

**THE LAW AS BARD: EXTOLLING A CULTURE'S VIRTUES, EXPOSING ITS VICES, AND TELLING ITS STORY**

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I. INTRODUCTION

Before literacy rates in the English-speaking world reached their apex (and long before they dropped into the trough they are now thought to occupy), before we commoners read newspapers (and long before we wrote 'blogs), before autobiographies crowded book shelves (and long before reality television created celebrities out of rather mean raw material), our cultural forebears appointed a rather singular individual to preserve for their children a record of their values, rituals, institutions, and assumptions: the bard. The bard told stories. But the bard didn't tell just any stories. The bard told stories drawn from the fabric of which his culture consisted.

The bard's stories, while entertaining, also served a much more lasting purpose, that of teaching, and in teaching, affirming, what choices his society valued. In particular, by reading the bard's stories one can identify which virtues (always courage and love, sometimes charity and chastity) the bard's society honoured and which vices

(always cowardice and cruelty, sometimes intemperance) it condemned. The bard extracted from his culture's fabric samples representative of the whole. In short, the bard reinforced for his contemporaries and identified for his successors what choices and cultural commitments his society considered right and good.

Today the bard lives on as a movie screenplay writer. The historian Paul Johnson has observed that from early in the life of Hollywood,

movies stressed patriotism, loyalty, truth-telling, family life, the importance and sanctity of religion, courage, fidelity, crime-does-not-pay, and the rewards of virtue. They also underpinned democracy, Republicanism, the rule of law, and social justice. Their presentation of American life was in all essentials the same as [the American illustrator] Norman Rockwell's *Post* covers. And the homogenizing effect, the encouragement to accept all-American norms, was far more successful than the crude social engineering of

the Red Scare and Prohibition.<sup>1</sup>

A society's laws function in much the same ways. The law contains a narrative, which has two aspects, (1) preservation of an account of human choices and cultural commitments, which reflects the culture's values and (2) instruction that informs and shapes future choices. In other words, the law's narrative preserves samples of a cultural fabric for the benefit of contemporary and future generations, and in turn teaches which individual and cultural choices are just.

The preservation function of the legal narrative is most easily discerned in judicial decisions, in which courts tell stories about particular human choices, which are meant to be representative of the choices participants in a culture make generally. A judicial decision literally renders judgment on the

rightness of a particular human choice. That judgment rests upon, among other things, cultural assumptions about what is good and virtuous, as well as conclusions about what is efficacious and useful. When read later, the decision reveals a tale of an individual who came to a crossroads and chose one course and not another. The decision also preserves the culture's expression of approbation or disapprobation of that choice.

To be sure, law is not *merely* a record of those choices that a particular society deems worthy of approbation, but it is at least that. While law promotes social utility it also identifies what conduct lawmakers deem useful. While law vindicates those who have been unjustly treated it also teaches what justice requires. While law protects valuable institutions it lends approbation to those relational arrangements that are good and valuable. When law punishes citizens for making particular choices it both expresses disapproval of those choices and affirms that human choices are meaningful.

After preserving a sample of cultural fabric, the legal narrative directs the future evolution of that fabric by teaching which choices are just and which ones are not. For better or

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<sup>1</sup> Paul Johnson, *A History of the American People* (1997) 696. Walt Disney was particularly adept at the cultural mediation function of the bard. 'By weaving animal characters into a moral tale, which was itself underpinned by the Judeo-Christian message of the Decalogue and the Sermon on the Mount, Disney invented a new form of miracle play, a quasi-religious subculture which translated morally based fantasy into screen reality': at 697.

worse, the common law tradition always looks backward before looking forward. Lawmakers and interpreters of the law begin their deliberations by reading the law's narrative about the past. Informed by this narrative, they proceed to pass new judgments on choices currently at issue.

More directly to the point, non-lawyers look to the law to teach them what choices they ought to make, and for what reasons they ought to make them. Choices informed by the law's narrative then combine to create or reinforce components of a culture – relationships, institutions, practices. Thus culture shapes the law and the law reciprocates.

For these and other reasons, one commentator has observed,

The many components of our culture largely are united by law, not by blood, not by race, not by religion, not even by language, but by law. It's the one principal cultural component we all have in common. ... In [the United States, at least] law is more important in teaching or instructing us than it is in directing us.<sup>2</sup>

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<sup>2</sup> Francis George 'Law and Culture in the United States' (2003) 48 *American Journal of Jurisprudence* 131, 135.

This essay examines three provisions of positive law that demonstrate the narrative functions of law. The first example is the punishment that the old English common law meted out to those who committed suicide. The second is necrophilia prohibitions, which criminalise the performance of sexual acts with dead bodies. The third example is the decisions of state high courts in Massachusetts and California to reject legislation that provided to same-sex couples all the same rights and privileges that heterosexual married couples enjoy.<sup>3</sup>

These laws cannot be explained as means to promote social utility, to direct conduct away from infringement of individual rights, or to prevent harm to persons other than the actor. In fact, these laws are not designed to serve what we commonly refer to as practical purposes, though they may promote some ancillary practical ends. Instead, they are intended to preserve and to teach some principle that the lawmaker has deemed indispensable to his or her culture's self-understanding. That these particular laws demonstrate only the narrative functions of law does not

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<sup>3</sup> *Opinions of the Justices to the Senate*, 440 Mass 1201 (2004), *Re Marriage Cases* (Reporter citation not yet available, Supreme Court of California, George CJ, Kennard, Werdegar, Moreno, JJ, 15 May 2008).

mean that the narrative functions of law cannot co-exist with other functions. Indeed, no matter to what ends any particular positive law is directed, it almost always exhibits this attribute of the bard: it articulates the story and values of the culture from which the law emanates.

