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I. Introduction

As rhetorical categories, heterosexuality and homosexuality loom as large over our political culture as they do over the personal identities of most Americans. Sexual identity is constructed both privately and publicly, as much in intimacy as in political battle. Privately, it is difficult to divorce identity from conduct because both are inextricably part of who we are. In public discourse, however, identity and conduct are rhetorically segregated. While something of a fiction, this decoupling has an enormous effect on how we understand and enforce the categories of heterosexual and homosexual. This article explores how these terms acquire their categorical potency and exclusivity, as well as how definitions of sexual identity mask a great variety of sexual practices that do not fit neatly into either category. Bisexuality is one valuable way of accounting for and articulating the discrepancies between those people who call themselves heterosexual or homosexual and the sexual acts they actually perform. The categories are rhetorical (as opposed to real, in the sense of connoting an actual set of sexual practices) because of a disjuncture between the concepts of homosexual and heterosexual and the sexual acts they claim to signify. These categories effectively delineate and control the expression of sexual identities within cultural and political discourse without being able to control or even account for sexual behavior. The categories are also rhetorical, or discursive, in the sense that homosexuality and heterosexuality maintain their bipolarity through the very language that constitutes them, a language that represents and reproduces mutually exclusive identities within a system that purports to account for all possible choices. One irony of the salience of homosexual and heterosexual as clearly understood identities is that the

† J.D., Stanford Law School, 1995; Law Clerk for the Hon. Marilyn Hall Patel, United States District Court for the Northern District of California, 1995-97. I am extremely grateful to a number of people for their help on drafts as well as their encouragement and inspiration: Matthew Paul, Kyle Chadwick, Bobbi Bernstein, William Eskridge, and especially Janet Halley.

more discursive power they acquire, the less they are able to signify a coherent set of sexual acts. In other words, the broader the net heterosexuality casts rhetorically, the more sexual practices not traditionally considered heterosexual are brought within its sweep without the definition of heterosexual changing.

This explanation of homosexuality and heterosexuality has a number of implications for bisexuality, which is the focus of this article and the vehicle by which I explore the oppositional dynamics of sexual identity choice. Bisexuality functions as the fulcrum of this project for two, admittedly contradictory, purposes. The first is to resurrect bisexuality from the realm of the rhetorically abused and misunderstood. I seek to do this by showing how often and how easily "bisexual *practices*" are absorbed into both heterosexual and homosexual *identities*, and why those identities either hide or disfigure bisexuality as an alternative identity. In this sense, the article is a legitimation project.

The second purpose of this project, however, is to break up the categorizations of sexual identity altogether such that the category of bisexuality would be as inconceivable and as void of descriptive value as heterosexuality and homosexuality are. Bisexuality as a critique of the hetero/homo paradigm actually facilitates this more radical analysis, which concludes, ironically, that bisexuality works no better than the other two categories in accurately describing concrete sexual *behavior*, and that a new conceptualization of sexual identities, such as one based on acts, is needed. Nevertheless, bisexuality is useful as a theoretical tool and, as a theoretical identity, deserves vindication. I employ it toward both these ends.

Part II introduces the mechanisms by which homosexuality and heterosexuality maintain a monopoly on sexual identity and suggests that bisexuality is the most obvious category this monopoly obscures. I contend that the most forceful method of modern homo/hetero predominance is the insistence that distinct sexual practices correspond to each sexual identity.

Part III examines studies of sexual practices, in particular those by Alfred Kinsey. These studies do two things. First, they provide a factual basis for showing that there is at best a tenuous correspondence between specific sexual acts and the sexual identity of those who engage in the acts. Second, they offer different ways of conceptualizing sexual identities based on the resulting data. All of the research done in this area has shown that the present system of classification is inadequate to the range of sexual practices. This section concludes by speculating about possible classificatory systems that abandon the homo/hetero dichotomy altogether.

The remainder of the article examines some of the means employed to enforce homosexuality and heterosexuality as exclusive identities. Part IV uses narratives to explore how the homo/hetero monopoly is enforced privately through an "ethic" of sexual identity and a corresponding betrayal of that ethic. I look first at the heterosexual ethic as articulated by Representa-

tive William Dannemeyer and then to the homosexual ethic conveyed in various bisexual narratives about the lesbian community to show how bisexuality is cast as a traitor to both.

Part V explores how homosexuality and heterosexuality are *publicly* enforced, through law and its equivalent. I use outing as an example of a public method of homosexual identity enforcement. I then turn to the law itself for evidence of heterosexual identity enforcement. Specifically, I examine *Bowers v. Hardwick* and its progeny as well as the new military policy on homosexuality. While both outing and the law depend on distinguishing sexual identity from sexual practices, ultimately neither can maintain the distinction within the current understanding of sexual identity. Finally, I conclude by taking the strategic uncoupling of acts from identity literally and asking a number of questions about what a reclassification of sexual identity might mean politically and pragmatically.

II. BISEXUALITY: THE INVISIBLE WALL

> ". . .
> Before I built a wall I'd ask to know
> What I was walling in or walling out,
> And to whom I was like to give offense.
> Something there is that doesn't love a wall,
> That wants it down." I could say "Elves" to him,
> But it's not elves exactly, and I'd rather
> He said it for himself. I see him there
> Bringing a stone grasped firmly by the top
> In each hand, like an old-stone savage armed.
> He moves in darkness as it seems to me,
> Not of woods only and the shade of trees.
> He will not go behind his father's saying,
> And he likes having thought of it so well
> He says again, "Good fences make good neighbors."
>
> — Robert Frost[1]

> The time has come, I think, when we must recognize bisexuality as a normal form of human behavior.
>
> — Margaret Mead[2]

There is a vast and vastly unacknowledged wall between heterosexual and homosexual identities that is vigilantly maintained. Like Frost's two farmers who meet each spring to repair the wall that marks the boundary

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[1] ROBERT FROST, *Mending Wall*, *in* THE POETRY OF ROBERT FROST: THE COLLECTED POEMS, COMPLETE AND UNABRIDGED 33, 34 (Edward C. Lathem ed., 1979). Fred Klein drew the analogy between Frost's poem and the management of the hetero/homo dichotomy. FRED KLEIN, THE BISEXUAL OPTION: A CONCEPT OF ONE-HUNDRED PERCENT INTIMACY 111 (1978).

[2] Margaret Mead, *Bisexuality: What's It All About?*, REDBOOK, Jan. 1975, at 29, 29.

between their properties, keeping the wall between them as they move along it, replacing stones that mysteriously have been dislodged, so those who walk on either side of the boundary between heterosexuality and homosexuality tirelessly repair and define their wall. And beneath the stones are buried the potential identities, desires, pleasures, and fears of myriad people. Buried each time anew is the potential to question that wall as Frost does, to ask if it doesn't arise from a philosophical darkness that is not natural; "[n]ot of woods only and the shade of trees," but born of our own social prejudices. But what and who is walled in and walled out? To whom is this wall and its placement likely to give offense? The answers to these questions necessitate going behind our fathers' saying, "[g]ood fences make good neighbors."

Animating this inquiry is the conviction that the social and rhetorical categories of heterosexual and homosexual fail even remotely to approximate the actual range of human sexual activity, let alone human sexual desire. In all the practices that lie between and among the polarized identities of heterosexuality and homosexuality is the potential for an important reclassification, for new categories that not only capture the diversity of sexual activity, but also contest the rigidity and slimness of our present choices and complicate those choices when they are made.[3] The importance of such a reclassification is not simply theoretical; sexual practices have become a salient vehicle for the construction of sexual identities, identities that in turn motivate hate crimes, housing and employment discrimination, local and national legislation, judicial decisions, military regulation, and powerful political coalitions. Law and politics both influence our rules of sexual classification and are deeply influenced by them.

The dichotomy of heterosexuality and homosexuality has not always governed sexual identity.[4] Moreover, different cultures at different times have not categorized people according to sexual preferences at all.[5] Foucault dated the birth of the homosexual as a species to the nineteenth cen-

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[3] While I believe in the worthiness of this project, I am not unaware of the ways in which attempting to disrupt the hetero/homo monopoly on sexual identification might be seen as undermining the fragile and hard-earned political strength of the gay and lesbian rights movement. This is not my intention. In fact, it is my hope that a reconsideration of the ways in which sexual identity is classified would create a broader political alliance around many of the same issues and render other issues obsolete. Indeed, while I criticize the ways in which the gay and lesbian community has participated in the maintenance of a bipolar model of sexuality, it is the hegemony of heterosexuality that remains the main focus of my critique. It is also partly heterosexual hegemony that has forced gays and lesbians to find solidarity on "their side" of the bipolar model.

[4] *See, e.g.*, EVA CANTARELLA, BISEXUALITY IN THE ANCIENT WORLD 50-51, 193 (Cormac Ó Cuilleanáin trans., Yale University Press 1992) (1988) (asserting that in ancient Greece and Rome sexual behavior was not conceptualized as heterosexual/homosexual but as active/passive); DAVID M. HALPERIN, ONE HUNDRED YEARS OF HOMOSEXUALITY: AND OTHER ESSAYS ON GREEK LOVE 29-33 (1990).

[5] *See* HALPERIN, *supra* note 4, at 27 (stating that "most pre-modern and non-Western cultures, despite an awareness of the range of possible variations in human sexual behavior, refuse to individuate human beings at the level of sexual preference").

tury.[6] Since then, much important work has been done to historicize sexual practices and sexual identity.[7] The significance of the homosexual "as a species" is precisely the emergence of a new social identity based on sexual acts—which themselves were displaced and dominated by a rhetoric of sexual identification.[8] Sodomy, the classic forbidden act, was no longer something one *did*, but something one *was*.

> What *was* new from the turn of the century was the world-mapping by which every person, just as he or she was necessarily assignable to a male or female gender, was now considered necessarily assignable as well to a homo- or a hetero-sexuality, a binarized identity that was full of implications, however confusing, for even the ostensibly least sexual aspects of personal existence. It was this new development that left no space in the culture exempt from the potent incoherences of homo/heterosexual definition.[9]

From the sexual taxonomy inherited from the nineteenth century to the infamous 1986 Supreme Court decision *Bowers v. Hardwick*[10] to the present, the organizational logic of sexual orientation has been one that claims to define identity based on conduct. "Homosexuality appeared as one of the forms of sexuality when it was transposed from the practice of sodomy onto a kind of interior androgyny, a hermaphrodism of the soul. The sodomite had been a temporary aberration; the homosexual was now a species."[11]

It perhaps is not surprising that anal sodomy has become synonymous with male homosexuality. Sodomy is assumed to be exclusively a homosexual act despite the many states that include oral as well as anal sex and cross-sex contact as well as same-sex contact in their definitions of sodomy.[12] In fact, Senator Strom Thurmond insists that "[h]eterosexuals don't

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[6] MICHEL FOUCAULT, THE HISTORY OF SEXUALITY VOLUME I: AN INTRODUCTION 43 (Robert Hurley trans., Vintage Books 1980) (1978).

[7] *See, e.g.*, HALPERIN, *supra* note 4; George Chauncey, Jr., *Christian Brotherhood or Sexual Perversion? Homosexual Identities and the Construction of Sexual Boundaries in the World War I Era*, *in* HIDDEN FROM HISTORY: RECLAIMING THE GAY AND LESBIAN PAST 294 (Martin B. Duberman et al. eds., 1989).

[8] Janet Halley does a careful reading of the Foucault passage arguing that Foucault has mostly been read to mean here that sodomy as a regime of acts was subsumed into homosexuality as an identity. Halley argues that the rhetoric of acts did not disappear but was rather displaced by the rhetoric of identities. This article further explores Halley's distinction between acts rhetoric and identity rhetoric. Janet E. Halley, *Reasoning about Sodomy: Act and Identity in and after* Hardwick v. Bowers, 79 VA. L. REV. 1721, 1739-40 (1993).

[9] EVE K. SEDGWICK, EPISTEMOLOGY OF THE CLOSET 2 (1990).

[10] 478 U.S. 186 (1986) (holding that the criminalization of "homosexual sodomy" did not violate a constitutional right of privacy).

[11] FOUCAULT, *supra* note 6, at 43.

