERIAL CHINA 306, 307 (2000) ("The regulation of sexuality in late imperial law was framed by an absolute phallocentrism that defined the sexual in terms of a stereotyped act of penetration.").

acts they were accused of."²⁰⁹ The Malaysian government effectively magnified the corrupting sexual disorder deployed against Anwar Ibrahim to ensure that the Malaysian judiciary appropriately conflated moral and political corruption. Indeed, by the time of the Anwar trial, the Malaysian judiciary had been effectively emasculated²¹⁰ to the service of the will of Mahathir.²¹¹

In Malaysia, Islam is deployed as a screen behind which gender discipline is given a freer hand. The journey of Islam in Malaysia is in some respects unique. Malaysian Islam, like that in neighboring Indonesia, traditionally existed in the context of indigenous customs and traditions. However, political developments since the 1960s, especially with respect to the intervention by the state into areas of family life traditionally left to the discretion of customary rules, have, as a result, increased an adherence to a more aggressively and traditionally interpreted Islam, as a form of resistance to governmental interference.

Contemporary Malay society is shaped by its customs and traditions (*adat*)²¹² and by Islam.²¹³ Reflecting a more general ambiguity in relationship between Malay culture and religion, Malay society was Muslim but *adat* principles tended toward the creation of more egalitarian divisions of authority between males and females in Malay communities.²¹⁴ Malay men preferred nuclear family arrangements after marriage. A father transferred property to his son when the son married and started his own family.²¹⁵ Malay men had authority over their wives and children. Malay men viewed themselves as guardians of morality because men have more self-control (*akal*)²¹⁶ than

209. AMNESTY INT'L PUBL'NS, *supra* note 86, at 18.

210. I use that term here for all of its gendered meanings, especially in the context of Malaysian politics. The acts taken since the 1980s by Mahathir against the courts would have been understood in positively (masculine) gendered terms by the Malay community. See, e.g., LUCIEN W. PYE, *ASIAN POWER AND POLITICS: THE CULTURAL DIMENSIONS OF AUTHORITY* (1985).

211. See LAWYERS COMMITTEE FOR HUMAN RIGHTS, *MALAYSIA: ASSAULT ON THE JUDICIARY* (1989) (describing the series of real and manufactured judicial crises that served to erode the independence of the judiciary in Malaysia in the 1980s and the resulting constitutional crises).

212. *Adat* in Malaysia could be interpreted liberally or conservatively. The description in the text, largely drawn from Aihwa Ong, *State Versus Islam: Malay Families, Women's Bodies, and the Body Politic in Malaysia*, in BEWITCHING WOMEN, PIOUS MEN: GENDER AND BODY POLITICS IN SOUTHEAST ASIA 167-78 (Aihwa Ong & Michael G. Peletz eds., 1995) [hereinafter BEWITCHING WOMEN] suggests a liberal interpretation. However, *adat* could be interpreted conservatively, and thus more in line with the traditional gender assumptions of Islam. See HILLEY, *supra* note 95, at 179-80.

213. See Ong, *supra* note 212.

214. See Michael G. Peletz, "Ordinary Muslims" and Muslim Resurgents in Contemporary Malaysia: Notes on an Ambivalent Relationship, in ISLAM IN AN ERA OF NATION-STATES: POLITICS AND RELIGIOUS RENEWAL IN SOUTHEAST ASIA 231 (Robert W. Hefner & Patricia Horvatich eds., 1997); Ong, *supra* note 212, at 165 ("in practice *adat* often prevailed over the Islamic law of paternity").

215. Ong, *supra* note 212, at 164. A married son living with his parents lost status. *Id.*

216. Michael Peletz suggests that one way *adat* respecting *akal* was understood was in its relationship to Islam. One way to develop reason is through the diligent practice of Islam. Michael G. Peletz, *Neither Reasonable nor Responsible: Contrasting Representations of Masculinity in Malay Society*, in BEWITCHING WOMEN, *supra* note 212, at 91-93.

women, who in turn have more animalistic lust (*nafsu*) than men.²¹⁷ Hence, masculinity under *adat* is based on economic power and moral authority over wife and children. Adolescent children were prohibited from contact with men. Brothers were responsible for policing their sisters' sexuality. *Adat* allowed women to move freely but not promiscuously: married women dressed sensually; divorced or widowed women were viewed as lustful and dangerous. Critical to *adat*, however, is the notion of morality, understood as both personal honor (*maruah*) and social recognition (*nama*).²¹⁸ The *adat* norm balanced out Islam's phallogocentric approach and produced a rough balance in power between male and female, or at least a rough split of available communal authority.

The increasing popularity of an Arabist Islam in the late twentieth century recast that balance. One consequence has been an increasing insistence, framed in the language of a universalist Islam, that men should have total control over women, even if it meant abandoning Malay (Islamic) customary practice.²¹⁹ "By insisting on a stricter adherence to the *umma*, the *dakwa*, was urging a social system more gender-stratified than existed in Malay society."²²⁰

Two reasons have been advanced for the resurgence of a more 'fundamentalist' Islam with greater affinity for its Arabic forms of gender normativity after the 1960s. First, an Arabist-style Islam provided a powerful means by which traditional society, and particularly its males, could resist the attempts by the Malaysian central government to assert control over Malay families in new and far-reaching ways.²²¹ Religion was thus deployed against what was seen as a totalitarian and secular government bent on eradicating

217. Michael Peletz suggests that passion (*nafsu*) is a term with derogatory context that is believed to be more common in women than in men. However, *adat*, as applied, appears to reverse the polarity of *akal* and *nafsu*. Men have less reason than women in areas of managing household resources and in social obligations. Because of this, women are favored in inheritance. *Id.* at 95-96. The father was seen as the symbolic head of the household, but the mother was seen as the real decision maker. See Ong, *supra* note 212, at 166.

218. See WAZIR-JAHAN KARIM, WOMEN AND CULTURE: BETWEEN MALAY ADAT AND ISLAM 7 (1992)

219. Ong suggests that: "In thus defining a new *umma*, . . . *dakwa* groups were inventing practices harking back to a mythic, homogenous past, while rejecting their Malay-Muslim cultural heritage . . . Arabization of Malay society depended in large part on implementing a rigid separation between male public roles and female domestic ones, a concrete realization of the architecture of male rationality (*akal*) and female eroticism (*nafsu*) that went beyond any arrangement found in indigenous village arrangements where *akal* and *nafsu* are found in both men and women." Ong, *supra* note 212, at 177.

220. *Id.* at 174.

221. Ong notes the ties between the fundamentalist parties in Malaysia and the Middle East. See Ong, *supra* note 212, at 174-78. Further links were forged by Malay elite studying in England. Many of the students returning "from abroad, notably England, . . . had been influenced by fundamentalist streams of Islamic thought and/or had found cultural security in Islam as a way of channeling their alienating exposure to Western values. Indeed, it was from English campuses that Malay students began to denounce government policies and to indict UMNO itself as 'a secular, Malay nationalist party, thus unIslamic.'" HILLEY, *supra* note 95, at 185 (quoting ZAINAH ANWAR, ISLAMIC REVIVALISM IN MALAYSIA: DAKWAH AMONG THE STUDENTS 30 (1987)).

traditional systems.²²² Second, Islam provided a means of resisting or recasting societal changes resulting from the migration and urbanization fostered by NEP programs.²²³ These changes appeared to threaten traditional forms of family and the accompanying power-sharing between the sexes.²²⁴ Along with providing a moral basis for resisting the corruption of the social reforms endorsed by the NEP, Islam also provided a challenge to the economic corruption that grew as the NEP was institutionalized.²²⁵

Mahathir was a dedicated champion of those state policies represented by the NEP which ultimately contributed to a resurgence of fundamentalist Islam.²²⁶ Anwar, on the other hand, represented an Islamic critique of the excesses of the NEP,²²⁷ but was also intimately involved with the government responsible for those excesses. Anwar thus represented not only a personal but also a policy threat to Mahathir and his life project.²²⁸ However, Anwar himself could not fully embrace the increasingly fundamentalist Islam through which he obtained power. On the one hand, he had ties to Mahathir's government,²²⁹ and even closer ties with several of the more prominent

222. As Ong describes it, the government instituted family planning. State family planning policies pushed for nuclear families and use of birth control. These policies opposed Islamic values. Malay men rejected the state's intervention into the family and had more children. Malay men and women argued over the pill. Men saw contraception as an affront to their exclusive sexual authority. Islam provided authority that men could rely on to oppose the family planning policies. See Ong, *supra* note 212, at 169-70.

223. For a discussion of migration and urbanization in Malaysia see Maila Stevens, *Becoming Modern In Malaysia: Women at the End of the Twentieth Century*, in WOMEN IN ASIA: TRADITION, MODERNITY AND GLOBALISATION 16-38 (Louise P. Edwards & Mina Roces eds., 2000).

224. As part of the NEP, the government allowed deployment of female labor in free trade zones. Women began working in labor-intensive industry in an increasingly urbanized society. Mothers collected wages from their daughters to support households; men were embarrassed by this reliance on their daughters. The new Malay society depended on the state and on the free market, not on the previous generation. See Ong, *supra* note 212, at 171-72. State policies implemented to eradicate poverty further undermined Malay custom. Women were advised to care for children, and men's authority over the child was now threatened. *Id.* at 172-74.

