

FROM HAND-HOLDING TO SODOMY: FIRST AMENDMENT PROTECTION OF HOMOSEXUAL (EXPRESSIVE) CONDUCT

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Navy Lieutenant Richard Dirk Selland found himself "in a situation resembling that of a sparrow caught in a badminton game."¹ As a closeted gay man in 1992, Selland was disturbed by shipmate kidding that he was probably a "homosexual." The taunts escalated when the Democrats' presidential nominee, Bill Clinton, promised to end the military's exclusion of lesbians, gay men, and bisexuals. Selland's internal turmoil impelled him to seek counseling from the ship's chaplain. On the day after Clinton's inauguration as President, the chaplain and Selland met with the ship's commanding officer, and Selland admitted that he was "homosexual" in orientation. Under the military policy then in effect, Selland was unfit to serve: the policy held that homosexuality was incompatible with military service, and flatly forbade homosexuals from serving in the military. Selland's commander immediately removed him from his position.²

Soon thereafter, however, President Clinton announced his intention to end the policy justifying such separations. The President's announcement triggered a political firestorm. What emerged from the firestorm was a policy of "don't ask, don't tell."³ Under this policy, military recruits and personnel will not be asked about their sexual orientation. In theory, gay men, lesbians, and bisexuals may serve in the military so long as they do not engage in homosexual conduct.⁴ The change came on the heels of several judicial decisions questioning the constitutionality of the previous

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¹ Memorandum for Appellant at 3, *Selland v. Aspin*, Civ. No. 93-1924-LFO (D.D.C. Sept. 28, 1993) (granting preliminary injunction).

² *Id.*

³ The policy was initially implemented by executive order and subsequently codified in a more restrictive form by statute. See Memorandum from Secretary of Defense Les Aspin to Secretaries of the Army, Navy, Air Force and the Chairman of the Joint Chiefs of Staff (July 19, 1993) [hereinafter *Aspin Memo*]; Policy Guidelines on Homosexuality in the Armed Forces, attachment to *Aspin Memo* (on file with authors) [hereinafter *Policy Guidelines*]; National Defense Authorization Act for Fiscal Year 1994, 10 U.S.C. § 654 (1993) (original version Pub. L. No. 103-160, § 571, 107 Stat. 1547, 1670-73 (1993)). Regulations are presently being drafted to implement the policy.

⁴ See *Policy Guidelines*, *supra* note 3.

policy which was predicated on sexual orientation.⁵ The military claims that under its new policy, fitness to serve in the military now turns not on one's sexual orientation, but on one's conduct. The qualifications for admission state, "[s]exual orientation is considered a personal and private matter, and homosexual orientation is not a bar to service entry or continued service unless manifested by homosexual conduct."⁶

This shift to conduct is misleading, however, for the military defines conduct in expansive, Orwellian terms. Under the new policy, homosexual conduct includes "any bodily contact, actively undertaken or passively permitted, between members of the same sex for the purpose of satisfying sexual desires"; "any bodily contact that a reasonable person would understand to demonstrate a propensity or intent to engage in [a homosexual act]" (including same-sex hand-holding and kissing); a same-sex marriage or attempted marriage; and any statement by the servicemember that he or she is homosexual.⁷

Unhappily for Selland, the new policy still excludes him from service; the armed forces didn't ask, but he told. Although he admitted no homosexual activity, his admission that he is gay creates a presumption under the new policy that he has a propensity to engage in homosexual acts. The only way he can defeat that inference is by proving that he has no desire or propensity to engage in homosexual acts.

Like others before him, Selland has challenged his separation in court.⁸ One of his arguments is that the military's action, predicated on his statement "I am a homosexual," violates the First Amendment. The government's response is that it is not punishing Selland for the words "I am a homosexual," but is using those words as evidence of conduct⁹—sodomy—that is illegal under the Code of Military Justice and that can be criminalized under the constitutional authority of *Bowers v. Hardwick*.¹⁰ Relying on similar reasoning, the government has thus far prevailed against First Amendment arguments by bisexual, lesbian, and gay soldiers protesting their discharges for making statements about their sexual identities.¹¹ During congressional hearings on the new policy, Pro-

⁵ See *Pruitt v. Cheney*, 963 F.2d 1160 (9th Cir. 1991), *cert. denied*, 113 S. Ct. 655 (1992) (remanding for factual hearing to determine rational basis of old policy); *Meinhold v. United States Dep't of Defense*, 808 F. Supp. 1455 (C.D. Cal. 1993) (invalidating old policy as unconstitutional), *appeal pending*; see also *Steffan v. Aspin*, 8 F.3d 57 (D.C. Cir. 1993) *vacated for reh'g en banc* (subsequent decision striking down old policy).

⁶ See *Aspin Memo*, *supra* note 3, at 1.

⁷ See *supra* note 3.

⁸ *Selland v. Aspin*, Civ. No. 93-1924-LFO (D.D.C. Sept. 28, 1993) (granting preliminary injunction).

⁹ See *supra* note 3.

¹⁰ 478 U.S. 186 (1986) (upholding Georgia sodomy statute against constitutional attack on privacy grounds).

¹¹ For cases where such First Amendment arguments have been addressed and rejected, see *Pruitt v. Cheney*, 963 F.2d 1160, 1163-64 (9th Cir. 1991); *Schowengerdt v. United*

fessor Cass Sunstein endorsed the government's position and opined that there was at most a 1.5% chance that a court would accept *any* constitutional challenge to the "don't ask, don't tell" policy. "So if the worry is are the justices going to strike this one down, I think the answer is don't worry."¹²

It remains to be seen whether Sunstein's dismissive prognosis will be borne out, but he makes the government's core argument in a nutshell: "This point," referring to the words-as-evidence-of-conduct argument, "suggests that the [controlling] question is whether homosexual conduct, as defined, is regulable behavior or status."¹³ Sunstein insists that the government's right to criminalize homosexual conduct allows it to use admissions of homosexual identity as evidence of such homosexual conduct. We think Sunstein's position is descriptively oversimple under existing First Amendment jurisprudence, and normatively wrong under traditional First Amendment values.

This Article maintains that the government's restrictions on gays in the military directly implicate First Amendment values, and should be subject to strict scrutiny under current First Amendment case law. We do not ignore Sunstein's insistence that expression and conduct are connected in this instance, but we invert Sunstein's line of reasoning. Where he argues that speech can be used as evidence of proscribable conduct, we contend that the underlying prohibition on homosexual conduct is in fact a restriction of expression. Homosexual conduct is expressive. While an act's expressiveness does not in itself entitle the conduct to stringent First Amendment protection, such protection is required where the government's reason for regulating the conduct is predicated on its communicative character, or where the government has selectively targeted some

States, 944 F.2d 483, 489 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 1514 (1992); *Woodward v. United States*, 871 F.2d 1068, 1071 (Fed. Cir. 1989), *cert. denied*, 494 U.S. 1003 (1990); *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563, 578-80 (9th Cir. 1990); *Ben-Shalom v. Marsh*, 881 F.2d 454, 462 (7th Cir. 1989), *cert. denied*, 494 U.S. 1004 (1990).

¹² *Assessment of the Plan to Lift the Ban on Homosexuals in the Military: Hearings Before the Subcomm. on Military Forces and Personnel of the House Comm. on Armed Services*, 103d Cong., 1st Sess. 322 (1993) (statement of Cass R. Sunstein) [hereinafter *July 1993 House Hearings*]; see *id.* at 324 ("I think one ought not to worry about judicial challenges."). These quotes are from Sunstein's oral colloquy with the Members of the Subcommittee. His written statement (page 4) says: "There is no impermissible content discrimination when the government uses words as evidence of regulable behavior or status." *Id.* at 260. Sunstein's written statement makes the further neo-republican point that Congress may (and Sunstein argues should) interpret the Constitution more liberally than the Court has. See Stephen F. Ross, *Legislative Enforcement of Equal Protection*, 72 MINN. L. REV. 311 (1987). The public record does not reveal that the Representatives had much interest in what they "might" do; their interest was focused on what limits the Court "would" impose on them.

¹³ *July 1993 House Hearings*, *supra* note 12, at 260 (prepared statement of Cass R. Sunstein).

forms of conduct and not others based on their message. The only reasons the government offers for the military's regulation of homosexual conduct are based on what that conduct communicates to other service members who may be offended by knowledge that some of their fellow soldiers are gay or lesbian. Moreover, the military policy treats the very same conduct—hand-holding, kissing, marriage, and sexual contact—differently depending on whether it sends a heterosexual or homosexual message. Therefore, under established First Amendment doctrine, the military's policy is "related to the suppression of expression," and must be justified under the traditional strict scrutiny accorded to regulation of speech.¹⁴

We do not limit our argument to the military's newly expanded definition of conduct. The military's criminal prohibition of sodomy itself, and indeed all state sodomy statutes, also regulate expressive conduct based on what that conduct communicates to others, and, therefore, should also be subject to traditional strict First Amendment scrutiny. In *Bowers v. Hardwick*, the Supreme Court upheld a statute criminalizing sodomy against a due process challenge, finding that it was rationally related to the state's interest in upholding morality.¹⁵ No First Amendment argument was raised, and the Court subjected the statute to only relaxed rational basis scrutiny. But the rationale for regulating sodomy—upholding community morals—is inextricably related to what sodomy expresses to the community, and therefore sodomy statutes should have to satisfy strict scrutiny, not rational basis review. They cannot meet that more stringent standard. Thus, the argument advanced here offers a doctrinal method for rethinking, and ultimately overruling, *Bowers*.

Prominent constitutional scholars, including former Solicitor General Charles Fried, have argued that *Bowers* was wrongly decided and will be overruled sooner or later.¹⁶ As the preeminent symbol of the legal sup-

¹⁴Sunstein and the government also argue that such regulation in the context of military service would pass strict scrutiny, *id.* at 262–64, and we dispute that conclusion as well.

¹⁵See *Bowers v. Hardwick*, 478 U.S. 186, 194–96 (1986).

¹⁶See CHARLES FRIED, *ORDER AND LAW: ARGUING THE REAGAN REVOLUTION—A FIRSTHAND ACCOUNT* 71–88 (1991); LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1424–33 (2d ed.) (1988); Janet E. Halley, *Reasoning About Sodomy: Act and Identity In and After Bowers v. Hardwick*, 79 VA. L. REV. 1721, 1748–53 (1993).

Fried would, however, support a ban on homosexual conduct by members of the armed services. See FRIED, *supra*, at 219 n.26. But see Ronald Dworkin, *The Reagan Revolution and the Supreme Court*, N.Y. REV. BOOKS, July 18, 1991, at 23. Fried's letter to the editor and Dworkin's response appear in N.Y. REV. BOOKS, Aug. 15, 1991, at 65. See also Charles M. Freeland, Note, *The Political Process as Final Solution*, 68 IND. L.J. 525 (1993); Joshua Schwartz, *The President's Lawyer as Frie(n)d*, 60 GEO. WASH. L. REV. 1081 (1992).

