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THE FEW, THE PROUD, THE GAYS:
DON'T ASK, DON'T TELL AND THE TRAP OF TOLERANCE

SUZANNA DANUTA WALTERS*

- I. THE ETHICS OF ANALOGY
- II. ACTS, IDENTITIES, IMMUTABILITIES
- III. BEYOND GUNS AND TAFFETA

In 2010, the satirical news site *The Onion* put out two pieces “responding” to President Obama’s goal of repealing “Don’t Ask, Don’t Tell.”¹ In one, a faux general gets on the faux news channel to argue against open service, saying “gays [are] too precious to risk in combat.”² “Gays of America,” gravely intones the General, “are the only group left untouched by war. They’re special, pure, and rare, like a gleaming diamond or a snow-white colt. We must protect them. . . . [w]e love them too much.”³ The other headline warns: “Repeal of ‘Don’t Ask, Don’t Tell’ Paves Way for Gay Sex Right on Battlefield, Opponents Fantasize.”⁴ The article goes on to quote a “soldier” who argues,

[t]he last thing I need after a 12-hour reconnaissance patrol is to know I’m hitting the showers with some guy who might be checking me out and who might, after seeing what I have to work with, find himself wondering if I too long for the firm yet tender embrace of another man.⁵

Jon Stewart also skewered the anti-repeal diehards like Senator John McCain in segments portending the “Gaypocalypse,” while *Daily Show* regular John Oliver countered Stewart’s objections to anti-gay discrimination by repeatedly insisting (with handy signs),

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1. *See Obama Calls for ‘Don’t Ask, Don’t Tell’ Repeal*, CNN (Jan. 27, 2010), http://articles.cnn.com/2010-01-27/politics/obama.gays.military_1_repeal-policy-that-bars-gays-servicemembers-legal-defense-network/?_s=PM:POLITICS.

2. *‘Gays Too Precious to Risk in Combat,’ Says General*, ONION, <http://www.theonion.com/video/gays-too-precious-to-risk-in-combat-says-general,14158/> (last visited Nov. 2, 2011) (internal quotation marks omitted).

3. *Id.*

4. *Repeal of ‘Don’t Ask, Don’t Tell’ Paves Way for Gay Sex Right on Battlefield, Opponents Fantasize*, ONION (July 12, 2010), <http://www.theonion.com/articles/repeal-of-dont-ask-dont-tell-paves-way-for-gay-sex,17698/>.

5. *Id.* (internal quotation marks omitted).

“[h]e is gay Jon” in discussing the dismissal of Dan Choi and other gay service members.⁶

The attempted repeal of the odious policy of military exclusion emerges in this context of increased gay visibility (and not just among our progressive satirists), new “normalization,” and a more generalized integration of lesbians and gays into American culture.⁷ It is now more than forty years since the Stonewall riots, and there is no question that the America of the new millennium appears quite altered from that signal moment of frustration, when sexual and gender rebels—denied even the right to freely associate, much less share in the fullness of American life—erupted in street protests on a hot summer night.⁸ From nondiscrimination statutes and gay marriage (now fully legal in six states and the District of Columbia)⁹ to out gay celebrities and gay-themed cable networks, we have witnessed a veritable sea-change in American politics and culture.¹⁰

Dig a bit deeper, however, and this seemingly brave new gay world reveals a half-finished project. For all of the clear changes, in both culture and society more broadly, many challenges remain. There may be gay wedding announcements in national papers but same-sex marriage is still decidedly illegal and unpopular in the vast majority of states, not to mention the federal government.¹¹ One

6. *The Daily Show with Jon Stewart* (Comedy Central television broadcast May 14, 2009) [hereinafter *The Daily Show*, May 14, 2009], available at <http://www.thedailyshow.com/watch/thu-may-14-2009/dan-choi-is-gay>; see *The Daily Show with Jon Stewart* (Comedy Central television broadcast Dec. 2, 2010), available at <http://www.thedailyshow.com/watch/thu-december-2-2010/gaypocalypse-now>.

7. See SUZANNA DANUTA WALTERS, *ALL THE RAGE: THE STORY OF GAY VISIBILITY IN AMERICA 15–18* (2001) [hereinafter WALTERS, *ALL THE RAGE*].

8. See *American Experience: Stonewall Uprising* (PBS television broadcast Apr. 25, 2011), available at <http://www.pbs.org/wgbh/americalexperience/films/stonewall/player/> (describing the Stonewall riots that began as protests against police raids and are now used to signify (simplistically perhaps) the beginning of the modern gay rights movement in the U.S.).

9. *Current States with Marriage Equality, Civil Unions & Domestic Partnerships as of 6/24/11*, MARRIAGE EQUALITY USA, <http://www.marriageequality.org/current-status> (last visited Nov. 2, 2011) (noting that same sex marriage is currently legal in New York, Massachusetts, New Hampshire, Vermont, Connecticut, Iowa, and the District of Columbia, and civil unions are currently legal in Hawaii, Illinois, New Jersey, and Rhode Island).

10. See WALTERS, *ALL THE RAGE*, *supra* note 7 (describing a more complete picture of this historic transformation); *About Logo*, LOGO, <http://www.logotv.com/about/> (last visited Nov. 2, 2011) (detailing network specifically catering to a gay demographic).

11. See Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996). The Defense of Marriage Act (DOMA) was enacted on September 21, 1996 and defined marriage as “a legal union between one man and one woman.” *Id.* Approximately thirty-seven states have what are often referred to as “mini-DOMAs”—state statutes defining marriage as between one man and one woman. *Massachusetts Becomes First State to Challenge Legality of DOMA*, DAVID M. GABRIEL & ASSOCIATES (Oct. 13, 2009), <http://www.attorneydavidgabriel.com/Articles/Massachusetts-Becomes-First-State-to-Challenge-Legality-of-DOMA.shtml>.

state, California, even reversed itself on gay marriage, voting in an anti-gay marriage proposition that quickly challenged the marriages that were joyously celebrated only a few months earlier.¹² Hate crimes continue to flourish;¹³ gay kids are still disproportionately likely to commit suicide and to be homeless,¹⁴ even as more gay youth come out and support services for them blossom; and the Employment Non-Discrimination Act still languishes in Congress.¹⁵ Even in the much-vaunted “gay-friendly” world of Hollywood and celebrity culture, precious few stars are openly gay, movies and television still feature more tokens than real characters, and the world of advertising continues to pretend gays simply do not exist.¹⁶

12. California is currently in limbo on this issue. On May 15, 2008, the California Supreme Court ruled for gay marriage. See *In re Marriage Cases*, 183 P.3d 384, 402 (Cal. 2008). But then, on November 4, 2008, Proposition 8, OFFICIAL VOTER INFORMATION GUIDE 128 (2008), available at <http://www.voterguide.sos.ca.gov/past/2008/general/text-proposed-laws/text-of-proposed-laws.pdf#prop8>, was voted in by the electorate, essentially overturning that ruling. Jessica Garrison et al., *Voters Approve Proposition 8 Banning Same-Sex Marriages*, L.A. TIMES, Nov. 5, 2008, <http://www.latimes.com/news/local/la-me-gaymarriage5-2008nov05,0,4876367,full.story>; *Strauss v. Horton*, 207 P.3d 48, 63–64 (Cal. 2009). Proposition 8 was itself overturned in a ruling in 2010 by U.S. District Court Judge Vaughn Walker, and that ruling was appealed and referred back to the California Supreme Court. *Perry v. Schwarzenegger*, 630 F.3d 898, 908 (9th Cir. 2011); *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 927 (N.D. Cal. 2010); News Release, Judicial Council of Cal. Admin. Office of the Courts, Supreme Court to Decide Prop. 8 ‘Standing’ Question from 9th U.S. Circuit Court of Appeals (Feb. 16, 2011), available at <http://www.courts.ca.gov/documents/NR04-11.pdf>.

13. Compare FED. BUREAU OF INVESTIGATION, U.S. DEPT OF JUSTICE, UNIFORM CRIME REPORT: HATE CRIME STATISTICS, 2007, at 3 (2008), with FED. BUREAU OF INVESTIGATION, U.S. DEPT OF JUSTICE, UNIFORM CRIME REPORT: HATE CRIME STATISTICS, 2008, at 2 (2009) (reporting an eleven percent increase in sexual orientation–based hate crimes between 2007 and 2008).

14. There are various statistics on the higher rate of suicide among LGBT youth. Some state that LGBT youth are up to four times more likely to attempt suicide, whereas other sources state that one in three teens attempt suicide. *Suicidal Signs & Facts*, TREVOR PROJECT, <http://www.thetrevorproject.org/suicide-resources/suicidal-signs> (last visited Nov. 2, 2011). On homelessness, the National Gay and Lesbian Task Force reports that of the estimated 1.6 million homeless youth in the U.S., between twenty and forty percent are LGBT. NICHOLAS RAY ET AL., NAT’L GAY & LESBIAN TASK FORCE, LESBIAN, GAY, BISEXUAL AND TRANSGENDER YOUTH: AN EPIDEMIC OF HOMELESSNESS 1 (2006), available at http://www.thetaskforce.org/reports_and_research/homeless_youth. A recent large-scale study by the Children’s Hospital of Boston, published in the American Journal of Public Health, confirms the significantly higher rates of homelessness amongst LGBT youth. Heather L. Corliss et al., *High Burden of Homelessness Among Sexual-Minority Adolescents: Findings from a Representative Massachusetts High School Sample*, 101 AM. J. PUB. HEALTH 1683, 1687 (2011).

15. See *Timeline*, HUM. RTS. CAMPAIGN, <http://sites.hrc.org/sites/passendanow/timeline.asp> (last visited Nov. 2, 2011). ENDA has been introduced in nearly every session of Congress but seems to get derailed every time. In our current Congress, it was introduced in April 2011, but it remains unfinished business. Employment Non-Discrimination Act of 2011, S. 811, 112th Cong. (2011); Employment Non-Discrimination Act, H.R. 1397, 112th Cong. (2011).