[12] Many states do not distinguish the gender of the participants in their definitions of sodomy. *See* ALA. CODE §§ 13A-6-60(2), 13A-6-65(a)(3) (1994); ARIZ. REV. STAT. ANN. §§ 13-1411, 13-1412 (1989); FLA. STAT. ANN. § 800.02 (West Supp. 1994); IDAHO CODE §§ 18-6605-06 (1987); LA. REV. STAT. ANN. § 14:89 (West 1986); MD. ANN. CODE art. 27, §§ 553, 554 (1992); MASS. ANN. LAWS ch. 272, § 34 (Law. Co-op. 1992); MICH. COMP. LAWS ANN. § 750.158 (1991); MINN. STAT. ANN. § 609.293 (West 1987); MISS. CODE ANN. § 97-29-59 (1973); N.C. GEN. STAT. § 14-177 (1993); OKLA. STAT. ANN. tit. 21, § 886 (West 1983 & Supp. 1995); R.I. GEN. LAWS § 11-10-1 (1981); S.C. CODE ANN. § 16-15-120 (Law. Co-op. 1985); UTAH CODE ANN. § 76-5-403 (1990); VA. CODE ANN. § 18.2-361 (Michie Supp. 1994); *see also* 10 U.S.C. § 925 (1983) (Uniform Code of Military Justice).

practice sodomy."[13] Separating the way we speak of sexual acts and sexual identities is crucial; if oral sex between a man and a woman is considered sodomy (which often it is), and if avowed beterosexuals engage in same-sex anal sodomy (which they do), then surely sexual identities do not correspond to the sexual acts to which they are linked in the popular imagination. Rather, acts and identities operate distinctly within the discourse of sexual orientation. This important conceptual separation is what Mary McIntosh identifies as a homosexual "role,"[14] and what Janet Halley means when she insists on speaking of rhetorics of both acts and identity.[15]

The problem with the organizational logic of the last century is that it depends on a highly selective and inventive categorization of behavior, one that necessitates a willing misreading of the data about sexual practices to make it fit the parameters of the hetero/homo regime. Hence the invisibility of bisexuality as a category. By refusing to name and acknowledge bisexuality as an identity based on a prevalence of bisexual *conduct*,[16] the paradigm of mutually exclusive heterosexuality and homosexuality ensures that bisexuality retains its currency as the formless receptacle of sexual confusion and fear—fear about the spread of AIDS, about sexual voraciousness, about promiscuity, and unarticulated fear of the taboo and degenerate. Bisexuality serves the function of deviancy so well not because it is thought to include some homosexual behavior, but precisely because it challenges the dual sexual categorization altogether. In doing so, bisexuality implies that the categories of heterosexual and homosexual have porous borders, that they are not mutually exclusive, and that they may not have any stable meaning at all. In this instance, to see and name the wall might be to begin to dismantle it.

III. Alternative Classifications

> If a bisexual community can form with no need to define itself in relation to its "opposite," perhaps there I will have my coming-out place. Until then, home is not a place, but a process.
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> — Carol A. Queen[17]

The world is not to be divided into sheep and goats. Not all things are black nor all things white. It is a fundamental of taxonomy that nature rarely deals with discrete categories. Only the human mind invents categories and tries to

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[13] *Senators Loudly Debate Gay Ban*, N.Y. Times, May 8, 1993, at A9.

[14] Mary McIntosh, *The Homosexual Role*, *in* Forms of Desire: Sexual Orientation and the Social Constructionist Controversy 25, 29 (Edward Stein ed., 1990) ("For the purpose of introducing the term 'role' is to enable us to handle the fact that behavior in this sphere does not match popular beliefs: that sexual behavior patterns cannot be dichotomized in the way that the social roles of homosexual and heterosexual can.").

[15] Halley, *supra* note 8, at 1733-42.

[16] *See infra* text accompanying notes 48-49 and note 128.

[17] Carol A. Queen, *The Queer In Me*, *in* Bi Any Other Name: Bisexual People Speak Out 17, 21 (Loraine Hutchins & Lani Kaahumanu eds., 1991).

> force facts into separated pigeon-holes. The living world is a continuum in each and every one of its aspects. The sooner we learn this concerning human sexual behavior the sooner we shall reach a sound understanding of the realities of sex.
>
> — Alfred C. Kinsey[18]

It is important to examine the data that exists on sexual behavior and to investigate the models that have been offered as more accurate sketches of corresponding categories of sexual identity. These models provide a lens through which to view the discrepancies between sexual practices and the boundaries of sexual identity.

Despite the criticism that has been launched at the sampling and statistics of the Kinsey studies of male and female sexual behavior,[19] Kinsey's work remains the most comprehensive and widely cited research on sexuality in the United States. Yet more surprising even than the radical findings of these famous studies is the extent to which Kinsey's name and work have earned a place in popular knowledge without the *implications* of his results being realized or understood. For example, Kinsey and his associates found that among males, only 50% were exclusively heterosexual throughout their adult lives and 4% were exclusively homosexual; in other words, 46% of men either engaged in what Kinsey called "heterosexual and homosexual activities" or responded erotically to people of both sexes.[20] Although most of Kinsey's work chronicled genital behavior and orgasm, the category of homosexual activity included sexual acts that did not result in orgasm and specific instances of erotic arousal where there was no overt contact.[21] Even when arousal is *not* included, the figures are telling. More than a third (37%) of males had engaged in "at least some overt homosexual experience to the point of orgasm between adolescence and old age."[22] Among women, the figures are lower but appreciable. By the age of forty, 28% of women had responded erotically to other women psychologically and 19% had had overt sexual experiences with other women.[23] Of those 19%,

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[18] ALFRED C. KINSEY ET AL., SEXUAL BEHAVIOR IN THE HUMAN MALE 639 (1948) [hereinafter MALE]. It is possible to imply from the above quotation that Kinsey is making an essentialist point about sexual orientation; that "nature" does not deal in neat categories but that it does deal in sexual identities. To the contrary, Kinsey, a taxonomist, was very careful about making such assumptions. His data showed, in fact, that patterns of sexual behavior often changed over the course of a lifetime. What he did believe to be "basic to the species" was

> the capacity of an individual to respond erotically to any sort of stimulus . . . . That patterns of heterosexuality and patterns of homosexuality represent learned behavior which depends, to a considerable degree, upon the mores of the particular culture in which the individual is raised, is a possibility that must be thoroughly considered before there can be any acceptance of the idea that homosexuality is inherited . . . .

Id. at 660.

[19] *See, e.g.*, WILLIAM G. COCHRAN ET AL., STATISTICAL PROBLEMS OF THE KINSEY REPORT (1954).

[20] MALE, *supra* note 18, at 656.

[21] *Id.* at 623.

[22] *Id.* at 650.

[23] ALFRED C. KINSEY ET AL., SEXUAL BEHAVIOR IN THE HUMAN FEMALE 452 (1953) [hereinafter FEMALE].

one-half to two-thirds had reached orgasm (or between 9-13% of all women).[24]

More recent sex studies report conflicting figures. For example, the 1993 *Janus Report* tends to support Kinsey's data, finding that 22% of men and 17% of women have had "homosexual experiences."[25] Of those who had homosexual experiences, 95% of the men and 94% of the women had a homosexual experience more than once.[26] The much publicized 1994 study of sexual practices conducted out of the University of Chicago found much lower figures for same-sex behavior.[27] According to the University of Chicago study, just over 9% of men and over 4% of women had some sexual experience with someone of the same gender.[28]

Despite the recent disagreements over Kinsey's figures, it is significant that both studies agree that self-reported sexual identity often does not correlate with sexual behavior.[29] In fact, the University of Chicago study charted the overlap of same-sex desire, behavior, and identity and found that of those who reported either same-sex desire or behavior or both, only 25% of men and 16% of women identified as either homosexual or bisex-

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24 *Id.* at 454. While the incidence of orgasm in women during a sexual experience with another woman was low compared to the percentage of men who achieved orgasm with another man, it was quite high compared to the percentage of women who experienced orgasm during sex with men or sought sexual satisfaction in other ways. In fact, the comparison caused Kinsey to note that "[h]omosexual contacts are highly effective for bringing the female to orgasm . . . . In spite of their relatively low incidence, they account[ ] for an appreciable proportion of the total number of orgasms of the entire sample of unmarried females." *Id.* at 457. Elsewhere Kinsey remarked, demonstrating his own obsession with orgasm as much as the effectiveness of "homosexual sex" for women, that "it is evident that the females who were having homosexual experience were reaching orgasm more frequently than those who were depending on other types of sexual activity for their outlet." *Id.* at 461.

25 SAMUEL S. JANUS & CYNTHIA L. JANUS, THE JANUS REPORT ON SEXUAL BEHAVIOR 69 (1993).

26 *Id.* at 70.

27 EDWARD O. LAUMANN ET AL., THE SOCIAL ORGANIZATION OF SEXUALITY: SEXUAL PRACTICES IN THE UNITED STATES 283-320 (1994). The study also severely criticizes the sampling methods of the *Janus Report*. *Id.* at 45-46. However, the University of Chicago study used face-to-face interviews which are believed to skew responses on the most sensitive questions. *See, e.g.*, Alison Bass, *Sex in the '90s: A New Look*, BOSTON GLOBE, Oct. 7, 1994, at A1; Philip Elmer-Dewitt, *Now for the Truth About Americans and Sex*, TIME, Oct. 17, 1994, at 70. In addition, the Chicago study has been criticized for its sampling technique and its questions. *See, e.g.*, Paul Robinson, *The Way We Do the Things We Do*, N.Y. TIMES, Oct. 30, 1994, § 7 (Magazine), at 3.

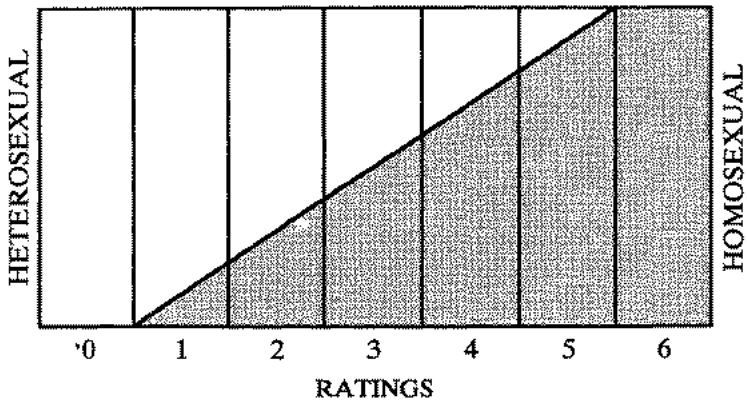
28 LAUMANN ET AL., *supra* 27, at 294-95. By their own admission, the authors believe the figures are probably low. "The estimates derived from survey data on socially stigmatized sexual behaviors and feelings, whether they be masturbation, homosexual relations, anal sex, or extramarital affairs, are no doubt lower-bound estimates." *Id.* at 284.

29

> The difficulty of extrapolating from data on homosexual acts to an estimate of the size of the homosexual population arises from the fact that many persons are bisexuals—they have sex with partners of both sexes. As we have noticed in other areas of sexual involvement, there is often a looseness of labeling relative to any particular sex activity. In our interviews, we found that, although there were respondents who identified themselves as heterosexual and reported having homosexual relations, there were also a number of respondents who identified themselves as homosexuals and reported that they have heterosexual relations as well.

JANUS & JANUS, *supra* note 25, at 70.

GRAPH 1



ual.[30] Thus, the importance lies less in the numbers themselves, and more in their relationship to each other and the conceptualization of sexual categories that relationship implies. In this respect, Kinsey's work remains vital and his conceptualization of sexual identity enduring.

Kinsey created a heterosexual-homosexual rating scale of seven categories that he felt accurately represented the possibilities of sexual identification based on both psychological reactions and overt behavior.[31] The scale represents what Kinsey called the "heterosexual-homosexual balance," an indication of the combination of heterosexual and homosexual aspects of a person's history, "rather than the intensity of his or her psychosexual reactions or the absolute amount of his or her overt experience."[32] Within the Kinsey scheme someone who is exclusively heterosexual would have a 0 rating, and someone exclusively homosexual would have a rating of 6.[33] Those who are predominantly heterosexual with only an incidental history of homosexual experiences or predominantly homosexual and only incidentally heterosexual are 1 and 5 respectively. Someone predominantly heterosexual with a distinct homosexual history is rated as 2, while someone predominantly homosexual with distinct heterosexual experiences is rated as 4. A 3 is someone "equally heterosexual and homosexual."[34] There is also an X rating, which Kinsey applied to people who did not respond erotically to either sex. Although generally unremarked,

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[30] LAUMANN ET AL., *supra* note 27, at 301. Even ruling out desire, there is a substantial discrepancy between the number of people who engage in same-sex behavior and the number who identify as homosexual or bisexual. *Id.*

[31] FEMALE, *supra* note 23, at 470. A fuller description of each category appears in MALE, *supra* note 18, at 639-41.