225. Throughout the 1970s and 1980s cronyism was rampant and a behind-the-scenes network of patronage controlled Malay business, which was dominated by the two state-owned enterprises of Pemas and PNB. (See EDMUND TERENCE GOMEZ AND JOMO K.S., MALAYSIA'S POLITICAL ECONOMY: POLITICS, PATRONAGE AND PROFITS (1997)). Malaysia's government consequently privatized many industries in the 1980s and 1990s because of inefficient performance and outside pressure from Western nations. Ethnic-Malay, or *bumiputera*, businessmen who were closely associated with Mahathir became the richest capitalists and the most powerful politicians in the country. See *id.* at 76-91.

226. For a defense of the NEP by Mahathir, see MAHATHIR BIN MOHAMMAD, THE WAY FORWARD 8-18 (1998).

227. See ANWAR IBRAHIM, ASIAN RENAISSANCE (1996).

228. Ong correctly notes that Mahathir chose Anwar as a means of limiting the oppositional potential posed by the Islamicist parties. Ong *supra* note 212, at 182-83. Hilley has noted a critical element of Mahathir's strategy—"Mahathir has sought to consecrate the idea that the UMNO speaks not only for Malays, but for Islam." HILLEY, *supra* note 95, at 185.

229. Mahathir and Zainuddin originally supported Anwar because of his influence over fundamental Islamic Malays. With the support of the top UMNO officials, Anwar quickly rose through the ranks of UMNO from 1982 to 1993. In 1993, Anwar defeated Shafar Baba and became Malaysia's Deputy Prime Minister. See HILLEY *supra* note 100, at 94-97. Indeed, Anwar was careful to express his gratitude to his patron Mahathir at the time of the writing of his book. "I am indebted in a very special

members of the new Malay business elite against whom he deployed some of his political rhetoric.²³⁰ On the other hand, Anwar sometimes distanced himself from the more extreme elements of the Islamic movement that was the source of his power.²³¹ Anwar was too tolerant to satisfy the conservative religious party activists and too conservative to consistently serve the secularists and ethnic Chinese.²³² Moreover Anwar's ideas about the West could be viewed as moderate. Anwar pressed the government to recognize human liberties and democracy as well as reduce corruption through traditional Asian and Islamic principles and institutions.²³³ Anwar was not opposed to Western ideals.²³⁴ He supported a Western-style liberalization of the economy²³⁵ and the cooperation of Asian and Western scholars in search of universalizing ideals.²³⁶ It is perversely ironic that Mahathir could effect Anwar's downfall by invoking the morality of corruption, which had been central to Anwar's program. An added perversity can be seen: Islam now at the service of the very state apparatus whose policies permitted fundamentalism to flourish in the first place.

The tensions and transitions inherent in Malaysia worked together nicely to produce the gendered intensity of the Anwar affair. Anwar was personally dishonored by his sexual conduct; that dishonor in turn corrupted the political system as Anwar sought to subvert the process of investigation of his 'crimes;' and the aggregate corruptions threatened to dishonor the state itself. The foundation of that dishonor was immorality; and the character of that immorality was gendered. There was an unmistakable double meaning to the newspaper article that trumped a headline "We Were Sodomized" in reporting

way to Dr. Mahatir Mohamad for the writing of this book. For his tolerance and for his giving me the latitude to articulate my thoughts, I am indeed grateful." ANWAR, *supra* note 227, at 16.

230. See GOMEZ & JOMO K.S., *supra* note 225, at 124-127.

231. Thus one critic remarked:

"Who is the real Anwar?" is a question that has been asked a number of times by Malaysian journalists exploring the character of the former deputy prime minister. Within days of his sacking he had reverted to the fervent radicalism and street politics of his student days. . . . The complex nature of Anwar is reflected in his writing. The idealistic characterisation of the renaissance of Asia contrasts starkly with the grubby money politics of UMNO, in which he was a willing participant.

STEWART, *supra* note 90, at 18.

232. "Many analysts believed that . . . Anwar had not stood up to Islamic conservatives, whilst he was in government. To the secular-oriented Malaysians, the main worry is that Anwar's movement will be co-opted by Islamic forces." Tey Tsun Hang, *Malaysia: The Fierce Politico-Legal Backlash*, 3 SING. J. INT'L & COMP. L. 1, 14-15 (1999).

233. See ANWAR, *supra* note 227.

234. He cautioned that "Asians, too, in their xenophobic obsession to denounce certain Western ideals as alien, may end up denouncing their own fundamental values and ideals. This is because in the realm of ideas founded upon the humanistic tradition, neither the East nor the West can lay exclusive claim to them. These ideas are universal." *Id.* at 23.

235. *Id.* at 85-92.

236. "In the realm of civilizational encounters, Asia could take the lead in engaging the West in continuous dialogue, which is the *sine qua non* for the establishment of 'the universal community of the human race.'" *Id.* at 100.

the allegations of the "victims" of Anwar's sexual attentions.²³⁷ The headline could as easily have referred to the Malaysian state as well.

The charges against Anwar combine a loss of personal honor (*maruah*) and social recognition (*nama*) as traditionally understood, with the notions of corruption (in the body of Anwar, gendered female) within Islam. The penetrative acts of government—gendered male—to deploy a sexualized Islam in the disciplining of sexually disordered males to restore traditional social gender order is not unique to Malaysia and the Anwar Ibrahim trial in this region.²³⁸ In the context of Muslim Southeast Asia, then, the pairing of political and sexual corruption through the gendering language of religion appears natural in the campaign to ruin Anwar. The Malaysian government went out of its way to conflate the two.²³⁹ The moral weakness of homosexuality provides the vehicle through which political corruption becomes easy. Any political state that does not protect itself from governance by a man of this type faces ruin.

The gendered construction/aspect/consideration of corruption in the disciplining of Anwar Ibrahim provided a necessary intensification of the charges against Anwar. The trial served as a showcase for the conflation of political and sexual corruption. Unmanliness, dishonor, and inversion became a gendered construction of the masculine anti-hero. It made explicit the connection between cultural and legal expectations grounded in the identification and importance of the "ideal" male. Anwar's faults are cast in terms of their femininity—weakness, immorality, lack of control—traits to which Mahathir provided an example of the polar opposite. "At first glance the charges against Anwar might seem quite disparate and variegated. But there is a common logic underlying and linking them, for just as each of them entails an allegation that Anwar transgressed one or another cultural code of fidelity or moderation, so too does each transgression constitute treason (*derhaka*)."²⁴⁰ There is irony here: both Anwar and Mahathir deployed the language and imagery of religion to describe the corruption of the other. Anwar focused on

237. Peter Eng, *Small Magazine Defies Despot*, 37 COLUM. JOURNALISM REV. 19 (1999).

238. Amnesty International relates, for example, a November 2000 attack on a meeting in Indonesia "attended by over 350 people working in the field of sexual health and reproductive rights." After questioning around 57 individuals, the government refused to press charges against anyone. AMNESTY INT'L PUBL'NS, *supra* note 86, at 47.

239. As one critic noted:

[Anwar] wants people to talk of how great a leader he is. That is a facade that he has created for himself. He knows that eventually he will have to face the court, so he starts off by saying that "all these things are fixed. . . . I am going to ask him to prove the corruption. He can prove, he must remember that we also have a lot of proof of his own corruption. But that is something else. I am not interested in that. I am interested in these things which I cannot accept. I cannot accept a man who is a sodomist to become a leader in this country. . . . Already some of his strongest supporters have turned against him. They said, "no, we are not going to accept a man who is like that as a leader."

Reasons for Ex-DPM's Arrest Under ISA, *supra* note 107.

240. MICHAEL G. PELETZ, *ISLAMIC MODERN: RELIGIOUS COURTS AND CULTURAL POLITICS IN MALAYSIA* 259 (2002).

the institutional corruption of Mahathir's government and lost. Mahathir focused on the personal corruption of Anwar and won.²⁴¹

Corruption cloaked in religion gives rise to greater irony still: In order to fully invoke the morality of religion in developing the gendered corruption charges against Anwar, Mahathir had to corrupt the political system itself. During the course of Anwar's trials, it became clear that much of the testimony against Anwar was dubious or coerced.²⁴² It was also clear that Mahathir had manipulated the political and judicial systems to smear Anwar and then avoid prosecution himself on the basis of his immunity from office.²⁴³

All of this was well known at the time. And there were consequences for Mahathir and his government.²⁴⁴ But none of it affected the outcome to any appreciable degree.²⁴⁵ The use of personal corruption as an intensifier raised the level of Anwar's corruption well above any that could be laid on Mahathir. The intensification effect occurred not only in the court but in the press as well, where the government permitted reporting in a way designed to expose Anwar to the maximum negative effects of the charges.²⁴⁶ Mahathir might permit cronyism and even profit from it, but the corruption was not personal, and indeed, the form of corruption itself might be gendered male. By using the

241. It could be argued that Anwar could have seen this coming. Rumors of his illicit sexual activity began within UMNO even earlier:

But alongside fears of Anwar's "moral authority" within UMNO, a more malevolent campaign against his succession was emerging. The first serious indication of such was the circulation of a *surat layang*, or poison pen letter, in August 1997 claiming that Anwar had engaged in homosexual and adulterous liaisons. Although subsequently dismissed by Mahathir, such smears signified the beginning of a concerted campaign to discredit him in the run-up to the 1999 UMNO elections.

HILLEY, *supra* note 95, at 96.