## II. FORFEITURE AND DISHONOUR OF THE SUICIDE

It is now commonly agreed that confiscating the personal property of one who has committed suicide and burying him at a crossroads with a stake through his body neither deters others from committing suicide nor punishes the person who performed the self-destruction. Forfeiture and dishonour served no social utility and prevented no harm to anyone, including the actor himself. Indeed, recognition that the forfeiture and dishonour provisions of the common law affected not the suicide himself but rather his family, further victimising people whom the suicide had victimised by his choice, led to abolition of those provisions in the 19<sup>th</sup> century in the United Kingdom, and earlier in the United States.<sup>4</sup> However, criminal punishment for an act of suicide, in the form of

forfeiture and dishonour, enjoyed a long life in positive, common law.<sup>5</sup>

Was criminalisation of suicide an unjustifiable practice? After all, the state has no power to punish the dead. And to suggest that punishment might deter one who has resolved to end her own life seems contrary to human experience. Indeed, deterrence, rehabilitation, retribution, incapacitation – the common justifications for criminal punishment – all fail to justify forfeiture and dishonour. Thus, the law could not have been justified on retributive or consequentialist grounds; forfeiture and dishonour neither repaired some imbalance caused by the suicide's usurpation of legal norms nor accomplished any practically-useful end.

To find a justification for forfeiture and dishonour it is useful to examine the narrative that the common law contains concerning suicide and those who commit it. Almost invariably, the authorities justified criminalisation on the ground that the law disfavors, even abhors, suicide.<sup>6</sup> The legal narrative has invariably portrayed suicide as a vicious act and, obversely, has characterised perseverance in the

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<sup>4</sup> See Thomas J. Marzen *et al*, 'Suicide: A Constitutional Right?' (1985) 24 *Duquesne Law Review* 1, 56-100.

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<sup>5</sup> *Ibid.* 59-63, 67-70.

<sup>6</sup> *Ibid.* 60-3, 68-9.

face of affliction as a virtue to be lauded. Blackstone famously offered his view that suicide constituted the ‘pretended heroism, but real cowardice, of the Stoic philosophers, who destroyed themselves to avoid those ills which they had not the fortitude to endure.’<sup>7</sup> Moreover, he attributed to the law the view

that no man hath a power to destroy life, but by commission from God, the author of it: and, as the suicide is guilty of a double offence; one spiritual, in invading the prerogative of the Almighty, and rushing into his immediate presence uncalled for; the other temporal, against the king, who hath an interest in the preservation of all his subjects; the law has therefore ranked this among the highest, crimes, making it a peculiar species of felony, a felony committed on oneself.<sup>8</sup>

The common law concerning suicide told a tale of one who, finding this world wearisome or arduous, fled the vexations of this life and rushed into the next unbidden. Though the law was unable to inflict upon this person any meaningful penalty, it nevertheless condemned him.

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<sup>7</sup> William Blackstone, *Commentaries on the Laws of England* (first published 1765-1769, 12<sup>th</sup> ed 1978) vol 4, 189.

<sup>8</sup> *Ibid.*

Blackstone himself acknowledged that the law was powerless to punish one who had withdrawn himself from the law’s reach.<sup>9</sup> Nevertheless, for centuries the law continued to declaim the villainy of those who ended their own lives while in their right minds.

That the law should express a preference in this matter, let alone that it should do so in such blunt terms of opprobrium, strikes many contemporary readers of the narrative as archaic. Nevertheless, though the penalties of forfeiture and dishonour gave way, the opprobrium persisted, and persists in American law. The Field Code, acknowledging that criminal punishment could not reach the perpetrator of suicide, called the act ‘a grave public wrong.’<sup>10</sup> This choice of words was significant because the distinction between acts giving rise to criminal liability and those giving rise merely to civil liability turned on the question whether the wrong was public or private.<sup>11</sup> Other lawmakers and courts declare suicide to be ‘a dreadful deed,’<sup>12</sup> ‘ethically

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<sup>9</sup> *Ibid.* 190.

<sup>10</sup> Marzen *et al*, above n 4, 76.

<sup>11</sup> William Blackstone, *Commentaries on the Laws of England* (first published 1765-1769, 12<sup>th</sup> ed. 1978) vol 4, 5.