[32] FEMALE, *supra* note 23, at 470.

[33] *Id.* It is interesting that some of Kinsey's ratings came to be synonymous with the identities he was attempting to complicate. Hence, it is considered a statement of gay pride to call oneself a "Kinsey 6."

[34] *Id.*

the figures for this category are not negligible: they included 14-19% of unmarried women between the ages of twenty and thirty-five.[35]

While Kinsey understood that his results radically disrupted the stability of the hetero/homo categories, and he attempted to chart a more accurate register of identities, he was conceptually unable to escape the binary view of sexuality that his results discredited. To his credit, he did grasp the homophobia at work in the asymmetrical assumptions people make about how homosexual behavior in particular constitutes identity. More significantly, he understood the political and social consequences of his own refinements to the system of classification.

> The group that is identified in the public mind as heterosexual is the group which, as far as public knowledge goes, has never had any homosexual experience. But the group that is commonly identified as homosexual includes not only those who are known or believed to be exclusively homosexual, but also those who are known to have had any homosexual experience at all. Legal penalties, public disapproval, and ostracism are likely to be leveled against a person who has had limited homosexual experience as quickly as they are leveled against those who have had exclusive experience. It would be as reasonable to rate all individuals heterosexual if they have any heterosexual experience, and irrespective of the amount of homosexual experience which they may be having.[36]

Despite his laudable goals and the continuing value of the data he amassed, Kinsey arranged his categorical constellation in a way that helped to reify the very categories he sought so vigorously to deconstruct. In the Kinsey universe, sexual identity remains a zero-sum game, in which heterosexuality and homosexuality stand in opposition to each other, so that the more homosexual someone is, the less heterosexual the same person can be. Kinsey exposed the wall between the two identities and found that it contained a great variety of what might be called bisexual behavior and fantasy. There remained, however, a great many people who still had no place to call home in the undefinable space of the "continuum" because Kinsey's conceptualization of his results obscured the more radical implications of his data. In retaining the given framework, Kinsey preserved one of its most pernicious aspects, the notion that a "pure" sexual identity exists at either end of the spectrum. This framework allows one to retreat to one side of the wall with a ready-made label, to continue to call oneself, if perhaps with more pride than honesty, a "Kinsey 0."[37]

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[35] *Id.* at 472, 499.

[36] *Id.* at 469.

[37] I don't for an instant want to insinuate that it is as "easy" to identify oneself homosexual as heterosexual, at least in the sense of being painless or without tremendous costs. By pairing homo and hetero as often and as "easily" as I do, I mean to emphasize only that each occupies a distinctive and acknowledged discursive territory and that each claims a rather fluid boundary. My main concern in this article is with how those boundaries are drawn, where people who don't qualify as either based on their behavior find themselves, and what political and epistemological options they might have.

Kinsey's findings inspired a number of sexual orientation studies that have attempted to correct some of his conceptual limitations, although none has replicated the breadth of his sample. These alternative models demonstrate, in both their improvements and shortcomings, the challenges in and necessity of reconceptualizing sexual identity.

Michael D. Storms studied the correlation between sexual orientation and two different characteristics: the degree of a person's masculinity and femininity and the nature of that person's erotic fantasies.[38] Storms found that gender attributes had little relation to sexual orientation but that there was a high correlation between sexual identity and erotic fantasy. In fact, he found that self-identified bisexuals had as many homosexual fantasies as gays and lesbians and as many heterosexual fantasies as heterosexuals.[39] Storms' measurements were not nominal, however; thus, it is *not* safe to assume from Storms' findings that bisexuals spent twice as much time fantasizing; this would be an unfortunate and stereotypical conclusion. Rather, the implication is that bisexuals are neither less "homosexual" than homosexuals nor less "heterosexual" than heterosexuals.

Storms graphed the results of his study orthogonally to avoid the one-dimensionality of the Kinsey scale. His taxonomy employed perpendicular vectors to chart not only a range of homoerotic and heteroerotic fantasy that varied independently of each other in one person, but also the *degree* of sexual fantasizing generally for that person. In other words, the calibration of eroticism encompassed the extent to which one might be considered sexual at all, allowing for an asexual orientation, a sophisticated version of Kinsey's X rating.

Storms' major conceptual contribution was to depart from Kinsey's "continuum" model. He thereby avoided making the degree of homoerotic fantasizing inversely proportionate to one's heteroerotic fantasizing. Homosexuality and heterosexuality were no longer bipolar and could vary independently. Nevertheless, by clinging to a model that viewed sexual identity as defined by degrees of homoerotic or heteroerotic behavior, Storms reinscribed the wall as a series of smaller walls: within four categories instead of the previous two there remained the same tremendous variation of sexual desire and behavior that could not be plotted as hetero/homo and which made the bipolar model inadequate. Storms' model failed even

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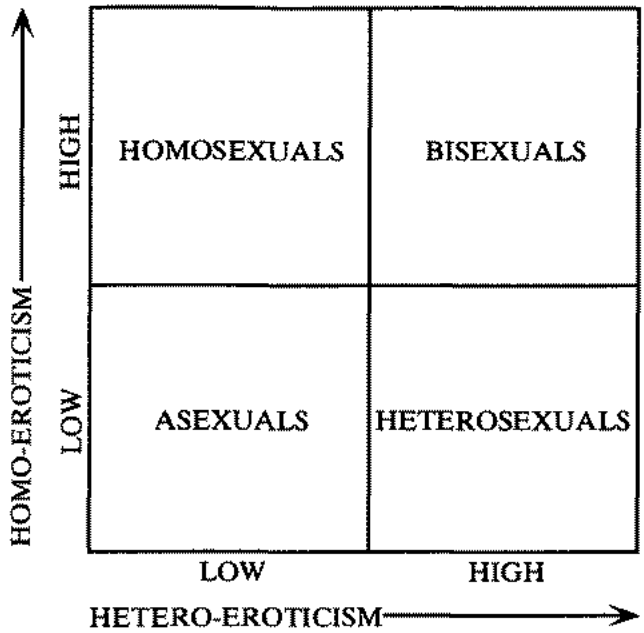
There have been a number of recent and intelligent analyses of the Kinsey scale from a variety of perspectives. *See, e.g.*, John P. De Cecco, *Sex and More Sex: A Critique of the Kinsey Conception of Human Sexuality*, *in* HOMOSEXUALITY/HETEROSEXUALITY: CONCEPTS OF SEXUAL ORIENTATION 367, 376 (David P. McWhirter et al. eds., 1990) (suggesting that Kinsey's data were overshadowed by the emergence of "the gay identity" and the movement that it was a part of); McIntosh, *supra* note 14, at 36-42; Amanda Udis-Kessler, *Appendix: Notes on the Kinsey Scale and Other Measures of Sexuality*, *in* CLOSER TO HOME: BISEXUALITY & FEMINISM 311 (Elizabeth R. Weise ed., 1992).

[38] Michael D. Storms, *Theories of Sexual Orientation*, 38 J. PERSONALITY & SOC. PSYCHOL. 783 (1980).

[39] *Id.* at 788.

GRAPH 2[40]



to account for the amount of variation found in the Kinsey data: a person who had a moderate amount of heteroerotic fantasizing and a smaller amount of homoerotic fantasizing would, in the Storms diagram, fall unproblematically into the category of heterosexuals.

Fritz Klein set out to account for more than just sexual behavior and fantasy in determining sexual identity.[41] In his study Klein used self-identified homosexuals, heterosexuals, and bisexuals. He found that sexual orientation was not fixed, but changed over time.

> All three of the self-identified groups became significantly more homosexually oriented over time . . . . There was a significant trend in the direction of the bisexual norm with heterosexuals moving toward a more homosexual orientation over their lifetimes, and homosexuals moving away from a homosexual orientation. One might assume that these changes over a person's lifespan would hold true for bisexuals and homosexuals only. In this study, however, heterosexuals also changed.[42]

Klein used Kinsey's numerical scale to assess the degrees of heterosexuality and homosexuality in his sample along a much broader range of

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[40] *Id.* at 784.

[41] Fritz Klein et al., *Sexual Orientation: A Multi-Variable Dynamic Process*, 11 J. HOMOSEXUALITY, Nos. 1/2, 1985, at 35, 39.

[42] *Id.* at 45. It should be noted, however, that Klein's sample consisted of 384 self-selected readers of *Forum Magazine*, a soft-core porn publication. Of the 384, 128 identified themselves as heterosexual, 172 as bisexual and 62 as homosexual. *Id.* at 38-40. While the sampling itself does not discredit the results, it may have consisted of more than its share of the sexually adventuresome.

human feeling and behavior. He applied a Kinsey rating to the sexual variables of attraction, fantasy, behavior, emotional preference, social preference, lifestyle, and self-identification. In doing so, be could account for more of the discrepancies that researchers were finding between sexual acts and self-designated identities.

Most significantly, Klein's model allowed him to chart *time*. Each variable was measured in the past, in tbe present, and as an ideal. For example, a person could say tbat in terms of social preference they had been a Kinsey 1, preferring to socialize almost exclusively with beterosexuals; that at present they were a 2; but ideally they would be a 4, socializing mostly with homosexuals but more than incidentally with heterosexuals. This dynamic element prompted Klein to consider sexual orientation as a process that could change over time.

Given that homosexuality, and bisexuality especially, are already problematic sexual identifiers, the effect of Klein's results was to substantially problematize heterosexuality as a stable category. This erosion of heterosexuality's domain is the most important contribution of a reconceptualization of the sexual orientation models: it affords a clearer analysis of the discrepancies between tbe sexual *acts* that heterosexuals engage in and the ways in which the boundaries of the heterosexual *identity* are drawn to disguise those discrepancies.[43] This disguising happens through the explicit use of the category of homosexuality and often with tbe direct help of the gay and lesbian communities.[44]

The deficiencies of Storms' model and the temporal movement of Klein's model suggest that bisexuality, as it has been used, is a largely incoherent category. Because everyone would benefit from a better understanding of bisexuality, this article begins to provide one. The bisexuality that could aid a recategorization of sexual identity, however, may not be one that is familiar: it may not be "one" at all, but many.

More sophisticated theories of bisexuality which acknowledge the range of possibilities *within* bisexuality have begun to emerge and have interesting implications for heterosexuality and homosexuality as well. Gary Zinik, for instance, identifies three types of bisexuality. "*Simultaneous* bisexuality" describes sex with a man and a woman at the same time, "*concurrent* bisexuality" entails sex with men and women separately but during the same time period in one's life, and "*serial* bisexuality" denotes alternating monogamous relationships with men and women over the course of a lifetime.[45]

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[43] Janet Lever et al., *Behavior Patterns and Sexual Identity of Bisexual Males*, 29 J. SEX RES. 141 (1992).

[44] *See infra* notes 67-70 and accompanying text.

[45] Gary Zinik, *Identity Conflict or Adaptive Flexibility? Bisexuality Reconsidered*, 11 J. HOMOSEXUALITY, Nos. 1/2, 1985, at 7, 8-9. I think serial bisexuality is an unfortunate choice of words, connoting as it does serial killers, serial rapists, etc. Jay P. Paul has referred to this same behavior

In a still more complex scale of sexuality, Braden Robert Berkey has identified six categories of bisexuality.[46] These categories demonstrate a compromise between a model like Zinik's and the Kinsey scale:

> (a) Homosexual orientation prior to exclusive heterosexual orientation; (b) heterosexual orientation prior to exclusive homosexual orientation; (c) predominant homosexual orientation (frequent homosexual desires and/or sexual contacts) with infrequent heterosexual desires and/or sexual contacts; (d) predominant heterosexual orientation . . . with infrequent homosexual desires and/or sexual contacts; (e) equal orientation toward members of both sexes, where desires for, and/or sexual contacts with members of both sexes occur on a fairly regular basis (concurrent bisexual); and (f) equal orientation toward members of both sexes, where exclusive homosexual orientation is followed by exclusive heterosexual orientation (or vice versa), on an ongoing basis (sequential bisexual).[47]

This scale also fails to exhaust the possibilities. For example, the scale excludes a sequential bisexual who made a monogamous lifetime commitment, but whose fantasy life continued to involve both men and women. The possibilities are not only endless along the axes of time and combinations of partners, but along countless other axes of acts, imagination, and preference.