16. See WALTERS, ALL THE RAGE, *supra* note 7, at 116–18, 287–88.

Although I would never want to understate the very real changes hard-won by queer activists, the evidence is simply more tenuous and fractured than is immediately apparent. I would argue, instead, that contemporary homophobia is at once more insidious and curiously more explicit. It may no longer be easy to get away publicly with overt gay bashing (and all right-thinking people believe in equal rights and love their gay neighbors), but there remains not one schoolyard in America where “gay” (or “fag” or some variant) is not the epithet of choice.¹⁷ The most recent polls certainly reveal significant shifts around marriage rights, military service, and even “moral acceptability,” but for most of these issues, they are at best slim majorities, meaning a sizable minority still firmly come down on the “gays are immoral deviants” side of the equation.¹⁸ The new Virginia Governor, Bob McDonnell, removed sexual orientation from state anti-discrimination protections, and only a few news organizations covered it.¹⁹ Virginia’s Attorney General, Ken Cuccinelli, has gone even further, “urging” the state’s public colleges and universities to rescind policies that ban discrimination on the basis of sexual orientation.²⁰ A few years ago Scott Brown—the Massachusetts miracle boy adored by mainstream America—attacked fellow state senator Cheryl Jacques for her decision to have a baby with her female partner, saying the situation was “unusual for two women . . . in terms of what’s normal in today’s society.”²¹ If that is not open homophobia I do not know what is, and yet, it has hardly held him back in his move through political life.²² Outright opposition to gay equality—whether in the form of marriage equality, workplace equality, service equality, or sexual freedom—seems not to be a

17. JOSEPH G. KOSCIW ET AL., GAY, LESBIAN & STRAIGHT EDUC. NETWORK, THE 2009 NATIONAL SCHOOL CLIMATE SURVEY: THE EXPERIENCES OF LESBIAN, GAY, BISEXUAL AND TRANSGENDER YOUTH IN OUR NATION’S SCHOOLS xvi (2010).

18. See *Gay and Lesbian Rights*, GALLUP BRAIN, <http://institution.gallup.com/poll/1651/Gay-Lesbian-Rights.aspx> (last visited Nov. 2, 2011) (reporting the poll results from May 2011).

19. OFFICE OF THE GOVERNOR, COMMONWEALTH OF VA., EXECUTIVE ORDER NUMBER SIX (2010), available at http://www.governor.virginia.gov/PolicyOffice/ExecutiveOrders/pdf/EO_6.pdf. On February 5, 2010, Governor Bob McDonnell signed an executive order that stripped sexual orientation from the list of “protected” identities in the state anti-discrimination statute. Rosalind S. Helderman, *Virginia Governor’s Anti-bias Order Removes Language Regarding Sexual Orientation*, WASH. POST, Feb. 10, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/02/09/AR2010020903739.html>.

20. Rosalind S. Helderman, *Attorney General Asks Colleges to End Policies that Shield Gays*, WASH. POST, Mar. 6, 2010, at A1.

21. Christopher Rowland, *Possible Political Rival Denounces Cheryl Jacques’s Personal Life*, BOSTON GLOBE, Nov. 1, 2001, at 2.

22. Michael Levenson, *Scott Brown Wins GOP Primary, Readies for Race vs. Coakley*, BOSTON GLOBE, Dec. 8, 2009, http://www.boston.com/news/local/breaking_news/2009/12/scott_brown_win.html.

barrier to political legitimacy at all. Just look at President Obama's position on marriage equality—he is against it until he is for it sometime in the unspecified future,²³ and he exhibited disturbing ease in inviting anti-gay leaders (e.g., Rick Warren) into the fold of official legitimacy.²⁴

Despite this more fraught reality, most gays and their allies believe access to marriage and the military are the brass ring of gay rights, and that once we have achieved these remaining goals, we will have essentially moved into a “post-gay” America.²⁵ The predominant cultural narrative—among both the left and the right—is that the battle for gay rights has largely been won, and that this particular battlefield in the culture war is no longer a viable one.²⁶ This narrative is made possible by the very real changes (both in policy and in public perception) and by the discourse of tolerance that sets the bar so low.²⁷ For many commentators, the glass is more than half full, and there are just a few steps (federal marriage rights, inclusive military service, etc.) remaining in the quest for full inclusion.²⁸ For example, longtime gay rights supporter and *New York Times* columnist Frank Rich recently wrote,

To a degree unimaginable as recently as 2004—when Karl Rove and George W. Bush ran a national campaign exploiting fear of gay people—there is now little political advantage to spewing

23. See Devin Dwyer, *Obama Gay Marriage Stance a Nod to 2012 Battlegrounds*, ABC NEWS (June 29, 2011), <http://abcnews.go.com/Politics/president-obama-gay-marriage-stance-nod-2012-battlegrounds/story?id=13948413> (according to the White House Press Secretary, “[t]he president’s position on gay marriage is that he has been against it But he has said that the country is evolving on this and he is evolving on this”).

24. *Obama Tells Gay Community to Respect Choice of Warren at Inauguration*, FOX NEWS (Dec. 18, 2008), <http://www.foxnews.com/politics/2008/12/18/obama-tells-gay-community-respect-choice-warren-inauguration/>. Despite public outcry, Obama invited anti-gay megachurch pastor Rick Warren to give an invocation at his inauguration. *Id.*

25. See DAVID A. J. RICHARDS, *IDENTITY AND THE CASE FOR GAY RIGHTS: RACE, GENDER, RELIGION AS ANALOGIES* 152–53 (1999) (stating that “full republican citizenship on terms of equal respect” must extend to gays serving in the military); WALTERS, *ALL THE RAGE*, *supra* note 7, at 181 (citation omitted) (asserting that mainstream and conservative gays believe “that ‘legal gay marriage would be the stamp of approval from mainstream American society’”).

26. See Frank Rich, Op-Ed., *Smoke the Bigots Out of the Closet*, N.Y. TIMES, Feb. 7, 2010, at WK10 (discussing the repeal of “Don’t Ask, Don’t Tell” and the overall political progress in the gay rights movement).

27. See Chelsea E. Schafer & Greg M. Shaw, *Trends—Tolerance in the United States*, 73 PUB. OPINION Q. 404, 406–07 (2009) (commenting on improvements in gay tolerance in American society, such as the fact that seventy-one percent of people would not mind having a gay neighbor).

28. See David A. Farenthold, *Gay Rights Advocates Sense Shift*, WASH. POST, Dec. 20, 2010, at A1 (stating the repeal of “Don’t Ask, Don’t Tell” “highlighted just how far American gay rights groups have come” and how the repeal of the law “opened up one of the last spheres of American life that was still legally off-limits”).

homophobia. Indeed, anti-gay animus is far more likely to repel voters than attract them. . . . Now that explicit anti-gay animus is an albatross, those who oppose gay civil rights are driven to invent ever loopier rationales for denying those rights, whether in the military or in marriage.²⁹

Leslie Savan, a reliably progressive writer for *The Nation*, claims “the Republican Party that won the White House in 2004 by vowing to protect us from homosexual terrorists has simply lost on the entire issue.”³⁰ The list of liberals who believe this progress narrative is both wide and deep.³¹

For some, gays are close to full inclusion and acceptance. For these folks—gay and straight alike—the repeal of “Don’t Ask, Don’t Tell” (DADT) and the acquisition of marriage rights will give birth to the truly tolerant society that is in our reach.³² For others, however, all of these changes in the years since Stonewall leave us far from the early vision of an expansive and celebratory sexual freedom.³³ For the more skeptical analysts, this is a dangerous moment of glib assimilation. The radical challenge to substantially dismantle homophobia gets dissipated in the rush toward “equality” and in the desire for “tolerance” or “acceptance” rather than sexual liberation or social transformation.³⁴

29. Rich, *supra* note 26.

30. Leslie Savan, *Without Anti-gay Hysteria, Massa’s a Dud for the GOP*, NATION (Mar. 11, 2010), <http://www.thenation.com/blog/without-anti-gay-hysteria-massas-dud-gop>.

31. I would include here not only Frank Rich and Leslie Savan, but also editorial writers for both *The New York Times* and *The Washington Post*, as well as critics like Dan Savage, Frank Bruni, and others. See, e.g., Frank Bruni, Op-Ed., *To Know Us Is to Let Us Love*, N.Y. TIMES, June 26, 2011, at SR2; Rich, *supra* note 26; Dan Savage, Op-Ed., *Same-Sex Marriage Wins by Losing*, N.Y. TIMES, July 30, 2006, at WK13; Savan, *supra* note 30.

32. The substantive differences between these two legal and political struggles is crucial to note, including, but not limited to, the site of the battlefield where the struggle for marriage rights is achieved through state politics, state legislatures, etc., and where the repeal of DADT is achieved through Oval Office initiatives and military approval; the symbolic salience of media-depicted “loving couples,” especially when figured with children, versus the more fraught image of the singular soldier; the fact that service in the military is not a “right” but a specialized institution that already requires certain qualifications and hurdles to jump to get in, whereas any (heterosexual) can get married. Gay people are already serving with honor and distinction in the military; the question is can they do so with openness, honesty, and job security. This is different from the marriage argument, where gays are fighting to be allowed simple access to an institution they have been formally excluded from. In addition, the military—unlike marriage—is seen as above or outside the rules and vicissitudes of everyday life. Courts have taken this position in various challenges to military law.

33. See David Carter, *What Made Stonewall Different*, GAY & LESBIAN REV. WORLDWIDE, July–Aug. 2009, at 11, 13 (describing the early “gay liberation” movement which began with the Stonewall Riots).

34. See, e.g., WALTERS, ALL THE RAGE, *supra* note 7, at 19 (reviewing the arguments about assimilation and its discontents); Lisa Duggan, *Beyond Same-Sex Marriage*, 9 STUD. GENDER & SEXUALITY 155, 156 (2008) (criticizing “the emphasis of lesbian and gay

It is true that one significant marker in the march toward social justice has been irrevocably passed: silence and invisibility. The days of homosexuality as the unspeakable and unseeable, and as easy and acceptable targets for violence and denigration are forever past.³⁵ There is no going back in that sense. But anti-Semitic and racist movements do not, for example, disappear simply because it is no longer publicly acceptable to utter racist and anti-Semitic remarks.³⁶ Anti-gay animus does not simply retreat in the face of public “tolerance” of gays, as any quick glance at an evangelical website detailing the evils of homosexuality will tell you.

