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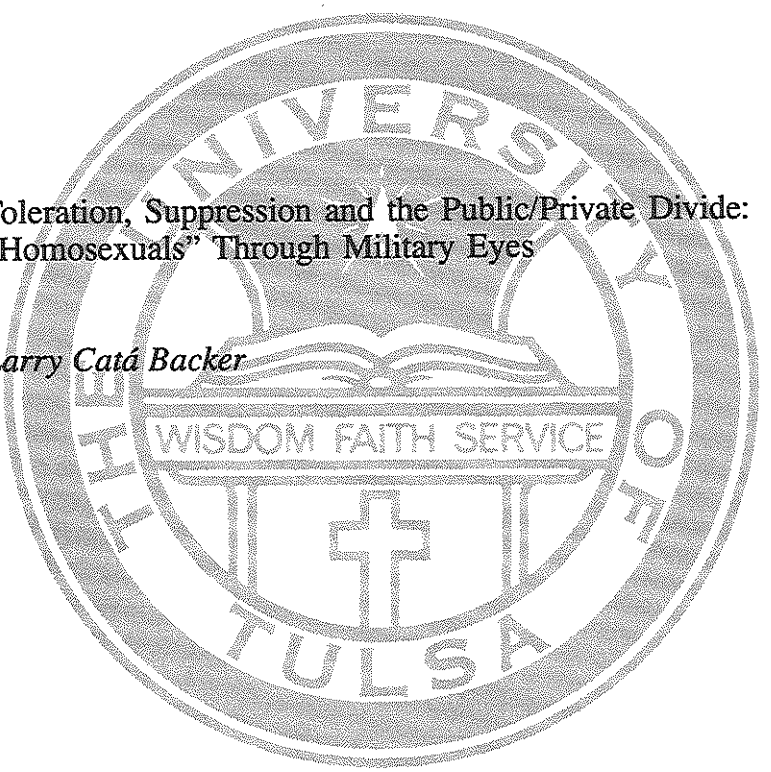

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ESSAYS

TOLERATION, SUPPRESSION AND THE PUBLIC/PRIVATE DIVIDE: "HOMOSEXUALS" THROUGH MILITARY EYES

Larry Catá Backer†

> The men of today show a certain duplicity of attitude which is painfully lacerating to women; they are willing on the whole to accept woman as a fellow human being, an equal; but they still require her to remain the inessential. For her these two destinies are incompatible; she hesitates between one and the other without being exactly adapted to either, and from this comes her lack of equilibrium. With man there is no break between public and private life: the more he confirms his grasp on the world in action and in work, the more virile he seems to be; human and vital values are combined in him. Whereas women's independent successes are in contradiction with her femininity, since the "true woman" is required to make herself object, to be the Other.[1]

Simone de Beauvoir was concerned about the status of women when she wrote this passage. Yet the women's dilemma described by Ms. Beauvoir, the division of the social and cultural world between the public and the private, can be generalized.

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1. SIMONE DE BEAUVOIR, THE SECOND SEX 262 (1989 ed.) (1949).

The division between public and private spaces describes the fundamental basis of the way in which modern Western liberal society[2] has made room for such difference *as it is willing to tolerate.*[3] This essay represents an attempt to illuminate the power of this ordering of the world. This essay also serves to demonstrate the foundationalist power of this Manichaean social ordering within the United States by examining the tortured relationship between the military and its sexual non-conformists.[4] The mandatory schizophrenia of our social ordering is built into our construction of toleration. Toleration is not bounded by conduct, instead it is centered on *public* identity and *public* conformity.[5] The American military's *Judenfrage*[6] and its

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2. I do not mean the modern, mindless pseudo-definition of "liberal" which represents a corruption of the term in the hands of modern religious populist traditionalists who themselves masquerade as "conservatives" in contradistinction to their narrow and fatuous definition of "liberal." I use the term in an older sense, that is, one embracing the view that civil liberties within a representative form of government ought to be promoted. One can be "traditional" or "progressive" and still form part of the liberal enterprise.

3. The dynamics of toleration are explored in Larry Catá Backer, *Constructing a "Homosexual" for Constitutional Theory: Sodomy Narrative, Jurisprudence and Antipathy in United States and British Courts*, 71 TUL. L. REV. 529 (1996) and *Exposing the Perversions of Toleration: The Decriminalization of Private Sexual Conduct, the Model Penal Code, and the Oxymoron of Liberal Toleration*, 45 U. FLA. L. REV. 755 (1993). Social concern with drawing legal and cultural barriers between the public and the private have not been limited to the sexual. In an earlier era, this distinction had significant effect on the ability to regulate contractual relations, labor, and social welfare. *See, e.g.*, Morton J. Horwitz, *The History of the Public/Private Distinction*, 130 U. PA. L. REV. 1423 (1982).

4. Terminology has become politically charged, and the meaning of words have shifted to suit the politics of the speaker. I use the term sexual non-conformists to include all people who do not conform to the cultural model of officially acceptable sexual behavior. The edges of this definition are fuzzy—consider the recent report in the Journal of the American Medical Association on the wide variation in the understanding of the meaning of the term "sex"—However, gay men and lesbians are clearly included within this definition. Others have attempted to avoid sexually charged labels by using different terms, for example "sexual minorities." Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of "Sex," "Gender," and "Sexual Orientation" in Euro-American Law and Society*, 83 CAL. L. REV. 1, 8 & n.16 (1995). Ruthann Robson uses the term "queer" "to denote gay male, lesbian, bisexual, transgendered, and other minority sexualities. . . . [and the] term 'lesbian/queer' because [her] focus is specifically lesbian and because of the historical and contemporary erasure of lesbianism in discussion of minority sexual practices, cultures, and theorizing." Ruthann Robson, *Beginning From (My) Experience: The Paradoxes of Lesbian/Queer Narrativities*, 48 HASTINGS L.J. 1387, n.1 (1997).

5. Carl Stychin has argued that "the military shifted its focus from a sexual act to a sexual identity, and it is that identity—a lesbian or gay identity—rather than a same-sex sexual act which, under this mode of analysis, must be continually erased from the forces." CARL F. STYCHIN, LAW'S DESIRE: SEXUALITY AND THE LIMITS OF JUSTICE 91 (1995) (analyzing the court's approach to upholding the military ban on gay personnel in Steffan v. Cheney, 780 F. Supp. 1 (D.C.C. 1991)); *see also* Francine D'Amico, *Race-ing and Gendering the Military Closet*, in GAY RIGHTS, MILITARY WRONGS 3 (Craig A. Rimmerman ed., 1996).

6. *Judenfrage* is the term used by 19th and 20th century Germans to refer to their "Jewish Problem." What Daniel Goldhagen has noted with respect to the *Judenfrage* is equally applicable to the "Queerfrage" of the American 20th century:

> The rupture in the German cultural fabric that Jews represented to Germans—and that they indeed constituted as a consequence of Germans' conception and treatment of them—was such that cultural taboos failed to hold sway when Germans discussed the Jews. The calls for their annihilation during the nineteenth century . . . presents an obvious, though not often recognized example. Also striking was the frequent broaching of the topic of sexuality, in the form of linking the Jews with prostitution and all forms of sexual depravity, and particularly by charging the Jews with defiling unsuspecting German virgins.