These studies of sexual practice show how bisexuality may facilitate the discursive separation of acts and identity. The tremendous range of behavior that could conceivably be categorized as bisexual necessarily makes the category itself mostly theoretical; because bisexuality rarely, if ever, describes concrete behavior, it exposes the logical problem of moving too easily between rhetorics of act and identity. What, for instance, would bisexual sex as an *act* look like? It may be so difficult to conceive precisely because our understanding of acts follows from our knowledge of identity rather than the other way around. If a bisexual man and bisexual woman have sex in classic missionary position for the purposes of procreation, is that bisexual sex? If a heterosexual couple engages in anal sex is it still a heterosexual act?[48] If a bisexual woman has sex with a straight man is it bisexual sex for her and heterosexual sex for him? And the classic question: if a gay man and a lesbian have intercourse, is the intercourse homosexual, heterosexual, or something else altogether?[49]

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as "sequential bisexuality," a vast improvement. Jay P. Paul, *The Bisexual Identity: An Idea Without Social Recognition*, 9 J. HOMOSEXUALITY, Nos. 2/3, 1984, at 45, 56.

[46] Braden R. Berkey et al., *The Multidimensional Scale of Sexuality*, 19 J. HOMOSEXUALITY, No. 4, 1990, at 67, 70. Again, the composition and size of this sample may make the results of the study less useful than the actual conceptualization. The subjects were found by contacting bisexual and homosexual organizations; this may account for the fact that they found no one identifying as asexual and no one who was "past homosexual, currently heterosexual," which is a highly problematic description in the first place. *Id.* at 77.

[47] *Id.*

[48] *See infra* text accompanying notes 58-60.

[49] Pat Califia, *Gay Men, Lesbians and Sex: Doing It Together*, ADVOCATE, July 7, 1983, at 24, 25-27 (arguing that sex between gay men and lesbians is gay sex).

Consider further the possible disruptions to our sexual paradigm if we were to adopt something like Sedgwick's speculative identity classification based on differences other than gender of the partner or posture of the act. For example,

> • Sexuality makes up a large share of the self-perceived identity of some people, a small share of others'. . . .
> • Many people have their richest mental/emotional involvement with sexual acts that they don't do, or even don't *want* to do.
> • For some people it is important that sex be embedded in contexts resonant with meaning, narrative, and connectedness with other aspects of their life; for other people, it is important that they not be; to others it doesn't occur that they might be. . . ,
> • Some people like spontaneous sexual scenes, others like highly scripted ones, others like spontaneous-sounding ones that are nonetheless totally predictable,[50]

These possibilities are not, per se, inaccurate descriptions of "sexual preference." The idea of basing sexual identity on a preference for a certain activity rather than a certain gender elucidates the utter contingency of our ruling taxonomy and the paucity of available descriptions of sexual orientation.[51] These variations also open up new possibilities for understanding the relationship between sexual acts and identities, a relationship that is the critical nexus of identity proscription and enforcement, as evidenced in *Hardwick* and more recently in the government's policy regarding "homosexuals" and "homosexual conduct" in the military.[52]

IV. Loyalty and Betrayal as Private Enforcement

It is a fact of international law that during wartime spies, when captured, are shot. An even worse fate is in store for a citizen, man or woman, convicted

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[50] Sedgwick, *supra* note 9, at 25.

[51] Nevertheless, John Boswell argues cogently for the limited utility of the categories heterosexual and homosexual:

> It can well be argued that the homosexual/heterosexual dichotomy is not a real one, and this would have been the response of most ancient authorities. At best these categories group together according to one arbitrarily chosen aspect of sexual actions—the genders of the parties involved—varieties of sexual behavior which may be more dissimilar than similar. . . . Moreover, it is not clear that in most humans it is the gender of the other party which makes the sexual act desirable or not: many people are apparently more aroused by the acts themselves (penetration, oral stimulation, etc.) than by the persons involved, and some people respond only to blonds or to people with blue eyes. Such objections are cogent but serve only to demonstrate the inevitable weakness of taxonomic arrangement of human behavior: the homosexual/heterosexual dichotomy is crude and imprecise and often obscures more than it clarifies; but it does nonetheless correspond to types of actions and feelings which can be distinguished by this criterion, and the fact that they could also be arranged in different ways does not undermine the limited validity of the division.

John Boswell, Christianity, Social Tolerance, and Homosexuality 42 n.3 (1980). However, the problem is less that sexual identities are arranged in this way and more that they are simply not true to their own arrangment.

[52] For an extensive analysis of the relationship between the discursive categories of acts and identities in *Hardwick*, see Halley, *supra* note 8, at 1741-70; *see also infra* part V.B.1.

> of treason. They are held up to public scorn, the quality of which is particularly vicious, and then they are often killed. Loyalty to "one's own" is held feudally dear by the human race north, south, east, and west. We simply do not condone spying or treason. They are acts so abhorrent that we are shocked by their existence, and often feel no guilt in erasing the spy, the traitor, so that no living trace remains.
>
> — Fred Klein[53]

> My lover was liberal. "You're not bisexual," she'd assure me, "you're just a lesbian who sometimes sleeps with men." The rest of our community, I knew, would not be so understanding . . . .
>
> — Carol A. Queen[54]

As the studies on sexual practices and identity demonstrate, sexual practices demand new models of sexual identity categorization. The greater challenge is making room in social and political discourse for these models when the rhetorical power of heterosexuality and homosexuality are so vigorously maintained through both private and public enforcement of an ethic of sexual identity. This enforcement takes many forms. First I will examine an articulation of the heterosexual ethic and then an example of the homosexual ethic to understand how the simplest hetero/homo binarism is enforced *privately*—not through law, hut through the give and take of speech and friendship, angry debates, and notions of loyalty to and betrayal of particular sexual identities and communities.

The rhetorical boundaries that mark permissihle heterosexual acts are easier to identify than homosexual boundaries because there is rarely political or personal danger (and generally political clout) in articulating them. Yet the acts themselves are rarely enunciated. Instead, they are typically implied hy the heated enumeration of *homosexual* acts. Shaping beterosexual *identity* through tbe condemnation of homosexual *acts* is strategic—it makes the admission or articulation of those acts contiguous with homosexual identity.[55] An *un*articulated homosexual act, however, does not automatically banish one from heterosexual identity. The identifiahility of the act is essential; an unidentified act does not disturb the rhetorical boundaries of heterosexual identity and thus contrihutes to the discrepancy that exists between the houndaries of heterosexual acts and identity. This method of negative definition is used strategically to delineate what constitutes a betrayal of the heterosexual ethic.

One of the most candid examples of *heterosexual identity* configured through the enumeration of *homosexual acts* is a speech given on the floor of the House of Representatives hy Representative William Dannemeyer.[56]

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[53] KLEIN, *supra* note 1, at 5.

[54] QUEEN, *supra* note 17, at 19.

[55] This is the inverse of the military policy, which makes articulation of homosexual or bisexual identity contiguous with homosexual acts.

[56] 135 Cong. Rec. H3511 (1989) (statement of Rep. Dannemeyer).

While it clearly is a public announcement by a public official, the sentiment and methods are characteristic of private venting. The language is representative of a variety of private homophobic tirades. Ostensibly the speech was a crusade against the "militant homosexual" who is trying to persuade the American public that homosexuality is simply another lifestyle choice. For Representative Dannemeyer, the betrayal of what he calls the "heterosexual ethic" is grounded in a deviancy of sexual acts, acts he assumes to be synonymous with homosexuality. "They are actually asking Americans to believe that a man can be a homosexual without ever committing sodomy or any other intimate physical act with the same sex."[57] You can tell the homosexuals by what they *do*, claims Representative Dannemeyer. He then goes on to articulate what these acts are in a section entitled "What Homosexuals Do."

> Militant homosexuals do not want you to know of *the behavior that defines their existence*. They do not want you to know that the average homosexual has homosexual sex two to three times per week. . . . And that the average homosexual's favorite activities include: Receiving oral sodomy, that is putting one man's penis in another man's mouth; performing anal penetration; and participating in mutual oral sodomy. Other activities *peculiar to homosexuality* include: Rimming, . . . golden showers, . . . fisting, . . . and using what are euphemistically termed "toys."[58]

Representative Dannemeyer rather artfully marks the boundary of his heterosexual property by repairing the wall that has been damaged by the gay rights movement specifically and secular American culture generally. He wants to be very clear about what is "peculiar to homosexuality," such as oral sex two or three times a week, in order to define what is *not* heterosexual and to mark the point at which that identity is transgressed. What is peculiar to homosexuality in the prevailing sexual paradigm, and even in the Kinsey continuum, is by definition *not* heterosexual. More important still for maintaining the flexibility and power of heterosexual identity is the insistence that all that is *not* homosexual *is* heterosexual. Thus, naming the constitutive elements of one is the same as defining the other, as well as claiming for that other everything not named. If Kinsey is right, many people whose practices include those of Representative Dannemeyer's "militant homosexual" locate themselves within the broad sweep of heterosexual identity.

Although Representative Dannemeyer speaks exclusively of heterosexuality and homosexuality, his language is essential to understanding the betrayal associated specifically with bisexuality. While his speech is most explicitly about homosexuality, implicitly it is more concerned with defining heterosexuality and drawing its boundaries to include all that is not homosexual. This project of boundary definition is only possible, in fact

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[57] *Id.*

[58] *Id.* (emphasis added) (citation omitted).

the betero/homo paradigm is only possible, if there are only two discreet and identifiable categories. Hence, tbe real fear and motivation bebind the speech is bisexuality, because bisexuality would render his project impossible by destabilizing tbe categories on which it depends. Representative Dannemeyer wants it to be clear when one has become a traitor by joining the ranks of bomosexuals, for be and others regard sucb traitors witb nothing less than paranoia.

This paranoia is reserved not for bomosexuals generally, but rather for those in a position to change the debate about sexuality from a war between two enemies to one of choice among countless and equal options. Representative Dannemeyer is pointedly concerned about infiltration of the *discourse*. He demonstrates a wartime mentality accustomed to propaganda and spies when he talks about "a legion of homosexual bureaucrats," about a "motherlode of homosexual psycbiatrists," of academia as an "endless breeding ground for homosexual apologists," of tbe media's ability to "sprout a homosexual or two," and about the "conclaves of both political parties, especially the Democratic Party."[59] All these land mines of homosexual sympathizers are positioned to change the terms of tbe discourse into one of lifestyles and difference rather than deviancy and betrayal. Representative Dannemeyer finds in this change tbe possibility of pure defeat; it must remain a matter of right and wrong, of health and sickness, of heterosexual and homosexual. "We have tried to ignore the phenomenon in bopes tbat it will go away. It won't. We must either defeat militant homosexuality or it will defeat us. They bave made it clear: *we have no third choice.*"[60] This language is significant indeed in a war being waged over what the terms of the debate will be. Representative Dannemeyer makes clear that tbere can be no tbird choice; in a discourse of lifestyles and difference there may be endless and endlessly disastrous cboices, but in a discourse of militant hetero- and homosexuality the divisions are clear; one knows wbo the enemy is and hence one knows oneself. The enemy is anything which threatens the stark terms of tbe debate and insists on more choices; the real enemy of tbe heterosexual etbic is bisexuality.

Bisexuality is behind an explicit fear of *physical* invasion as mucb as it is behind the fear of *discursive* invasion. The language of militancy and paranoia is not limited to the threat of homosexual influence on the discourse of identity, but includes a greater fear of physical infiltration of homosexual acts (and the "filth" associated with those acts) into beterosexual ranks. Bisexuality need not be named to imagine who the infiltrators will be. "Homosexuals are among the most unhealtby of demographic groups. Historically, their bowels have been full of the bulk of enteric diseases in America. Sypbilis, gonorrbea, and hepatitus [sic] B bave been tbe mainstays of their viral menu. And, of course, AIDS has saturated and

[59] *Id.* at H3513.
[60] *Id.* at H3514 (emphasis added).

nearly decimated their ranks."[61] Although Representative Dannemeyer undoubtedly is sincere in his characterization of homosexuals, he misnames the real objects of his paranoia. They are not the homosexuals but the bisexuals who must be acknowledged if the rhetoric of identity were to change and who are, in the rhetoric of acts, the only ones who could come back as traitors to infect the heterosexuals.