242. See Simon Ingram, *Sex, Lies and Videotape in Malaysia*, BBC NEWS, Dec. 1, 1998, at <http://news.bbc.co.uk/1/hi/world/asia-pacific/182999.stm> (last visited Feb. 23, 2005), and discussion *supra*.

243. See *Mahathir Will Not Testify*, BBC NEWS, at <http://news.bbc.co.uk/1/hi/world/asia-pacific/hi/english/world/asia%2Dpacific/newsid%5F721000/721374.stm> (Nov. 15, 1999).

244. One commentator concluded that the trials of Anwar and Mahathir's actions against the judiciary in 1988

were both perceived as politically motivated, leading to charges of executive interference in the judiciary. This has resulted in the loss of public confidence in the independence of the latter, a fact admitted by the new Chief Justice of the Malaysian Federal Court, Tan Sri Mohamed Dzaiddin Abdullah, who took over the post of the top judge from Tun Eusoffe Chin on 20 December 2000.

ABDUL RAHMAN EMBONG, *STATE-LED MODERNIZATION AND THE NEW MIDDLE CLASS IN MALAYSIA* 163 (2002).

245. Writers sympathetic to Mahathir, however, do bemoan the consequences of the battle for Malaysia and Mahathir's legacy. In doing so, however, they still place greater blame on Anwar's conduct, his ambition, and his response to disciplining by Mahathir. See, e.g., STEWART, *supra* note 90.

246. Stewart observes that,

The *New Straits Times* did not merely say that Anwar had engaged in a homosexual act with the two men. It printed the charges in full, which in each case stated that the defendant had committed the alleged act of gross indecency "by allowing him [Anwar] to introduce his penis into your anus". The publication of these words—taboo under normal circumstances—was an astonishing departure for the establishment media and was widely believed to have been officially encouraged to counter Anwar's attacks on the government by destroying his Islamic credentials.

Id. at 103-04.

formalities of law to declare Anwar Ibrahim a sodomite Anwar was gendered 'not-male,' and thus corrupt and unworthy of power, since the socio-political hierarchy demands a morally fit male leader.²⁴⁷ Having engineered Anwar's conviction, Mahathir could declare "We can't have a deputy who is homosexual, not in this country. So we had to take action. In this country a homosexual is not acceptable as the prime minister."²⁴⁸ Anwar's effeminacy and his political corruption made him "morally unfit."²⁴⁹ Law here reinforces the perceived connection between personal and political corruption, between the female and weakness. Anwar's story reinforces the notion that "[i]t is particular groups of men, not men in general, who are oppressed within patriarchal social relations, and whose situations are related in different ways to the overall logic of the subordination of women to men."²⁵⁰ Indeed, it was never clear whether world opinion was outraged that Anwar was a sodomite or that he was wrongfully convicted.

Subtext may also help explain the triumph of gender discipline over political corruption in the struggle between Anwar and Mahathir. Ethnic divisions, as well as gender divisions, played out in the Anwar trials. Mahathir was committed to policing an understanding between Malay indigenous people, constructed through law as necessarily Muslim, and the ethnic Chinese and South Asian communities.²⁵¹ That required balancing religious and ethnic divisions. Anwar would have attacked directly the corruption and cronyism of the *bumiputeras*,²⁵² but the consequence might well have been to destabilize the fragile ethnic peace, and, more importantly, Mahathir's political power base.²⁵³ Closer to home, an attack on corruption might have threatened Mahathir's control over the ruling party by exposing the extent of nepotism within the administration. Anwar pursued this anti-Mahathir corruption

247. As one commentator noted early in the course of the first trial: "if Anwar is convicted, and the verdict is perceived in Malaysia as being fair, then Anwar's political career will be finished because of the strength of the moral reaction to the sexual crimes he is charged with." Stuart McMillan, *Asian Security: The Impact of the Asian Economic Crisis*, 24 N.Z. INT'L REV., Jan.-Feb. 1999, at 10.

248. Nicholas Watt, *Malaysian PM Rebuked for Threat to UK Gay Ministers*, GUARDIAN (London), Nov. 2, 2001, available at <http://politics.guardian.co.uk/commons/story/0,9061,585283,00.html>.

249. *Anwar Arrested Amid Kuala Lumpur Protests*, BBC NEWS, at <http://news.bbc.co.uk/1/hi/world/asia-pacific/175896.stm> (Sept. 20, 1998).

250. Tim Carrigan et al., *Toward a New Sociology of Masculinity*, 14 THEORY AND SOC'Y 551, 587 (1985).

251. For a discussion of the most significant source of ethnic division, that between Islamic ethnic Malay communities and Confucian overseas Chinese, see PYE, *supra* note 210, at 248-62. See also SHARIFAH SUHANA AHMAD, MALAYSIAN LEGAL SYSTEM 1-14 (1999). A Malay is defined as a person of Muslim religion, who speaks the Malay language, who conforms to Malay customs and whose parents are from Malay or Singapore. Similar characteristics define natives of Sabah and Sarawak. *Id.* at 50-51. Mahathir was very sensitive to these divisions, as well as their exploitability. See MAHATHIR, *supra* note 226.

252. He argues that Asian nations must capitalize on economic success by building strong social institutions and democratic governments. See ANWAR, *supra* note 227.

253. Ironically, some scholars have suggested that Anwar owed his quick rise in UMNO politics not only to the patronage of Mahathir, but also to the "support that Anwar enjoyed from this generally younger generation of corporate-cum-political figures." GOMEZ & JOMO K.S., *supra* note 225, at 125.

strategy openly even after his imprisonment, writing a letter from his jail cell in 1998 that suggested that he had information regarding Mahathir's own cronyism and nepotism.²⁵⁴ In a sense, then, Anwar's sexualized purge was about anything but gender, but gender, or at least its cultural understanding, intensified the nature and importance of the fall from power.²⁵⁵

Ironically, Anwar's own corruption trial occurred at a time when it appeared that Malaysia was easing social and political restrictions on sexual minorities. Gay rights and sex education campaigners claimed that sodomy laws were not usually used to prosecute consenting adults. In fact, the Malaysian AIDS Council, headed by Mahathir's daughter, produced education material that accepted same-sex relationships.²⁵⁶ But in another twist, Mahathir used the Anwar Ibrahim affair to deploy the rhetoric of post-colonialism as a means of delegitimizing Western criticism of the Anwar trial.²⁵⁷ Sex, post-colonialism, and Anwar were conflated by Mahathir, and his allies among the Malay elite. Mahathir claimed that he would expel gay British ministers from Malaysia, stating: "The British people accept homosexual ministers but if they ever come here bringing their boyfriend along, we will throw them out." Sex, post-colonialism, and corruption were deployed against Anwar's followers—and the West—in a different way after September 11th as well.²⁵⁸ Though the West had initially and officially been outraged by the Anwar affair,²⁵⁹ it soon forgot the politician denounced as a sodomite and, after September 11, 2001,

254. The letter stated that:

Under Mahathir's grandiose economic program, important issues such as hard-core poverty, the safety of working conditions and the availability of basic housing are dealt with only at the periphery. Naturally, we would not see social and economic justice until we see the end of cronyism and nepotism. In Malaysia, a select and selfish few have appropriated the lion's share of the wealth generated by economic development. What was meant to be affirmative action has turned into a system of corruption and favoritism. Projects and contracts are won on the basis of whom you know instead of what you know. The handful of people who keep getting the largesse continue to get richer at the expense of others. Cronyism breeds nepotism and corruption. It's a vicious circle.

Anwar Ibrahim, *Prayer from Prison*, NEWSWEEK INT'L, Dec. 28, 1998/Jan. 4, 1999, available at <http://members.tripod.com/~harundin/prayer.htm> (last visited Mar. 31, 2005). See also HILLEY, *supra* note 95.

255. In this respect, consider Michal Peletz's argument that symbols, idioms, and ideologies are rarely about gender. They are about kinship, human nature, and society. The legitimacy of ethnic and class hierarchies are questioned by Peletz's conclusion that the construction of gender norms is related to causes other than gender. Peletz, *supra* note 216, at 111-13.

256. John Gittings, *Sex Claims in Anwar Trial Fuel Gay Fears*, GUARDIAN (London), Nov. 4, 1998, at 24, available at LEXIS, United Kingdom, News, The Guardian (London).

257. On the way in which cultural Islam could be positioned for this use of post-colonial discourse to resist foreign mores, see Joseph Massad, *Re-Orienting Desire: The Gay International and the Arab World*, 14 PUBLIC CULTURE 361 (2002).

258. Leslie Lau, *West 'Using Terror War to Dominate World'; It Is Waging a Battle on the Developing World and Muslims that Smacks of Double Standards, Says Mahathir*, STRAITS TIMES (Singapore), Feb. 25, 2003, available at LEXIS, General News, Major Papers.

259. See *Malaysian PM: I'm not Quitting*, BBC NEWS, Nov. 10, 1998, at <http://news.bbc.co.uk/1/hi/world/asia-pacific/211839.stm>; *Albright Snubs Malaysia*, BBC NEWS, Nov. 15, 1998, at <http://news.bbc.co.uk/1/hi/world/asia-pacific/214943.stm>; Rohan Sullivan, *Top U.S. Official Meets Wife of Malaysia's Jailed Politician Anwar*, ASSOCIATED PRESS NEWSWIREs, July 30, 2002, at FACTIVA.

forgave an increasingly compliant Mahathir, who joined, more or less, the fight against anti-Western religious extremists in Malaysia.²⁶⁰ Mahathir was then able to recast his actions against Anwar and his followers in the language of anti-terrorism.²⁶¹

In Malaysia, then, the sexual becomes the political. The political is both gendered and enforced through the institutions of an apparently neutral legal system. The effect is similar to those achieved through medicine in the United States, and through what I have called post-colonial discourse in Zimbabwe. In the last section of this part, we will examine more formally the similarities and differences among the techniques of gender conformity through the examples of the three narratives.

