EMASCULED MEN, EFFEMINATE LAW IN THE UNITED STATES, 
ZIMBABWE AND MALAYSIA

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Abstract:

This paper focuses on an area of study largely neglected in feminist theory – the development of gender differentiation within masculinity, and its application in law in three socio-culturally distinct communities. At the close of the 20th century, the United States, Zimbabwe and Malaysia, each experienced dramatic socio-political episodes that highlight both similarities and differences in the ways gendered norms are translated into socio-legal norms. In the United States, rumors of homosexuality surfaced in the non-elite press to demonize and explain the motivation of Mohammed Atta, one of the suicide pilots of September 11, 2001, Jonathon Walker Lindh, the “American Taliban” and John Mohammed and Lee Boyd (John) Malvo, the D.C. snipers of 2002. Zimbabwe, the sodomy trial of Zimbabwe’s first President provided a focal point for the campaign to de-colonize the law of Zimbabwe from an effeminate corrupting foreign law and reinforce rulings on the gendered consequences of a reconstituted customary law. In Malaysia, the jailing of the Deputy Prime Minister, Anwar Ibrahim, on charges of corruption and sodomy at the instigation of the Prime Minister of Malaysia, and who had, in turn, been criticized for political and economic corruption by Anwar prior to his arrest. These narratives provide the factual grounding for a study of the way conceptions of good order are intimately connected to the discipline of the male body, the way law is used to reinforce gendered understandings of appropriate behavior, and the way that the sexualization of misconduct intensifies the legal effects of communal wrongs. Law memorializes the characteristics of that complex of behavior expectations that gender an individual fully male through a matrix of xenophobia, status hierarchy, science and religion. The male body (personal and social) – reconstructed as sexually muddled – is disciplined for gender disorder. That same now feminized male body, also serves to define the female, both socially and physically, as aberrational. That which is female continues to be laced with elements of corruption (Anwar Ibrahim), uncontrollable impulses, madness or dangerous anti-social behavior (Muhammad Atta, Lindh, Mohammed and Malvo), and invasive weakness or disease (Zimbabwean law).
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1 Professor of Law, Pennsylvania State University. Earlier versions of this paper were presented at the Critical Legal Conference, University of North London, September 5-9, 2002, and the conference: Subversive Legacies: Learning from History/Constructing the Future, University of Texas School of Law, Nov. 22-23, 2002. My thanks to the participants for their comments. Special thanks to my research assistants, Assaf Zilbering (’04), Tim Gilsbach (’05) and especially Joshua Bonn (’04) for their excellent work.
“He 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. . . . Once the truth is known, everybody, even his best friends will reject him. 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.’”

Ideologies of gender remain ascendant throughout the world. These ideologies are imprinted in the law of all states – modern and ancient, religious and secular. These

2 Reasons for Ex-DPM’s Arrest under ISA, NEW STRAIGHTS TIMES (Singapore), Sep. 23, 1998, available at Westlaw (former Malay Prime Minister Mahathir Mohammad, damning his former deputy prime minister and then likely successor, Anwar Ibrahim, shortly after Anwar’s arrest on sodomy charges precipitating Anwar’s fall from power).

3 For my purposes here ideology might best be understood from the perspective of a community as its

"articulated forms of social self-consciousness," the explicit public ideas [the community has] 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.

SUSAN STAVES, MARRIED WOMEN'S SEPARATE PROPERTY IN ENGLAND, 1660-1833 6 (1990). 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.” 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)). An ideology of gender might, then, be reduced, to a cluster of norms, expectations, understandings and the like derived from the meaning of sex, where sex is used in its multiple and ambiguous senses.

4 Vicki Jackson recently reminded readers that

the history of feminism which, from its inception, has been a multi-national and multi-sourced movement. . . . Just as the 19th and 20th-century legal, literary and political pioneers of feminism were not confined in their understanding or influence to a single nation, those who today seek to advance equality rights should be familiar with and try to use law at the local, national and transnational levels. The legal world today exists at multiple levels with interactive, permeable boundaries: domestic systems look to international norms and to other domestic systems, and international or transnational
ideologies become increasingly less visible as societies substitute a policy discourse of corruption, psychosis and socio-cultural debasement for that of gender role expectations.\(^5\) Corruption, especially in the political discourse of religion, has reinvigorated gender discipline in some countries.\(^6\) The embrace of ‘science’ provides a basis on which gendered policy can be translated into law in many states.\(^7\) Post-colonial theory has been put to work in other places as the policy basis for reinstituting regimes of gender as an act

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\(^5\) It is in the nature of the success of ideology that it remain opaque. “[I]deologies are most effective when most taken for granted. They resist correction and critique by making the status quo appear natural, as ‘the way things are’ rather than as the result of human intervention and practice. Like stereotypes, ideologies depoliticize what are in fact differences, in power that serve some more than others.” Spike Peterson and Anne Sisson Runyan, Global Gender Issues 44 ( Westview Press, 1999).

\(^6\) For an example out of Egypt, see, e.g A KARAM, WOMEN, ISLAMISISTS AND THE STATE: CONTEMPORARY FEMINISM IN EGYPT (Macmillan Press 1998). Some Islamic feminists have suggested a liberating power to gender demarcations, whether or not written into law. See, e.g., LEILA AHMED, A BORDER PASSAGE (1999) (on feminist Islam). For feminists in multi-religious states, the competing demands of feminism, religion, and post-colonialism make for complications within feminism. Ratna Kapur captures the essence of the difficulty in India. “In post-colonial India, for example, the relationship between gender and religion remains very complex due to the increasing legitimacy of the Hindu Right and their political agenda emphasizing the assimilation of religious minorities. Muslim women are caught in the tension between their demands for gender equality within their religious community and their dependence upon and support for the community as a site of cultural and political resistance to Hindu majoritarianism.” Ratna Kapur, The Tragedy of Victimization Rhetoric: Resurrecting the “Native” Subject in International/Post Colonial Feminist Legal Politics, 15 HARV. HUM. RTS. J. 1, 11 (2002).

of socio-cultural purification.8

The power of these ideologies to discipline and subordinate women is well understood in the West,9 even among conservative jurists.10 Less well understood is the way in which these ideologies discipline and subordinate women by defining, disciplining and subordinating the ‘female’ in men. Three examples drawn from recent events that were widely reported in the popular press provide evidence of the critical place that disciplining the female out of the male plays in the socio-cultural basis of law and its ‘genderless’ ideologies. The first is from the United States – the homosexualization of violent anti-social pathologies through the intense scrutiny of the disordered sexualities one of the participants in the September 11, 2001 attacks on New York, the “American Taliban” (John Walker Lindh) and his family, and John Allen Mohammed and his companion John Malvo, the D.C. sniper terrorists. The second is from Malaysia – the homosexualization of opposition to the current Malaysian Prime Minister and the resulting prosecution of a powerful politician on charges of corruption and sodomy. The

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10 See, e.g., Nevada Department of Human Resources v. Hibbs, – U.S. –, 123 S. Ct. 1972 (2003). Chief Justice Rehnquist authored an opinion in which a majority of the Court determined that Congress appropriately exercised its legislative power under Section 5 of the 14th Amendment in enacting the family leave provisions of the Family and Medical Leave Act of 1993, 29 U.S.C. Section 2612(a) in part because “the States’ record of unconstitutional participation in, and fostering of, gender- based discrimination in the administration of leave benefits is weighty enough to justify the enactment of prophylactic § 5 legislation.” Id., at –.
last is from Zimbabwe – where the trial of Zimbabwe’s former President for the sexual corruption of men served to reintroduce a pre-colonial normative structure in which gender equality and homosexuality are attacked as decadent products of a corrupt West. Ideologies of gender are indigenous everywhere.

The origins of these ideologies are modest indeed. All arise from a truly base reality – reproduction divides humankind in the simplest and most fundamental way.\\footnote{The philosophy, utility and manipulation of difference has had a stranglehold of sorts on Western thought at least since the time of Darwin. For a discussion of difference theory within French philosophy, see, e.g., Todd May, Reconsidering Difference: Nancy, Derrida, Levinas, and Deleuze (Pennsylvania State University Press, 1997). As one theorist notes: “the postmodern criticism goes further with respect to the form of theory itself. Incorporating difference into social theory is not merely a matter of adding something in order to correct an omission. It has involved a more thorough criticism of the way in which analytical categories are organized, social processes conceptualized and theoretical moves structured.” Nancy Weiss Hanrahan, Difference in Time: A Critical Theory of Culture 1 (Praeger Publishers, 2000). Feminists have also confronted the difficulties of sameness/difference. See, e.g., Carrie Menkal-Meadow, Women’s Ways of “Knowing” Law Feminist Legal Epistemology, Pedagogy, and Jurisprudence, in Knowledge, Difference, and Power: Essays Inspired by Women’s Ways of Knowing 57 (Mary Field Belenky, Blythe Mcvicker Clinchy, Nancy Rule Goldberger, Jill Mattuck Tarule, eds.; Basic Books, 1996)\\footnote{Richard A. Posner, Sex and Reason, 181-204 (1992)(sex is a morally indifferent subject). Cf. Bertrand Russell, Marriage and Morals (1929).}

Men are biologically equipped to produce and deliver sperm, a thing vital to the production of offspring. Women are biologically equipped to gestate and nourish offspring at the beginning of their lives. This division produces one sure consequence – no individual can reproduce without some thing produced or harbored by another. But, the realities of reproduction, and the utility of the body, do not of themselves necessarily produce meaning.\\footnote{Nonetheless, people have generated meaning, mountains of meaning, from the bodies of individuals. The human community has shown a certain obsession with writing}
meaning onto the bodies of individuals. Everywhere communities of people have invested the simple realities of reproduction – and the division of function through which it is effected – with additional meaning. Sufficiently encrusted with meaning, regulation centered on reproductive division can provide a basis on which communities of people can order their social, economic, political and religious lives. An evangelical Protestant can say – “The basic unit of social, local, national and international organization in God’s world order is the family.” This view would not sound odd, at a certain level of generality, to a pious Chinese traditionalists, invested in conceptions of yi (morality) and li (loosely, proper behavior in specific relationships). Nor would it seem strange to Muslim clerics in Malaysia, nor to a Zimbabwean invested in the traditions of his

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13 “So we must not refer a history of sexuality to the agency of sex; but rather show how ‘sex’ is historically subordinate to sexuality. We must not place sex on the side of reality, and sexuality on that of confused ideas and illusions; sexuality is a very real historical formation; it is what gave rise to the notion of sex, as a speculative element necessary to its operation.” MICHEL FOUCAULT, I THE HISTORY OF SEXUALITY: AN INTRODUCTION 157 (Robert Hurley, trans. 1978; Vintage Books, 1990) (1976).

14 PAT ROBERTSON, THE NEW WORLD ORDER 235 (Dallas: World Publishing, 1991). “History shows that every civilization in which the creative energies of people were dissipated by sexual promiscuity and drunkenness has quickly gone into decline. Without trust, fidelity, and discipline, families fail and nations fail.” Id., at 241 (on the marriage bond).

15 The Chinese term li has a number of meanings.

In the narrowest sense, it means ‘rituals,’ ‘propriety,’ and just ‘good manners’; in a historical sense, it means the rationalized system of feudal order; in a philosophic sense, it means the ideal social order with ‘everything in its place’; and in a personal sense, it means a pious, religious state of mind.”


16 See, e.g., ANWAR IBRAHIM, ASIAN RENAISSANCE (Times Books Int’l, 1996).
community. But the specifics of meaning – the application of generalized concepts to specific conduct – might vary. Each of these cultures will have devoted a substantial amount of energy to create complicated systems of governance grounded in the bodies of its members.

The detail, the peculiarities, of behaviors grounded in the body, are as important as the desired consequences of such complexes of behavior. Gender ideology, in this sense, forms part of communal culture that:

is best seen not as complexes of concrete behavior patterns – customs, usages, traditions, habit clusters – . . . but as a set of control mechanisms – plans, recipes, rules, instructions (what computer engineers call ’programs’) – for the governing of behavior.

Infusing meaning on things, conditions, and events as a means of constituting mechanisms for the control individual behavior in particular, and of communal organization in general, is an obsession of culture. It seems that, ”man is precisely the animal most desperately dependant upon such extragenetic, outside-the-skin control mechanisms, such cultural programs, for ordering behavior.”


Among the most pervasive forms of gender ideology is that bundle of beliefs and understandings commonly understood in the West as “patriarchy.” Patriarchy has many faces. Patriarchy is not only a ‘stand alone’ ideology; it also folds neatly into most of the major religious, economic, social and cultural systems of the world today. As a

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) (defining patriarchy as “the manifestation and institutionalization of male dominance over women and children in the family and the extension of male dominance over women in society in general”). 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, because the systematically differential delivery of benefits and deprivations required making no mistake about who was who.

Catharine MacKinnon, Feminism Unmodified 40 (1987). There have been endless studies, critiques and defenses of this ideology over the course of the last several hundred years. It is difficult to remain ‘objective’ about systems which dominate the world view of the writer. However, a number of people have attempted comprehensive accounts of this ideology. See, e.g., Anna G. Jónasdóttir, Love, Power, and Political Interests: Towards a Theory of Patriarchy in Contemporary Western Societies (1991); David Bakan, And They Took Themselves Wives: The Emergence of Patriarchy in Western Civilization (1979). There are a number of modern scholars who have begun unveiling, investigating and (usually) contesting, the ideological component of gender. For good recent analysis along these lines in the West, see, e.g., Sylviane Agacinski, Parity of the Sexes (Lisa Walsh trans., 2001); David B. Cruz, Disestablishing Sex and Gender, 90 Cal. L. Rev. 997 (2002); Elvia Rosales Arriola, Sexual Identity and the Constitution: Homosexual Persons as a Discrete and Insular Minority, 14 Women’s Rts. L. Rep. 263 (1992); Adrienne Rich, Compulsory Heterosexuality and Lesbian Existence, in, Powers of Desire: The Politics of Sexuality 177 (Ann Snitow et al. eds., 1983); Gayle Rubin, The Traffic in Women: Notes on the "Political Economy" of Sex, in Toward an Anthropology of Women 157 (Rayna R. Reiter ed., 1975).

consequence, an understanding of gender meaning can become quite complex. Inextricably bound up within the social, cultural, economic and religious systems within which it forms a part, patriarchy is sometimes subsumed in the study of these underlying structural systems themselves. 25

Most modern studies of patriarchy focus on the way understanding about what it means to be ‘male’ and ‘female’ shape the public and private social space shared between

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23 For a discussion of patriarchy and capitalism, see, e.g. 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, e.g., Marc Linder, Mackinnon on Marx on Marriage and Moral an Otsogistic Odyssey, 41 BUFF. L. REV.


25 Some of the more important work of modern American feminists is sensitive to this insight. See, e.g., CATHARINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW, (Harvard University Press, 1987); MOTHERS IN LAW: FEMINIST THEORY AND THE LEGAL REGULATION OF MOTHERHOOD (ed. Martha Alberson Fineman and Isabel Karpin, Columbia University Press, 1995).
men and women, as well as the cultural space left to the ‘female.’ In the West, for example, much of the study of patriarchy among feminists focus 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.’ 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. 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 standard normal – that is, the ‘male’ – and the ‘female.’ Among traditionalists, the focus is also on women, but geared toward justifying the complex of meaning that produces that attributes of the ideal “woman.”

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26 Within the legal academic literature, there is a wealth of articles and books. See, e.g., CITE; CATHARINE MACKINNON, FEMINISM UNMODIFIED (1987); Nancy Levit, Keeping Feminism in Its Place: Sex Segregation and the Domestication of Female Academics, 49 U. KAN. L. REV. 775, 782 (2001).


28 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, e.g., See e.g., 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).

29 See, e.g., THOMAS LACQUER, MAKING SEX: BODY AND GENDER FROM THE GREEKS TO FREUD 22 (Cambridge: Harvard Univ. Press, 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”).

30 I am well aware of the play on words in the sentence above. That was meant to reify, in a sense, the reality of gender, at virtually every level of discourse. “Not only gender difference, but also the privileging of men and masculinity over women and femininity, is "justified" by the assumption that male being and knowing are the norm and are more valuable than female being and knowing.” SPIKE PETERSON AND ANNE SISSON RUNYAN, GLOBAL GENDER ISSUES 62 ( Westview Press, 1999).

Moreover, since the 19th century, study within patriarchy, has extended to non-standard deviations – that is the study of those gendered male or female who do not conform to the ideal meaning built into their assigned gender.³² Men, as the primary beneficiaries of patriarchy,³³ are less often the subject of anti-patriarchal – and usually feminist –


³³ 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 (1992).

Religion, in particular, has sought to suggest that patriarchy is as much about the dignity of women as it is about the authority of men. Thus, for example, among the members of the Southern Baptist Convention:

The husband and wife are of equal worth before God, since both are created in God's image. The marriage relationship models the way God relates to His people. A husband is to love his wife as Christ loved the church. He has the God-given responsibility to provide for, to protect, and to lead his family. A wife is to submit herself graciously to the servant leadership of her husband even as the church willingly submits to the headship of Christ. She, being in the image of God as is her husband and thus equal to him, has the God-given responsibility to respect her husband and to serve as his helper in managing the household and nurturing the next generation.
discourse. Echoing feminist complaints of male centered study of women, males who study masculinity have suggested that women theorize men from their perspective, that is from 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 other than the object of normalization.

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

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Holy Scripture affirms that man and woman were created for one another: "It is not good that the man should be alone." The woman, "flesh of his flesh," i.e., his counterpart, his equal, his nearest in all things, is given to him by God as a "helpmate"; she thus represents God from whom comes our help.


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themselves.\textsuperscript{36} Much of what follows is a trans-cultural elaboration of this notion.

Meaning, of course, has more than social, economic, ethnic, cultural and religious consequences. In all communal systems, meaning tends to drive the articulation of specific conduct norms.\textsuperscript{37} Systems of gender meaning find themselves reflected in social mores, and written into law.\textsuperscript{38} Within these communities, men and women who do not conform to expectations, legal and social, derived from communal understandings of gender are disciplined.\textsuperscript{39} Conformity to gender behavioral expectations, on the other hand, is rewarded. Assimilation is a primary strategy for communal survival and

\footnotesize{\begin{itemize}
\item \textsuperscript{36} \textit{Id.}, at 7.
\item \textsuperscript{37} “The ‘control mechanism’ view of culture begins with the assumption that human thought is basically both social and public – that its natural habitat is the house yard, the marketplace, and the town square.” \textsc{Clifford Geertz}, \textsc{The Interpretation of Cultures} 45(1973).
\item \textsuperscript{38} In another context I have explained how:
\begin{quote}
Courts function as chroniclers of the norms through which people sharing a common culture understand themselves. The primary functions of courts are to identify cultural practice and then to memorialize that practice as law. Juridical expressions of law are essentially descriptive; standing alone, their pronouncements cannot coerce cultural practices. As such, law is an enterprise of affirmation.
\end{quote}
\item \textsuperscript{39} Discipline invokes sanctions from all of the major instrumentalities of social organization – social, legal and religious. In China, for example, social control started with the family, intricately defined according to gender roles and behavioral expectations. Those roles were then analogized to appropriate relation systems between families, and between individuals, family groups and the state. The means of social control were effected through the command of religion and morals, and enforced through the social order (community approbation or disapprobation of acts), the economic order, and the instrumentalities of law. \textsc{See Matthew H. Sommer, Sex, Law and Society in Late Imperial China} 30 (Stanford Univ. Press, 2000).
\end{itemize}}
perpetuation. To “rework the pattern of social relationships is to rearrange the coordinates of the experienced world. Society’s forms are culture’s substance.”

Because the ‘male’ is the normal, the standard within communal systems embracing patriarchy, the refinement and protection of the male standard assumes an important object. Defining the male serves to set the normal standard. It also serves to define the standard deviation – the female. Communities enforce the ideal normal standard. Such enforcement affects those gendered ‘female’ consequentially – women’s ideal is a composite of idealized culturally positive and negative characteristics other than those belonging to men. But, the consequences fall hard on men. Non-conforming men, perhaps even more than women, appear to threaten the viability of the community. They invert, and thus present the possibility of destroying, or at least subverting, the gender ordering which is a part of the bedrock on which the social order is based.

40 For an excellent analysis of assimilation in a gendered context, see Ruthann Robson, Assimilation, Marriage and Lesbian Liberation, 75 TEMP. L. REV. 709 (2002) (the “idealized version of dominant group members is evident in gender jurisprudence, which concerns whether any women, as well as which women, can be assimilated into male culture. In fact, the entire so-called sameness/difference debate that has been pronounced in feminist legal theory from its beginnings is a version of the assimilation conflict.” Id., at 715-716).

41 GEERTZ, supra note –, at 28.

42 This understanding, of course, is central to that of gender traditionalists in the United States. The arguments against constitutionalizing protection for sexual non-conformists, for example, was peppered with suggestions that suborning such a right would lead to the undoing of the traditional social order, a social order heretofore upheld by the edifice of law. Justice Scalia recently wrote, “This [Lawrence’s holding that the moral interest of the majority can not be a rational basis for a state law] effectively decrees the end of all morals legislation. If, as the court asserts, the promotion of majoritarian sexual morality is not even a legitimate state interest, none of the above-mentioned laws [fornication, bigamy, adultery, adult incest, bestiality, and obscenity] can survive rational-basis review.” See Lawrence v. Texas, 123 S. Ct. 2472, 2495 (2003). Later in the opinion, he suggests that a majority of people believe that homosexuality is destructive to society. “Many Americans do not want persons who openly engage in homosexual conduct as partners in their business, as scoutmasters for their children, as teachers in their children’s schools, or as boarders in their home. They view this as protecting themselves and their families from a lifestyle that they believe to be immoral and destructive.” See id. at 2497. But the
Consequently, policing the borders of the ideal male, of the conduct and attitudes that express the meanings imposed by the community on those gendered ‘male,’ becomes a critical social, cultural, political and legal function. Law serves as an important direct and indirect tool for the reinforcement of gender norms. Combined with gender and deployed against male violators of important sexual conduct norms, law can sexualize, and by sexualizing, amplify, the wrongdoing or the wrongdoer. As an example, the seriousness of President Clinton’s criminal wrongdoing – lying – for which he was impeached, cannot be understood without a knowledge of the underlying sexualization of the wrongdoing – the lying was part of a pattern of disordered sexual acts. Americans may well have thought worse of the lying because it was bound up in sexual wrongdoing – moral corruption intensified the lying.

As an example, the seriousness of President Clinton’s criminal wrongdoing – lying – for which he was impeached, cannot be understood without a knowledge of the underlying sexualization of the wrongdoing – the lying was part of a pattern of disordered sexual acts. Americans may well have thought worse of the lying because it was bound up in sexual wrongdoing – moral corruption intensified the lying. See discussion, supra at notes –. For a discussion of the Clinton impeachment and sexual ethics, see, e.g., RICHARD A. POSNER, AN AFFAIR OF THE STATE: THE INVESTIGATION, IMPEACHMENT, AND TRIAL OF PRESIDENT CLINTON, 95-132 (1999); Diane H. Mazur, Sex and Lies: Rules of Ethics, Rules of Evidence, and our Conflicted Views on the Significance of Honesty, 14 NOTRE DAME J. L. ETHICS & PUB. POL’Y 679 (2000); Anita L. Allen, Privacy and the Public Official: Talking about Sex as a Dilemma for Democracy, 67 GEO. WASH. L. REV. 1165 (1999).

It needs emphasizing here, because it has not been common in American academic literature at least, that the object of the paper is to assess the transcultural consequences of particular notions of gender. While one can readily concede that the details are different, and in that difference there may be substantial clues to the unique nature of cultures, there can be much to be learned from observing approaches of different cultures to similar sets of challenges.

We are, in sum, incomplete or unfinished animals who complete or finish ourselves through culture – and not through culture in general but through highly particular forms of it: Douban and Javanese, Hopi and Italian, upper class and lower class, academic and commercial. Man’s great capacity for learning, his plasticity, has often been remarked, but what is even more critical is his extreme dependance upon a certain sort of learning: the attainment of concepts, the apprehension and application of specific systems of symbolic meaning.

This article concentrates on a single aspect of the symbolic meaning of gender – the definition and control of maleness through governmental and non-governmental communal institutions. In particular, the article focuses on the effects of the production of this particular bundle of social and legal gender meaning on three highly distinctive socio-cultural legal systems – The United States, Malaysia and Zimbabwe. In each of these socio-legal systems, the mechanics of gender norms was brought into focus in the context of specific sets of events that occurred at the end of the 20th century and the beginning of the 21st century. The three sets of events were quite dramatic and generated global interest.

In the United States, an embrace of notions more and more closely tying medical pathology and criminality, tied to understandings of traditional behavior norms, provided the lens through which events were interpreted and actions taken. After the September 11, 2001 attacks\(^\text{45}\) and the subsequent American “declaration of the war against terrorism,” American newspapers used rumors of homosexuality to explain the motivation behind the anti-American sentiment that led to the attacks.\(^\text{46}\) One source rumored that one of the principles involved in the attack, Mohammed Atta, was secretly gay and, motivated by self-hatred and a desire to reclaim his masculinity as he understood

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it. 47 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 or not Lindh’s possible homosexuality was a motivating factor in the decision of his son to seek the comforts of a radicalized sect of Islam, join the Taliban, and arguably engage in acts of violence against the country of his birth. 48 Ironically, the press then circulated stories accusing the American Taliban himself of homosexuality with his new religious mentors. 49 Yet another sector of the popular press sought to explore what it termed the homosexual relationship between the 42 year old John Mohammed and the 17 year old John Malvo, the men accused of a sniper style killing spree in Maryland, Virginia and Washington, D.C. during the Fall of 2002. 50

Zimbabwe has embarked on a massive campaign of race-based cultural cleansing. Among the first rules to be changed were those affecting sex and gender. Homosexuality and gender socio-political equality are both repressed, the former as a vestige of corrupt

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47 Two sources reported that the National Enquirer published an article accusing that Mohamed Atta had been gay. See Signorile supra note 36; Terrorists Were Gay supra note 36.