These physical fears of health and contagion based on acts are not independent of the rhetorical war over identity classification. As Mary Douglas posits, dirt is no different from disorder, and our notions of pollution and hygiene are products of symbolic systems.

> Where there is dirt there is system. Dirt is the by-product of a systematic ordering and classification of matter, in so far as ordering involves rejecting inappropriate elements. This idea of dirt takes us straight into the field of symbolism and promises a link-up with more obviously symbolic systems of purity. . . . In short, our pollution behaviour is the reaction which condemns any object or idea likely to confuse or contradict cherished classifications.[62]

It is not surprising that condemnation by the many who subscribe to the rigid boundary lines of the heterosexual ethic has driven many bisexuals either into the closet or into gay and lesbian communities, places that have been a profound comfort for some, and another closet for others. Perhaps it is not surprising that there also exists, in various forms, a homosexual ethic, a set of rules about the boundary lines of authentic gay identity. It is precisely this ethic that Representative Dannemeyer wants to maintain within the discourse: it is the perfect enemy—heterosexuality's rhetorical opposite—a world like his, with no ambiguity.

The homosexual ethic is explored in a number of recently anthologized bisexual narratives.[63] These anthologies are the first to assemble the voices and experiences of bisexuals in any sustained and respectful way. The texts attest to a common sense of homelessness among the writers as they face rejection from both straight and gay friends, as well as from communities to which they once belonged. These writers also describe a new kind of closet. In one anthology, appropriately titled *Closer to Home: Bisexuality and Feminism*, one woman writes, "As a bisexual feminist, I am also drifting. Drifting between communities—lesbian and straight—neither of which is really home."[64] Most of the examples of rejection these writers recount are by a homosexual community, usually lesbian. There are at least two reasons rejection has come principally from lesbians. First, many of the bisexual women writers previously identified as lesbians, were involved

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[61] *Id.* at H3513.

[62] MARY DOUGLAS, PURITY AND DANGER: AN ANALYSIS OF CONCEPTS OF POLLUTION AND TABOO 35-36 (1966).

[63] See, for example, the works collected in BI ANY OTHER NAME: BISEXUAL PEOPLE SPEAK OUT, *supra* note 17, and CLOSER TO HOME: BISEXUALITY & FEMINISM, *supra* note 37.

[64] Elizabeth McKeon, *To Be Bisexual and Underclass*, *in* CLOSER TO HOME: BISEXUALITY & FEMINISM, *supra* note 37, at 27, 27.

for years in the lesbian community and thus felt their greatest sense of rejection from that quarter.[65] Second, as bisexual women who had felt the effects of homophobia acutely, they simply were less surprised by the mecbanisms employed by beterosexuals to demonstrate their sense of betrayal and anger. They were startled to find that homosexuality had its own identity ethic.

Many bisexual women attest to the contours of a lesbian ethic that sees bisexuals very explicitly as traitors, as straight women who want to experiment and are quick to leave them for a man, or as women afraid to own up to tbeir "true" lesbian identity. "[W]bile many nonbisexual gays have, as individuals, supported us and encouraged our attempts to organize, tbe lesbian and gay community abounds witb negative images of bisexuals as fence-sitters, traitors, cop-outs, closet cases, people whose primary goal in life is to retain 'beterosexual privilege,' power-hungry seducers who use and discard their same-sex lovers like so many Kleenex."[66]

Stacey Young, who considered herself a lesbian, did not call berself bisexual until sbe bad been with the man sbe had fallen in love with for three and a half years. She kept calling berself a lesbian

> partly for political reasons (I had learned that lesbianism was the only effective challenge to the institution of heterosexuality); partly for self-preservation (I was terrified of being cast out by the community that had been so very important to me); and partly because I assumed that this relationship was an anomaly, and that except for this particular man I would only have women lovers.[67]

A common theme running through these narratives is a fear not only of losing a community, but also of being straigbt. Part of the etbic these women had learned was that lesbianism was the only alternative to the ignominious fate of a life dedicated to beterosexuality and patriarchy. There is, in fact, a word for traitors: basbians. It is a powerful pun tbat invokes tbe abyss of not being what you bad been thought to be, of really being *nothing*.

Part of the sense of betrayal attached to bisexuality stems from the conviction tbat to identify as anything other than "purely" homosexual is to deny wbat is "true" about oneself. The feeling of betrayal is tbe product of a belief in autbentic identity that has been a conviction and political rallying

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65 This also has something to do with the fact that one anthology, *Closer to Home: Bisexuality and Feminism*, includes only women, so there is a preponderance of stories about their relationship as bisexuals to the lesbian communities they know. Another, more substantive reason these tales of private enforcement come from lesbian sources is that for many, as feminists, lesbianism was more explicitly tied to a political commitment. Lesbianism was often called the practice that accompanied the theory of feminism.

66 Lisa Orlando, *Loving Whom We Choose*, *in* BI ANY OTHER NAME: BISEXUAL PEOPLE SPEAK OUT, *supra* note 17, at 223, 224.

67 Stacey Young, *Breaking Silence About the 'B-Word': Bisexual Identity and Lesbian-Feminist Discourse*, *in* CLOSER TO HOME: BISEXUALITY & FEMINISM, *supra* note 37, at 75, 81.

cry for many gays and lesbians.[68] Young reports of a letter that appeared in an issue of *Lesbian Connection* about ex-lesbians:

> I am a True Lesbian. . . . This means I have no fantasies about having sex with men and I am faithful in relationships with women. There seems to be a plague hitting a lot of long-time lesbians and turning them straight. . . . These women must be very insecure with themselves and their lifestyle. . . . Obviously these women who go straight are confused about their sexuality and who they are. . . . When it is your friend who turns straight, then you, too, will feel anger, betrayal, and a wall between you.[69]

The wall is clearly being repaired from both sides. That one "goes straight" according to gay friends, or "goes queer" according to straight ones, is part of the same matrix of betrayal; it is to be lost to the faith, to be cast out into a liminal identity for which there is no community because it is an identity that both sides claim does not really exist. In the rhetoric of these lesbians who distrust bisexual women, "faithfulness" cannot mean that lesbians never leave their lovers for other women. Rather, it means they do not leave their lovers *for men*. It is not a faithfulness to an individual, but to an identity for which there is a corresponding code of conduct. Thus, the heterosexual ethic's critique of bisexuality is based on acts, acts that are by definition homosexual and define one as a homosexual. The homosexual ethic's critique is based explicitly on identity, and loyalty to an identity that nonetheless implicitly relies on acts. That is, one betrays one's lesbian *identity* by *sleeping with* a man.

As an oppressed subculture, homosexual communities rely on an ethic of homosexual identity to maintain strength and coherence against the constant onslaught of virulent attacks like Representative Dannemeyer's. Yet the price of that strength is the same hypocrisy evident when heterosexuals assert that their identity is consistent with a certain set of sexual practices.[70] Not only will a rigid ethic of identity sometimes fail to be a political

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[68] I am not concerned here with whether sexual orientation is biological and "essential" or historically contingent and "socially constructed." To know conclusively one way or the other, even if that were possible, would not, in the end, tell us very much about how to navigate the ethics of sexual identity. We would still need to negotiate friendships, communities, and alliances among a wide range of sexual practices and identities. However, while this article is broadly predicated on a social constructivist view of sexual orientation, I recognize the ambivalence of many gays and lesbians toward this position. There is an understandable desire for and political expediency to seeing sexual identity as immutable. *See generally* Janet E. Halley, *Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability*, 46 STAN. L. REV. 503 (1994).

[69] Young, *supra* note 67, at 79, 82 (quoting LESBIAN CONNECTION).

[70] In addition to the meaninglessness of an ethic built around any notion of authentic sexual identity, there is a disconcerting paradox to a homosexual ethic being used first to escape sexual oppression and then to oppress.

> And yet, for the gay and lesbian community, the paradox is that our strength, our very *existence*, is founded on sexual liberation, on acceptance of diversity and the breaking of boundaries. How can we demand of the straight world, "We will love whom we choose and in the way we choose, you must accept us as we are," and then turn around and tell others in our own community, "The way you love is misguided and wrong; we will not accept you because you are not exactly like us." Craziness.

Greta Christina, *Drawing The Line: Bisexual Women in the Lesbian Community*, ON OUR BACKS, May-June 1990, at 14, 35.

strength, but conceptually it quickly unravels into incoherence. Greta Christina has unpacked the implications for bisexuality of attempting to enforce an ethic of "true lesbianism":

> Is a lesbian: a woman who only fucks other women? That would include bi women who're monogamously involved with other women. A woman who doesn't fuck men? That would include celibate straight women. A woman who would never get seriously involved with a man? Rules out lesbians who've been married in the past. A woman who never has sexual thoughts about men? That excludes dykes who are into heavy and complex gender play, who get off on gay men's porn, or who are maybe just curious. Do you have to be 100% directed at women and away from men in thought, feeling, word, and deed from birth to death to qualify as a "real" lesbian? That would rule out all but about two women on the planet. I hope they find each other. . . . Since the lesbian struggle for identity is already a formidable one in a world that defines women as asexual and homosexuals as evil, any additional complications may seem intolerable. Bisexuality is therefore commonly cast out, dismissed as either wicked or non-existent.[71]

Finally, a more recent phenomenon of private identity enforcement by both homosexuals and heterosexuals relies on a notion of betrayal, but its accompanying attitude is flip rather than angry. It also finally names the object, only to dismiss it: bisexual chic. A telling example was a half-mocking piece in *The Village Voice* on hip heterosexuals who have a crush on identity politics and so dress and socialize to pass as homosexual.[72] These "queer straights" are people who claim a queer identity but who "don't practice the fundamental acts of intimacy that ground homosexual identity."[73] Rather, they betray queer identity by going to gay bars or by daring to chant at a rally "We're here! We're queer! Get used to it!"[74] Never is there a thought that these "queer straights" might not be straight. Even when couched in tones of glib cultural commentary, this rhetoric is still about betrayal of "true" identities, those grounded in "fundamental" acts. And as long as those acts are segregated into only two identities, bisexuals will always be one or the other, or at best a passing fad. Heterosexuals and homosexuals alike participate privately and publicly in con-

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[71] *Id.* at 14-15.

[72] Ann Powers, *Queer in the Streets, Straight in the Sheets: Notes on Passing*, VILLAGE VOICE, June 29, 1993, at 24.

[73] *Id.*

[74] *Id.* The Powers piece drew an angry response from a bisexual woman:

> The shocking truth is, some of us have fucked women. True, some of us also sleep with or have slept with men. But the whole point about the concept of queer identity, Powers seems to forget in her musings about her own sexuality, is that it offers terminological refuge from such icky labels as 'bisexual' for people who don't feel themselves to be necessarily one thing or the other. . . . [Queer] means giving up the comfortable straight identity available to those of us in current relationships with opposite sex partners. Take our word for it: we *are* queer; we *are* here; and we *would* like you to get used to it without our constantly having to publicly enumerate each of our personal sexual experiences to prove it.

Florence Dore, *Dire Straights*, VILLAGE VOICE, July 20, 1993, at 5, 5-6.

structing a dual regime of sexual identity that builds a prison wall of waste out of those who are neither or both; and they enforce it through notions of truth and betrayal, through strategic conflations of act and identity.

V. Public Enforcement: Outing and the Military Ban

> But to report on someone's sexual orientation is not to report on her sexual behavior.
>
> — Richard D. Mohr[75]

> A statement by a servicemember that he or she is a homosexual or bisexual creates a rebuttable presumption that the servicemember is engaging in homosexual acts . . . .
>
> — Former Department of Defense Policy on Homosexual Conduct[76]

For most private beliefs espoused by a community, there is a corresponding method of public enforcement. However, the method of enforcement is quite different in subordinated communities than in communities with more institutional power. And enforcement is different still when pursued by the United States government, backed with the threat of the military. Enforcement by the "heterosexual community" refers to that community most broadly conceived, whose most notable mechanism of enforcement is simply the law—in this instance, constitutional law as well as statutory law governing homosexual conduct in the military.[77] The homosexual community, also broadly conceived, exercises enforcement of its ethic of authentic identity most dynamically through outing.[78] But despite the vast disparities in power and effect, I mean the comparison of outing and the legal regime to illustrate the similarities in the conceptualization of sexuality that is enforced within each and the methods of that enforcement.