Indeed, what is even meant by “gay rights” is in question. The quest for equal treatment is often centered on a paradox. On the one hand, gays (and ethnic and racial minorities) argue that gayness doesn’t matter; in making laws, taking a job, raising a family, and serving in the military, it is irrelevant.³⁷ At the same time, most groups have struggled mightily over this irrelevancy stance, and embraced and articulated difference with a vengeance.³⁸ Gay pride, of course, was and is part of that history, demanding rights *and* recognition, identity *and* inclusion.

For most of its history, the gay movement has—like so many other social movements before it—focused on the simple, but curiously elusive, goal of equal citizenship.³⁹ In a general sense, this quest for citizenship includes an insistence upon equal treatment in employment, housing, education, and law.⁴⁰ Feeling fully included

leaders and organizations on same-sex marriage”); Michael Warner, *Normal and Normaller: Beyond Gay Marriage*, 5 GLQ: J. LESBIAN & GAY STUD. 119, 120–21 (1999) (commenting on the shift in the “language of gay politics” away from urgent issues such “as HIV and health care, AIDS prevention, the repeal of sodomy laws, antigay violence, job discrimination, immigration, media coverage, military antigay policy, sex inequality, and the saturation of everyday life with heterosexual privilege”). See also the writings of other left/queer academics such as Lauren Berlant and journalists such as Richard Goldstein.

35. See, e.g., Rich, *supra* note 26 (discussing the increased acceptance of homosexuality throughout mainstream American society and the political world).

36. See, e.g., *About the Anti-Defamation League*, ANTI-DEFAMATION LEAGUE, <http://www.adl.org/about.asp?s=topmenu> (last visited Nov. 2, 2011) (exemplifying the continued efforts of organizations to fight anti-Semitism and racism).

37. See WALTERS, ALL THE RAGE, *supra* note 7, at 18 (stating that “gay identity is made legitimate only through assimilation into the dominant heterosexual gestalt”).

38. See *id.* at 19; *Mission Statement*, HUM. RTS. CAMPAIGN, <http://www.hrc.org/the-hrc-story/mission-statement> (last visited Nov. 2, 2011) (stating that the “HRC strives to end discrimination against LGBT citizens and realize a nation that achieves fundamental fairness and equality for all” rather than asking the LGBT community to assimilate as a means to acceptance).

39. Diane Richardson, *Locating Sexualities: From Here to Normality*, 7 SEXUALITIES 391, 391 (2004) (stating that “[l]esbian and gay movements are increasingly demanding equal rights of citizenship”).

40. *Id.* at 394 (discussing gains in “healthcare, rights associated with social and legal recognition of domestic partnerships, immigration rights, parenting rights and so on”).

in the society in which you live, however, entails more than the formal acquisition of legal equality. For so many minority groups, legal or formal equality is but the starting point of a more thorough-going struggle for substantive inclusion.⁴¹ A truly robust citizenship signals a sense of belonging, a combination of shared responsibilities and shared rights. Throughout U.S. history, innumerable groups have struggled to acquire both formal equality and the often more intangible substantive equality offered through full citizenship and inclusion.⁴² Gays are no different in this regard,⁴³ yet, the persistent fact of gay invisibility alters how these citizenship claims play out.

Americans are uniquely likely to assert a “post” right before we approach the finish line, effectively shutting off the real and substantive public debate needed for that final push.⁴⁴ We did it with women’s rights, declaring an era “post-feminist” while women still remained lower paid, sexually vulnerable adjuncts to a still male-dominant culture.⁴⁵ We are doing it now with racial equality, depicting the election of our first black president as an indication that the long struggle for civil rights is essentially over, even as poverty and incarceration rates disproportionately climb in African-American communities.⁴⁶ Americans tend to look at the road ahead and see not where it continues to branch off and divide, but rather where it ends and comes to a full stop.⁴⁷ Like a mirage of shimmering water

41. See Duggan, *supra* note 34, at 157 (discussing how the right to marriage is a minor aspect of equal citizenship and that the emphasis needs to be broader to gain actual equality and justice).

42. *E.g.*, *National Association for the Advancement of Colored People Press Kit*, NAACP, http://naacp.3cdn.net/1746740dc694a593ba_u3m62w9bw.pdf (last visited Nov. 2, 2011) (describing the multifaceted mission of the NAACP as “ensur[ing] the political, educational, social, and economic equality of rights of all persons and to eliminate race-based discrimination”).

43. *E.g.*, *Mission Statement*, HUM. RTS. CAMPAIGN, *supra* note 38 (“HRC seeks to improve the lives of LGBT Americans by advocating for equal rights and benefits in the workplace, ensuring families are treated equally under the law and increasing public support among all Americans.”).

44. See, Fahrenthold, *supra* note 28, at A6 (quoting the vice president of the Human Rights Campaign as saying that same-sex marriage rights will flow naturally from the repeal of DADT and that “[w]e won’t have to say a thing”); Scott James, *Celebration of Gay Pride Masks Community in Transition*, N.Y. TIMES, June 26, 2011, at 27A (stating that “[o]thers, however, believe recent gay rights victories and greater societal acceptance have led to complacency”).

45. See Suzanna Danuta Walters, *Premature Postmortems: “Postfeminism” and Popular Culture*, 3 NEW POL. 103, 112 (1991).

46. *E.g.*, Peter Wallsten & David G. Savage, *Voting Rights Act Out of Date?*, L.A. TIMES, Mar. 18, 2009, at A1 (“The election of Barack Obama as president has been hailed as a crowning achievement of America’s civil rights movement, the triumph of a black candidate in a nation with a history of slavery and segregation.”).

47. See Fahrenthold, *supra* note 28 (noting how the repeal heralds the success of overcoming one of the last major obstacles because marriage equality will soon follow on the heels of the repeal).

on a hot and barren desert, we imagine we have found the source that will quench our national thirst for justice, even as it continues to stand just beyond our reach. We get part of the way there and, instead of doing the hard work of pushing through to the end, we prematurely declare victory.⁴⁸ When it comes to matters of homegrown injustice, we get to the shores of Normandy and turn around and go back, comfortable in our conviction that we already know the outcome. By doing so, we pat ourselves on the back and avoid the deeper challenges.

We then set the stage to get angry with those who still claim disenfranchisement. We turn the tables and say we live in a “feminized” world in which boys and men are dealt a bad hand.⁴⁹ We rail at “racial preferences” and claim minorities already have “too much” help from the government.⁵⁰ We are doing this now with lesbians and gays, creating the fantasy that we have almost won, that gayness is not still an impediment to full participation and citizenship.⁵¹ We assert that gays already have too much political power and should back off.⁵² We claim gays want “special rights,” are pressing a “gay agenda,” and have been tolerated just about enough.⁵³ By doing this, we prevent ourselves from crossing the finish line and achieving real integration and inclusion.⁵⁴

The framework of “tolerance,” a framework that has come to dominate public discussion about gay and lesbian rights—including access to open military service—enables this fantasy of completion. At first glance, tolerance seems like a good thing. It seems to herald openness to difference and a generally broad-minded disposition. Indeed, one of the primary definitions of “tolerance” concerns sympathy

48. *See id.*

49. *E.g.*, Tom Digby, *Male Trouble: Are Men Victims of Sexism?*, 29 SOC. THEORY & PRAC. 247, 247 (2003) (“[A]ntifeminism is a common theme in angry man discourse: feminism has ‘gone far enough,’ women have already achieved equality, now it’s men who are suffering from inequality, so it’s time to tilt the balance back toward men a little.”).

50. *E.g.*, Terry Eastland, *The Case Against Affirmative Action*, 34 WM. & MARY L. REV. 33, 34 (1992) (“When examined in terms of both theory and practice, affirmative action deserves a negative judgment. Affirmative action cannot remain a way of life unless we wish to change for the worse the very essence of what it means to be an American.”).

51. *See* Fahrenthold, *supra* note 28.

52. Elyse Siegel, *More Than Half of Tea Party Supporters Say Gays and Lesbians Have Too Much Political Power*, HUFFINGTON POST (June 2, 2010, 3:08 PM), http://www.huffingtonpost.com/2010/06/02/tea-party-poll-more-than_n_597968.html (“Fifty-two percent of respondents also said that ‘compared to the size of their group, lesbians and gays have too much political power.’”).

53. Rich, *supra* note 26; *see* Joseph P. Shapiro, *The True State of Gay America: Why the Backlash Is Only a Part of the Story*, U.S. NEWS & WORLD REP. (Oct. 19, 1992), http://www.usnews.com/usnews/news/articles/921019/archive_018511.htm (quoting Lon Mabon, the leader of Oregon’s anti-gay initiative, as saying “[t]he gay community ‘is probably, pound for pound, the strongest political lobby in the nation’”).

54. *See* Rich, *supra* note 26.

or indulgence for beliefs or practices differing from, or conflicting with, one's own.⁵⁵ It is a word and a practice, however, with a more complicated history and with real limitations. The late Middle English origins of the word indicate the ability to bear pain and hardship.⁵⁶ In more contemporary times, we speak of having a tolerance for something as the capacity to endure continued subjection to it—a plant, a drug, a minority group—without adverse reactions.⁵⁷ We speak of people who have a high tolerance for pain, or worry about a generation developing a tolerance for a certain type of antibiotic because of overuse.⁵⁸ In more scientific usages, it refers to the “allowable amount of variation of a specified quantity.”⁵⁹

Tolerance almost always implies or assumes something negative, or undesired, or even a variation contained and circumscribed. The crucial point is that it does not make sense to say that we tolerate something unless we think that it is wrong in some way. To say one “tolerates” homosexuality means that you deem homosexuality to be wrong (or bad or immoral or whatever), and at the same time that you are willing to put up with it.⁶⁰ If there is nothing problematic about something—say, homosexuality—then there is really nothing to “tolerate.” This model of tolerance therefore skirts the issue of the “virtuousness” of homosexuality and can easily slip into a “love the sinner, hate the sin” obfuscation.⁶¹ It allows homosexuality to be designated as “less than” heterosexuality, as a problem, a dilemma, a threat to the moral good.⁶² Tolerance allows bigotry to stay in place and shores up irrational hatred even as it tries to corral it.⁶³ Tolerance, like acceptance, is transient, dependent on circumstances and whims. It can turn on a dime. Tolerance can become intolerance in the blink of an eye, just as acceptance can easily lead to “except us” as history shifts about.⁶⁴ And “tolerance” is surely the backdrop to the gays-in-the-military debate, as it is, sadly, for gay rights more generally.