50 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 2/21/2003. For those who, from their elitist towers, are tempted to dismiss this news source as credible or worthy of using I note that for good or ill, the National Enquirer is among the most important sources of news for many Americans. It is reported to have two and a half times as many readers weekday as The New York Times. See Maria Elizabeth Grabe et al., Sourcing and Reporting in News Magazine Programs: 60 Minutes Versus Hard Copy, 76 JOURNALISM & MASS COMM. Q. 293, 294 n.6 (1999).
western colonialisim decadence, and the latter in furtherance of the return to traditional
Zimbabwean values. At the end of the last century, the Zimbabwean male elite, through
its longtime political head, President Robert Mugabe, began a large scale, multi-front
campaign to discipline gender, but on a vast scale. In 1995 Robert Mugabe ranted against
gay men and lesbians at the Harare International Book Fair and ordered a mob to smash
a gay oriented exhibit. In response to international criticism, Mugabe labeled
homosexuality “un-African.” In 1997, Canaan Banana, President of Zimbabwe from
1980-1987 and a high Methodist official, was charged with sodomy. The charges grew
out of the murder trial of a former body guard, Jefta Dube. Dube’s defense was based on

51 For biographies of Robert Mugabe see STEPHAN CHAN, ROBERT MUGABE: LIFE OF POWER
AND VIOLENCE (2003); MARTIN MEREDITH, MUGABE: POWER AND PLUNDER (2002); and PATRICK BOND,
ZIMBABWE’S PLUNGE: EXHAUSTED NATIONALISM, NEOCOLONIALISM AND THE STRUGGLE FOR SOCIAL JUSTICE
(2002). For an earlier history of the revolutionary Mugabe, on the cusp of his dictatorship, see DAVID
SMITH AND COLIN SIMPSON, MUGABE (1981). For a collection of some of the statements of Mugabe, written
virtually in the form of a panegyric to the dictator, see, NATHAN M. SHAMUYARIRA ET AL., MUGABE’S

52 For an interesting discussion of the rift between traditionalists and emancipationists in
contemporary Zimbabwe, see, Deborah S. Ballard-Reisch, Paige K. Turner, Marcia Sarratea, The
Paradox of Women in Zimbabwe: Emancipation, Liberation, and Traditional African Values, 24 Women and
Language 65 (2001) (“In response to the passage of progressive legislation by the Zimbabwean
parliament, 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.” Id., at --).

53 See MARTIN MEREDITH, MUGABE: POWER AND PLUNDER IN ZIMBABWE 129-130 (2002);
Trevor Grundy, Mugabe Embarrassed in Special Envoy’s Gay Rape Trial, SCOT. ON SUNDAY, July 13, 1997, at
Pg. 21, available at LEXIS-NEXIS Academic Universe.

54 See, Grundy, supra.

55 See James Roberts, Ex-president’s Sex Trial Grips Zimbabwe; Canaan Banana is Accused of
NEXIS Academic Universe.
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.56 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.57 After the intervention of the Catholic hierarchy,58 Mugabe directed the state attorney general to press charges.59 Banana, a likely rival of Mugabe, denied his homosexuality but was ultimately convicted.60 Lastly, in a series of cases, of which

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Magaya v. Magaya\(^{61}\) is the most notorious,\(^{62}\) the Zimbabwean courts, applying customary law, disinherited a woman of property rights. The case has generated tremendous international criticism.\(^{63}\)

In Malaysia, religion provided both the veil and the language through which political acts were sexualized and behavior, at the very highest sectors of the male elite, were severely disciplined. In 1998, Anwar Ibrahim was arrested on charges of corruption and sodomy.\(^{64}\) Until his arrest, Anwar was considered the likely successor of the still current Prime Minister of Malaysia, Mahathir Mohamad.\(^{65}\) Mr. Mahathir had earned a reputation as an ardent critic of the West and Western values.\(^{66}\) The arrest and

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\(^{62}\) Another important case is Mahureva, in which a widow was disinherited in favor of her oldest son by operation of customary law. The case is discussed in Corina Schuler, For African Women, Rights Come Slowly, CHRISTIAN SCIENCE MONITOR ELECTRONIC EDITION, March 9, 2000, available at http://search.csmonitor.com/durable/2000/03/09/fp1s4-csm.shtml (last visited 3/26/04).


\(^{66}\) The Prime Minister’s views on these subjects were made quite clear in a work that received a lot of attention in Asia. See MAHATHIR BIN MOHAMMAD, AND SHINTARO ISHIHARA, THE VOICE OF ASIA: TWO LEADERS DISCUSS THE COMING CENTURY (1995). See also MAHATHIR BIN MOHAMMAD, THE WAY FORWARD (1998).
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subsequent proceedings effectively destroyed Anwar’s political career. At his
subsequent trial, it became clear that much of the testimony against Anwar was dubious
or coerced. It was also clear that Mahathir had manipulated the political and judicial
systems to smear Anwar and then avoid prosecution on the basis of his immunity from
office. Anwar was convicted. World public opinion, initially and officially outraged,
soon forgot the politician denounced as a sodomite and, after September 11, 2001, forgave
an increasing compliant Mahathir, who thereafter joined, more or less, the fight against
anti-Western religious extremists in Malaysia.


72 C.f. Doug Bandow, Emerging Friendships, WASH. TIMES, Dec. 11, 2001, at A14, available at Lexis-Nexus Academic Universe, General News, Major Papers (arguing that Prime Minister Mahathir is “serious about combating terrorism”, sympathetic over the 9/11 attacks, and supportive of Washington’s goal of eradicating terrorism; President Bush thanked Mahathir for Malaysia’s support of the war on terrorism); with 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, ASIA, available at Lexis-Nexus Academic Universe, General News, Major Papers (Mahathir said, “It is a
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. 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 his relationship with God and corrupt in his 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.

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revival of the old European trait of wanting to dominate the world and the expression of this trait invariably involves injustice and oppression of people of other ethnic origins and colours. Since Sept. 11 the rich and the powerful have become enraged with the poor half of the world. And their extreme measures have only amplified the anger of the oppressed poor. It is no longer a war against terrorism. It is in fact a war to dominate the world, that is, the chromatically different world.”); and Julie Chao, Critics: Rights Lost to Malaysia’s War on Terror, ATLANTA J. CONST., Nov. 17 2002, at 6B, available at Lexis-Nexis

Consequentially, this article examines the effect of the construction of the masculine on the definition and control of the female in men directly, and indirectly in women. The occurrences which are the object of this study evidence the way in which the disciplining of males through enforcement of sex conduct norms reinforces differences between men, and thus between men and women. These sex conduct norms embody male notions about negative female characteristics, at least when these characteristics are exhibited by 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 the feminine 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 manhood is thus reinforced by the mechanisms used to suppress the effeminate in men. 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 assigned to the purely female ‘gender,’ a bundle of characteristics which, because they are not worthy of inclusion as purely male characteristics, are consequentially adjudged negative and worthy of subordination.

The article starts with a focused recounting of the events that will serve as the basis of the analysis. Though the usual practice favors developing theoretical insights before applying them, usually summarily, to some factual pattern or another, I choose a different path here. 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 it 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 therefrom 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 Part II, considers the factual narratives from the perspectives of the structural ideologies through which each of the societies operate. For the United States, the narratives are retold using the language of the dominant discourse in the United States – the language of science and the therapeutic, as an overlay over an older religious normative structure. For Zimbabwe, the narratives are recast from the perspectives of post-colonial and nationalist ideologies, the language of the dominant socio-political discourse in that nation. For Malaysia, the narratives are recast in the local religious vernacular, in this case grounded in the language of modern East Asian Islam. The article looks particularly to history for patterns and repetitions of conduct which might support generalizations. The narratives are taken apart and analyzed for what makes each unique and what makes each similar to the others. What emerges is a consistent drive, within each

74 A simple example of the point: suppose that observations were made about a group of males, all of them between 45-50, all of them earning $50,000 a year and all of them living in Cleveland. While a tremendous amount could be learned from them, it would be difficult to justify, without more, generalizing that learning into theories about all men everywhere, or even all men in Ohio. Race, age, income, and other differences might make the application of the theory impossible, in fact, at a level of generality above or below that actually studied. In the medical context, the error of essentialism can have significant repercussions – for example, studies of Asian males for propensity to high blood pressure may not reveal a significantly higher risk for African-Americans. Critical race, LatCrit and queer theorists have recognized the trap posed by essentializing and decontextualizing a subject. See, e.g., CITE.
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, the mutability, of the drive to invest sex with meaning, and the consistency of that meaning from system to system of social organization.\textsuperscript{75}

In Part III, the narratives serve as the basis for an exploration of the possibility 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. Despite vast differences in social, political and cultural forms – despite a self-assured conscious belief in the incompatibility, as a foundational matter, of the three societies – each society imposes meaning on gender in the same general way. 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 characteristics of the ideal ‘male’ and to distinguish that ideal from the lesser ‘others.’ That price is sometimes written into law directly – through the regulation of sexual conduct by men. But in other circumstances the law will indirectly enforce conduct norms. The focus is on lessons that can be generalized from the narratives without distorting their essential differences. 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 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

\textsuperscript{75} See discussion infra at notes —.
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 be to some extent directed. So it is with culture, and within culture, the complex of meanings ascribed to gender. The article ends with a consideration of the possibilities within the realities of assimilation-modification, and the possibilities of creating and implementing conscious strategies to the same effect.

I. THREE SOCIO-LEGAL NARRATIVES OF MASCULINITY AND LAW

The United States, Zimbabwe and Malaysia are very different countries. Each has a different history. And within each history is a different set of oppressions and subordinations – many of which remain a problems for each of these societies today.

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76 But we will see whether and to what extent theorizing in that vein yields insights. See, e.g., ARTHUR KOESTLER, THE GHOST IN THE MACHINE (1967).

77 It is in this context that one can better understand, for example the movement from Bowers v. Hardwick, 478 U.S. 186 (1986) (states may criminalize certain sexual conduct between people of the same sex) to Lawrence v. Texas, 123 S. Ct. 2472, 2495 (2003) (states are constitutionally prohibited from criminalizing intimate conduct between people of the same sex). See discussion, infra at notes —.
These subordinations arise from differences in history, religion, and socio-ethnic composition of each nation. Each also has a different legal tradition. Each invests gender with meaning in different ways, again reflecting the formal differences between them. Yet, each set of difference produces a functional equivalence among these states. That equivalence tends to produce a subordination of those characteristics distilled as ‘female.’ In this section we will explore in some detail the factual contexts in which gender is invested with meaning in the United States, Zimbabwe and Malaysia. In all three contexts the narratives center on similar subjects – males who are the subject of the sanction of the criminal law of their respective countries.

A. The United States – Terrorism, Foreign and Domestic.

Since September 11, 2001 America has been fighting a “War Against Terrorism”. This war is not traditional in that the enemies are not traditional nation-states. Two types of enemies now exist. First are individuals who carry out attacks against the United States motivated, to some extent by interpretations of the imperatives of Islam as well as other more customary reasons for violence at the state level. Mohammad Atta and John Walker Lindh fall into this category. Atta was a member of “Al Queda”, an international organization of terrorist “cells” which plan attacks against the United States, Israel and citizens of both nations. Jonathan Walker Lindh was a teenage traveler and student of

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78 Afghanistan, Iraq and other ‘terrorist harboring’ states (ex. Syria, Iran, North Korea) may disagree. For the ‘War on Terrorism’ has been fought within the confines of states deemed to have harbored the non-state opponents of the United States (Afghanistan) or otherwise deemed to harbor weapons of mass destruction (Iraq). However, the motivation for the second Gulf War was not solely the war on terrorism. The exact motivation for the war remains unclear. See Andrew Gumbel, *Iraq’s Arms Chief Surrenders, but Where are the Weapons of Mass Destruction?*, INDEPENDENT (London), Apr. 13 2003. Since the end of the Second Iraq War, the popular press has reported that the American government had a number of different motivations. In any case, this article only examines the non-state entities that the US is currently attempting to eradicate.
Islam who joined a Taliban unit in Pakistan, and later moved to Afghanistan. This Taliban unit carried out attacks against United States troops in Afghanistan. The second type of enemy is not necessarily a political or religiously motivated adversary. Rather, because their actions mimic the destructive potential as well as the tactics of the first group of enemies, they might tend to be treated the same. Among these are the otherwise ‘common’ criminals committing non- or vaguely-political acts of criminal mischief. John Lee Malvo and John Allen Muhammad fall into this category. In the summer and fall of 2002 these individuals are alleged to have driven around the greater Washington D.C. area and murdered thirteen individuals, one at a time, sniper-style. Their motivation is unknown. Their activities did, though, induce mass terror over a large geographic area. But there is no link between them and the terrorist activity that sparked the American response to the September 11, 2001 attacks.

These “terrorists” have one common characteristic. US news media and other international sources have reported that Atta, Lindh, Malvo, and Mohammad were motivated by sexual deviance. The media made attempts to further demonize these actors and explain their motivations by reporting stories of alleged homosexual affairs, desires, and repressions which somehow caused each individual to violently attack America. Each of these published stories are based on rumors; the true sexual identity of each attacker remains almost impossible to confirm.

1. Muhammad Atta – Hijacker of a plane that crashed into the World Trade Center on September 11, 2001. 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.⁷⁹ Newsweek did not run the story, but reported that the National Enquirer printed an article claiming that Atta was gay.⁸⁰ The Houston Chronicle published an interview with Muhammad’s father. The elder Atta claimed that the September 11th attacks were an Israeli conspiracy and the United States is a “tyrant nation” that supports Israel, adultery, and homosexual marriage.⁸¹ The New York Times published an editorial piece by Lawrence Fishberg who wrote, “If 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 him,’ and maybe more so than Al Qaeda’s party line.”⁸²

There was little investigation of Atta’s conformity with gender roles. There was little evidence offered that Atta was motivated by homosexuality. Sociologist Michael Kimmel theorized that Atta was motivated by repressed ‘manhood’ which he was attempting to reclaim. He wrote,

Currently, for example, there is much speculation about Atta’s sexuality. Was he gay? Was he a repressed homosexual, too ashamed of his sexuality to come out? Such innuendoes are based on no more than a few circumstantial tidbits about his life. He was slim, sweet-faced, neat, meticulous, a snazzy dresser. The youngest child of an ambitious lawyer father and a pampering mother, Atta grew up shy and polite, a mama’s boy.

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'He was so gentle,' his father said. ‘used to tell him, ‘Toughen up, boy.’”\textsuperscript{83} 

Atta was dead, and the speculation, flaring briefly, died soon after as attention was diverted to ----- the only living September 11\textsuperscript{th} conspirator captured and brought to trail in Virginia.\textsuperscript{84} With respect to him, there was little speculation of homosexual motivation.\textsuperscript{85} There were, however, intimations generally, about the disordered sexual lives of the co-conspirators generally. These included visits to strip clubs, casinos, purchases of lap dances from topless dancers, and drinking alcohol.\textsuperscript{86} 

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.

Two allegations exist in regards to 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 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. Michelangelo Signorile disagreed with

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87 Corkery wrote:

Not that it matters a whit to us here in the cool, gray city of love what Frank Lindh, daddy of the Taliban warrior from Marin, does, did or dreams of doing with other consenting adults, but shouldn’t he come clean with us about all the facts in the odd odyssey of his son?

Frank Lindh has been quoted time and again as saying it was his son John’s reading of the ‘Autobiography of Malcolm X’ when John was 16 in 1997 that turned his son’s head and heart towards Islam. But something else then going on in the family’s life may be have been just as pertinent.

When Frank Lindh left his family in 1997, it was to move in with a male companion. Yep . . . The man with who Lindh lived has since been described as ‘a family friend,’ but other family friends say the men lived as a gay couple.

It would take a specialist in family issues to map the constellations of feelings and
problems that would describe John Walker’s path toward Islam in 1997, but sources close to the family say the father’s turn of life from married man to modern gay man startled and flustered the 16-year-old.


89 In its mission statement, the organization describes itself thus:

“The American Enterprise Institute for Public Policy Research is dedicated to preserving and strengthening the foundations of freedom–limited government, private enterprise, vital cultural and political institutions, and a strong foreign policy and national defense–through scholarly research, open debate, and publications.”


90 As I read about his upbringing, his passive ‘60s-leftover father and his vegetarian/shaman/free love/in-a-flower/from-a-comet mother, and then his interview describing why he liked the Islamic way, one thought kept coming back: Gangs. The gangbangers I deal with have parents who provide little structured discipline, and I repeatedly see such kids gravitate toward some alternate authority. They want rules, and somebody who cares enough about them to enforce those rules. Reading Walker’s reasoning for why he chose such a hard-line organization, and then putting that up against his no-morals California background, makes
implying that this fact explains why John Lindh strayed from societal norms.91

Other publications lashed out at the press for reporting Frank Lindh’s homosexuality and its probability of turning John to the Taliban.92 Other publications saluted P.J. Corkery for excellent journalism.93 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.”94


The second allegation in regards to Jonathan Walker Lindh surfaced in October 2002 after Time Magazine published a reputable, biographical article on Lindh. The article did print that Frank Lindh left his family in 1998 because he was gay, but the article never reported or implied that John Walker Lindh was gay. The article included interviews with Pakistani businessman/missionary Khizar Hayat and Mufti Iltimas Khan. 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,” and “I was loving him. Because love begets love, you know.” Khan said, “Everyone 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 Lindhs’ attorney denied that John was gay.95

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 Triangle96 and the New York Daily News published the story Bizman: Lindh and I were Gay Lovers.97 Both articles included a denial by Lindh that he is gay, but the headlines do not reveal this.98 The articles also reported that Frank Lindh is gay.99 These

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97 See Jose Martinez, Bizman: Lindh and I were Gay Lovers, N.Y. DAILY NEWS, Sept. 30, 2002, at 6, available at 2002 WL 24835637.

articles sensationalize the story reported by *Time*. *Time* reported that the shamans said that Frank Lindh was gay, but *Time* did not base an entire story on an accusation by one or two individuals. The articles in the New York Post and the Daily News took one quote from an eighteen page article and used that as a foundation for the articles each published. The focus on the sexual habits of Lindh, might appear to reduce the context of the Lindh’s role in Afghanistan to something more manageable to American audiences. Was this an attempt to sell individual newspapers? Or was this an attempt to demonize Lindh?

3. **John Muhammad and John Lee Malvo – The Washington, DC Snipers.** John Muhammad and John Lee Malvo are the principal characters in a weeks long spree of serial killing in the Washington, D.C. area that captured media attention worldwide. They have been accused of murdering ten people in Washington D.C., Maryland and Virginia, for the murder of some of whom they have already been convicted. In addition,

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militancy was cemented by a sexual relationship with a Pakistani businessman who guided the American Taliban turncoat toward schools that fueled his hatred of the United States . . .”

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100. . . . the man and the boy would stand accused of one of the most terrifying murder rampages in the country's history, one that had led the White House to contemplate opening up military bases so children could go trick-or-treating in safety and that had induced otherwise rational residents to scurry in a zigzag formation across bland suburban parking lots. In three weeks, the case elicited 138,000 tip-line calls, seven times the number the Unabomber case yielded over 18 years. The 14 shots took 10 lives, though the tally may still not be complete. The FBI is investigating whether unsolved murders and petty thefts in other locales, from the West Coast to the South and up the Eastern Seaboard, may also be linked to the duo.

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they are suspected of killing three more people in Washington state, Alabama, and Louisiana.\textsuperscript{101}

According to press accounts, Muhammad had failed in his careers and his personal life. He was raised without parents by an elderly grandfather and aunt. In 1985 he divorced his first wife, converted to Islam, and joined the Army. From 1990 to 1992 he fought in the Gulf War. While serving in the army, he won a mark of “expert” for marksmanship exercises.\textsuperscript{102} Muhammad’s ex-wife Mildred said that Muhammad’s life was changed by an incident in the Gulf War. Army officials suspected Muhammad of lighting a tent with an incendiary grenade. Officers tied him up and refused to give him a gas mask during a purported gas raid. Upon his return to the US, Muhammad demanded to live a strict, regimented, and religious life. He became obsessed with controlling his children’s lives.\textsuperscript{103} After divorcing Mildred, Muhammad kidnaped their children and fled to Antigua in 2000. In Jamaica he met Malvo.\textsuperscript{104}

Lee Malvo grew up in poverty in Jamaica, bouncing from guardian to guardian. Off and on he lived with his mother Una James, who would travel abroad to work. He had little or no contact with his father. Those who knew the young Malvo said that he

\textsuperscript{101} See Rebecca Winters, \textit{The Sniper Trail Grows}, \textit{TIME} (Canada), Nov. 11, 2002, at 11,\textit{ available at 2002 WL 15168094.}

\textsuperscript{102} See, Amanda Ripley, \textit{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}, \textit{TIME}, Nov. 4, 2002, at 34,\textit{ available at 2002 WL 102386750.}

\textsuperscript{103} See, Marcia Slacum Greene, ‘I’m Sure he had me in his Scope’; \textit{Muhammad’s Ex-Wife Links Killings to Custody Fight}, \textit{WASH. POST}, Nov. 8, 2002, at A1,\textit{ available at 2002 WL 102570305.}

\textsuperscript{104} See, Amanda Ripley, \textit{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}, \textit{TIME}, Nov. 4, 2002, at 34,\textit{ available at 2002 WL 102386750.}
yearned for a father figure in his life. He was bright, obedient and religious, doing well in schools which he enrolled in; but he often had to leave the schools because of his legal status. In 2000, Malvo met Muhammad. Muhammad befriended Malvo’s mother and helped her illegally enter the United States. Malvo moved in with Muhammad and his children. He looked up to Muhammad and tried to mimic his lifestyle. He called Muhammad ‘Dad’ and affixed the name ‘John’ in front of his first name. By 2001, Malvo’s involvement in the Church of Seventh Day Adventist school declined. He converted from the Christianity to Islam.\(^\text{105}\) While staying in Antigua with Malvo, Muhammad lost custody of his children.\(^\text{106}\) Muhammad decided to move back to the United States. He supplied Malvo with illegal immigration documents and they moved to Florida and later to Washington. After living in a homeless shelter in Washington, Muhammad and Malvo took to the road and visited both of Muhammad’s ex-wives.\(^\text{107}\) Soon thereafter it is suspected that Muhammad and Malvo traveled across the United States and committed thirteen murders.

The racial politics of the ‘occupation’ serial killer also became an issue in this

\(^{105}\) See, Serge F. Koveleski & Mary Beth Sheriden, *A Boy with Bright Promise and No Roots; After Transient Childhood, Sniper Suspect Latched on to Strong Father Figure*, WASH. POST, Jan. 12, 2003, at C1, available at 2003 WL 2367828; and Evan Thomas, *Descent into Evil; He was a Soldier, a Muslim Convert, and a man who had Failed*, NEWSWEEK, Nov. 4, 2002, at 20, available at 2002 WL 7295371; and Peter Whoriskey, *In Antigua, Parts of Malvo’s Life Remain a Mystery*, WASH. POST, Oct. 29, 2002, at A6, available at 2002 WL 101780487.


\(^{107}\) See, Serge F. Koveleski & Mary Beth Sheriden, *A Boy with Bright Promise and No Roots; After Transient Childhood, Sniper Suspect Latched on to Strong Father Figure*, WASH. POST, Jan. 12, 2003, at C1, available at 2003 WL 2367828; and Evan Thomas, *Descent into Evil; He was a Soldier, a Muslim Convert, and a man who had Failed*, NEWSWEEK, Nov. 4, 2002, at 20, available at 2002 WL 7295371; and Peter Whoriskey, *In Antigua, Parts of Malvo’s Life Remain a Mystery*, WASH. POST, Oct. 29, 2002, at A6, available at 2002 WL 101780487.
Throughout the course of the shooting spree, Muhammad and Malvo traveled at will through Maryland and Virginia. At first, police and experts insisted they were looking for a suspect, the composite characteristics of whom did not in the least bit resemble either of the two men. The suspect was, on the basis of the profiling work of police experts, a middle aged, intelligent, well educated white male. As a consequence, the pair were able to travel unimpeded. Indeed, eyewitnesses report that they stopped at convenience stores, restaurants, truck stops and worked out at a YMCA in Silver Spring, Maryland. They slept either in Muhammad’s car or in hotels or motels. Often they would stay at the scene of the shootings for hours, sometimes even overnight. In fact, 

108 Though not the focus of this article, it is hard to avoid comment. Having been instructed by the American ‘expert’ community to expect serial killers to be ‘angry white men,’ racial communities were surprised to race the snipers as ‘black.’ Some groups of African Americans were surprised to learn that the serial killer was African American. See, Darryl Fears and Avis Thomas-Lester, Blacks Express Shock At Suspects Identity; Most Say They Expect a Serial Killer to be a White, WASH. POST, Oct. 26, 2002, at A17, available at 2002 WL 101779772. On the other hand, according to guidelines published by the Journal of the American Academy of Psychiatry and Law, Muhammad and Malvo were actually spree-killers, not serial murderers because they did not cool off and return to their regular lives in between the killings.