D. The Importance of Discursive Differences

The consequences of male gendering and the production of the female out of that gendering produce similar effects. In each case, though, the language of discourse is fundamentally different. Though American, Zimbabwean, and Malaysian are each bound by the effects of gendered conduct rules imposed on men, the character of those rules and their sources are significantly different. That we are dealing with *gender* explains the similarities in *effect* among the three sets of narratives. That we are dealing with gender embedded within different communal organizing principles—religion, scientism, tradition—explains the differences in *form* among those three sets of narratives. This section considers the *effect* of gender within each of the specific and different sets of organizing principles in the United States, Zimbabwe, and Malaysia.

The sort of social disciplining examined in these three narratives serves as a coded means, a mask, through which people can engage in great battles for social and political control. The codification of sex aimed at the internal regulation of what is male provides a means “of exerting violence, of appropriating that violence for the benefit of the few, and of exploiting the dissymmetries and injustices of domination under cover of general laws.”²⁶² The disciplining power of gender serves as a sort of shorthand, as a veil, for general social and political ordering. “The feminine figures the rules posed are naturalized within legal discourse by declaration . . . and by a host of linguistic strategies that link women to particular images of the female body. By deploying these images, legal discourse rationalizes, explains, and renders authoritative the female body rule network.”²⁶³ Each person is thus

260. Cf. Doug Bandow, *Emerging Friendships*, WASH. TIMES, Dec. 11, 2001, at A14.

261. See Julie Chao, *Critics: Rights Lost to Malaysia's War on Terror*, ATLANTA J. CONST., Nov. 17, 2002, at 6B.

262. FOUCAULT, *supra* note 157, at 88.

263. Mary Joe Frug, *A Postmodern Feminist Legal Manifesto (An Unfinished Draft)*, 105 HARV. L. REV. 1045, 1050 (1992).

"continuously subject to the test of 'honor' and reputation, which she never really passes. Her sense of disempowerment stems from the terror exercised over her body, death being its infrequent extreme."²⁶⁴ The examples from Malaysia, the United States, and Zimbabwe—from Southeast Asian Islam, the developed world, and the developing world—evidence the manner in which "[l]aw, like politics, and the constitution of states, exists simultaneously as fabricated for public consumption, and as arranged for private advancement."²⁶⁵ Indeed, law is deployed in each of these narratives to obscure successfully the way in which it reinforces gendered rules of appropriate behavior. "An ideological production is all the more successful as it is able to put in the wrong anyone who attempts to reduce it to its objective truth: enunciating the hidden truth of a discourse causes a scandal"²⁶⁶

The three episodes also show that the use of gender to maintain a gender hierarchy in which a particular sort of maleness is deemed the highest and best form of behavior is trans-national even if the peculiarities of the meaning of maleness are culturally distinct. There can be little argument over the great differences in the meanings and origins of sodomy and gender privilege in Malaysia, the United States, and Zimbabwe in the 21st century. These differences are culturally significant. However, the mechanics of gender discipline through formal mechanics of socio-legal control remains a constant. That which is characterized as female within the male continues to be laced with elements of corruption (Anwar Ibrahim), uncontrollable impulses or madness (Muhammad Atta and John Walker Lindh), and weakness or disease (Zimbabwean law). These characteristics then leak across gendered sex boundaries, providing another basis for the construction and discipline of the gendered female.

But there are great distinctions and ironies between the three narratives as well. Among the greatest are the elasticity of post-colonialism and the fear of the foreign, in driving popular (or at least state) conceptions of gender. In Zimbabwe, post-colonialism is a device useful for resisting the introduction of changing notions of gender meaning, primarily from the West and Western-influenced international norm-making bodies, without actually having to defend the particular customary meaning at all. The foreign is demonized as foreign and corrupt and a threat to the strength of manhood as customarily understood.²⁶⁷ In Malaysia, on the other hand, post colonialism is a device

264. Lama Abu-Odeh, *Post-Colonial Feminism and the Veil: Considering the Differences*, 26 NEW ENG. L. REV. 1527, 1529 (1992).

265. Larry Catá Backer, *Constituting Nations—Veils, Disguises, Masquerades*, 20 PENN STATE INT'L L. REV. 329, 330 (2002).

266. PIERRE BOURDIEU, *THE POLITICAL ONTOLOGY OF MARTIN HEIDEGGER* 90 (Peter Collier trans., 1991).

267. In addition to the sources cited above, see also notes for Section III.B, *supra*; Margrete Aarmo, *How Homosexuality Became "Un-African": The Case of Zimbabwe*, in FEMALE DESIRES: SAME

useful for resisting changing notions of social and economic organization influenced by Western models by looking to the absorption of foreign models of gender meaning to create forms of religious resistance. The foreign is both demonized as corrupting (the West) and embraced as a source of salvation (Arabic Islam).²⁶⁸ Religion thus intersects with gender, which does not necessarily and predictably always cut in the same direction. Globalization on Islamic terms avoids the post-colonial condemnation, unlike other forms of globalism. These nuances merit further study.

These narratives thus dramatize the subtleties of modern expressions of gender in a world in which gender equality has been embraced. By making fundamental social and political disciplining that much less obvious—by speaking of fundamental cultural transgressions through gendered feints—the most critical policing of social organization can be made banal, easy to implement, and more difficult to confront. Thus, gender neutrality is subverted indirectly within political structures that in Malaysia privilege religion, in Zimbabwe privilege reconstructed pre-colonial and ethnic traditions, and in the United States privilege both science and religion. The extent to which generalizations are both possible and useful are explored in the next section.

IV. SIMILARITY WITHIN DIFFERENCE: GENDER AS CULTURE, SOCIETY, AND LAW

What appear to be disparate stories with little connection are in actuality closely bound up. Together, these episodes evidence the power of an ideology of gender as an ordering principle for social and political life.²⁶⁹ Each of the episodes provides a window on the flexibility of systems of patriarchy to develop within indigenous socio-cultural systems as a fundamental part of the ordering principles of communal organization. Each also shows the role of law as an important, but secondary, tool in the enforcement of socially significant behavioral codes. These three episodes, then, serve as archetypal or foundational narratives of the ways in which the legal language of ordered and disordered sex contributes to the construction and engendering of the male (dominant) and the female (remaindered) body through a complex of

SEX RELATIONS AND TRANSGENDER PRACTICES ACROSS CULTURES 255 (Evelyn Blackwood & Saskia Wieringa eds., 1999).

268. See Merete Lie & Ragnhild Lund, *What Is She up To? Changing Identities and Values Among Women Workers in Malaysia*, in GENDER AND CHANGE IN DEVELOPING COUNTRIES 147 (Kristi Anne Stølen & Mariken Vaa eds., 1991).

269. A study of sex norms and experiences suggested that "Homosexuality is disapproved because it is seen as socially disruptive. It has no place in a society that values heterosexual family life and supports sex-role definitions that maintain traditional family stability." Klassen, *supra* note 164, at 227.

regulations and expectations which have, as an object, the elimination of the feminine from the male (the social) body.

A. The Unifying Power of Ideology Conflating Sex, Gender, and Behavior

Among the most pervasive forms of gender ideology is that bundle of beliefs and understandings commonly understood in the West as "patriarchy."²⁷⁰ Patriarchy is not only a "stand alone" ideology; it also folds neatly into most of the major religious,²⁷¹ economic,²⁷² social and cultural²⁷³ systems of the world today. As a consequence, an understanding of gendered meaning can become quite complex. Inextricably related to/connected with the social, cultural, economic and religious systems of which it forms a part,

270. A feminist might define patriarchy as "the power of the fathers: a familial-social, ideological, political system in which men—by force, direct pressure, or through ritual, tradition, law, and language, customs, etiquette, education, and the division of labor, determine what part women shall or shall not play, and in which the female is everywhere subsumed under the male." ADRIENNE RICH, *OF WOMAN BORN: MOTHERHOOD AS EXPERIENCE AND INSTITUTION* 57 (1976). See also GERDA LERNER, *THE CREATION OF PATRIARCHY* 239 (1986). Catharine MacKinnon picks up on the notion of force to elaborate the construction: "[O]n the first day that matters, dominance was achieved, probably by force. By the second day, division along the same lines had to be relatively firmly in place. On the third day, if not sooner, differences were demarcated, together with social systems to exaggerate them in perception and in fact" CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* 40 (1987).