55. See 2 SHORTER OXFORD ENGLISH DICTIONARY ON HISTORICAL PRINCIPLES 3286 (6th ed. 2007).

56. MIDDLE ENGLISH DICTIONARY 856 (Robert E. Lewis et al. eds., 1995).

57. 2 SHORTER OXFORD ENGLISH DICTIONARY ON HISTORICAL PRINCIPLES, *supra* note 55, at 3286.

58. *Id.*

59. *Id.*

60. See *Romer v. Evans*, 517 U.S. 620, 646 (1996) (discussing the difference between “tolerance” and “acceptance”); Rajiv Malhotra, *Tolerance Isn't Good Enough: The Need for Mutual Respect in Interfaith Relations*, HUFFINGTON POST (Dec. 9, 2010, 7:24 AM), http://www.huffingtonpost.com/rajiv-malhotra/hypocrisy-of-tolerance_b_792239.html (discussing how “tolerance” leaves room for moral disapproval).

61. See Malhotra, *supra* note 60.

62. See *id.*

63. See *id.*

64. See *id.*

I. THE ETHICS OF ANALOGY

The trope of tolerance is most often tethered to historical comparisons and analogies. Arguments for gay rights have—unsurprisingly—long been couched in analogical terms.⁶⁵ With both the military and marriage debates, analogies have been hard to avoid, particularly given the history of both institutions in this country as rife with segregationist ideologies and mandates.⁶⁶ No public or legislative discussion around either can avoid analogies and historical comparisons, most potently—and perhaps most problematically—around race.⁶⁷ Analogies, and even comparisons, are complicated rhetorical moves and even more fraught when used explicitly in legal and political contexts.⁶⁸ I do not want to go into the merit of such analogies, but I am interested in how pliable and fluid they seem to be in the case of discussions around DADT. The analogical move itself becomes the playing field—with some, like Colin Powell, decrying the analogy in a move to displace the gay claim on historical struggle, and others arguing that the lessons of the analogy are central to overturning the ban.⁶⁹

When making comparisons and analogies, we typically focus on the difference of visibility that marks out the gay experience as analogically dissonant from that of its most frequent comparators—women and blacks.⁷⁰ There is good reason to do so, for having difference marked on your body produces both specific discourses of the abject and different attempts to constrain and control.⁷¹ Therefore, the place of visibility and recognition figure mightily here. For example, while “coming out” may have changed in this new era of media visibility, internet access, and tepid social embrace, it remains a process almost uniquely “gay” in its very essence.⁷² Entry into the public eye becomes itself the sign of gay inclusion precisely because gays can assimilate so well, and can hide with such ease. These declamatory moments have unique resonance for gays: “I do” and “Don’t Ask,

65. RICHARDS, *supra* note 25, at 6–7.

66. DEP’T OF DEF., REPORT OF THE COMPREHENSIVE REVIEW OF THE ISSUES ASSOCIATED WITH A REPEAL OF “DON’T ASK, DON’T TELL” 81–85 (2010).

67. *See id.* at 85. It is interesting that the racial analogy has been more often invoked than the ethnic/religious one. Analogies between Jews and gays seems to me much more intriguing, and more helpful in revealing the mechanisms of anti-gay sentiment. Like Jews, gays are pilloried as cosmopolitan dandies and intellectuals, mocked as rootless wanderers drawn to urban centers, and feared as signs of social demise and contagion. And like Jews, but importantly not like many other groups (e.g., African Americans), gays can hide, can shield their identity, and can easily pass as that which they are not. *Id.*

68. RICHARDS, *supra* note 25, at 1–2.

69. *Same Sex Marriage*, 48 HAW. B. J. (1995) (quoting Colin Powell).

70. RICHARDS, *supra* note 25, at 7.

71. *See id.* at 9.

72. *See id.*

Don't Tell" reference a love that not only dare not speak its name, but that must traverse a metaphor of darkness to light, abject to normal, closet to community, in order even to utter itself into existence.

Because sexual difference is not typically marked on the body—unlike racial and gender categorization—it must be uttered, performed, or enacted to make it manifest to others (and sometimes to oneself).⁷³ It must be made visible to be made legible.⁷⁴ But also—and this is important to remember—because heterosexuality is so assumed, so much the default, so not in need of explanation, gayness is always placed, not as the simple parallel to heterosexuality, but as its hidden other.⁷⁵ While both masculinity and whiteness are equally dominant in relation to femininity and “color,” they are—by and large—visible.⁷⁶ If you appear to be a woman, no one typically assumes you are a man, unless you declare otherwise. The same can be said for racial identifiers. Thus, the potential to “pass” and indeed assimilate is quite different along these axes.

In addition, the gay experience differs along another axis: kinship. For most minority populations, the bonds of kinship temper social exclusion and the project of integration.⁷⁷ When faced with a hostile world, African Americans and Jews can look at their immediate family as “like them” and take comfort.⁷⁸ Gays, on the other hand, are by and large born into a family that differs from them along the profound trajectory of sexual identity and desire.⁷⁹ To put it simply, most gays are raised in families comprised largely of heterosexuals; they literally and figuratively live in the very house of difference.⁸⁰ This is one reason why questions of kinship, family, and the legitimacy of such bonds are so deeply felt among gays across the political spectrum even when they differ as to the best way to challenge gay exclusion from those practices and institutions. It might also go a long way toward explaining the perhaps excessive focus on access to marriage and other familial rights and why this issue (over employment rights

73. *See id.*

74. *See* Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187, 193–94. Clearly, the drafters of DADT somehow “got” this; the status/conduct (or even speech/status) distinction puts gays in unique knots and special double binds that are premised on the closet as a livable default zone of unknowability.

75. *Id.*

76. DEP'T OF DEF., *supra* note 66, at 85, 87.

77. *See, e.g.*, RICHARDS, *supra* note 25, at 13 (describing how African-American familial relationships nurture self-respect in light of racial prejudice).

78. *See id.*

79. Kari E. Hong, *Parens Patri[archy]: Adoption, Eugenics, and Same-Sex Couples*, 40 CAL. W. L. REV. 1, 57 (2003).

80. *Id.*

for example) has come to be understood (wrongly, in my view) as *sine qua non* of the success of the gay rights movement.⁸¹

For gay rights activists eager to locate military inclusion in the long trajectory of civil rights struggles now canonized as shining moments of American tolerance, reference to the history of racial and gender integration of the military is necessary. It justifies gay inclusion and makes the contiguous argument that open service will—like the integration of blacks and (partial) integration of women—have generally positive effects on military readiness.⁸² Surely, these analogies have been useful and hold some merit. They have been embraced by many, African Americans included, who see the “basic equality” questions that open service raises as similar to those faced by other oppressed minorities and women.⁸³ While segregation and exclusion are not exactly the same as closeted presence and formal rejection, they are close cousins, both in their structural motivations (to instantiate second-class status, to legally discriminate) and their experiential effects (resentment, fear, isolation, loss of employment).⁸⁴ The arguments used in both instances retain striking similarities with opponents invoking stereotypes of gays in a manner similar to stereotypes of blacks and women used in earlier eras.⁸⁵ Similar antagonistic sentiments were expressed around desegregating the army, including arguments about isolation, unit cohesion, morale, etc.⁸⁶ Surely, part of the resistance to the integration of blacks into the armed services derived from a prejudicial belief in the legitimacy of those whites who did not want to have to associate in such “close quarters” with blacks.⁸⁷ Similar objections to openly gay service members invoke this “close quarters” argument as well, creating a heady mix of contagion fears, infiltration anxiety, and the sully of the purity of (male, heterosexual, white) military culture. Of course, in the sexual-orientation

81. See, e.g., JONATHAN RAUCH, *GAY MARRIAGE: WHY IT IS GOOD FOR GAYS, GOOD FOR STRAIGHTS, AND GOOD FOR AMERICA* 94–95 (2004) (describing the argument for gay marriage, without as strong a focus on other rights, such as employment).

82. One such positive effect will be the retention of Arabic and Farsi translators. Laura R. Kesler, *Serving with Integrity: The Rationale for the Repeal of “Don’t Ask, Don’t Tell” and Its Ban on Acknowledged Homosexuals in the Armed Forces*, 203 MIL. L. REV. 284, 291–92 (2010). This is particularly important today as the U.S. struggles with two wars and a stretched volunteer army. Open service and gay inclusion would stop the loss of translators necessary for the war effort.

83. Julie Kruse, “*Don’t Ask, Don’t Tell*” Repeal Urged at Congressional Black Caucus Conference, SERVICEMEMBERS LEGAL DEF. NETWORK (Oct. 18, 2007), <http://www.sldn.org/blog/archives/don't-ask-don't-tell-repeal-urged-at-congressional-black-caucus-conference/>.

84. Kesler, *supra* note 82, at 378–79 (justifying the exclusion of African Americans and women from military service because of the fundamental difference between the aforementioned groups and white men).