109 I needed a sniper’s face just to keep it real, and for a while I tried to imagine a white male, a mid-thirtyish, household-handyman sort of guy. After all, that’s who does these kinds of serial killings, right? Maybe I’d been watching too many weekend cable hunting shows where white men move stealthily through the woods, lie in wait for some unsuspecting animal to come along and -- with deadly accuracy -- drop it.


111 Immediately after shooting and killing Kenneth Bridges at an Exxon Station in Massaponax, Muhammad and Malvo checked into the Econo Lodge across the street. They ordered a pizza and watched CNN coverage of the investigation taking place at the Ramada Inn next door, the hotel
they were even repeatedly pulled over and sighted by police, but let go with no suspicion. When they called the FBI’s tip-line they were refuted as pranksters.112 On October 24, 2002 tips led police to believe that Muhammad and Malvo were sleeping at a highway rest-stop in Maryland.113 They surrounded the sniper’s blue Chevy Caprice, smashed in the windows and arrested the surprised pair.114

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 investigations. 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 September 11 World Trade Center attack.115 A national news weekly teased its readers with the notion that the relationship between the two


112 See, Evan Thomas, Descent into Evil; He was a Soldier, a Muslim Convert, and a man who had Failed, NEWSWEEK, Nov. 4, 2002, at 20, available at 2002 WL 7295371.

113 Ironically, the most useful tips may have been provided by the snipers themselves. See, Evan Thomas, Descent into Evil; He was a Soldier, a Muslim Convert, and a man who had Failed, NEWSWEEK, Nov. 4, 2002, at 20, available at 2002 WL 7295371.


killers was a *folie a deux.*\textsuperscript{116} 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.\textsuperscript{117} Juxtaposing science with religion, that same newspaper also proffered a writing suggesting that the snipers motivation was pure evil.\textsuperscript{118} Additional speculation about the murders centered on John Muhammad’s obsession with control of and loss of his children.\textsuperscript{119}

\textsuperscript{116} A *folie a deux* is where the psychosis of a controlling individual is adopted by the 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 AND WORLD REPORT, Nov. 4, 2002, at 29, available at 2002 WL 8431687. It was suggested that Muhammad’s fruitless search for success in life turned him into a desperate man. He sought control of his life through religion and by the control of women and children. Malvo’s search for a father figure and discipline led him into the life of Muhammad. Muhammad essentially adopted Malvo, and both men found solace for their pain in the other. The two played their roles so well that people who observed them playing chess in a coffee shop believed that they were father and son. See, 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, available at 2002 WL 102386750.


\textsuperscript{119} Mildred claimed that Muhammad 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, available at 2002 WL 102570305. It is known that two weeks before the killing spree Muhammad surprised both of his ex-wives with visits. See, 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, available at 2002 WL 102386750. 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 and 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, Westlaw at 2002 WL 7295435.
The most intriguing story was run briefly by a national circulation periodical catering to the non-elite population of the United States. The National Enquirer reported that the snipers were gay.120 No other newspapers reported this story. However, the idea was credited enough to have 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 as well as a ‘father-son’ relationship.121 On month later, 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.122 A month later, the press reported the defense attorney’s allusions to Malvo’s fear of ‘homosexual rape’ in prison in relating the proceedings in Malvo’s trial.123 A final reference in December, 2003, appeared in a story about the use at trial of the sketches Malvo made in prison after his capture. This reference appears to attempt to refute the


122 “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. "We Jamaicans don't play that," Malvo allegedly told a Maryland prison guard who asked him about the subject after his arrest. 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, adding that he learned to meditate by reading books.” Kiran Krishnamurthy, A Trail of Terror: Suspects’ Path Stretched Far, and so Did Fear, The RICHMOND TIMES-DISPATCH, Oct. 12, 2003 available at Westlaw 2003 WL 8036468.

123 “On cross-examination, defense attorney Thomas Walsh tried to show that Mr. Malvo may have taken credit for the shootings to appear tough. He asked whether Mr. Malvo sounded like he was bragging. Mr. Walsh also alluded to Mr. Malvo’s fear of homosexual rape in prison if he did not appear tough in the adult jail. "You've heard complaints and concerns about sexual assaults?" he asked the captain.” S.A. Miller, Youngest Victim Leery of Malvo ; Takes Seat Near Prosecutors, WASHINGTON TIMES, Nov. 21, 2003, available at Westlaw 2003 WL 7723164.
‘homosexuality’ allegations. Perhaps it was thought that Malvo’s life hung in the balance. Already depicted as motivated by racial and religious hatred – the additional demonification of Malvo as ‘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.

Muhammad was the first tried in Virginia. “Attorney General John Ashcroft says the venues were picked because they have ‘the best law, the best facts, and the best range of available penalties.’” Virginia has a reputation for conservatism in matters of morals, except in urban areas and the suburban areas around the nation’s capital. Muhammad was ultimately convicted and sentenced to death. Malvo was convicted and sentenced to life in prison.

B. Zimbabwe – Post-Colonial Identity Crises.

In 1980, after years of revolution, Zimbabwe was granted independence. Robert

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126 See, CITE

Mugabe,\textsuperscript{128} one of many revolutionary leaders, spent his pre-independence days in exile and in prison.\textsuperscript{129} Mugabe was elected as Zimbabwe’s first president, a position he holds to this day.\textsuperscript{130} As a revolutionary, he learned to use guerilla tactics and manipulation, playing the various ethnic and political factions against another, to achieve his aims.\textsuperscript{131} To this day, he uses these tactics to retain control of Zimbabwe. White settlers who remained in Zimbabwe after independence are the main group harassed by Mugabe. Two other groups that Mugabe suppressed in order to retain control of male black voters include women and homosexuals. Unequal treatment of women under the law and threats of violence against homosexuals are two tactics Mugabe uses to maintain popular support.

The trial of Canaan Banana brought these issues into the lime light.\textsuperscript{132} Banana was


\textsuperscript{131} What is now Zimbabwe and Zambia were carved out of colonial Rhodesia. Southern Rhodesia, for a while a breakaway colony dominated by the white colonial elite practicing apartheid, was eventually defeated and reached an accommodation with the indigenous African majority on power sharing. Indigenous Rhodesia was an amalgamation of tribes, the Ndebele and the Shona were the two main tribes. 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. (5). 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 for African Unity. Mugabe eventually rose to prominence in the 1980s as the winner of a series of intense inter and intra party strife. CHRISTOPHER HITCHENS, INEQUALITIES IN ZIMBABWE, MINORITY RIGHTS GROUP (nd) (especially parts I and II).

\textsuperscript{132} When one compares the cultural treatment of women to the cultural taboo of homosexuality, one finds a link between the attitude towards women and homosexuals. Women are disempowered at the family level; they are seen as inferior to men. This view of inferiority leaks into
the first prime minister of Zimbabwe. Although this position was mainly symbolic, Banana used his political influence and wealth to seduce male subordinates. When these affairs were publicly revealed during the trial of Jefta Dube, Mugabe and Zimbabwean’s reacted in a way that sheds light on the cultural attitudes towards homosexuality. As discussed above, these attitudes bear a surprising resemblance towards attitudes about females.


Zimbabwe’s class structure recognizes serious gender differences between men and women. Officially, Zimbabwean civil law, implemented by Roman-Dutch colonizers, recognizes gender equality. In practice, however, black citizens of Zimbabwe are governed by two different sets of laws. Under recent interpretations of customary law, which governs the private sphere of black Zimbabweans, women are seen as inferior to men. Customary law is applied in the private sphere, in areas such as family law and inheritance.

In the private sphere, traditional and post-colonial Zimbabwean elites have characterized women occupying a position of subservience to their husbands.133

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133 “In traditional Shona, Ndebele, and European cultures “women” have been constituted as natural procreators and caretakers of children and male relatives. Speaking of Ndebele custom, one analyst describes gender roles this way: ‘While it is the man’s obligation to feed, clothe and comfort his spouse, the woman is expected to cook and bear children for the man. She must prepare bedding, please
Customary marriages can be viewed as a contract between the husband and the wife’s family. As consideration, the husband pays lobolo or bride wealth to the woman’s father. The woman is then transferred from the possession of her father to become property of her husband.\textsuperscript{134} A related practice that reinforces gender hierarchy is tied to the rituals of death and inheritance.\textsuperscript{135} While there is some debate about the nature and character of the gender expectations of customary law, most men appear to embrace a view favoring gender subordination.\textsuperscript{136}

\textsuperscript{134}See Charles R. Cutshall, Justice for the People: Community Courts and Legal Transformation in Zimbabwe 190-192 (Harare: University of Zimbabwe Pub., 1991). The payment of lobolo can lead to problems. If a man can not afford to pay the lobolo he becomes indebted to the woman’s father. The husband’s inability to pay causes stress in the relationship and has lead to violence.

\textsuperscript{135}Three days after the deceased husband is buried, the wife must be cleansed. Selected community elders choose an insane stranger to be intimate with the widow overnight. Sometimes this is accomplished by having the stranger drink himself into something like a drunken stupor before forcing him to “cleanse” the women. However, the practice, to some extent at least, has created a market of sorts for men available to ‘cleanse’ widows. Some of these professionals charge as much as $3,000 to perform the ritual. On the day following “cleansing” the villagers choose a relative of the deceased to become his inheritor. The relative approaches the widow sexually, she can either submit to his overtures or reject him. However, she is not expected to ask him to wear a condom, for this is a sign of moral weakness and of a bad partner. Even though condoms are available in Zimbabwe, women have to submit to a man’s will. AIDS is an epidemic in Zimbabwe, and widows have little choice in avoiding sexual encounters which spread the disease. See Tim Chigodo, Mixed Views Over ‘Wife Inheritance’, The Herald (Harare) April 4, 2002, allAfrica.com, at http://allafrica.com/stories/printable/200204040316.html. (date last visited 4/15/2002).

\textsuperscript{136}Tim Chigodo suggests that University of Zimbabwe sociologist Mr. Claude Mararike does not support the traditional practice of wife inheritance “Remarrying the brother’s or uncle’s wife should be discouraged by all means. It is even morally wrong for people who inherit their father’s young wives.” Most men do not agree with Mararike’s view. Mr Peter Sibanda, a spokesman for the Zimbabwe National Traditional Healer’s Association, said, “This [wife inheritance] actually reduces promiscuity which encourages the spread of AIDs because the woman will not have many partners. There is nothing wrong with inheritance, even the Queen of England inherited the crown from her father. Why not us?” See, id.
Through customs such as lobolo and wife inheritance, women in Zimbabwe are disempowered at a social level, the family. This disempowerment leaks to areas outside of family life including social, political and legal attitudes towards women. Today, men are instilled with a hostile attitude towards women. Husbands use violence to control their wives and this violence is socially accepted. This acceptance leads to further to the cultural divide between women and men.\textsuperscript{137}

The disempowerment of women at the level of family is mimicked at the social and political level of Zimbabwean life. In 1998, the Zimbabwean Parliament began reviewing the 1982 Legal Age of Majority Act, a document which gave women the rights to vote, own property, open bank accounts, own businesses, access credit, acquire passports, be guardians of children, and marry without consent of a guardian. Parliament Member Livingstone Manhombo said, “What is good in England and America does not necessarily mean the same should apply to Zimbabwe. The law has caused so much unnecessary suffering. The executive should get it loud and clear that, beyond voting, this House is against the Legal Age of Majority Act.”\textsuperscript{138} Another member of parliament, John Tsimba, claimed that the act causes feuds in families.\textsuperscript{139}

The disempowerment of women at the social and political level is then solidified


through the construction of a legal edifice enforced by the courts. David M. Bigge and Amelie von Briesen show that under the Zimbabwean Supreme Court judgement in *Magaya*, independent, Zimbabwean women over 18 years of age are legally classified as minors.\(^{140}\) In *Magaya*, a younger male sibling receives his families entire inheritance over his older female sibling. Justice Muchechetere, of the Supreme Court, said “what is common and clear from the [texts] is that under the customary law of succession of the above tribes males are preferred to females as heirs.”\(^{141}\) He continued, “Whilst I am in total agreement with the submission that there is a need to advance gender equality in all spheres of society, I am of the view that great care must be taken when African customary law is under consideration.”\(^{142}\)

Judge Muchechetere’s application of “customary law” dramatically illustrates the pitfalls and abuse possible in the reconstruction of customary law. Unable to discover applicable Zimbabwean or Shona customary law, he unquestioningly uses questionable texts written by European observers purporting to describe custom to determine that the male is the rightful heir.\(^{143}\) Where necessary, the judge substituted South African

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\(^{141}\) See, id., at 294.

\(^{142}\) Id.

\(^{143}\) The question of the treatment of Zimbabwean women before colonization is contested. Joan May argues that European colonizers changed the role of the Zimbabwean woman was changed to fit their own Victorian notions. See Joan May, *Zimbabwean Women in Customary and Colonial Law* (Mambo Press/Holmes McDougall, Harare/Edinburgh, 1983). For example, before colonization, the status of Zimbabwean women was defined by their age, their fertility, their position in their family, and their property. Women were seen as the head of the family while the husband was away working. Women could obtain high status in the community. There is even evidence that some women became chiefs. Id., at 21-31.
customary law in the absence of Zimbabwean precedent. Judges are given great discretion over what sources to use when determining customary law.

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. Traditional law was restricted by ‘repugnancy clause’ which allowed Europeans to change laws which they found in conflict with ‘universal standards’, ‘natural justice and morality’, or which ‘inherently impress us with some abhorrence or are obviously immoral in their incidence’, or ‘so outrages accepted standards of ethics as to create a sense of revulsion’. Although rarely used, the ‘repugnancy clause’ allowed Europeans to impose external, Western values, under the guise of ‘universal standards’, 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 permitted status of legal guardian for their children, rather the father’s family was vested with this status.

2. Mugabe’s War Against Homosexuals

In 1995, Zimbabwe President Robert Mugabe first moved publicly against homosexuals at the Harare International Book Fair, where he ordered a mob of his
followers to smash a gay rights stand. Mugabe told the media that whites introduced homosexuality to Africa and that no black man would ever do such a thing. Handsome Gwindi, education secretary of the Association of Traditional Healers, agreed with Mugabe, “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.”

Again in 1997, Mugabe prevented the group Gays and Lesbians of Zimbabwe (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?” Human rights groups believe that Mugabe bashed homosexuals to gain popular support for an upcoming presidential election.

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149 See, id.


152 See, Alec Russell, Attacks on Gays by Mugabe Seen as Political Smokescreen, DAILY TELEGRAPH, Aug. 25, 1995, at 14, LexisNexis Academic Universe. 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. A 2000 study prepared by the International Gay and Lesbian Human Rights Commission and the Center for Women’s Global Leadership cited a number of similar stories. For example, in 1995 Kenyan President Daniel arap Moi attacked the 1995 Fourth UN World Conference on Women in Beijing as a gigantic gathering of lesbians. INTERNATIONAL GAY AND LESBIAN HUMAN RIGHTS COMMISSION AND THE CENTER FOR WOMEN’S GLOBAL LEADERSHIP, WRITTEN OUT: HOW SEXUALITY IS USED TO ATTACK WOMEN’S ORGANIZING. 2-3 (2000). The Tunisian government continued a broad attack on feminist organization in the late 1990s suggesting that these political
The US Congress sent a letter to Mugabe denouncing his remarks, and Mugabe responded by characterizing homosexuality as “Un-African.”\textsuperscript{153} 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.”\textsuperscript{154} Mugabe criticized US politicians, “Leaders in the US are scared of losing their positions of power. That’s why they give in to homosexuals so they can get their votes.”\textsuperscript{155}

Mugabe attacked homosexuals again in 2002. He ordered the Central Intelligence Organization to compile a list of possible gay ministers and officials in Zimbabwe’s government. Alum Mpofu, 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 Mpofu.\textsuperscript{156}

Mugabe’s campaign against homosexuals, and the homosexual demonification of Canaan Banana as an integral part of that process, discussed below, suggests a number of organizations were fronts for lesbian activity and, by extension that these women were not fulfilling their core patriotic role as Tunisians – motherhood. \textit{Id.}, at 4-5.


of questions about motive. Perhaps, as we will see, psychology or political calculation provides an answer. Mugabe’s intense desire for absolute control may have found an easy means of its fulfillment by transforming an attack on effeminacy and the feminine into a metaphor for an attack on Zimbabwe’s colonial past and the emasculation of the indigenous population. Thus, Mugabe might be motivated less by moral outrage than by convenience. To the extent that people raced white and homosexuality can be conflated – an attack on effeminacy in men and on women, provides the vehicle for an attack on whiteness itself – a use of post colonial rhetoric for ethnic cleansing. Fear of loss of power, the transformation of history into an emasculating event, the conflation of effeminacy and women with European culture and the white race, provide Mugabe with all the ingredients he needed to retain power and transform Zimbabwe into a post colonial, racist, patriarchal state. The attack on homosexuals might be calculated to divert attention from the land issue, unite Zimbabweans against the ‘colonizer’, and reinforce the pattern of gender hierarchy that has grown ascendant since independence.

3. The Trial of Canaan Banana

Mugabe’s repeated attacks on homosexuals became especially embarrassing in 1997. Canaan Banana, the President of Zimbabwe from 1980 to 1987, was charged with sodomy. The trial produced a Zimbabwean Supreme Court judgment affirming the power of the state to criminalize sodomy. The sodomy charges stemmed from the trial of Jefta Dube, Banana’s former bodyguard. Dube went on trial for the murder of a fellow

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157 See, infra, at Part II.B.

158 See discussion, infra at Part III.B.
police officer who taunted him as “Banana’s Wife”. Dube testified that Banana raped him on repeated occasions. After Dube’s accusations became public, further allegations of Banana using his power to coerce others into sexual encounters were made by players on the State House Tornadoes, the state’s soccer team, and by students at the University of Zimbabwe. Church officials knew that Banana used his office to coerce subordinates into homosexual acts. Dozens of employees accused Banana of using drugged soft drinks and promising top jobs to have homosexual sex. State prosecutor Augustine Chikumira stated, “Taking advantage of his position, he coaxed a number of men into sexual activities which they did not approve and which they resisted. Finally, Mugabe directed the attorney-general to press charges against Banana after human rights lawyers and the Catholic church demanded that Banana face justice.

Banana called the charges, “a mortuary of pathological lies and a malicious

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160 See, id.


163 See, id.


vendetta of vilification and character assassination.” Janet Banana, Canaan’s estranged wife, said, “Mugabe used the issue of my husband’s sexuality as a way of mobilising opinion against Canaan. Mugabe was jealous of Canaan’s role in the OAU, which offered him an international platform not available to Mugabe. Canaan was also regarded as the most likely contender to Mugabe’s position. The attack on Canaan was an attempt to eliminate any hint of opposition.” Indeed, Banana’s defense rests in part on an attack on homosexuality and its practice. For that reason, as well as because of the non-consensual nature of the acts charged, Gays and Lesbians of Zimbabwe (GALZ) does not support Banana.

During Dube’s trial, Dube testified that Banana drank, danced and played cards with him before drugging and raping him. Dube had sex with Banana many times in the State House grounds and in a sports dressing room. Dube testified that, “He invited me to dinner. He offered me whisky, we played cards. He offered to teach me ballroom music and during the dance he was pressing his erect penis against me. He gave

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170 See, id.
me a French kiss before I broke away from him.”

Dube said that Banana used drugs in soft drinks to seduce him, “I felt dizzy after a while. Then he was all over me, kissing and removing my clothes . . . “When I got home, I wept at the attack and I have suffered since then.”

Banana was convicted on 11 counts of sodomy, attempted sodomy, and indecent assault in November of 1998. He fled to South Africa and Botswana before his conviction, but turned himself into authorities on December 17, 1998. On January 18, 1999, Canaan Banana was sentenced to 10 years imprisonment and hard labor. On May 29, 2000, Banana’s sentence was reduced to one year by the Supreme Court. In another ironic twist, Janet Banana is currently is out of contact with Canaan and believes that he

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may have rejoined Mugabe’s forces.176

In S v. Banana, the Supreme Court of Zimbabwe 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.”177 In a 3-2 decision, the court decided that consensual sodomy should remain illegal because of traditional African attitudes towards homosexuality.178 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 to criminal same sex sexual activity accorded with the jurisprudence of the United States Supreme Court.179


179 See, id., at 631. Justice McNally explained:

“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.”
Chief Justice Gubbay, dissenting, reasoned that sex laws which criminalize male but not female activity are discriminatory against men.\textsuperscript{180} He performed an international analysis of nations that have decriminalized consensual sodomy and found that the UK, Ireland, Canada, Australia, New Zealand, most of Western Europe, and South Africa have decriminalized sodomy.\textsuperscript{181} 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.\textsuperscript{182}

There are reasons to suspect that the decision in \textit{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 direct intimidation. Former Supreme Court Chief Justice Anthony Gubbay, who wrote the dissenting opinion in \textit{Banana}, resigned after he was approached by ‘war veteran’ Joseph Chnotimba.\textsuperscript{183} Seven other justices have resigned from Zimbabwean courts due to intimidation.\textsuperscript{184} The decision left the judiciary substantially weakened, the position of women and gay men and lesbians dubious, the white population more open to (now legally sanctionable) expulsion.

\textit{Id.}, at 634-35.

\textsuperscript{180} See \textit{id.}, at 619-620.

\textsuperscript{181} See \textit{id.}, at 620-623.

\textsuperscript{182} See \textit{id.}, at 623-625.


\textsuperscript{184} \textit{Id.}
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 moral corruption, and sentenced to a long prison term.

Anwar Ibrahim’s affair began with a political dispute over the direction of Malaysia’s economy. As Malaysia’s deputy prime minister, he was aware of corruption within the business influenced government. He was determined to gain control of the country and liberalize its economic position. Prime Minister Mahathir Muhammad feared that Anwar would take control of the country and change the culture so he created a conspiracy to topple Anwar’s momentum. Originally, Mahathir undertook an underground smear campaign to stop Anwar. When this failed to work, Mahathir created a conspiracy involving sexual crimes which lead to the destruction of Anwar’s reputation and Anwar’s jailing.

Prime Minister Mahathir controlled Malaysia’s economy from the 1970’s through his retirement in 2004. Malaysia’s political structure is divided along ethnical lines and government policies often reflect splits between the ethnic groups. Mahathir heads UMNO, the largest ethnic-Malay political party. Upon becoming the Prime Minister, Mahathir implemented what became known as the New Economic Policy (NEP). The purpose of the NEP was to eradicate poverty in Malaysia by restructuring society to achieve inter-ethnic economic parity.\footnote{Before Mahathir became prime minister, the private sector was dominated by ethnic-Chinese. The NEP nationalized many of the economies main industries. \textit{See EDMUND TERRENCE GOMEZ,}}
consolidating his power, Mahatir became a strong anti-Western voice within Asia. He and a conservative Japanese politician became somewhat notorious in the West for a strongly polemical anti-Western tract.186

But while Mahatir was working through issues of race, class and ethnicity, placing the anti-West culture card, Islam, and Islamic political discourse was becoming more important within Malaysia. Enter Anwar Ibrahim. A savvy economist, businessman and politician, Anwar Ibrahim, early in his career, was the head of the PAS Islamic party, a fundamentalist Islamic party that supported the Islamic revival in Southeast Asia. Even when head of the PAS, 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.187
Anwar was not opposed to Western ideals. He supported a western style liberalization of the economy and the cooperation of Asian and Western scholars in search of universalizing ideals.

Anwar initially received support from Mahathir. To some extent, the booming economy of the 1990’s and Mahatir’s political skills provided security and Mahathir did not see Anwar as a threat. This all changed in 1997 when the Asian financial crisis threatened to destroy Malaysia’s economy. Anwar publicly recommended a monetary

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188 “We have absorbed from the West not only their science and technology, but also the modern education system, statecraft and economic management.” Id., at 137. And 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 22.

189 Id., at 85-92.

190 “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.

191 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. Anwar’s election as Deputy Prime Minister was interpreted as a sign that Malays were growing impatient with the corruption and patronage in government and business. Many Malaysian’s had been left behind by the NEP. Well connected Malay bumiputeras controlled Malaysian business. However, young Malay entrepreneurs, ethnic Chinese businessmen, and ethnic Indian businessmen could not enter the economy. These groups supported Anwar because he was an outsider. 

See JOHN HILLEY, MALAYSIA: MAHATIRISM, HEGEMONY AND THE NEW OPPOSITION 94-97 (Zed Books, 2001). Indeed, Anwar was careful to express his gratitude to his patron Mahatir at the time of the writing of his book. “I am indebted in a very special way to Dr. Mahatir Mohamad for the writing fo this book. For his tolerance and for his giving me the latitude to articulate my thoughts, I am indeed grateful.” Id., at 16.

192 See Hilley, supra, at 95.

1. **Sacking and Arrest**

On September 2, 1998 Anwar Ibrahim was officially and personally fired by Prime Minister Mahathir. No official reason for the firing was given.\footnote{See Malaysia’s Deputy Prime Minister Fired, \textit{BBC NEWS}, Sep. 2, 1998, at http://news.bbc.co.uk/1/hi/world/asia-pacific/163200.stm; and Richard Lloyd Parry, \textit{Mahathir’s ‘Heir’ Sacked over Crisis}, \textit{The Independent} (London), Sep. 3, 1998.} The next day, an affidavit filed in the Malaysian High Court accused Anwar of committing acts of sodomy.\footnote{One site, ‘Anwar Online,’ included messages and speeches written by Anwar while in prison and were freely circulated. \textit{See EDS: Updates with New Allegations}, \textit{XINHUA ENGLISH NEWSWIRE}, Sep. 3, 1998. Of course, it could be argued that Anwar could have seen this coming. As Hilley describes it: 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}
and sexual deviance. Anwar began to campaign across Malaysia calling for Mahathir to resign and professing his innocence. On September 29, 1998, Anwar was arrested at his home. Since his arrest, Anwar has been incarcerated in Malaysia. Anwar was never granted bail because Justice Augustine Paul found that Anwar might tamper with witnesses.

