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Exposing the Perversions of Toleration: The Decriminalization of Private Sexual Conduct, The Model Penal Code, and the Oxymoron of Liberal Toleration

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EXPOSING THE PERVERSIONS OF TOLERATION: THE DECRIMINALIZATION OF PRIVATE SEXUAL CONDUCT, THE MODEL PENAL CODE, AND THE OXYMORON OF LIBERAL TOLERATION

*Larry Catá Backer** **

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[M]ankind prefers to see gestures rather than to hear *reasons*.

*Friedrich Nietzsche*¹

I. PRELUDE

Gay men and lesbians, sexual nonconformists,² are tolerable and tolerated in American society and under American law only if they keep their identities submerged and participate in their own public obliteration.³ The sexual-conduct taboos of dominant culture mark sexual intercourse other than heterosexual vaginal intercourse within a monogamous marriage as a breach of a basic, clear, and immutable Divine commandment.⁴ “For gays,

1. FRIEDRICH NIETZSCHE, *THE ANTICHRIST* ch. 54 (1888), reprinted in *THE PORTABLE NIETZSCHE* 568, 639 (Walter Kaufmann ed. & trans., 1968).

2. Terminology has become a touchy subject in recent years, and rightly so. Janet Halley has noted that “[r]ecent academic writing on homosexuality almost always begins with an acknowledgment that the words we use to describe same-sex love inevitably reflect and shape our political commitments on this volatile subject. This article can be no exception.” Janet E. Halley, *The Politics of the Closet: Towards Equal Protection for Gay, Lesbian, and Bisexual Identity*, 36 *UCLA L. REV.* 915, 916 n.5 (1989); see also Jeffrey G. Sherman, *Speaking Its Name: Sexual Orientation and the Pursuit of Academic Diversity*, 39 *WAYNE L. REV.* 121, 122 (1992) (noting that the selection of terminology is a potentially tedious exercise). I use the term “sexual nonconformists” in an attempt to find a relatively neutral term (neutral, if only because rarely used) for other, more problematical, terms: gay, lesbian, homosexual, and bisexual (used either as an adjective or a noun). The term is meant to connote another species of nonconformists, modern day American Protestants, whose forebearers were originally viewed as heretics by the dominant European Catholic majority, and despised and suppressed as such, and who frequently came to this country in search of the right to affirm their religious identity in public.

3. Marc A. Fajer, *Can Two Real Men Eat Quiche Together? Storytelling, Gender-Role Stereotypes, and Legal Protections for Lesbians and Gay Men*, 46 *U. MIAMI L. REV.* 511, 587-91 (1992) (describing the phenomenon of “flouting,” which from the perspective of heterosexual society means being seen or heard as anything other than a neutered individual); Randy Von Beitel, *The Criminalization of Private Homosexual Acts: A Jurisprudential Case Study of a Decision by the Texas Bar Penal Code Revision Committee*, 6 *HUM. RTS.* 23, 44-45 (1976) (describing the fear of flouting by gay men and lesbians as a source of the reticence of Texas lawmakers to decriminalize sodomy in the 1970s). I note, at the outset, that it is not the purpose of this article to engage in victim talk, which, as Martha Minow recently suggested, “blurs evaluations of degrees of harm and degrees of responsibility in both the lives of individuals and the larger structures of society.” Martha Minow, *Surviving Victim Talk*, 40 *UCLA L. REV.* 1411, 1413 (1993).

4. See *Leviticus* 18:22 (“Thou shalt not lie with mankind, as with womankind; it is an abomination.”); *Leviticus* 20:13 (“And if a man lie with mankind, as with womankind, both of them have committed an abomination: they shall surely be put to death; their blood shall be upon them.”). It is interesting to note that *Leviticus* also enjoins, on pain of death, a variety of other actions, all of which modern religious Christians tend to ignore. For example, working on the Sabbath, *Leviticus* 23:30, and cursing your parents, *Leviticus* 20:9, are both capital offenses. Some of these offenses remain of interest to American lawmakers. For an interesting discussion on this point, see generally MEL WHITE, *STRANGER AT THE GATE* (1994) (attempting a Christian reinterpretation of Biblical imperatives from a modern perspective).

the taboos mark them as unspeakably gross and disgusting—like shit.”⁵ As far as the dominant culture is concerned, at least in its popular manifestation:

A major problem exists between heterosexuals and homosexuals. However, a solution is at hand. Science has come to the rescue once again. The discovery that the DNA of homosexuals is different than normal DNA is a major breakthrough. This will allow expectant women to have a DNA test performed on their unborn baby. If the results show the DNA pattern of a homosexual, she can simply abort the abnormal child.⁶

That seems to be the lesson of twenty-five years of liberal toleration. That is what continues to stymie the promise of a positive public existence for sexual nonconformists which appeared so attainable in the aftermath of the June 1969 police raid on the Stonewall Bar in New York City.⁷ That is our inheritance from those modern sources of western sexual “liberation theology,” at least as they touch directly on the criminal law⁸—the

5. RICHARD D. MOHR, *GAYS/JUSTICE: A STUDY OF ETHICS, SOCIETY, AND LAW* 100 (1988).

6. Chuck Brinson, *Draw the Line*, *TULSA WORLD*, Oct. 2, 1993, at News-12 (letter to the Editor); accord William A. Henry III, *Born Gay?—Studies of Family Trees and DNA Make the Case That Male Homosexuality Is in the Genes*, *TIME*, July 26, 1993, at 36, 39 (quoting “Thomas Stoddard, director of the Campaign for Military Service: ‘One can imagine the science of the future manipulating information of this kind to reduce the number of gay people being born.’”).

7. The raid on the Stonewall Bar and the ensuing riot mark the birth event of the modern gay and lesbian movement, the anniversary of which is now celebrated as Gay Pride Day. DENNIS ALTMAN, *THE HOMOSEXUALIZATION OF AMERICA* 113 (1982).