<sup>12</sup> *Commonwealth v Bowen*, 13 Mass 356, 360 (1816). Massachusetts at the time of Bowen’s trial for abetting another’s suicide had abolished forfeiture but retained

reprehensible and inconsistent with the public welfare,<sup>13</sup> and ‘unlawful and criminal as *malum in se*.’<sup>14</sup>

After abolition of forfeiture and dishonour, many American states continued to treat suicide as a crime, albeit one for which punishment is impossible.<sup>15</sup> Thus the New Jersey Superior Court prior to that State’s repeal of the criminal prohibition against attempted suicide reasoned, ‘Suicide is none the less criminal because no punishment can be inflicted. It may not be indictable because the dead cannot be indicted.’<sup>16</sup> Indeed, throughout the Twentieth Century courts affirmed the inherent criminality of the act. In 1933, the Florida Supreme Court stated, ‘No sophistry is tolerated in consideration of legal problems which seek to justify self-destruction as commendable or even a matter of personal right.’<sup>17</sup> And in 1973, the United States Supreme Court

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ignominious burial. Massachusetts abolished the latter practice in 1823, but the Massachusetts Supreme Judicial Court continued thereafter to label suicide ‘a crime of awful turpitude.’ *Marzen et al*, above n 3, 74-5.

<sup>13</sup> *May v Pennell*, 64 A 885, 886 (1906).

<sup>14</sup> *Commonwealth v Mink*, 123 Mass 422, 429 (1877).

<sup>15</sup> *Marzen et al*, above n 4, 79-82.

<sup>16</sup> *State v Carney*, 55 A 44 (NJ Super 1903). See also *McMahan v State*, 53 So 89, 90 (1910); *State v Willis*, 121 SE 2d 854, 856 (NC 1961).

<sup>17</sup> *Blackwood v Jones*, 149 So 600, 601 (Fla 1933).

acknowledged the existence of constitutionally unchallenged laws against suicide.<sup>18</sup>

So the law retains a narrative about suicide, a tale of cowardly Stoic philosophers and creatures carrying heavy burdens who, despite their afflictions, are equally to be condemned as pitied. And while this narrative has in some respects adapted to the times, it remains largely intact. Thus formed, the narrative teaches us that the life of one who would destroy himself is valuable in itself. Even when life ceases to be of any use to the one living it for the extrinsic purposes of enjoying play, beauty, or friendship, human life remains valuable *qua* human life. Thus, the loss of all extrinsic values is an insufficient justification for suicide, according to the narrative of the common law. In short, the lesson of the narrative is that the decision to commit suicide is contrary to a basic good, the intrinsic value of human life.

The law’s narrative concerning suicide has important consequences, for it informs other important cultural commitments. For example, though we no longer mete out punishment for acts of suicide, the

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<sup>18</sup> *Paris Adult Theater I v Slaton*, 413 US 49, 68 n 15 (1973).

law's narrative influences contemporary debate over the related issues of physician-assisted suicide and euthanasia.

In their landmark *Glucksberg* decision,<sup>19</sup> in which they upheld Washington State's ban on assisted suicide, the Justices of the United States Supreme Court debated the significance of forfeiture and dishonour and the abolition of those provisions. Writing for the majority, Chief Justice Rehnquist framed the issue before the Court as 'whether the "liberty" specially protected by the Due Process Clause includes a right to commit suicide which itself includes a right to assistance in doing so' and inquired 'whether this asserted right has any place in our Nation's traditions.'<sup>20</sup>

After reviewing the common law's history of criminalising suicide,<sup>21</sup> Rehnquist noted the 'consistent and almost universal tradition that has long rejected the asserted right' to commit suicide 'and continues explicitly to reject it today.'<sup>22</sup> He observed that 'for over 700 years, the Anglo-American common-law tradition has punished or otherwise

disapproved of both suicide and assisting suicide.'<sup>23</sup> And though the American States had abolished the harsh penalties for suicide, abolition 'did not represent an acceptance of suicide; rather, as [Connecticut] Chief Justice [Zephaniah] Swift observed, this change reflected the growing consensus that it was unfair to punish the suicide's family for his wrongdoing.'<sup>24</sup> To strike Washington's law, Rehnquist concluded, the Court 'would have to reverse centuries of legal doctrine and practice, and strike down the considered policy choice of almost every State.'<sup>25</sup>

Justice Souter concurred, but wrote separately to advocate for a liberty interest in having the assistance of a physician in suicide. (He ultimately concluded that the State's interests were sufficiently serious to justify prohibiting the practice.) Though Souter favored recognising a constitutional right to assisted suicide, he was constrained by the common law's narrative about the immorality and felonious nature of suicide. Significantly, Souter acknowledged that the States abolished forfeiture and dishonour 'largely because the common-law punishment of forfeiture was

<sup>19</sup> *Washington v Glucksberg*, 521 US 702 (1997).

<sup>20</sup> *Ibid.* 723.

<sup>21</sup> *Ibid.* 710-15.

<sup>22</sup> *Ibid.* 723.

<sup>23</sup> *Ibid.* 711.

<sup>24</sup> *Ibid.* 713.

<sup>25</sup> *Ibid.* 723.

rejected as improperly penalising an innocent family.<sup>26</sup> And Souter concluded that decriminalisation does not ‘imply the existence of a constitutional liberty interest in suicide as such.’<sup>27</sup>

Thus the long Anglo-American narrative concerning suicide informed and, to some extent, directed the legal analysis in *Glucksberg*. Justices Rehnquist, Souter, and the other members of the Court operated within the context of a 700-year old story about suicide, preserved in the common law for the most recent generation by all those preceding. Two observations about this process seem valuable.