On appeal for habeas corpus, Justice Wahab Patail dismissed Anwar’s political conspiracy claim ‘plainly and obviously frivolous’.

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 Mahatir, such smears signified the beginning of a concerted campaign to discredit him in the run-up to the 1999 UMNO elections.

Hilley, supra, at 96.


203 See Anwar Appeal Fails, BBC NEWS, Oct. 4, 1998, at http://news.bbc.co.uk/1/hi/world/asia-pacific/202911.stm. Mimi Kamaria Majid, Professor on the Faculty of Law University of Malaya, argues that the reasoning behind the judgment denying bail was not sound. See Mimi Kamaria Majid, Appeal From the High Court To the Court of Appeal Against a Bail Decision: Dato’ Seri Anwar Bin Ibrahim v. Public Prosecutor, 26 JOURNAL OF MALAYSIAN AND COMPARATIVE LAW 251 (1999).
2. The Corruption Trial

Anwar’s trial for corruption began on November 2, 1998. Justice Paul ruled on the first day that foreign observers would not have access to the trial. 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. On cross, Awang read from a report that he sent to Prime Minister Mahathir in 1997. The report stated, “Through our sources, the allegations do not have, (or) contain, any proof, and the sequence of events appears to be deliberately created.” After reading this line, Awang contradicted his own report and testified that there was no political conspiracy to topple Anwar. He also admitted that he would lie on the stand if told to do so by superiors.

In response to Awang’s testimony, Justice Paul ordered Anwar’s lawyers not to pursue evidence of a conspiracy. Paul said, “Even if you manage to prove there was a conspiracy, my job at the end of the day is to see whether sufficient evidence has been [presented] in relevance to the charge.” After the evidence of sodomy was introduced in trial and reported by the press, the judge allowed the prosecution to change the corruption charges so that sodomy was no longer an element to be proven for a

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At this point, the damage to Anwar’s reputation was already done because the press had reported the alleged sodomy.

The next witness in the corruption trial was Amir Junus, former Deputy Chief of Police Intelligence. Junus testified that Anwar forced police to rewrite retraction letters by Anwar accusers Azizan Abu Bakar and Ummi Hafilda Ali because the letters were not strong enough.

Early in December 1998, the state’s star witness took the stand. Azizan Abu Bakar was the former chauffeur of Anwar. Azizan sent a letter to Prime Minister Mahathir in 1997 that accused Anwar of sodomizing him. Azizan read from this letter, “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.” During the trial Azizan read excerpts from the letter, saying, “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.” Azizan said that he was motivated to contact (5 years after the supposed act) the prime minister when he learned of an alleged affair

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between Anwar and a married woman, “I made a decision to bring up the allegations after five years because it (the alleged affair between Shamsidar and Anwar) made me realize the despicable act that he has done to me.” Later, on cross examination, Azizan said that Anwar never sodomized him. Azizan later retracted this denial, saying he did not understand the defenses question. Further, on prosecution re-cross, he said, “One incident that I cannot forget is in the house of Kukma . . . where the accused sodomised me first after which his adopted brother sodomised me.” Despite these discrepancies, Justice Paul refused Anwar’s request to have Azizan disqualified as a witness for inconsistency.

The next witness for the state was Assistant Commissioner of Police Musa Hassan Musa. On his first day of testimony, Musa testified that during Anwar’s tenor as Deputy Prime Minister, Anwar had trysts with married women. Musa then testified about the discovery of a semen stained mattress found at the flat of Anwar’s tennis partner Solaimalai Nallakaruppan. 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

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216 He found the mattress while investigating the book “Fifty Reasons Why Anwar Cannon Become Prime Minister.” On this day Musa did not testify to the identity of 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.
broadcasted around the world. Musa testified, “While examining the mattress on July 10, 1998, I saw patches on the cloth which I suspected to be seminal stain.” Again, Musa did not testify as to the identity of whose semen was on the mattress.217

The mystery of whose semen stains were on the mattress was purportedly solved two days after Musa’s testimony. Government chemist Lim Kong Boon testified that 13 of the stains on the mattress belonged to Anwar Ibrahim and the wife of Anwar’s former secretary. Additional stains remained unidentified.218 On cross examination by the defense, Dr. Lim testified that he had no experience working with experience 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.”219

After introducing the testimony regarding Anwar’s alleged sodomy, the
prosecution moved to amend the corruption charges.\textsuperscript{220} The corruption trial ended when Anwar’s defense lawyers filed a motion for Justice Paul to step down, and refused to give closing statements. Justice Paul threatened to hold the lawyers in contempt for filing the motion.\textsuperscript{221} Three days later, Justice Paul ruled that he would not step down.\textsuperscript{222} When Anwar’s attorneys proceeded with closing statements, Justice Paul ordered them not to talk about conspiracy. “If you want to make a speech like this, you should go out there. Don’t turn this into a political forum.”\textsuperscript{223}

On April 14, 1999 Justice Paul convicted Anwar on all five counts of corruption, and sentenced Anwar to six years in jail.\textsuperscript{224} When the sentence was announced, riots broke out in Kuala Lumpur.\textsuperscript{225} Anwar’s lawyers immediately filed an appeal with the High Court.\textsuperscript{226} A three judge panel on the Malaysian High Court dismissed Anwar’s appeal in April of ________

\textsuperscript{220} The original corruption charges focused on the accusation that Anwar asked witnesses to retract their statements that accused Anwar of sodomizing them, so that Anwar could avoid criminal prosecution. The amended charges charged Anwar with asking the witnesses to retract their accusations so that he could avoid embarrassment. The amended charges did not require proof of sodomy. For a list of the original and amended charges see \textit{Anwar: the rewritten charges}, BBC NEWS, Jan. 13, 1999, \textit{at} http://news.bbc.co.uk/1/hi/special_report/1998/10/98/malaysia_crisis/254565.stm.

\textsuperscript{221} \textit{See Abrupt End for Anwar Trial}, BBC NEWS, Mar. 23, 1999, \textit{at} http://news.bbc.co.uk/1/hi/world/asia-pacific/301485.stm.

\textsuperscript{222} \textit{See Anwar Judge will not Stand Down}, BBC NEWS, Mar. 27, 1999, \textit{at} http://news.bbc.co.uk/1/hi/world/asia-pacific/305287.stm.

\textsuperscript{223} \textit{See ‘Anwar’s Only Crime was Courage}, BBC NEWS, Mar. 31, 1999, \textit{at} http://news.bbc.co.uk/1/hi/world/asia-pacific/308470.stm.

\textsuperscript{224} \textit{See Public Prosecutor v. Dato’ Seri Anwar bin Ibrahim (no 3), 2 MALAY. L. J. 1 (High Ct. 1999)}.


In response to the dismissed appeal Anwar said, “This is a political persecution, using the courts. I am appalled by that.” The date for Anwar’s appeal to the Kuala Lumpur Federal Court was set as January 14, 2002. Sankara Nair, Anwar’s appellate attorney, spoke during the first day of the corruption appeal. He said, “The man is in jail, he’s not on bail, and therefore is justice denied. And it’s become a pattern – every time a trial comes up there’s an increased level of harassment. I’ve always felt it was a form of mental torture, technique, to rattle him and to affect his train of thought.

3. The Sodomy Trial

Anwar said that Mahathir manufactured sodomy charges because they would be the most damaging to Anwar’s career. Sodomy was a particularly good way to ruin Anwar’s career. It is commonly understood within Islam that sexual deviance, and in particular, sex between men, is forbidden.


231 See Sodomy Charge Preferred Because it’s More Embarrassing, Says Anwar, MALAY. GENERAL NEWS, Nov. 1, 1999, LEXIS.

Anwar’s trial for sodomy began on June 7, 1999. Anwar was charged with sodomizing his former driver Azizan Abu Bakar. Strict limits were imposed on public discussion of trial matters. Further acts of sodomy were alleged by Sukma Dermawan, Anwar’s adopted brother, and Munawar Anees, Anwar’s close friend and advisor. Sukma and Munawar plead guilty to “committing acts of gross indecency by allowing themselves to be sodomized.” Sukma testified that police beat a confession out of him. Sukma claimed that police physically assaulted him, detained him in an unlit, damp cell with no food, and threatened to frame him of a crime punishable by capital offense. Malaysian papers published that Sukma testified he had sex with Anwar because he was indebted to him. The defense sought to show that the charges were fabricated by the government.

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234 Before the trial began, Justice 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, Apr. 14, 1999, at http://news.bbc.co.uk/1/hi/world/asia-pacific/318677.stm.


237 See Sukma Had Sex With Anwar Because He Was Indebted, Court Told, MALAY. GENERAL NEWS, Sep. 19, 1998, LEXIS.

238 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 Mustaffa offered him $200,000 and asked, “why don’t you say you brought some 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 Frances Harrison, Malaysian Lawyers Fight Back, BBC NEWS, April 21, 2000, at http://news.bbc.co.uk/1/hi/world/asia-pacific/699873.stm.
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 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. But the judge then reversed himself and ruled that Mahathir did not have to testify in Anwar's trial.

On November 15, 1999 the Malaysian Government announced a general election and Anwar's sodomy trial was suspended indefinitely. The sodomy trial resumed on January 25, 2000 after the general elections took place. In the interim, the government brought pressure to bear on the defense team. Anwar's sodomy trial ended with Anwar

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240 The judge said "After careful consideration, I find there is no evidence to show or even suggest that Dr Mahathir was involved in any way to fabricate allegations of sodomy against Dato Seri Anwar or the second accused in this trial." Following the ruling, Anwar stood and spoke, "Dr Mahathir should have the moral courage to come to this court and not hide behind his cloak. What we have here is a judgement that makes whatever Dr Mahathir said as gospel truth. Where is the justice in this court?" Judge Arifin responded, "I'm not going to listen to him . . . He may be on the grounds of contempt. I would have to adjourn if he goes on." Anwar responded softly, "My Lord, please be fair. What privilege does Dr Mahathir have? You should be fair." See Mahathir will not Testify, BBC NEWS, Apr. 21, 2000, at http://news.bbc.co.uk/1/hi/world/asia-pacific/hi/english/world/asia%2Dpacific/newsid%5F721000/721374.stm.


242 Karpal Singh, defense attorney for Anwar, was charged with sedition over the break. Karpal replied, "The 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/hi/english/world/asia%2Dpacific/newsid%5F616000/616984.stm.
firing his defense team and giving a fiery speech condemning his accusers.\textsuperscript{243}

On August 8, 2000 Judge Ariffin found Anwar guilty of sodomy and sentenced him to nine years in prison.\textsuperscript{244} The year long trial (smear campaign) of Anwar was filled with discrepancies. First, prosecutors originally charged that the sodomy occurred in 1994, but changed the date to 1992 after the defense accounted for all the possible dates in 1994. The defense then showed that the building where the events took place was not finished in 1992 and the prosecutors amended the date to 1993. Azizan testified that police advised him to change the date of the charges.\textsuperscript{245} Second, Judge Ariffin Jaka held that the testimony of Azizan was truthful and uncontradicted. If contradictions did exist the witness sufficiently explained them.\textsuperscript{246} “It was clear in the charges it was specified the offences were alleged to have been committed one night at about 7.45pm between the months of January and March 1993 at Tivoli Villa, in the Federal Territory of Kuala Lumpur. These particulars were sufficient to clothe the charges with clarity and

\textsuperscript{243} His defense team asked Judge Arifin to allow Anwar to speak. When Judge Arifin refused, Anwar fired his defense team. Anwar said, "My action does not in any way question the competence and credibility of my lawyers. They have done a brilliant job I can't think of a better team. They are part of my family. But I have to do this to reply to some matters that have been raised personally against me." Anwar then gave a speech outlining the conspiracy against him. Judge Arifin dismissed this action as a stunt and suggested that Anwar concentrate on the evidence and not speak on the conspiracy. See Anwar Dismisses Defense Team, BBC NEWS, Apr. 29, 2000, at http://news.bbc.co.uk/1/hi/world/asia-pacific/hi/english/world/asia%2Dpacific/newsid%5F836000/836946.stm.

\textsuperscript{244} 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.

\textsuperscript{245} See Landler, Mark, End of a Malaysian Drama, and Very Likely of a Career, N.Y. TIMES, Aug. 9, 2000, LEXIS-NEXIS Academic Universe.

\textsuperscript{246} See Public Prosecutor v. Dato' Seri Anwar bin Ibrahim, 3 MALAY. L. J. 229 (2001).
certainty. The witness was confused as to whether the attack occurred in 1992, 1993, or 1994. “Azizan was a wholly reliable, credible, and truthful witness taking into consideration the whole of his evidence notwithstanding inconsistencies, discrepancies and contradictions which did not detract the weight and truth of his evidence in relation to the ingredients of the charges against both accused. Azzian’s description and direct experience of being sodomized completely negative any probability that Azizan was tutored or coached as claimed by the defense counsel. . . . Only persons directly and actively subjected to these acts of sodomy would be able to narrate the details of the whole episode.” Anwar’s alibi only covered February to March 1993. The charge states that the act of sodomy occurred between January and March 1993. Therefore, the alibi does not save the accused. Despite this contradicting and faulty evidence, Judge Arrifin Jaka convicted Anwar, saying, “There were some discrepancies, and they were explained. I’m satisfied that the prosecution has proved its case beyond a reasonable doubt. I therefore find the defendant guilty as charged.” The judge described the acts of sodomy as, “despicable acts in our society” and that Anwar deserved “utmost condemnation.”

Anwar was sentenced to nine years for sodomy, to be served after his six-year

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247 See, id., at 244.

248 See, id., at 255.

249 See, id., at 258.

250 See, id., at 316.

251 See Chandrasekaran, Rajiv, Malaysian Ex-Official Convicted of Sodomy; Defense Argued That Charge Was Part of Plot by Premier, WASH. POST, Aug. 8, 2000, at A17, LEXIS-NEXIS Academic Universe.

252 See Landler, Mark, End of a Malaysian Drama, and Very Likely of a Career, N.Y. TIMES, Aug. 9, 2000, LEXIS-NEXIS Academic Universe.
sentence for corruption. Further, Anwar will be denied from serving in a political office for five years after his release from prison.253 Even if each sentence is reduced by one third for good behavior, Anwar will be 67 years old before he can return to politics.254 Hence Anwar’s potential political career is effectively ended by the conviction.

4. Mistreatment of Anwar, His Family, Lawyers and Supporters

Throughout his incarceration, Anwar has been mistreated and beaten; he may have been poisoned. On the first day of his trial, Anwar appeared in court with a bruised left eye. Anwar claimed to have been beaten by police; Mahathir claimed that the injuries were probably self-imposed.255 Eventually, a doctor found that Anwar’s injuries were the result of an assault.256 This finding led to the resignation of former Kuala Lumpur Police Chief and Inspector General Abdul Rahim Noor, who claimed ‘full responsibility’ for the assault.257 In addition, during his sodomy trial, Judge Arifin Jaka was so surprised by

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253 See Chandrasekaran, Rajiv, Malaysian Ex-Official Convicted of Sodomy; Defense Argued That Charge Was Part of Plot by Premier, WASH. POST, Aug. 8, 2000, at A17, LEXIS-NEXIS Academic Universe.

254 See Landler, Mark, End of a Malaysian Drama, and Very Likely of a Career, N.Y. TIMES, Aug. 9, 2000, LEXIS-NEXIS Academic Universe.


Anwar’s appearance, that he ordered Anwar to be medically observed. Eventually, Malaysian doctors found that Anwar’s blood contained an ‘acceptable’ level of arsenic, but the level was not high enough to constitute blood poisoning. In 2001, Anwar suffered a slipped disc while in prison. Anwar claimed he was beaten by guards; guards claimed Anwar fell during a game of football.

Anwar’s suffering at the hands of his accusers has not been confined solely to Anwar. Malaysian government officials have harassed Anwar’s family and supporters. After Anwar’s arrest, Wan Azzizah, Anwar’s wife, faced charges of sedition and was questioned three times by police. During the corruption trial, Anwar’s brother, Idrus Ibrahim was arrested for suspicion of being in “close proximity” with a woman. When protests broke out after Anwar was fired, arrested, and sentenced. Hundreds of protestors

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See John Aglionby, From Prisoner to Prime Minister?, GUARDIAN UNLIMITED, June 21, 2001, at: http://www.guardian.co.uk/Archive/Article/0,4273,4208103,00.html.

were arrested, and police used water cannons and eye irritant against the crowds.\textsuperscript{262}

Even Anwar’s legal counsel could not avoid the government’s attempts at intimidation. Zainur Zakaria, one of Anwar’s counsel, was sentenced to three months imprisonment for failing to apologize for an affidavit he filed on Anwar’s behalf.\textsuperscript{263} Manjeet Signh Dhillon avoided similar punishment by apologizing to the court.\textsuperscript{264} At the end of the corruption trial, Anwar’s attorneys filed a motion to disqualify Justice Augustine Paul and refused to give closing statements until Augustine stepped down. Augustine cited the lawyers for contempt and threatened to arrest them.\textsuperscript{265} During the postponement of the sodomy trial for the general elections, Anwar’s attorney Karpal Singh was arrested for filing an affidavit. Karpal responded, “The 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.”\textsuperscript{266} The Malaysian Bar


\textsuperscript{264} Id.


\textsuperscript{266} See Anwar Trial Resumes Amid Protests, BBC NEWS, Jan. 25, 2000, at http://news.bbc.co.uk/1/hi/world/asia-pacific/hi/english/world/asia%2Dpacific/newsid%5F616000/616984.stm.
Counsel passed a resolution asking for Karpal’s charges to be dropped.\footnote{See Frances Harrison, \textit{Malaysian Lawyers Fight Back}, BBC NEWS, Apr. 3, 2000, at http://news.bbc.co.uk/1/hi/world/asia-pacific/hi/english/world/asia%2Dpacific/newsid%5F690000/690346.stm.} When Anwar was prohibited from speaking to the conspiracy issue through his defense counsel, Anwar was forced to fire them and represent himself.\footnote{See \textit{Anwar Dismisses Defense Team}, BBC NEWS, Apr. 29, 2000, at http://news.bbc.co.uk/1/hi/world/asia-pacific/hi/english/world/asia%2Dpacific/newsid%5F836000/836946.stm.}

\section{The Defamation Lawsuit}

Following Anwar’s arrest, Prime Minister Mahathir held a press conference to explain why he fired Anwar. At the press conference, Mahathir publicly revealed accusations of sodomy committed by Anwar.\footnote{See Simon Ingram, \textit{Sex, Lies and Videotape in Malaysia}, BBC NEWS, Dec. 1, 1998, at http://news.bbc.co.uk/1/hi/world/asia-pacific/182999.stm.} Mahathir believed that the charges were true, because no one would confess to the acts unless they did them.\footnote{See \textit{Anwar Sues Mahathir}, BBC NEWS, Nov. 13, 1998, at http://news.bbc.co.uk/1/hi/world/asia-pacific/213711.stm.} Mahatir essentially sought to discredit Anwar within the context of his greatest political strength – the moral authority of his traditional Islamic stance.\footnote{Mahatir said:

“Anwar’s greatest fear is that he will be charged in court because then all the things that he had done will be revealed and all the witness witnesses will be able to appear to give evidence.”

“These witnesses are different from others. They will have to give evidence which in a way will bring shame to themselves. Anwar’s greatest hope is that they will not tell their stories, because to do so will bring shame to themselves. He was relying on that.”

“But he did not expect that his own adopted brother and his friend will come out in the open and make this statement. They made this statement because I believe the police,
who are Muslims, and those knowledgeable about Islam, pointed out to them that what they committed was a great sin and punishable in the after-life and that they need to repent and recant.”

“But it would seem that they decided that they should come clean, even at the risk of being jailed for or abetting in an act of sodomy, even at the risk of their families being shamed by their confessions.”

“What they said was the absolute truth. Anwar has not sworn in the mosque as he claimed. What he did was just to say "I swear." And that is not good enough. "The fact is that the man had for years been masquerading as a religious person and yet had been committing these things, not today, not yesterday but for years.”

“A man like that who appears to be religious, but in fact is not religious at all, is quite capable of swearing in a mosque, knowing full well that what he was swearing was not the absolute truth.”

“There are other examples of people who will make speedy definitions in order to say that what they say is true, technically or even religiously. So I don't put much value to Anwar's swearing in the mosque.”

“And yet, when I discovered he was guilty of something that I cannot forgive, something that the Malaysian society cannot accept, whether Muslims or non-Muslims, action has to be taken.”

“Action has to be taken against a person whom I had regarded as a friend, a colleague and to a certain extent as my protege. Because this man cannot be allowed to become a leader in a country like this.”

“I actually interviewed the people he sodomised, the women he had sex with, the driver who brought the women to the place where Anwar met them. These were told to me without the presence of the police or anybody else. And I told them "if you are forced into making confessions, please tell me, I will protect you" but they said no, "we are not forced by the police. We are telling the truth". Several of them said this man is not fit to be a leader.”

honourable. I could have found some other reason of getting rid of him (Anwar) if it is political. But it is unfortunate that this turns out to be as it is.”

Mahatir was thus able to conflate moral and economic corruption in the person of Anwar.

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272 Id. Asked about the reformation movement. Mahathir said,

“There is no reformation movement. This is a cover up because he doesn't want people to focus on his misdemeanor. He 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 of by saying that "all these things are fixed." And that very soon he will be arrested and charged and taken in under the ISA. Because they didn't, he created a situation that forced them to take action under the ISA. He is a very clever man, a very clever operator.”

“I am going to ask him to prove the corruption. He can prove, he must remember that we also have a lot of proof about 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.”

“Before I decided that he is no longer fit, I heard from the police who were investigating him because he made a report to the police to ban the book "50 Reasons Why Anwar Should Not be PM". The police just cannot ban the book without investigating the contents of the book. When the police investigated, they found that the allegations were true and told me that he has done all these things. I cannot believe the police just like that. I felt the need to ask because people have said that the police like to force the police to confess.”

“I requested that they come and see me without the presence of the police. In two of the cases, I didn't request, they requested to see me. They came to see me on their own will. And what they told me confirmed what the others have told me. I was forced to believe that there is truth to the allegations.”

“It has been damaged by Anwar behaving in this manner. What he should have done is to wait for the courts to charge him and to be tried and to trust the findings of the court. But he chose to make a political issue out of his dismissal and the accusations leveled at him. This is something that ordinary people do not have the right to do and I don't see why he should think he has the right to do.”

“Once the truth is known, everybody, even his best friends will reject him. 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.”

Id.
He turned Anwar’s charges around and doubled their intensity, drawing on the religious values from which Anwar derived his moral authority to undo Anwar. It was, all in all, a brilliant campaign of manipulating the gender potential of the effeminate.273

Between 1999 and 2002, Anwar unsuccessfully sued Prime Minister Mahathir in a defamation lawsuit. On November 13, 1999 Anwar filed suit against Prime Minister Mahathir.274 Anwar sought to prove that his firing from his position as Deputy Prime Minister was illegal and unconstitutional.275 In addition, Anwar charged that Mahathir defamed him at a press conference in September 1998 and requested $26 million dollars in damages. At the press conference Mahathir detailed Anwar's alleged acts of sodomy.276 Mahathir publicly spoke in defense saying that he spoke in his capacity as prime minister and that he wanted the reasons for his decision to dismiss Anwar known.277 The High Court rejected Anwar's suit in August 1999.278 The High Court Justice called the suit "frivolous, vexatious, and an abuse of court process" and said that Prime Minister's Mahathir's press conference statements were "statements of fact".279 The High Court

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273 The implications are more fully discussed at Part II.C., infra.


275 Id.


made this statement before the judgment in the trial for sodomy was announced. In April 2002 Anwar was ordered to pay Prime Minister Mahathir's costs for the lawsuit.  

6. Treatment of Foreign and Malaysian Press

During Anwar’s corruption trial, Mahathir attacked the international press for painting a sympathetic picture of Anwar’s defense. Meanwhile, local Malaysian newspapers sensationalized documents and ignored public protests. Prime Minister Mahathir said that conviction of Anwar would lead to racial harmony. Judge Abdul Wahab Patail ordered the press to remain silent during the sodomy trial.

Anwar’s detention has met resistance from around the world. Indonesian President BJ Habbi and Philippines President Estrada expressed concern for Anwar. US President Bill Clinton refused to attend an APEC forum in Kuala Lumpur because of Anwar’s detention and US Secretary of State Madeline Albright met with Anwar’s wife rather than

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284 See Anwar Judge Gags Press, BBC NEWS, APRIL 14, 1999, AT HTTP://NEWS.BBC.CO.UK/1/HI/WORLD/ASIA-PACIFIC/318677.STM.

Malaysia defiantly responded to nations who opposed the detention of Anwar. Prime Minister Mahathir defended Anwar’s detention. Mahatir attempted a deployment of the language of post-colonial discourse in general to counter the allegations of human

“Ideas about human rights are getting more and more peculiar. Impoverishing millions of people, depriving them of medicine, even killing large numbers of them directly or indirectly are not considered violations of human rights. But arrest a political dissident and the whole world condemns the government for violations of human rights.” Further he said, “If a favorite son or favorite leader is being tried and he is not acquitted, then the court is viewed as not independent. But if I were brought before the court and the court decides against me, then the court is independent. We have nothing to hide, but open minds are necessary for you to judge fairly.”