After retiring, Justice Powell himself questioned his deciding vote in *Bowers*. In response to a student at a New York University Law School presentation, he stated with respect to his *Bowers* vote, "I probably made a mistake in that one." Anand Agneshwar, *Ex-Justice Says He May Have Been Wrong*, NAT'L L.J., Nov. 5, 1990, at 3. According to

pression of gays and lesbians, *Bowers* is to the growing gay rights movement what *Plessy v. Ferguson*¹⁷ was to the civil rights movement, and what *Dred Scott v. Sandford*¹⁸ was to the abolitionists. Each of these decisions reflects the Court's failure to recognize the equal humanity and personhood of members of a minority group. Because *Bowers* focused on sexual conduct rather than identity, it appears to invite rationales like those the military now advances, which separate sexual identity from sexual conduct. The First Amendment tradition we invoke bridges the gap that *Bowers* created, by noting the integral connection between regulation of expressive sexual conduct and regulation of sexual identity.

The argument we advance in this Article is different in kind from the First Amendment arguments pressed to date in challenges to the military's ban on gay and lesbian members. Previous arguments have focused on the punishment imposed on service members for admitting that they are gay.¹⁹ We argue that even the underlying regulation of homosexual conduct should be subjected to First Amendment strict scrutiny because the rationales for that regulation turn wholly on the offense that the conduct communicates to others. Because homosexual conduct between consenting adults can have no effect on society other than by virtue of what it communicates,²⁰ its regulation should trigger searching examination by a reviewing court.

The first Parts of this Article track First Amendment theory and doctrine. In adjudicating the constitutionality of statutes regulating expressive conduct, the Supreme Court has applied a two-step analysis. It asks first whether the conduct is expressive, namely, whether it is intended to communicate and whether it is likely to be understood by an audience as communicative.²¹ This is a low threshold, recognizing that a great deal

the *Washington Post*, in conference, Justice Powell agreed to provide the fifth vote to invalidate the statute but instead filed a brief concurring opinion suggesting that, while criminalizing sodomy does not violate substantive due process, serious punishment would raise an Eighth Amendment issue. See *Bowers*, 478 U.S. at 196 (Powell, J., concurring); Al Kamen, *Powell Changed Vote in Sodomy Case*, WASH. POST, July 13, 1986, at 1.

¹⁷ 163 U.S. 537 (1896).

¹⁸ 60 U.S. 393 (1856).

¹⁹ See cases cited *supra* note 11. For related arguments along different lines see José Gómez, *The Public Expression of Lesbian/Gay Personhood as Protected Speech*, 1 LAW & INEQ. J. 121 (1983); Note, *The Constitutional Status of Sexual Orientation: Homosexuality as a Suspect Classification*, 98 HARV. L. REV. 1285, 1295-96 (1985).

²⁰ It might be argued that homosexual conduct might undermine a social policy in favor of procreation. But there is no evidence that procreation *per se* is a goal of our society; indeed, overpopulation is a more likely social concern. And even if procreation were a goal, penalizing homosexual conduct would not necessarily contribute to the goal. More open toleration of gay and lesbian couples could encourage the formation of families that might not otherwise form, through artificial insemination (for lesbian couples) and surrogacy (for gay couples).

²¹ See *Texas v. Johnson*, 491 U.S. 397 (1989); *Spence v. Washington*, 418 U.S. 405 (1974).

of conduct can be communicative, from burning a flag to wearing an arm-band to shooting a President. We argue in Part I that homosexual conduct not only easily satisfies this threshold inquiry, but its treatment as expression is consistent with the essential purposes served by the First Amendment.

The second step in the analysis of regulation of expressive conduct is the critical one: it asks whether the government's purpose in regulating the conduct is related to the conduct's expressive elements.²² A law barring murder, for example, is designed to protect human life, irrespective of what the murderer communicates, and therefore does not violate the First Amendment even if applied to an assassination designed to send a political message. Part II posits that the military's regulation of "homosexual conduct," by contrast, is concerned solely with what that conduct communicates. Moreover, the policy punishes some conduct and not other conduct based on the message it expresses, just as the city ordinance in *R.A.V. v. City of St. Paul*²³ punished some instances of symbolic hate speech and not others. While the sodomy prohibition is less explicitly predicated on what sodomy communicates, it too cannot be justified except by virtue of the harm assertedly caused by communication of the conduct to others.

Part III demonstrates that the military's justifications for its policy do not withstand strict scrutiny, and Part IV argues that the deference traditionally shown by the Court to the President in matters of military policy does not save the gay/lesbian exclusion. Finally, Part V addresses the broader implications of our argument. Does extending First Amendment protection to private sodomy require its extension to public sodomy? If not, have we inverted traditional First Amendment values, by protecting private but not public communication? If the state may regulate obscenity in order to preserve social order and morality, why shouldn't it be allowed to regulate sodomy? And most importantly, does this argument invalidate all morals regulation? Our position resurrects arguments previously advanced by H.L.A. Hart and John Stuart Mill against morals regulations, but suggests that First Amendment concerns about censorship provide a normative baseline for identifying some impermissible forms of morals regulation.²⁴

²² See *United States v. Eichman*, 496 U.S. 310 (1990); *Johnson*, 491 U.S. at 404. See also *R.A.V. v. City of St. Paul*, 112 S. Ct. 2538 (1992).

²³ 112 S. Ct. 2538 (1992).

²⁴ See J.S. MILL, *ON LIBERTY* 93 (E. Rapaport ed. 1978) (only preventing harm to others justifies interfering with individual's liberty); H.L.A. HART, *LAW, LIBERTY AND MORALITY* (1963) (responding to PATRICK DEVLIN, *THE ENFORCEMENT OF MORALS* (1965)). See also Anne B. Goldstein, *History, Homosexuality and Political Values: Searching for the Hidden Determinants of Bowers v. Hardwick*, 97 YALE L.J. 1073, 1091-98 (1988).

I. Sexual Expression and First Amendment Values

If conduct is not expressive, the First Amendment is not implicated. If one engages in conduct without any intent to communicate, or if nobody would understand one's action as communicating anything, there is nothing for the First Amendment to protect. Thus, the threshold inquiry in any expressive conduct case is whether the plaintiff's conduct was intended to communicate a message, or whether it would be understood by others as communicative.²⁵

Both the broadly defined "conduct" regulated by the military's new policy and the conduct traditionally criminalized by sodomy laws meet the basic First Amendment threshold. As noted above, the new military policy defines "homosexual conduct" to include a statement by a service-member that she is homosexual, a same-sex marriage, and "any bodily contact which a reasonable person would understand to demonstrate a propensity or intent to engage in" homosexual contact for sexual pleasure.²⁶ Thus, not only is sodomy sufficient to justify separation from the armed forces, but so apparently is "hand-holding or kissing in most circumstances," same-sex marriage, or an admission that one is gay or lesbian.²⁷

An admission of sexual identity is expressive in the strictest sense of the word. But all of the other "conduct" that military policy regulates is equally expressive. Regulation of this conduct implicates the core values served by the First Amendment's guarantee of free expression in ways at least as profound as other regulations that the Supreme Court has invali-

²⁵ Compare *Texas v. Johnson*, 491 U.S. 397, 404 (1989) (flagburning is communicative) and *Barnes v. Glen Theatre, Inc.*, 111 S. Ct. 2456 (1991) (erotic dancing is communicative) with *Dallas v. Stanglin*, 490 U.S. 19, 24-25 (1989) (purely recreational dancing is not communicative, so long as its goal is nothing more than calisthenic).

The Supreme Court's decision in the old "fighting words" case would add a further (and we think questionable) threshold: some expressive conduct is "of such slight social value as a step to truth that any benefit that may be derived from [it] is clearly outweighed by the social interest in order and morality." *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942). *Chaplinsky* may have inspired the plurality opinion in *Young v. American Mini Theatres*, 427 U.S. 50 (1976) (opinion of Stevens, J., for four Justices), but any implication that there are "tiers" of expression was rejected by a Court majority in that case, *id.* at 73 n.1 (Powell, J., concurring in the judgment); *id.* at 85 (four dissenting Justices). See also *Fed. Communications Comm'n. v. Pacifica Found.*, 438 U.S. 726 (1978) (Powell, J., concurring in part and concurring in the judgment). We, too, reject this broad reading of *Chaplinsky* and only discuss that possible implication here because it can be demonstrated that sexual expression between two people, or even alone in one's house, is conduct that goes to the core of what the First Amendment has come to mean in our society.

²⁶ See 10 U.S.C. § 654(f)(3); Aspin Memo, *supra* note 3, at 2 ("homosexual conduct"); Policy Guidelines, *supra* note 3, at 1 ("homosexual activities").

²⁷ See Policy Guidelines, *supra* note 3, at 1. Other activities, "such as association with known homosexuals, presence at a gay bar, possessing or reading homosexual publications, or marching in a gay rights rally in civilian clothes" would not, under the executive policy, constitute a basis for discharge. See *id.* at 1-2.

dated. The First Amendment furthers the mutually reinforcing ideals of individual liberty and pluralistic tolerance. The military's regulation of sexual expression implicates both of these complementary values.

The First Amendment tradition is committed to individual liberty; it assures a safe haven for individuals to develop and then to express their ideas, feelings, and emotions in a manner that suits them.²⁸ This libertarian value of the First Amendment has two features, one communicative and one developmental.

As the Supreme Court has recognized, sexual expression possesses deep communicative significance. Eight Justices agreed that nude dancing in public is "expressive conduct" in *Barnes v. Glen Theatre, Inc.*²⁹ The ninth Justice, Scalia, defined "inherently expressive conduct" as activity "that is normally engaged in for the purpose of communicating an idea, or perhaps an emotion, to someone else."³⁰ Sexual conduct—from hand-holding to kissing to intercourse—is expressive in precisely this way. While also engaged in for carnal pleasure and (in increasingly rare instances) procreative purposes, sex is intrinsically communicative and may express a wide range of emotions—love, desire, power, dependency, even rage or hatred.³¹ Indeed, the communicative power of sex is often unmatched by other forms of communication.³² To say "I love you" is one thing; to hold a lover's hand in public to express one's love can express something quite different; and "to make love" is often a still more profound expression of what one feels and thinks. Even when no one else is

²⁸This is the necessary implication to be drawn from cases such as *Cohen v. California*, 403 U.S. 15 (1971) (protecting right of person to print "Fuck the Draft" on his jacket); *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972) (protecting freedom of individual movement); *Stanley v. Georgia*, 394 U.S. 557 (1969) (protecting right of person to view pornography); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (protecting within a "penumbra" of First Amendment, among others, a couple's right to use contraceptives). See generally THOMAS EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* (1970); C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964 (1978); Martin Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591 (1982).

²⁹111 S. Ct. 2456, 2460 (1991) (plurality opinion) (accepting that nude dancing is "expressive conduct"); *id.* at 2468 (Souter, J., concurring in the judgment); *id.* at 2471-72 (White, J., dissenting). Only Justice Scalia refused to join this consensus. *Id.* at 2463-65 (Scalia, J., concurring in the judgment).

³⁰*Barnes*, 111 S. Ct. at 2466 n.4.

³¹For useful, and differently focused, introductions to the communicative features of sex, see 1 MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY* (Robert Hurley trans., 1st ed. 1978); RICHARD D. MOHR, *GAYS/JUSTICE: A STUDY OF ETHICS, SOCIETY, AND LAW* 106-14 (1988); CAMILLE PAGLIA, *SEXUAL PERSONAE* 1-39 (1990); RICHARD A. POSNER, *SEX AND REASON* 111-45 (1992).