8. The effect, obviously, is not limited to the criminal law, but pervades all aspects of the legal rights of the “immoral.” An examination of these effects lies outside the scope of this article. For a discussion of these issues in other contexts, see, e.g., *Developments in the Law—Sexual Orientation and the Law*, 102 *HARV. L. REV.* 1508, 1554-1670 (1989). Those issues include employment, see *Gaylord v. Tacoma Sch. Dist. No. 10*, 535 P.2d 804, 805 (Wash. 1975) (firing of a gay teacher on grounds of immorality upheld), *cert. denied*, 434 U.S. 879 (1977); marriage, see *Baehr v. Lewin*, 852 P.2d 44, 48 (Haw. 1993) (discussing the constitutionality of suppressing nontraditional marriages); adoption, see *FLA. STAT. § 63.042(3)* (1993) (prohibiting gay men and lesbians from adopting); child custody (even of one’s own children), see Elizabeth Kastor, *The Battle for the Boy in the Middle; Little Tyler’s Mom Is a Lesbian, so Grandma Got to Take Him Away*, *WASH. POST*, Oct. 1, 1993, at C1 (reporting that a judge determined the mother’s life with her lover was immoral and illegal and on that basis awarded custody of her son to the grandmother); *Mother’s Lesbianism Cited as She Loses Custody Case*, *N.Y. TIMES*, Oct. 7, 1993, at B14 (reporting that the custody of two children was awarded to the father because “their mother’s lesbian lifestyle was bad for [the youngsters],” even though the mother had had custody of the children since the 1988 divorce); immigration, see *Boutillier v. Immigration & Naturalization Serv.*, 387 U.S. 118, 120-25 (1967) (holding that Congress, in adopting the Immigration and Naturalization Act, intended to exclude homosexuals from admission under the category “psychopathic personality”); insurance, see, e.g., Karen A. Clifford & Russel P. Iuculano, *AIDS and Insurance: The Rationale for AIDS-Related Testing*, 100 *HARV. L. REV.* 1806, 1806 (1987) (contending that laws intended to ensure fair protection of AIDS victims are endangering the financial stability of insurance carriers); and housing, see *Mister v. A.R.K. Partnership*, 553 N.E.2d 1152, 1160

Wolfenden Report,⁹ and the Model Penal Code.¹⁰

Unfortunately for the beneficiaries of these methodologies of “liberation,” the Wolfenden Report and Model Penal Code are themselves instruments of perversion.¹¹ They provide an excellent example of the manner in which heterosexual liberal discourse can, by invoking such high concepts as toleration, conceal multiple forms of subjugation of sexual nonconformists. I use these pillars of liberal toleration to examine a subtext of modern toleration—that decriminalization requires those whose conduct is thus liberated to continue to act as if decriminalization never occurred. As long as sexual nonconformists continue to *act* as if they are engaging in criminal acts—furtively, secretly, always in fear of detection—their conduct will not be subject to criminal penalty. The perversity of this liberation is evident when one considers that, at this point, a reader might be tempted to dismiss the argument that all acts of sexual nonconformity

(Ill. Ct. App. 1990) (holding there was no right to rent in violation of fornication statute); State v. French, 460 N.W.2d 2, 23 (Minn. 1990) (refusing to rent to an unmarried couple did not violate law); Matthew J. Smith, *The Wages of Living in Sin: Discrimination in Housing Against Unmarried Couples*, 25 U.C. DAVIS L. REV. 1055, 1065-68 (1992).

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

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

11. It is clear that the liberal ideology of toleration is perversely contradictory. It is possible, however, that the contradictions I uncover in this article are functional and not dysfunctional. Whether some action or concept is functional or dysfunctional would appear to turn on its goal. Therefore, if we were to assume that the function of the law is to legitimate the exercise of power by dominant social groups, then ideological contradictions would be functional. In this sense, my argument could be turned on its head—I show not that liberal toleration is not working, but how the force of cultural oppression works or functions in this particular and concrete context, by weaving ideological contradictions. In any case, dysfunction can also operate on a less theoretical plane. It can also encompass the contradiction between the advertised function of the law—that which we are supposed to believe—and the subtexts of that functioning, of which we are supposed to remain blissfully unaware. The advertised goal-toleration doctrine is the protection of individual liberty; its subtext is the ability to regulate and suppress the individual liberty of certain disfavored groups. In that sense, at least, notions of liberal toleration explored in this article are dysfunctional. I am grateful to Professor Stephen Feldman for this insight. For a discussion of this notion in the context of civil rights law, see *infra* note 25.

must be kept hidden on the theory that public displays of heterosexual vaginal sex between married people are not tolerated either. Even Bill and Hillary Clinton must act furtively should they engage in sexual intercourse in a public park or in their car, or risk the application of the criminal law.¹² But this analogy misses the point. Society approves of public expressions short of actual heterosexual sexual acts, such as solicitations for sex at one's home, hand holding, and kissing, while society condemns and punishes similar behavior among gay men and lesbians. It is to that quite significant extent that the modern trend of decriminalizing sexual acts offers little; society remains free to criminalize presexual acts with respect to which it is indifferent when men and women engage in such acts.

I can best illuminate the extent of the perversity of the mainstream liberal toleration embedded in the Wolfenden Report and the Model Penal Code by relating a parable—The Parable of the Dusty House. The parable invites the reader to adopt the viewpoint of the “protagonist,” the creature of the parable. In the context of the parable, this article examines a single example of the deleterious effect of the almost unconscious acceptance of the perversity of liberal toleration as it evidences itself in the criminal law of sexual conduct. I use the examination to argue that current notions about protecting society from offensive conduct are fundamentally incompatible with freeing consensual sexual conduct from criminal regulation. Indeed, my basic theme is that inherent in modern liberal notions of decriminalization of sexual nonconformist conduct is the understanding that society has given little and purchased a great deal. In return for removing the formal threat of severe criminal sanction for *hidden and discrete* acts (which society had rarely enforced in any case), dominant heterosexual society has sought the quiescence of sexual nonconformists—their tacit agreement to hide themselves from view and spare the beneficent dominant culture the disgust of any type of public presence.

For purposes of illumination,¹³ I will focus on the scheme of sexual regulation of “deviate sexual intercourse” the Model Penal Code proposes,¹⁴ and particularly, its prohibitions against lewdness and solicitation.¹⁵

12. But note that enforcement of state proscriptions of public sexual activity may vary depending on the sex of the couple caught. Thus, a heterosexual couple caught engaging in intercourse in a parked car might be lectured (“Why don’t you folks rent a motel room?!”) rather than cited for something like outraging public decency, or a similar offense, usually a misdemeanor. *See, e.g., CAL. PENAL CODE* § 647(a) (West Supp. 1994) (engaging in acts of lewdness). Two men caught under the same circumstances would more likely be charged with a felony. *See, e.g., Carter v. State*, 500 S.W.2d 368, 370 (Ark. 1973) (concerning two adult males who were convicted of sodomy). They would be far less likely to be lectured and sent home.