DANIEL JONAH GOLDHAGEN, HITLER'S WILLING EXECUTIONERS: ORDINARY GERMANS AND THE HOLOCAUST 63 (1996). The American religious right has attempted to transfer the language and imagery of traditional anti-Semitism to sexual non-conformists. *See* DIDI HERMAN, THE ANTIGAY AGENDA: ORTHODOX VISION AND THE CHRISTIAN RIGHT (1997). They have been successful enough that the imagery has appeared in the language of opinions of the Supreme Court within this decade. See Justice Scalia's dissenting opinion in *Romer v. Evans*, 517 U.S. 620 (1996). For a discussion, see Larry Catá Backer, *Reading Entrails: Romer, VMI and the Art of Divining Equal Protection*, 32 TULSA L.J. 361, 378-79 (1997).

response to this "Jewish Problem" is merely the most visible example of the way society generally attempts to make room for some (small) difference, suppress the rest, and use the tools of law and culture to enforce the boundaries it makes between conduct labeled normal and everything else.[7]

No society has ever been willing to tolerate everything; most societies, including our own, are constructed to make assimilation the *preferred course* for those who "do not fit in." The boundaries of toleration were once the province of religion; lately it has become more the province of "science."[8] Suppression or expulsion are the ultimate cures against those whom society will not "digest." Toleration, on the one hand, and assimilation on the other, require consciousness of and general agreement about two fundamental notions. The first is the maintenance of a sense of difference, that is, of those things that set one group of people apart from all others. These points of difference do not have to be objectively large; they must merely exist as a *subjectively significant* chasm between otherwise similar people.[9]

The second is the creation of boundaries between those forms of difference which are tolerable and those forms of difference which constitute deviance. Deviance must be suppressed. Thus, circumcision is acceptable but sexual sado-masochism is not.[10] Deviance poses a direct challenge to the norm boundaries society has created. Yet, these boundaries are fluid. What society cannot contain, it can sometimes incorporate. Manipulating definitions of the categories "different" and deviant" permit preservation of the social order in the hands of constantly reconstituted and assimilated majorities. Thus, assimilation works in all directions when it must. The white race can remain the majority in the United States by the expedient of reconstituting "whiteness."[11] Slavery was once tolerated; it is now suppressed. Fornication was once suppressed; today it may be constitutionally protected and is a matter of *de facto* social toleration.[12] The same applies to interracial marriages once thought deviant.[13]

The two greatest impulses of the post-1945 world are toleration and cultural

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7. Despite the creation of a constitutional jurisprudence built by our courts on the basis of the acceptance of the notion that the military is different, as exemplified in Able v. United States, 155 F.3d 628, 631 (2d Cir. 1998) (quoting in part Orloff v. Willoughby, 345 U.S. 83, 94 (1953)) ("Justice is afforded on different terms than is found in civilian life because the military is a 'specialized community governed by a separate discipline.'").

8. In an earlier work, I have traced the evolution of the basis of sodomy jurisprudence from one in which boundaries of the acceptable were religiously derived to one much more informed by the language of medicine and consent. *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). On the medical definition of mental disorder and its links to culture, see *Diagnostic and Statistical Manual of Mental Disorders* xxi (4th ed. 1994) (discussing the problems with a definition of mental disorder).

9. Perhaps the differences between Arian and Roman Catholics in the sixth century in Spain provide a nice sense of the subjectivity of difference. This construction of difference, and its dynamics are explored nicely in Christie Davies, *Religious Boundaries and Sexual Morality*, 6 ANN. REV. SOC. SCI. OF RELIGION 45 (Fall 1983).

10. *See* Regina v. Brown, 1 App. Cas. 212 (H.L. 1994) (holding consent is no defense to assault causing bodily injury).

11. *See* Larry Catá Backer, *Pitied But Not Entitled: The Normative Limitations of Scholarship Advocating Change*, 19 W. NEW ENG. L. REV. 59, 64 (1997).

12. *See* Backer, *Raping Sodomy*, *supra* note 8, at 89-94 (1993) (discussing Oklahoma's judicial reluctance to decriminalize heterosexual sodomy).

13. *See* Loving v. Virginia, 388 U.S. 1 (1967).

definition. Culture provides the mechanics for identifying difference and measuring its distance from the "normal" and the "acceptable." Culture provides the common understandings which bind a group of people together and describe the characteristics of those who share membership. Tolerance signifies the manner and degree to which society enforces conformity within the physical space controlled by a culture. It also suggests the symbolic space within which society permits deviance. Culture defines good and evil, normal and deviant, encouraged and taboo, as they apply generally and specifically to the homosexual. Tolerance is the institutional manifestation of the measure of the evil, deviant, or taboo. Toleration is the name society gives to a necessary cultural safety valve; toleration advances political stability and permits social modulation within the parameters of underlying basic social (hetero)sexual conventions. Dissent is tolerated because, like the difference between venial and mortal sin, some cultural taboos are more important than others. Efficiency in a world of limited resources militates against strict enforcement of dominant norms in most societies. The larger and more complex the society, the less likely enforcement can be either constant or uniform. Society will turn a blind eye *where* it can *when* it can afford to.

Selective social blindness, the construction of our social safety valves, has produced a series of perversities: liberal democratic states in the West permit sexual minorities to exist, but only as long as they keep their identities submerged and participate in their own public obliteration, and only as long as society's public and private institutions remain free to condemn the group they tolerate.

> Persons who publicly seek or make themselves available for deviate sexual relations openly flout community standards. Moreover, indiscriminate solicitation in public streets, parks, and transportation facilities is not only an affront to moral and aesthetic sensibilities; it is also a source of annoyance to, and harassment of, members of the public who do not wish to become involved.[14]

This is the kind of toleration the liberal world is quite used to.[15] Practiced by

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14. MODEL PENAL CODE § 251.3 cmt 2 (1980). The Model Penal Code is a project of the American Law Institute (ALI), an organization devoted to the reformulation and modernization of law. The ALI develops uniform codes representing their view of the best approach to a particular body of law. It is then hoped that state legislatures use the laws developed by the model rules in reformulating their own law. The drafting of the Model Penal Code was commenced in 1952. The proposed official draft of the Model Penal Code was adopted on May 4, 1962. The revision of the Commentaries began in 1976. *See* MODEL PENAL CODE (1980). Unless otherwise noted, I use the Model Penal Code comments as revised after 1976.

15. The touchstone of decriminalization—of toleration on a broader plane—is public offense. Neither the Wolfenden Report nor the Model Penal Code sought to soften or devalue the state's interests in permitting the punishment of morally offensive conduct. The only concession is to limit punishment of moral offenses under the criminal law to public manifestations of such conduct. As long as one concealed one's nonconformity from *every* member of the dominant group, one's conduct was private and inoffensive; otherwise, one's conduct could be branded public and punished. The liberal canon, therefore, preserves, substantially undisturbed, the core traditional purpose of morals legislation—the restraint of official (public) conduct both sinful and, on that basis, irredeemably offensive.

Backer, *Exposing the Perversions of Toleration*, *supra* note 3, at 787.

a culture "holding its nose," this was the toleration permitted the Jews until after Europe nearly succeeded in exterminating them.[16] It was the sort of relationship Western society had with its citizens of African descent until recently.[17] It is the sort of "matrix of rights" or "social place" official society reserves for groups it despises but does not yet have the power or the will to eradicate. Thus, the world has wrestled with the "Jewish problem," the "Negro problem," and now wrestles with the "homosexual problem."[18]

The *homosexual*[19] embodies the cultural significance of public and private offense. The homosexual defines the ways society divides the world between the public and the private. The public world is socially official. The public world includes conduct, social attitudes and prejudices, which are socio-politically acceptable. The public world is made up of things that are accepted as normal and commonplace. Marriage is public. In contrast, the private world is just that—private, hidden from public view, officially non-existent. The private world is the trash can into which we hurl conduct, social attitudes, and prejudices which are socio-politically unacceptable *and* un-extirpable. Adultery and fornication are private. Expressions of sexual affection between men or between women is private. Their exposure makes us all uncomfortable, not necessarily with the activity, but with the exposure. The recent unsuccessful attempt to remove President Clinton after a successful impeachment provides a telling case.[20]

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16. For an account of the way in which culture, law, and politics combined to make it "normal" to kill Jews and a mark of deviance to attempt to protect them in the period leading to the Second World War in Europe, see generally GOLDHAGEN, *supra* note 6.