First, the narrative constrained the Justices’ reasoning and prevented them from discerning a constitutional right of self-destruction. They did not write on a clean slate. They could not express approbation for suicide without doing violence to the plot of the common law tradition. Nor would it have been sufficient for the Justices to decide the constitutionality of Washington State’s ban on assisted suicide in a vacuum, without reference to the common law

tradition. If a right to *assist* suicide is consistent with the common law narrative disapproving of suicide then the Justices would have been compelled to justify the right on that basis. They were not free to reason that assistance of suicide is a fundamental right because suicide is legally permissible; the common law has never denoted suicide an acceptable practice.

Second, the *Glucksberg* decision is now part of the narrative. *Glucksberg* adds a chapter to the Anglo-American account of suicide. The decision teaches the reader the law’s history of reviling self-destruction. It communicates the law’s respect for the intrinsic value of human life, even the life of one who wishes to destroy herself. It preserves for future lawyers and jurists an account of the stigma attendant to suicide. It tells a story of one who, suffering from some physical affliction, finds the suffering too much to bear and seeks a way out. It records the judgment of the people of the State of Washington that the decision to live in spite of the suffering is courageous, virtuous, and right. And it affirms that judgment as consistent with America’s tradition.

Another generation of jurists might someday revisit the issue whether the United States Constitution

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<sup>26</sup> *Ibid.* 774.

<sup>27</sup> *Ibid.* 777.

guarantees a right to assistance in the commission of suicide. That generation might overturn *Glucksberg*. However, if future lawyers reject the *Glucksberg* ruling they must do so in spite of and contrary to the 700-year (and running) Anglo-American tradition that disfavors the choice to destroy oneself, and they must reject the teachings of those generations that came before.

The bard tells a compelling narrative about the despairing soul who loves life and its pleasures so little that he kills himself. The bard records a cultural judgment condemning this choice, declaring it cowardly. The narrative teaches us that previous generations have invariably commended the virtue of perseverance in the face of suffering and valued human life for its own sake. These teachings inform our cultural commitments to practices and institutions that alleviate pain through counseling, palliative care, and charity, rather than end pain through assisted suicide or euthanasia. These cultural commitments shape new laws, and the process is repeated.

### III. NECROPHILIA PROHIBITIONS

Like prohibitions against suicide, prohibitions against necrophilia defy justification on grounds of social

utility. They serve no practical ends. They do not protect the physical integrity of persons; dead bodies are not persons.<sup>28</sup> They do not prohibit violence because sexually molesting a dead body does not require force or violence, and the dead cannot withhold their consent. Unlike rape, necrophilia involves no usurpation of a victim's will because dead bodies have no wills to overcome.<sup>29</sup> The dead body does not suffer physically, emotionally, or psychologically from the act. It does not apprehend assault. It does not fear injury.

Nevertheless, many common law jurisdictions expressly prohibit necrophilia, not in service to social utility or to prevent harm to some victim, but rather to preserve a

<sup>28</sup> This appears to be settled, at least in the United States. See, eg, *People v Kelly*, 1 Cal 4th 495, 524 (Cal 1992); *State v Perkins*, 248 Kan 760 (1991), 771; *State v Wagner*, 97 Wash App 344, 348 (1999).

<sup>29</sup> Necrophilia is distinguishable from rape-homicide, in which application of the force and consent elements of rape can be, and often is, complicated by the death of the victim during the crime. See, eg, *Lipham v State*, 364 SE 2d 840, 842-843 (Ga 1988); Transcript of Proceedings, *England v Director of Public Prosecutions* (High Court of Australia 26 May 2000). The typical rape-homicide consists of a series of wrongful acts by the perpetrator, which include both a rape and a killing. The series of acts begins while the victim is still alive, raising the issues of force and consent. The case is thus unlike pure necrophilia, where the series of wrongful acts commences after the body has ceased to contain a living person.

narrative concerning sex and the ends for which it ought not be used. California has adopted a necrophilia prohibition, which is illustrative and provides, ‘Every person who willfully... commits an act of sexual penetration on, or has sexual contact with, any remains known to be human, without authority of law,<sup>30</sup> is guilty of a felony.’<sup>31</sup> This statute is the judgment that comes at the end of an ignoble and troubling tale.

In 2003, a California legislator told the ‘horrifying story of Robyn Gillet,’ a girl four years old at the time of her death.<sup>32</sup> The person responsible for transporting Robyn’s body to the morgue sexually abused the body. The community was shocked. The bill’s author continued:

This is why California must take action. By failing to make this a heinous act a crime, we will only promote disrespect for the deceased. Families suffer enough when

they lose a loved one and should feel secure in knowing that if their loved one’s body is molested, there is a law in place that will ensure the crime will not go unpunished.<sup>33</sup>

The tale moved the California legislature to act. The State disclosed its cultural assumption that sexual acts have meaning, even when they harm no person other than, or perhaps even including,<sup>34</sup> the actor. California adjudged sex with a corpse to be beneath the dignity of the departed, the perpetrator, or both, and it crafted a narrative consistent with this judgment.

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<sup>33</sup> *Ibid.*

<sup>34</sup> One prudential purpose that necrophilia statutes might hypothetically serve is the protection of the health and welfare of the perpetrator. It does not take a great flight of imagination to suppose that state legislatures intended to protect necrophiles from disease or physical harm. However, no evidence of this concern appears in the legislative histories.