A. Public Enforcement by Homosexuals

" 'Outing,' " according to Mohr, "is making publicly acknowledged the *sexual orientation of a homosexual* without regard to whether the person is willing to have this information publicly acknowledged."[79] The defini-

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[75] Richard D. Mohr, Gay Ideas: Outing and Other Controversies 16 (1992).

[76] Dep't of Def., Memorandum on the Policy of Homosexual Conduct in the Armed Forces 2 (July 19, 1993) [hereinafter Clinton DoD Policy].

[77] *See* 10 U.S.C. § 654 (Supp. 1995).

[78] It should be made clear that although I am discussing outing by homosexuals, outing has mainly been a heterosexual practice engaged in for vastly different and virulent motives. Where outing by heterosexuals has been persecutory, outing by homosexuals is largely an attempt to undermine that persecution. The history of outing gay, lesbian, and bisexual military personnel by heterosexuals is especially well documented. *See e.g.*, Allan Berube, Coming Out Under Fire: The History of Gay Men and Women in World War Two (1990); Chauncey, *supra* note 7.

[79] Mohr, *supra* note 75, at 11 (emphasis added).

tion Mohr offers is curious, suggesting at once that the person outed is always a bomosexual, and also implying that there may be a difference hetween sexual orientation and homosexuality as a category. For example, Mohr does not say that outing is making puhlic someone's homosexuality. Rather, outing exposes the orientation of the homosexual (the identity) but not the homosexuality (the bebavior?) itself. Mohr is insistent that outing does not reveal sexual behavior, which is private, only sexual identity, wbich may be secret but never has a claim to privacy; Mohr emphasizes that "[i]t is the person's sexual orientation that I am *revealing*."[80] At work in outing is not revelation, however, which implies exposing an unproblematic truth, but literal and public construction of identity. By severing identity from behavior in order to defend outing from attacks by those wbo see it as a violation of privacy, Mohr outs people as homosexuals hecause they were seen at a gay pride parade or a gay bar, not because their erotic life involves same-sex contact. In this way, outing functions to make homosexual identity far more encompassing than the behavior it claims, mucb as heterosexuality has always done. Outing, as Mohr describes it, does not radically disengage the rhetoric of identity and acts in order to explore the complicated relationship of one to the other, but rather to hury the complex range of acts so as to claim more rhetorical territory for identity.

Outing purports to get at the "truth." Once outed, a person is no longer heterosexual; she is now homosexual. "The outee is free to tell the truth, tell a lie, or remain silent."[81] But in a world ruled by a dichotomous sexual paradigm, lying and telling the truth are not sufficient options for anyone who is not exclusively heterosexual or homosexual; those choices only serve as proxies for the identity cboices themselves. Does one lie or tell the truth when one claims to be hisexual? To those who ascribe to the strict identity regime enforced by outing, a claim of hisexuality sounds like shame, repression, or hedging; it would be to lie.[82] Outing is a way of puhlicly enforcing a strict economy of sexual choice; it says, "We know you are not strictly heterosexual, therefore you are homosexual. Stop living a lie." This insistence on choosing hetween two ahsolutes is nowhere more evident than the famous posters by which New York activists outed people as "*Absolutely* Queer."[83]

> This practice [of outing] reinforces the homo/hetero dichotomy by insisting that the objects of outing, once evicted from the class of heterosexuals, are

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80 *Id.* at 15 (emphasis added).

81 *Id.* at 18.

82 *See* MICHELANGELO SIGNORILE, QUEER IN AMERICA 89 (1993) (discussing outing record producer David Geffen's homosexuality after Geffen defended homophobic clients. Geffen came out as bisexual. "To his credit he has since become involved and visible in several gay causes. Eventually, he came out *fully* as 'a gay man.' " (emphasis added)).

83 *Id.* at 87-88 (emphasis added).

necessarily and unproblematically homosexuals. It thus denies any value to bisexuality as a social position or project.[84]

B. Public Enforcemeot by Heterosexuals: The Legal Regime

While the sexual dicbotomy is publicly enforced by the gay community througb outing, a practice which is ostensibly based on respecting the privacy of conduct but exposing the hidden identity, that same dichotomy is publicly enforced by the beterosexual community througb tbe law. The hetero/homo dicbotomy has been explicitly developed in constitutional doctrine since *Hardwick* and is given perhaps its most salient articulation in the government's military policy, a policy ostensibly based on respecting the privacy of identity but exposing the bidden conduct.

1. *Hardwick* aod Its Progeny[85]

In tbe cases wbere bomosexuals make equal protection and due process claims, tbe rhetorical structures of sexual identity classification appear in stark relief. By invoking tbese structures, judges not only apply many prevailing beliefs about the categories of sexual identity, tbey also help to construct the very methods of categorization. These cases evince a rhetoric that has become so reified that the claims they make are both rhetorically and doctrinally unstable.

In *Bowers v. Hardwick*,[86] tbe Supreme Court was confronted witb tbe constitutionality of a facially neutral Georgia statute tbat prohibited sodomy regardless of the gender of those who engaged in it.[87] Yet somewhere between the court papers and the opinion, the issue became framed as one of "homosexual sodomy," and the Court concluded that the privacy right implicit in the Due Process Clause does not confer a fundamental right to

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[84] Halley, *supra* note 8, at 1738.

[85] *Hardwick* was by no means the first case to explicitly enforce heterosexual privilege through legal definitions of homosexuality. Nor was it the first to do so by asymmetrically defining the class of homosexuals by conduct. It is simply the most influential. Almost twenty years earlier in Boutilier v. Immigration and Naturalization Service, 363 F.2d 488, 491 (2d Cir. 1966), *aff'd*, 387 U.S. 118 (1967), Clive Michael Boutilier was found to be deportable because his homosexual acts confirmed a "psychopathic personality." In fact, the record clearly indicated that Boutilier was bisexual. Although the word is never mentioned, bisexuality is implicitly acknowledged in the footnotes. A letter from one doctor indicated that Boutilier's " 'sexual structure still appears fluid and immature so that he moves from homosexual to heterosexual interest as well as abstinence with almost equal facility.' " 363 F.2d at 491 n.6. Furthermore, in a move that anticipated the recent military policy, the court protected the INS' interpretation of the term "psychopathic personality" to include homosexuals and sex perverts on the basis that it did not regulate conduct. "The provision was never designed to regulate *conduct*; its function was to exclude aliens possessing certain *characteristics*." 363 F.2d at 495. For a discussion of the Boutilier case, see William N. Eskridge Jr., *Gadamer/Statutory Interpretation*, 90 COLUM. L. REV. 609 (1990).

[86] 478 U.S. 186 (1986).

[87] The statute held that "[A] person commits the offense of sodomy when he performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another . . . ." GA. CODE ANN. § 16-6-2 (1984).

engage in "homosexual sodomy."[88] In reaching this conclusion, the justices perform wholesale rhetorical recategorization, wrenching heterosexual identity free of the act of sodomy while making sodomy the equivalent of homosexual identity. This is achieved partly by the artful and insistent repetition of the phrase "homosexual sodomy."[89] Since *Hardwick*, lower courts and litigators alike have scrambled to determine exactly what the Supreme Court meant and to either extend or circumscribe the scope of the Court's interpretation.

The *Hardwick* progeny generally involve challenges under the Equal Protection Clause. The complainants seek constitutional protection of homosexual identity irrespective of the acts that the *Hardwick* Court found could be criminalized without infringing due process. This tactic requires arguing either that the Equal Protection and Due Process Clauses rely on fundamentally different rationales,[90] or that homosexual identity bears no relationship to homosexual sodomy. The courts have been willing to entertain the latter argument, and the result, for the most part, has been an expansive reading of *Hardwick*, the denial of equal protection claims, and vigorous judicial participation in the construction of sexual identities.

In *Padula v. Webster*,[91] the Second Circuit ruled that *Hardwick* precludes suspect classification for homosexuals under the Equal Protection Clause. The court's holding turns on a deft alignment of act and identity. In *Padula*, the plaintiff claimed that the FBI violated her right to equal protection by refusing to hire her because she was homosexual.[92] The court found that because *Hardwick* allowed states to criminalize "*the behavior that defines the class*, it is hardly open to a lower court to conclude that state sponsored discrimination against the class is invidious. After all, there can hardly be more palpable discrimination against a class than making the conduct that defines the class criminal."[93] By making conduct *define* identity, the court orchestrated a theoretical and practical triumph for heterosexuality: it buttressed the sexual dichotomy while asymmetrically defining the classes. Conduct, then, only defines *homosexual* identity. Currently, however, states may constitutionally criminalize far more than homosexual sodomy (as Georgia did), which raises the question of *when* status should be defined by conduct. A married heterosexual couple engaging in criminalized oral sodomy would not be defined by that activity. And if they were, what would they be defined as? Heterosexuals? Sodomites? In *Padula*, as in *Hardwick*, the only people who are defined by the act of

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[88] *Hardwick*, 478 U.S. at 190. Justice Blackmun notes in dissent that the "Court's almost obsessive focus on homosexual activity is particularly hard to justify in light of the broad language Georgia has used." *Id.* at 200 (Blackmun, J., dissenting).

[89] *See supra* notes 8-11 and accompanying text.

[90] Cass R. Sunstein, *Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection*, 55 U. CHI. L. REV. 1161 (1988).

[91] 822 F.2d 97 (D.C. Cir. 1987).

[92] *Id.*

[93] *Id.* at 103 (emphasis added).

criminal sodomy are those who *already* admit to being homosexual. Identity defines the behavior and that behavior defines the class.

Doctrinally, criminalized sodomy as a definitional category for homosexuality is both underinclusive and overinclusive: it includes some homosexuals who do not commit sodomy and excludes many heterosexuals who do. Even the category of "homosexual sodomy" would be similarly infirm. Rhetorically, the category functions to immunize heterosexuals from the taint and incomprehensibility of sharing a sexual practice with homosexuals. The doctrine, as adopted by the *Padula* court, confirms the mythic mutual exclusivity of sexual identity choice and sexual practices by defining homosexuals tautologically "as persons who engage in homosexual conduct."[94] In order to make the conduct define the class, the court must make the class define the conduct. With *Padula*, the unbearable ambiguity of meaning in *Hardwick* begins to grow. This obscurity invites the mystical definitions later used by the military: not only does behavior define the class, but that behavior is no longer confined to sodomy.

Among the courts that have invoked *Hardwick* to foreclose suspect or quasi-suspect classification for homosexuals,[95] the Ninth Circuit has been particularly avid in debating the breadth of the original holding. In *High Tech Gays v. Defense Industry Security Clearance Office*,[96] the plaintiffs challenged the Defense Department's policy of subjecting homosexuals who applied for security clearances to expanded investigations. Here the majority read *Hardwick* rather aggressively to say that "homosexual *activity* is not a fundamental right protected by substantive due process . . . ."[97] "Activity" is a long way from "sodomy." "Activity" might include anything homosexuals do, from buying a house to whistling show tunes. Whereas the *Hardwick* Court expressly declined to protect homosexual *sodomy* as a fundamental right, the opinion is now interpreted to support the argument that "homosexual *conduct* is not a fundamental right."[98] Therefore, because conduct (arguably *any* conduct) defines the class, homosexual identity merits no enhanced protection.

In his dissent from a denial of an en banc rebearing of *High Tech Gays*,[99] Judge Canby gives the narrowest possible reading to *Hardwick*. He asserts that in *Hardwick* the Court did not even authorize a state to selectively prosecute homosexual sodomy; it merely established "that a homo-

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[94] *Id.* at 102.

[95] *See e.g.*, Ben-Shalom v. Marsh, 881 F.2d 454, 464 (7th Cir. 1989) ("If homosexual conduct may constitutionally be criminalized, then homosexuals do not constitute a suspect or quasi-suspect class entitled to greater than rational basis scrutiny for equal protection purposes."), *cert. denied*, 494 U.S. 1004 (1990); Woodward v. United States, 871 F.2d 1068, 1076 (Fed. Cir. 1989) ("After *Hardwick* it cannot logically be asserted that discrimination against *homosexuals* is constitutionally infirm." (emphasis added)), *cert. denied*, 494 U.S. 1003 (1990).

[96] 895 F.2d 563 (9th Cir. 1990).

[97] *Id.* at 571 (emphasis added).

[98] *Id.* at 574 (emphasis added).