17. Some would argue that the condition of the African-American has not changed much. *See, e.g.*, DERRICK BELL, FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM (1992).

18. For a comprehensive discussion of the character of the Western model of liberal toleration, see Backer, *Exposing the Perversions of Toleration*, *supra* note 3.

19. The term is here used to implicate a cultural condition rather than an individual or group characteristic. As Leslie Moran has suggested in his examination of the construction of the machinery for policing the borders of liberal toleration, this term embraces "the machinery through which the very legibility of homosexuality and 'homosexual offenses' is produced." LESLIE J. MORAN, THE HOMOSEXUAL(ITY) OF LAW 102 (1996).

20. Annie Murphy Paul's observations in this regard provide a wonderfully succinct summary in this regard:

> Outrage also lives on in the public's reaction to the Clinton-Lewinsky matter. Here, however, we trade the crystalline purity of outrage felt on behalf of the weak for a motive that's distinctly muddier. This outrage is full of irony and paradox, of incongruities and inconsistencies. Its aim is scatter-shot, triggered by the violation of laws and the violation of privacy, by the betrayal of marriage and the betrayal of friendship, by the partisan excess of outrage and the public lack of it. And its ends are varied: it leads some to line up at the polls, and others to stay at home; it makes some tune in for the details, while others tune out in disgust.

Annie Murphy Paul, *OutRAgE!: The Clinton Scandal Puts This Infuriated—and Infuriating—Emotion Under the Microscope*, 32 PSYCHOL. TODAY 32 (1999). The popular press has captured the sentiment well:

> "The irony is that maybe the public came to believe Starr's investigation was a greater threat to our society than the President's irresponsible behavior," says Thomas Mann of the Brookings Institution, a public policy think tank. Widely viewed as partisan, the Republican Starr has seen his ethics—using Linda Tripp's taped chats with Lewinsky, and pressuring Lewinsky to cooperate with the investigation—called into question. Moreover, the Texas-born minister's son has been excoriated for the sexually graphic nature of his voluminous Starr Report—with its allusions to oral sex and the erotic deployment of cigars—which many saw as an attempt to humiliate Clinton into resigning. "He calculated that the nation would rise up in moral revulsion," says Jamin Raskin, professor of constitutional law at American University. "In fact, people were grossed out by the prurience and voyeurism of the independent counsel." But friends insist he's no gonzo Puritan. "He doesn't act precipitously," says ex-law partner Theodore Olson. "I think he took the

Toleration, thus understood, firmly establishes perversity in the law of liberal democracies. The perversity of toleration in the schemata of social liberal toleration is founded on irony and paradox—though toleration advances stability and provides a means of modulating the interpretation of social norms, toleration also extracts from society a measure of tension and instability. The tensions and instabilities arise from the very nature of toleration in a social context in which society must preserve its boundaries and self-identity, while providing some space for the expression of boundary-threatening conduct. Permitting practices which "openly flout community standards"[21] becomes intolerable to that part of the community most offended by the flouting. Conversely, the cost of a grudging toleration is huge; the "creativity of the individual is as effectively quashed by the hatred, contempt and rejection of the community as by a jail sentence or the loss of a job."[22] Toleration and instability are thus related in a very real sense. This is an age in which society liberates much of sexual non-conformity from the bonds of criminal suppression, while it simultaneously tightens the protective cords around a cultural consensus that such non-conformity is disgusting.[23] It forbids jail, yet permits shunning. We give, and we take away, and the net result is anxiety for the "liberated" and nausea[24] for those who would suppress outright.

The "private" has become "public" and an object for examination. We are as aware of our symbolic psychic and cultural genitals as we are of the manifestations of their physical counterparts. In much the same way as our physical genitals respond to stimulation, our psychic and cultural genitals are stimulated by the tug and pull of every social and institutional lurch. The sensations are much like those experienced by the newly post-pubescent—exciting, uncomfortable, ever-present, and uncontrollable. These sensations, these genitals, affect what we do and what we think. We as a society are always moments from socio-cultural orgasm.

Sexuality, as metaphor for the dynamics of toleration and the possibility of cultural change, stands at the center of the culture wars which animate social

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job out of a sense of civic responsibility."
The 25 Most Intriguing People of '98: Kenneth Starr; The Bland Inquisitor Won Few Fans as He Went All out To Get His Man, TIME, Dec. 28, 1998, at 54.

21. MODEL PENAL CODE § 251.3 cmt. 2, at 476 (1980) (loitering to solicit deviate sexual relations) ("Persons who publicly seek or make themselves available for deviate sexual relations openly flout community standards.").

22. Paul D. Carrington, *The Moral Quality of the Criminal Law*, 54 NW. U. L. REV. 575, 580 (1959) (addressing the context of rehabilitative versus deterrence models of criminal law).

23. This is quite evident in judicial opinions. Justice Scalia's dissent in *Romer v. Evans* vividly illustrates this tension as well as the frustration it produces. 116 S. Ct. 1620, 1635-36 (1996) (Scalia, J., dissenting). State courts have expressed this disgust quite explicitly. For example, the Florida court which voided Florida's crime against nature statute on vagueness grounds emphasized that it did not "sanction historically forbidden sexual acts, homosexuality or bestiality." Franklin v. State, 257 So.2d 21, 23 (Fla. 1971). *See* Backer, *Raping Sodomy*, *supra* note 8, at 90-91 (discussing the moral reticence expressed by the Oklahoma Court decriminalizing *heterosexual* sodomy in Post v. State, 715 P.2d 1105 (Okla. Crim. App. 1986)).

24. On nausea as a component of lawmaking (and the maintenance of norms in the military), see, e.g., RICHARD POSNER, SEX AND REASON 318 (1992); Judith H. Steihm, *Managing the Military's Homosexual Exclusion Policy: Text and Subtext*, 46 U. MIAMI L. REV. 685, 691-95 (1992). "The conviction that homosexual conduct is 'bad' quickly translates into the conclusion that it therefore should be punished, and there is a corresponding fear that removing criminal sanctions would amount to implied endorsement of a kind of behavior that majoritarian sentiment finds abhorrent." Model Penal Code § 213.2, cmt. 2, at 366 (1980).

discourse today. Like the birds used by miners in the last century to warn of the presence of poisonous gas in a mine, sexuality is the "bird" whose chirping will be listened for by a society exploring the limits of its socio-political caverns. Society has designated the sexual as a critical site through which it will confront the limits of its willingness to tolerate.

The little subterfuges, the masquerade balls, which are modern liberal toleration, become completely exposed in those interstices of our society where our "republican" patina is removed—particularly in the military. Is the model of liberal toleration posited here implemented in that conservative and anti-democratic world of our military institutions? The courts have insisted for years that the military is "different," that restrictions on behavior intolerable as a matter of law in civilian society must be tolerated within military society.[25] The cases considering the limits of the military's power to exclude from service sexual non-conformists which I discuss here reveal that the difference is one of degree and not of kind. These cases expose the manner in which the military creates public and private spaces, as well as the way in which military policy mirrors the civilian policy of liberal toleration. In both spheres, society is permitted to conflate expressive speech and non-sexual behavior with the behavior itself.