13. The notion inherent in the Wolfenden Report, that private immoral conduct ought to be beyond the reach of the law as long as it stays private, affects a number of areas, all of which are beyond the scope of this article. *See supra* note 8.

14. MODEL PENAL CODE § 213.0(3) (1980). The term “deviate sexual intercourse” is defined as

The Parable of the Dusty House is explored from the perspective of the creature in part III entitled: "Be Yourself . . . But Keep the Shades Drawn." In part IV, "What We Preach," I examine the state of regulation in light of the theories giving rise to the deregulation of private conduct.

The state of regulation is recast again in part V entitled: "What We Practice," wherein I briefly examine the flow of the common statutory reality—the manner in which private conduct has been "deregulated" but "public" conduct has been "reregulated." I discuss the effect of this public/private distinction in part VI, "What We Really Preach." This is perhaps best read as one of the morals of the Parable of the Dusty House. Shifting the interpretive focus of the parable from that of the creature to that of the object of the creature's attention, the dust provides the moral. The dust is neither animate nor worth knowing as other than a nuisance. It does not speak with the voice of the creature.

I consider another moral of the Parable of the Dusty House in part VII, "An Ending But Not a Conclusion." Certain groups, especially political groups, tend to appear to tolerate those whose conduct or beliefs deviate from the dominant group's cultural ideal. Thus, to a substantial extent, toleration is by its nature fundamentally intolerant. Toleration arises from a political inability to continue suppressing conduct, not from any sense that the conduct tolerated is worthy of respect. Toleration in this guise is a grudging activity; an easily-dissipated activity. It amounts to a forbearance

"sexual intercourse per os or per anum between human beings who are not husband and wife, and any form of sexual intercourse with an animal." *Id.* This is a broader phrase than sodomy, and is intended to be more inclusive. For a discussion of the meaning of the phrase as used in the Model Penal Code, see MODEL PENAL CODE § 213.2 cmt. 1. For a general discussion of the evolution of the term "sodomy," see Anne B. Goldstein, *History, Homosexuality, and Political Values: Searching for the Hidden Determinants of Bowers v. Hardwick*, 97 YALE L.J. 1073, 1081-86 (1988); Janet E. Halley, *Misreading Sodomy: A Critique of the Classification of "Homosexuals" in Federal Equal Protection Law*, in BODY GUARDS: THE CULTURAL POLITICS OF GENDER AMBIGUITY 351 (Julia Epstein & Kristina Straub eds., 1991); Lawrence R. Murphy, *Defining the Crime Against Nature: Sodomy in the United States Appeals Courts 1810-1940*, 19 J. HOMOSEXUALITY 49, 53-54 (1990).

15. Some attention has also been paid to the general closeting effect of suppressing public conduct while trumpeting the liberation of private conduct. See, e.g., Joseph J. Bell, *Public Manifestations of Personal Morality: Limitations on the Use of Solicitation Statutes to Control Homosexual Cruising*, in HOMOSEXUALITY AND THE LAW 97, 97-114 (Donald C. Knutson ed., 1980). In contrast, current antidiscrimination strategy focuses more on the elimination of the last remnants of suppression of private conduct through enforcement of sodomy statutes, and on recognition of gay and lesbian relationships. See, e.g., William B. Rubenstein, *We Are Family: A Reflection on the Search for Legal Recognition of Lesbian and Gay Relationships*, 8 J. L. & POL. 89, 90-105 (1991) (discussing perspectives on the changing treatment of the family under the law); Heidi A. Sorensen, Note, *A New Gay Rights Agenda? Dynamic Statutory Interpretation and Sexual Orientation Discrimination*, 81 GEO. L.J. 2105, 2107 (1993) (arguing the merits of dynamic statutory interpretation to ameliorate the sexual orientation bias of statutes dealing with immigration, sodomy, and family issues). In any case, the people most interested in reformulating the dysfunction of the Wolfenden formulation appear to be, naturally enough, those who feel the negative effects of the dysfunction. For them, the search for equality and positive toleration continues despite the reverse progress of closeted acceptance.

from suppression wherein dominant society preserves as legitimate its power to express revulsion at the practices of sexual nonconformists—and to manifest these expressions through the law.¹⁶

Toleration continues to speak the language of disapproval when discussing the sexual practices and inclinations it has liberated. At least as tolerance manifests itself in its treatment of sexual nonconformists, American society embarked forty years ago on a toleration of intolerance. Sexual nonconformity, particularly sexual conduct between people of the same sex, falls far beyond the limits of traditional American sexual conduct norms—far enough to permit suppression. That same-sex conduct is no longer actively suppressed is a mark of the indecisiveness of the sexually dominant group in America as that group weighs the acceptability of the types of sexual conduct those sexual nonconformists now practice more openly. However, failure to suppress does not imply tolerance. That is the trap for those who place such importance on eliminating the sodomy laws as a means to acceptance and toleration. Such progress is ephemeral and insubstantial while society is free to use the law to discourage private immorality and to suppress its public expression.

II. THE PARABLE OF THE DUSTY HOUSE

Once upon a time, there was a creature who loved clean things. This creature detested what appeared to it to be small things with which it shared its world—what the creature called dust. As far as the creature knew, the dust flew about, carried by the wind and the creature's movements, and appeared to contaminate everything it touched. The creature convinced itself that the dust could not be good and was probably bad. The creature was sure that the dust was responsible for fatal diseases and bad conduct.