[99] High Tech Gays v. Defense Indus. Sec. Clearance Office, 909 F.2d 375 (9th Cir. 1990).

sexual had no fundamental right to violate the sodomy laws."[100] However optimistic this interpretation may be, Judge Canby insists that even if *Hardwick* allows states to criminalize only that sodomy committed by homosexuals, it is discrimination against the *act* that *Hardwick* condones, not against the *identity*.

> It is an error of massive proportions to define the entire class of homosexuals by sodomy. I will be the first to admit that homosexuals, in sexually expressing their affection for persons of their own sex, frequently engage in sodomy, *as do heterosexuals* sexually expressing their affection for persons of the opposite sex.[101]

This extraordinary statement not only returns sexual conduct, including sodomy, to homosexuals at a time when admitting to anything other than celibacy appears to foreclose any legal protection, but it does so without insisting on perfect congruence of acts and identity. In other words, Judge Canby does not enforce identity. In addition, by insisting that heterosexuals engage in the same practice, Judge Canby protects homosexuals from a rhetorically and legally forced congruence. This is indeed striking: if the behavior defines the class and the behavior is sodomy neutrally defined, then the classes of heterosexual and homosexual do not make much doctrinal sense. While Judge Canby stops short of admitting that heterosexuals also engage in sodomy when expressing their affection for persons of their *own* sex, his opinion is still a startling departure from the reigning legal articulation of identity.

Although Judge Canby does not admit that heterosexuals do in fact have "homosexual sex," Judge Norris implies as much in his opinion in Perry Watkins' case against the U.S. Army.[102] Within the first footnote, Judge Norris explains that "we use the terms 'homosexual conduct' and 'homosexual acts' to refer to sexual activity between two members of the same sex whether their orientations are homosexual, heterosexual, or bisexual . . . ."[103] Given such an explicit complication of the act/identity matrix, as well as a finding that homosexuals constitute a suspect class, it is not surprising that this opinion was promptly revised. Judge Reinhardt's dissent in *Watkins*, in marked contrast to Judge Canby, offers one of the more expansive readings of *Hardwick*. Judge Reinhardt asserts that the case is either about sodomy or homosexuality, and since the Court went out of its way to read a facially neutral law so as to burden homosexuals, the decision is not about sodomy at all.[104] Part of Judge Reinhardt's motivation is to salvage the ever-precarious privacy right from the implications of *Hard-*

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[100] *Id.* at 379 (Canby, J., dissenting from denial of rehearing en banc).

[101] *Id.* at 380 (emphasis added).

[102] Watkins v. United States Army, 837 F.2d 1428 (9th Cir. 1988), *amended*, 847 F.2d 1329 (9th Cir. 1988), *withdrawn*, 875 F.2d 699 (9th Cir. 1989) (en banc), *cert. denied*, 498 U.S. 957 (1990).

[103] *Id.* at 1429 n.1.

[104] *Id.* at 1452-54 (Reinhardt, J., dissenting).

wick's holding.[105] But in so doing, he refuses to recognize the extent to which *Hardwick* was truly about both sodomy *and* homosexuality. To so forcefully fuse act and identity, *Hardwick* had to he about hoth.

Although suspect classification for homosexuals did not survive, some district courts have held that *Hardwick* is not controlling, and that homosexual identity warrants heightened scrutiny.[106] Recently, in *Equality Foundation v. Cincinnati*,[107] a district court in Ohio held that sexual orientation is a quasi-suspect classification. While this conclusion is undouhtedly a victory for gay rights, the rhetorical means of achieving it are more duhious. In order to reach its decision in the face of contrary authority, the court essentially had to reverse the act/identity alignment that followed in the wake of *Hardwick*. The result was to sever identity from conduct as unconvincingly as it had heen fused. The Ohio court found that "[s]exual orientation is a characteristic which exists separately and independently from sexual conduct or behavior."[108] From this finding, the district court could conclude that "neither *Bowers*, nor the reasoning of *High Tech Gays*, *Woodward*, *Padula*, *Ben-Shalom*, nor any of the other cases similarly ruling, is controlling. *Bowers*, therefore, does not preclude a finding that gays, leshians, and hisexuals constitute a quasi-suspect class."[109] The problem with this ruling—in addition to the fact that it essentializes sexual identity[110]—is that much like the *Padula* formulation, *Equality Foundation*'s characterization of sexual identity bears little relation to reality. To the extent that sexual identity is about erotic and sexual desires, however psychic and elusive, it is also about sexual acts. The challenge is to negotiate a relationship between acts and identity that does not force either an untenahle hinarism or universal congruence. Focusing on the gender of one's sexual partner will always make the choice dichotomous. The case law demonstrates that in such a hinary system, homosexuals will have a paucity of choices about self-definition. Bisexuals will have none.

2. The Military Policy

Early in his administration, President Clinton commissioned then Secretary of Defense Les Aspin to draft a revised military policy on homosexuality. The informal document, commonly known as "Don't Ask, Don't Tell," departed from previous policy by insisting that sexual *orientation* alone would no longer be a har to military service—applicants would not be asked if they were homosexual or hisexual. Homosexual conduct, however,

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105 *Id.* at 1454-55.

106 *See e.g.*, Jantz v. Muci, 759 F. Supp. 1543 (D. Kan. 1991), *rev'd*, 976 F.2d 623 (10th Cir. 1992), *cert. denied*, 113 S. Ct. 2445 (1993).

107 860 F. Supp. 417 (S.D. Ohio 1994).

108 *Id.* at 426.

109 *Id.* at 440.

110 *See* Janet E. Halley, *The Construction of Heterosexuality*, *in* FEAR OF A QUEER PLANET: QUEER POLITICS AND SOCIAL THEORY 82, 91-97 (Michael Warner ed., 1993).

remained grounds for discharge.[111] Under the Clinton policy, a servicemember would no longer be investigated to determine sexual orientation alone; an investigation would be launcbed only where there was credible information of homosexual conduct.[112] Within months, Congress passed a statute revising the military policy.[113] This statute, now in effect, attempts a similar decoupling of act and identity, but in doing so, it lays bare a much more expansive privilege for heterosexual identity irrespective of conduct. Where the case law purports to define identity by conduct, the military defines conduct by identity. In addition, the statute defines bisexuality only to define it away. The Clinton policy stated that homosexual orientation itself was not a har to service, but the statute is silent on this point. Both purport to proscribe only that behavior that is considered incompatible with military service: "The prohibition against homosexual conduct is a longstanding element of military law that continues to he necessary in the unique circumstances of military service."[114] The practical differences between the two policies are minimal—both attempt to regulate conduct. The statute, however, hopelessly fails (or intentionally fails) to identify *any* sexual conduct that does not depend on and enforce rhetorical identity.

The statute specifically defines the homosexual *conduct* which is cause for separation as much broader than *sexual acts*; this conduct includes a homosexual act (or an attempted or solicited one), a statement by the servicemember of homosexual or hisexual identity, or a homosexual marriage or attempted marriage.[115] The third category is curious, since it is a legal impossihility. The second category of conduct is perhaps the most controversial. Mirroring tbe Clinton policy, the statute mandates that a statement by a servicemember that she is a homosexual or bisexual creates a rebuttable presumption that she engages in homosexual acts.[116] Making a state-

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> The Department of Defense has long held that, as a general rule, *homosexuality* is incompatible with military service because it interferes with the factors critical to combat effectiveness, including unit morale, unit cohesion and individual privacy. Nevertheless, the Department of Defense also recognizes that *individuals with a homosexual orientation* have served with distinction in the armed services of the United States.
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> Therefore, it is the policy of the Department of Defense to judge the suitability of persons to serve in the armed forces on the basis of their conduct. *Homosexual conduct* will be grounds for separation from the military services. Sexual 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.

Clinton DoD Policy, *supra* note 76, at 1 (emphasis added). For a rich account of the military policy from the perspective of gaylegal narrative, see William N. Eskridge, Jr., *Gaylegal Narratives*, 46 STAN. L. REV. 607 (1994).

112 Clinton DoD Policy, *supra* note 76, at 1.

113 *See* Pub. L. No. 103-160, 107 Stat. 1670 (codified at 10 U.S.C. § 654 (West Supp. 1995)).

114 10 U.S.C. § 654(a)(13) (Supp. 1995).

115 *Id.* § 654(b).

116 It is grounds for separation that a servicemember

> has stated that he or she is a homosexual or bisexual, or words to that effect, unless there is a further finding, made and approved in accordance with procedures set forth in the regulations, that the member has demonstrated that he or she is not a person who engages in,

ment of sexual *identity* created a presumption of sexual *acts*, under a policy that seeks to distinguish identity from acts, subverts the policy from within. This provision undermines the policy by making the articulation of ostensibly protected identity evidence of the prohibited conduct. By equating the expression of homosexual or bisexual identity with prohibited acts, the provision also specifically penalizes speech by making it perilous.[117] Moreover, the provision penalizes a propensity for conduct as if it were conduct.[118]

The statute obviously proscribes "homosexual acts" themselves. However, this category is somewhat mystifying and circular. Under the statute, a homosexual act is defined as "(A) any bodily contact, actively undertaken or passively permitted, between members of the same sex for the purpose of satisfying sexual desires; and (B) any bodily contact which a reasonable person would understand to demonstrate a propensity or intent to engage in an act described in subparagraph (A)."[119] In a society that is highly intolerant of homosexual identity, defining homosexual activities according to the perception of others is acutely problematic—especially when that perception need only be of a "propensity" or "intent." In addition, the category of conduct is undefinably broad. As Judge Canby noted in *High Tech Gays*, "There are many varieties of conduct that might be characterized as homosexual, from hand-holding to sodomy. *Hardwick* establishes only that the latter may be criminalized."[120] Thus, at least in the military, the great variety of same-sex acts that fall between hand-holding and sodomy—acts that may not involve sexual desire or propensity at all—may now be proscribed.

The military policy insists upon something Justice White could not contemplate in *Hardwick*—the celibate homosexual. The military evi-

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attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts.

Id. § 654(b)(2).

[117] A suit challenging the Clinton DoD Policy on freedom of speech grounds was filed against the Secretary of Defense but was withdrawn subsequent to the statute's passage. *See* Doe v. Aspin, No. 93-1549 (D.D.C. filed July 27, 1993). A similar suit is pending with respect to 10 U.S.C. § 654. *See* Able v. United States, No. 94-6181, 1995 U.S. App. Lexis 109 (2d Cir. Jan. 3, 1995) (remanding to district court). As this piece went to press, U.S. District Court Judge Eugene Nickerson found that the military's policy regarding homosexuals violated both the First and Fifth Amendment rights of six plaintiff service members. The court enjoined the military from enforcing the "Don't Ask, Don't Tell" policy against the plaintiffs. Able v. United States, No. 94 CV 0974, 1995 U.S. Dist. LEXIS 3928 (E.D.N.Y. March 30, 1995). Attorneys for the military plan to appeal the decision. Frances A. McMorris, *Judge Rejects Military's Policy on Gays*, WALL ST. J., Mar. 31, 1995, at B6. On the First Amendment issue, see also David Cole & William N. Eskridge, Jr., *From Hand-Holding to Sodomy: First Amendment Protection of Homosexual (Expressive) Conduct*, 29 HARV. C.R.-C.L. L. REV. 319 (1994) and Bobbi Bernstein, *Power, Prejudice, and the Right to Speak: Litigating "Outness" Under the Equal Protection Clause*, 47 STAN. L. REV. 269 (1995).

[118] *See supra* note 113; *see also* Janet E. Halley, Straight Procedure: Act and Identity in the 1993 Revisions to Military Anti-Gay Policy 41 (Nov. 20, 1994) (unpublished manuscript) (discussing the propensity provisions of the statute and its implications for identity).

[119] 10 U.S.C. § 654(f)(3) (West Supp. 1993).