See Zaharah Othman, Mahathir Feels Sorry For Those Who Can’t Distinguish Right From Wrong, MALAY. GENERAL NEWS, Aug. 24, 2000, LEXIS.
rights abuses specifically against Anwar. Malaysian Trade Minister Rafidah Aziz told countries attending APEC not to raise the issue of Anwar. Aziz later called a pro-Anwar speech, by US Vice President Al Gore, the most disgusting thing she had heard in her life. Foreign Minister Datuk Seri Syed Hamid Albar suggested that the criticism constituted an unwarranted interference in the internal affairs of Malaysia.

While the world community concentrated on the political corruption charges, the Malaysians focused on the violation of gender norms. Malaysian Congressman Datuk Seri Abudullah Ahmad Badawi said, “What have they to do with our legal system . . . they think that they know more, are cleverer than our judges.” A minister in the Prime Minister’s Department, Datuk Dr Rais Yatim, defended Malaysia’s judiciary and judicial system at a conference in Cambridge England. He said, “Perhaps the international people ought to be informed – Malaysian law prohibits and condemns homosexuality . . . it my


293 She was quoted as saying:

“Although the resolution is largely symbolic in nature and of little real consequence, it represents a gross interference in the internal affairs of a sovereign country. It is therefore unbecoming of members of the US Congress to attempt to exert political pressure on the government of Malaysia to reverse the verdict of our courts. This is an arrogance of power that was unacceptable. It should be clearly understood that Malaysia will never accept such interference in its internal affairs.”

See Syed Hamid, Malaysia Disappointed

294 See US Congressman Interfering in M’sia’s Affairs, Sayd Abudullah, MALAY. GENERAL NEWS, Nov. 2, 2000, LEXIS.
be an accepted norm in the west but Malaysia will continue to be an exception to that. Asian and Islamic sanction against it have been in place and it will for a long time persist.**295** Mahathir stressed continually that “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.”**296**

II. GENDER AND GOOD SOCIAL ORDER

What appears to be disparate stories with little connection in actuality are closely bound up. Together, these episodes evidence the power of gender as an ordering principle for social and political life.**297** 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


**296** See Nicholas Watt, Malaysian PM rebuked for threat to gay ministers, GUARDIAN UNLIMITED, Nov. 2, 2001, at: http://www.guardian.co.uk/Archive/Article/0,4273,4290310,00.html.

**297** 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.

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

In each case, though, the language of discourse is fundamentally different. Though American, Zimbabwean and Malay 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.

A. The United States.

Portraying Muhammad Atta as a repressed ‘homosexual’ permits a gendered rationalization of Atta’s criminal behavior. Likewise, recasting the odyssey of John Walker Lindh in sexual-psychological terms, not a religious conversion at all but rather a reaction to the trauma of a father abandoning his family to live with another man, situates political criminality within the realm of the degrees of madness. The madness is in the blood as well – for John Walker is in turn recast as a sodomite within Islam, son imitating father. John Mohammed and Lee (John) Malvo are the personification of the evils of the gay pedophile – the gay man as Rasputin turning the innocent into a sexual and social outlaw.\footnote{This echoes older sodomy cases in which this sort of corruption was a theme. See, e.g., Tuggle v. State, 73 Okla. Crim. 208 (Okla. Crim. App., 1941). For a discussion of the ways in which} 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. 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.

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 19th 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.

In the United States criminality is reduced to a medical condition. In the American therapeutic state, gender boundaries are defined by a sexualized pathology

\[\text{299} \quad \text{See Larry Catá Backer, } \text{Raping Sodomy and Sodomizing Rape: A Morality Tale About the Transformation of Modern Sodomy Jurisprudence, } 21 \text{ AM. J. CRIM L. 37 (1993).}\]

\[\text{300} \quad \text{Cf. KATHLEEN DALY, GENDER, CRIME AND PUNISHMENT (1994).}\]

\[\text{301} \quad \text{An example of this sort of pathologizing of the female can be found in the work of the American Enterprise Institute. See Liberal Parents, Lost Children, AMERICAN ENTERPRISE INSTITUTE FOR PUBLIC POLICY RESEARCH, March 1, 2002, available on LEXIS/NEXIS, — lib. (Comparing the upbringing of John Walker Lindh with that of Chandra Levey and Monica Lewinsky as examples of gender treason and the resulting ruin of the parties).}\]

\[\text{302} \quad \text{There is a well established literature on this point. See, e.g., CITE}\]
which hard wires gender.³⁰³ The American Taliban political’s 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 determination to destroy the Twin Towers, phallic symbols of American global power gendered male substitutes American castration – the political – for his own sexual castration, unable to function fully as a gendered male. This gendered therapeutic vision of pathology pairs the sexual with the pathological. The homosexual is sick³⁰⁴ 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 behavior motivating force.³⁰⁵


³⁰⁴ In Zimbabwe they are possessed by a female demon best exorcized for the good of the body. See, e.g., CITE and discussion, infra at notes —. In Malaysia they are possessed by the Devil, who opens the door to unIslamic conduct. See discussion infra at notes ----.

³⁰⁵ The intimation is to the famous passage:

What matter where, if I be still the same,
There is a long American tradition of demonizing sexual deviance through the discourse of medicine (and especially psychiatry). 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. 306 These statutes were enacted on the theory that a sex 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. 307 In some states, however, this category included adults found to have engaged in consensual homosexual activity. 308 The hysteria of times, centering on fifth columns of diseased gender-benders bent on recruiting America’s children to their depravities and thus posing a danger not only to the family but to the

And what I should be, all but less than hee
Whom Thunder hath made greater? Here at least
We shall be free; th' Almighty hath not built
Here for his envy, will not drive us hence:
Here we may reign secure, and in my choyce
To reign is worth ambition though in Hell:
Better to reign in hell, then serve in Heav’n.


308 See Caporale & Hamann, supra, at 325 (Nebraska).
state as well is nicely captured in the literature of the times. Sexual Psychopath laws were roundly criticized by a number of commentators, and eventually fell into disuse in the 1960s.

The 1980s witnessed the rise of the next generation of medically enhanced sexual criminality. From the early 1980s, the United States popular imagination indulged again in a medicalized gender-bending hysteria that started with a series of scandals involving alleged abuse at day care centers. By 2004, the hysteria produced a popular certainty that a number of categories of sexually disordered males constituted a threat to children and women – principally pedophiles and internet predators preying on young adults. 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 children – and enhanced enforcement of suppression of certain categories

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310 For a particularly influential critique, see PAUL W. TAPPAN, NEW JERSEY COMMISSION ON THE HABITUAL SEX OFFENDER, THE HABITUAL SEX OFFENDER

311 Among the most destructive was the scandal of the McMartin day care center in California. For a discussion, see See EDGAR W. BUTLER, ANATOMY OF THE McMARTIN CHILD MOLESTATION CASE (2001); and PAUL EBERLE, THE ABUSE OF INNOCENCE: THE McMARTIN PRESCHOOL TRIAL (1993).


313 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, ALA. CODE §15-20-25 (2003); ALASKA STAT. §18.65.087 (2002); 2003 Ariz. Legis. Serv. 173 (2003)(amending ARIZ. REV. STAT. §§13-3821, 13-3825 (2002)); ARK. CODE ANN. §§12-12-901-920 (2003),
of predators by both state and federal law enforcement agencies. In addition, states like Kansas, resurrected sexual psychopath type laws by broadening the rules under which the state could seek the civil commitment, for an indefinite period, of people (mostly males) considered to suffer from sexual psychosis.

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. 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.

The early training and active interest of parents in the child’s activities and associates are a deterring influence. Too many innocent youths are
unconsciously led into trying a "red bird" or "reefer," and easily follow persuasion, and then we have a likely recruit for organized crime. After a time the pervert becomes callous, may no longer recognize the criminal act as wrong, and the debauchery may even be practiced in view of the public.317

Courts tended to emphasize “the importance also of attempting to rehabilitate 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.”318 Disordered gender roles leading to gross anti-social behavior was not confined by any means to feminized men. “Thus, in Tuggle, the depravity was caused by the association with prostitutes and whoremongers; the result of this association produced evidence of insanity. The modern transformation, however, is represented by the actions of the Tuggle trial judge, who viewed the accused as a sexual psychopath, and insisted on independently satisfying himself that the defendant was sane before pronouncing sentence.”319 The judicial propensity to embrace a medical view of


319 Larry Catá Backer, Raping Sodomy and Sodomizing Rape: a Morality Tale about the Transformation of Modern Sodomy Jurisprudence, 21 AM. J. CRIM. L. 37, 84 (1993). The reference was to Tuggle v. State, 119 P.2d 857, 863 (Okla. Crim. App. 1941)(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). In explanation of the murders, the defendant provided a detailed narrative to the trial court of a lifetime spent engaging in a number of what, for the time, were extremely deviant sexual activities. Id. at 860-61. See also Adams v. State, 86 S.W. 334, 334 (Tex. Crim. App. 1905) (reversing conviction for sodomy
This medicalization of gender deviation in the United States, sits atop an older tradition, one that, in fundamental respects, mimics modern Malaysia, but with a strong religious, and primarily Christian, gloss.320 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 ordering language of gender – religion – and its successor – medicine.321 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. Paradoxically, the scientia sexualis that emerged in the nineteenth century kept as its nucleus the singular ritual of the obligatory and exhaustive confession, which in the Christian West was the first technique for producing the truth of sex. Beginning in the sixteenth century, this rite . . . emigrated toward pedagogy, relationships between adults and children, family relations, medicine, and psychiatry.322

There is, therefore, a certain relationship 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 pathology.

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 the English Protestants Puritans, Church of England, Baptists, Unitarians, Presbyterians, and, at least in Maryland, Roman Catholicism. As a result, the colonies adopted laws which were meant to reflect and enforce the moral order and structure dictated by their religious beliefs. To do so was beyond question; nor was any neutral, secular rationale needed to support such legislation.

Colonial lawmakers and divines assumed, without much opposition that there was a fundamental link between law, especially common law, and Christianity, and that Christian morality was necessary for political stability and prosperity. Thus, reference was freely made to God in laws attempting to enforce the divinely commanded sexual order of things. In this, American theologians and legislators sought to establish a moral and legal order in the new colonies little different from that being created in Protestant

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325 The Massachusetts Body of Liberties, adopted as law in the colony in 1641, providing for the punishment for adultery as a criminal offense. Chapter XXVIII of the Body of Liberties, in which this proscription is found, begins by invoking the authority of the laws of God. "Whereas the violation of the marriage covenant is highly provoking to God, and destructive to families..." See Winfield E. Ohlsoin, Adultery: A Review, 17 B.U. L. REV. 329, 358 (1937).
Europe. William Williams is perhaps representative of the underlying sense of the obligation of the state to serve as the enforcer of the moral systems imposed by religion. During debate on the ratification of the Constitution, Williams, of Connecticut, expressed his dismay over the fact that the Constitution contained no acknowledgment of the Protestant God and the supremacy of Divine Law in the United States.\textsuperscript{326}

And indeed, prior to the revolution in American jurisprudence, starting with Griswold v. Connecticut,\textsuperscript{327} which began a process of federalizing and constitutionalizing basic individual liberty rights, reorienting the basis for mandatory gender normativity – but not eliminating it. Let me briefly recapitulate the sum of the regulations just described. The state enforced an extensive system to foster the creation and maintenance of family units defined as father, mother and children\textsuperscript{328} by permitting certain kinds of sexual intercourse between men and woman who had formally and publicly married, and proscribing all other forms of sexual conduct. This proscription was effective regardless of the status or sex of the people seeking to engage in any kind of sexual practice. In addition, the state prescribed the requirements for marriage, including limitations on who could take advantage of the institution. Under the regulations, an otherwise single man

\textsuperscript{326} Edwin S. Gaustad, Religion and Ratification, \textit{in The First Freedom: Religion and the Bill of Rights} 41, 43-45 (James E. Wood, Jr. ed., 1990). As Gaustad notes in his essay, this sentiment did not end after the ratification of the Constitution and Bill of Rights. In the 19th Century, for instance, the National Reform Association campaigned to change the preamble to the Constitution to read as follows: "Recognizing Almighty God as the source of all authority and power in civil government, and acknowledging the Lord Jesus Christ as the Governor among nations, His revealed will as the supreme law of the land, in order to constitute a Christian government, we the people. . . ." \textit{Id.} at 44. Cf. Martin E. Marty, Protestantism in the United States: Righteous Empire \textsuperscript{—} (1986, 2nd. ed.).

\textsuperscript{327} 381 U.S. 479 (1965).

could marry an otherwise single woman, if both were old enough, and not related by blood or marriage to the degree prohibited under statute. No other combination was possible for the purpose of sexual intercourse. Thus, people of the same sex could not marry (and, therefore, could not engage in lawful sexual intercourse), neither could a person marry an animal (and thereby engage in lawful sexual intercourse).

The manner in which sexual acts could be performed lawfully was also regulated, irrespective of the marital status of the parties. Sexual acts other than heterosexual vaginal intercourse were proscribed. All sexual acts between people of the same sex were proscribed. Anilingus, cunnilingus, and fellatio constituted criminal sodomy, irrespective of the sex of the parties, or their marital status. Other sexual acts not necessarily amounting to intercourse or the stimulation of sexual organs were proscribed as lewd acts, again irrespective of the marital status of the parties.

The overall plan of the sexual conduct rules, then, becomes plain: the limitation of sexual conduct to married couples primarily for the purpose of procreation. Lawmaking was bent to this goal: heterosexual vaginal intercourse between a man and a woman married to each other was substantially the sole means of engaging in lawful sexual intercourse. Sex was thus made to be intimately tied to procreation. In the absence of the availability of contraception, the only lawful means of sexual conduct would likely lead to conception. And marriage served as the encouraged outlet for reproduction, supporting the underlying acceptance of the family as the basic building block of society.

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People who engaged in any kind of sexual activity in violation of the rules were punished in a variety of ways.\(^{330}\) Sexual intercourse outside of marriage, irrespective of the gender or marital status of the other party, could result in imprisonment and a fine or both. Additionally, sexual activity of a type which would not promote procreation could also result in imprisonment, fines, or both. Any persons who promoted sexual conduct other than that determined to be lawful, either by facilitating such conduct, or producing materials or productions depicting such conduct, would be punished as well, as aiders and abetters, and the offending material destroyed.

Engaging in much of the conduct proscribed in the criminal law could also expose one or more of the participants to civil liability, loss of job or educational opportunities, or discrimination in housing.\(^{331}\) Thus, there existed a number of tort actions available to recompense those "damaged" by proscribed conduct. Commission of an act of moral turpitude could result in impeachment of elected officials, loss of job of other public officials, and loss of license of doctors, lawyers and other professionals. Employers had the right to terminate employees.\(^ {332}\) Finally, there was no bar to private discrimination

\(^{330}\) For a discussion from the perspective of law and science, see Richard Green, Sexual Science and the Law (Harv. Univ. Press, 1992) (discussing the law and science of fornication, child custody, ‘orientation’, immigration, transsexualism, pronography, and intergenerational sexuality).

\(^{331}\) For a discussion, see, e.g., WILLIAM ESKRIDGE, JR., GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET 139-141, 362-71 (1999). For certain criminal offenses, castration, either surgical or chemical have been available to the state. See Green, supra, at 216-228.

against those who deviated from lawful sexual practice.\textsuperscript{333} A landlord could refuse to rent to such people;\textsuperscript{334} a restaurant or retail establishment could refuse to serve them,\textsuperscript{335} and they could otherwise be excluded from society.\textsuperscript{336}

The relationship between American scientism and religion is both unstable and contentious. The shifts from science to morality (or good order) as the rhetorical (or policy) basis for the establishment and policing of gendered conduct base lines reflect the great socio-cultural uncertainties of identity in the West. In the absence of normative

\begin{footnotesize}
\textsuperscript{333} Cf. The Civil Rights Cases, 109 U.S. 3 (1883) (14\textsuperscript{th} Amendment protections do not extend to discrimination by private persons). Justice Kennedy, writing for the majority in Lawrence v. Texas, 539 U.S. ____, 2003 WL 21467086 (U.S. 2003) noted that discrimination against homosexuals in states that criminalize sodomy extends well beyond incarceration or fine. For example those convicted of sodomy have to register as sex offenders in several states and thereafter are ineligible for a variety of professional licenses. \textit{See id.}, at **11. Justice Scalia argues in dissent that the constitution does not prohibit sexual identity discrimination and that the majority of people in the US have a rational basis to discriminate because they believe that the homosexual lifestyle is destructive to society. \textit{See, id.}, at **29.


\textsuperscript{335} \textit{See, e.g., Hubert v. Williams, 133 Cal. App. 3d Supp. 1, 184 Cal. Rptr. 161 (1982) (may not refuse to rent on basis of sexual orientation under state anti-discrimination statute); Kramarsky v. Stahl Management, 401 N.Y.S. 2d 943 (N.Y. Sup. Ct., 1977) (“Absent a supervening statutory prescription, a landlord is free to do what he wishes with his property, and to rent or not to rent to any given person.” \textit{Id.}, at 945).}

\textsuperscript{336} \textit{See, e.g., PATRICIA A. CAIN, RAINBOW RIGHTS: THE ROLE OF LAWYERS AND COURTS IN THE LESBIAN AND GAY CIVIL RIGHTS MOVEMENT, 74-76 (Westview Press, 2000)(arguing that gays and lesbians are excluded from the public space because of societies notion of morality and the resulting pressure to keep their sexual orientation secret). A version of this set of popular conceptions was well known to the American judiciary. \textit{See, Bowers v. Hardwick, 478 U.S. 186 (1986), overruled Lawrence v. Texas, 539 U.S. –, 2003 WL 21467086 (U.S. 2003).}
equilibrium, American socio-legal discourse is marked by what academics characterize as the ‘post’ modern, in which everything is contested.337  “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.”338

The disorder of the post modern is well evidenced in the narratives of Atta, Lindh, and Muhammed/Malvo.  Atta, Lindt and Muhammed/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

337  This enterprise is both frustrating and fruitless.  An earlier critique of one strain within Queer theory, is generalizable in th American context:

Queer theorists seems to thirst for the assumption of the 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.  It may well be the ultimate act of colonization and re-creation within hegemony.  This accords with our own mythology in the West, peopled as it is with gods who eat their children, gods who are obliterated in turn by those closest to them in blood and culture, perpetuating the same sort of hegemonic system.  But the value of a queering theory will not lie in its search for the power to pull the levers, either as a general matter, or as a vassal group within the dominant order.  There is little value in a mindset no different from that of the dominance-subordinated matrix which is so eloquently criticized.  But, shorn of its introductory language of affront at categorization and subordination, transformative queer rhetoric serves merely as a vehicle for the recreation of a subordinating hierarchy.  It is reducible to a contest for power, the control of Foucaultian truth.


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’ 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 judgements 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 conflate where ‘science’ serves to confirm religious moral judgments, and thus strengthens the religious community’s arguments for using the power of the state to enforce (a now scientifically proven) good moral order.339 In this well established context it comes as no surprise that the American Taliban can evoke some sympathy. Given the disordered sexual life of his father, his conversion to Islam and his actions in Afghanistan, could be understood in medical terms as a hysterical reaction to gender betrayal by his father leading to the dissolution of his family.340 In this context medicine provides a window not only to family dysfunction, but also to the connection between family dysfunction and the state. But so does the older notion of immorality leading to the weakening of the moral fiber of the state. Under both views, the way the

339 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 of the ‘Letter to the Bishops of the Catholic Church on the Pastoral Care of Homosexual Persons (Jeannine Gramick and Pat Furey, eds., Crossroad Press, 1988) (“we will focus our reflection within the distinctive context of the Catholic moral perspective. It is a perspective which finds support in the more secure findings of the natural sciences, which have their own legitimate and proper methodology and field of inquiry.” Id at 1, ¶ 2).

340 See discussion, supra, at Part II.A. and notes –.
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). But Mohammad Atta evokes fear, not sympathy, as the person who, harboring well hidden gender disorder, can mask them long enough to change a self destructive act (suicide as a result of unresolved sexual-gender conflict) to a political act affecting the well being of multiple political communities. 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 bete noir of the American dream scape – preying on vulnerable young men – turning them to moral and sexual depravity. Malvo is the modern version of the apocryphal story of Tuggle – the prodigal son beyond redemption. But the American experience is not unique.

Whether couched in the ordering language of science or religion/morality what is striking in the coverage of Atta, the American Taliban and the alleged DC Snipers, is the extent to which is manifested a desire to recast all of them as sexually disordered, as homosexual. At some level, the American community wanted all of them to be homosexual. That sort of deviation/depravity/disorder would have confirmed the belief

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341 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 have no 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 prove. (Or it could be that they cannot conceive of their friends as behaving in such a way.)

in their bad character and thus in their guilt. Whether any of them were members of a sexual minority, in fact, was less important than the belief in the possibility of their disorder. Perhaps, for that reason, 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.

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, through 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. Zimbabwe.

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

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342 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 9/11 terrorists were motivated by homosexuality. Newsweek did not publish the article. See, Terrorists 'Were Gay', MAIL ON SUNDAY, Nov. 4, 2001, page 13, available at LEXIS. The New York Post and New York Daily News articles 'outing' John Lindh were based on excerpts from a Time magazine article. The Time article did not accuse Lindh of homosexuality. See discussion infra part III-A-2 and accompanying footnotes. Further, the National Enquirer was the only newspaper that reported the possibility of a homosexual relationship between the DC snipers. See National Enquirer Online, Snipers: Their Secret Gay Life, National Enquirer Online, Nov. 1 2002, available at http://www.nationalenquirer.com/stories/feature.cfm?instanceid=50120, last visited 2/21/2003.
Ironically, 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 re instituted with an indigenous face. 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 at odds with the historical record. 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. 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.

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343 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). Jill Zimmerman has explained the difficulty of searching for ‘pure’ pre-colonial African customary law by reference to memorialized systems of customary law. She explains how African customary law was created in Southern Africa in the late 19th century by British colonialists through a process involving consultation with indigenous leaders colored by the European presumptions of how ‘native’ society was thought to operate. The result was the creation of a rigid code of custom in place of the previously fluid system of custom that had the added benefit of supporting and legitimating patriarchal leaders and vertical hierarchy. See Jill Zimmerman, Border People and Anti-discrimination Law: The Reconstitution of Customary Law in South Africa, 71 HARV. BLACKLETTER L.J. 197, 200-202 (2001)

345 American jurists on the Supreme Court are increasingly divided on the nature and meaning of that tradition on which interpretation of law must be grounded to enjoy a minimum level of authority (at least among traditionalists). This division is especially marked in determinations over the meaning and application of the Establishment Clause of the First Amendment to the American Constitution. In Lee v. Weisman, 505 U.S. 577 (1992), for example, Justice Souter, in concurrence, offered a vision of traditional understandings of religious coercion significantly different than that offered by Justice Scalia, in dissent.
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 with respect to which she has no power to change. In the case of Zimbabwe, as in South Africa to some extent, customary law is presented as a fait accompli, not only binding, but extremely difficult to overcome. 346 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. 347

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.” 348 This is particularly true in Zimbabwe. In their analysis of Magaya, 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. 349 Customary laws were for the most part memorializations of a part of African tradition determined by white settlers who interviewed male (but not female)

346 See, e.g., discussion in T.W. BENNETT, HUMAN RIGHTS AND AFRICAN CUSTOMARY LAW 64-65 (1999 ed.).

347 See, e.g.,

348 T.W. BENNETT, HUMAN RIGHTS AND AFRICAN CUSTOMARY LAW 60 (1999 ed.).

tribal authorities. Colonial period institutionalized “customary laws” could not replicate the inherent flexibility of traditional African law, but instead replicated in African clothing a rigid companion to the strict civil code. “Customary law” is thus a hybrid reflecting colonial needs as much as actual custom. It also serves significant post-colonial agendas of male privilege that benefit the emerging African elite to the extent impossible without the boost from the Europeanization of customary law. In the first place, the official version of customary law now bears all the marks of a typical, western legal system. . . . In the second place . . . the predominance of conservative males in the new homeland governments meant that important social issues, such as the equality of women, were never seriously considered. . . . In the third place, the tradition that the official version of customary law is supposed to represent is now said to be ‘invented.’ This epithet is meant to warn us that customary rules owe less to ancient practice than to the interests of European writers and officials.

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T.W. BENNETT, HUMAN RIGHTS AND AFRICAN CUSTOMARY LAW 62-63 (1999 ed.) (Referencing, in part, the important germinal work in this field of M.L.CHANOCK, LAW, CUSTOM AND SOCIAL ORDER: THE COLONIAL EXPERIENCE IN MALAWI AND ZAMBIA (1985) (and especially chapters 9-10)). See also B. A. RWEAZAURA, TRADITIONALISM AND LAW REFORM IN AFRICA 22 (1983) (colonial administrators sought information from communal elders about what appropriate conduct ought to be rather than discover how conduct is regulated in fact).

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351 T.W. BENNETT, HUMAN RIGHTS AND AFRICAN CUSTOMARY LAW 60 (1999 ed.).

352 David M. Bigge and Amelie von Briesen, Conflict in Zimbabwean Courts: Women’s Rights and Indigenous Self Determination in Magaya v. Magaya, 13 HARV. HUM. RTS. J. 289 at 301. South African jurists have encountered a similar distinction within South African ethnic customary law. “Unlike Western law, which is generated by legislation or precedent, [customary law] tends to be both volatile and uncertain.” T.W. BENNETT, HUMAN RIGHTS AND AFRICAN CUSTOMARY LAW 60 (1999 ed.).