The creature made no attempt to communicate with what it called the dust; after all, it was insignificant and so unlike the creature as to hardly be deemed Life. And so, to separate itself from this dust, the creature decided to build a house. It was a beautiful house, meant to be clean and, therefore, dust free, with windows looking out over a great expanse. But it grew stuffy in the house, and the creature opened the windows one afternoon. To its horror it discovered that by nightfall the house had filled with dust. Dust covered everything. The creature thought and thought, finally

16. Though beyond the scope of this article, contrast the relative ease with which society permits the decriminalization of sodomy with society's resistance to permitting the recognition of marriages between people of the same sex. See, e.g., William N. Eskridge, Jr., *A History of Same Sex Marriage*, 79 VA. L. REV. 1419, 1485-1510 (1993); William Rubenstein, *The Stonewall Anniversary: 25 Years of Gay Rights*, HUM. RTS., Summer 1994, at 18, 18-19; Steven K. Homer, Note, *Against Marriage*, 29 HARV. C.R.-C.L. L. REV. 505, 505-06 (1994).

hitting upon a solution. Abandoning the old dusty house, the creature built a new house. The windows of the house were hermetically sealed. An advanced climate control system with multiple filters circulated air, and the entryways contained various dust catching devices. At last, the creature thought, it could now escape contamination of the house. However, by nightfall of the first day, the creature discovered that the house was again dusty. The amount of dust had been significantly reduced from that in the old house, but if it looked carefully, the creature could see dust everywhere.

The creature was at its wits' end. Technologically speaking, the creature could do nothing further to eliminate the dust entirely. Constant cleaning was no real help either. While cleaning would remove the dust temporarily, other dust would soon replace it. And the creature could never be sure that it had eliminated all of the dust. No matter what the creature tried, some dust would creep into its house. After some reflection, the creature realized that it had lived all its life with the dust. While the creature was convinced that it had contracted a number of colds from the dust, it could expect to continue to exist even in the presence of the dust. However, no matter how hard the creature tried to reconcile itself with the existence of dust, it still felt an almost uncontrollable fear and dread about dust. The creature understood that it would never really accept dust as anything but a potentially threatening nuisance, and it certainly had no intention of sharing its house with the dust.

The creature shrugged its shoulders, plugged in the vacuum cleaner, and eliminated all of the visible dust. It picked up a broom and swept the remaining dust from its sight. Whatever dust that remained could not be seen. The creature was happy. And why not? If it could not get rid of the dust, at least it could substantially reduce its effect. Anyway, the creature could now pretend that the dust had disappeared. The dust seemed to understand. Except for stray bits which continued to settle on the furniture in the rooms of the house, the dust did not complain. But even if it did complain it would not matter; the creature could not hear, would not listen, and had already decided that it understood the dust and its relationship to the dust well enough.

Both liberal and conservative America, like the creature in the Parable of the Dusty House, continue to sweep sexual nonconformists into the cracks and crevices of social existence. It is an endless and ultimately unsuccessful task, but one that requires resort to every manifestation of power, if only to achieve the limited result of a temporary and incomplete disappearance of the problem. In the end, at every end, there is little to *show* for the effort—what is hidden has not disappeared, and the creature *knows* that. For all the effort, and all the futility, the dust still revolts the creature sufficiently that the creature continues its efforts despite the con-

scious knowledge of its futility. The creature has given up the attempt to eradicate, concluding that the attempt to eradicate is just not worth the effort. However, the act of sweeping away all evidence of the existence of the dust, is, for the creature, still worth the effort.

And what of the material the creature called dust? The creature attempted to eradicate the dust, yet made no attempt to understand the dust. The dust was a nuisance, not worth looking at or communicating with, nor worth understanding. Indeed, in identifying the material as dust—something inanimate and unconscious—the creature embodied the determination that it could deal with the dust as a thing. The material labelled dust neither disabused the creature of its possibly spurious view of things, nor participated in the creature's determination to sweep the dust into the dark places of the house.

Nausea was the means by which the creature dealt with the dust—a thing insignificant and threatening, but not worth knowing.

[B]ut I do not think one can ignore disgust if it is deeply felt and not manufactured. Its presence is a good indication that the bounds of toleration are being reached. Not everything is to be tolerated. No society can do without intolerance, indignation, and disgust; they are the forces behind the moral law, and indeed it can be argued that if they or something like them are not present, the feelings of society cannot be weighty enough to deprive the individual of freedom of choice.¹⁷

It is nausea which drives the conservative version of the creature to rid itself of the dust, for the good of the creature. It is also nausea which drives the liberal version of the creature to hide the dust, for the well being of the dust. The price of toleration according to the liberal merchants of the stuff, our creature, is acceptance of nausea. However, too much nausea will debilitate the creature in its conservative guise. Thus, the recipients of toleration are obliged to devote their lives to minimizing the public disgust which arises by reason of their existence. To ensure the meeting of this obligation, the state is permitted, maybe even required, to help in this endeavor. The only remaining question is the amount of tolerable nausea allowed—with how much dust must the creature live? With this in mind, we can begin to appreciate the Parable of the Dusty House and the problems of a blindly applied and self-delusionally well-intentioned methodology of liberal toleration.

17. PATRICK DEVLIN, *THE ENFORCEMENT OF MORALS* (1965), *reprinted in MORALITY AND THE LAW* 15, 26-27 (Robert M. Baird & Stuart E. Rosenbaum eds., 1988).

III. BE YOURSELF . . . BUT KEEP THE SHADES DRAWN

The Wolfenden Report and the Model Penal Code express the aspirational goals of Anglo-American criminal jurisprudence,¹⁸ and in that respect, they have been quite influential.¹⁹ They exist as a role model and as the purveyor of our loftiest institutional jurisprudential sentiments on the criminal law; they are the idealized form of sound legislation. For sexual nonconformity, these aspirational ideals encompass two goals. The first is decriminalization, and thus tolerance, of sexual nonconformity hidden from view.²⁰ The second is punishment for violation of the first—punishment for and the suppression of the public expression of any nonconformist conduct or any interference with the state's power to express its nausea, disgust, and offense at any sexual expression permitted when hidden.²¹

The approach the Wolfenden Report and the Model Penal Code adopted was intended to help usher in a world of greater tolerance. Instead, the rhetorical shield of toleration has made it easier to perpetuate the state's power to condemn, through criminal law, conduct which does not suit the fancy of its lawmakers. The Wolfenden Report and the Model Penal Code have given society license, stemming from the power to protect community values regarding public expression of sexual nonconformity, to enforce the dominant morality. The Wolfenden Report and the Model Penal Code have reserved for the dominant morality an exclusive place in the legal order—all public space. The documents' liberality consists largely of the miserly permission to sexual nonconformists to use the cracks and crevices of what is left—a narrowly defined "private space"—for the furtive practices which offend the dominant morality. The permission is largely rhetorical; it is the difference between a sentence of death and one of life in

18. Its principles have also found their way into the Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222. For a discussion of the protection of sexual nonconformists under international law, see Laurence R. Helfer, *Lesbian and Gay Rights as Human Rights: Strategies for a United Europe*, 32 VA. J. INT'L L. 157, 157 (1991). But see Adamantia Pollis, *Eastern Orthodoxy and Human Rights*, 15 HUM. RTS. Q. 339, 353-56 (1993), for the view that the Christian Orthodox world view is incompatible with Western European notions of individual human rights.