It should come as no surprise that our model of liberal toleration finds a cozy home within the world of the military. Indeed, I would argue that very generally, when reduced to its essence, liberal toleration itself amounts to little more than "don't ask/don't tell."[26] The policing of the public space in the military suggests the

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25. *See, e.g.*, Thomasson v. Perry, 80 F.3d 915 (4th Cir. 1996); Philips v. Perry, 106 F.3d 1420 (9th Cir. 1997).

26. This, of course, is the commonly understood shorthand for the current American military policy for the exclusion of "homosexuals" from military service. The court in *Holmes v. California Army National Guard*, 124 F.3d 1126 (9th Cir. 1997), *cert. denied*, 119 S. Ct. 794, provides a nice description of the policy and its predecessor:

> The "don't ask/don't tell" policy differs from the military's former policy on homosexuals in that the statement "homosexuality is incompatible with military service" was eliminated. See DOD Directive 1332.14, 32 C.F.R. pt. 41, App. A at 93 (1981) ("old policy"). As a result, the military no longer asks new recruits questions about their sexual orientation. Also unlike the old regulatory policy, the regulations implementing the new policy stipulate that sexual orientation is considered a personal and private matter, and does not bar entry into service or continued service, unless manifested by homosexual conduct. DOD Directive 1332.30 at 2-1C. However, the "don't ask/don't tell" policy continues to require discharge of any service member (1) who engages in or intends to engage in homosexual acts, see 10 U.S.C. § 654(b)(1); DOD Directive 1332.30 at 2-2(C)(1)(a) (hereafter "acts prong"); (2) who makes a statement that he is homosexual and fails to rebut the presumption, raised by that statement, that he has a propensity to engage in homosexual acts, see 10 U.S.C. § 654(b)(2); DOD Directive 1332.30 at 2-2(C)(1)(b) (hereafter "statement prong"); or (3) who has married or attempted to marry a person of the same biological sex, see 10 U.S.C. § 654(b)(3); DOD Directive 1332.30 at 2-2(C)(1)(c). "Homosexual" is defined as "a person, regardless of sex, who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts, and includes the terms 'gay' and 'lesbian.'" [10 U.S.C. § 654(f)(1)]. "Homosexual Act" means:
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> > (A) any bodily contact, actively undertaken or passively permitted, between members of the same sex for the purpose of satisfying sexual desires; and
> >
> > (B) any bodily contact which a reasonable person would understand to demonstrate a propensity or intent to engage in an act described in subparagraph (A).
>
> [10 U.S.C. §654(f)(3)]

Holmes, 124 F.3d at 1128-29. For a discussion of this "new and improved" military exclusion policy, see William A. Woodruff, *Homosexuality and Military Service: Legislation, Implementation and Litigation*, 64 UMKC L. REV. 121 (1995) (defending traditional policy and arguing that the Defense Department regulations deviate in material respect from the statute), and the response to that essay, Andrew Koppelman, *Gaze in the Military: A Response to Professor*

conservative antipode to the line drawing of the progressive expression of liberal toleration which forms the sexual regulatory basis of most states.[27] While the difference between "progressive" and "traditionalist" is great, it is still merely one of degree. The basic postulates of the closet are accepted. Sexual subterfuge on the part of sexual non-conformists is the order of the day. The cases in which men and women have been separated from service on grounds of their sexual non-conformity provide a vivid, if poignant, picture of the boundaries that liberal toleration has drawn for our society. The implications of the public/private binary and its corollary—that public expressions of "being" is another form of "doing"—reach their limit in the military context. Let us examine some of these cases more closely.[28]

The "don't ask/don't tell" policy follows the pattern constructed by the Model Penal Code and Wolfenden Report.[29] It represents "a carefully crafted national political compromise, one that was the product of sustained and delicate negotiations involving both the Executive and Legislative branches of our government."[30] The policy suggests moral disapprobation, but with a twist. The old nakedly moral standard of disapprobation—"homosexuality is incompatible with military service"[31]—*did* disappear. In the face of the absolute disapprobation of the old moral standard itself, concealment of both mind and body as an absolute requirement for service appears less necessary. Instead, sexual *orientation* is now relegated to the world of the private. Moreover, like its civilian counterpart, "deviate" sexual orientation is to be tolerated only when placed in the room with the shades drawn—sexual orientation, standing alone, is now a private matter not barring participation in the military.[32] Yet, this softer, gentler replacement of the prior standard changed little other than the context in which the concealment of sexual non-conformity would be judged. For though now a private matter of no concern to military society, any manifestation of "homosexual conduct" brings with it the traditional penalty—exclusion from the society of the military.

True to the formal requirements of the model of liberal toleration, the description of these "manifestations" are essentially *public acts*. These public acts are broken down into three categories, any one of which is sufficient grounds to effect a separation from service. The three categories are made up first of tangible

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Woodruff, 64 UMKC L. REV. 179 (1995).

27. For a discussion, see Backer, *Exposing the Perversions of Toleration*, *supra* note 3.

28. I note here that the purpose of this section is not to exhaustively analyze the legal reasoning of the cases. That I leave to others. I use the case to illuminate the way the private/public cultural perspective overrides even the niceties of constitutional law.

29. COMMITTEE ON HOMOSEXUAL OFFENSES AND PROSTITUTION, THE WOLFENDEN REPORT (Authorized Am. ed., Stein & Day 1963) (1957) (hereinafter The Wolfenden Report). The Committee on Homosexual Offenses and Prostitution was created on August 24, 1954 by an act of Parliament to consider the law and practice relating to homosexual offenses, prostitution, and solicitation for immoral purposes. *Id.* para. 1. Its report to the British Parliament, dated August 12, 1957, recommended that private consensual homosexual conduct, but not the crime of gross indecency between males, be decriminalized. *Id.* para. 355. Interestingly, their recommendations were largely rejected by British lawmakers for nearly a decade. For a discussion of the Wolfenden Report, and its effects, see J.E. Hall Williams, *Sex Offenses: The British Experience*, 25 LAW & CONTEMP. PROBS. 334, 347-58 (1960).

30. Thomasson v. Perry, 80 F.3d 915, 921 (4th Cir. 1996).

31. 32 C.F.R. §41.13(a) (1981).

32. *See* Meinhold v. United States Dep't of Defense, 34 F.3d 1469 (9th Cir. 1994).

"homosexual acts," physical contact consummating desire.[33] The second consists of intangible acts or expressions. This is a category encompassing confession and the articulation of desire.[34] The third category confirms the status-limiting formulation of defining "act" as intangible expression of status. It requires discharge of any person who attempts marriage with a person of the same sex. Here is presented confession in its most provocative; an in your face appropriation of the heart of the heterosexual public space.[35] I look at each in turn in the context of the recent cases.

The first category involves "homosexual acts"—engaging, attempting to engage in or soliciting homosexual acts,[36] that is bodily contact between people of the same sex with sexual intent.[37] At first blush, this sort of conduct could appear entirely *private*. And, when unobserved and not communicated to others, homosexual acts, as defined in the statute, *do* remain outside the reach of military society. This is so, not because they are protected, but because they are invisible. Since invisibility is the prime directive of liberal toleration, homosexual acts which remain invisible may be treated, like the people who engage in them, as not existing in society. That is enough to satisfy the boundary protections built into the policy. When the policing authorities go beyond this boundary, when they enter into that space within which the curtains have been drawn, they are subject to more criticism.