271. For a discussion of patriarchy and Christianity, see Rebecca French, *Shopping for Religion: The Change in Everyday Religious Practice and Its Importance to the Law*, 51 *BUFF. L. REV.* 127 (2003); Elisabeth Schüssler Fiorenza, *Public Discourse, Religion, and Women's Struggles for Justice*, 51 *DEPAUL L. REV.* 1077 (2002). For a discussion of patriarchy and Judaism, see, for example, Jonathan Boyarin, *Another Abraham: Jewishness and the Law of the Father*, 9 *YALE J.L. & HUMAN.* 345 (1997); Ilana S. Cristofar, *Blood, Water and the Impure Woman: Can Jewish Women Reconcile Between Ancient Law and Modern Feminism?*, 10 *S. CAL. REV. L. & WOMEN'S STUD.* 451 (2001). For a discussion of patriarchy and Islam see, for example, Khaled Abou El Fadl, *The Culture of Ugliness in Modern Islam and Reengaging Morality*, 2 *UCLA J. ISLAMIC & NEAR E. L.* 33 (2003); Kimberly Younce Schooley, *Cultural Sovereignty, Islam, and Human Rights—Toward a Communitarian Revision*, 25 *CUMB. L. REV.* 651 (1994). For a discussion of patriarchy and Hinduism see, for example, Gita Sahgal & Nira Yuval-Davis, *Introduction: Fundamentalism, Multiculturalism, and Women in Britain*, in *REFUSING HOLY ORDERS* 1 (Gita Sahgal & Nira Yuval-Davis eds., 1992). For a discussion of patriarchy and Confucian ideals see, for example, Chaiark Hahm, *Law, Culture, and the Politics of Confucianism*, 16 *COLUM. J. ASIAN L.* 253 (2003); Erin Cho, *Caught in Confucius' Shadow: the Struggle for Women's Legal Equality in South Korea*, 12 *COLUM. J. ASIAN L.* 125 (1998). For a discussion of patriarchy and Shinto, see, for example, Karen A. Smyers, *Women and Shinto: The Relation Between Purity and Pollution*, 12 *JAPANESE RELIGIONS*, July 1983, at 7.

272. For a discussion of patriarchy and capitalism, see, for example, ØSTEIN GULLVÅG HOLTER, *GENDER, PATRIARCHY, AND CAPITALISM: A SOCIAL FORMS ANALYSIS* (1997); Gila Stopler, *Countenancing the Oppression of Women: How Liberals Tolerate Religious and Cultural Practices that Discriminate Against Women*, 12 *COLUM. J. GENDER & L.* 154 (2003). For a critique of patriarchal elements in Marxism, see, for example, Marc Linder, *MacKinnon on Marx on Marriage and Morals: An Otisogistic Odyssey*, 41 *BUFF. L. REV.* 451 (1993).

273. See, e.g., JANE C. OLLENBURGER & HELEN A. MOORE, *A SOCIOLOGY OF WOMEN: THE INTERSECTION OF PATRIARCHY, CAPITALISM, AND COLONIZATION* (2d ed. 1998); TOWARD AN ANTHROPOLOGY OF WOMEN (Rayna R. Reiter ed., 1975).

patriarchy is sometimes subsumed in the study of these underlying structural systems themselves.²⁷⁴

But what marks the episodes as odd from this perspective on patriarchy is a mismatch between the analytical framework of conventional patriarchal analysis and the factual contexts in which the fates of the John Walker Lindh, President Banana and Anwar Ibrahim are determined. These do not seem to "fit" within conventional articulations of the ideology of patriarchy.

Most modern studies of patriarchy focus on the way understandings about what it means to be "male" and "female" shape the public and private social space shared between men and women,²⁷⁵ as well as the cultural space left to the "female."²⁷⁶ In the West, for example, much of the study of patriarchy among feminists focuses on the power disparities proceeding from patriarchal notions of the attributes of "man" and "woman" as well as on the justifications for such power disparities inherent in the meanings ascribed to "woman" and "man."²⁷⁷ The cluster of meanings attributable to the "male" is constituted as the "normal" or the ideal against which other clusters of attributes—principally those of the "female"—are measured.²⁷⁸ To study patriarchy, then, is to penetrate into the sex constituting the primary positive deviation from the normal—that is, the "female"—and to understand the complex of interrelationships between the "female" and the standard normal—that is, the "male."²⁷⁹ Among traditionalists, the focus is also on women, but geared toward justifying the complex of meaning that produces the attributes of the ideal "woman."²⁸⁰ Moreover, since the nineteenth century, study within patriarchy has extended to non-standard deviations—that is, the study of those

274. Some of the more important work of modern American feminists is sensitive to this insight. See, e.g., MACKINNON, *supra* note 270; MOTHERS IN LAW: FEMINISM AND THE LEGAL REGULATION OF MOTHERHOOD (Martha Albertson Fineman & Isabel Karpin eds., 1995).

275. Within legal academic literature, there is a wealth of articles and books. See, e.g., MACKINNON, *supra* note 270; Nancy Levit, *Keeping Feminism in its Place: Sex Segregation and the Domestication of Female Academics*, 49 U. KAN. L. REV. 775, 782 (2001).

276. See, e.g., RUTH WHITNEY, FEMINISM AND LOVE: TRANSFORMING OURSELVES AND OUR WORLD (1998).

277. The subject is vast and varied. For a discussion of the various approaches of feminism to the power disparities of patriarchy, primarily in the West, see MARY JOE FRUG, POSTMODERN LEGAL FEMINISM (1992). For a discussion of Indian patriarchy along these lines, see, for example, RATNA KAPUR, SUBVERSIVE SIGHTS: FEMINIST ENGAGEMENTS WITH LAW IN INDIA (1996); FEMINIST TERRAINS IN LEGAL DOMAINS: INTERDISCIPLINARY ESSAYS ON WOMEN AND LAW IN INDIA (Ratna Kapur ed., 1996).

278. See, e.g., THOMAS LAQUEUR, MAKING SEX: BODY AND GENDER FROM THE GREEKS TO FREUD 22 (1990) (gender as a category is "itself defined as that aspect of social relations based on differences between the sexes in which the standard has always been man").

279. Some of the most compelling feminist scholarship has sought to invert this study—to posit a standard that is centered on the female. See, e.g., MARTHA ALBERTSON FINEMAN, THE NEUTERED MOTHER, THE SEXUAL FAMILY, AND OTHER TWENTIETH CENTURY TRAGEDIES 235 (1995) (positing a normative baseline in the mother and child, *id.* at 5-6, in which the male serves as the catch-all for "not-mother" and suggesting that a father is a male who can conform his behavior to the ideal of "mother").

280. See, e.g., Lynn D. Wardle, *Essay: "Multiply and Replenish": Considering Same-Sex Marriage in Light of State Interests in Marital Procreation*, 24 HARV. J.L. & PUB. POL'Y 771 (2001).

gendered male or female who do not conform to the ideal meaning built into their assigned gender.²⁸¹ Men, as the primary beneficiaries of patriarchy,²⁸² are less often the subject of anti-patriarchal—and usually feminist—discourse.²⁸³ Echoing feminist complaints of the male-centered study of women, males who study masculinity have suggested that women theorize men from their perspective, which is the perspective from which they experience masculinity, as something outside themselves—as the socio-political normal. Feminist studies of masculinity and manhood fail to give insight into a male perspective of how masculinity affects men as something other than the object of normalization.²⁸⁴

Women are not incidental to masculinity, but they are not always its central feature, either. At times, it is not women as corporeal beings but the “idea” of women, or femininity—and most especially a perception of effeminacy by other men—that animates men’s actions. Femininity, separate from actual women, can become a negative pole against which men define themselves.²⁸⁵

This inter-sexual application of patriarchy has power. It has, as we have now seen, potential for elaboration as a transcultural notion, as implemented and as encoded in law within very different socio-cultural frameworks.

Consequently, despite the great difference in delivery—despite the great differences in the cultural and socio-political context in which it is effected, the pattern of gendering that appears obsessed with men reverberates throughout society. The not-male in males constitutes a source of the female. Sex thus serves as a basis for gendering conduct. Conduct is in this sense sexed, though the basis of the sexing is not dependent on sexual difference as such. Gendering conduct has important consequences. First, it provides a basis of sex differentiation beyond physical difference. Second, it creates a framework that makes hierarchy possible. Males can use gendered behavior norms to differentiate between men and to distinguish between individual men as a category and females as a category. When institutionalized within politics,

281. For a postmodern theoretical perspective on the rise of this sort of classification and study, see FOUCAULT, *supra* note 157. Modern queer and lesbian theory, for example, focuses primarily on the study of the non-standard deviation in clusters of gender meaning. For excellent examples of the emerging field of study, see, for example, STYCHIN, *supra* note 185; Ruthann Robson, *Assimilation, Marriage, and Lesbian Liberation*, 75 TEMP. L. REV. 709 (2002); WILLIAM N. ESKRIDGE, JR., *GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET* (1999); Francisco Valdes, *Theorizing ‘OutCrit’ Theories: Coalitional Method and Comparative Jurisprudential Experience—RaceCrits, QueerCrits and LatCrits*, 53 U. MIAMI L. REV. 1265 (1999).

282. This conclusion that males are the sole or primary beneficiaries of patriarchy, of course, is also contested. See, e.g., GEORGE GILDER, *MEN AND MARRIAGE* (1986).

283. See, e.g., Devon W. Carbado, *Motherhood and Work in Cultural Context: One Woman’s Patriarchal Bargain*, 21 HARV. WOMEN’S L.J. 1 (1998). This is not to suggest that men have not been the subject of some important and valuable recent work. See, e.g., MICHAEL KIMMEL, *MANHOOD IN AMERICA: A CULTURAL HISTORY* (1996); E. ANTHONY ROTUNDO, *AMERICAN MANHOOD: TRANSFORMATIONS IN MASCULINITY FROM THE REVOLUTION TO THE MODERN ERA* (1993); MARK E. KANN, *ON THE MAN QUESTION: GENDER AND CIVIC VIRTUE IN AMERICA* (1991).