85. DEP’T OF DEF., *supra* note 66, at 81–82, 85–86.

86. *Id.*

87. *Id.* at 81–82.

case, the fear of sexual desires (yours, mine, and ours) is added into the mix.⁸⁸

What is striking, however, is how the military—now faced with a president who has insisted on the full inclusion of openly gay service members—manages to create a hierarchy of analogy in order to maintain the legitimacy of anti-gay animus, while at the same time acknowledging the need for “tolerance.” In the DoD report that emerged from the recent congressional hearings, the military brings up the analogy of homosexual and racial integration only to make sure to differentiate the two:

In drawing parallels to racial integration in the 1940s and 1950s, there are similarities and differences between that experience and repeal of Don't Ask, Don't Tell today that we must acknowledge.

First, skin color and sexual orientation are fundamentally different. That said, the concerns expressed in the 1940s about the effects of integration on unit cohesion and effectiveness sound much the same as those voiced in this debate.

Second, there is a religious component to the issue of homosexuality that generally does not exist on matters of race. Many hold a sincere religious and moral belief that homosexuality is a sin. Many military chaplains today express opposition in religious terms to allowing gay men and lesbians to serve openly in the military. By contrast, there was no significant opposition to racial integration among military chaplains. In fact, the historical record of the period indicates that the military chaplain community, for the most part, encouraged followers along the path of racial integration.⁸⁹

The analogy has weight, yet also does not hold water. The fundamental flaw that these military analysts—and indeed many conservative and mainstream writers on gay rights—find in the analogy is that, at bottom, the analogy doesn't logically “work.” The animus against blacks, and the stereotypes underlying the animus, were proven to be simply and undeniably false and based on prejudice, whereas the animus against gays has merit.⁹⁰ Moreover, visibility enters directly into the debate because “race is an obvious identifier; sexual orientation is not. Even if the law is repealed, it is likely that gay men and lesbians will continue to be discreet and private about their sexual orientation, as in civilian society.”⁹¹

88. Kesler, *supra* note 82, at 297–98.

89. DEP'T OF DEF., *supra* note 66, at 84.

90. *Id.* at 85, 131.

91. *Id.* at 85.

So, the official line from the military is that, while it is true that older arguments against blacks serving alongside whites in the military sound curiously like those used today against gays, one should not mistake the absolute difference between the two. The “absolute difference” is based on two linked arguments. First, that sexual “orientation” and racial identity are radically different forms of identity. As Colin Powell argued before the recent iteration of the debate, “[s]kin color is a benign, non-behavioral characteristic. Sexual orientation is perhaps the most profound of human behavioral characteristics. Comparison of the two is a convenient but invalid argument.”⁹² For Powell, race is different because it is meaningless, the emptiest of signifiers. Yet, for others, including the DoD, race is different because it is much *more* meaningful. It is the ultimate signifier of *illegitimate* social exclusion, historical victimization, and discrimination.⁹³

Second, more elliptically and perhaps more dangerously, the race/sexuality analogy is challenged because the moral and religious justifications for anti-gay animus have merit and need to be respected.⁹⁴ The DoD report repeatedly assures readers, soldiers, and the public that moral and religious objections to homosexuality deserve respect.⁹⁵ The difference now will be that those with objections—while legitimate—must nonetheless treat “them” fairly.⁹⁶ In other words, if you are morally and religiously opposed to homosexuality, the military will not “turn its back on you” and your legitimate animus towards gays will not be a problem at all, although you will now be required to treat “them” equitably.⁹⁷

Now again we see how the assumptions underlying the analogical moves are different. Imagine a military report assuring soldiers that it is really okay if they think blacks are animalistic inferiors who are immoral and simply wrong. Here is where the hierarchy of analogies becomes even more head-turning; the same report seems to indicate that resistance to women in the military had/has some legitimacy as well—and, indeed, women’s exclusion from combat roles is yet one more indicator of the acceptance of this ideology. Thus, anti-black animus is deemed a full-scale relic of the past and motivated wholly by prejudice and irrationality.⁹⁸ Conversely, anti-woman animus

92. *Same Sex Marriage*, *supra* note 69. Powell has since come out for repeal of DADT.

93. See DEPT OF DEF., *supra* note 66, at 13–14.

94. See *id.* at 131 (noting that, in an effort not to make those with particular religious beliefs feel rejected, “individual service members are *not* expected to change their personal . . . beliefs” upon repeal of DADT).

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.* at 82, 84.

is deemed old-fashioned, but legitimately motivated by “traditional”—and therefore sanctified—understandings of the different “roles” of men and women in the world and the supposedly different physical capacities for warfare.⁹⁹ Righteous anti-gay animus, however, is justified by reference to unchallengeable religious and moral objections that tautologically are backed up with the simple phrase from Jon Oliver of *The Daily Show*: “But he’s gay!”¹⁰⁰ Therefore, heterosexual military men’s enforced “tolerance” of gays in “their” army coexists with official military tolerance of homophobia and anti-gay animus. In the DoD report, anti-gay animus is explicitly addressed as legitimate, and its legitimacy is framed largely through reference to morality, religion, and traditional values.¹⁰¹

We might do better to make nuanced, historically specific comparisons rather than overarching analogies. In making the analogical case, it is hard to avoid the argument that gays are “like” blacks because, like skin color, gayness is something one does not choose; it is something one is born with through “no fault of one’s own.”¹⁰² Of course, the easy analogy conveniently obscures race itself as a social construction, a fiction. In addition, the analogy can’t help but reassert the troubling assumption of gayness as whiteness and blackness as heterosexual. This shores up the old opposition (all the women are white, all the blacks are men) that refuses to see not only the constructedness of these categories but of course also their overlapping or intersecting nature (e.g., some of those gay soldiers are black, Latino, etc.). Here, we cannot help but fear an analogical move that effectively causes black lesbian and gay service members to disappear. The easy and glib use of analogy can make racial and gender discrimination appear a thing of the past—a triumph of brave integrationism and tolerance over (now formally delegitimized) old school prejudice.

II. ACTS, IDENTITIES, IMMUTABILITIES

If the debate over the validity of analogies is slippery, it surely hinges on a strange bifurcation largely invisible in the earlier moment of racial integration: the status/conduct distinction. Unlike other “suspect class” categories, the question of causation (i.e., “what causes homosexuality?”) almost always enters into discussions of gay

99. DEPT OF DEF., *supra* note 66, at 86.

100. *The Daily Show*, May 14, 2009, *supra* note 6; see also DEPT OF DEF., *supra* note 66, at 84 (noting the “religious component to the issue of homosexuality”).

101. DEPT OF DEF., *supra* note 66, at 131.

102. See Nancy Levit, *Theorizing and Litigating the Rights of Sexual Minorities*, 19 COLUM. J. GENDER & L. 21, 57–58 (2010).

rights,¹⁰³ whereas for women and blacks, the discussion centers more on the *meanings* of race and gender in terms of access, identity, behaviors, etc. Gays are inevitably caught up in a public discourse that engages both cause and effect and inevitably links the two—particularly in a moment of biological obsessiveness.¹⁰⁴ As one analyst succinctly put it, “[p]rior to the 1940s, dismissal was based on conduct, that is, the commission of an act of sodomy; in the postwar era, the attention shifted to status or identity, that is, to sexual orientation.”¹⁰⁵

Many writers have thoroughly critiqued DADT around the dubiousness of the status/conduct distinction,¹⁰⁶ but it seems that the various versions of that faux “tolerance” (for example, love the sinner, hate the sin) have been largely supplanted by another—perhaps uniquely American—normative trope. This trope has transformed into a kind of everyday truth and has enormous consequences both legally and politically.

If marriage and military access are conjured as the Oz of queer liberation—and tolerance is most assuredly the good witch—then biological and genetic arguments are the yellow brick road, providing the route and the rationale for civil rights.¹⁰⁷ The medicalization of sexual identity, and the search for a cause, if not a cure, has a long and infamous history.¹⁰⁸ This history includes not only well-meaning attempts by social activists to create a safe life for same-sex desire

103. See *id.* at 61 (noting that this is certainly true of hearings around same-sex marriage cases).

104. See SUSAN GLUCK MEZEY, *QUEERS IN COURT: GAY RIGHTS LAW AND PUBLIC POLICY* 148 (2007).

105. *Id.* at 137.

106. Jonathan Pickhardt, *Choose or Lose: Embracing Theories of Choice in Gay Rights Litigation Strategies*, 73 N.Y.U. L. REV. 921, 931, 932 (1998). The status/conduct distinction seems specific to the language of DADT but has larger, albeit vaguer, iterations across the political spectrum (e.g., in appeals to “normalcy”: do not be too gay, too flamboyant, too gender non-normative). DADT repeal efforts therefore illustrate well the limits of tolerance in the absolute refusal to address homophobia by positing an “acceptable” (just the same as you and me) gayness counterposed to an the still available abject queer. The interviews excerpted in the recent DoD report put gay service members, unsurprisingly, on the side of discretion and fitting in. DEP’T OF DEF., *supra* note 66, at 5. Like interviews with long-term couples desirous of the marriage option, interviews with gay service members largely mimic the hegemonic frame of “fitting in” and “discretion” that is often explicitly juxtaposed to those few flamboyant gays who give the rest of them a bad name. *Id.* at 6. In the move to repeal DADT, both gay advocates and reluctant military personnel repeatedly assert that it is much ado about nothing: that after repeal, little will change because most gay service members “will continue to be discreet.” *Id.* at 85; David Wood, *Pentagon Asks for Repeal of ‘DADT’; Most Troops OK with Gays in Service*, POL. DAILY (Nov. 30, 2010), <http://www.politicsdaily.com/2010/11/30/pentagon-says-troops-ok-with-don't-ask-repeal-gates-urges-qui/>.