³²Sexual expression is one example of what Justice Harlan spoke of in *Cohen*, 403 U.S. at 26, where he stressed the importance of the choice of specific words to the message. Just as "words are often chosen as much for their emotive as for their cognitive force," so sexual conduct is often chosen for its emotive force in communicating certain messages that cannot be equally communicated through mere words. And "that emotive function . . . may often be the more important element of the overall message sought to be communicated." *Id.*

watching, all of these acts are, to use Justice Scalia's terms, "normally engaged in for the purpose of communicating . . . an emotion . . . to someone else."³³

Sexual conduct is also important to the developmental feature of the liberty value. The First Amendment protects the individual's freedom to explore, develop, and expand upon her identity. It assures that the state may not seek to control a person's thoughts or beliefs, those intellectual characteristics that are central to our identities. Sexual expression is equally important to individual development. Indeed, some philosophers consider expression of the passionate, sexual side of ourselves to be more identity-generative than expression of the verbal, intellectual side. They posit that a goal of flourishing human beings is "self-expansion," which seeks "anything experienced as rapidly expanding the self, such as bursts of creative insights, religious conversions, discoveries . . . and, notably, falling in love and intense sexual experiences."³⁴ There is no doubt that in our culture, sexual orientation is a critical feature of one's identity; indeed, the very laws we challenge in this Article are themselves testament to that fact. Talking about and engaging in sex is a useful if not necessary way for a person to explore, discover, announce, and/or renounce her orientation.³⁵

This interest in people's exploration of their own sexuality and identity underlies, albeit indirectly, *Stanley v. Georgia*,³⁶ where the Court struck down a law prohibiting possession of obscene materials in the home, even though the state may prohibit the manufacture and sale of the same obscene materials.³⁷ "If the First Amendment means anything," the Court said, "it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch."³⁸ In other words, Mr. Stanley's sexual fantasies were his business—and not the state's.

Both the military's exclusion policy and sodomy statutes generally threaten the developmental and communicative values of the First Amendment. The military policy acknowledges that lesbians, gay men, and bisexuals serve (and have served) honorably and productively in the armed forces and expressly permits them to continue to serve—but only at

³³ *Barnes*, 111 S. Ct. at 2466 n.4 (Scalia, J., concurring).

³⁴ Arthur Aron & Elaine Aron, *Love and Sexuality*, in *SEXUALITY IN CLOSE RELATIONSHIPS* 42 (Kathleen McKinney & Susan Sprecher eds., 1991).

³⁵ See Vivienne C. Cass, *The Implications of Homosexual Identity Formation for the Kinsey Model and Scale of Preference*, in *HOMOSEXUALITY/HETEROSEXUALITY: CONCEPTS OF SEXUAL ORIENTATION* 39 (David P. McWhirter et al. eds., 1990).

³⁶ 394 U.S. 557 (1969).

³⁷ *United States v. Twelve 200-Ft. Reels*, 413 U.S. 123 (1973) (importation of obscene materials for private use may be prohibited); *United States v. Orito*, 413 U.S. 139 (1973) (upholding statute barring distribution of obscenity in interstate commerce, even if only for personal use).

³⁸ *Stanley*, 394 U.S. at 565.

substantial cost to their personal liberty. If, like Dirk Selland, a gay man must closet his feelings even when talking with the chaplain, the armed forces are seeking to close down a critical part of the man's identity. It is akin to asking a Jew to hide her ethnicity and religion, a woman to cover up her gender, or an African American to disguise her race. Just as *Stanley* objected that the state may not tell a person what books to read in his own home, so the state may not force that person to confine his identity to the closet.

Sodomy statutes also implicate developmental and communicative values. In *Bowers v. Hardwick*,³⁹ however, the Supreme Court expressly refused to extend *Stanley* to prohibit the state from telling a man what consensual sex he may have in the privacy of his own home. The *Bowers* Court distinguished *Stanley* as a First Amendment case, rather than a right to privacy case, implicitly insisting that Michael Hardwick's appeal did not preserve any First Amendment ground.⁴⁰ While Hardwick invoked *Stanley* for his privacy argument, he did not specifically raise a First Amendment challenge.⁴¹ Thus, *Bowers* does not foreclose analysis of sodomy prohibitions under the First Amendment.⁴²

The First Amendment also has a strong social or political component. Its protection of individual autonomy and liberty engenders collective benefits in the body politic, by fostering a diverse citizenry and assuring that "debate on public issues [is] uninhibited, robust, and wide-open," as the Court said in *New York Times v. Sullivan*.⁴³ Homosexual conduct, from public hand-holding and kissing by same-sex couples to private sexual conduct, fosters the diverse polity that the First Amendment envisions. Public expression of same-sex intimacy is as important a critique of gender assumptions and gender roles in American society as any published treatise.⁴⁴ It is therefore not only individually expressive, but also socially valuable under the robust pluralism endorsed in *Sullivan*. The fact that gestures like kissing and hand-holding are symbolic of ideas and attitudes rather than literal statements of position in a debate does not

³⁹ 478 U.S. 186 (1986).

⁴⁰ *Id.* at 195.

⁴¹ *Id.*

⁴² *Cf.* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 113 S. Ct. 2217 (1993) (Souter, J., concurring in the judgment) (urging this sort of reason for overruling Employment Div., Dep't. of Human Resources of Oregon v. Smith, 494 U.S. 872 (1990)).

⁴³ 376 U.S. 254, 270 (1964); see ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948); Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245. But see Robert Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971).

⁴⁴ See *infra* text accompanying note 49; Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187; see also Elvia R. Arriola, *Sexual Identity and the Constitution: Homosexual Persons as a Discrete and Insular Minority*, 10 WOMEN'S RTS. L. REP. 143 (1988); Nan Hunter, *Marriage, Law, and Gender: A Feminist Inquiry*, 1 LAW & SEXUALITY 9 (1991).

diminish their importance. The public debate has never been limited to books, articles, letters to the editor, speeches, and signs; it has always included symbolic gestures such as dancing, visual art, advertising imagery, public demonstrations, clothing, and physical conduct.⁴⁵

While private homosexual conduct does not directly contribute to public debate in the way that public affirmations of homosexuality do, it nonetheless plays an indispensable part in shaping public debate. Because lesbians, gay men, and bisexuals explore and develop their sexual identity through private sexual conduct, that "private" conduct is critical to their ability to take part as lesbians, gay men, and bisexuals in public life. Sodomy laws and the military exclusion are two of many mechanisms by which society has discouraged such personal exploration and development. The repression is political as much as personal, for it reflects a social effort to keep homosexuality "in the closet," not only hidden from the public but incapable of contributing to public discourse and politics.⁴⁶ Since the Stonewall riots of June 1969, large numbers of lesbians and gay men have defied the tyranny of the closet, and only that defiance has made it possible for their voices to be heard in American politics. So long as lesbians, gay men, and bisexuals kept their orientation a secret, they could "pass" in American society.⁴⁷ Passing not only exacted incalculable personal costs from individuals, but also discouraged the formation of an openly gay subculture and gay and lesbian political activism.⁴⁸ Once people started defying that suppression, they formed a thriving political as well as cultural community. That community could not exist without homosexual expression. For bisexuals, lesbians, and gay men, the personal is the political.⁴⁹

As Lee Bollinger has suggested, the First Amendment serves a pedagogical function in reflecting our social commitment to tolerance.⁵⁰ Insisting that society restrain its impulse to persecute unpopular minorities, the

⁴⁵ See, e.g., *Stromberg v. California*, 283 U.S. 359 (1931) (waving flag); *Brown v. Louisiana*, 383 U.S. 131 (1966) (sit-in); *Texas v. Johnson*, 491 U.S. 397 (1989) (burning flag); *Tinker v. Des Moines Sch. Dist.*, 393 U.S. 503 (1969) (wearing armband).

⁴⁶ On the complicated features of the closet, see EVE KOSOFKY SEDGWICK, *EPISTEMOLOGY OF THE CLOSET* (1990).

⁴⁷ Contrary to lore, heterosexual Americans are usually incapable of "detecting" a gay person who does not want to reveal her sexual identity. WARREN J. BLUMENFELD & DIANE RAYMOND, *LOOKING AT GAY AND LESBIAN LIFE* 86 (1993).

⁴⁸ We only say "discouraged" because there were, of course, gay subcultures well before Stonewall, and a handful of activists fought social and political discrimination before 1969. See JOHN D'EMILIO, *SEXUAL POLITICS, SEXUAL COMMUNITIES: THE MAKING OF A HOMOSEXUAL MINORITY IN THE UNITED STATES, 1940-1970* (1983).

⁴⁹ The personal as political is also ironically true for homophobes. Their personal anxiety about same-sex intimacy manifests itself in public efforts to suppress the expression they fear.

⁵⁰ See LEE BOLLINGER, *THE TOLERANT SOCIETY: FREEDOM OF SPEECH AND EXTREMIST SPEECH IN AMERICA* (1986).

First Amendment sets a public example that might inspire cooperative rather than exclusionary conduct throughout society. In the past, the First Amendment has protected the Amish, Jehovah's Witnesses, the NAACP, Communists, Nazis, and various ethnic groups—all despised by popular majorities.⁵¹ The First Amendment's willingness to insulate groups against suppression has contributed to its strength over time. By their sexual conduct, lesbians, gay men, and bisexuals are creating or searching for their own identities and voices, and the First Amendment insists that this new group be given the same public space as previous groups have been afforded.

Both the military policy and sodomy laws strike at the values of pluralism and tolerance implicit in the First Amendment. Kenneth Karst has shown that military service in American history has been a badge of citizenship, and that exclusions from military service reflect exclusions from citizenship.⁵² In fact, he argues, the exclusion and later segregation of people of color, the exclusion and later segregation of women, and the exclusion of lesbians, gay men, and bisexuals can be attributed to an ideology of "manhood," where the members of one race, one gender, and one sexual orientation are held up as the people who ought to run and defend our country. So, too, sodomy statutes offend the values of toleration. To prescribe by criminal law the forms of non-harmful sexual intimacy that consenting adults may engage in is the very definition of intolerance.

All that we have sought to demonstrate in this Part is that sexual conduct—whether it be hand-holding or intercourse—is expressive. Indeed, sex without expression is virtually inconceivable. Establishing this fact does not, of course, doom the regulations we question; all sorts of regulations of expressive conduct are indisputably constitutional. But the values noted above at least require that the regulation of sexual conduct undergo the First Amendment expressive conduct analysis that follows.

II. The Military Exclusion Policy and Sodomy Laws Trigger Stringent First Amendment Scrutiny

The government generally has a free hand to regulate expressive conduct, with two significant and related exceptions. When the reason the

⁵¹ See, e.g., *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (Amish protected by Free Exercise Clause); *NAACP v. Alabama*, 357 U.S. 449 (1958); *NAACP v. Button*, 371 U.S. 415 (1963) (NAACP protected by First Amendment right of association); *Yates v. United States*, 354 U.S. 298 (1957), and *Scales v. United States*, 367 U.S. 203 (1961) (Communists protected by Speech Clause); *Skokie v. Nat'l Socialist Party of America*, 366 N.E.2d 347 (1977) (Nazis protected by First Amendment); *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (KKK protected by First Amendment).