284. KIMMEL, *supra* note 283, at 6.

285. *Id.* at 7.

history, culture and law, what at first appeared as a gendered sorting device between males becomes a method for organizing society, including political communities.

The occurrences that are the object of this study demonstrate the way in which the disciplining of males through the enforcement of sex conduct norms reinforces differences between men, and thus between men and women. These sex conduct norms embody dominant male notions about behaviors gendered "female," and consequently treated as negative behaviors, at least in men. Sex conduct norms work both as mechanisms for the suppression of the female in males and as a means for conceptualizing female characteristics, which must be suppressed when exhibited by males. These negatively charged views of behavior gendered "female" as applied to the regulation of male conduct carry over to male interactions with females. Female traits viewed negatively by men in relation to male conduct become charged with notions of a generalized inferiority. The superiority of that cluster of behavior norms gendered "male" is thus reinforced by the mechanisms used to suppress the effeminate in people sexed "male."²⁸⁶ The mechanisms for suppression of behavior gendered "female" in males serve to regulate behavior within all aspects of society. Thus, behavior gendering in males serves, when generalized, as the basis for judging all conduct within society and for using mechanics of control—social, religious and legal—to reinforce those judgments and coerce specific conduct. Women are then left in a bind: either they embrace conduct norms used to reinforce the hierarchy between males—one of the underlying themes of American Supreme Court jurisprudence of "equal rights for women"²⁸⁷—or they are relegated to a subordinate space. This is the sense in which internal male regulatory norms leak into the public space shared between men and women. These internal norms serve as reinforcing mechanisms for male understanding of the bundle of characteristics and behaviors gendered "female," a bundle of characteristics which, because they are not worthy of inclusion as purely male characteristics, are consequentially adjudged negative and worthy of subordination. Here we are confronted with the greatest utility of the three apparently different episodes. Each repeats the same underlying pattern—the deployment of gendered behavior characteristics to regulate social, religious, and political relationships within society, and the use of law to perpetuate this ordering based, in large measure, on a hierarchy grounded in an

286. As Mary Anne Case noted in a different context: "The man who exhibits feminine qualities is doubly despised, for manifesting the disfavored qualities and for descending from his masculine gender privilege to do so." Mary Anne C. Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L.J. 1, 3 (1995).

287. See the opinion by Justice Ruth Bader Ginsberg in *United States v. Virginia*, 518 U.S. 515, 558 (1996) ("There is no reason to believe that the admission of women capable of all of the activities required of VMI cadets would destroy the Institute rather than enhance its capacity to serve the 'more perfect Union.'").

assumption that the cluster of behavior gendered "male" serves as the ideal for social and political ordering.

B. Commonality Within Difference: Males, Flawed Males, and Females

At a great level of generality, the fates of John Walker Lindh, Canaan Banana, and Anwar Ibrahim all appear to evidence both the *variety* of mechanisms used to discipline disordered males and the extent to which lawlessness is *gendered* and deviant males are thus *sexualized*. Gender operates on a number of levels. It functions as a connective device between the individual, his intimate relations, and his relations with the community. Gender thus serves as the set of mechanisms whose characteristics create a homologous relationship between the domains of the individual, the family, and the state.²⁸⁸ In each case, a specific set of conduct norms serves simultaneously as the basis of individual self-conceptualization, as the basis of individual relations with others (sexual and non-sexual), and as the basis of individual relations with the state (or community and its subparts). In each case, gendered foundational behaviors are replicated at every level of socio-political organization. The specific sets of conduct norms are not the same in the United States, Zimbabwe, and Malaysia. But each is internally consistent. And in each case, the socio-legal structures peculiar to each community are invoked to similar effect. In every case, but following very different legal paths, social or political deviance is analogized to sexual or sexualized deviance, to produce a double deviance.

Law, particularly as manifested in the spectacle of criminal trials or the threat of judicial action, plays an important role in each narrative. The court and the judge, articulating and applying as law a memorialized codification of communal gendered behavioral norms, serves, in each society, as a critical actor in keeping systems of gender viable. Law, especially as articulated and applied through the courts, has a limited but critical function: to provide an institutional "*post facto* imprimatur to the current iteration" of behavior expectations.²⁸⁹ That is, law serves as both an identification and memorialization within an institutional framework of behavior norms that are crucial to the organization and functioning of a socio-political community.

Thus, one of the primary *post facto* functions of the court is to identify the current normative framework of popular culture. This normative framework is at once "law" and the basis on which "law" can be "named." It is the process of

288. I use Bourdieu's terms here. See PIERRE BOURDIEU, *LES STRUCTURES SOCIALES DE L'ECONOMIE* 97 (2000).

289. Larry Catá Backer, *Chroniclers in the Field of Cultural Production: Courts, Law and the Interpretive Process*, 20 B.C. THIRD WORLD L.J. 291, 297 (2000).

becoming conscious of "what is" as opposed to a process of imposing "that which was not."²⁹⁰

The courts serve an equally important purpose within culture—they are an important place from which behavior norms are memorialized and, thus memorialized, transmitted to the society.

The second primary *post facto* function of courts is to memorialize the norms identified as law. Memorialization serves several important functions. On one level, the project of memorialization stabilizes the court's message and makes it appear immutable. On another level, memorialization provides a place through which identification can be transmitted.²⁹¹

The judiciary also serves as an institutionally significant place for acting out the forms of discourse between the gendered individual and the state and as a representative of the normative basis for gender expectations. "Because legal text must correspond to 'real needs and interests,' it is perceived as socially productive: The formalization—the memorialization of its social text—becomes efficacious within the field of cultural production."²⁹² What is specifically acted out is *law*—that is, the identified, memorialized, and institutionally sanctioned clusters of behaviors assigned to members of each sex. Law, as codified gender expectations, thus mirrors and supplements hierarchies of conduct deemed socially useful and binding on the members of the socio-political community. And law, itself, is gendered male.

Law is identified with the hierarchically superior, "masculine" sides of the dualisms. "Justice" may be depicted as a woman, but, according to the dominant ideology, law is male, not female. Law is supposed to be rational, objective, abstract, and principled, like men; it is not supposed to be irrational, subjective or personalized, like women.²⁹³

Thus, for example, there is, in the American context, a certain similarity between the ritual of medical examination within the medical clinic and that of legal examination within the court. The language of the law was deployed to play out the parable of the vulnerable male in the case of John Walker Lindh. Confused by his father's betrayal, rebellious, undisciplined by his female-headed family, it was only to be expected that the youth would fall prey to evil. While in this country the pattern usually results in criminality of a petty sort, John Walker Lindh's calamity was different only in degree. It was not surprising, then, that the prosecutor and the courts, after a suitably well-

290. *Id.* But identification is not the same thing as creation of standards. Law functions best in the former, worst in the latter guise. *Id.* at 299.

291. *Id.* at 301.

292. *Id.* at 303.

293. Frances Olsen, *Feminism and Critical Legal Theory: An American Perspective*, 18 INT'L J. OF THE SOC. OF LAW 199, 201 (1990) (citation omitted).

publicized confession and repentance,²⁹⁴ received far less than the maximum penalty that could have been assessed.²⁹⁵ On the other hand, the transgressions of Atta, and the alleged D.C. snipers required sterner discipline. Federal prosecutors worked hard to ensure this, by taking advantage of the possibilities in law to shift the trial to a jurisdiction known for close adherence to the “old ways.”²⁹⁶

This replicating similarity is also evidenced in the narratives from Zimbabwe and Malaysia. In Zimbabwe, law served as a shield against the importation of the foreign and corrupt, as well as the vehicle for the preservation—and virtual reconstitution—of a mythic sense of the time before the great corruption of colonization. Law is active, in the sense of its utility for reinforcing norms. But it is also passive—it is merely a tool requiring an underlying normative framework to become effective. Rights, the benefits of law, are available only to those whose behavior is in accord with the “morals and beliefs espoused by our society.”²⁹⁷ Those who attack the moral fiber of society have no claim to protection “under the rubrics of ‘individual freedom’ and ‘human rights,’ including the freedom of the press, to write, publish and publicise their literature.”²⁹⁸ “We don’t believe they have any rights at all.”²⁹⁹ Ironically, then, Zimbabwe demonstrates, in a sense, the amorality of law in the absence of the social meanings of the appropriate.

In Malaysia, we come closest to the old connection between the form of religious confession within Islam and that of social confession within the judicial field. The Anwar trial was notorious for the fervor with which the government sought to extract confession and impose penance. Law, in the form of the courtroom, served as the site of a great morality play in which corruption was exposed in all of its manifestations, in which the tie between moral and political corruption was highlighted, and in which the value of appropriate conduct was emphasized, while the fate of the transgressor was highlighted. Anwar provided the perfect victim for this ritual. Anwar was exposed precisely because he reflected critical contradictions—he was a moralist in a government he accused of immorality, a man committed to Islam who condemned intolerance in religious matters. The trial was theater of a sort—as effective a means of communicating norms as the posting of judicial stories on the Internet.

294. For descriptions from the popular press, see, e.g., Neil A. Lewis, *Traces of Terror: The Captive*, N.Y. TIMES, July 16, 2002, at A1; Rebecca Carr, *American Taliban Fighter Cuts Deal*, ATLANTA J. CONST., July 16, 2002, at 1A.