Consider in this light the furor raised about the military's investigation of a service person for "homosexual acts" on the basis of information the Navy obtained from the confidential files of the internet service provider. The case concerns Senior Chief Petty Officer Timothy McVeigh, a subscriber to America Online ("AOL"). McVeigh sent an e-mail message to the wife of a fellow crewman. The message contained a potentially suggestive return address. The recipient of the message looked up the AOL user profile and discovered that the name on the account was "Tim," the marital status listed was "gay," and the hobby listed was "boy watching." She reported this to a commanding officer who refused to take further action, but the investigation commenced anyway when the initial order was overruled. During the course of the investigation, the Navy obtained McVeigh's full name and address in violation of AOL's confidentiality rules, and that information was used against McVeigh in the separation proceedings. The case has generated some criticism.[38]

Despite the criticism, McVeigh's visibility occurred on two levels. On one level, McVeigh exposed himself with the e-mail message he sent from an e-mail

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33. *See* 10 U.S.C. § 654(b)(1). "Homosexual Acts" means "any bodily contact . . . between members of the same sex for the purpose of satisfying sexual desire," *id.* § 654(f)(3)(A), and "any bodily contact which a reasonable person would understand to demonstrate a propensity or intent to engage" in acts for the purpose of satisfying sexual desire, *id.* § 654(f)(3)(B).

34. *See id.* § 654(b)(2). Discharge is required of any person who makes "a statement that he is homosexual" and a failure "to rebut the presumption, raised by that statement, that he has a propensity to engage in homosexual acts." Homosexual acts also include the intent to engage in such acts. *See id.* § 654(b)(1). The effect of propensity and intent is confirmed in the definition of "Homosexual Acts." *See id.* § 654(f)(3).

35. *See id.* § 654(b)(3) (marriage or attempted marriage with a person of the same sex).

36. *See id.* § 654(b)(1).

37. *See id.* § 654(f)(3).

38. *See 'Don't Ask Don't Tell' Online*, N.Y. TIMES, Jan. 26, 1998, at A-18, col. 1 (editorial); Jill Lawrence and Steven Komarow, *Watchdogs Worry About Internet Privacy in Sailor's Case*, USA TODAY, Jan. 16, 1998, at 9A.

account with publicly available information which might have been sufficient to expose him. An investigation following this act of exposure is not surprising. What makes this case different is the exposure occurring at a very different level—the exposure coerced from an entity with a contractual obligation of silence. At this level, AOL's conduct had the effect of closing in the private space available to those who would protect their invisibility. It made invisibility harder to control. In this sense, the second exposure, the exposure by AOL, was the more damning because the military sought to project itself into the core space of private invisibility.[39]

Well, then, what qualifies as *visible acts*? These include any public expression of the desire to engage in sexual acts, for instance, an appearance at any venue or event in which sexual non-conformists are known to frequent—like parks and bars—and any public solicitation of even private sexual acts. To the extent such expressive action can be observed and reported, it falls within the domain of the public and becomes fodder for the discipline of exclusion from service.

But public acts also include any sort of public confession of otherwise invisible acts. The statements of a lover or one's own statements may convert an invisible act into a visible one. More importantly, public confessions of invisible behavior are likely *acts of betrayal*. There is much of the story of Judas in the ways of military exclusion.[40] Concealment of 'homosexual acts' requires absolute silence and total discretion.[41] *That* is the true meaning of "don't tell" with respect to acts of a sexual nature. It is only within this space of absolute concealment that the military authority will not "ask."

The second category, therefore, invariably flows out of and substantially enlarges the first. This second category speaks to expression of a different order. This manifestation creates boundaries for direct and more verbal "confessions" of desire. No acts are necessary other than the act of confession.[42] In a sense, public

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39. In a sense, McVeigh demonstrated the ease with which the public space can appropriate any site for the expression of desire, even space which might have been thought far from "view." It demonstrates the utter contingency and narrowness of private space. "The contradiction, the dysfunction, the power to give with one hand (and feel good about it) and take away with the other (and feel safe) is all too clear." Backer, *Exposing the Perversions of Toleration*, *supra* note 3, at 796.

40. Indeed, many of the ways in which gays are "uncovered" for dismissal from the armed forces provide examples of such privacies disregarded: a snooping sergeant reads a private's diary in which lesbian desire is expressed; a chaplain reports to military officers the homosexual confessions of an enlisted man; a navy doctor or psychiatrist reports a sailor's anxieties over his sexual orientation or his fears that non-gay soldiers will kill him.

Richard Mohr, *Military Privacy: Blacks, Women and Gay Men in the Showers* 1-2 (unpublished manuscript), *quoted in* Koppelman, *supra* note 26, at n.59.

41. But even this exposure is not invariably fatal. The military recognizes a severely limited "one strike" rule, if the service member "has demonstrated that . . . such conduct is a departure from the member's usual and customary behavior." 10 U.S.C. § 654(b)(1)(A). Additionally, the service member will have to show that the conduct "is unlikely to recur" *Id.* § 654(b)(1)(B), that the act was not coercive, that the service member's continued presence in the armed forces is consistent with the interests of the armed forces, and (to emphasize the point perhaps) that the member does not have a propensity or intent to engage in homosexual acts. *Id.* § 654(b)(1)(C)-(E). This one strike rule is unavailable where the separation from service results from the public declaration of sexual non-conformity or the attempt to marry a person of the same biological sex.

42. All that the statute and regulation require is the making of a "statement that he is homosexual and [the failure] to rebut the presumption, raised by that statement, that he has a propensity to engage in homosexual acts." Holmes v. California Army Nat'l Guard, 124 F.3d 1126, 1128 *cert. denied* (9th Cir. 1997) (Reinhardt, J., dissenting) (citing 10

declarations of affective inclination are treated as more subversive than sexual acts; from the perspective of the military, declarations may be the most dangerous of the acts which may be indulged by a sexual non-conformist. Confession poses a direct challenge to the order imposed by the society. The military might be able to tolerate conduct which can, under severe circumstances, be made invisible. Confessions, however, by their very nature are public and confrontational. They are challenges which cannot be ignored. As such, constitutional protections for "speech" peter out long before they arrive at the realm of the confession.[43] Thus, for instance, the court in *Meinhold v. United States Dep't of Defense*[44] held that the mere statement of status was an insufficient basis on which to base a determination to separate the service member from the armed services. However, the court also construed the regulation as permitting the very same statement to be used as evidence as a desire to commit acts which form the predicate for separation from service.[45] The result, of course, is that the boundary itself becomes an object through which enforcement is possible. Those who regulate the public space become obsessed with the possibility that those using the private space will violate the divide. Gay baiting and surveillance, suspicion, and enforced conformity with heteronormative stereotypes become essential to survival within the private space. This game playing at the border of the public and private has been especially troubling for women in the military.[46]

The fact that the speaker may have never engaged in any sexual acts in this context becomes irrelevant.[47] The speaker has become a political sexual non-conformist. The expression of desire is an act in and of itself—an *open* solicitation of an act requiring separation.[48] His actions, in a sense are more provocative than the

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U.S.C. § 654(b)(2)).

43. *See, e.g.*, Philips v. Perry, 106 F.3d 1420, 1429-30 (9th Cir. 1997); Thomasson v. Perry, 80 F.3d 915, 931-34 (4th Cir. 1996).

44. 34 F.3d 1469 (9th Cir. 1994).

45. *Id.* at 1479. For a discussion of these issues, see, e.g., David Cole and William N. Eskridge, Jr., *From Hand Holding to Sodomy: First Amendment Protection of Homosexual (Expressive) Conduct*, 29 HARV. C.R.-C.L. L. REV. 319 (1994).