⁵² Kenneth L. Karst, *The Pursuit of Manhood and the Desegregation of the Armed Forces*, 38 UCLA L. Rev. 499 (1991).

government seeks to regulate particular conduct relates to what that conduct communicates to others, its regulation is treated as a prohibition on speech. And when government treats similar conduct differently based on its content, it also triggers strict First Amendment review. The military policy requires strict First Amendment scrutiny for both reasons.

Because virtually all conduct is potentially expressive, the critical First Amendment inquiry is why the government is regulating the particular conduct it has targeted. If those reasons are unrelated to the expressive elements of the conduct, as in a prohibition on sex with minors,⁵³ the regulation is subject to relaxed scrutiny, and generally upheld.⁵⁴ If, on the other hand, the regulation is tied to what the conduct communicates to others, the law must be treated as if it were a regulation of speech itself, and subjected to strict scrutiny.⁵⁵ As Justice (then Judge) Scalia put it,

freedom of expression makes the communicative nature of conduct an inadequate *basis* for singling out that conduct for proscription. A law *directed at* the communicative nature of conduct must, like a law directed at speech itself, be justified by the substantial showing of need that the First Amendment requires.⁵⁶

For example, when first Texas and then the United States sought to outlaw flagburning, the Court found that the governmental interest was in suppressing the messages associated with flag-burning, and subjected the laws to traditional First Amendment scrutiny.⁵⁷ By contrast, when protesters who sought to dramatize the plight of the homeless by sleeping in Lafayette Park challenged the National Park Service's ban on sleeping in

⁵³ The prohibition of sex with minors is founded upon scientific, philosophical, and experiential evidence that such sex causes psychological damage to the minor.

⁵⁴ *United States v. O'Brien*, 391 U.S. 367, 376–77, 384 (1968).

⁵⁵ See *Texas v. Johnson*, 491 U.S. 397, 403 (1989).

⁵⁶ *Community for Creative Non-Violence v. Watt*, 703 F.2d 586, 622 (D.C. Cir. 1983) (en banc) (Scalia, J., dissenting) (emphasis in original), *rev'd sub nom.*, *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984). See also John Hart Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482, 1497–98 (1975).

This expressive conduct analysis is consistent with the Court's doctrine relating to more traditional forms of speech. All communication can be seen as comprised of both physical characteristics (time, place, and manner) and communicative elements (content). Thus, just as a content based regulation of speech triggers stringent scrutiny, so too does a regulation motivated by the communicative content of conduct. Similarly, regulation of conduct "unrelated to the suppression of expression" is analogous to regulation of the time, place, and manner of speech. *Clark*, 468 U.S. at 293 (1984) (noting that the same test applies to time, place, and manner restrictions on speech and to regulation of conduct "unrelated to the suppression of expression").

⁵⁷ See *Texas v. Johnson*, 491 U.S. 397 (1989); *United States v. Eichman*, 496 U.S. 310 (1990).

parks, the Court upheld the ban under minimal scrutiny.⁵⁸ It found that the governmental interest in prohibiting sleeping in parks had nothing to do with the message a would-be sleeper might communicate, but instead was predicated on safety and upkeep of the parks.⁵⁹

Thus, the critical question in reviewing any regulation of symbolic expression is whether the government's interest in banning the conduct is "related to the suppression of expression," as the Court put it in *Texas v. Johnson*.⁶⁰ Under this analysis, both the military policy prohibiting homosexual conduct and the Code of Military Justice's criminalization of sodomy trigger stringent First Amendment examination.

The very name given to the military's policy—"don't ask, don't tell"—reveals that it is designed to regulate expression. The military expressly disclaims any concern with whether an individual is in fact homosexual; its concern is specifically with those individuals who "tell" that fact to others, by proclaiming that they are gay or lesbian in word or deed. Thus, the bulk of the "conduct" regulated by the new policy consists of public expressions of homosexuality, e.g., hand-holding, kissing, marriage, or saying that one is homosexual.

The military has conceded that homosexual identity does not affect a soldier's ability to perform in the military, *except to the extent that the identity is expressed to others*. General Colin Powell, then Chairman of the Joint Chiefs of Staff, testified in Congress that gays and lesbians had always served in the military, and that their presence did not cause any problems as long as they remained "in the closet." Asked by Congressman Barney Frank whether there is any evidence of behavior problems as a result of the longstanding presence of gays and lesbians in the military, Powell responded:

No, because as a matter of fact they have kept, so-called, in the closet. It is quite a different thing when it is openly practiced or openly known throughout the force and within the units. I think it makes very difficult management problems.⁶¹

Powell has consistently reiterated this view in subsequent congressional appearances, and it is now the official Defense Department line.⁶²

⁵⁸ *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984).

⁵⁹ *Id.* at 297-98.

⁶⁰ *Johnson*, 491 U.S. at 407.

⁶¹ *Fiscal Year 1993 Defense Budget: Hearing Before the House Comm. on the Budget*, 102d Cong., 2d Sess. 45 (1992).

⁶² See *July 1993 House Hearings*, *supra* note 12 (testimony of Gen. Powell and Secretary Aspin); *Gays in the Military: Hearings of the Senate Armed Services Comm.*, 103d Cong., 1st Sess. (1993) [hereinafter *July 1993 Senate Hearings*].

A "don't ask, don't tell" policy makes sense only if homosexual conduct and identity are not in themselves problematic: if they were, there would be no basis for directing military officers *not* to ask about or investigate homosexuality. Enforcement is triggered only by *public* declarations of homosexuality, whether through statements or symbolic gestures. Thus, same-sex hand-holding or marriage, two public statements of sexual identity, are grounds for discharge unless the individual can prove that he or she has no propensity or intent to engage in homosexual sex. By contrast, hand-holding in private, or a private commitment to a lifelong homosexual relationship, does not trigger investigation or penalty.

When government selectively regulates public conduct, as the military has done with respect to declarations of homosexual identity, it raises heightened First Amendment concerns.⁶³ By singling out public conduct, the regulations imply that the government's interest does not have to do with the physical aspects of the conduct, but with what the conduct communicates to others. Similarly, the fact that the military's new policy singles out admissions of homosexuality, but does not inquire into whether an individual is homosexual absent such an admission, underscores the military's concern for what is communicated, rather than for the underlying reality of homosexual orientation. The military's "bargain"—gays and lesbians may serve so long as they remain "in the closet" or so long as they publicly repudiate any desire to consummate their sexual desires—demonstrates that the military seeks to regulate not homosexuality itself, but its public acknowledgment and expression, that is, its communicative content.⁶⁴

The military's stated rationales for its policy also reflect a concern for what homosexual conduct communicates to others. The military has advanced two principal arguments for its regulation, each of which underscores its interest in regulating the expression of homosexuality rather

⁶³ In *Johnson*, 491 U.S. at 403, the fact that Texas prohibited only flag-burnings that would offend "one or more persons likely to observe or discover" the burning flag, led the Court to conclude that the statute was directed toward flag-burning's communicative elements. By contrast, in *United States v. O'Brien*, 391 U.S. 367, 375 (1968), the Court treated a draft card burning regulation as not related to the suppression of expression in part because the law "does not distinguish between public and private destruction."

⁶⁴ For this reason, the new policy is more vulnerable to a broad First Amendment attack than the old policy. Under the old policy, the military maintained that it was not penalizing service members for their speech, but for their identity or status. Homosexuality itself was the disqualifying characteristic, and an admission of homosexuality was merely used as evidence of one's status. *See, e.g., Ben-Shalom v. Marsh*, 881 F.2d 454, 462 (7th Cir. 1989) (rejecting First Amendment challenge to old policy because "it is the identity that makes [appellant] ineligible for military service, not the speaking of it aloud"), *cert. denied* 494 U.S. 1004 (1990). Under current policy, however, the military concedes that homosexuality itself is not incompatible with military service; rather, the regulations focus specifically on the communication of one's homosexuality to others. We believe that both the old and new policies fail the expressive conduct analysis, but the new policy clarifies the military's expression-suppressive purpose.

than homosexuality itself. First, it argues that "morale" and "unit cohesion" will be threatened by the presence of openly gay, lesbian, and bisexual personnel.⁶⁵ But the "don't ask" half of its policy concedes that "morale" and "unit cohesion" are not threatened by the presence of *closeted* gay, lesbian, and bisexual personnel. Thus, the problem has less to do with identity or conduct itself than with the expression of that identity or conduct to others. The military's interests are threatened only by the communication of gay members' sexual identities to other (presumably homophobic) members of a military unit.

Second, the government has contended that the presence of gay and lesbian soldiers in the military will invade the privacy of heterosexual soldiers, given the close quarters that military life frequently requires. But once again, the fact that the military allows closeted gay, lesbian, and bisexual personnel to serve suggests that the privacy concern is triggered not by the mere presence of such personnel, but by the public acknowledgement of their presence.

While the current challenges to the military's exclusionary policy have primarily focused on the regulation of public declarations of homosexuality, the military's underlying prohibition on homosexual sodomy—and indeed all regulation of sodomy—also requires stringent First Amendment scrutiny under the analysis we have set out. Because sodomy is potentially and possibly even inherently expressive, stringent First Amendment scrutiny applies unless the government's interest in regulating sodomy is unrelated to the suppression of expression. The rationale consistently advanced for the regulation of sodomy is the maintenance of community morality. Sodomy is said to be immoral, and society condemns it for that reason. Many might argue that this moral condemnation holds irrespective of what the sodomy communicates, thus immunizing it from stringent First Amendment review.

That argument, however, begs the question. One might equally claim that burning a flag or cross is immoral. To say that conduct is immoral is to say little more than that the majority disapproves of it. The further question that First Amendment analysis asks is *why* does society condemn

⁶⁵ See *July 1993 Senate Hearings*, *supra* note 62 (testimony of Gen. Powell and the Joint Chiefs of Staff, supporting the new policy of "don't ask, don't tell").

In House hearings, several "unofficial" witnesses favoring the military exclusion made arguments that "homosexuals" were actually unfit for military service, based upon their alleged selfishness, *Policy Implications of Lifting the Ban on Homosexuals in the Military: Hearings Before the House Comm. on Armed Services*, 103d Cong., 1st Sess. 89 (1993) [hereinafter *May 1993 House Hearings*] (testimony of Col. John Ripley), or predatory nature. *Id.* at 94–102 (statement of Brig. Gen. William Weise). Those testimonies were not embraced by the official policymakers (the Joint Chiefs, headed by Gen. Powell, and Secretary Aspin, none of whom testified in these hearings) and were rebutted in detail by reference to empirical studies. *Id.* at 247–61 (prepared statement of Dr. Gregory Herek, for the American Psychological Association).

sodomy as immoral? If it is immoral because it causes harm in a non-communicative manner, as murder certainly does, the First Amendment's stringent review would not be appropriate. But if the moral harm it causes is related to what it communicates, its regulation should trigger strict scrutiny.