353 See discussion, supra, Part II.B. at notes –. In effect, customary law, as reconstituted on European lines attempts a memorialization in law of a narrow slice of the more extreme forms of African proverbial lore.
Zimbabwe’s case, in particular, this institutionalized product of the English colonizer was used in the context of a post-colonial discourse to impose an unAfrican gender hierarchy satisfactory to the post-Independence African male elite.

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.354 Neither can the community administer it. Instead, the interpretation of customary law is now in the hands of the man as being the father and ... head of the family." Saud Ibrahim Abdi, Religious and Cultural Laws Used to Deny Women Their Rights, in HEINRICH BOELL FOUNDATION, GENDER GAPS IN OUR CONSTITUTIONS: WOMEN’S CONCERNS IN SELECTED AFRICAN COUNTRIES (2002). , at 64. See also Mineke Schipper, Source of All Evil: African Proverbs and Sayings on Women (1991), at 86-90 (quoting some African proverbs depicting male-female power play in African families). For instance, "Woman's intelligence is like that of a child." (Benin, Senegal, West Africa); "A woman and an invalid man are the same thing." (Gikuyu, Kenya); "A woman is like a goat: she is tethered where the thistles grow." (Rwanda, Rwanda); "If a man is not obeyed by his wife, he must beat her thwack!" (Swahili, East Africa); "The arrogant woman is controlled by strokes." (Rundi, Burundi; Rwanda, Rwanda); "Women have no mouth." (Beti, Cameroon); "No woman is called upon to speak." (Rwanda, Rwanda); "A woman in trousers? What is dangling inside?" (Fon, Benin); "A wife is a piece of cloth; beat it and cover it at the same time." (Mongo, Zaire); "Never marry a woman with bigger feet that your own." (Sena, Malawi/Mozambique); "Only a shameful woman takes her husband to court." (Ganda, Uganda); "Beat your wife regularly; if you don't know why, she will." (West Africa, possibly of Arab origin). Id.”


354 See discussion supra Part II.B. at notes —.
of the Zimbabwean judiciary. 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 now has 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 it’s not culture. It’s the power that comes with culture that they feel they are losing,’’ she says.”

355 See discussion supra, Part II.B. at notes –.

356 Myth making occurs on multiple levels. For example, Muhammad Ali served as a physical manifestation of the post-colonialist urge among previously colonized peoples. See Grant Farred, The Prettiest Postcolonial: Mohammed Ali, in BOYS: MASCULINITIES IN CONTEMPORARY CULTURE 151 (Paul Smith, ed., 1996) (“By beating white fighters such as Lubbers, Ali was acting out the black man’s Postcolonial fantasy: the public humiliation of the historical white adversary. . . . Muhammad Ali gave the post colonial nations in which he fought – and to some extent blacks all over the world – an ideal expression of themselves.” Id., at 162).

of regendered subordinates.\textsuperscript{358} 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 on gender. This perversity is possible to some extent 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.\textsuperscript{359} 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 domination of 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

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\textsuperscript{359} 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”). Professor Roberts was arguing against the essentialism within feminist discourse that ignored the ways that racism and patriarchy are interrelated in the social construction of motherhood.
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past which modern (male) jurists can enforce.\textsuperscript{360}

This is most easily 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. \textit{Magaya}\textsuperscript{361} is particularly rich in this respect. In the opinion, hinging on interpretation of customary law, the court was initially confronted with a fundamental problem – there was no written custom.\textsuperscript{362} Justice Muchechetere, in the face of the difficulty finding written Zimbabwean or Shona customs, turns to secondary sources. But the Justice does not use traditional customary sources.\textsuperscript{363} Instead, the Justice turns to texts written by European observers to determine that the male is the rightful heir.\textsuperscript{364} Moreover, Justice Muchechetere substitutes South African customary law in the absence of Zimbabwean precedent.\textsuperscript{365} Within this case is evidenced the manner in

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  \item[360] The \textit{Magaya} case is especially telling example of this approach. It was reported, after the decision, that by Justice Gibson Muchechetere that he had deliberately rewritten the law to recharacterize females as ‘junior males’ under customary law because previous rulings had given women “rights they never had under customary law.” Sue Njanji Matetakufa, \textit{Women’s Rights Gone Wrong}, DEVELOPMENTS: THE INTERNATIONAL DEVELOPMENT MAGAZINE (Issue 8, Nov. 12, 1999) available at \url{http://www.developments.org.uk/data/08/womens_r.htm} (Last visited Aug. 5, 2003) (quoting Justice Muchechetere with respect to his participation in the \textit{Magaya} case).
  \item[363] There was no attempt to discover ‘living’ customary law as practiced by traditional Shona or other Zimbabwean peoples. See T.W. BENNETT, HUMAN RIGHTS AND AFRICAN CUSTOMARY LAW (1999 ed.).
  \item[365] See discussion, \textit{id.}, at 303.
\end{itemize}
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 non-traditional 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 law 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 institutionalized, whose organization is fundamentally at odds with the framework within which customary law ‘lives’.  

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, at the time, an active Christian pastor. 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 a tradition he himself has

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367 Id., at 304.

abandoned against his mother when the result favors him economically.\textsuperscript{369} The court embraces a blindness to the distortions created thereby.

Thus, 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.\textsuperscript{370}

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

\textsuperscript{369} Indeed, this case in particular highlights the dilemma of customary law, which traditionally relied on the intervention of families and now must rely on the kindness of strangers dressed as European judges.

Today, families do not have the traditional ability to help in disputes. In the past, three factors allowed families enforce decisions regarding marital disputes. These are “dependence of members on the family for resources and approval, traditional power hierarchies within the family and spiritual belief.” However, the traditional power of family is weakening. First, families members are not as dependent on each other. Second, traditional hierarchies are losing respect. Third, education and Christianity have weakened spiritual beliefs.


privilege against attack. In Zimbabwe, customary law as lived practice exists side by side with customary law as codex received from the old colonial masters. This codex now is meant to do service 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.

The Banana trial reveals that the treatment of homosexuality is closely associated with the treatment of women. The subtext of the trial was suffused with gender panic. The idea that a predatory male, a powerful male, would penetrate more vulnerable males was threatening in a fundamental way. Such conduct threatened the identity, as males, 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 immanent 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 uncontainability of

See ALICE ARMSTRONG, CULTURE AND CHOICE: LESSONS FROM SURVIVORS OF GENDER VIOLENCE IN ZIMBABWE (Violence Against Women in Zimbabwe Research Project, 1998) (Traditional law is still applied in the area of gender violence because physical and sexual assault of women is seen as a familial and not a state problem. Today, in the name of “culture”, traditional practices are warped by men to advantage men. Women of Zimbabwe wish to define “culture” in a way that respects women’s problems and needs in the area of gender violence. (Id., 135-143)).

372 The potentially dramatic differences between the two is more readily apparent after a disaster. Rwanda provides an example, where traditional roles changed necessarily after the Tutsi massacres (and the resulting exit of complicit Hutus) created a number of stresses to traditional approaches to inheritance and property ownership in a society bereft of males. See Mike Crawley, Rwandan Social Structure Evolves, THE CHRISTIAN SCIENCE MONITOR June 21, 2000 available at http://www.csmonitor.com/atcsmonitor/specials/women/rights/rights062100.html (last visited Aug. 5, 2003).
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 shoring up his power. By conflating his political agenda to 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. That restriction of rights, ironically enough, could also be read in gendered terms. Mugabe’s control of 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 President Robert Mugabe recently dramatized the way post-colonialist dialogue can be deployed to reinforce gender hierarchies. “I find homophobia, 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.” Mugabe has linked national decline with the sexual corruption represented

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By one common rhetorical tactic, any discussion of ‘gender,’ ‘feminism’ or ‘sexual rights’ is taken to refer to ‘deviant’ sexualities, or assumed to be ‘promoting homosexuality.’ This has long been a staple of anti-feminist attacks. It has gained force by exploiting fears in recent years, as lesbian and gay organizing grows more visible around the globe. The
by neo-colonialism in the form of sexual perversion. 374 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. 375 “Opponents of the regime thus faced a double stigma: as sexual deviants, and as agents of the corrupting former colonial power.” 376 Mugabe is not alone in the deployment of these sorts of attacks to insulate the state from scrutiny on the basis of international norms. In a widely circulated 1995 newspaper article quoted a statement made by Daniel arap Moi, Kenya’s President, that “[w]e Kenyans have rejected resolutions made in the Beijing women’s conference. Words like lesbianism and homosexuality do not exist in African languages.” 377

 effects are double: such attacks reduce the definition of ‘gender’, and the scope of sexualities, to a single issue within the spectrum; and they exploit, and give added strength to, the stigma attached to homosexuality.”


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.” The homosexual is a man possessed by female demons that must be exorcized. Male gendering thus reinforces the construction of the female whose characteristics have legal effect. The ‘nature’ of woman informs views of female consent to sexual activity, and of female rights to property. “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.”


379 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.” Id.

380 A recent work published through the Violence Against Women in Zimbabwe Research Project concluded that:

The first conclusion is that the meaning of ‘rape’ is ambiguous and varies in the minds of ordinary people. . . . One explanation is that the focus is on the consent of the family, which is necessary under traditional law, rather than the consent of the individual girl. . . . The cultural construction of ‘maleness’ and ‘manhood’ also plays a role. Men are expected to be sexually active and sexually aggressive, and are not expected to control their sexual urges. This also silences women. If women are not expected to initiate sex, their sexual needs and desires are silenced. If a ‘real man’ is sexually active, men may ignore women’s wishes in pursuit of ‘manhood’. If men are not expected to control themselves, they do not respond to women who say ‘no’. . . . ‘Unsilencing’ women sexually involves much more than simply talking openly about sexuality– it involves challenging conventional notions of sexuality.

ALICE ARMSTRONG, CULTURE AND CHOICE: LESSONS FROM SURVIVORS OF GENDER VIOLENCE IN ZIMBABWE 140-142 (1998).

381 INTERNATIONAL GAY AND LESBIAN HUMAN RIGHTS COMMISSION AND THE CENTER FOR WOMEN’S GLOBAL LEADERSHIP, WRITTEN OUT: HOW SEXUALITY IS USED TO ATTACK WOMEN’S ORGANIZING. 17 (2000) (noting the difficulty of operating for organizations like Gays and Lesbians of Zimbabwe in the face of such attacks; mainstream organizations fear to deal with them for fear of government reprisal and
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 to the 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. Malaysia.

Using the formalities of law to declare Anwar Ibrahim a sodomite reduces him to a she-male, and thus corrupt and unworthy of power, since the socio-political hierarchy demands a morally fit male leader. Having engineered Anwar’s conviction, Mahathir could declare “We can’t have a deputy who is a homosexual, not in this country. So we had to take action. In this country a homosexual is not acceptable as the prime minister.”382 The connection between Anwar’s effeminacy and his political corruption made him ‘morally unfit.’383 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

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382 Nicholas Watt, Malaysian PM Rebuked for Threat to Gay Ministers, GUARDIAN UNLIMITED, Nov. 2, 2001 available at http://www.guardian.co.uk/Archive/Article/0,4273,4290310,00.html (last visited Aug. 18, 2003) (Mahathir threatened to expel gay British clergy who attempt to enter Malaysia).

ways to the overall logic of the subordination of women to men.” Indeed, it was never clear whether world opinion was outraged that Anwar was a sodomite or that he was wrongfully convicted.

The disciplining of Anwar Ibrahim was conducted in gendered terms. Anwar’s faults are cast in terms of their femininity – weakness, immorality, lack of control. The feminine, in Malaysia, 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. Telling in this respect is 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 sentenced to six months’ imprisonment for ‘outrages on decency’. They had been forced under torture 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 acts they were

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385 “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.” MATTHEW H. SOMMER, SEX, LAW AND SOCIETY IN LATE IMPERIAL CHINA 306 (Stanford Univ. Press, 2000). “[P]enetration was understood (in both law and popular perception) as a potent and even dangerous act. Depending on the context, this act could impose or overthrow legitimate hierarchies; it could reproduce or invert the normative gender order; it could initiate persons into social adulthood, or inflict the polluting stigma that provoked homicide and suicide.” Id., at 307.
accused of.\textsuperscript{386}

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 emasculated\textsuperscript{387} to the service of the will of Mahathir.\textsuperscript{388}

In Malaysia, Islam is deployed as a screen behind which gender discipline is given a free hand.\textsuperscript{389} The journey of Islam in Malaysia is in some respects unique. Malaysian

\textsuperscript{386} AMNESTY INTERNATIONAL PUBLICATIONS, CRIMES OF HATE, CONSPIRACY OF SILENCE: TORTURE AND ILL-TREATMENT BASED ON SEXUAL IDENTITY 18 (2001).

\textsuperscript{387} 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 (Harvard University Press, Cambridge Mass., 1985). Pye describes the traditionalist Malay expectation of authority as one in which “the supreme figure will always rise above his immediate passions and achieve a blend of impartial detachment and self-centered arrogance.” Malays defer to their leaders, yet hold an inherent mistrust of them. Malay officials believe that people are self serving, and need to be checked by government and religion. Malay’s believe that power is supernatural and whimsical. Id., at 255-262.

\textsuperscript{388} See JAMES ROSS AND NABEEL SARWAR, MALAYSIA: ASSAULT ON THE JUDICIARY (Lawyers Committee for Human Rights, New York, 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).

\textsuperscript{389} Islam was introduced to the region by Middle Eastern traders in the 13\textsuperscript{th} century. The beliefs are mainly Sunni, but some Shiite and Sufi philosophy influence the religion. MARY SOMER HEIDUS, SOUTHEAST ASIA: A CONCISE HISTORY 77 (Thames and Hudson, London, 2000). Islam in Malaysia became increasingly important in the Peninsula after the establishment of the Sultanate of Malacca, an early Malay kingdom. The Malay language was written in Arabic script and Malay became a language of Islamic discourse. Id., at 79. Students of Islam study in a pesantren or madrasah, a rural school where students study the Koran and Islam with a live in master. Id., at 80. Through Islam, the Near East and South East Asia have developed close political, economic and religious ties. Starting in the 1980’s there was an Islamic revival known as the Dakwah. Id., at 81. Politics has become increasingly Islamicized since as the majority Malaysian political party, UMNO, has adopted a more philo-Muslim politics in an attempt to woo PAS, a hard-line Islamic party, followers. Id., at 82. Tensions exist between Malaysia’s Muslims and members of other religions and it is not uncommon to see published wars of words between
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.

Traditionally, Malay society was shaped by Malay customs and traditions (adat) and by Islam. Malay society was Muslim but adat principles tended toward the creation of more egalitarian divisions of authority between males and females in Malay communities. Malay men preferred nuclear family arrangements after marriage. A

follows of the two religions in an attempt to gain influence and adherents. See, e.g., ERGUN MEHMET AND EMIR FETHI CANER, UNVEILING ISLAM: AN INSIDER LOOKS AT MUSLIM BELIEFS (Kregel, Grand Rapids, 2002) (comparison between Christian and Islamic beliefs).

For a discussion of the history of the Indonesian variant, see, e.g., STUDIES ON INDONESIAN ISLAM, (B.B. Herring ed., 1986); MOHAMMAD KAMAL HASSAN, MUSLIM INTELLECTUAL RESPONSES TO “NEW ORDER” MODERNIZATION IN INDONESIA (1982); CLIFFORD GEERTZ, ISLAM OBSERVED; RELIGIOUS DEVELOPMENT IN MOROCCO AND INDONESIA (1968).

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 167-178 (Aihwa Ong and Michael G. Peletz, eds., University of California Press, Berkeley, 1995) suggests a liberal interpretation. However, adat could be interpreted conservatively, and thus more in line with the traditional gender assumptions of Islam. See JOHN HILLEY, MALAYSIA: MAHATIRISM, HEGEMONY AND THE NEW OPPOSITION 179-180 (2001). Much of this paragraph is taken from Ong.


However, as John Hilley suggests, traditional Islam in Malaysia had been subject to a number of crises and movements since the 19th century.

Diverging perceptions of Malay-Islamic consciousness crystallized around the Kaun Tua - Kaun Muda (Old Order – New Order) debate in late nineteenth century Malaya. The
father transferred property to his son when the son married and started his own family.\footnote{394} Malay men had authority over their wife and children. Malay men viewed themselves as guardians of morality because men have more self-control (\textit{akal})\footnote{395} than women, who have more animalistic lust (\textit{nafsu}) than men.\footnote{396} Hence, masculinity under \textit{adat} is based on

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former adhered to a traditionalist interpretation of Islamic \textit{sharia} law . . . , a conservative \textit{adat} consistent with feudal hierarchy and a spiritual universalism of pan-Islamic salvation. The later, reflecting progressive streams of Middle East/Ottoman intellectual thought, embraced a nationalist modernism based upon the ideals of rational secular knowledge, technology and education.
\end{quote}

\textbf{JOHN HILLEY, MALAYSIA: MAHATIRISM, HEGEMONY AND THE NEW OPPOSITION 179 (2001).} See also \textbf{OZAY MEHMET, ISLAMIC IDENTITY AND DEVELOPMENT 103 (Kuala Lampur: Forum, 1990).}

\footnote{394} “\textit{Adat} required the father to give his son property in order to establish a new household upon marriage.” \textit{Ong, supra}, note –, at 164. A married son living with his parents lost status. \textit{Id.} Neither father nor son was fulfilling a male gender norm. In this respect male \textit{adat} distinguished ethnic Malays from ethnic Chinese families, in which inter-generational households were common and respected.

\footnote{395} Michael Peletz suggests that one way \textit{adat} respecting \textit{akal} was understood was in its relationship to Islam. One way to develop reason is through the diligent practice of Islam. Michael G. Peletz, \textit{Neither Reasonable or Responsible: Contrasting Representations of Masculinity in Malay Society}, in \textit{BEWITCHING WOMEN, PIous MEN: GENDER AND BODY POLITICS IN SOUTHEAST ASIA} 91-93 (Aihwa Ong and Michael G. Peletz, eds., University of California Press, Berkeley, 1995).

\footnote{396} Michael Peletz suggest that , passion (\textit{nafsu}) is a term with derogatory context that is believed to be more common in women than in men. Passion caused the original sin of Adam and Eve eating the forbidden fruit. Passion is housed in men in the adam’s apple and in women in the breasts. Passion causes indulgence in desire and absence of strength. A male village elder says, “This ‘passion,’ it’s the devil. You want to eat a lot, drink a lot, that’s all the devil, Satan. You want to buy clothes, buy a house, make your house all beautiful, that’s the same: Satan, the devil. These are worldly matters; in the Afterlife they don’t exist.” Michael G. Peletz, \textit{Neither Reasonable or Responsible: Contrasting Representations of Masculinity in Malay Society}, in \textit{BEWITCHING WOMEN, PIous MEN: GENDER AND BODY POLITICS IN SOUTHEAST ASIA} 89 (Aihwa Ong and Michael G. Peletz, eds., University of California Press, Berkeley, 1995). Passion is tied to practices of eating pork, cannibalism, and incest. Aborigines eat pork so they are accused of having no religion. Passion is a trait of animals and nature. Malay’s view of passion may explain why Sufism is not popular in Malaysia. \textit{Id.}, at 88-91. As a formal matter, \textit{adat} suggests that women have more passion and men have more reason. Male village elders describe that women have more sexual desire because they want sex after the man is finished. Women describe that they need shame to control their passion. Malay interpretations of Islam view women as more animal than men. \textit{Id.}, at 93-94. However, \textit{adat}, as applied, appears to reverse the polarity of \textit{akal} and \textit{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. Men are seen as less reliable: many men are unfaithful and entrapped
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. Malaysian Islam invested men with the guardianship of women.\(^{397}\) Under Islam masculinity was defined by a duty to preparation male children for their roles, control the sexuality of wives and daughters, and provide economic support for the family.\(^{398}\) Under *adat*, women had the rights to authority over children, but under Islam, men have rights to authority over children.\(^{399}\) The *adat* norm balanced out Islam’s phallocentric approach and produced a rough balance in power between male and female, or at least a rough split of available communal authority.

The resurgence of fundamentalist Islam overturned that balance. Fundamentalism in Malaysia sacrificed ancient *adat* and its relationship to traditional ethnic forms of Islamic expression, for a harsher and more internationalized form of Islam. The turn to fundamentalism had as a large component an insistence, framed in the language of a universalist Islam, that men should have total control over women, even as it meant

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by gambling, alcoholism, and credit debt. *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. Ong’s discussion of marriage is instructive. The groom had to receive permission from the brides mother to marry the bride, and later moved into mothers household. If the bride died, the groom would have to ask the bride’s mother to remain in the household. The father's of the couple to be married played a symbolic role. They sealed the documents that consummated the marriage, but they did not take any part in the decision making process. See Ong, *supra* note –, at –.

\(^{397}\) Ong, *supra* note –, at –.

\(^{398}\) Ong, *supra* note –, at –.

\(^{399}\) Ong, *supra* note –, at –.
abandoning Malay (Islamic)customary practice. 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. This 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.”

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 more far reaching ways.

400 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. This 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.”


402 See, e.g., 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 167-178 (Aihwa Ong and Michael G. Peletz, eds., University of California Press, Berkeley, 1995) (“The use of foreign Islamic practices to validate increased male authority over women was evident in the middle class milieu.” Id., at 177).

403 Ironically, Mahatir’s New Economic Policy also reflected a reaction to traditional Malay notions of the human character, and in particular the tendency of Malay communities to embrace amok at times of stress when traditional methods of reducing strife failed. Amok refers to an explosion of emotion or violence on an individual or communal level when inner repression required by adat or life circumstances created an inner crisis requiring release. See R. Winzeler, Amok: Historical, Psychological and Cultural Perspectives, in EMOTIONS OF CULTURE: A MALAY PERSPECTIVE (Singapore, Oxford University Press, 1990). Ong notes the ties between the fundamentalist parties in Malaysia and the Middle east. See Aihwa Ong, State versus Islam: Malay Families, Women’s Bodies, and the Body Politic in Malaysia, in...
thus deployed against what was seen as a totalitarian and secular tendency on the part of the government meant to eradicate traditional systems.\textsuperscript{404} In this sense, the Malaysian example followed a pattern that on its surface at least had parallels to events in Eastern Europe on the eve of its liberation from Soviet domination.\textsuperscript{405} Second, Islam provided a means of resisting the economic changes brought about by migration urbanization which appeared to threaten the traditional forms of family structure and power sharing between the sexes.\textsuperscript{406} Mahatir represented a champion of those state policies represented by the

\textbf{Bewitching Women, Pious Men: Gender and Body Politics in Southeast Asia} 174-78 (Aihwa Ong and Michael G. Peletz, eds., University of California Press, Berkeley, 1995). Hilley well describes the effect of English education, that is education abroad in England, on the formation of fundamentalist Islamic sentiment amongst the young of the Malay elite, an education ironically sponsored by NEP policies.\textsuperscript{404} JOHN HILLEY, MALAYSIA: MAHATIRISM, HEGEMONY AND THE NEW OPPOSITION 184-185 (2001). 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.’” Id., at 185 (2001) (quoting in pat, ZAINAH ANWAR, ISLAMIC REVIVALISM IN MALAYSIA: DAKWAH AMONG THE STUDENTS 30 (1987)).

\textsuperscript{404} 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 states 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. Wage employment also challenged men’s sexual authority and economic ability to raise children. Malays viewed family planning as a threat to national survival of the Malay race. \textit{Asee Ong, supra, note —, at 169-170).}

\textsuperscript{405} There is something of an analogy between the use of religion, in this case Islam, to contest governmental power, and the ideology in which it was grounded, in Malaysia, and a similar use of Catholicism in Poland in the 1970s and 1980s to resist the Soviet controlled Polish state apparatus. For a discussion of the deployment of religion in Poland, see, e.g., ADAM PIEKARSKI, FREEDOM OF CONSCIENCE AND RELIGION IN POLAND (Warsaw, Interpress Publishers, 1979); CITÉ. For a discussion of John Paul II’s conscious intensification of the religious challenge to Socialist Poland, see GEORGE WEIGEL, WITNESS TO HOPE: THE BIOGRAPHY OF POPE JOHN PAUL II 291-325(1999).

\textsuperscript{406} As part of the NEP, the government allowed deployment of female labor in free trade zones. Malay youths, whose parents grew up in rural society, were transplanted into a wider, urban, diversified society. Women began working in labor intensive industry. Mothers collected wages from their daughters to support households; men were embarrassed by this reliance on their daughters. In the
new society, women competed with men and acquired experience once reserved to men. Young women chose their own husbands and experimented with interracial dating. The new Malay society depended on the state and on the free market, not on the previous generation. See, Ong, supra note 171-172. Japanese industries stressed a patrilineal “family welfare” model, but women refused to recognize managers in place of their parents. 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 at threat. Id., at 172-174. Moreover, as a result of the NEP, significant incentives were created that resulted in large migrations of ethnic Malays moved from rural to urban areas. One of the consequences of this migration was that class differentiation amongst ethnic Malays increased. Id., at 167-168. First, the government promoted capitalist development and migration of workers. Commercial farming enriched some while impoverishing others. Youth, men and women, went to schools and found urban jobs. Id., at 168-169.

407 For a defense of the NEP by Mahatir, see, MAHATHIR BIN MOHAMMAD, THE WAY FORWARD 8-18 (1998). Essentially, Mahatir argued that The NEP had two goals: “the eradication of poverty irrespective of race”, and “the elimination of the identification of race with economic function”. Essentially, the government wanted to even the fortunes of the ethnic groups of Malaysia by creating new wealth and distributing it to ethnic Malays. Ethnic Malays, or bumiputeras, were an agriculturally based group and were historically poor. The Chinese and the Indians were urban based groups that generated much more income. By adding to the income of the poorer Malays, the NEP would diminish the economic disparities amongst ethnic groups. Id., at 8-9. In implementing the NEP, the government needed to restructure society in an equitable and just way. The NEP was a form of affirmative action. Communism and socialism were inappropriate for Malaysia because they do not work. The NEP would empower bumiputeras through education, and then enrich bumiputeras through distribution of business opportunities. Id., at 9-18.