46. For a discussion of the gay-baiting of women in the military, see, e.g., Michele M. Benecke and Kristin S. Dodge, *Military Women: Casualties of the Armed Forces' War on Lesbians and Gay Men*, in GAY RIGHTS, MILITARY WRONGS: POLITICAL PERSPECTIVES ON LESBIANS AND GAYS IN THE MILITARY 71 (Craig A. Rimmerman ed., 1996).

47. Carl Stychin provides an interesting analysis of the limiting case of the non-sexual gay man as the site from which to contest the incoherence of the military exclusion policy. He proposes an insider/outsider binary, and examines its utility in *Steffan v. Cheney*, 780 F. Supp. 1 (D.D.C. 1991) *rev'd sub nom. Steffan v. Aspin*, 8 F.3d 57 (D.C. Cir. 1994). Such a binary can be used to destabilize the categories "status and conduct" as well as the underlying foundations of the status—heterosexual—as well. *See* Carl F. Stychin, *Inside and Out of the Military*, 3 LAW & SEX. 27 (1993). In an insider/outsider context, as in the public/private context discussed in here, it is the profession or declaration of proclivity, as much as the indulgence in the proclivity itself, which damns.

> The extent to which Steffan proved himself an insider, despite the construction of his status as outsider, demonstrated that his identity, rather than being marginal, is silenced because it is central to the military establishment. That centrality must be decentered by the Court in order to re-establish the separation between the homosocial environment of the military, same-sex acts, and a gay identity.

Id. at 38.

48. Indeed, this bundling of act/expression/solicitation/consummation was at the heart of a few key state court actions in which state criminal solicitation statutes were challenged on constitutional grounds. *See* Christensen v. State, 468 S.E.2d 188 (Ga. 1996); Commonwealth v. Wasson, 842 S.W.2d 987 (Ky. 1992); Sawatzky v. City of Oklahoma City, 906 P.2d 785 (Okla. Crim. App. 1995). For a discussion of the relationship of solicitation and underlying sexual acts in the context of constitutional attacks on conduct regulation, see Larry Catá Backer, *Tweaking Facts, Speaking*

furtive sexual acts which ostensibly result in separation from service. The provocation comes in the form of a challenge to the status/conduct divide, out of which the law is constructed. Here is a situation in which a bald statement of status, shorn of conduct, is used as a proxy for conduct. The proxy is sufficient to obviate the need to prove the actual occurrence of conduct; the statement is sufficient to suggest the potential for actualization. And that potential itself is sufficient to constitute conduct of the sort which is the necessary predicate for separation.[49]

Yet, the model of liberal toleration suggests that the real battle is not fought within the status-conduct divide.[50] The site of conflict occurs in the context of the public-private divide. "Hypocrisy and deception, if artfully practiced, do not offend the Constitution, at least not in most instances."[51] The military, and society in general, prefers invisible law breakers to people who declare their unity with groups of lawbreakers, but who have not necessarily engaged in any lawbreaking themselves. As in the civilian context, the public declaration of sexual difference is treated as the commission of a public sexual act subject to suppression.

> If a service member keeps his homosexual orientation secret, then he is allowed to remain in the military. However, if a service member acknowledges that he is gay, then he is a threat to "unit cohesion" and must be discharged. The only material difference in these two situations is that information regarding the service member's homosexuality has been communicated to other service members, who might react negatively to the information and threaten unit cohesion.[52]

It is the act of public association, rather than the conduct threatened, which provokes suppression. There should be no surprise then, that a federal district court deemed extraordinary "the almost total lack of concern evidenced in the Congressional hearings and the Committee reports as to the impact on the unit cohesion of the attempts to enforce secrecy on homosexuals and to enlist them in the perpetration of a hoax on heterosexuals."[53] It follows that "[t]he sad corollary of this 'policy of pretense' is that moral courage like that displayed by Lt. Thomasson is punished."[54]

Judgment: Judicial Transmogrification of Case Narrative as Jurisprudence in the United States and Britain, 6 S. CAL. INTERDISC. L. J. 611 (1998). *Christensen* was superceded by *Powell v. State*, 510 S.E.2d 18 (Ga. 1998).

49. Thus, consider the attitude of those who would support the continued suppression of sexual non-conformist in the military with respect to the importance of the divide between status and conduct: "In the final analysis, Congress, professional military judgment, and common sense all recognize that homosexuality is inextricably linked to homosexual conduct. To pretend otherwise is absurd." Woodruff, *supra* note 26, at 167. The point for traditionalists is that status is a proxy for conduct, and that the propensity (if not the actualization) for the expression of (forbidden) desire is the "conduct" necessary and sufficient to impose the discipline of separation.

50. Yet, many commentators have chosen the status/conduct divide as the ground on which to battle. For an interesting critique of military exclusion scholarship, see Diane H. Mazur, *The Unknown Soldier: A Critique of "Gays in the Military" Scholarship and Litigation*, 29 U.C. DAVIS L. REV. 223 (1996).

51. Holmes v. California Army Nat'l Guard, 124 F.3d 1126, 1139 *cert. denied* (9th Cir. 1997) (Reinhardt, J., dissenting).

52. Philips v. Perry, 106 F.3d 1420, 1435 (9th Cir. 1997) (Fletcher, J., dissenting).

53. Able v. United States, 880 F. Supp. 968, 979 (E.D.N.Y. 1995).

54. Thomasson v. Perry, 80 F.3d 915, 953 (4th Cir. 1997) (Hall, J., dissenting). For an interesting commentary on this notion, see Kay Kavanaugh, *Don't Ask, Don't Tell: Deception Required, Disclosure Denied*, 1 PSYCHOL. PUB. POL'Y & L. 142 (1995).

The language of both statute and policy mask this reality. The indulgence by those who would overturn this policy of military exclusion in the status/conduct distinction is thus fatally misdirected.

Holmes v. California Army National Guard,[55] proves an exemplary case in point. It could only have been the misdirected notion that status discrimination was at issue, and that on this point the military exclusion rules were vulnerable, which led the litigants and their counsel down the factual path they traveled. Consider how the separation scenario was cast in this case:

> On October 28, 1994, Watson delivered to his commanding officer a one page document, entitled "Submission of Sexual Orientation Statement," in which he stated: "I have a homosexual orientation. I do not intend to rebut the presumption."... [Thereafter, during the pendency of the separation proceedings] Watson's civilian counsel submitted a Letter of Deficiency to the Commander of Naval Base Seattle and the Board of Review for their consideration in reviewing the Board of Inquiry's decision. The following statement was included [in] with the letter:
>
> a. I expressly deny that I have engaged in any homosexual conduct with any military student or service member.
> b. I expressly deny that I engaged in any homosexual conduct during the performance of military duty, or while on any military installation.
> c. I expressly deny that I have any intent or propensity to engage in any conduct described above.[56]

Here, plaintiffs attempted to cast their narrative as one essentially of "status." And surely status appears to be the sole issue in this case as it was in *Meinhold*.[57] Indeed, the court devoted a substantial amount of space to prove to itself that status distinctions were not at the heart of the new regulations, and that the "presumption" standard of the new policy adequately protected against unlawful status distinctions.[58]

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55. 124 F.3d 1126 (9th Cir. 1997).