19. Indeed, critics of the shift in the law to the libertarian principles of John Stuart Mill tend to ascribe a substantial amount of blame for this phenomenon on the influence of both the Wolfenden Report and the Model Penal Code. See, e.g., ROBERT E. RHODES, JR., *LAW AND LIBERATION* 157-58 (1986).

20. THE WOLFENDEN REPORT, *supra* note 9, paras. 61, 355; MODEL PENAL CODE § 213.2 (1980).

21. THE WOLFENDEN REPORT, *supra* note 9, para. 355 (advocating the modification, but not the repeal of the crimes of buggery, gross indecency, indecent assault, and importuning for immoral purposes); MODEL PENAL CODE §§ 251.1, .3 (1980) (proposing the crimes of open lewdness and loitering to solicit deviate sexual relations).

prison without the possibility of parole.

At bottom, the permission to use the private spaces of the social order permits an unrelenting confirmation of the baseness of the privatized conduct, one which is so shameful it is not permitted to see the (societally speaking) light of day. Such permission is linked with the affirmation of the right to “suppress[] . . . public nuisance[s],” and with the open flouting of community standards.²² The very rationales reek with the aroma of nauseating conduct—conduct which is vile enough to be indirectly suppressed. Mere offense becomes the touchstone for regulation;²³ offense “will be based on moral, social or cultural standards.”²⁴

This dysfunctional notion of tolerating sexual nonconformists has permeated both liberal²⁵ and conservative²⁶ thought. The notion appears

22. MODEL PENAL CODE § 251.3 cmt. 2 (1980).

23. THE WOLFENDEN REPORT, *supra* note 9, para. 13 (stating the functions of criminal law).

24. *Id.* para. 15.

25. See, e.g., 4 JOEL FEINBERG, *THE MORAL LIMITS OF THE CRIMINAL LAW—HARMLESS WRONGDOING* 15-16 (1988); DAVID A.J. RICHARDS, *SEX, DRUGS, DEATH AND THE LAW* 29-63 (1982); Paul D. Carrington, *The Moral Quality of the Criminal Law*, 54 NW. U. L. REV. 575, 580-81 (1959); Louis Henkin, *Morals and the Constitution: The Sin of Obscenity*, 63 COLUM. L. REV. 391, 393 (1963); Morris Ploscowe, *Sex Offenses: The American Legal Context*, 25 LAW & CONTEMP. PROBS. 217, 218-24 (1960); David A.J. Richards, *Unnatural Acts and the Constitutional Right to Privacy: A Moral Theory*, 45 FORD. L. REV. 1281, 1333-46 (1977); Stephen J. Schnably, *Beyond Griswold: Foucauldian and Republican Approaches to Privacy*, 23 CONN. L. REV. 861, 868-77 (1991); Larry E. Joplin, Note, *Criminal Law: An Examination of the Oklahoma Laws Concerning Sexual Behavior*, 23 OKLA. L. REV. 459, 470-72 (1970). Even nonmainstream thinkers are susceptible to the allure of this dysfunction, though they might argue that such dysfunction does not exist, or if it does exist, it is irrelevant given the immediacy of a particular social or political agenda. From it may come the freedom (for weighty reasons) to marginalize the “other” (perhaps in the spirit of tit for tat) in the process of creating (morally favored) separateness within the imperative of inclusion (within the dominant group). Thus, Ruthann Robson writes:

Within our own communities, theories, and relationships, the implementation of equality in the form of antidiscrimination rules of law would bring out change. . . . If we accepted the rule of law as the rule of lesbianism, we would not discriminate between lesbians and nonlesbians. For many of us, this is unacceptable.

I am not proposing that we must either totally adopt antidiscrimination discourse into all facets of our lives, or we must totally abandon it as a legal strategy. Such a duality is a false one. We are not hypocritical, inconsistent, or contradictory if we recognize antidiscrimination as a potential strategy for legal change, yet recognize its limitations. Our desires are as complex as we are.

RUTHANN ROBSON, *LESBIAN (OUT)LAW* 89-90 (1992). But does this amount to little more than contradictory principles of the Wolfenden Report—a principled resort to ruthlessness, of the taking for oneself the power to include and exclude while suppressing the use of that power by others? See MOHR, *supra* note 5, at 94-100. Professor Mohr states that “generally, an obligation to *privacy*, an obligation to shield specific acts from the vision and hearing of nonparticipants, does not entail a requirement of *secrecy* about the acts—and vice versa.” *Id.* at 99. For an interesting approach to the private/public space problem, see Harlon L. Dalton, “*Disgust*” and *Punishment*, 96 YALE L.J. 881, 897-900, 909-12 (1987) (reviewing 2 JOEL FEINBERG, *THE MORAL LIMITS OF THE CRIMINAL LAW—OFFENSE TO OTHERS* (1985)). Professor Dalton argues that disgust-based harm should normally be exempted from punishment except, for the most part, when the disgusting conduct occurs within the personal space of the

to have shaped European notions as well.²⁷ The liberal canon emphasizes the first part of the Wolfenden formula—that there is a realm of conduct substantially beyond the reach of the criminal law.²⁸ It downplays, but does not disavow, the second part of the Wolfenden formula—that in the furtherance of a societal morality, immoral public conduct can be suppressed.²⁹ Traditionalists, to a greater or lesser degree, acknowledge the existence of a zone within which the law has no business, but limits this zone to conduct within the traditional patriarchal family.³⁰ Traditionalists, however, emphasize the second part of the Wolfenden formulation—that the majority can use criminal law to protect its citizens from public indecency and offense.³¹ The difference between liberal and traditionalist positions, therefore, can be characterized more as one of line drawing than as one of giving content to the Wolfenden formulation. Both have accepted the notion of spheres of privacy and of the right of the state to suppress public displays of deviant conduct.³²

person disgusted. *Id.* In this sense, a sphere of personal privacy ought to be maintained for the protection of the nonconformist, rather than as a vehicle for their oppression. *Id.*

26. ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 10-11, 241-50 (1990); RHODES, *supra* note 19, at 167-69; Bruce C. Hafen, *The Constitutional Status of Marriage, Kinship, and Sexual Privacy—Balancing the Individual and Social Interests*, 81 MICH. L. REV. 463, 538 (1983); Michael J. Sandel, *Moral Argument and Liberal Toleration: Abortion and Homosexuality*, 77 CAL. L. REV. 521, 521-22 (1989) (citing the Conference on Community, Law and Moral Reasoning); Philip Selznick, *The Idea of a Communitarian Morality*, 75 CAL. L. REV. 445, 445-47 (1987). See generally ELIZABETH R. MOBERLY, *HOMOSEXUALITY: A NEW CHRISTIAN ETHIC* (1983) (contending that homosexuality should be tolerated only in order for the condition to be healed).