408 See ANWAR IBRAHIM, ASIAN RENAISSANCE (Times Books Int’l, 1996). & QUOTE.

The penetrative acts of government – gendered male – to deploy a sexualized Islam in the disciplining sexually disordered males to restore traditional social gender order – is not unique to Malaysia and the Anwar Ibrahim trial in this region.\footnote{410} 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 Ibrahim. The Malaysian government went out of its way to conflate the two. 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 this type of man faces ruin.

As a subtext, ethnic divisions play out in the Anwar trial. Mahathir was committed to policing an understanding between Malay indigenous people, and the ethnic Chinese and South Asian communities.\footnote{411} Anwar would have attacked directly the corruption and

\footnote{410} 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.” \textit{AMNESTY INTERNATIONAL PUBLICATIONS, CRIMES OF HATE, CONSPIRACY OF SILENCE: TORTURE AND ILL-TREATMENT BASED ON SEXUAL IDENTITY} 47 (2001). “This attack took place in the context of an increased number of attacks by radical Muslim groups against a range of targets which included bars and discotheques, as well as events such as the . . . conference.” \textit{Id.} The Indonesian government did little. After questioning around 57 individuals, the government refused to press charges against anyone. \textit{Id.}

\footnote{411} For a discussion of the most significant source of ethnic division, that between Islamic ethnic Malay communities and Confucian overseas Chinese, see LUCIEN W. PYE, ASIAN POWER AND POLITICS: THE CULTURAL DIMENSIONS OF AUTHORITY 248-62 (Harvard University Press, Cambridge Mass., 1985). \textit{See also} SHARIFAH SHUANA AHMAD, MALAYSIAN LEGAL SYSTEM 1-14 (Malayan Law Journal Sdn Bhd, Kuala Lumpur, 1999) (on the immigration of Chinese and South Asians to Malaysia through the end of the English colonization). 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. \textit{Id.}, at 50-51.
cronyism of the bumiputeras. The consequence might well have been to destabilize the fragile ethnic peace, and more important, directly attack Mahathir’s political power base. Closer to home, the attack on corruption by Anwar might have threatened Mahathir’s control over the ruling party by exposing the extent of nepotism within the administration. From his jail cell, Anwar wrote a letter in 1998 that suggested that he had information regarding Mahathir’s own cronyism and nepotism. In a sense, then, Anwar’s

Mahathir was very sensitive to these divisions, as well as their exploitability. See MAHATHIR BIN MOHAMMAD, THE WAY FORWARD (1998). Prime Minister Mahathir provides a useful but biased look at the New Economic Policy (NEP), a governmental program of affirmative action instituted in the 1970’s and 1980’s and at privatization of state owned corporations in the 1980’s and 1990’s. He argues that these programs were designed to stabilize ethnic tension that resulted from colonization and unequal distribution of wealth between ethnic groups. The NEP and privatization created new wealth and distributed the wealth to ethnic-Malays, or bumiputeras. Id., at –. For a discussion of the origins of multi-ethnic settlement in Malaysia, see SHARIFAH SHUANA AHMAD, MALAYSIAN LEGAL SYSTEM 1-15 (Malayan Law Journal Sdn Bhd, Kuala Lumpur) 1999.

He argues that Asian nations must capitalize on economic success by building strong social institutions, democratic governments, and developing a shared culture based on universal, moral and religious principles. In addition he asks the West to cooperate with Asian nations and find universal principles which aid globalization of political, economic and social ideals. See ANWAR IBRAHIM, ASIAN RENAISSANCE (Times Books Int’l, 1996).

Ironically, some scholars have suggested that Anwar owed his quick rise in UMNO politics not only to the patronage of Mahatir, but also to the “support that Anwar enjoyed from this generally younger generation of corporate-cum-political figures.” EDMUND TERENCE GOMEZ AND K.S. JOMO, MALAYSIA’S POLITICAL ECONOMY: POLITICS, PATRONAGE AND PROFITS 125 (1997). What appears to emerge in the 1990s is a fight, to some extent between the older generation of politically connected bumiputeras, who with Mahatir’s help continued to control the Malay corporate world, and a younger generation eager for its own slice of the Malay economic pie. See id., at 125-126.

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.
sexualized purge was about anything but gender, but gender intensified, in the sense of cultural understanding, the nature and importance of the fall from power.\footnote{415}

Ironically, Anwar’s 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 claim that sodomy laws are 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.\footnote{416} 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.\footnote{417} Sex, post-colonialism and Anwar were conflated by Mahathir in the course of reacting to the possibility of the ordination of gay ministers in England. Mahathir said he would expel gay British ministers from Malaysia if they ‘come here with their gay boyfriends.’ Mahathir said,


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\textbf{415} 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. \textit{Peletz}, supra note – at 111-113.
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\textbf{417} On the way in which cultural Islam could be positioned for this use of post-colonial discourse to resist foreign mores, see, Joseph Massad, \textit{Re-Orienting Desire: The Gay International and the Arab World, 14.2 PUBLIC CULTURE 361 (2002)} (suggesting that when gay rights activists and theorists attempt to transplant westernized gay rights into Arab culture, Arabs ignore evidence of historical same-sex relations in their culture and imply that gayness is a western trait. The effect is that Arab same-sex relations are now viewed as a product of the imposition of western values.). Massad describes how, during an Egyptian case against homosexuals, “the prosecution frequently referenced the Gay International’s campaign, pledged to defend the “manhood” of Egypt against attempts to “violate” it, and wondered what would become of a nation who sits by idly as its “men become like its women” through “deviance”. \textit{Id.}, at 379-382.
\end{quote}
“The British people accept homosexual ministers but if they ever come here bringing their boyfriend along, we will throw them out.” Mahathir talked about Anwar and said, “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.”

In Malaysia, then, the sexual becomes the political. The political is both gendered and enforced through the institutions of a legal system that appears neutral. The effect is similar to those achieved through medicine in the United States, and 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 of the techniques of gender conformity through the examples of the three narratives.

D. Similarities and Differences: A First Slice.

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.” 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

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418 Nicholas Watt, Malaysian PM rebuked for threat to gay ministers, GUARDIAN UNLIMITED, Nov. 2, 2001, at: http://www.guardian.co.uk/Archive/Article/0,4273,4290310,00.html.

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.”

Each person is thus “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.” 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 “law, like politics, and the constitution of states, exists simultaneously as fabricated for public consumption, and as arranged for private advancement.” Indeed, law is deployed, in each of these narratives, to successfully obscure 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 . . . .”

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

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421 Lama Abu-Odeh, *Post-Colonial Feminism and the Veil: Considering the Differences*, 26 NEW ENG. L. REV. 1527, 1529 (1992). The gendered reconstruction of female bodies in terms of deviations (or affinities) to the male is more pronounced in the case of infertility. In Egypt, for example, “a woman without children feels, and is viewed as, less than a normal female -- a “pseudo-male,” who is more masculine than feminine by virtue of her uncooperative reproductive organs. In addition to her ambiguous sexual identity, the infertile woman’s gender identity is marred, for, without claims to motherhood, she can never be viewed as a complete woman, who has fulfilled her God-given adult role in life.” MARCIA C. INHORN, *INFERTILITY AND PATRIARCHY: THE CULTURAL POLITICS OF GENDER AND FAMILY LIFE IN EGYPT* 10 (University of Pennsylvania Press, 1996).


trans-national even if the peculiarities of the meaning of maleness is 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 a 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 Jonathon 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 is 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.\(^{424}\) In Malaysia, on the other hand, post colonialism is a device 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

\(^{424}\) In addition to the sources cited above, see notes --, supra, see Margaret Aarmo, *How Homosexuality Became “Un-African”: The Case of Zimbabwe*, in *FEMALE DESIRES: SAME SEX RELATIONS AND TRANSGENDER PRACTICES ACROSS CULTURE*, (Evelyn Blackwood & Saskia Wieringa, eds., Columbia University Press, New York, 1999).
West) and embraced as a source of salvation (Arabic Islam).\footnote{In addition to sources previously cited, see notes ----, supra, see Merete Lie and Ragnhild Lund, \textit{What is she up to? : Changing Identities and Values among Women Workers in Malaysia}, in \textit{GENDER AND CHANGE IN DEVELOPING COUNTRIES} (Kristi Ann Stolen and Mariken Vaa, eds., Norwegian Univ. Press, 1991).} Gender, those provides an intersection with gender that does not necessarily and predictably always cut in the same direction. Globalization on Islamic terms avoids the post-colonial condemnation as other forms of globalism do not. 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, and easy to implement, and more difficult to confront. Thus, gender neutrality is subverted indirectly within political structures which in Malaysia privileges religion, in Zimbabwe privilege pre-colonial and ethnic traditions, and in the United States privileges both science and religion. The extent to which generalizations are both possible and useful are explored in the next section.

\section*{III. SIMILARITIES WITHIN DIFFERENCE:
A COMMON CULTURAL MASculINITY}

Let us assume that gender is constructed and regulated within three related spheres – a purely female space, a purely male space and a public space shared by men and women. In socio-political systems based on patriarchy, maleness serves as the basis of social ordering – the regulation of maleness also serves as the basis for regulating behavior in the space shared by men and women. Moreover, as feminist scholarship has well
demonstrated, maleness both shapes the definition of the female and contributes to its devaluation relative to the male.\textsuperscript{426} In overcoming patriarchy as the ordering system of social organization, feminists have tended to concentrate on the interrogation and liberation of the female and male-female shared spaces.

Male space is treated as a largely as monolithic space. Male space is assumed to react and change as the rules of shared space is renegotiated and as females take control of their own space. What men do to themselves is, therefore, a matter of incidental concern – to women. Yet, the construction of maleness, and the regulatory devices, the tools for the discipline of gender based on male normality remain sourced and reinforced within the social space left to and for males.\textsuperscript{427} The normative system of maleness thus maintained within male space continues to shape maleness. Maleness thus conceived informs male approaches to the regulation of the space shared with females, and may influence the construction of the female, even within female space.

From the perspective of semiotics, the importance of male/female and shared spaces becomes more clear. Male and female serve as the basic ordering point for codes.\textsuperscript{428} Codes in this sense provide the rules which generate meaning to words and actions.

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\textsuperscript{426} See, e.g., \textit{Catharine MacKinnon, Feminism Unmodified} (1987)
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\textsuperscript{428} Umberto Eco speaks of codes in a useful manner for my purposes:
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One can maintain that it is not true that a code organizes signs; it is more correct to say that codes provide the rules which \textit{generate} signs as concrete occurrences in communicative intercourse. Therefore, the classical notion of ‘signs’ \textit{dissolves} itself into a highly complex network of changing relationships.

Codes generate expectations that words and actions will follow certain forms – will be sent by one party and received by another – in a set and pre-arranged manner. The words and actions themselves dissolve complex patterns of meaning dependant on the expectations of sender and receiver. They function as “the provisional result of coding rules which establish transitory correlations of elements.” An exploration of this male space is therefore both useful and necessary to understand the persistence of the male centered conduct hierarchies that seem to be so difficult to eliminate in those spaces shared by men and women.

Examined from this perspective, the subversion of the foundations of masculinity, which appears to proceed apace, may in turn be subject to subversion. Much is made of the successes of the feminist project of dismantling the formal structures of patriarchal socio-political organization. The focus of this formal subversion of masculinity, however, tends to be limited to those socio-cultural spaces shared between men and women. An increasing acceptance of the idea of the formal equality of the sexes, as well as of the

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429 Id.


formal recognition of differences between males and females\textsuperscript{432} has profoundly influenced the development of local\textsuperscript{433}, foreign\textsuperscript{434} and international\textsuperscript{435} law. Despite its formal success, the formal structures of masculinity continue to produce disparities between men and women within their shared socio-cultural, political and legal space.

\textsuperscript{432} The most influential work in this vein has been CAROL GILLIGAN, \textit{IN A DIFFERENT VOICE} (1982) which served as a foundational text for the cultural feminism of the 1980s and 1990s. Cultural feminism focused on those characteristics essential to females, making a virtue of a vice, and challenging legal and social impediments to the valuation of the distinctively female in our culture. While this work ranged across the legal field, CITE MENKLE-MEADOW ARBITRATION, it was especially important with respect to legal norm structures affecting women – family law and welfare. See, e.g., LENORE J. WEITZMAN, \textit{THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA} (1985); CITE MARTHA FINEMAN RE MOTHER CHILD DYAD. For a critique of the cultural feminist approach, at least as developed or deployed against women, see, e.g., DIANA FUSS, \textit{ESSENTIALLY SPEAKING: FEMINISM, NATURE AND DIFFERENCE} (1989).


\textsuperscript{434} Most post-World War II constitutions now expressly provide for equality between the sexes. The Japanese Constitution provides that “All of the people are equal under the law and there shall be no discrimination in political, economic, or social relations because of race, creed, sex, social status or family origin.” Kempç, Ch. III, Art. 14. The constitution of the German Federal Republic provides that “(1) all persons are equal before the law. (2) Men and women shall have equal rights. (3) No one may be disadvantaged or favored because of his sex, his parentage, his race, his language, his homeland and origin, his faith, or his religious or political opinions.” GG Sec. I, Art. 3. Supra-national organizations have also embraced this principle as a formal normative statement of the organization of society. See, e.g., Charter of Fundamental Rights of the European Union, Official Journal of the European Community (2000/c, 364/01), Articles 20, 21, 23 (stating that everyone is equal before the law; prohibiting discrimination based on sex; and declaring equality of man and woman); Convention for the Protection of Human Rights and Fundamental Freedoms, Article 14, \textit{available at} http://www1.umn.edu/humanarts/instree/z17euroco.html (“The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any grounds such as sex, race, colour, language, religion, political or other opinion, national or social origin with a national minority, property, birth, or other status.”)

\textsuperscript{435} Gender equality has become a part of international treaties and conventions. See, e.g., \textit{See e.g.}, Convention for the Protection of Human Rights and Fundamental Freedoms, Article 14, \textit{available at} http://www1.umn.edu/humanarts/instree/z17euroco.html (Last visited March 12, 2004).
Critics of the traditional approaches to sexual justice have sought to draw more attention to the interior spaces of sex. Within feminism, the great debates about pornography, which exploded into academic and political consciousness in the early 1990s, provided a focus for explorations of that interior space by women which has become an important element of feminist discourse. Feminist confrontations with motherhood have provided another focus. In the case of motherhood, in particular, feminists have focused within female space to explore intersections between gender, class, race, and ethnicity. Feminist confrontations with essentialism has become a significant element of feminist examination of gender oppression. “Exploring, pursuing, and accepting differences among women and differences among sexual practices is necessary to challenge the oppression of women by sex. Only when sex means more than male or female, only when the word ‘woman’ cannot be coherently understood, will oppression by sex be fatally undermined.” The interior space of women, and the relationship between those interior spaces and the space shared between men and women, remains a fertile field of study.

Like the internal space of the female, the internal space of the male remains


essentially a problematic area. Traditionally, the regulation and study of that space tends to fall, by default, to men, for men.\footnote{For a sampling of the more pronounced recent writing in this context, see, e.g., \textsc{James Dobson}, \textit{Bringing Up Boys: Practical Advice and Encouragement for Those Shaping the Next Generation of Men} (2001) (a guidebook for protecting boys from the feminist assault on maleness); \textsc{Geoff Dench}, \textit{Transforming Men: Changing Patterns of Dependency and Dominance in Gender Relations} (1996) (men have no place within feminism if they mean to keep their gender values intact). \textit{See generally} \textsc{Allan G. Johnson}, \textit{The Gender Knot: Unraveling our Patriarchal Legacy} (1997).} This division parallels the way in which the interior space of the female remains the province of women, even in feminist and progressive environments.\footnote{But even maleness theorists sympathetic to the feminist project maintain that male space can only be regulated – or changed – by males. For example, \textsc{Michael Kimmel}, in his cultural study of American masculinity, suggests that men cannot obtain a new manhood by joining feminists or other formally excluded groups. Men must combine old qualities, “strength, a sense of purpose, a commitment to act ethically, controlled aggressiveness, self-reliance, dependability”, with new qualities, “compassion, nurturing, and a fierce egalitarianism”, to define a new manhood. \textsc{Michael Kimmel}, \textit{Manhood in America: A Cultural History} 331-335 (New York: The Free Press, 1996).} This male space has been shrouded in indifference. It has tended to be caricatured and essentialized as a monolithic bundle of characteristics women must overcome.\footnote{\textit{See Catharine Stimpson, Where the Meanings Are: Feminism and Cultural Spaces} (New York: Methuen 1988) (nature and importance of female space within cultural studies); \textsc{Richard Delgado}, \textit{Rodrigo’s Sixth Chronicle: Intersections, Essences, and the Dilemma of Social Reform}, \textit{in Critical Race Theory} at 243-46 (Richard Delgado, ed., Philadelphia: Temple Univ. Press, 1995 (1993)) (privileging of authority within female gendered spaces to women).} And for the purpose of exposing, of interrogating the complex of behavior roles and expectations labeled female, that exercise has been useful.\footnote{\textit{Cf. Carl Stychnin, A Nation by Rights: National Cultures, Sexual Identity Politics, and The Discourse of Rights} (Philadelphia: Temple University Press, 1998).}

But, assuming the complex of behavior roles and expectations labeled male as the social standard, then male space, as such, becomes important in its own right. And the contours of that space may be most clearly seen in the way men are regulated within male
space to conform to male gender ideals. As Michael Kimmel noted in his important work on the culture of masculinity in the United States – “In large part, it’s other men who are important to American men; American men define their masculinity, not as much in relation to women, but in relation to each other. Masculinity is largely a homosocial enactment.”

At a great level of generality, the fates of the American Taliban, Canaan Banana and Anwar Ibrahim all appear to evidence both the variety of mechanisms used to discipline disordered males and the singularity with which lawlessness is gendered and deviant males are thus sexualized. Gender thus 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. In each case, a specific set of conduct norms serves simultaneously as the basis of

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individual self-conceptualization, of individual relations with others (sexual and non-sexual), and 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 is invoked to similar effect. In every case, but following very different legal paths, social or political deviance is analogized to the sexual, or sexualized, to produce a double deviance.

An important foundation for this analysis is provided by the insights derived by Cynthia Herrup in her study of the sex scandal which led to the beheading of the 2nd Earl of Castlehaven for abetting the rape of his wife and for sodomizing his servants. The 2nd Earl was denounced by his son, who said he feared for his inheritance. The case came to the attention of Charles I. This monarch, in the face of rising Puritan sentiment, was seeking to impose a more sober reputation on his Court, and thus distinguish it from that of the more notoriously frolicsome Court of his father, James I (VI of Scotland and the son of Mary Queen of Scots). In the complaint against the 2nd Earl, the King might well have thought to have found a vehicle for cementing his reputation for morality, and thus distance the monarchy from its reputation for immorality earned during the reign of his

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571, 584-586 (1977) (defining the fetishism of commodities).


446 Id. at 18, 38-42, 47, 66, 76, and 82.

447 HERRUP, supra note –, at 20.
The 2nd Earl was eventually tried. The case caused a sensation. Though condemned to death and ultimately executed, the aristocracy split on the issue of guilt. Ironically, neither the 2nd Earl’s widow, nor his children, profited from the affair – their reputations were ruined. Indeed, the social consequences of the trial and its aftermath, rather than the particulars of proof, seem to have had the greatest importance after the fact. The trial and execution of the 2nd Earl served as a sort of morality fable – a cautionary tale – on the consequences of violations of social, economic and cultural taboos. The trial and execution of the 2nd Earl also clearly showed, for those willing to see, the ways in which such taboos were sexualized tightly bound up with gender and thus sexualized.

Herrup, in opening a window onto the gendered policing of the political and social order in 17th century England, correctly suggests that “[s]ex and gender often provide the issues around which people learn about mastery and its abuse and about privileges and their obligations; what we see in parliaments and in courts and in palaces as political behaviour is typically learned in more intimate situations.” The resulting social matrix conflates sex, gender, social and political roles. “The gendered identity of individuals shapes those gendered institutions, and the gendered institutions express and reproduce the inequalities that compose gender identity.” Infractions of the rules at any point in

448  Id., at 20-21.

449  Id. at 57-58, 92-93.

450  Id., at 87.

451  Id., at 110-114.


the matrix reverberates throughout the system of social, political, gender and sexual relationships. Sodomy was a symptom of moral corruption. This corruption was disruptive to the social order.454

Like rape, sodomy threatened not only the individual, but also those around him; it was an act of corruption as well as of desire. . . . Sodomy, like rape, seemed the perversion of the most sacred of positive relationships; the one a cruel parody of marriage, the other a crude degeneration of mastery and male friendship. But rape undermined a trust between men and women that most people saw as intrinsically delicate; sodomy, by weakening homosocial bonds in a society where so much of public life relied on male clientage and male patronage, more directly attacked the sinews of community.455

Herrup thus posits a series of interrelationships through which the political organs of the social order can enforce social and political hierarchies through the labyrinth of regulation of the most intimate of personal sex and gender rules. "The trial dramatically illustrates the ending need of early modern rulers to reiterate the organizing social principles of early modern English life: manhood, hierarchy, and English Protestantism."456

The larger dimensions of the case were not lost on the English. Castlehaven’s case was reused in the early 1700’s.457 Sodomy was associated with Catholics, foreigners, and


456  Id., at 147.

457  See HERRUP, at 132-137.
Contagion.\textsuperscript{458} Castlehaven, himself, was used as an example of the extent to which sodomy can corrupt an entire household, leading to general familial, and thus social, disorder.\textsuperscript{459} But the example of Castlehaven was focused not on the sodomy as a technical violation of law, but sodomy as a natural result, and as a high form, of the moral and physical corruption flowing from the abandonment of those characteristics gendered male. These characteristics were, in the language of the times, grounded in God, gender, status, and country.\textsuperscript{460} Effeminacy thus understood, served much larger social ends as charges introduced against Castlehaven in The Trial and Condemnation and reiterated in The Case of Sodomy.\textsuperscript{461}

The narrative of the Earl of Castlehaven runs most clearly through the trail and conviction of Anwar Ibrahim. Indeed, the construction of Anwar’s disorder appeared closer to the socio-legal understanding of effeminacy than that of the Earl himself. But unlike the Earl, Anwar has unmasked the charges. Like the trial of Anwar, the trial of Canaan Banana conflates effeminacy, corruption, and threats to the state and the stability of the social order. As in Anwar’s case, the conflation intended by the sodomy charge is efficient. The American cases seem to present something of an anomaly. But on closer

\textsuperscript{458} HERRUP, at 133. Ironically, Catholics, looked on increasingly as tools of a foreign power – the Holy See, tended to counteract on the same grounds as those used against them. It was not uncommon at the time for Catholics to argue that sodomy was a direct result of the abandonment of the true faith and the embrace of a schismatic and heretical Protestantism. Thus, for example, Herrup recounts the use of this argument by Father Augustine Baker, an English Catholic of some note in the early 17th century. Id., at 34. For a wealth of information about Father Baker, see, e.g., See http://www.augustine-baker.org.uk/.

\textsuperscript{459} Id., at 133. The Christian concept of sin is that society was in a constant battle with good and evil, and that if one member of society fell to contagious sin, society as a whole would be weakened. Id., at 63.

\textsuperscript{460} Id., at 68

\textsuperscript{461} Id., at 134-136.
inspection, the family resemblance is quite apparent. Sexual disorder serves to confirm the social, criminal or political disorder which is so terrible that something more than mere criminality may be needed to explain it. Atta, Lindt, and Muhammad/Malvo are not ordinary criminals – their acts exceeded expectations of garden variety evil. Sexual disorder serves to complete the picture – the sort or moral evil that each of these men represent requires a corresponding totality of sexual as well as social disorder. In scientific terms, the quality of the act required a psychiatric basis to explain the deviation from normal conduct. Sexual deviation provided that explanation. Had Herrup’s Second Earl of Castlehaven lived in our time, he might have resisted, or been explained, in different ways.462

The homologies of the sexual and social domains described in Herrup’s study of 17th century English society are mirrored in the personal, social and legal domains of late imperial China.463 In place of a complex set of gender rules implemented through a language of Christian morals and ethics, imperial China evidenced an equally complex set of gender rules implemented through a language of Confucian moral and ethical rules.464

The framework of sexual orthodoxy throughout the imperial era was an ideology of social control that linked propriety in personal relationships to political order. This linkage lies at the heart of Confucianism, which, like many moral systems, cherishes the hierarchy of the patriarchal family as a natural model for legitimate political authority.465

463 MATTHEW H. SOMMER, SEX, LAW AND SOCIETY IN LATE IMPERIAL CHINA (Stanford Univ. Press, 2000).
464 See, id., at 30-65.
465 Id., at 30.
The organizing principle of the modern Chinese state was constructed during the last imperial dynasty, the Qing. It was grounded in “gender performance, in which a uniform standard of sexual morality and criminal liability was extended across old status boundaries and all people were expected to conform to gender roles defined strictly in terms of marriage.”466 The organizing principles of gender regulation extended far beyond the domestic. The gender ordering in law targeted the peasant family as the ideal object of lawmaking.467

Within this patriarchal ordering, filial piety provided the template for hierarchy,468 and penetration the symbol of authority.469 “Penetration became both the metaphor and physical expression of gender domination.”470 It served also as a metaphor for the

466    Id., at 5.

467    See, id., at 308-310. In effect, gender rules were used as a method of democratizing and universalizing law and the relationship between individuals and the state. Thus, “the normative male householder was a penetration harassed to the social roles of husband and father, and disciplined by the filial duty to procreate and by a sober fear of community sanction and imperial authority.” Id., at 307.