295. See Lewis, *supra* note 294.

296. See Eric Lichtblau & Jayson Blair, *Ashcroft Decides Virginia will Try Sniper Cases First*, N.Y. TIMES, Nov. 8, 2002, at A1.

297. MEREDITH, *supra* note 55, at 130 (quoting Robert Mugabe).

298. *Id.*

299. *Id.* at 131.

These episodes also suggest that while the particularities of the form of discipline and the shape of the tools used to support the closed matrix of gendered identity and institutions are historically tied, the discipline itself is ahistorical. Ironically, in recent years each of the cultures has deliberately attempted to reclaim traditional understandings of gender rules. In Malaysia that attempt has revolved around a return, both formal and informal, to traditional Islam as currently understood. In Zimbabwe, the attempt is bound up in the post-colonial attempt to reimpose the cultural norms of a reconstructed, if dubious, pre-colonial state. In the United States, it centers on the privileging of socio-religious tradition and original intent, on the one hand, and science on the other hand, in the judicial and political spheres.³⁰⁰

Indeed the conflation of the sexual and the political can be so strong that the existence in fact of sexual deviance may be irrelevant. Thus, for example in the case of Anwar Ibrahim and John Walker Lindh, the fact that the accusations of sexual disorder were flimsy at best makes little difference to the result. In the case of Anwar Ibrahim, political and sexual corruption are conflated. Both are then mediated through the language of a normative superstructure provided by an inescapable Islam. That conflation is nicely exemplified in Malaysia where, in the aftermath of Anwar's fall, vigilante groups sprang up all over Malaysia threatening "*all men perceived to be effeminate and all women perceived to be masculine*, especially since being effeminate in the case of a male and masculine in the case of a female is increasingly construed as a major sign or symbol of being 'a homosexual' (*seorang homoseksual*)."³⁰¹ In the case of John Walker Lindh there appeared to be a desire to match his disordered political choices with an equally disordered set of sexual choices, however unlikely.³⁰²

The disciplinary power of this conflation is even more evident in the behavior of Canaan Banana, who when faced with the political consequences of gendered discipline denied his sexual disordering and strategically deployed his ex-wife as a spokesperson,³⁰³ and indeed turned on the gay and lesbian

300. For a detailed study of the way in which both tradition and science have been deployed to support the gender disciplining of the sodomy laws over the course of the twentieth century, see Backer, *supra* note 140.

301. PELETZ, *supra* note 240, at 269.

302. The newspaper reports of the Lindh's homosexual encounters are based on quotes from his purported lovers whose meaning is ambiguous at best. The Pakistani businessman alleged to be one of his lovers is quoted as saying "He was liking me very much. All the time, he wants to be with me . . . I was loving him. Because love begets love, you know." Hunter, *supra* note 36. He was also characterized as jealous of Lindh's religious instructor. *Id.* That imam was also quoted as hinting of a sexual relationship: "It was the beginning of the dangerous journey, the first jaunt, the pleasure journey." Martinez, *supra* note 37.

303. See Rebecca Taylor, *Real Lives: 'They Say That Power Corrupts—and It Does,'* GUARDIAN (London), Jan. 23, 2002, at 6.

community of Zimbabwe in an effort to rehabilitate himself politically and socially.³⁰⁴

To some extent, these episodes lay bare an old juridical technique, now deployed as a new technique of power—a marriage of what Foucault described as the juridical power of formal law³⁰⁵ and “the *disciplines*: an *anatomopolitics of the human body*.”³⁰⁶ In each case, the sex laws provide “an organizing principle for other fears.”³⁰⁷ As a consequence, “the judicial institution is increasingly incorporated into a continuum of apparatuses (medical, administrative and so on) whose functions are for the most part regulatory.”³⁰⁸ Each episode thus provides enriching insights, in a surprisingly transcultural manner, into the continuing power of the disciplining of sex and gender to aid institutionalized male elites seeking to preserve their privileged place in the social and political hierarchy.

The normative ideal of the sexually deviant male exemplifies the way in which the technologies of gender discipline can invoke a variety of categories of authority, through the discourse of law, to preserve the gender status quo. Put another way, gender meanings serve as the *great intensifier of male criminality*. Thus sexualized, law serves a dual purpose—maintaining socio-political as well as gender order. The Qing Dynasty jurists were not far from the modern mark when, in the seventeenth and eighteenth centuries, they intensified the conflation of hierarchy built around gender rules defining the relationship of individuals to family to state.³⁰⁹ Anwar Ibrahim’s corruption—ordinary by the standards of Malaysia—becomes significant when coupled with the moral/religious corruption of sodomy, of sexual disorder. In Zimbabwe, Banana’s criminality was augmented by its characterization as foreign. The crime was not only one of gender but also of race and ideology.³¹⁰ The corruption inherent in deviations from imagined gender roles was intensified for women as well. Female equality was the work of she-males, lesbians, who sought, through the thoroughly un-African device of women’s equality, to corrupt African women with something foreign and sexually deviant.³¹¹ And

304. See Roberts, *supra* note 61.

305. FOUCAULT, *supra* note 157, at 87-89.

306. *Id.* at 139.

307. CYNTHIA B. HERRUP, *A HOUSE OF GROSS DISORDER: SEX, LAW, AND THE 2ND EARL OF CASTLEHAVEN* 37 (1999).

308. FOUCAULT, *supra* note 157, at 144.

309. See SOMMER, *supra* note 208. In the American context, those relationships are particularly intensified when the state becomes involved in mediating family relationships. See Martha Fineman, *Dominant Discourse, Professional Language, and Legal Change in Child Custody Decisionmaking*, 101 HARV. L. REV. 727, 766 (1988) (social workers punishing parents seeking sole custody as breaching family behavior expectations).

310. In this sense, as well, Banana serves as a victim of colonialism and the depravity of foreign customs imported by the colonizers for the dissipation of the moral strength of the colonized. Mugabe was good at using the trial of Banana in this way. See Roberts, *supra* note 61.

311. For a particularly damning indictment of this ploy, see, for example, discussion, *supra* notes 267-70.

finally, in the United States, sexualizing the crimes of the September 11 terrorists and those of the D.C. snipers provides a certain amount of distance—and comfort—between these vastly disordered lives and the rest of the population. Muhammad Atta (the repressed homosexual), John Walker Lindh (family betrayal by a gay father), and John Mohammed (the sexual predator), all could be distinguished from the general population by their psychological maladies. Those maladies not only intensified the depravity of their criminality but reinforced the basic moral of gendered behavior codes—the connection between criminality and psychosis.³¹²

In this context in the United States, the reality of legal rights and rights discourse assumes a surreal character. For all of its potential as a method of “transformation,” law and the legal “option” will continue to reinforce the meaning of gender and expectations about gendered behavior. Indeed, the narratives have suggested that law tends to act as a conservative rather than a progressive force. Here, ironically enough, Mary Ann Glendon’s contentions about the consequences of a rights-driven legal culture find expression.³¹³ Professor Glendon argues that legal-rights-centered discourse hinders political debate because it does not focus on the balance between rights and duties. Her analysis actually works a traditionalist result. To the extent that duties are never addressed in rights based discourses of law, the underlying socially coded understandings of appropriate behavior are never adequately articulated nor contested. Instead, rights-based discourse tends to mold itself in ways that conform in some way or other to the underlying norm system.³¹⁴ Law becomes an intensifier of socially conceived appropriateness in individual conduct that is tied to gender role expectations. The result is not merely the domestication of sexual liberation by the constraining discourse of “gay” marriage, but also the sexualization of criminal or political acts in conformity with gender role expectations.

312. Thus the tradition in the United States of conflating illness with criminal conduct discussed *supra* Section III.A. It is not unusual to suggest that the perpetrator of a particularly heinous crime is “sick.” That judgment serves as explanation and as a way of separating the perpetrator from the community. See, e.g., Backer, *supra* note 140, at 86.

313. See MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* (1991).

314. The relationship of norm and law has always been strong, and the methodology of the (symbiotic) relationship between them well chartered. See Backer, *supra* note 292. The debate over same-sex marriage conflates sex, gender and law in an ironically conservative way. Ruthann Robson has explained in a way that by analogy confirms the insights of the narratives explored in this Article—that by “naturalizing and universalizing marriage rather than heterosexuality, I fear we are simply in danger of replacing compulsory heterosexuality with a regime of compulsory marriage.” Robson, *supra* note 281, at 820. Carlos Ball has advanced a model based on reinterpreting the traditional and traditionally gendered domestication model of marriage. See Carlos A. Ball, *Sexual Ethics and Postmodernism in Gay Rights Philosophy*, 80 N.C. L. REV. 371 (2002). Both are sensitive to the pull of the traditional in the construction of behavior expectations for sexual non-conformists. This is the power to reinforce gender even as it domesticates non-conforming behavior.

Rights discourse, law as an aggressively used tool for communal behavior modification, itself acquires a very different meaning in Malaysia. Here the socio-legal, rather than the jurisprudential, consciously takes pride of place. The fall of Anwar Ibrahim evidences clearly the way "the public, aggressive assertion of rights is reserved for particular types of conflicts, generally those in which the hope of continuing a superficially harmonious relationship between the parties has been abandoned, and the possibility for informal agreement is stalled."³¹⁵ But once invoked—by Mahathir through the apparatus of the criminal law, and by Anwar through the apparatus of individual human rights against arbitrary action—rights themselves become a conduit for deeper "truths." Behavior expectations tied to social position, traditional understandings of reason and passion (*akal* and *nafsu*), strained through the absolutist behavior-code interpretations of Islam, become critically important to the understanding of the trial and its outcome. Again, law plays a peripheral role. It is invoked, but focused on service to deeper, and deeply gendered, meaning.