[120] High Tech Gays v. Defense Indus. Sec. Clearance Office, 909 F.2d 375, 380 (9th Cir. 1990) (Canby, J., dissenting from denial of rehearing en banc).

dently attempted to extract homosexual identity from homosexual acts. But, because the utterance of homosexual identity carried with it the specter of the prohibited acts, the military had to censor identity in order to adequately proscribe conduct. In *Hardwick*, the Court identifies homosexuals the same way Representative Dannemeyer does, by what they *do*. By attempting to rhetorically distinguish sexual identity from any corresponding conduct, by creating a standard of celibacy for homosexuals (or as a *Village Voice* column put it, "Don't Ask, Don't Screw"), the military simply created another identifying and determinative conduct: the homosexuals are the only ones in the military who cannot screw. Now we know them by what they *do not* do.[121]

The exception for avowed heterosexuals who engage in "homosexual acts" is the most striking provision of the statute and the one that most distinguishes it from the Clinton policy. Under the Clinton DoD policy, Secretary Aspin assured that investigations of alleged violations of the Uniform Code of Military Justice would be carried out "in an evenhanded manner without regard to whether the conduct alleged is heterosexual or homosexual or whether it occurs on-base or off-base."[122] Presumably, he was referring to sodomy, which is prohibited by the Code of Military Justice whether performed by people of the same sex or different sexes.[123] Although evenhanded investigations may seem unlikely under a policy in which a statement of homosexual identity (but not of heterosexual identity) raises a presumption of prohibited conduct, this was far superior to the Congressional language.[124]

The statute, in a provision Janet Halley has aptly termed the "Queen-for-a-Day Exception,"[125] allows service members to argue that they should be retained despite homosexual acts because they are *really* heterosexuals. The provision allows a discharge exception if the homosexual act was uncustomary behavior, unlikely to recur, consensual, and did not demonstrate a propensity to engage in other such acts.[126] Here, the expression of

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121 Unfortunately, gay rights litigators may accomplish the same thing with cases like Equality Foundation of Greater Cincinnati v. City of Cincinnati, 860 F. Supp. 417 (S.D. Ohio 1994). *See supra* notes 106-108 and accompanying text.

122 Secretary of Defense Les Aspin, Statement before the House Committee on Armed Services (July 21, 1993) (transcript on file with author).

123 10 U.S.C. § 925, art. 125 (1983).

124 *See* Halley, *supra* note 118, for a detailed discussion of how the different military policies treat sodomy prosecution.

125 *Id.* at 33.

126 A member who engages in, attempts to engage in, or solicits a homosexual act will be separated unless they can show that

> (A) such conduct is a departure from the member's usual and customary behavior; (B) such conduct, under all the circumstances, is unlikely to recur; (C) such conduct was not accomplished by use of force, coercion, or intimidation; (D) under the particular circumstances of the case, the member's continued presence in the armed forces is consistent with the interests of the armed forces in proper discipline, good order, and morale; and (E) the member does not have a propensity or intent to engage in homosexual acts."

10 U.S.C. § 654 (b)(1) (Supp. 1995).

heterosexual identity defeats *actual* evidence of homosexual acts. Conversely, the expression of homosexual identity is grounds for dismissal even without any evidence of homosexual acts. Hence, two servicemembers of the same sex could engage in a sexual act, and the one who identifies as homosexual or bisexual will be dismissed while the one who identifies as heterosexual will not, so long as she claims to be straight and professes regret. With respect to sodomy, the statute follows the Court in *Hardwick*: it construes a facially neutral rule in such a way as to let avowed heterosexuals off the hook. A statement of heterosexuality does not create a presumption that the person engages in either opposite-sex or same-sex sodomy (when certainly the former and possibly the latter would be plausible). This provision graphically illustrates the codification of the claims of this article; it gives legal significance and authority to rhetorical moves that disengage acts from identity, but only for those who profess heterosexual identity. The effect of this asymmetrical uncoupling of act and identity is that "heterosexuality" can claim an enormous scope and privilege that explicitly include every conceivable "homosexual" act. At the same time, the provision forcefully aligns acts and identity for self-identified homosexuals such that the mere utterance of homosexual identity effectively functions as a synonym for those very same acts. Because one need only claim heterosexuality to escape discharge, the only people who face separation are those who engage in "homosexual" acts but refuse to identify as straight or those who affirmatively claim to be homosexual or bisexual irrespective of what they do. Since the statute treats identical acts by different actors differently—on the grounds that one of the acts undermines morale and discipline because of the professed identity of the actor—it unavoidably proscribes not conduct, but identity *simpliciter*. The statute effectively legislates tremendous rhetorical breadth for heterosexual identity and rhetorical rigidity for homosexual identity.

Not only does the new military policy distinguish sexual identity and sexual acts only to forcefully realign them according to identity, but it identifies bisexuality only to subsume it. The policy states: "The term 'bisexual' means a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual and heterosexual acts."[127] Although the statute defines "homosexual acts," it is silent as to what "heterosexual activities" are. It does not describe them because defining the acts would necessarily curtail the privileges of claiming heterosexual identity, privileges that allow heterosexuality to encompass any sexual act as long as it is done by a "heterosexual." Because the policy admits of no definable "heterosexual acts," bisexuality enjoys no heterosexual privilege for whatever opposite-sex erotic acts it might include. Bisexuality becomes more like homosexuality, where identity and acts are mutually constitutive.

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[127] *Id.* § 654(f)(2).

In fact, in the military, as elsewhere, bisexuality *is* homosexuality. A statement of bomosexual *or bisexual identity* could initiate an investigation because it creates a presumption of *homosexual acts.*[128] In perhaps the most explicit realignment of tbe hetero/homo regime, the policy names bisexuals only to rename tbem as homosexuals based on acts.

Bisexuals have again been absorbed into the identity category of homosexuality only to fall through the discursive cracks between identity and acts. A bisexual is not probibited all sexual conduct even though she may consider all of ber conduct bisexual. By inadequately accounting for her identity, the military accomplisbes two things. It can discipline ber as homosexual if she expresses her bisexual identity. But until then, tbe military may continue to hide ber unarticulated desires, fantasies, and actions in the class of beterosexuals, giving tbat identity more rhetorical territory. Both accounts enforce the sexual dichotomy. Although applicants for military service are no longer asked about sexual orientation, sexual identity is still not respected. Instead, sexual identity is enforced.

The policy demonstrates that tbe military no more wants to know about conduct than it wants to know about identity, and it acbieves this ignorance by insisting on the privacy of identity and the secrecy of conduct. This is what Sedgwick calls the "epistemological privilege of unknowing," the power to wield ignorance as potently as knowledge, to transform it into a mechanism of discipline.[129] The military policy employs ignorance as outing employs knowledge—to enforce the betero/homo sexual dicbotomy. Both practices disengage acts from identities, but both get caught in their own inevitable tautologies.

With respect to the military policy, the value of addressing identity classifications is immediate and practical. By predicating conduct so fundamentally on identity, and vice versa, tbe statute refutes tbe very distinction on wbicb the military, many courts, and gay rigbts advocates alike depend. To the extent that sexual acts and sexual identity are rbetorically aligned, bisexuals and homosexuals will always struggle under tbe oppressive weight of *Hardwick.* To tbe extent that acts and identity are disarticulated, any resulting freedom will only apply with any force to heterosexuals, as the military policy vividly demonstrates. In either case, tbere seems to be no room for a bisexual identity that is anything more than a composite of the two prevailing norms or just a more deviant form of bomosexuality.

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[128] *See* text accompanying *supra* notes 48-49 (asking, Can a bisexual have homosexual sex? What should we call the acts upon which a bisexual identity might be predicated?) How, for that matter, should we define the acts upon which a homosexual identity might be predicated? If homosexuals are those people who engage in homosexual sex and we know what homosexual sex is because it is engaged in by homosexuals, we get caught in a tautology. Same-sex sex does not work to define homosexuality either because we know from Kinsey that heterosexuals engage in it. Sodomy cannot be the identifying act because many states define it to include oral sex or anal sex between people of different sexes.

[129] SEDGWICK, *supra* note 9, at 5.

Because we cannot move forward, nor do we want to go back, I propose moving away from the debate as it is currently framed. Both court cases and statutes show that identity that is predicated on the gender of one's erotic object choice has become definitionally and doctrinally incoherent. As Judge Canby admits, heterosexuals and homosexuals share many of the same sexual practices.[130] Even Judge Reinhardt admits this, although he believes that he is distinguishing homosexuals when he says "oral sex is the primary form of homosexual activity."[131] If we were to take *Padula* at face value and truly let the behavior define the class, we would fundamentally alter the "classes" as we now understand them.

The implications of sexual identity classification based on acts could mean a more genuine and liberating correspondence between identity and acts that would dissolve gender as the locus of sexual identity. It would certainly render *Hardwick* and its progeny almost meaningless. By insisting on a literal, rather than rhetorical, classification of identities based on acts, we also invite a new alignment that may create enough possibilities for identification that both the inclination toward hierarchy and the pitch of the prejudice as we know it may be avoided. This theoretical work should be useful to litigators because short-term legal victories may not be worth their long-term effects on the way sexual identity is conceived. Thus far, the law has enforced two options for sexual identity in such a way that only heterosexuals effectively have a choice. In such legal practice, "definitional incoherence is the very mechanism of material dominance."[132] The task is to resist the temptation to exacerbate the incoherence for immediate legal gains; ultimately we will be best served by fashioning a more expansive and realistic classification scheme based on acts.

VI. A Queer Conclusion

> [W]e need to consider the possibility that one day, perhaps, in a different economy of bodies and pleasures, people will no longer quite understand how the ruses of sexuality, and the power that sustains its organization, were able to subject us to that austere monarchy of sex . . . .
>
> — Michel Foucault[133]

A pivotal question remains: how do we begin to dismantle the wall in a way that is both politically and socially workable? The conceptual questions addressed in this article raise a host of pragmatic questions that must be grappled with before any theorized reconceptualization of sexual identity can mean something concrete for identity politics. We need to ask if insist-

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130 *See supra* text accompanying note 101.

131 Watkins v. United States Army, 837 F.2d 1428, 1455 (9th Cir. 1988), *amended*, 847 F.2d 1329 (9th Cir. 1988), *withdrawn*, 875 F.2d 699 (9th Cir. 1989) (en banc), *cert. denied*, 498 U.S. 957 (1990) (Reinhardt, J., dissenting).

132 Halley, *supra* note 110, at 98.

133 Foucault, *supra* note 6, at 159.

ing on a recognition of bisexuality as an identity could effectively challenge the hetero/homo dichotomy and introduce a source of new energy into the politics of sexuality. Or, as Lisa Duggan suggests, would this only "paradoxically reinstate[ ] sexual polarity through the addition of a third naturalized term, as rigidly gendered as the original two, only doubled"?[134]

Duggan instead envisions a "queer community" that explodes the constricting categories of gender and sexual identity in favor of a community "unified only by a shared dissent from the dominant organization of sex and gender."[135] Or even more amorphously, queer may mean "people who are using their experience of marginalization to produce an aggressive critique of the prevailing social system."[136] Or, more general still, "everyone was welcome under the word *queer*."[137] These somewhat problematic definitions suggest more questions. What does identity politics mean under an all-inclusive identity? In what ways do we want identity politics to function in the future? Toward what ends? Does an identity even exist outside of a relationship with what it is not? In other words, must there be an "other," or at least "others," in order to claim an identity at all?

Duggan's all-embracing queer politics falls prey to the criticism of Andrew Sullivan, who finds such thinking paradigmatic of a "radical politics of homosexuality" whose problems are that "its conception of homosexuality is so amorphous and indistinguishable from other minority concerns that it is doomed to be ultimately unfocused; and its relationship with the views of most homosexuals—let alone heterosexuals—is so tenuous that at moments of truth (like the military ban) it strains to have a viable politics at all."[138] Sullivan sounds an instructive warning. But it should not be taken so literally as to preclude the possibility of a radical critique of sexual classification and heterosexual hegemony that also aspires to an effective politics. The gay and lesbian rights movement has been the only challenge so far to the institutional privilege of heterosexuality. I have tried to point out some of the ways in which the movement undermines that project by participating in a discourse of sexual identity that renders its closest potential allies invisible. But those allies are there, attempting to name themselves, to find a voice and someplace to call home. This voice is increasingly important to foster, for as most lesbians and gay men know, "[s]ilence, if it does not equal death, equals the living equivalent."[139] The challenge, finally, is pragmatic: to craft a reformulated vision of sexual identity that is both socially feasible and politically viable, one that allows us to forge unprecedented and potentially powerful alliances.

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[134] Lisa Duggan, *Making It Perfectly Queer*, SOCIALIST REV., Jan.-Mar. 1992, at 11, 20.

[135] *Id.*

[136] *Id.* at 21 (quoting Alexander Chee).

[137] *Id.*

[138] Andrew Sullivan, *The Politics of Homosexuality*, NEW REPUBLIC, May 10, 1993, at 24, 26.

[139] *Id.*