How does consensual homosexual conduct harm the community, other than by what it expresses to that community? A consensual act of homosexual sodomy has no physical effect whatsoever on anyone other than the participants. It can affect the broader community only if the fact that it occurred is somehow communicated to the community, thereby offending or demoralizing its homophobic members. It may well be precisely this reason that sodomy has long been referred to as the "unmentionable crime," *crimen inominatum*,⁶⁶ "a heinous act 'the very mention of which is a disgrace to human nature,' and 'a crime not fit to be named.'"⁶⁷ Because society's (or the military's) interests can be undermined only if the fact of the proscribed sodomy is in some way communicated, the government's interest in regulating sodomy is necessarily related to sodomy's expressive character.

We have demonstrated thus far that First Amendment strict scrutiny is required for both the "don't ask, don't tell" policy *and* for state or federal sodomy laws, on the ground that both laws regulate expressive conduct because of what that conduct expresses to others. A related line of First Amendment argumentation supports the same conclusion: the First Amendment's strict scrutiny is also triggered where government *selectively* regulates expressive conduct on content-based grounds. As the Supreme Court said in *R.A.V. v. City of St. Paul*, in striking down a municipal prohibition against cross-burning, "[t]he First Amendment generally prevents government from proscribing speech or even expressive conduct because of disapproval of the ideas expressed."⁶⁸ Under the military policy, the same conduct is permitted if it expresses heterosexuality and proscribed if it expresses homosexuality. A heterosexual couple may freely hold hands and kiss; if a lesbian couple engages in the same conduct, they will be presumptively subject to discharge. A heterosexual can proclaim his sexual orientation loudly, repeatedly, and wherever he chooses; a gay or bisexual man proclaiming his sexual orientation is subject to discharge. A heterosexual couple may engage in physical contact for sexual pleasure; if a homosexual couple does the same, they are punished. This selectivity further supports the application of strict First Amendment scrutiny.

⁶⁶ BLACK'S LAW DICTIONARY 1563 (4th ed. 1968).

⁶⁷ *Bowers v. Hardwick*, 478 U.S. 186, 197 (1986) (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES *215).

⁶⁸ *R.A.V. v. City of St. Paul*, 112 S. Ct. 2538, 2542 (1992) (citations omitted).

The First Amendment demands content neutrality to ensure that there is "equality of status in the field of ideas."⁶⁹ This equality (or content-neutrality) feature of the First Amendment is importantly related to the underlying values of the First Amendment tradition (liberty and pluralism discussed in Part I), for it prevents the political majority from achieving a regulatory goal at the expense of the expressive interests of an unpopular or less powerful minority.⁷⁰ The state therefore cannot selectively discriminate against expressive conduct simply because of what it expresses.

In *Police Department of Chicago v. Mosley*,⁷¹ for example, the Court invalidated an ordinance prohibiting picketing because it exempted labor picketing, thus violating the principle of neutral treatment of similarly situated speakers. "Because picketing plainly involves expressive conduct within the protections of the First Amendment, discriminations among pickets must be tailored to serve a substantial governmental interest."⁷² Had the ban applied neutrally to all picketing, it would have been upheld, but the Court was unwilling to tolerate regimes "selectively suppressing some points of view."⁷³

In *R.A.V.*, the Court applied the *Mosley* precept in a case of expressive conduct ("fighting words") that is ordinarily beyond the First Amendment's protection.⁷⁴ Nonetheless, the Court invalidated the St. Paul ordinance penalizing cross-burning (and other expressions of hatred) because the ordinance did not treat all symbolic "fighting words" equally, but selectively prohibited those based on race, color, creed, religion, or gender.⁷⁵

The equality value is directly implicated by the military's "don't ask, don't tell" policy because it singles out same-sex conduct for treatment different from different-sex conduct. Like the cross-burning ordinance in *R.A.V.* and the selective picketing prohibition in *Mosley*, the "don't ask, don't tell" policy must therefore be subjected to stringent scrutiny.⁷⁶

⁶⁹Police Dep't of Chicago v. Mosley, 408 U.S. 92, 96 (1972) (quoting ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE 27 (1948)).

⁷⁰See Kenneth L. Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20 (1975).

⁷¹408 U.S. 92 (1972). See also *Carey v. Brown*, 447 U.S. 455 (1980).

⁷²*Mosley*, 408 U.S. at 99 (citations omitted). The Court relied on both the First Amendment and the Equal Protection Clause throughout the opinion. See *id.* at 94-95, 96, 100-01.

⁷³*Id.* at 97.

⁷⁴The Court accepted the Minnesota Supreme Court's interpretation of the St. Paul ordinance as regulating only "fighting words," which are not protected under the Court's First Amendment precedents. *R.A.V.*, 112 S. Ct. at 2542 (citing *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942)).

⁷⁵*Id.* at 2543-45. See generally David Cole, *Neutral Standards and Racist Speech*, 2 RECONSTRUCTION 65 (1992).

⁷⁶For similar reasons, state employment discrimination against lesbian and gay employees simply because of their sexual expression is presumptively at war with First

III. The Military Exclusion Policy and Sodomy Prohibition Fail Strict Scrutiny

To establish that strict scrutiny applies does not necessarily end the constitutional inquiry. If the military's rationales are compelling, and if the means it has chosen are narrowly tailored to further those ends, the policy may withstand strict scrutiny.⁷⁷ The government has typically advanced three "compelling" interests in defense of its policy.

A. Evidence of Unlawful Conduct

The government has in the past successfully evaded First Amendment review altogether by casting its regulatory concern with expressions of homosexuality as evidentiary in nature. As noted above, the government consistently defeated First Amendment challenges to the old military policy by arguing that it was not punishing a servicemember for saying, "I am gay," but was simply using those words as evidence of the fact of homosexual identity.⁷⁸ Under the new regulation, it now admits that it is not concerned with homosexual identity, but it will presumably now argue that its concern is with homosexual *conduct*.

This argument fails for several reasons. First, the military's own definition of the "conduct" with which it is concerned makes its argument circular. The "conduct" encompassed by the military policy includes pure speech, such as declarations of homosexuality. More importantly, its definition of conduct selectively includes conduct (such as hand-holding, kissing, and marriage) that expresses homosexuality, while excluding the exact same conduct if it expresses heterosexuality. Thus, the military cannot say it uses expressions of homosexuality only as evidence of

Amendment values. Courts have frequently struck down such discrimination as violative of the First Amendment. *National Gay Task Force v. Board of Educ.*, 729 F.2d 1270 (10th Cir. 1984); *Jantz v. Muci*, 759 F. Supp. 1543 (D. Kan. 1991); *Acanfora v. Board of Educ.*, 491 F.2d 498 (4th Cir. 1974); *cf. Norton v. Macy*, 417 F.2d 1161 (D.C. Cir. 1969) (relying on due process to protect federal employee dismissed because of a "homosexual" overture made off the job); *but see Singer v. United States Civil Serv. Comm'n*, 530 F.2d 247 (9th Cir. 1976) (upholding dismissal of gay man who "flaunted" his "lifestyle"), *vacated*, 429 U.S. 1034 (1977).

The military's prohibition of sodomy is not so vulnerable on its face because the prohibition applies to both heterosexual and homosexual conduct. But the equality value underlying the requirement of content neutrality is nonetheless implicated. Sodomy laws do not treat all sexual conduct equally, for they permit heterosexual vaginal intercourse while prohibiting sodomy. Thus, they selectively single out some sexual conduct for prohibition, just as the ordinance in *R.A.V.* singled out some symbolic fighting words.

⁷⁷ *E.g.*, *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990) (upholding content-based regulation of corporate campaign speech after concluding that regulation was narrowly tailored to the compelling interest of avoiding the distorting effects that corporate wealth might have on public debate concerning political campaigns).

⁷⁸ See cases cited *supra* note 11.

homosexual conduct, because the conduct it prohibits is itself largely limited to expressions of homosexuality.

Second, the expression is punished whether or not any other homosexual conduct is ever demonstrated. If a servicemember so much as admits (or demonstrates by hand-holding or the like) that she is lesbian, she will be discharged unless she can rebut a presumption that she has the desire or propensity to engage in homosexual acts. By adopting this presumption, the policy punishes mere expression without more. Indeed, the military policy treats a statement of homosexual identity more harshly than speech advocating illegal activity, which may be punished only where it is both intended and likely to produce imminent violence.⁷⁹

Third, the government's presumption regarding homosexual expression is decidedly non-neutral. If homosexual statements and same-sex kissing do have some correlation with conduct violating sodomy prohibitions, the same is true of heterosexual statements and different-sex kissing, given empirical studies consistently showing that a large majority of heterosexuals have engaged in oral sex and a significant minority have engaged in anal sex.⁸⁰ Both oral and anal sex violate the military's sodomy prohibition, as well as that of most state sodomy laws.

B. *The Unit Cohesion Rationale*

During the 1993 congressional hearings on the gay/lesbian exclusion, the military's main line of defense was that the presence of openly gay and lesbian soldiers would undermine cohesion, discipline, and morale.⁸¹ Colonel William Henderson laid out the government's case during House hearings in 1993.⁸² He posited that the cohesion of the unit is the "central factor" in the success of a military unit, citing the Shils and Janowitz study of the Wehrmacht and the Stouffer study of the U.S. Army during World War II.⁸³ He then argued that unit cohesion is impossible without

⁷⁹ *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (per curiam); see *National Gay Task Force v. Board of Educ.*, 729 F.2d 1270, 1274 (10th Cir. 1984) (invalidating regulation of all homosexual advocacy short of public acts of criminal homosexual sodomy), *aff'd mem. by an equally divided Court*, 470 U.S. 903 (1985); *Norton v. Macy*, 417 F.2d 1161 (D.C. Cir. 1969).

⁸⁰ See ALFRED C. KINSEY ET AL., *SEXUAL BEHAVIOR IN THE HUMAN MALE* 393 (1948) (59% of American males had engaged in oral sex, and 37% had engaged in some homosexual experience during the 1940s); MORTON HUNT, *SEXUAL BEHAVIOR IN THE 1970s* 199, 204 (1974) (90% of married couples under age 25 engaged in oral sex; nearly 25% of married couples under age 35 had engaged in anal-genital sex); PHILIP BLUMSTEIN & PEPPER SCHWARTZ, *AMERICAN COUPLES: MONEY, WORK, SEX* 236 (1983) (over 70% of heterosexual couples in the early 1980s had engaged in oral-genital sex).

⁸¹ See *May 1993 House Hearings*, *supra* note 65; *July 1993 House Hearings*, *supra* note 12; *July 1993 Senate Hearings*, *supra* note 62.

⁸² See *May 1993 House Hearings*, *supra* note 65, at 265-70 (testimony of Col. William Darryl Henderson).