New York has expressed its view that the necrophile ‘is a sick individual who injures himself more than he does the public.’ Commission Staff Notes to NY Penal Law § 130.20. For this reason, New York, unlike most states (see note 48, below) has made necrophilia a misdemeanor rather than a felony: at § 130.20. However, the presumed mental illness of the perpetrator is not a justification for punishing the perpetrator in the first instance. Nor does the legislative history support the inference that New York believes that concern for the necrophile’s mental health justifies punishment.

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<sup>30</sup> The ‘without authority of law’ clause is a curious exception. One wonders whether the California legislature, trying unsuccessfully to imagine a circumstance in which sexual contact with a corpse would not be morally reprehensible, added this exception in an excess of caution.

<sup>31</sup> CAL HEALTH & SAFETY CODE § 7052(a) (West 2007).

<sup>32</sup> *Hearing of the California Assembly Committee on Public Safety* (22 April 2003) 2 <[http://www.leginfo.ca.gov/pub/03-04/bill/asm/ab\\_1451-1500/ab\\_1493\\_cfa\\_20030421\\_111600\\_asm\\_comm.html](http://www.leginfo.ca.gov/pub/03-04/bill/asm/ab_1451-1500/ab_1493_cfa_20030421_111600_asm_comm.html)> at 2 April 2008.

California is not the only jurisdiction to preserve in law its cultural assumptions concerning necrophilia. It is among seventeen states that have express and particular prohibitions against the act. An additional eleven states, while not identifying necrophilia in particular as a criminal act, have adopted the approach of the Model Penal Code ('MPC'), which outlaws abuse of a corpse generally and includes within its purview 'sexual indecency'.<sup>35</sup> That twenty-eight of the fifty American states have adopted this criminal prohibition without a utilitarian justification is striking. This fact alone suggests that state legislatures around the United States consider the legal expression of disapprobation a sufficient justification for criminalising this conduct. Outside the United States, the Australian State of Victoria<sup>36</sup> and the United Kingdom<sup>37</sup> both expressly prohibit necrophilia.

The codification schemes of many statutes further support the inference that states are primarily concerned with expressing disapproval of necrophilia. Many jurisdictions, including the United Kingdom, codify necrophilia with sex

offenses.<sup>38</sup> Utah codified its abuse of corpse and necrophilia prohibitions among offenses 'against public order and decency'.<sup>39</sup> Other states group necrophilia together with bestiality.<sup>40</sup>

Rhode Island classifies necrophilia not with sex offenses but rather with crimes pertaining to graves and corpses.<sup>41</sup> Yet it defines necrophilia as 'the act of first degree sexual assault upon a dead human body'.<sup>42</sup> This is a curious formulation. Rhode Island law defines first degree sexual assault as 'sexual penetration with another person' in enumerated circumstances.<sup>43</sup> Evidently, though necrophilia does not usurp the will of a person, as sexual assault does, the Rhode Island legislature nevertheless considers necrophilia equally as culpable as sexual assault.

The MPC, which eleven states imitate, helpfully identifies the purpose of the prohibition against abuse of a corpse as protection 'against outrage to the feelings of

<sup>35</sup> MODEL PENAL CODE § 250.10, comment 2 (1985).

<sup>36</sup> *Crimes Act 1958* (Vic) s 34B.

<sup>37</sup> Sexual Offenses Act 2003 (UK) c 42, s 70.

<sup>38</sup> Some place the offense with regulation of mortuaries. Curiously, New Jersey classifies necrophilia as an offense against property. NJ STAT ANN § 2C:22-1 (West 2005).

<sup>39</sup> UTAH CODE ANN § 76-9-704 (2007).

<sup>40</sup> These include Connecticut, CONN GEN STAT § 53a-73a (2007), and North Dakota, ND CENT CODE § 12.1-20-02 (2008).

<sup>41</sup> RI GEN LAWS § 11-20-1.2 (2008).

<sup>42</sup> *Ibid.*

<sup>43</sup> *Ibid.* § 11-37-2.

friends and family of the deceased.<sup>44</sup> Yet even as it seeks to protect the feelings of one particular family, the MPC employs a deliberately objective standard; ‘it does not vary either to exculpate on the basis of the actor’s unusual callousness or to condemn for outraging an excessively delicate relative of the deceased.’<sup>45</sup> The MPC thus draws its judgment of the act from a sense of decency common to reasonable people within the community; it is the response that a hypothetical, ordinary family member would make to the act that counts.

The Alabama statute, which derives from the MPC, includes its justification in its definition of the act. ‘A person commits the crime of abuse of a corpse if, except as otherwise authorised by law, he knowingly treats a human corpse in a way that would outrage ordinary family sensibilities.’<sup>46</sup> The annotated commentary to Alabama’s statute explains the use of the word ‘ordinary,’ which denotes ‘the contemporary local community standard.’<sup>47</sup> Several other states employ similar statutory language, referencing not the feelings of the

particular family of the deceased but rather an objective standard derived from the cultural views of the community. In this way, states using the MPC approach preserve an account of a cultural response to an ignoble choice.