Zimbabwe most clearly evidences the limitations of law in its socio-legal context. Gender role expectations—tied to a hierarchy clearly favoring the dominance of traditionally male behaviors—affects understanding of individual, community and nation. Law here operates most effectively against itself. Law provides a national and supra-national context for the determination of individual rights and clusters of behavior expectations. But law also provides a communal context for those determinations. Law is depicted as foreign and corrupting; law is a badly disguised attempt at recolonization—and thus emasculation, of a newly freed people. To embrace this law is to embrace the feminine. But law is also tradition, a mythologized set of "good-old days" with only a passing resemblance to the past and a tight bond to the creation of the postcolonial present—societal hypermasculinity. To embrace law in this context is to embrace the masculine. But this occurs at a terrible price—law's effectiveness is based on a gender apartheid that mimics the cruel system of separation which provoked the long and violent attempts by African peoples to overthrow a colonizer. This new apartheid of gender becomes as troubling, and as destabilizing, as the possibility of recolonization through international legal norms. The trials of Canaan Banana and Mugaya's daughter suggest the power of sexualization within legal discourse in Zimbabwe, and its limits.

In all three cases, Foucault's understanding of law's limitations (though by no means its implications) and Eco's understanding of the codes of language are nicely demonstrated. Law serves as both mask and language through which fundamental behavior expectations—revolving around gendered individuals—can be both hidden and enforced. The mask is unaware of its role as mask;

315. ERIC A. FELDMAN, *THE RITUAL OF RIGHTS IN JAPAN: LAW, SOCIETY, AND HEALTH POLICY* 5 (2000).

efficiency depends on unconscious deployment. The power of gender "is tolerable only on condition that it mask a substantial part of itself."³¹⁶ Thus the power of effeminacy to order male gendering and to affect perceptions of valued conduct in the public space shared by men and women continues both hidden and encoded onto basic behavior norms. This pattern is evidenced still, even in the highest institutions of the American political hierarchy. A senior member of the U.S. Senate and a member of the Democratic Party recently illustrated the power of male gendering in a speech reported in major national newspapers.³¹⁷ Arnold Schwarzenegger, the current California governor, famously rebuked California Democratic Party state legislators for delaying passage of a state budget by referring to them as the "women" of the special interests they purported served.³¹⁸

Reform from outside—from the realm of the female, from the realm of that which society describes as negative in males—must struggle against an encoding built into the foundations of the socio-legal system itself. To believe that through a simple invocation law, the gender constructions built into male social organization and encoded in law, will simply disappear, thus significantly underestimates the force of male-male gendering on the social order. There is no sorcerer's (much less witch's) spell that can transform the object to which the incantation is directed through the medium of law.

V. CONCLUSION

This Article attempts a preliminary investigation of the nature of the regulation of "manhood" and its effects in law. To that end, it argued that male dominance is predicated on a normative framework of maleness and that the female (less than male) is derived not from gender differences, but from differences between males and males. That is, gendering is as much an intra-male behavior discipline device as it is a way to create a hierarchy between

316. FOUCAULT, *supra* note 157, at 86.

317. The news story related recent oratory by Senator Byrd of West Virginia:

As his colleagues hurriedly tried to give the president a domestic security bill, Senator Robert C. Byrd took the floor this morning to tell them of a "truly great" senator from the first century A.D. named Helvidius Priscus. One day this Roman was met outside the senate by the emperor Vespasian, who threatened to execute him if he spoke too freely.

"And so both did their parts," Mr. Byrd said. "Helvidius Priscus spoke his mind; the emperor Vespasian killed him. *In this effeminate age it is instructive to read of courage.* There are members of the U.S. Senate and House who are terrified apparently if the president of the United States tells them, urges them, to vote a certain way that may be against their belief."

John Tierney, *Byrd, at 85, Fills the Forum With Romans and Wrath*, N.Y. TIMES, Nov. 20, 2002, at A1 (emphasis added).

318. "If they don't have the guts to come up here in front of you and say, 'I don't want to represent you, I want to represent those special interests, the unions, the trial lawyers . . . if they don't have the guts, I call them girlie men.'" *California Gov. Not Sorry For 'Girlie Men' Remark: Democrats Blast Schwarzenegger for Mocking Lawmakers*, MSNBC News, July 19, 2004, at <http://www.msnbc.msn.com/id/5460326/> (last visited Feb. 23, 2005).

male and female. It is a way in which females as a gender matter are subordinated, but so is deviant male behavior. The legal system subsidizes a particular dominant male behavior. So the law generally softens what are specifically gender notions. The result is the same in three very different cultures—the United States, Zimbabwe, and Malaysia.

To this end, the Article first looked behind the essentializing and decontextualizing veil of maleness to study the character of the mechanisms and techniques for regulating maleness. For this purpose the paper concentrated on formal legal structures, and in particular on the use of formal and informal sex conduct rules—created by men for use primarily against men. The rules are based on a distinction between appropriate (male) and inappropriate behavior (female) in men. This Article also resisted the temptation to essentialize both maleness and its critique within the American and European socio-political experience. The aim was to avoid privileging or demonizing those experiences as the norm against which the experiences of global others would be ignored or deemed irrelevant or quaint. In order to expand the breadth of the analysis, the techniques of intra-male disciplining were examined from three distinct perspectives, American (and Christian), Malaysian (and Muslim), and Zimbabwean (and post-colonial). Lastly, it sought to avoid the trap of “application,” or of shoe-horning the facts considered into some academically fashionable theoretical perspective. I am mindful that in “literary study as in everyday life, we have entered the Age of Appliances. More and more scholars and critics write and teach by *applying* an ideology or a methodology to a cultural ‘text.’ This reliance on appliances tends to eliminate the experience and the love of literature.”³¹⁹

This Article also sought to understand the ways in which the regulation of manhood might “leak” out of an exclusively male space to influence the organization and the normative foundation of the “public space” shared by men and women. Again, the Malaysian, American and Zimbabwean experiences suggested some insights. Legal and cultural systems based on patriarchy tend to focus on maleness, and regulation of what it means to be gendered male tends to find expression as what it means to be a person—male or female. Patriarchy normalizes the male. This normalized male, reconstituted as the neutral foundational standard *par excellence*, serves as the basis for constructing the social, political and legal relations between men and women. Feminist thought has understood this interrelation as well within the socio-legal space shared by men and women. But the male gendered orientation of the bargain struck in the service of a governance feminism and built on an emphasis of the sameness between the sexes, or on their differences, has been criticized on that grounds that it “consistently functioned to require that women either conform to a male

319. ROGER SHATTUCK, *CANDOR AND PERVERSION: LITERATURE, EDUCATION AND THE ARTS* 7 (1999).

standard of conduct or accept inferior treatment as a condition of acknowledging the differences between women and men."³²⁰ This Article sought to add a layer of complexity to that insight from a different perspective.

The reinforcement of male hierarchy was traditionally policed through the regulation of sexual activity. Though the sodomy laws, or laws like them, have substantially disappeared from the Western world, informal policing remains effective, primarily through the mechanisms of everyday social rules in which gendered conduct ideals are vested with important social and political consequences. And by imposing and enforcing these differences, differences based on a need to distinguish male from female behavior—more from less valued—these episodes are symptomatic of the more subtle and corroding subversive nature of the hierarchy of male gendering. Intra-sexual gender role hierarchies, based on a normative model of male role supremacy, continue to marginalize the normatively female both *within* each sex and *between* the sexes. Each of these political episodes thus illustrates the more subtle ways in which conduct norms work to gender law and politics.

This Article has sought to paint a picture with fairly hard edges, and points to the importance of gender as the basis for those clusters of behavior norms that create severe boundaries around what men and women, families, social groups, and political communities consider appropriate. Boundaries thus formed are institutionalized as law. I have also suggested the lengths to which the power of those norms can be used to legitimate characterizations of behavior as good or bad—ordered or disordered. While I have suggested that this perspective is a powerful tool in understanding human action and institutional organization, I am also mindful of its limitations. Thus, I end with the caution put into the mouth of a fourteenth century monk, Adso of Melk, by Umberto Eco:

At the end of my patient reconstruction, I had before me a kind of lesser library, a symbol of the greater, vanished one: a library made up of fragments, quotations, unfinished sentences, amputated stumps of books. . . . I have often consulted them like an oracle, and I have almost had the impression that what I have written on these pages, which you will now read, unknown reader, is only a cento, a figured hymn, an immense acrostic that says and repeats nothing but what those fragments have suggested to me. . . .³²¹

Human organization is complex. Part is visible; part is submerged. I have pulled the curtain back, if only for a moment, on a fragment of a much larger canvas of individual identity and human community. I have illuminated one of the many facets of meaning that makes law at once so simple and so complex.

320. FRUG, *supra* note 277, at 4.

321. UMBERTO ECO, *THE NAME OF THE ROSE* 500-01 (William Weaver trans., 1983) (1980).

The lessons are valuable, but can provide only the beginning of a journey to understanding.