⁸³ *Id.* at 265, referring to SAMUEL A. STOFFER ET AL., *THE AMERICAN SOLDIER:*

basic agreement among unit members about cultural values, an agreement that is shattered if one of the unit members reveals himself or herself to be gay or lesbian.⁸⁴

The "discipline, good order, and morale" argument may not even satisfy rational basis review, much less strict scrutiny. Several lower courts have rejected this justification under rational basis scrutiny because it has no factual basis and is, at best, predicated on the prejudices of other servicemembers.⁸⁵ The government's own studies provide no evidence that openly gay service personnel actually disrupt unit cohesion,⁸⁶ and considerable anecdotal evidence demonstrates that thousands of servicemembers have been known by their colleagues to be lesbian or gay, with no negative repercussions for morale and unit cohesion.⁸⁷ Even the studies cited by Colonel Henderson undermine rather than support his point.⁸⁸ The Stouffer study found that shared religious belief was the main inspiring (and cohering) force for our soldiers during World War II, but surely the armed forces would not seriously defend barring atheists based upon this study. The Shils and Janowitz study found that "primary group solidarity in the Wehrmacht was based in part on latent homosexual tendencies" among the soldiers.⁸⁹ This sort of evidence is a frivolous basis for excluding lesbians and gay men from the military.

If open acknowledgement that some soldiers are gay or lesbian would undermine unit cohesion, it can only do so by virtue of the prejudices of other soldiers, a patently insufficient rationale even under minimal rational basis review.⁹⁰ For the same reason that the armed forces cannot

COMBAT AND ITS AFTERMATH (1949); Edward A. Shils & Morris Janowitz, *Cohesion and Disintegration in the Wehrmacht in World War II*, 12 PUB. OP. Q. 280, 315 (1948).

⁸⁴ May 1993 House Hearings, *supra* note 65, at 268.

⁸⁵ See *Steffan v. Aspin*, 8 F.3d 57, 67-69 (D.C. Cir. 1993), *rehearing en banc granted*; *Selland v. Aspin*, Civ. No. 93-1924-LFO (D.D.C. Sept. 28, 1993) (preliminary injunction); *Meinhold v. United States Dept. of Defense*, 808 F. Supp. 1455 (C.D. Cal. 1993), *appeal pending*.

⁸⁶ See GAYS IN UNIFORM: THE PENTAGON'S SECRET REPORTS xv (Kate Dyer ed., 1990) (describing reports).

⁸⁷ See RANDY SHILTS, CONDUCT UNBECOMING: LESBIANS AND GAYS IN THE U.S. MILITARY, VIETNAM TO THE PERSIAN GULF (1993); MARY ANN HUMPHREY, MY COUNTRY, MY RIGHT TO SERVE: EXPERIENCES OF GAY MEN AND WOMEN IN THE MILITARY, WORLD WAR II TO THE PRESENT (1990); ALLAN BÉRUBÉ, COMING OUT UNDER FIRE: THE HISTORY OF GAY MEN AND WOMEN IN WORLD WAR II (1990).

⁸⁸ See May 1993 House Hearings, *supra* note 65 at 270-78 (testimony of David R. Segal, Professor of Sociology, Univ. of Maryland).

⁸⁹ In a perverse way, this may support the military exclusion: the homosocial armed forces do indeed rely on "latent" homosexual feelings among servicemen but feel the need to suppress this bonding feature in a country where many citizens are anti-homosexual. In this way, "don't ask, don't tell" works as a way to maintain the public appearance of the army as a heterosexual institution, while allowing a liberal amount of homosexual bonding to go on beneath the surface. We note that the military does not rely on this perverse logic, and we insist that such a defense of the exclusion amounts to a hypocrisy that should not satisfy even the rational basis standard.

⁹⁰ *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985) (city cannot

use the anti-Semitism of some soldiers to exclude Jews, the racism of some soldiers to exclude Japanese Americans, or the religious bigotry of some soldiers to exclude Southern Baptists, so the armed forces cannot use the homophobia of some its members to exclude lesbians, gay men, or bisexuals.

Morale and unit cohesion arguments were precisely the arguments made by the military to continue its policy of racial segregation in the 1940s,⁹¹ and are no more legitimate today than they were then.⁹² The military's experience with desegregation also provides another ground for suspecting the military's rationale regarding unit cohesion. Although most white soldiers did not want to serve with black soldiers when President Truman ordered desegregation in 1948, actual integration was unproblematic, at least in part because integration led white soldiers to rid themselves of their earlier prejudices.⁹³ Precisely the same phenomenon has been observed in Western countries that now allow openly lesbian and gay personnel to serve.⁹⁴

As Judge Mikva observed in *Steffan*, the principle that the law should not cater to prejudice has a particularly fitting parallel in First Amendment law: the "heckler's veto."⁹⁵ The First Amendment makes it impermissible to silence speech because of the reaction of a hostile audience.⁹⁶ Yet the notion that the "good order" of the military requires suppression of expression of homosexuality is nothing more than a decision to value the hostile reactions of homophobic soldiers over the expressive freedom of their gay and lesbian compatriots. Where First Amendment scrutiny is applied, such a rationale cannot justify the government's policy.

C. The Privacy Argument

A final argument sometimes made by defenders of the gay/lesbian exclusion (but not by the top brass) is that it would invade the privacy of heterosexual soldiers. This is the so-called "shower room argument": straight servicemembers are said to be nervous about being seen naked in

deny zoning permit for home for the mentally disabled on ground that biased neighbors will threaten safety of the mentally disabled residents).

⁹¹ See William N. Eskridge, Jr., *Race and Sexual Orientation in the Military: Ending the Apartheid of the Closet*, 2 RECONSTRUCTION 52 (1993).

⁹² See *Steffan v. Aspin*, 8 F.3d 57 (D.C. Cir. 1993), *reh'g en banc granted*.

⁹³ See MORRIS J. MACGREGOR, JR., *INTEGRATION OF THE ARMED FORCES, 1940-1965* at 54, 405, 408, 442 (1981); BERNARD C. NALTY, *STRENGTH FOR THE FIGHT: A HISTORY OF BLACK AMERICANS IN THE MILITARY* 100 (1986).

⁹⁴ See *May 1993 House Hearings*, *supra* note 65 (testimony of Gregory M. Herek, on behalf of the American Psychological Association); *GAYS IN UNIFORM: THE PENTAGON'S SECRET REPORTS*, *supra* note 86, at 40-41, 54.

⁹⁵ *Steffan*, 8 F.3d at 68.

⁹⁶ *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949).

the shower room by someone who might find them sexually attractive.⁹⁷ It is hard to credit this sort of anxiety as a compelling *state* interest, unless it were accompanied by evidence of more tangible secondary effects, such as a greater risk of sexual assault. But as yet there is no empirical evidence, or even any anecdotal examples, that shower-room observations have actually led to sexual assaults. The argument amounts to a raw appeal to prejudice, which is an unacceptable (and certainly not a compelling) policy for the state to embrace.

Moreover, even accepting *arguendo* that the military's goal is legitimate, its policy is not narrowly tailored because it is underinclusive.⁹⁸ It does not bar closeted gay and lesbian soldiers. If anything, such closeted soldiers would pose a *greater* threat to heterosexual soldiers' privacy than those who have disclosed their sexual orientation, precisely because the heterosexual soldier, fearful of his privacy, will have no way of identifying who might pose this "threat." The fact that the policy singles out only those gay and lesbian soldiers who acknowledge their sexual orientation suggests that the military's interest is not in protecting privacy, but in suppressing the expression of homosexual identity.

IV. Deference to the Military Should Not Save the Unconstitutional Exclusionary Policies

In defending the gay/lesbian exclusion in court, the government's initial argument tends to be that courts should defer to military judgment. The purpose of this argument is either to lower the level of judicial scrutiny back to rational basis, or to bootstrap a weak set of state interests into a compelling interest.⁹⁹ We have inverted the order of presentation (looking at the state interests first, then turning to the general deference point) to emphasize the irrationality of the government's substantive position. Even a deferential standard of review would be hard for the government to meet. We now emphasize that the deference argument is itself

⁹⁷ Marine Corps Commandant Carl E. Mundy put the argument this way: "How would you (or most American families) react if your son called and informed you that his roommates for the next few years were two homosexuals? Would you be at all concerned?" Quoted in John Lancaster, *Why the Military Supports the Ban on Gays*, WASH. POST, Jan. 28, 1993, at A8.

⁹⁸ It is by no means clear that this is a legitimate rationale. Every time we use a locker room, we risk the "invasion of privacy" that the military seeks to protect, whether we are gay, bisexual, or heterosexual. Yet nowhere do we have separate gay and heterosexual locker rooms, nor do we have separate gay and heterosexual sports teams. Thus, we have all assumed the risk that when we use a locker room we expose our bodies to public view by others of the same sex, and there may be no reasonable expectation of privacy to protect.

⁹⁹ See, e.g., *Rostker v. Goldberg*, 453 U.S. 57 (1981); *Goldman v. Weinberger*, 475 U.S. 503 (1986).

rather complicated, and that the precedents do not clearly support deference on these issues.

It is true that the Court has frequently shown great deference to military judgments about the need for "discipline" and "good order," upholding rules that would likely be unconstitutional in the civilian setting.¹⁰⁰ This deference cannot be limitless, however. Surely, for example, the military could not punish a soldier for criticizing President Clinton's health plan or his foreign policy regarding Bosnia, even though it can discipline an officer for urging enlisted men to disobey orders in war-time.¹⁰¹ Indeed, in *Greer v. Spock*,¹⁰² the Court suggested that the First Amendment would be violated if a military commander selectively sought to bar political candidates of one party from speaking on base. In *Greer*, the Court upheld a policy excluding all political candidates, noting that the military base's purpose was to train soldiers, not to serve as a public forum, and that the military had a strong interest in avoiding partisan politics.¹⁰³

Similarly, the Court in *Goldman v. Weinberger*¹⁰⁴ invoked deference to military judgments when it upheld application of an Air Force regulation that barred the wearing of headgear indoors to prohibit an orthodox Jewish soldier from wearing a yarmulke. But again the Court emphasized the narrowness of its deference and the generality of the regulation it was

¹⁰⁰ See, e.g., *Goldman*, 475 U.S. 503 (upholding against a free exercise challenge an Air Force regulation barring wearing of headgear indoors as applied to Jewish officer wearing a yarmulke, and emphasizing deference due to military judgments regarding the need to "foster instinctive obedience, unity, commitment, and esprit de corps"); *Brown v. Glines*, 444 U.S. 348 (1980) (upholding Air Force regulation prohibiting distribution of literature without permission of Commander, on ground that "since a commander is charged with maintaining morale, discipline, and readiness, he must have authority over the distribution of materials that could affect adversely these essential attributes of an effective military force"); *Greer v. Spock*, 424 U.S. 828 (1976) (upholding content-based exclusion from military base of political candidates, on ground that military base is not a public forum); *Parker v. Levy*, 417 U.S. 733 (1974) (upholding court-martial of captain for publicly urging enlisted personnel to refuse to obey orders to go to Vietnam, holding that such speech is not protected by the First Amendment).

¹⁰¹ In *Parker*, the Court stated that "the members of the military are not excluded from the protection granted by the First Amendment," even though the special character of the military community "may render permissible within the military that which would be constitutionally impermissible outside it." 417 U.S. at 758. See also *Banks v. Garrett*, 901 F.2d 1084, 1088 (Fed. Cir. 1990) ("military transfers that violate the First Amendment are reviewable by this court"); *United States v. Wilson*, 33 M.J. 797, 799 (ACMR 1991) ("members of the armed forces enjoy the First Amendment's protections of freedom of speech"); *Rich v. Secretary of the Army*, 735 F.2d 1220, 1229 (10th Cir. 1984) (same). Several courts have drawn distinctions between military regulations that govern official conduct and private conduct of a member of the military. E.g., *Banks*, 901 F.2d at 1088-89 (upholding regulation prohibiting reservist from writing unauthorized letter to Congress in official capacity, but noting that he is free to do so in his private capacity).