The definition of the act and the justification for the prohibition are clearly tied to cultural opprobrium. The act is outrageous because it is contrary to certain cultural norms, particularly the standards with which parents raise families. And it is criminalised because it is outrageous. Note the reasoning behind this formulation. The lawmaker starts with an observation about the culture: families are institutions built upon a salutary and discernable set of moral norms. The lawmaker then reasons that any act that, when compared to familial norms, appears outrageous is an act that the culture ought not tolerate.

That abuse of a corpse offended only against family sensibilities or decency, and not against some more concrete, prudential concern, was, in the view of the framers of the MPC, reason to make the offense a misdemeanor rather than a felony.<sup>48</sup> However, state legislatures, which

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<sup>44</sup> MODEL PENAL CODE § 250.10, comment 2 (1985).

<sup>45</sup> *Ibid.*

<sup>46</sup> ALA CODE § 13A-11-13(a) (2008).

<sup>47</sup> *Ibid.* Cf Alaska Criminal Code Revision, Tentative Draft Part I, 89 (February 1997).

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<sup>48</sup> MODEL PENAL CODE § 250.10 comment 3 (1985).

are accountable to the people and thus more in tune with cultural commitments, have not always agreed with this assessment. Alabama, Arizona, Arkansas, California, Georgia, Indiana, Iowa, Maine, Nevada, Oregon, Rhode Island, Tennessee, Utah, and Washington all denote abuse of a corpse and/or necrophilia as a felony.<sup>49</sup> Nevada punishes necrophilia with life imprisonment, with the possibility of parole after five years.<sup>50</sup> Florida has made

necrophilia a second-degree felony<sup>51</sup> and places abuse of a corpse and necrophilia at level seven out of ten (ten being most severe) on its ‘Offense Severity Ranking Chart,’ used for sentencing purposes.<sup>52</sup> Among those other offenses also classified as level seven offenses are manslaughter, vehicular homicide, battery with a deadly weapon, sexual abuse of a child, and carjacking.<sup>53</sup> In Kentucky, abuse of a corpse is a misdemeanor, ‘unless the act attempted or committed involved sexual intercourse or deviate sexual intercourse with the corpse,’ in which case the act is a felony.<sup>54</sup> Thus necrophilia warrants more severe punishment than mutilation.

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<sup>49</sup> ALA CODE § 13A-11-13 (2008); ARIZ REV STAT § 32-1364 (2008); ARK CODE ANN § 5-60-101 (Michie 2008); CAL HEALTH & SAFETY CODE § 7052 (West 2007); GA CODE ANN § 16-6-7 (2008); IND CODE § 35-45-11-2 (2004); IOWA CODE § 709.18 (2008); ME REV STAT ANN tit 17-A, § 508 (2006); NEV REV STAT § 201.450 (2008); OR REV STAT § 166.087 (2003); RI GEN LAWS § 11-20-1.2 (2008); TENN CODE ANN § 39-17-312 (2008); UTAH CODE ANN § 76-9-704 (2007); WASH REV CODE § 9A.44.105 (2000).

By contrast, Alaska, ALASKA STAT § 11.61.130 (Michie 2008); Colorado, COLO REV STAT § 18-13-101 (2008); Connecticut, CONN GEN STAT § 53a-73a(a)(3) & (b) (2007); Delaware, DEL CODE ANN tit 11, § 1332 (2008); Hawaii, HAW REV STAT § 711-1108 (2008); New Hampshire, NH REV STAT ANN § 644:7 (2008); New Jersey, NJ STAT ANN §§ 2C:1-4 & 2C:22-1 (2005); New York, NY PENAL LAW § 130.20 (2004); North Dakota, ND CENT CODE §§ 12.1-20-12 & 12.1-20-02 (2008); Pennsylvania, 18 PA CONS STAT § 5510 (2000); and Texas, TEX PENAL CODE ANN § 42.08 (2008); have made necrophilia a misdemeanor.

<sup>50</sup> NEV REV STAT § 201.450 (2008).

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<sup>51</sup> FLA STAT § 872.06 (2007).

<sup>52</sup> 1996 Fla Laws c 96-393, § 1; FLA STAT § 921.0012 (2007).

<sup>53</sup> FLA STAT § 921.0012(3) (2007).

<sup>54</sup> KY REV STAT ANN § 525.120(2) (2008). Ohio distinguishes between those acts performed on a corpse that would ‘outrage reasonable family sensibilities,’ which are misdemeanors, and acts that would ‘outrage reasonable community sensibilities,’ which are felonies. OHIO REV CODE ANN § 2927.01 (West 2008). These terms are not self-defining, to say the least. In the one decision touching upon the matter, an Ohio court rejected the argument of a rape-homicide defendant that he could not be convicted of felony rape, where he performed the sexual penetration after the victim’s death, because Section 2927.01 makes sexual abuse of a corpse a misdemeanor. *State v Collins*, 66 Ohio App 3d 438, 442-43 (1990).

All of these legislative expressions of revulsion and opprobrium demonstrate the seriousness with which states treat necrophilia. In California, the necrophilia narrative began with a morgue worker defiling the body of a dead four-year old girl. The tension in the plot inheres in the community's shock and outrage, the offense to the culture's family-oriented sensibilities. California and twenty-eight other states<sup>55</sup> choose to resolve the tension by attaching punitive consequences to the performance of the act, preserving in unequivocal terms an account of the culture's judgment. With minor variations, the end of the narrative is this: sexual contact with a dead body is so indecent that civilised society will not tolerate it.