27. See, e.g., Helfer, *supra* note 18, at 157. "Although it is now taken for granted in nearly all Western European nations that private sexual relationships between consenting adults can no longer be criminalized, lesbians and gay men have had only partial success in convincing their governments, and the European public, to recognize their other important social concerns." *Id.* These include public issues such as equality in employment, marriage, and adoption. *Id.*

28. 4 FEINBERG, *supra* note 25, at 165-73; HERBERT L. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 304 (1968); JOSEPH RAZ, *THE MORALITY OF FREEDOM* 412-19 (1986).

29. 2 JOEL FEINBERG, *THE MORAL LIMITS OF THE CRIMINAL LAW—OFFENSE TO OTHERS* 1-5 (1985); MOHR, *supra* note 5, at 94-106.

30. *Poe v. Ullman*, 367 U.S. 497, 547-48, 552 (1961) (Harlan, J., dissenting); BORK, *supra* note 26, at 110-26. To the extent that conduct other than that between husband and wife is acknowledged to come within this zone it is done so on purely practical grounds. For instance, some traditionalists can, if grudgingly, accept the notion of decriminalization of sodomy on grounds of efficiency, and to the extent they remain free to continue to treat the practice as vile, and not worthy of emulation. RHODES, *supra* note 19, at 153-85.

31. BORK, *supra* note 26, at 123-24. "But, in any event, physical danger does not exhaust the categories of harms society may seek to prevent by legislation, and no activity that society thinks immoral is victimless. Knowledge that an activity is taking place is a harm to those who find it profoundly immoral. . . . Moral outrage is a sufficient ground for prohibitory legislation." *Id.*

32. For an interesting characterization of the line drawing engaged in by the courts in the area of constitutional privacy jurisprudence, see Joel Feinberg, *Autonomy, Sovereignty, and Privacy: Moral Ideals in the Constitution?*, 58 NOTRE DAME L. REV. 445, 486-91 (1982). Professor Feinberg argues that the Supreme Court has always "recognized the very anti-Millian interest in 'enforcing the requirements of decency' as a constitutionally legitimate one so long as it is not pressed unnecessarily

Tolerating private conduct does not mean accepting the conduct tolerated.³³ Ironically enough, it was a leading traditionalist critic of the time, Patrick Lord Devlin, an outspoken opponent of the Wolfenden Report, who, if somewhat derisively, exposed this dysfunction and warned of its consequences almost forty years ago.

Some people sincerely believe that homosexuality is neither immoral nor unnatural. Is the "freedom of choice and action" that is offered to the individual, freedom to decide for himself what is moral or immoral, society remaining neutral; or is it freedom to be immoral if he wants to be? The language of the [Wolfenden] Report may be open to question, but the conclusions at which the Committee arrive answer this question unambiguously. If society is not prepared to say that homosexuality is morally wrong, there would be no basis for a law protecting youth from "corruption" or punishing a man for living on the "immoral" earnings of a homosexual prostitute, as the Report recommends. This attitude the Committee make even clearer when they come to deal with prostitution. In truth, the Report takes it for granted that there is in existence a public morality which condemns homosexuality and prostitution. What the Report seems to mean by private morality might perhaps be better described as private behavior in matters of morals.³⁴

If, indeed, society means what its says about freedom of choice (for this is what we have come to believe that we say), then should not society remain neutral in matters of sexual practice and not act to severely limit the manner in which tolerated conduct is practiced? But it does not mean what it says. Rather, society continues to impose its moral judgments of sexual conduct through law, but only more discreetly, and all in the name of protecting the sensibilities of society. We protect our youth against corrup-

beyond the proper boundaries of privacy." *Id.* at 489. The arguments about the extent of privacy rights, then, consist of little more than line drawing. My thesis is that, whatever the line drawing with respect to constitutionally protected private conduct rights, the line will be drawn quite narrowly respecting limits on the power of the state to control public conduct.

33. See John M. Finnis, *Law, Morality, and "Sexual Orientation,"* 69 NOTRE DAME L. REV. 1049, 1051-53 (1994). This point is eloquently demonstrated by the storytelling of Marc Fajer. See Fajer, *supra* note 3, at 570-607.

34. Devlin, *supra* note 17, at 19-20 (footnote omitted). Lord Devlin took the position that society has the right to protect its own existence, and that society, as conceptualized by a majority of its members, has the right to follow its own moral convictions in defending its social environment from changes it opposes. For a discussion of Lord Devlin's argument, see RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 240-58 (1977); BASIL MITCHELL, *LAW, MORALITY, AND RELIGION IN A SECULAR SOCIETY* 1-18 (1967). For a discussion of the manner in which disgust and the suppression of immorality are intertwined, see Dalton, *supra* note 25, at 906-09.

tion (because nontraditional sexual practices are bad); we demand that those we tolerate continue to hide. Contrary to advertised reality, society has made preciously small, and cruelly perverse, strides in its toleration of sexual conduct. Unfortunately, Lord Devlin's point, made in the context of a broad traditionalist attack on the Wolfenden Report approach to decriminalization, was lost in the rush to climb aboard the Wolfenden Report bandwagon, a rush in which even those with the greatest interest in pursuing strategies of greater positive tolerance participated.³⁵ It is not at all clear to me that, as Richard Mohr has declared, "Whither sodomy laws go, so too do sexual solicitation laws."³⁶

I believe that Lord Devlin's point is well taken, and indeed, ought to be better taken. Lord Devlin's "private behavior in matters of morals" is the better characterization of the liberal ideal.³⁷ That ideal accepts as a given the need for the subordination of nonconformity. The necessary subordination is measured on a scale of nausea.