¹⁰² 424 U.S. 828 (1976).

¹⁰³ *Id.* at 828.

¹⁰⁴ 475 U.S. 503 (1986).

upholding. The regulation did not target religious minorities (though it was insensitive to their concerns), and it is unlikely that the Court would have upheld the ban if it selectively barred the wearing of yarmulkes.¹⁰⁵ Can there be doubt that if the military argued that it needs to segregate black and white soldiers in order to preserve "morale" and "unit cohesion" (and these were in fact the arguments deployed by the military in the 1940s), courts would not defer?

The danger posed by the deference argument is vividly demonstrated by the Supreme Court's decision in *Korematsu v. United States*,¹⁰⁶ upholding the internment of Japanese American citizens in concentration camps during World War II. That decision, justified by deference to the military's race-based judgment about the threat posed by Japanese Americans, is one of the Court's most embarrassing moments, and has been thoroughly repudiated by history.¹⁰⁷ The best that can be said for the Court's decision is that it was reviewing military action during wartime. Where, as here, a policy is judged in peacetime, similar justifications for deference do not exist.

Thus, while traditional deference to the military makes any challenge to military policy difficult, it is not an insurmountable barrier. Even where government has "plenary power," that power must be exercised in accordance with constitutional limits.¹⁰⁸ In *United States v. Robel*,¹⁰⁹ for example,

¹⁰⁵ Indeed, several years later, in *Employment Division v. Smith*, 494 U.S. 872 (1990), the Supreme Court held that the Free Exercise Clause is not implicated by prohibitions generally applicable to all, even where they disproportionately burden particular religious groups. Under this reasoning, the regulation in *Goldman* would be upheld even if it were not in a military setting.

In *Anderson v. Laird*, 466 F.2d 283, 290 (D.C. Cir. 1972), *cert. denied*, 409 U.S. 1076 (1972), the D.C. Circuit invalidated a military regulation compelling chapel attendance at military academies. It rejected the district court's deference to the military and stated:

This deference to military decision making has been justified by the military's role, its mandate to prepare for the waging of war, and the necessity of this mandate for our national security. However, deference has inherent limitations which have also been fully recognized in judicial decision. Thus, although First Amendment rights to free speech and expression may be "less" for a soldier than a civilian, they are by no means lost to him.

Id. at 294-95.

¹⁰⁶ 323 U.S. 214 (1944).

¹⁰⁷ See COMMISSION ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS, PERSONAL JUSTICE DENIED (1982).

¹⁰⁸ See, e.g., *Fong Yue Ting v. United States*, 149 U.S. 698, 712-13 (1893) (Congress's plenary power over immigration must be exercised "consistent[ly] with . . . the Constitution"); *Carlson v. Landon*, 342 U.S. 524, 537 (1952) ("the power to expel aliens . . . is, of course, subject to judicial intervention under the paramount law of the Constitution"); *Communist Party v. Subversive Activities Control Bd.*, 367 U.S. 1, 96 (1961) ("congressional power in this sphere [protection from foreign invasion], as in all spheres, is limited by the First Amendment").

¹⁰⁹ 389 U.S. 258 (1967).

the Court struck down a statutory ban on employing Communist Party members at United States defense facilities. The Court acknowledged Congress's plenary power over war and national defense, but held that even the government's legitimate concerns about "the danger of sabotage and espionage in national defense industries" did not justify overriding First Amendment rights:

the phrase "war power" cannot be invoked as a talismanic incantation to support any exercise of congressional power which can be brought within its ambit. "[E]ven the war power does not remove constitutional limitations safeguarding essential liberties" . . . [The] concept of 'national defense' cannot be deemed an end in itself, justifying any exercise of legislative power designed to promote such a goal . . . It would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties—the freedom of association—which makes the defense of the Nation worthwhile.¹¹⁰

Finally, any argument that the courts should defer to the government's "expert" judgment in matters of military discipline must address the fact the government's "experts" themselves have often been skeptical of the exclusion of gays and lesbians. The Crittenden Report written for the Department of Defense in 1957 was critical of the military's justification for excluding gays and lesbians in the 1950s. The report rejected as baseless the argument that such soldiers would be subject to blackmail.¹¹¹ The Department suppressed that report. The next examinations of the issue by experts for the Department were the now-famous PERSEREC¹¹² reports written in 1988 and 1989.¹¹³ These reports concluded that lesbians, bisexuals, and gay men are just as capable of serving in the armed forces as straight persons and suggested that their continued exclusion rests upon nothing more than prejudice and a desire to suppress homosexuality. The Government Accounting Office has written a report that also undermines the logic of the current exclusion by demonstrating that gays and lesbians have served without incident in the military ranks in other countries, and

¹¹⁰ *Id.* at 263–64.

¹¹¹ See GAYS IN UNIFORM, *supra* note 86, at xv.

¹¹² PERSEREC stands for the Defense Personnel Security Research and Education Center.

¹¹³ Theodore R. Sarbin & Kenneth E. Karols, *Nonconforming Sexual Orientations and Military Suitability* (Dec. 1988), reprinted in GAYS IN UNIFORM, *supra* note 86, at 3–97; Michael A. McDaniel, *Preservice Adjustment of Homosexual and Heterosexual Military Accessions: Implications for Security Clearance Suitability* (Jan. 1989), reprinted in GAYS IN UNIFORM, *supra* note 86, at 111–35 (gay and lesbian personnel adjust at least as well as straight personnel).

in police and fire departments in the United States.¹¹⁴ If the most neutral and least politicized “experts” within our government are skeptical of the need for exclusion, one should hesitate before “deferring” to the “expertise” of other government officials inspired more by politics than by the nation’s defense needs.

V. Implications of the Sex-as-Expressive-Conduct Thesis

Even if we have thus far established a *prima facie* doctrinal case for invalidating both sodomy laws and the military exclusion under the authority of the First Amendment, our argument—especially our view that sodomy regulations themselves trigger strict First Amendment review—raises a host of broader questions. While different critics might emphasize different questions, we have identified three key issues for discussion: Does our extension of First Amendment protection to private sodomy also reach public sex, and if not, haven’t we inverted the First Amendment’s concern for public dialogue? If obscenity can be regulated to further social interests in good order and morality, why can’t sodomy be regulated on similar grounds? And more broadly, does this argument invalidate all regulation of morality?

A. *The First Amendment and Regulation of Private Sexuality*

At least superficially, our analysis creates an anomaly in First Amendment jurisprudence. Normally, First Amendment concerns are greater when a person engages in expressive activity in public. Certain First Amendment images capture this paradigm: the soapbox speaker, the dissident burning a flag on the steps of the Capitol, and even the nude dancer in a bar. The same images in a private setting—standing in one’s living room making a speech, burning a flag in one’s basement, or dancing nude in one’s bedroom—would appear to raise less central First Amendment issues. This is in part because of the First Amendment’s primary concern with protecting public debate and dialogue, although it may also be attributable to the lack of prosecution of such conduct. Both practical difficulties of detection and other constitutional protections, such as the Fourth Amendment and the due process right to privacy, limit the state’s ability to intrude upon these private realms independently of the First Amendment.

Yet while we maintain that regulation of private sodomy violates the First Amendment, we do not maintain that public sexual intercourse is similarly protected. Although public intercourse may be as expressive as

¹¹⁴U.S. GENERAL ACCOUNTING OFFICE, DEFENSE FORCE MANAGEMENT: DEPARTMENT OF DEFENSE’S POLICY ON HOMOSEXUALITY 4-6 (1992).

private intercourse, and therefore would be entitled to stringent scrutiny, the state has a stronger interest in regulating public sex. Such an interest arises from the extremely high value our society places on maintaining the private character of sexual conduct, and from the related interest in not subjecting unconsenting adults and children to explicit sexual conduct. It is difficult to articulate precisely why public sex disturbs most of us so much more profoundly than other forms of offensive expression, but there is little doubt that it does. We believe that the answer lies in the public/private line itself, which is seen as central to maintaining the mystery, sanctity, and (indeed) sexiness of sex.¹¹⁵

Providing greater First Amendment protection for private rather than public expressive conduct may seem unusual, but in fact such protection accords with First Amendment jurisprudence regarding sexual speech. On matters of sex, First Amendment doctrine already provides greater protection to private than to public conduct. While the Court has frequently upheld state regulation of the public sale or display of pornography,¹¹⁶ the Court in *Stanley v. Georgia* struck down a law regulating the private possession of obscenity. *Stanley's* reasoning, predicated on an amalgam of First Amendment and privacy concerns, is fully applicable to sodomy laws: "[The makers of our Constitution] 'sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized man.'"¹¹⁷

This reveals a paradox in the Court's First Amendment jurisprudence: the First Amendment is most vigilant in protecting political expression in a public setting, and sexual expression in a private setting. Culture more than logic probably inspires this paradox: politics is considered intrinsically public, and sex intrinsically private. Indeed, sex in America has traditionally been a matter for secrecy and taboo.

While we do not seek to challenge the regulation of public sexual intercourse, we do challenge the military's regulation of other public displays of sexual intimacy, such as hand-holding, kissing and the like. But our attack is not predicated on an absolute right to engage in such conduct in public; in other cultures and other eras, many of these displays were (and are) generally forbidden. Rather, we challenge the content-discriminatory nature of the military's regulation: when hand-holding ex-

¹¹⁵This point is developed in detail by David Cole, *Playing By Pornography's Rules: The Regulation of Sexual Expression* (1994) (unpublished manuscript on file with authors).

¹¹⁶See *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986); *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976); *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973).

¹¹⁷*Stanley v. Georgia*, 394 U.S. at 564 (quoting *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)).

presses heterosexuality, it is permitted, but when it expresses homosexuality, it is condemned. Such a departure from content neutrality cannot be justified by recourse to the public/private line, because it draws the line differently depending on the content of the expression. Thus, if society tolerated public heterosexual sexual intercourse, but barred public homosexual sodomy, First Amendment concerns would be raised.

Finally, in accepting the public/private line for purposes of regulation of public sexual conduct, we do not mean to endorse it. Maintenance of this distinction has played an integral role in the suppression of gays, lesbians, and bisexuals. Before the Stonewall riots of June 1969, social mores and regulations were designed to keep people with so-called "deviant" sexual orientations in the closet. When the drag queens, gays, and lesbians fought back against a routine raid of the Stonewall Inn, they triggered a chain reaction of "coming out" by closeted baby boomers and others. What had been private, and deeply secret, became public, and deeply political. For those who came out, the experience was strongly emotional, usually liberating and often traumatic, because people were politicizing an element of their identity they had been taught to keep hidden. Once one was "out," there was no turning back. The private became the public.