468    “It may be said that the family had to be maintained so that the ancestors could be sacrificed to. Ancestor worship was then the first and last purpose of marriage. It is therefore not difficult to understand why a bachelor or a married man without a son was considered unfilial.” T’UNG-TSU CH’Ü, LAW AND SOCIETY IN TRADITIONAL CHINA 91 (Paris: Mouton & Co., 1965), quoted in MATTHEW H. SOMMER, SEX, LAW AND SOCIETY IN LATE IMPERIAL CHINA 30-31 (Stanford Univ. Press, 2000).

469    “In the proper order of things, as seen by High Qing jurists, this act [of penetration] took place only within marriage. The husband and master penetrated his wife: by doing so he reproduced the patriarchal household and reinforced the axis of gender hierarchy at its heart. . . . This vision of penetration as initiation, possession, or pollution informed both the popular perception and the judicial construction of anal intercourse between males. For males, too, penetration positioned both roles on a hierarchy; the penetrated suffered a loss interpreted as an inversion or degradation of masculinity. The penetration suffered no such loss, as he played the definitively masculine role.” MATTHEW H. SOMMER, SEX, LAW AND SOCIETY IN LATE IMPERIAL CHINA 162-163 (Stanford Univ. Press, 2000).

470    Id., at 162.
relationship between the individual and the state. And it was centered on the male – protecting both the chastity of women and of vulnerable males from rogue males threatening the organization and hierarchy of the household, and thus the organization and stability of the state. “Sex between women was simply not constructed as a crime. This interpretation makes sense, given the phallocentrism of both law and social norms: if gender and power were keyed to a hierarchy of phallic penetration, then sex without a phallus would seem to undermine neither.”  

The rogue male, the male who would engage in penetrative acts out of place, posed a grave danger not only to the family, and its gendered component parts, but also to the state. For the rogue irregularly gendered male, the state reserved its greatest punishments for the good order of the state.

The relationship between Muhammad and Malvo, its hierarchy and its sexualization, echo the sexualized hierarchy imprinted onto traditional Chinese state culture. Mohammad and Malvo present the classic rogue males - a danger to the state and to society. Sexual disordering – especially a disordering that crosses generational boundaries, upsets not only the sexual but the familial ordering. There is a whiff of ultra-deviance here - the father figure and the sexualized ‘son.’ The state reserved its highest punishment for the rogue. Malvo was spared, to some extent, for having distanced himself from the excesses of sexual disorder. To some extent, the American Taliban is also a tale of familial disorder with significant ramifications on the good order of the state, and on the stability of the social order. In Canaan Banana and Anwar Ibrahim the

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472 See discussion, supra at Part I.A.3 and notes –.

473 See discussion, supra at Part I.A.2 and notes –.
state and the personal are conflated, and the crime thus intensified. The former, a
President of the Republic, the later, a Deputy Prime Minister on the cusp of ascending to
the office of Prime Minister, each, in a sense represented the state. Their personal disorder
was a necessary predicate of their political fall. For both, the touchstone is effeminacy –
turning a gendered hierarchy of values, the good order of the state, and appropriate
personal roles – upside down.\textsuperscript{474}

Sommer demonstrates both the utility and malleability of the gender rules
providing the organizing principles of society. In imperial China, gender role expectations
changed dramatically during the last imperial dynasty from status based performance to
a purely gender based one, reflecting in part changes in the social and economic character
of Chinese society, the decline in importance of the old aristocracy and the rise of a
dominant peasantry.\textsuperscript{475} Michael Kimmel provides an analogous insight with respect to the
culture of masculinity in the United States.\textsuperscript{476}

Kimmel posits that throughout American history, men attempted to prove
masculinity and in a quest for manhood, but the definition of manhood keeps changing.\textsuperscript{477}
Feminist studies of masculinity and manhood fail to give insight into a male perspective
of how masculinity affects men.\textsuperscript{478} Homosociality is the process where men constantly try

\textsuperscript{474} See discussion, supra, at Part I.B. and I.C., and notes –.

\textsuperscript{475} MATTHEW H. SOMMER, SEX, LAW AND SOCIETY IN LATE IMPERIAL CHINA 5-12 (Stanford
Univ. Press, 2000).

\textsuperscript{476} See MICHAEL KIMMEL, THE GENDERED SOCIETY (Oxford Univ. Press, 2000); MICHAEL
KIMMEL, MANHOOD IN AMERICA: A CULTURAL HISTORY (Free Press, 1996).

\textsuperscript{477} MICHAEL KIMMEL, MANHOOD IN AMERICA: A CULTURAL HISTORY 4-5 (Free Press, 1996).

\textsuperscript{478} Id., at 6.
to prove their manhood in the eyes of other men.\textsuperscript{479} Three dominant patterns exist within American manhood; men exercise self-control, men project their fears onto others, and men attempt to escape from reality.\textsuperscript{480} From the self-made man as male gender model,\textsuperscript{481} the American male entered into a crisis stage of sorts in the 20th century, during which male appropriate behavior complexes shifted from wealth making, to a hyperattention to male behaviors within and outside the family, all with an eye to distinguishing that conduct cluster from those defining ‘female’ behavior expectations.\textsuperscript{482} Maleness, and the conduct it engendered, those proved malleable in its particulars but otherwise quite stable.\textsuperscript{483} Crisis came at the end of the last century, as challenges to male dominance conduct became increasingly the object of challenge. Early in the 1960’s, Betty Friedan and Arthur Schlesinger, Jr. pointed out that men were uncertain about their masculinity, and that the ideal manhood guaranteed by the duel father/breadwinner role was not attainable.\textsuperscript{484} Women, race and ethnic minorities, sexual minorities, and youth campaigned for equal rights and recognition.\textsuperscript{485} White middle class men countered by asking for their own liberation.\textsuperscript{486} These stresses have left masculinity, as a stable system of behavior expectations in crisis. And one of the results has been the creation of a culture

\textsuperscript{479} Id., at 7.
\textsuperscript{480} Id., at 9.
\textsuperscript{481} Id., at chapters 1-2.
\textsuperscript{482} Id., at chapters 3-6.
\textsuperscript{483} Id., chapters 6-7.
\textsuperscript{484} Id., at 261-262.
\textsuperscript{485} Id., at 262-263.
\textsuperscript{486} Id., at 263-264.
of masculine hypersensitivity to emasculation.487

Kimmel concludes by suggesting that the American male search for a stable system of gender meaning has failed. Strategies of exclusion, escape, and self-control have not allowed men to gain the mythic manhood they seek. Instead, he suggests the adoption of a different set of myths for maleness. Men must redefine their goals within societies norms. Men must seek a manhood based on inclusion of the traditional “other” and private and public commitments. However, differences between sexes cannot be ignored, rather they must be recognized. Men must combine old qualities, “strength, a sense of purpose, a commitment to act ethically, controlled aggressiveness, self-reliance, dependability”, with new qualities, “compassion, nurturing, and a fierce egalitarianism”, to define a new manhood.488

From Kimmel’s perspective, the more telling lesson to be drawn from the execution of the Earl of Castlehaven is in the relationship between the male actors in that drama – the social order reserved its highest punishment for one of its own. This is one of the lessons Michael Kimmel draws: “the relations between and among men emerge also as relations of power – power based on class, race, ethnicity, sexuality, age, and the like.”489 The world of gendered difference is best preserved through the obedience of the privileged caste, and the greatest obligation to conform to gender norms is incurred by those at the highest level of the male hierarchy.

487 “The fears of feminization—that we have lost our ability to claim our manhood in a world without fathers, without frontiers, without manly creative work—have haunted men for a century.” Id., at321.

488 Id., 331-335.

More importantly, perhaps, institutions of gender hierarchy create expectations of privilege as well. When the privileges that are meant to flow from conformity to privileged roles do not materialize, or do not materialize in expected ways, then the boundary setting of gender can break down. And the relationship between sexual and political disorder made manifest. Kimmel in this sense turns the conventional perspective upside down by suggesting that individual expectations arising from the complex matrix of sex and gender rules lead to individual social or political action.\footnote{490} The power of perceived social betrayals of gender privilege can work to turn an individual against the society or polity held responsible for the betrayal. Acts of terrorism, rebellion, or treason, thus, can be viewed as gendered acts of revenge.\footnote{491}

Kimmel provides another useful window into the the peculiar subversiveness of the narratives from the United States, Zimbabwe and Malaysia. With Kimmel another layer of meaning within the narratives is revealed – the way each demonstrates how the male body itself can also serve to discipline the female body by proxy. Sodomy, like other sex crimes, provides a formal language through which gender hierarchies are normalized and institutionalized as a means of social and political discipline.\footnote{492} It serves as an exemplar of the way the formal discourse of law is invoked to mask political struggle over the technologies of control.\footnote{493} The male body, reconstructed as sodomite or otherwise as sexually disordered, serves as the mechanism through which the physical body of the

\footnote{490} Michael Kimmel, Manhood in America: A Cultural History (Free Press, 1996).


male is punished for disordering the personal, and the male social body is disciplined against a gendered disorder in social and political action. Perversely, that mechanism simultaneously suppresses all that is gendered female. The object of the discipline, the corruption that must be excised in the male, is the female. The episodes show how it is possible to define, and confine, the female from out of the male body.

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 to be evidenced 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:

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.494

Images of the male role model, based on a contrast with a negative depiction of female characteristics thus continue to mold both the gendering of males, and the specification of appropriate behavior characteristics within the public shared space of men and women. The regulation of male self image within purely male space continues to

assert a power to discipline society and politics based on a hetero-patriarchal normative ordering. The exploration undertaken here suggests some of the ways in which the disciplining of males through enforcement of sex conduct norms reinforces differences between men directly, and thus between men and women indirectly. It also points to some of the ways in which the preservation of these differences reinforces a power that is gendered male through a matrix of sex, gender, society and politics that appears no less strong today than when first exposed by feminist theory.

In patriarchal societies the male gender role is placed superior to that of all other gender roles. This is true of societies that continue to follow the patriarch model openly, such as in Zimbabwe and Malaysia, or in countries where the patriarch model is less openly part of current society and more ingrained history, such as in the United States. When society view men who have feminine qualities as less of a man this in turn reveals how that society views the female gender role. In the various examples discussed, in which societies felt it necessary to not only punish men for wrongful acts, such as corruption and terrorism, but felt it necessary to discipline them for their gender role, either in the media or through overt court action, this reflects on the place that the society places the female gender role. Because these societies have punished or disciplined males for taking on female qualities this demonstrates that these societies view that which is female to be less important and unequal with that which is male. In this way, it becomes apparent that the second class citizen role that women have been placed in historically is alive and well in the way in which we enforce laws and certainly subconsciously through the media. In the section that follows, we will examine the role of law within the edifice of gender hierarchy and the privileging of behaviors tied to the ideal male. We will explore the manner in which law is inextricably tied to systems of idealized gender roles embraced by the societies for whose benefit the law memorializes communal preference.
IV. Masculinity and Law

Law plays one of the more important roles in each of the narratives. More particularly, law as manifested in the spectacle of criminal trials or the threat of judicial action. 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 the maintenance of viable systems of gender. Law, and especially law 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.495 That is, law serves as both an identification and memorialization, within an institutional framework, of behavior norms critical 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 becoming conscious of "what is" as opposed to a process of imposing ‘that which was not.’”496 The


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

Indeed, a great sin of modernist liberal theory is to confuse the identification of law with the creation of law. Our modernist commonplace is that courts "create" law. This lazy commonplace misunderstands the very real differences between identification and creation. Identification postulates the existence a priori of the conduct norm encompassed by judicial law-making. As such, the act of cultural production by courts is in the naming
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.”

The utility of law in this respect is not lost even on countries with little reputation for respect of the judicial function in the sense understood in the West. Thus, for example, in Cuba, “El Grupo de Gestión del Conocimiento del Ministerio de justicia que trabaja en la dirección de Informática Jurídica, fue el impulsor y gestor de éste proyecto. De la actividad de gestión de este grup, nació la idea de elaborar e implantar una novedosa modalidad de edición y publicación de las normas jurídicas cubanas utalizando las ventajas que ofrece el ciberspacio.” Judicial norms, the stories and morals spun out of the ordinary cases judged by the courts, create a body of socially useful work which constantly rearticulates and reinforces the conduct norms, behavioral expectations, of the

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of the norm identified. This identification is significant but of a vastly different order than that of the wholesale creation of law.

*Id.*, at 299.

*Id.*, at 301.

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Edel Bencomo, *Cuba: Cuba y la Publicidad normativa en la era de la Sociedad de la Información y el Conocimiento*, REVISTA DE DERECHO INFORMÁTICO (No. 22, Aug. 2003) (abstract, available at [http://www.alfa-redi.org/publicacion/publicacionactual.asp](http://www.alfa-redi.org/publicacion/publicacionactual.asp); last visited Aug. 7, 2003) (“The Development of Knowledge Working Group of the Ministry of Justice that works on issues of juridical information, was the initiator and developer of this project. From the development work of this group was born the idea of elaborating and implementing a new modality of editing and publishing Cuban juridical norms taking advantage of the advantages (in that respect) offered by the internet”).
socio-political community. Law serves as propaganda, narrative, teacher and moralist, even in totalitarian states.

The judicial also serves as an institutionally significant place for acting out the forms of discourse between the gendered individual and the state, as 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.” What is specifically acted out is law. That is, the identified and memorialized, institutionally sanctioned clusters of behaviors assigned to members of each sex. Law, as codified gender expectations, thus mirror and supplement, 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 fo 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.”

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499 “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.” Larry Catá Backer, Chroniclers in the Field of Cultural Production: Interpretive Conversations Between Courts and Culture, 20 B.C. THIRD WORLD L.J. 291, 303 (2000).


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 the American Taliban. Confused by his father’s betrayal, rebellious, undisciplined by a 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, the American Taliban’s calamity was different only in degree. It was not surprising, then, that the prosecutor and the courts, after a suitably well publicized confession and repentance, received far less than the maximum penalty which could have been assessed. On the other hand, the transgressions of Atta, and the alleged DC snipers require a sterner discipline. Federal prosecutors, worked hard to ensure this, by taking advantage of the possibilities in law to shift the trial to a jurisdiction

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503 Much of the discourse of legislative welfare reform in the 1990s, for example, was tied to notions of troubled youth – the children born of unwed young women receiving state aid who turned to lives of gang violence and the like, all of which could be ameliorated by the reconstruction of nuclear families with a traditional division of gender roles. See, e.g. CITE.


known for close adherence to the ‘old ways.’

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. 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 trail 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 magnified. The trial was theater of a sort – as effective a means of communicating norms as the posting of judicial stories on the internet. The use of law as theater is important not only in Malaysia, where it also served to reinforce religion as a mediating language of conduct, but also in the United States.


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 a-historical. It is in this sense that the three episodes belie Herrup’s suggestion that the power of the sort that could result in the beheading of a member of the English elite is deeply historical and peculiar to late pre-modern western society. It is true enough that “the meaning of rape and sodomy, and our appreciation of their origins today, is completely different from what it would have been in the seventeenth century.” But differences in detail veil the sameness of the effect of those tools of gender individual, social and political behavior. The meaning of rape and sodomy, and its connection to normative socio-political ordering has changed over the centuries in Malaysia, the United States and Zimbabwe, but rape and sodomy, however interpreted, continue to operate to order socio-political norms in each culture. 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

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509 See Michael Kimmel, Manhood in America: A Cultural History ix (Free Press, 1996). Kimmel shows how the construction of maleness has both changed, but remained the same, over the last two centuries in the United States. What is striking is not the obvious – that definitions of ‘manhood’ has changed in some respects dramatically from the 18th century to modern times, but that the fundamental need to define manhood as something unique, something not female, and to invest social and political resources to the cultivation of this vision by men and to the maintenance of this difference between men and women.
science on the other hand, in the judicial and political spheres.\footnote{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 20th century, 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).}

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 Jonathon Walker Lindh, the fact that the accusations of sexual disorder were flimsy at best make little difference to the result. In the case of Anwar Ibrahim, political and sexual corruption are conflated.\footnote{The NGO Human Rights Watch noted that: “The prosecution of Anwar has been widely viewed inside and outside of Malaysia as a case of political revenge against Anwar and his supporters, who had grown increasingly critical of Prime Minister Mahatir in the months prior to Anwar’s ouster and arrest.” Human Rights Watch, Malaysia: Anwar Verdict: “A Step Backwards,” (New York, Aug. 8, 2000), available at \url{http://www.hrw.org/press/2000/08/anwar0808.htm} (Last visited March 30, 2004).} Both are then mediated through the language of a normative superstructure provided by an inescapable Islam. In the of Jonathon Walker Lindh there appeared to be a desire to match his disordered political choices with an equally disordered set of sexual choices, however unlikely.\footnote{The newspaper reports of the American Taliban’s homosexual encounters are based on quotes from his purported lovers whose meaning is ambiguous at best. The Pakistani business man supposed 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.” Brad Hunter, American Taliban Lindh in Gay Pleasure Triangle, N.Y. Post, available at 2002 WL 100594340.. He was also characterized as jealous of Walker Lindh’s religious instructor. \textit{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.” Jose Martinez, Lindh and I Gay Lovers: A Step on the Road to Taliban, N.Y. DAILY NEWS, available at 2002 WL 24835637.} 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 for that purpose deployed his ex-wife strategically as a
spokesperson,\textsuperscript{513} and indeed turned on the gay and lesbian community of Zimbabwe in an effort to rehabilitate himself politically and socially.\textsuperscript{514}

In a large sense, then, the Earl of Castlehaven’s ghost haunts each of the episodes of modern intra-masculine punishment considered here. That ghost, in the form of an old juridical technique, is now deployed as a new technique of power – a marriage of what Foucault described as the juridical power of formal law\textsuperscript{515} and “the disciplines: an anatomo-politics of the human body.”\textsuperscript{516} In each case, the sex laws “provides an organizing principle for other fears. . . .”\textsuperscript{517} 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.”\textsuperscript{518} Each episode thus provides enriching insights, in a surprisingly trans-cultural manner, with respect to the continuing power of the disciplines of sex and gender to aid institutionalized male elites seeking to preserve their privileged place in the social and political hierarchy.


\textsuperscript{514} See James Roberts, Ex-president’s Sex Trial Grips Zimbabwe; Canaan Banana is Accused of Sodomy. Mugabe’s Rhetoric Won’t Help, INDEPENDENT (London), June 2, 1998, at Page 15, LEXIS-NEXIS Academic Universe.


\textsuperscript{517} See CYNTHIA B. HERRUP, A HOUSE OF GROSS DISORDER: Sex, Law, and the 2\textsuperscript{nd} Earl of Castlehaven 37 (1999).

The normative ideal of the sexual deviant male, in particular, 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 both within masculinity and between masculinity and femininity. 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.

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 17th and 18th century, they intensified the conflation of hierarchy built around gender rules defining the relationship of individuals to family to state. 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. The corruption inherent in deviations from

519 See discussion, supra at note —.

520 Anwar Ibrahim, himself, noted the banality of corruption within Asia, at least of the political and economic kind. “In many parts of Asia, signs of moral entropy, corruption, nepotism and other excesses abound which the elite, for reasons best known to themselves, choose to gloss over.” ANWAR IBRAHIM, THE ASIAN RENAISSANCE 39 (Times Books Int’l 1996) (see also 91-92 on corruption).

521 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.
imagined gender roles was intensified for women as well. Female equality was the work of she-males, lesbians, who sought, through the thoroughly unAfrican device of women’s equality, sought to corrupt African women with something foreign and sexually deviant. And finally, in the United States, sexualizing the crimes of the September 11 terrorists and those of the DC 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), the American Taliban (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.

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 its behavior expectations. Ruthann Robson gets to the heart of the problem:

I am profoundly troubled by our failure to interrogate adequately our quest, individually and collectively, to enter into the institution of legal marriage. By naturalizing and universalizing marriage rather than heterosexuality, I

522 Fora particularly damning indictment of this ploy, see, e.g., discussion, supra at notes 373-377.

523 Thus the tradition in the United States of conflating illness with criminal conduct discussed supra at Part II.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. For examples, see, e.g., Larry Catá Backer, Raping Sodomy and Sodomizing Rape: A Morality Tale About the Transformation of Modern Sodomy Jurisprudence, 21 AM. J. CRIM. LAW 37 (1993), 81-86.
fear we are simply in danger of replacing compulsory heterosexuality with a regime of compulsory matrimony.\footnote{524}{Ruthann Robson, \textit{Assimilation, Marriage, and Lesbian Liberation}, 75 TEMP. L. REV. 709, 819-820 (2002). For a sensitive argument centered on the domestication model and grounded in a reinterpretation (but not an abandonment) of traditional role expectations, see Carlos A. Ball, \textit{Sexual Ethics and Postmodernism in Gay Rights Philosophy}, 80 N.C. L. REV. 371 (2002).}

Indeed, the narratives have suggested how 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 finds expression.\footnote{525}{See \textit{MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE} (1991).} Professor Glendon’s argument, essentially that legal rights centered discourse hinders political debate because of a lack of focus within that discourse of a balance between rights and duties, 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 way conform in some way or other to the underlying norm system.\footnote{526}{The relationship of norm and law has always been strong, and the methodology of the (symbiotic) relationship between them well chartered. See Larry Catá Backer, \textit{Chroniclers in the Field of Cultural Production}, 20 B.C. THIRD WORLD L. J. 291 (2000).} Law becomes an intensifier of socially conceived appropriateness in individual conduct that is tied to gender role expectations. The result – 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.

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.” But once invoked – by Mahatir 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 here plays a peripheral role. It is invoked, and 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 – affect 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 with it 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 post colonial present – societal hypermasculinity. To embrace law in this context is to embrace the masculine. But at a terrible price – law’s effectiveness is based on a gender apartheid that

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mimics the cruel system of separation which provoked the long and violent attempts by African peoples to overthrow a race hierarchy bound 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 suggests the power of sexualization within legal discourse in Zimbabwe, and its limits.

In all three cases, Foucault’s understanding of the limitations of law (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, efficiency depends on unconscious deployment. The power of gender “is tolerable only on condition that it mask a substantial part of itself.”528 To believe that the simple invocation of law, will, like some sorcerer’s spell, transform the object to which the incantation is directed, is to misunderstand the significance of the meanings, in this case gender focused, encoded on law.

V. CONCLUSION

This paper attempts a preliminary investigation of the nature of the regulation of ‘manhood’ and its effects in law. It first looked behind the essentializing and decontextualizing veil of maleness to study the character of the mechanisms, the techniques, for regulating maleness. For this purpose the paper concentrated on formal legal structures, and in particular the use of formal and informal sex conduct rules –

against men. The paper also resisted the temptation to essentialize maleness, and its critique, within the American and European socio-political experience. The aim was to avoid privileging or demonizing those experiences as the normal 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 was examined from three distinct perspectives, American (and Christian), Malaysian (and Muslim) and Zimbabwean (and post-colonial). Lastly, it avoided the trap of “application,” that is of a sort of cookie cutter shoe-horning of the facts considered with one or another currently fashionable academic 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.”

The paper 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 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 standard of conduct or accept inferior treatment as a condition of acknowledging the differences between women and men.”

This paper 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 it 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

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530 Mary Joe Frug, Postmodern Legal Feminism 4 (1992). Michael Kimmel, on the other hand, has suggested that, at least in the United States, the social spaces gendered purely male and female be abandoned in favor of the construction of one non-gendered standard (drawing from the best characteristics of traditional male and female gender norms). Kimmel also suggests that women have already begun to work toward this genderless gender standard by adopting characteristics formerly reserved exclusively for males. Males in turn, Kimmel argues, must now adopt more feminine characteristics. In this way male and female can overcome the limitations of gender roles. See Michael Kimmel, The Gendered Society (Oxford Univ. Press 2000).

531 Indeed, and with some irony, it is left for women to enforce male gender roles, both on males and on females. In the case of infertility in Egypt, for example, women police other women, but also, in this way, make it extremely difficult for males to escape their own gender role expectations.

Thus, it is women -- specifically the female relatives of husbands -- who most often serve as the standard-bearers of the norms regarding motherhood and who are usually the first to castigate and stigmatize fellow women who fail to achieve "normal womanhood" by becoming mothers after marriage. Furthermore, their reasons for setting this crisis reaction in motion often revolve around protective concerns for their male relatives, whom they see as being "deprived" of their ultimate right: that of creating life, of producing living offspring, thereby demonstrating the legitimacy of their claims to patriarchal power on both a familial and societal level.

enforcing these differences, differences based on a need to distinguish male from female – more from less valued – behavior, these episodes are symptomatic of the more subtle and corroding subversiveness 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 gender law and politics.

I have painted a picture with fairly hard edges. The truth (so-called), thus revealed, 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 can consider appropriate. I have also suggested the lengths to which the power of those norms can be used to intensify characterizations of behavior as good or bad, as ordered or disordered. But in painting this picture, I am mindful of Umberto Eco’s admonition, put into the mouth of a fourteenth century monk, Adso of Melk:

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. . . .

Human organization is complex. Part is visible; part is submerged. I have pulled the

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532 Umberto Eco, The Name of the Rose (William Weaver, trans., 1983).
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. The lessons are valuable, but can provide only the beginning of a journey to understanding.