56. *Holmes*, 124 F.3d at 1129-30. Holmes' actions leading to separation were substantially the same—he addressed a memorandum to his commanding officer in which he stated "[a]s a matter of conscience, honesty and pride, I am compelled to inform you that I am gay." *Id.* at 1131. Note, though, what Watson's statement did not include: a denial of engaging in or the propensity to engage in "homosexual" conduct other than on a military installation, during the performance of military duty, or with a military student or service member. The court refused to distinguish non-military from military activity for purposes of making a determination of the occurrence of "homosexual acts." "Although Watson presented a statement contending that he did not commit homosexual acts on base, on duty, or with other military personnel, neither Watson nor Holmes offered any evidence regarding off base, off duty activity, even though military regulations still reach the off base and off duty activities of military personnel." *Id.* at 1135. From the perspective of the public/private divide this conclusion can be understood as a proxy for the notion that it is the unmasking of desire which is critical to the enterprise of separation. The unmasking itself will bring up the necessary level of revulsion required for the social group to discipline the person unmasked.

57. 34 F.3d 1469, 1479 (9th Cir. 1994) (construing the former exclusion policy not as effecting separation on the basis of status, but rather permitting separation only on the basis of statements of status that "show a concrete, fixed, or express desire to commit homosexual acts despite their being prohibited").

58. The court suggested that the presumption procedure made all the difference in the world. Since a service member was provided with an opportunity to rebut the presumption of conduct/propensity after making a declaration of status, then the government could justifiably rely on status as a proxy for conduct/propensity. *See* Holmes, 124 F.3d

The court found constitutional comfort by reducing status declaration to little more than evidence of conduct/propensity.

Yet, read closely, this "status as evidence" opinion suggests something quite different from a concern with status and conduct. It suggests that public *expressions* of status, rather than presumptions of propensities of conduct, drove the court to its status/conduct convolutions. The act of public declaration of non-conformity *itself becomes the commission of a homosexual act.*[59] As such, commission of this act places the burden on the declarant to abjure.[60] Indeed, the presumption standard is more about *retraction* of a declaration of status, than it is about refuting circumstantial evidence of conduct.

> Watson's and Holmes's respective declarations of homosexual orientation did not automatically lead to their discharge; rather, their declaration was coupled with their tacit acceptance of the link between their orientation and their conduct as evidenced by their failure to show that they did not engage in, attempt to engage in, have a propensity to engage in, or intend to engage in homosexual acts.[61]

The importance of concealment to the regulation of membership in the military becomes clearer when we consider the context in which many of the most celebrated cases considering challenges to the military's exclusion policy arose. In some cases, the service member orally confessed to a superior officer.[62] In other cases, the service member delivered a written declaration of his sexual orientation to a superior officer.[63] These challenges were deliberately structured as expressive challenges to the exclusion policy.[64] Ironically, though, formal recognition of the benefits of concealment may make concealment that much more onerous. The aggressive pursuit of information in confidential internet accounts by the Navy, discussed above, is one

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at 1135 (Reinhardt, J., dissenting).

59. Leslie Moran has examined the way in which creation of a private space free of the constraints of sexual conduct regulation has the perverse effect of strengthening the taboos against public expression of the use of this private space. "Here the emphasis is not merely upon display but upon the possibility of display .... The mere possibility of display of the male genital body in juxtaposition with another male body will render those bodies capable of total visibility in law. 'In private' is to be haunted by the paranoid figure of an ever-present third party." MORAN, *supra* note 19, at 58.

60. Indeed, the court's recital of the cases in which service members have successfully overcome the presumption is full of the stuff of disavowal. The service members confessed to "status" but disavowed that status by swearing obedience to military norms. Others hid successfully behind marital status, or, in one case, "confusion" about the actual state of his status. *See Holmes*, 124 F.3d at 1135-36.

61. *Holmes*, 124 F.3d at 1135. This echoes the analysis of earlier cases. Thus, in *Philips v. Perry*, 106 F.3d 1420 (9th Cir. 1997), the court concluded that the service member "was discharged because the board found that he had engaged in homosexual acts and intended to engage in homosexual acts in the future, based on his statements to this effect. Thus, as in *Pruitt* [*Pruitt v. Cheney*, 963 F.2d 1160 (9th Cir. 1991), *cert. denied*, 506 U.S. 1020 (1992)], Philips's statements were used as evidence, not as the reason for discharge." *Philips*, 106 F.3d at 1430.

62. *See Philips*, 106 F.3d at 1421-22 (plaintiff told his division officer that he was "homosexual," that he had had sex with men on a number of occasions, and that he would continue to do so); Richenberg v. Perry, 97 F.3d 256, 260 (8th Cir. 1996) (statement made to commanding officer, acknowledging "I am forcing you to take actions which may ultimately result in my discharge").

63. *See Holmes*, 124 F.3d at 1129 (9th Cir. 1997) (written declarations delivered to commanding officers); Thomasson v. Perry, 80 F.3d 915 (4th Cir. 1996) (delivery of letter to four admirals stating that he was gay and expressing strong disagreement with the military separation policy).

64. For the criticism of this as litigation strategy, see Mazur, *supra* note 50.

indicator of this effect. Indeed, anecdotal evidence suggests that since the adoption of the exclusion policy, military authorities have become far more aggressive in flushing out "homosexuals" from spaces traditionally respected as invisible.[65]

The third category is virtually a subset of the second. It condemns as a manifestation of 'homosexual acts' the attempt to marry a person of the same biological sex.[66] Certainly, if a statement of 'homosexual' propensity can be treated as a public expression of sexual desire which must be suppressed, how much more energetically suppressed ought to be something even more deliberately provocative—the act of appropriating the centerpiece of heterosexual monogamous sexual unions. Such actions amount to subversive mimicry at their most visible.

The irony is that separation from military service on this ground results from the assertion of an empty right. It is likely that this provision was included as a result of the fear that the courts of Hawaii or some other state would permit marriages by people of the same biological sex. That has yet to happen. But even the most progressive of European jurisdictions have not accorded unions between people of the same sex the status of marriage. As the European Court of Justice noted in rejecting the expansion of sex discrimination laws to cover acts of discrimination on the basis of sexual orientation,

> while in some [of the Member States of the European Union] cohabitation by two persons of the same sex is treated as equivalent to marriage, although not completely, in most of them it is treated as equivalent to a stable heterosexual relationship outside marriage only with respect to a limited number of rights, or else is not recognized in any particular way.[67]

Yet the magnitude of the danger for the model of liberal toleration is not the failure of the attempt to mimic the forms of heterosexual union, but rather the public declaration by words and deeds, that one stands ready to do just that.

Thus, the public/private distinction created by the accepted model form of liberal toleration finds significant expression even in that most illiberal institution—the military. Though much of the case law is couched in the formalistic language of status and conduct, the real boundaries of toleration are formed by the public expression of acts which are offensive when the institutions of dominant society are required to publicly acknowledge them. This is the point at which society will tolerate prejudice and accommodate offense. The military cases make that evident.[68] But it operates as well in the civilian sector.

Ironically, the cases I have considered, so loaded with the sexual, desexualize those nonconformists seeking to overcome the military's attempts to separate them

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65. Thus, for example, the number of sexual non-conformists dismissed from the military reached a five year high in 1996 when 850 persons were separated from service, prompting the military to review its enforcement of the policy. *See* Tamra Fitzpatrick and Ed Timms, *Speaker Wants Military Sex Issues Studied: Scandals, Gay Controversy Hurt Morale, Speaker Says*, DALLAS MORNING NEWS, Aug. 4, 1997, at 1A.

66. *See* 10 U.S.C. § 654(b)(3).