#### IV. MARRIAGE IN MASSACHUSETTS AND CALIFORNIA

Recent decisions by the high courts of Massachusetts and California contain a narrative about marriage that cannot be read as neutral between competing societal values. In both cases, the high courts have

told morality tales, selectively extracting certain cultural assumptions and values and teaching a lesson about the meaning of intimacy and marriage.

Conjugal marriage, the monogamous, committed, intimate union of one man and one woman, not close blood relatives, neither of whom is married to a third person, has until recently enjoyed a special place in positive law. In its controversial *Goodridge* decision,<sup>56</sup> the Massachusetts Supreme Judicial Court ("SJC") announced that the special status accorded to conjugal marriage violated the Massachusetts constitution. It reasoned that same-sex couples – not homosexual individuals *qua* homosexuals, but monogamous, same-sex pairs of persons – ought to enjoy the same rights as monogamous, opposite-sex couples. It noted various ways in which the law made it easier for conjugal, married couples to dispose of property and to care for one another.<sup>57</sup> It concluded that same-sex couples ought to have access to these legal means.

The Massachusetts legislature responded to the *Goodridge* decision by proposing the creation of a new

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<sup>55</sup> Florida also enacted its necrophilia prohibition in response to particular incidents, sexual union with a dead body after a homicide and the removal of a sex organ from a dead human body lying in a funeral home. Florida Senate Staff Analysis and Economic Impact Statement for Bill CS/SB 108, 5 (9 January 1996).

<sup>56</sup> *Goodridge v Dept Pub Health*, 440 Mass 309 (2003).

<sup>57</sup> *Ibid.* 323-6.

institution, the civil union. It proposed to endow the civil union with all of the legal characteristics of marriage. The legislature's proposal would have mended the injury that the SJC perceived in *Goodridge*, namely that the conjugal marriage statute denied same-sex couples 'access to civil marriage itself, with its appurtenant social and legal protections, benefits, and obligations.'<sup>58</sup>

The SJC rejected the civil union proposal in a subsequent decision, *Opinions of the Justices to the Senate*.<sup>59</sup> It was not enough, in the majority's view, to grant to same-sex couples all of the rights, benefits, and obligations of marriage. Instead, the SJC mandated that the law approve the moral teaching that homosexual intimacy is a reason for action equally as worthy as conjugal, marital union. After noting that 'civil marriage is an esteemed institution,'<sup>60</sup> the SJC appropriated that esteem for intimate, same-sex couples. It secured for those couples the law's 'stamp of approval.'<sup>61</sup>

In *Goodridge* and *Opinions of the Justices*, the SJC told a story of 'fourteen

individuals from five Massachusetts counties'<sup>62</sup> who sought approbation for their intimate conduct. Each of the plaintiffs in *Goodridge* desired not merely 'to secure the legal protections and benefits afforded to married couples and their children' but also 'to marry his or her partner in order to affirm publicly their commitment to each other.'<sup>63</sup>

It is instructive to note that the seven couples who sued the Commonwealth in *Goodridge* sought approbation not for their friendship or love but more particularly for their intimate commitment to each other. That the law and the culture already affirmed non-sexual, same-sex commitments in many other contexts – business contracts, fraternity pledges, heroic acts on behalf of fellow soldiers in the field of battle – did not satisfy the *Goodridge* plaintiffs. They sought approbation of a different kind. They requested that the law of Massachusetts be re-written to draw moral equivalence between same-sex intimacy and opposite-sex, conjugal monogamy. The SJC granted this request.

Most scholars treat the *Goodridge* decision as if it were predicated upon

<sup>58</sup> *Ibid.* 315.

<sup>59</sup> 440 Mass 1201 (2004).

<sup>60</sup> *Goodridge v Dept Pub Health*, 440 Mass 309, 322 (2003).

<sup>61</sup> *Ibid.* 333.

<sup>62</sup> *Ibid.* 313.

<sup>63</sup> *Ibid.* 314.

some morally-neutral principle of equality or autonomy. If this interpretation of *Goodridge* were ever reasonable in the first instance, *Opinions of the Justices* renders it untenable. The civil union proposal that the SJC rejected in *Opinions of the Justices* would have treated same-sex couples and conjugal, monogamous couples the same in every regard except in terms of moral approbation. Thus, the only rational basis for the SJC's holding in *Opinions of the Justices* is the morally-partisan predicate that same-sex intimacy is valuable.

For this reason, *Opinions of the Justices* goes beyond securing rights for same-sex couples. It places the imprimatur of the Commonwealth of Massachusetts on the proposition that that homosexual conduct adds something of value to a friendship between two persons of the same sex. Committed, intimate same-sex relationships, as distinguished from business, fraternal, professional, or other relationships between members of the same sex, are in Massachusetts placed in a special class. They are accorded, if the members of the relationship so choose, the designation 'marriage.' That designation historically has been reserved for monogamous, conjugal couples. Prior to *Opinions of the Justices*, the term 'marriage'

distinguished conjugal monogamy from all other relationships, whether same-sex or opposite-sex.