That was the experience of the baby boomers, and their mass coming out has in turn affected the next generation. The post-Kennedy assassination generation has grown up not only knowing openly lesbian and gay people (the boomers had this advantage), but also being exposed to a culture whose creation is specifically that of known lesbian, gay, and bisexual scholars, entertainers, filmmakers and playwrights, artists, athletes, writers, and even political leaders. This new generation takes for granted that homosexual and bisexual expression is part of public culture. To the extent this view prevails, it may indeed strengthen our argument that sexual expression is entitled to strong First Amendment protection, by undermining the public/private distinction so critical to the suppression of much sexual expression.

B. Obscenity Regulation and Morality

Implicit in our analysis of the military exclusion policy is the notion that it is impermissible to regulate sexual conduct simply because it offends other people's moral values. Yet, when it comes to obscenity, the Supreme Court allows the state to do precisely that. The rationale for prohibiting obscenity is to protect "the social interest in order and morality."¹¹⁸ If speech can be regulated in that interest, doesn't it follow that

¹¹⁸Roth v. United States, 354 U.S. 476, 485 (1957), *quoted with approval in Paris Adult Theatre I*, 413 U.S. at 61.

sexual conduct may be similarly regulated? We believe it does not, for three reasons.¹¹⁹

First, the obscenity doctrine is a very narrow exception to the First Amendment's general rule, which is precisely the opposite: namely, that society may not regulate expression in order to uphold morality. In *Cohen v. California*,¹²⁰ Justice Harlan flatly repudiated the state's argument that a law barring offensive conduct was justified to uphold public morality. He reasoned that the principle advanced by the state had no stopping point, and would justify any regulation of expression:

the principle contended for by the State seems inherently boundless. How is one to distinguish this ["Fuck"] from any other offensive word? Surely the State has no right to cleanse public debate to the point where it is grammatically palatable to the most squeamish among us. Yet no readily ascertainable general principle exists for stopping short of that result were we to affirm the judgment below.¹²¹

For this reason, a majority of the Court has not permitted the state to penalize speech for its offensive moral content beyond the narrow category of obscenity per se. Where New York attempted to prohibit a non-obscene film, *Lady Chatterley's Lover*, because it undermined morality by presenting adultery in a positive light, the Court invalidated its effort.¹²² When Jacksonville, Florida prohibited the display of nudity at drive-in movie theaters, the Court again struck down the ordinance.¹²³ And when Indiana sought to require otherwise nude dancers to wear pasties and G-strings to uphold public morality, only four Justices upholding the statute felt that the morality justification was permissible.¹²⁴

¹¹⁹For a general critique of obscenity doctrine, see Cole, *Sex and Civilization*, *supra* note 115. For purposes of this Article, however, we do not attack obscenity doctrine itself but maintain that even accepting obscenity doctrine, the regulation of private sodomy cannot be constitutionally justified.

¹²⁰403 U.S. 15 (1971).

¹²¹*Id.* at 25.

¹²²*Kingsley Intl. Pictures Corp. v. Regents of the Univ. of New York*, 360 U.S. 684 (1959).

¹²³*Erznoznick v. Jacksonville*, 422 U.S. 205 (1975).

¹²⁴*Barnes v. Glen Theatre, Inc.*, 111 S. Ct. 2456, 2461 (1991). "[T]he public indecency statute furthers a substantial government interest in protecting order and morality." *Id.* at 2462 (Rehnquist, J., writing for the plurality joined by O'Connor and Kennedy, JJ.). Only one Justice found nude dancing to fall outside the purview of First Amendment protection, *Id.* at 2463 (Scalia, J., concurring in judgment). The fifth vote disclaimed reliance on morality, and instead relied on the secondary effects specifically associated with nude dancing bars. *Id.* at 2468-71 (Souter, J., concurring in judgment). Four Justices would have struck down the rule as violative of the First Amendment. *Id.* at 2471 (White, J., dissenting, joined by Marshall, Blackman, and Stevens, JJ.).

Second, sodomy may be many things, but it is not obscene. Obscenity is limited to sexually explicit depictions of sexual conduct that are patently offensive and lack any social value.¹²⁵ Since sodomy is practiced by a vast majority of the American public, it can hardly be characterized as "patently offensive." Moreover, much non-obscene pornography—gay, lesbian, and heterosexual—contains depictions of sodomy. Finally, even the obscene is protected in the privacy of the home. Thus, if regulation of sodomy could be analogized to regulation of obscenity, the precedents permitting regulation of the latter would not justify criminalization of private acts of consensual sodomy.

C. Justice Scalia's Slippery Slope?

Justice Scalia has already registered his objection to the consequences of the argument advanced here. In *Barnes*, he warned that the Court's willingness to treat nude dancing as expressive conduct was an invitation to subject "sodomasochism, cockfighting, bestiality, suicide, drug use, prostitution, and sodomy" to First Amendment scrutiny.¹²⁶ If the Court were to apply its expressive conduct doctrine to nude dancing, he suggested, the First Amendment might well incorporate the "Thoreauvian 'you-may-do-what-you-like-so-long-as-it-does-not-injure-someone-else' beau ideal."¹²⁷ In one sense Scalia was correct; the argument advanced here, like the argument advanced by the dissenters in *Barnes*, has broad implications for so-called morals regulation. However, we view that as a positive, not a negative feature. And we think Justice Scalia greatly overstated the consequences, because much of the conduct he believes should continue to be regulated would clearly satisfy the First Amendment test we have proposed here.

As Justice Harlan pointed out in *Cohen*, the slippery slope argument can be made just as strongly in the opposite direction:¹²⁸ if we are willing to permit the state to regulate expressive conduct solely because we object to what it communicates, what is to stop the state from regulating all expression on that basis? Once one recognizes that First Amendment concerns are triggered by the regulation of expressive conduct, as virtually everyone (beyond Justice Black) does, the seemingly simple distinction between conduct and speech dissolves, and difficult lines must be drawn. We insist on nothing more than what the Supreme Court estab-

¹²⁵ *Miller v. California*, 413 U.S. 15 (1973).

¹²⁶ *Barnes*, 111 S. Ct. at 2465 (Scalia, J., concurring in the judgment). Justice Scalia's list largely replicates that compiled by Lord Patrick Devlin as part of his classic defense of sodomy laws. See LORD PATRICK DEVLIN, *THE ENFORCEMENT OF MORALS* (1965).

¹²⁷ See David Cole, *Sexual Conduct and the First Amendment*, *LEGAL TIMES*, Aug. 30, 1993, at 23.

¹²⁸ See *supra* note 32 and note 115.

lished in *Texas v. Johnson*: that rationales long rejected as a basis for regulating "pure speech" cannot be accepted when the state is regulating conduct because of what it communicates.¹²⁹

Moreover, once one applies the principle Justice Scalia himself has advocated for analyzing regulation of expressive conduct, it becomes relatively easy to draw some of the lines Scalia suggested would dissolve. Regulation of "cockfighting" and "bestiality," for example, are justified by the interest in protecting animals from unnecessary harm and pain, irrespective of what these practices express to the rest of society. Similarly, drug use and prostitution are often accompanied by significant secondary effects unrelated to the suppression of what those practices express. Drug use, for example, undermines society's interest in health and safety, and contributes directly to violent crime. Prostitution is a practice almost invariably accompanied by violence against and exploitation of women, and also poses significant health concerns. All of these harms are independent of the "message" these practices send to the rest of society.¹³⁰

Sadomasochism presents a more difficult case. The state has a legitimate, non-expression-related interest in protecting against unconsented-to bodily injury and other harms (such as heightened risks of the transmission of AIDS). On the other hand, where consenting adults engage in sadomasochistic play that stops short of injury,¹³¹ it would seem that the state has no greater interest in barring such conduct than in prohibiting sodomy. One point is clear: state regulation of sadomasochism would be unconstitutional if premised only upon the unease or disgust that some citizens harbor against sadomasochism, without more.¹³²

¹²⁹ *Texas v. Johnson*, 491 U.S. 397, 406 (1989).

¹³⁰ Most of the harms are also independent of the existing illegality of these activities. Although we concede that many of the secondary effects of prostitution (especially some of the dangers to women) are the result of its illegality, the ways in which prostitution might exploit women for male profit might survive the illegality, as would most of the public health concerns.

¹³¹ See Susan Etta Keller, *Viewing and Doing: Complicating Pornography's Meaning*, 81 GEO. L. J. 2195, 2217-22 (1993). See generally GEORGES BATAILLE, *EROTISM* (Mary Dalwood trans., 1962); MARQUIS DE SADE, *JUSTINE* (Richard Seaver and Austryn Wainhouse trans., 1965); GILLES DELEUZE, *MASOCHISM* (Jean McNeil trans., 1971); ROBERT J. STOLLER, *PERVERSION: THE EROTIC FORM OF HATRED* (1975); *LEATHERFOLK: RADICAL SEX, PEOPLE, POLITICS, AND PRACTICE* (Mark Thompson ed., 1991); PAT CALIFIA, *MACHO SLUTS* (1988). For a fascinating life example, see JAMES MILLER, *THE PASSION OF MICHEL FOUCAULT* (1993).

¹³² A similar analysis would govern regulation of incest. Regulation of incest is in most instances justified by interests in preventing child abuse, nonconsensual sexual encounters, and health problems (birth defects). The difficulty of discerning "true consent" in family settings, and the disruptive effect of incest on family relationships may well justify broad prohibitions of incest. But incest regulation should not be upheld if it is solely based on society's moral disapproval, without the identification of non-expression related justifications.

Perhaps the most difficult issue presented by sadomasochism is the legitimacy of parentalism: can the state regulate conduct that does physical harm to an individual, even if the individual has freely consented? The same issue is presented by the regulation of suicide, and a wide range of other personally harmful conduct. While this raises significant moral and ethical questions, those questions are beyond the scope of the First Amendment, and therefore of this Article. We note only that under the approach we have proposed, the First Amendment itself does not forbid the state from regulating such conduct. If the state is otherwise free to enact laws to save individuals from self-imposed or consensual physical harm, the First Amendment would not bar such laws, because the regulation of conduct causing physical harm is distinct from what the conduct communicates.

VI. Conclusion

The distinction between speech and conduct has long troubled First Amendment scholars, while the legitimacy of morals legislation has long been the focus of a different jurisprudential debate. In this Article, we have sought to demonstrate that the two debates are linked, and that the Court's current doctrinal approach to expressive conduct may offer a fruitful avenue for evaluating the constitutionality of morals legislation. It also suggests that what may underlie the morals legislation debate may be very similar to what underlies debate about the limits of dissent: to what extent can society suppress conduct or expression simply because it finds what it communicates offensive, disgusting, or harmful?

The link we draw between morals legislation and regulation of expressive conduct is a particularly appropriate subject for this Symposium, because if Stonewall stands for anything it stands for the refusal of gay and lesbian people to allow their conduct to be regulated by other people's morals. The resistance sparked by Stonewall took form in gay and lesbian individuals' "coming out," identifying themselves, and insisting on the right to be gay or lesbian in a predominantly heterosexual society. In other words, the resistance consisted of an insistence on the right to dissent, and the right to equal respect for dissent that is implicit in our First Amendment tradition. Gays and lesbians, more than perhaps any other group in society, have reason to understand the deep interconnection between conduct, expression, identity, and the right to take part in the public debate that constitutes us as a community.