107. See Levit, *supra* note 102, at 54–55.

108. See HENRY L. MINTON, *DEPARTING FROM DEVIANCE: A HISTORY OF HOMOSEXUAL RIGHTS AND EMANCIPATORY SCIENCE IN AMERICA* 55 (2002); Levit, *supra* note 102, at 54–55.

through the designation of homosexuality as biologically predetermined, but also, more ominously, includes the long and sordid history of incarceration, medication, electroshock “therapy,” and numerous other attempts to rid the body (and mind) of its same-sex desires.¹⁰⁹

Notions of homosexuality as “inbred,” innate, and immutable were endorsed by a wide variety of thinkers and activists, including progressive reformers, such as Havelock Ellis, and not so progressive conservatives eager to assert same-sex love as nature’s mistake.¹¹⁰ Richard von Krafft-Ebing in the 1880s and Magnus Hirschfeld in the 1920s and 30s—both pioneer sexologists and general advocates of “toleration,” or at least decriminalization—came to believe in some notion of “innate” homosexuality, whether through theories of brain inversion or vague references to hormonal imbalances and other (unsubstantiated) anomalies.¹¹¹ These theories had little traction and no supporting evidence whatsoever. They were further undermined during the heyday of the early gay movement, which included a deep commitment to the depathologization and demedicalization of homosexuality, manifested in a long-term attempt to remove “homosexuality” as a disease category in the *Diagnostic and Statistical Manual of Mental Disorders* (DSM).¹¹²

Theories of heritability, genetic, or biological origins of “gayness” have ebbed and flowed during different historical and social moments, most obviously intersecting with the rise of eugenics and other determinist frameworks in the early part of the last century.¹¹³ There is no question, however, that the romance with biological and/or genetic explanations for sexual “orientation” (really, same-sex orientation as the search for the hetero gene or the straight hypothalamus goes unexamined) has ratcheted up in recent years. This is due in no small part to the combined force of the gay marriage debates and the increasing “medicalization” and “geneticization” of behavior and identity,

109. MINTON, *supra* note 108.

110. HAVELOCK ELLIS & JOHN ADDINGTON SYMONDS, *SEXUAL INVERSION* 307 (1897).

111. See MAGNUS HIRSCHFELD, *THE HOMOSEXUALITY OF MEN AND WOMEN* 365–81 (Michael A. Lombardi-Nash trans., 2000) (explaining various theories supporting the innate nature of homosexuality); R. V. KRAFFT-EBING, *PSYCHOPATHIA SEXUALIS WITH ESPECIAL REFERENCE TO THE ANTIPATHIC SEXUAL INSTINCT: A MEDICO-FORENSIC STUDY* 347–50 (F.J. Rebman ed., 12th ed. 1922).

112. See Richard Pillard, *From Disorder to Dystonia: DSM-II and DSM-III*, 13 *J. GAY & LESBIAN MENTAL HEALTH* 82 (2009) (explaining the rise of the gay movement and the subsequent removal of homosexuality as a mental illness from the DSM).

113. See JENNIFER TERRY, *AN AMERICAN OBSESSION: SCIENCE, MEDICINE, AND HOMOSEXUALITY IN MODERN SOCIETY* 297–314 (1999) (articulating the historical development and reaction to theories on the origin of homosexuality as biological, heritable, or genetic rather than as a personal choice); Garland E. Allen, *The Double-Edged Sword of Genetic Determinism: Social and Political Agendas in Genetic Studies of Homosexuality, 1940–1994*, in *SCIENCE AND HOMOSEXUALITIES* 242 (Vernon A. Rosario ed., 1997) (examining different motivations underlying genetic studies of homosexuality).

spurred on by the initiation of the Human Genome Project in 1989.¹¹⁴ This move to medicalize homosexuality furthered the already booming interest—both popular and scientific—in genetic bases for behavior, personality, and disease.¹¹⁵

Indeed, this turning of the century seems to provide a “perfect storm” moment in which the idea of immutability captured the public imagination. It is important to note that some of this impetus toward “hard” scientific evidence of homosexuality emerges at least in part as a reaction to the kinds of social/psychological theories that predominated in the 20th century and that attributed homosexuality to some version of stunted development, bad mothering, absent fathers, or failed Oedipal resolutions. In addition, this new moment is marked by the relatively unique phenomenon of openly gay scientists (e.g., LeVay, Hamer, and Bailey) conducting this research.¹¹⁶ Not only does this give an added legitimacy to the research, but many, if not all, of these researchers claim that they are doing this “for” gay people and in the service of furthering “tolerance,” if not gay rights.

No cultural moment sums it up like the otherwise quite illuminating debate that took place in August of 2007. LOGO—the all gay, all the time cable network—joined with the Human Rights Campaign to host the first ever Democratic primary presidential debate with primary candidates Hillary Clinton, Barack Obama, and all the other major and minor Democratic contenders.¹¹⁷ At one point, host Melissa Etheridge, a gay rights advocate, asked the inevitable “born with it” question to Bill Richardson who clearly gave a “wrong” answer when he responded that he did not know and even uttered the awful word “choice” in speaking about gay identities.¹¹⁸ Etheridge was quick to correct him, asking how or why anyone would choose to be gay? By the looks on the faces of Etheridge and the other hosts, Richardson had

114. See ROBERT ALAN BROOKEY, *REINVENTING THE MALE HOMOSEXUAL: THE RHETORIC AND POWER OF THE GAY GENE* (2002) (highlighting the idea that many believe homosexuality is not a choice); TERRY, *supra* note 113, at 40–73 (explaining how homosexuality is being medicalized); Allen, *supra* note 113 (describing how scientific advances, such as the Human Genome Project spurred an ever-increasing interest in the potential biological origin of homosexuality).

115. See BROOKEY, *supra* note 114; TERRY, *supra* note 113; Allen, *supra* note 113.

116. See J. MICHAEL BAILEY, *THE MAN WHO WOULD BE QUEEN: THE SCIENCE OF GENDER-BENDING AND TRANSSEXUALISM* (2003) (researching the biological nature of homosexuality); DEAN HAMER & PETER COPELAND, *LIVING WITH OUR GENES: WHY THEY MATTER MORE THAN YOU THINK* (1998); *Talking with Simon LeVay*, GUIDE, Feb. 2004, at 15–19.

117. Paul Brownfield, *Discomfort Amid Comfiness*, L.A. TIMES, Aug. 11, 2007, <http://articles.latimes.com/2007/aug/11/entertainment/et-ontv11>.

118. *LOGO Gay and Lesbian 2008 Democratic Presidential Forum* (Logo television broadcast Aug. 9, 2007), available at <http://www.youdecidepolitics.com/video/logo-visible-vote-08-democratic-presidential-forum/>.

clearly made an “error” and, sure enough, follow-up questions attempted to get him to rectify that error.¹¹⁹ Etheridge’s reaction feeds the insidious outcome of the genetic argument: that because it is genetic, people cannot help being gay (“born this way”) and therefore “tolerance” for this genetic aberration is the humane and appropriate response.¹²⁰ It further takes the focus off of homophobia—the real social ill—and puts it on the “victim” of genetics.¹²¹

Three years earlier, John Kerry made the same case in speaking of Dick Cheney’s lesbian daughter.¹²² “We’re all God’s children,” said Kerry when asked a “gay” question by the moderator.¹²³ Referring to Mary Cheney, the lesbian daughter of Vice President Dick Cheney, Senator Kerry said, “she would tell you that she’s being . . . who she was born as. I think if you talk to anybody, it’s not [a] choice.”¹²⁴ Strangely enough, it was George Bush who said, “I just don’t know,” once again demarcating the “choice” position as the conservative one!¹²⁵

Indeed, in our present political context, gay volition is like Voldemort—too dangerous even to be uttered.¹²⁶ There is, unarguably, an overwhelming “born with it” ideology afoot, encompassing gay marriage, gay genes, and gayness as a “trait.” This is used by both gay rights activists and anti-gay activists to make arguments for or against equality.¹²⁷ Central to recent claims for equal treatment has been a deep reliance on notions of heritability or biological determinations of sexual orientation. If there is one reigning ethos now, it is the belief that gays are “born that way.”¹²⁸ Causality is—of course—the wrong question and will only get muddled answers.

It is intriguing, however, that immutability arguments—so generally pervasive and utilized so deliberately in many legal and social battles, including the marriage battle and earlier arguments

119. *Id.*

120. *See id.*

121. *See id.*

122. *Transcript: Third Presidential Debate*, WASH. POST, Oct. 13, 2004, http://www.washingtonpost.com/wp-srv/politics/debatereferree/debate_1013.html.

123. *Id.*

124. *Id.*

125. *Id.*

126. *See* J.K. ROWLING, *HARRY POTTER AND THE SORCERER’S STONE* (1997) (developing a theme used throughout the book where people are afraid to actually mention Lord Voldemort by name, instead referring to him as “He-Who-Must-Not-Be-Named”).

127. *See* HAMER & COPELAND, *supra* note 116, at 197 (concluding that there is a gene relating to sexual orientation but, without corroboration, this observation can be used by either side to further arguments).

128. *See LOGO Gay and Lesbian 2008 Democratic Presidential Forum*, *supra* note 118 (noting the moderators’ attempt to get Bill Richardson to “correct” his “erroneous” belief that homosexuality is a choice).

to overturn the anti-sodomy laws—seem curiously absent when it comes to the discussions around DADT and open military service.¹²⁹ In the entire DoD report, there is not a single reference to issues of etiology, whereas, in the legal proceedings of gay marriage statutes or sodomy laws, immutability arguments stand front and center.¹³⁰ Indeed, it was more salient in earlier iterations of this debate. In the 1993 hearings around DADT, key witness and longtime sexuality scholar Gregory Herek addressed the “born with it” question rather carefully by arguing that

Regardless of whether they are homosexual, heterosexual, or bisexual, people generally experience their sexual orientation as an essential part of their core identity, their sense of who they are sexually. Scientific research has not established why anyone develops a particular sexual orientation, but we do know that whether they are heterosexual, homosexual, or bisexual, people generally do not choose their sexual orientation. Rather they discover it and come to understand it through a long developmental process.¹³¹

The question of what a gay “is” (i.e., the question of “identity”) marks this debate in ways that are contiguous with the immutability debates but not reducible to it.