On May 15 of this year, the California Supreme Court told a much less subtle morality tale. In *Re Marriage Cases*<sup>64</sup> the court struck down a two-pronged statutory scheme for classifying intimate relationships. Prior to the decision, California recognised both conjugal marriages and domestic partnerships. Domestic partners enjoyed all of the rights and bore all of the obligations that California law assigned to marriages.<sup>65</sup>

The court held this scheme unconstitutional and found that a same-sex couple enjoys a fundamental right "in having their family relationship accorded the same respect and dignity enjoyed by an opposite-sex couple."<sup>66</sup> Because the term "marriage" is "unreservedly approved and favored by the community," the word has "considerable and undeniable symbolic importance."<sup>67</sup> The court appropriated this approbation and symbolism for same-sex intimacy.

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<sup>64</sup> *Re Marriage Cases* (Reporter citation not yet available, Supreme Court of California, George CJ, Kennard, Werdegar, Moreno, JJ, 15 May 2008).

<sup>65</sup> *Ibid.* 40-2.

<sup>66</sup> *Ibid.* 10. See also at 102-03.

<sup>67</sup> *Ibid.* 103.

As the court implicitly recognised, California's marriage-domestic partnership scheme never withheld respect or dignity from any *individual* person, whether heterosexual or homosexual. The scheme did endorse the proposition that conjugal monogamy is distinguishable from non-conjugal relationships on relevant, discernable grounds. The court thought this distinction impermissible because the law did not endorse the additional proposition that same-sex intimacy has moral worth equal to conjugal monogamy and must be accorded dignity and respect for that reason.

Together, the marriage decisions in Massachusetts and California reflect moral assumptions underlying a particular set of cultural behaviors and commitments. They reflect the assumptions that (1) conjugal marriage does not possess unique moral value and (2) by choosing homosexual intimacy a person chooses something morally valuable. The decisions declaim that the same-sex couples who sought marriage licenses in those states added something of value to their lives when they moved beyond friendship and entered into intimate commitment. The tale is one of people who seek fulfillment in acts and commitments that are not

conjugal but approximate conjugal monogamy in an ostensibly meaningful way. The story assures that same-sex intimacy is, in fact, meaningful and valuable in the same way and to the same degree as conjugal marriage.

As the decisions tell a story about same-sex couples they also teach certain controversial, moral propositions. These include the moral claim that conjugal marriage is neither unique nor special. Once embodied in positive law, these propositions become less controversial. Ten, twenty, or thirty years from now, the legal approbation of same-sex intimacy will no longer be an innovation. Instead, it will be an old story, grown familiar with the passage of time. In this way the California and Massachusetts decisions not only approve but also fortify and preserve particular cultural characteristics. The culture shapes the law's narrative and the law, in return, shapes the culture.

## V. CONCLUSION

This essay has examined three provisions of law that serve no practical purpose in the sense that they vindicate no usurpations and promote no felicitic calculi. None of these positive laws deters an

infringement of rights. None of them incentivises wealth-creating activities. None produces a tangible social benefit, such as efficiency, prosperity, or order. At the same time, each of the three provisions tells a story about its culture and each teaches a lesson about what choices the culture deems valuable. Indeed, because they serve no practical purposes, these laws demonstrate clearly the narrative function that positive laws often perform.

The forfeiture and dishonour provisions of the English common law identified a despondent soul who succumbed to the temptation to end the source of his despondency in an irreversible manner. The law taught that this person is not yet welcome in the next life and is unworthy of honour in this one. This tragic tale ended with the suicide's family in penury and his body staked to a place of unrest and commotion.

State legislatures in Alaska, California, New York, and elsewhere have responded to tales of ill persons seeking sexual satisfaction from the remains of the deceased, who cannot object to or reject sexual advances. These states have condemned these activities as beyond the boundaries of what a civilised society can and will permit. This story ends much

like a horror show, with the audience members expressing their revulsion.

The high courts of Massachusetts and California told a story of same-sex couples who sought from the states approbation for their intimacy. The courts bestowed that approbation, decreeing that same-sex intimate relationships deserve the law's stamp of approval. This story ends with a promise that same-sex intimacy satisfies the deep longing that conjugal marriage has long been understood to fulfil.

Whether one agrees with the proposition that suicide is cowardly, that intimate, same-sex relationships are equally deserving of approbation as conjugal marriage, or that sex with dead bodies is uncivilised, it is difficult to avoid the conclusion that each of these propositions inheres in one of the positive laws discussed above. And one perceives from each law a glimpse of the culture from which the proposition emanates. One discerns the culture's assumptions about life, relationship, sex, and family. One detects the culture's values, the virtues that the culture lauds and the vices that the culture condemns.

This is true of law in general. This essay has focused upon three legal provisions that can be explained *only*

as forms of cultural expression. However, laws that serve more practical ends also express something about their cultures. Homicide prohibitions, for example, deter homicide, vindicate the state's interest in protecting innocent human life, and teach that human life has value. City expenditures for school departments both fund teacher salaries and leave a record of the city's judgment that education is important. The law teaches and records even while it meets more pedestrian needs. To abuse the analogy, like a singing waiter, the law continues to tell a story while it serves supper.

The law is a bard. It tells a narrative and preserves a record of the culture that forms and enacts it. We would do well to consider what story our law tells of us and what it will teach future generations.