67. Grant v. South-West Trains, Ltd., Case C-249/96 (17 Feb. 1998) *reprinted at* http://curia.eu.int/jurisp at ¶32.

68. *See, e.g.*, Thomasson v. Perry, 80 F.3d 915, 950-952 (4th Cir. 1996) (Hall, J., dissenting).

from service. Here we touch on what Ruthann Robson has called the "paradoxes of narrativity."[69] Professor Robson identifies seven forms of paradox;[70] the last two are most telling in the context of military separation cases involving sexual non-conformists. *Holmes* is certainly a study in impact litigation by self censorship. That case involved a sexual non-conformist who did not engage in homosexual conduct, and did not engage in sexual conduct with military personnel or while on military duty, or on any military installation.[71] The effect, of course, is to magnify the importance of the public/private divide. It constitutes an acceptance of the invisibility of sexual non-conformity from the public space as something shameful, something which ought to be hidden. *Holmes* speaks to expression; it presents us with the "most acceptable" homosexual—the desexualized man.[72]

The tribulations of Timothy McVeigh illustrate the future. In the cyberworld of sex-once-removed, the public/private binary intrudes again. The hyper-narrative of McVeigh's three way relationship with the military and his Internet service provider again concedes the primacy of public space determinations to the issue of tolerance and suppression of conduct.[73] It also serves as a harbinger of the possibilities of suppression within a culture of liberal toleration. Private space can be as illusory as the toleration conferred upon sexual non-conformity, and as illusory as the protections of "don't ask/ don't tell." The military's incursion into the "private" space of the Internet serves as warning that no space is private unless those who control the public space create and maintain it. This lesson has already been learned in Britain.[74] Private space is really *kinetic space*, the object of a socio-

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69. Robson, *supra* note 4, at 1410.

70. These paradoxes relate to the masculinity/heterosexuality of the narrative structure itself, the ubiquity of narrative, the contrast of narrativity with feminist consciousness raising, the interplay between individual and collective narratives, the tendency of narrative to provoke counter-narratives, the lure of self-censorship, and finally the fact that we may be at the end of the period in which narrativity is a relevant undertaking.

Id. at 1410-11.

71. *See Holmes*, 124 F.3d at 1129-30.

72. Professor Robson notes find this pattern of impact litigation troubling as well. By advancing "arguments that a declaration of homosexuality does not necessarily mean sexual conduct, [advocates] betray[] 'the celebration of sexuality from which the gay rights movement once stood.'" Robson, *supra* note 4, at 1423; quoting in part Teresa M. Bruce, Note *Doing the Nasty: An Argument for Bringing Same-Sex Erotic Conduct Back into the Courtroom*, 81 CORNELL L. REV. 1135, 1772 (1996); *cf.* Patricia A. Cain, *Litigating for Lesbian and Gay Rights: A Legal History*, 79 VA. L. REV. 1551 (1993). Carl Stychin has argued that the problem of the desexualized sexual man has the potential for destabilizing the sexual categories used by society to reward some and punish other forms of desire. *See* Stychin, *supra* note 47.

73. Professor Robson speaks of the death of the narrative by the emerging hypertext culture, or its transformation. Robson, *supra* note 4, at 1414-26. I would suggest that this transformation is here. McVeigh's encounter with the military surveillance machinery in a hypertext world is a stark example of the disembodying of act and the primary of space in connection with the policing of sexual non-conformity. The text itself becomes the space, as well as the narrative site for acts which are consummated merely by their utterances in hypertext. An AOL on-line profile has become an open solicitation to engage in (homo)sex. Hypertext status becomes story with a narrative conclusion provided by law. Sex itself has become secondary. Exposure is the primary offense and hypertext the new open space.

74. "In England, then, juries become the *vehicle* of the expression of popular culture as judgment." Backer, *Tweaking Facts*, *supra* note 48, at 643 (for a general discussion of the English approach to determinations of public and private space, and of moral and immoral conduct, see *id.* at 641-49). Even the act of public kissing has been characterized by British courts as carrying within it the potential for significantly disruptive effect. *See* Masterson v. Holden, [1986] 1 W.L.R. 1017, 1024 (Q.B.).

cultural game of hide-and-seek. Private space exists as a site in constant flight from the public arena. If it can be found, if it can be searched out, no matter how onerous the searching, the potential exists for the appropriation of that space as public.

The nature of the toleration accorded sexual non-conformists, like all toleration, is narrow and formalistic in theory, arbitrary and expeditious in practice. This is a largesse fit only for slaves. Liberal toleration steals the power of identity from sexual non-conformists, reserving the power to define to the group which permits toleration (thus the construction of the "normal" traits of sexual non-conformists through judicial narrative).[75] Liberal toleration extracts as the price of toleration an obliteration of the sexual non-conformist from the public space. Liberal toleration defines the public space so broadly that there is little room within it for sexual minorities to attempt to communicate formally in their own voice. Liberal toleration is passive, based substantially on the munificence of the tolerating group, and subject to its whims. Liberal toleration presents dangers for the objects of toleration; it is dangerous because while it suppresses public expression from sexual minorities, it encourages the majority to use all means short of compulsion to condemn the practices tolerated. Liberal toleration is unstable; it will last as long as it takes for a new dominant consensus to emerge; it is only during this time that sexual minorities may have hope of affecting the nature of that consensus, but perversely while their conduct is tolerated, their voices are suppressed.

The homosexual *Judenfrage*, our Queerfrage, is not one of juridical making; the courts cannot command cultural acceptance any more than Canute could order the tides.

> A powerful way to conceive of the cognitive, cultural, and even, in part, the political life of a society is as a conversation. . . . When a conversation is monolithic or close to monolithic on certain points—and this includes the unstated, underlying cognitive models—then a society's members automatically incorporate its features into the organization of their minds, into the fundamental axioms that they use (consciously or unconsciously) in perceiving, understanding, analyzing, and responding to all social phenomena. . . because that is all that is available for a developing mind to draw on.[76]

Liberal toleration shields only that which remains hidden. Without a place in the public space, any subsequent new cultural consensus may well sweep away even that grudging toleration. That has been the juridic-historical pattern of our world these past several millennia; that is what awaits us in the millennium to come.

Yet these statements ought not to be taken as a condemnation of liberal toleration. Rather these arguments serve to illuminate the limitations and potential of regimes of liberal toleration, and to warn against the far more repressive regimes

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75. This is particularly evident in the military cases considered. For a more detailed study of the way in which courts function as the place where culturally significant images of sexual non-conformists are created, see Backer, *Constructing a "Homosexual" for Constitutional Theory*, *supra* note 3.

76. GOLDHAGEN, *supra* note 6, at 33-34.

of illiberal toleration. Liberal toleration is constituted as its own best warning against its limitations as well as its bounty. The regime of liberal toleration draws lines between difference and deviance. Yet other regimes draw no such lines. For these others, difference is deviance and as such must be utterly suppressed. The line between difference and deviance is a shifting one within regimes of liberal toleration. Yet only in regimes of liberal toleration does the possibility exist to transform deviance to mere difference, and mere difference to "normal." That is not possible in regimes in which concepts of the normal are ossified and never permitted to shift within the official and non-official conversations constituting culture. The Germans *can* attempt to reconstitute their conception of Jews; the cultural conversation can evolve away from the monolithic. The American cultural conversation about sexual non-conformity has never been monolithic. It is *possible* that sexual non-conformity can also be reconstituted either as difference or as inconsequential—that is, as normal. Possibility, however, is not certainty. Possibility carries with it responsibility, a burden to converse within the social, political and juridical spheres. Yet possibility is the genius of liberal toleration. Possibility— the power to incorporate change within the matrix of social, legal and cultural organization—is the most exquisite gift of liberal toleration to the world.