Largely cohering around the “status/conduct” distinction—which is the cornerstone of DADT—and challenges to it, the identity question also crops up in the issue of “unit cohesion.”¹³² The current hegemonic arguments against inclusion (excluding for the moment ones that express a simple and unadorned hatred of homosexuals) focus on the issue of unit cohesion.¹³³ This is where the analogies of race and gender do make some sense, to a point. The argument is that many service members do in fact feel uncomfortable with, if not antagonistic toward, gays and therefore will not be able to function to the best of their ability if openly gay people serve beside them. This has

129. DEP’T OF DEF., *supra* note 66 (lacking any reference to immutability).

130. *See, e.g.*, Brief for American Psychological Association et al. as Amici Curiae Supporting Petitioners at 7–9, *Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02-102), 2003 WL 152338 (arguing that homosexuality is not a choice).

131. *Policy Implications of Lifting the Ban on Homosexuals in the Military: Hearings Before the Comm. on Armed Servs.*, 103d Cong. 245 (1993) (statement of Gregory M. Herek, Psychologist, American Psychological Association).

132. *See, e.g.*, *Testimony Relating to the “Don’t Ask, Don’t Tell” Policy: Hearing Before the Comm. on Armed Servs.*, 111th Cong. 8–9 (2010) (statement of General John J. Sheehan, Retired, United States Marine Corps).

133. *See* Merrill A. McPeak, Op-Ed., *Don’t Ask, Don’t Tell, Don’t Change*, N.Y. TIMES, Mar. 5, 2010, at A27.

prompted at least one judge, in ruling against DADT, to note that “[T]he known presence of homosexuals may disrupt the unit because heterosexual members may morally disapprove of homosexuals. This is an outright confession that ‘unit cohesion’ is a euphemism for catering to the prejudices of heterosexuals.”¹³⁴ Sometimes, the (fake) unit cohesion argument gives way to an alarming honesty, as in 2007 when General Peter Pace, then chairman of the Joint Chiefs of Staff, offered a different rationale. “I believe homosexual acts between two individuals are immoral and that we should not condone immoral acts.”¹³⁵ Of course, acts—specifically sexual acts—have always figured prominently in both gay rights acquisitions and discrimination itself.¹³⁶ Identities (such as they are) have been brought into being, policed, punished, and legitimated through reference to specific acts.

The unit cohesion argument is the military parallel to the marriage disintegration argument: let gays in the military and all hell will break loose, and brave (hetero) soldiers will no longer be brave.¹³⁷ Let gays get married and all hell will break loose, and hetero couples will find their own relationships—and indeed, the institution itself—wrecked on the shoals of homo love and lust.¹³⁸ Ah, would that it were so! But of course, gay activists on both issues respond almost identically: gays in the military will only enhance unit cohesion and military readiness by allowing for openness and—importantly—utilizing every willing soldier in the world-wide battle to make the world safe for heteronormativity and unfettered capitalism.¹³⁹ The argument that ultimately carried the day was that the military—and the nation—were suffering as a result of gay exclusion, as evidenced by the selective “stop loss” actions, when gays were deemed

134. Jennifer Gerarda Brown & Ian Ayres, *The Inclusive Command: Voluntary Integration of Sexual Minorities into the U.S. Military*, 103 MICH. L. REV. 150, 156, n.21 (2004) (alteration in original) (quoting *Able v. United States*, 968 F. Supp. 850, 858 (E.D.N.Y. 1997)).

135. Aamer Madhani, *Don't Drop 'Don't Ask, Don't Tell,' Pace Says*, CHI. TRIB., Mar. 13, 2007, http://articles.chicagotribune.com/2007-03-13/news/0703130169_1_immoral-homosexual-acts-gay-behavior.

136. Compare *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (holding a Texas statute criminalizing sodomy unconstitutional), with *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986) (upholding a Georgia statute criminalizing sodomy), *overruled by Lawrence*, 539 U.S. 558.

137. See Rich, *supra* note 26 (arguing that the rhetoric and logic against gays in the military are “ever loopier”).

138. *Id.* (describing a so-called “expert” witness testimony that same-sex marriage threatens traditional heterosexual marriage).

139. *E.g.*, Suzanne B. Goldberg, *Open Service and Our Allies: A Report on the Inclusion of Openly Gay and Lesbian Servicemembers in U.S. Allies' Armed Forces*, 17 WM. & MARY J. WOMEN & L. 547, 557–58 (2011) (discussing the neutral or positive effects of open service of gay and lesbian servicemembers in other countries).

too essential to discharge over a stupid policy and by the loss of so many Arab translators.¹⁴⁰ In other words, discrimination against gays is not just bad in a moral sense; it is actually bad for national security and the economy.¹⁴¹ And gays in marriage will not alter hetero marriage one bit, but will rather enhance the cachet of this rather tattered institution by pledging more bodies and lives to the altar of normative familialism.¹⁴²

The arguments against gays in the military not only claim gays will disrupt unit morale and effectiveness (by their very difference, their free-floating and unmoored desires, their effeminate or—alternately—their manly nature), but also claim they are not “fit for service.”¹⁴³ Underlying both these objections is an argument about performance: gays cannot perform soldiering because they are not heterosexual, because they are aberrant, because they are unmanly, because they are too manly, or because they are morally corrupt.¹⁴⁴ And the “pro” arguments generally respond in kind: gays are indeed fit for service.¹⁴⁵ They may not be heterosexual but they are fighting machines—ready to die for God and country like any other normal, red-blooded American who signs up to serve.¹⁴⁶ “Pro” arguments are filled with tales of brave gay service members and hetero service members supporting their brethren because they have seen firsthand how very soldierly they actually are.¹⁴⁷ Because the military is seen as a “special” institution—not one open to all on a democratic basis but rather the few, the chosen, the Marines—the basic equality claims are invoked less frequently than, say, around marriage or employment rights. “Just as long as he is a good fighter/soldier” is the dominant supportive trope in DADT repeal discourse and one that simply cannot work the same way for the marriage question.¹⁴⁸

140. See *Testimony Relating to the “Don’t Ask, Don’t Tell” Policy: Hearing Before the Comm. on Armed Servs.*, 111th Cong. 45 (2010) (statement of Sen. Carl Levin, Chairman, S. Comm. on Armed Servs.).

141. See Nathaniel Frank, *Why We Need Gays in the Military*, N.Y. TIMES, Nov. 28, 2003, at A43; Michael Schewel, *The Economics of Discrimination*, WASH. POST, July 9, 2006, <http://www.washingtonpost.com/wp-dyn/content/article/2006/07/07/AR2006070701105.html>.

142. See RAUCH, *supra* note 81, at 94.

143. See, e.g., Walter John Krygowski, Comment, *Homosexuality and the Military Mission: The Failure of the “Don’t Ask, Don’t Tell” Policy*, 20 U. DAYTON L. REV. 875, 919 (1995) (stating that DADT promotes this view).

144. See Robert I. Correales, *Don’t Ask, Don’t Tell: A Dying Policy on the Precipice*, 44 CAL. W. L. REV. 413, 463 (2008).

145. See, e.g., Jim Scheye, *Gays and Lesbians Are Fit for Full Duty*, SUN SENTINEL (Fort Lauderdale), Aug. 3, 2010, http://articles.sun-sentinel.com/2010-08-03/news/fl-gay-lesbian-forum-0803-20100803_1_gays-openly-lesbians.

146. See *id.*

147. See, e.g., *id.* (describing anecdotal accounts of such bravery).

148. See *id.*

Indeed, DADT hinges precisely on this status/conduct distinction: that one can “be” gay without “acting” (performing) gayness.¹⁴⁹ But what is often ignored in this discussion is that acting “not gay” (but being gay) requires a performance of another kind, and not simply the performance of the closet or of dissimulation. If gayness is conduct unbecoming an officer, then straightness is conduct becoming an officer, and straightness is not just marked through sexual acts but through the displacements of those acts into soldiering, into killing, into male bonding, and into brotherhood.¹⁵⁰

III. BEYOND GUNS AND TAFFETA

In the words of the late great Peggy Lee, “is that all there is?”¹⁵¹ And how significant have changes in the larger cultural milieu been to the decision to—finally—get rid of “Don’t Ask, Don’t Tell”? While surely the relationship between current ideologies concerning “gayness” and military policy is not a singular and linear one, changing ideologies of immutability, identity, citizenship, and public perception have played a part in the push to integrate. The polls have consistently revealed a growing majority in favor of open service and, to a much lesser extent but still significant, same-sex marriage.¹⁵² Many of our allies have had an open policy for years, with no “dire consequences” for morale or military effectiveness.¹⁵³ And, surely, the more general cultural shift—reflected in polls but also of course in the by now banal visibility of LGBT folks in everyday life—makes it more tenable to repeal DADT (“the American people want this”) and pushes the military to match more closely the tenor of the times.¹⁵⁴ Recent court rulings—easier now in the wake of *Lawrence v. Texas*—have also prompted the President to move on this, lest he seem both behind the times and out of sync with current legal reasoning.¹⁵⁵

Freedom to marry and freedom to serve are the watchwords of the same-sex marriage and gay military service movements; both rely on classic liberal egalitarian and civil rights arguments to make the case for gaining access to these two social institutions.¹⁵⁶ Both discourses depend (variously) on notions of immutability, discretion, and

149. See Amy E. Pizzutillo, Note, *A Perry, Perry Poor Policy Promoting Prejudice Rebuked by the Reality of the Romer Ruling: Thomasson v. Perry*, 42 VILL. L. REV. 1293, 1315 n.114 (1997) (noting the status/conduct distinction).

150. See Krygowski, *supra* note 143, at 931 n.487.

151. PEGGY LEE, *Is that All There Is?*, on IS THAT ALL THERE IS? (Capitol Records 1969).

152. *Gay and Lesbian Rights*, *supra* note 18.