Its presence is a good indication that the bounds of toleration are being reached. Not everything is to be tolerated. No society can do without intolerance, indignation, and disgust; they are the forc-

35. Thus, for instance, Joseph Bell, in arguing for the decriminalization of sexual solicitation statutes, characterized both the Model Penal Code and the Wolfenden Report as rejecting "the use of criminal law to deter sexual behavior because it is 'sinful, morally wrong, or objectionable for reasons of conscience, or of religious or cultural tradition.'" Bell, *supra* note 15, at 102. The right to regulate public manifestations of that private morality was unquestioned, only the drawing of the line between regulated and unregulated public manifestation was troublesome. *Id.* at 103.

36. MOHR, *supra* note 5, at 55; see also Paula A. Brantner, *Removing Bricks From a Wall of Discrimination: State Constitutional Challenges to Sodomy Laws*, 19 HASTINGS CONST. L.Q. 495, 496 (1992) ("Gay and lesbian activists consider the eradication of sodomy laws essential to the further advancement of gay rights."). Of course, nothing appears to modern eyes to be absolute. In some jurisdictions the solicitation statutes have appeared to follow the sodomy laws into oblivion. See Pryor v. Municipal Court, 599 P.2d 636, 646-47 (Cal. 1979) (narrowing a California sexual solicitation law to include only the solicitation to perform public acts, and the public touching of the genitals, buttocks, or female breast for purposes of sexual arousal); Commonwealth v. Sefranka, 414 N.E.2d 602, 606 (Mass. 1980) (voiding a solicitation statute on constitutional grounds); People v. Uplinger, 447 N.E.2d 62, 63 (N.Y. 1983) (overturning New York's sexual solicitation statute on constitutional grounds), *cert. dismissed*, 467 U.S. 246 (1984). But even in jurisdictions where the repeal of the sodomy laws may have contributed to the evisceration of the sexual solicitation laws, it is not clear that the resulting legal environment is substantially more open to the activities of the public sexual nonconformist. See CAL. PENAL CODE § 647(d) (West Supp. 1994) (criminalizing loitering); People v. Superior Court (Caswell), 758 P.2d 1046, 1057 (Cal. 1988); Pamela Sirkin, Comment, *The Evanescent Actus Reus Requirement: California Penal Code § 647(d)—Criminal Liability for "Loitering With Intent . . ." Is Punishment for Merely Thinking Certain Thoughts While Loitering Constitutional?*, 19 SW. U. L. REV. 165, 165-66 (1990) (arguing that, as interpreted, the loitering statute still provides the state with a largely standardless means of harassing people whose views or lifestyles are not in favor); *infra* notes 112-14 and accompanying text. I take a somewhat more critical view of the advances represented by cases of this type. See *infra* part IV.

37. Devlin, *supra* note 17, at 20.

es behind the moral law, and indeed it can be argued that if they or something like them are not present, the feelings of society cannot be weighty enough to deprive the individual of freedom of choice.³⁸

Under this liberal conceptualization, disgust can drive the law, and the law provides the means to service disgust. The measure of disgust is the perceived distance between the norm and that being measured, which, by definition, is not the norm. Distance is measured not only by difference, but by the relation between that being measured and the conduct rules of the norm givers.³⁹ Liberal protection of “private behavior in matters of morals” concedes to traditionally dominant social and cultural groups the power to enforce its mores directly and indirectly—to determine and condemn group affronts. The adherents worry only at the margin; this provides another manifestation of the line drawing encouraged by the Wolfenden Report and the Model Penal Code approach. The difference between liberal and traditionalist is that the latter knows where to draw the line between tolerated disgust and everything else. The liberal accepts the necessity of instruction in social disgust and of the participation by government in this endeavor. Liberal ideology seeks merely to contain disgust, like our creature in the parable, by finding a place where the creature will not search and the object of disgust can hide.⁴⁰

It is thus “OK” to characterize certain conduct, particularly sexual

38. *Id.* at 26-27 (footnote omitted).

39. Thus, for instance, insertion of a penis into a vagina in the missionary position is different from the same act when a woman straddles her partner, not too different, but for some, perhaps different enough. Compare, however, anal intercourse between men. This is not only substantially different from the norm (heterosexual vaginal intercourse), but also fundamentally violates core conduct taboos of the norm givers—both the penetration of the anus for purposes of sexual gratification and sex between people of the same gender are absolutely prohibited. As a result, the former conduct may be derided by the norm givers as unconventional and troubling, and rarely punished, but the latter conduct approaches the definition of cultural nausea and is suppressed.

40. Thus, for instance, Professor Feinberg frets about what to do about offending others. See 2 FEINBERG, *supra* note 29, at 1-24. For an interesting critique of this need to worry, see Dalton, *supra* note 25, at 901 (criticizing the offense principle as deeply flawed and arguing that “disgusting conduct should be placed beyond, not within, the reach of the criminal law”). Professor Feinberg, however, has no problem agreeing that the state may criminalize conduct which offends but otherwise causes no direct harm to others. 1 JOEL FEINBERG, *THE MORAL LIMITS OF THE CRIMINAL LAW—HARM TO OTHERS* 3, 14 (1984). This view has also been criticized. See, e.g., Richard Warner, *Liberalism and the Criminal Law*, 1 S. CAL. INTERDISCIPLINARY L.J. 39, 41 (1992) (arguing “that liberalism’s line drawing aspirations are futile: in the area of the criminal law, there is no bright line that defines the limit of state power.”). Traditionalists are more sure about where to draw the line. Arguing against the enactment of gay rights legislation, Robert Rhodes argues that “the proponents of such legislation want to ‘come out of the closet,’ that is, to have homosexuality accepted as an alternative mainstream lifestyle, one that can be publicly professed without adverse consequences. This I would be unwilling to concede.” RHODES, *supra* note 19, at 169.