153. Goldberg, *supra* note 139.

154. See *Gay and Lesbian Rights*, *supra* note 18.

155. See, e.g., Correales, *supra* note 144, at 450–51.

156. See, e.g., RICHARDS, *supra* note 25, at 6–7 (comparing the civil rights and gay rights movements).

blending in to argue that gays in the military, or gays in marriages, will not “damage” the institution itself, nor even fundamentally alter it.¹⁵⁷ And, for many activists and writers—given the centrality of military service and marriage to national status and citizenship—these two represent the nail in the coffin of institutionalized homophobia and the sign of full inclusion.¹⁵⁸ Even though anti-military activists have questioned our focus on repealing DADT, it is the marriage movement that has elicited much more robust internal gay debate.¹⁵⁹ There are many reasons for this discrepancy, but surely one is the simple fact that repealing DADT has direct consequences for those already serving in the military, and doing so in conditions that place them in positions of great vulnerability.¹⁶⁰ In other words, the military is an *employer* and, moreover, an employer of largely working-class and minority youth.¹⁶¹ While the economic benefits of married life have been well documented, entrance into it has largely been argued on intimate and symbolic grounds.¹⁶²

While marriage and the military differ along these and other axes, they both retain enormous symbolic importance, particularly in their shared iconicity around citizenship and in the ways in which victory in these venues is seen by so many to signal a new era of tolerance and acceptance.¹⁶³ The two—tolerance and acceptance—are inevitably linked in American discussions of rights and difference. We tend to think there is an easy transition from tolerance of the despised minority to a broader and deeper acceptance of that same group.¹⁶⁴ We learn to tolerate and then we come to accept.¹⁶⁵ Or so the story goes. But who is this “we” that tolerates? Who has the right to “accept” another? No civil rights movement worthy of the name has banked its future on being tolerated or accepted.¹⁶⁶ Women did not demurely request tolerance; they demanded voting rights, pay

157. DEP’T OF DEF., *supra* note 66, at 5; RICHARDS, *supra* note 25, at 7.

158. See RAUCH, *supra* note 81, at 94–95; RICHARDS, *supra* note 25, at 152–53.

159. Jane S. Schacter, *The Other Same-Sex Marriage Debate*, 84 CHI.-KENT L. REV. 379, 382 (2009) (describing LGBT internal debate over same-sex marriage).

160. See, e.g., *Policy Implications of Lifting the Ban of Homosexuals in the Military*, *supra* note 131, at 255 (asserting that the DoD believes allowing homosexuals to serve would cause problems).

161. Amy Lutz, *Who Joins the Military?: A Look at Race, Class, and Immigration Status*, 36 J. POL. & MILITARY SOC. 167, 184 (2008) (explaining over-representation of African Americans and working class in the military).

162. See, e.g., RAUCH, *supra* note 81, at 7 (describing the symbolic meaning of marriage).

163. See *id.*; RICHARDS, *supra* note 25.

164. See HANS OBERDIEK, *TOLERANCE: BETWEEN FORBEARANCE AND ACCEPTANCE* 152 (2001) (describing tendency to consider tolerance as almost acceptance).

165. See *id.*

166. See Malhotra, *supra* note 60 (discussing how “tolerance” leaves room for moral disapproval and that “[w]e tolerate those we consider inferior”).

equity, and freedom from sexual violence.¹⁶⁷ African Americans continue to struggle not for some bizarre “acceptance” of their skin tone, but for full and deep integration and inclusion in the American dream.¹⁶⁸ Disabled Americans do not want to be tolerated; they want streets made accessible to them and laws strong enough to protect them from discrimination.¹⁶⁹ Immigrants—Jews, Irish, Italians, and Latinos—who came into this country by the millions and over the hundreds of years of U.S. history—were often escaping persecution and discrimination.¹⁷⁰ My grandparents were among them, Russian and Polish Jews leaving a world of pogroms and second-class lives. They, like today’s immigrants, came wanting—and often demanding—not simply respite from the tyranny of the majority but a robust integration into this promising new land.¹⁷¹ I cannot imagine that the word “tolerance” was central to their immigrant vocabulary. To live freely and fully is not to be “tolerated,” but to be included, even sometimes to be celebrated. The language of tolerance is, in fact, antithetical to the goals of civil rights.¹⁷² The ethical alternative to discrimination and bigotry is not tolerance, but rational thought and a commitment to equality.¹⁷³

For many gay liberals and their allies, tolerance and acceptance have been the dominant notes in the ongoing aria of American history.¹⁷⁴ Like so many of the arguments for ending the ban on same-sex marriage, proponents of ending the ban on gays in the military advance a sameness argument (i.e., we just want to serve our country, or we just want to raise a family like everyone else). Colonel Margarethe Cammermeyer, a retired lesbian army officer who successfully challenged the military’s ban on homosexuals stated,

167. Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 948, 977 (2002).

168. See Mark Johnston, *From Exclusion to Integration: The N.A.A.C.P.’s Legal Campaign Against Educational Segregation*, 2 VOCES NOVAE: CHAPMAN U. HIST. REV. 203, 217 (2011) (describing the NAACP’s ongoing efforts to achieve educational equality).

169. See *AAPD Policy Positions*, AM. ASS’N PEOPLE WITH DISABILITIES, http://www.aapd.com/site/c.pv11IkNWJqE/b.5606943/k.669B/AAPD_Policy_Positions.htm (last visited Nov. 2, 2011).

170. Michael English, Comment, *Distinguishing True Persecution from Legitimate Prosecution in American Asylum Law*, 60 OKLA. L. REV. 109, 109 (2007).

171. See, e.g., Marcos Restrepo, *Across the U.S., Immigrant Advocates Demand Obama Terminate Secure Communities*, FLA. INDEP. (Aug. 16, 2011, 9:47 AM), <http://florida.independent.com/43449/obama-secure-communities/> (describing immigrants’ demands for the termination of the Secure Communities program so that they can pursue the American dream).

172. See Malhotra, *supra* note 60 (discussing how tolerance implies inferiority and consequently supports inequality).

173. See *id.*

174. See Warner, *supra* note 34, at 159.

[w]hat I hope to represent is a part of the normality of being homosexual, of not being in leather or shaving my hair, but rather showing how much we are all alike If people can see the sameness of me to you, then perhaps they won't have the walls that makes it so they have to hate us without a cause.¹⁷⁵

It is also the case that the movement for open military service is predicated on an understanding of “gayness” as a discrete, knowable, legible, and utterable identity.¹⁷⁶ To oppose DADT means you assume there is something clear to be asked and to be told. This is, undeniably, one of the persistent dilemmas of civil rights legislation and litigation around stigmatized minorities: how to gain rights, access, and freedoms while at the same time not enshrining (and creating) the very categories of identity that many believe to be partially responsible for the very abridgement of those freedoms. What happens, in other words, when Foucault goes to court?

For many queer radicals, on the other hand, the present—with its display of gay identity as a fashion accessory, its commodification, its cleaning up and dumbing down—represents the death knell of a more vibrant gay sensibility.¹⁷⁷ There is much truth to this, and I myself have added to the fears of what this kind of liberal inclusion excludes. But perhaps we are working with too weak a notion of inclusion or integration that does not distinguish it substantively enough from assimilation. Indeed, for gays and many others who cohere around a minority identity, both these terms have come to have a quite negative valence, as “inclusion” becomes the codeword for a kind of liberal “tolerance” that broaches no challenge to heterosexual dominion even as it lets a few queers sit at the table.¹⁷⁸ There is a difference, however, between a robust, substantive integration and a thoughtless, commodified assimilation. For many gays, these are often confused. We so fear/reject the relentless project of commodified assimilation that the integrationist project gets tossed out in the process of resisting assimilation.¹⁷⁹

175. Timothy Egan, *Dismissed from Army as Lesbian, Colonel Will Fight Homosexual Ban*, N.Y. TIMES, May 31, 1992, at 18.

176. Rich, *supra* note 26.

177. E.g., Nadia Guidotto, *Cashing in on Queers: From Liberation to Commodification*, CANADIAN ONLINE J. QUEER STUD. EDUC., <http://jqstudies.library.utoronto.ca/index.php/jqstudies/article/view/3286/1415> (last visited Nov. 2, 2011).

178. See Misty Harris, *Coming Out Can Still Be a Challenging Process: Despite Some Progress, There's Still a Long Way to Go*, MONTREAL GAZETTE, July 27, 2011, <http://www.montrealgazette.com/sports/Coming+still+challenging+process/5163856/story.html> (“Tolerance was an important step, but we need to go farther; it's not much of a compliment to say ‘I can tolerate you’ . . .”).

179. See, e.g., Guidotto, *supra* note 177 (rejecting gay commodification).

Just as “tolerance” leaves a bitter taste in the mouths of many gays, it is vital to remember that justice is not identical to equality, just as gay rights may not fully institute gay belonging.¹⁸⁰ And while there is healthy debate within the gay community on goals and strategies, it is nevertheless the case that while any individual gay person may not care much about pride or sexual freedom (and another may care a great deal), all gays desire equal treatment and equal opportunity and most deeply value inclusion.¹⁸¹

Would “victory” be signaled by formal moves towards equality and equal access (e.g., marriage rights, equal employment legislation) or is a more abstract and elusive “liberation” being sought? Is “tolerance” and “acceptance” all that can be hoped for, or is a more vivid “rainbow” of civic inclusion the golden ring? And what would a “robust integration” that eschews simple assimilation but values the challenge offered by social and sexual difference actually look like?

The symbolic and iconic value of victories such as the two “m’s” of the military and marriage are heady indeed but, I would argue, not singularly or unambiguously “positive.” Surely removing structural barriers and challenging legalized discrimination are necessary, but not sufficient, conditions for full civic inclusion. But, by framing these gains in a discourse of tolerance, we set the bar too low. By avoiding thornier and more contentious and more challenging questions (e.g., how might full inclusion undermine the heteromascularity at the heart of military culture? What can queer kinship say to bourgeois familialism? How can we detach acts from identities and still embrace egalitarian struggles?) we allow animus new tributaries and byways through our cultural waterways. Repeal, enjoin, sign up, and pledge your troth to God and country and legally wedded spouse. But do not imagine that this is all that we can imagine. It just might be that an army of lovers can only make war, not the queer new world that our electric bodies demand.

180. See Schacter, *supra* note 159, at 395 (describing a proposal that would have afforded homosexuals rights but avoided assimilation).

181. See, e.g., *About GLAAD*, GAY & LESBIAN ALLIANCE AGAINST DEFAMATION, <http://www.glaad.org/about> (last visited Nov. 2, 2011) (describing the mission of GLAAD to advance equality).