conduct other than heterosexual vaginal intercourse, as deviant, immoral, or offensive, and to act on the basis of such characterizations to suppress its public expression.⁴¹ Under the liberal canon (but less so under the conservative or traditionalist canon), sexual liberation is limited to the practice of immoral acts by people in secret, hidden from view. Thus hidden, the conduct can retain its status as a societal wrong. The perversity of this liberation has been awesome. The toleration of a mere clandestine existence permits the "tolerant" society to feel good about the extent of its tolerance.⁴² But, it simultaneously permits this tolerant society the luxury of continuing to regulate the manifestation of the object of its tolerance in a manner that confirms to all but the dead that the conduct is disgusting, filthy, deviant, sick, and not worthy of emulation.⁴³

The authors of the Wolfenden Report intended this perverse liberation (or at least may have hoped for it), as did the authors of the Model Penal Code.⁴⁴ The drafters consciously intended to incorporate such sentiments into mainstream thought in this manner. These sentiments are embodied in approaches to the solution of toleration of the types of sexual conduct

41. The term "public" is meant to be construed quite broadly. See MODEL PENAL CODE §§ 251.1 cmt. 2, at 451-52, 251.3 cmt. 3, at 478-79 (1980). The definition of public is so broad, in fact, that it effectively makes public what, for sexual nonconformists, has been viewed as "private space." See, e.g., LAUD HUMPHREYS, *TEA ROOM TRADE: IMPERSONAL SEX IN PUBLIC PLACES* 1-15 (1970) (discussing various behavior environments). For a discussion of the difference between private and public space, see MOHR, *supra* note 5, at 104-05. For a discussion of the means by which the division between public and private space is affected, see Fajer, *supra* note 3, at 570-607. In fairness, the Model Penal Code's comments recognize the abusive potential of the statute and attempt to limit the potential breadth of its interpretation. The revised comments explain: "A 'gay' bar, for example, might fit that description [of a public place], but a person who goes to such an establishment is unlikely to be affronted or annoyed by solicitation. At the very least, he has assumed the risk of that occurrence." MODEL PENAL CODE § 251.3 cmt. 3, at 478 (1980). Note, however, that this language is a product, not of the intent of the drafters of the Model Penal Code, but of the revisors of the Model Penal Code's comments more than 15 years after the adoption of the Model Penal Code. I believe it may reflect the good intentions of the comment revisors but does not reflect the scope or intent of the provision itself.

42. Thus, society can be comforted by believing that at least they did not condemn them to death, as they could have. For a discussion of the traditional treatment of sexual nonconformity in the Anglo-American world, see Polly Morris, *Sodomy and Male Honor: The Case of Somerset, 1740-1850*, 16 J. HOMOSEXUALITY 383, 383-406 (1988); Robert F. Oaks, *Perceptions of Homosexuality by Justices of the Peace in Colonial Virginia*, in HOMOSEXUALITY AND THE LAW, *supra* note 15, at 35-41; Robert F. Oaks, "Things Fearful to Name": *Sodomy and Buggery in Seventeenth-Century New England*, 12 J. SOC. HIST. 268, 268 (1978).

43. Society can in this way continue to derive pleasure from the thought that it is doing its bit for the conversion of the perverted by making the cost of such conduct so high that one would have to be socially or economically insane to persist in the conduct. Marc Fajer discusses the effect of this social opprobrium as it extends even to sickness, death, and beyond. See Fajer, *supra* note 3, at 577-84. For a discussion of the effect of disgust or empathy in shaping constitutional interpretation, see Lynne N. Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574, 1574-77 (1987).

44. See THE WOLFENDEN REPORT, *supra* note 9, para. 355. The Comments to the Model Penal Code are quite clear on this point. See MODEL PENAL CODE §§ 213.2 cmt. 2, 251.3 cmt. 2 (1980).

which violate majority conduct-norm taboos in every aspect of life in the United States—the result of the “solution” to the “problem” of gay men and lesbians in the United States military provides an almost apocryphal example of the permeation of this approach.⁴⁵ Such sentiments lie even at the root of the discomfort with the notion of diversity in academia⁴⁶ and create what, in other circumstances, would be considered bizarre moral dilemmas, principally “outing.”⁴⁷

45. During the 1992 presidential campaign, then candidate Clinton promised to eliminate the military's ban on gay men and lesbians. When, in January 1993, President Clinton proposed to officially lift the ban, he met with a substantial amount of resistance in Congress and from high military officials. In July 1993, a compromise was approved by the parties under which homosexual conduct would continue to be banned on and off military establishments, and military personnel would still be subject to dismissal for declaring their sexual orientation. However, recruiters would no longer ask about sexual orientation, nor would military personnel be investigated unless there was evidence of homosexual conduct. See Clifford Krauss, *With Caveat, House Approves Gay-Troops Policy*, N.Y. TIMES, Sept. 29, 1993, at A15 (discussing the so-called “don't ask, don't tell” policy). The effect, of course, is in keeping with the Model Penal Code approach to the toleration of sexual nonconformity—as long as the dominant group can pretend it does not exist, then it will not be ferreted out and punished. When exposed to the light of day, however, the traditional approach (suppression) will prevail. In this sense, we continue to allow societal notions of disgust to guide policy. For a discussion of the use of disgust in this manner, see RICHARD A. POSNER, SEX AND REASON 314-23 (1992). *But see* Selland v. Aspin, 832 F. Supp. 12 (D.D.C. 1993) (granting a preliminary injunction barring discharge based on sexual orientation); Meinhold v. United States Dep't of Defense, 808 F. Supp. 1455, 1458 (C.D. Cal. 1993) (enjoining the government from enforcing rules excluding gay men and lesbians from the armed forces), *stay denied*, 61 Empl. Prac. Dec. (CCH) 42, 197 (9th Cir. 1993). For a discussion of the basis of current military policy, see Jeffrey S. Davis, *Military Policy Toward Homosexuals: Scientific, Historical, and Legal Perspectives*, 131 MIL. L. REV. 55, 99-103 (1991).

46. See Sherman, *supra* note 2, at 123-24 (arguing for the need to include more gay males and lesbians on law school faculties). Professor Sherman notes that “the invisibility of most gays and lesbians contributes to their oppression. The ground beetle's camouflage may protect the creature from isolated predators, but it increases the likelihood of his being stepped on.” *Id.* at 124.

47. Outing refers to revealing the sexual preference of people, usually, but not always, celebrities and public officials. It has been used almost exclusively to describe the revealing of the homosexuality of its object. The morality of outing has been debated most visibly in the popular press. For a discussion of the issues of outing, see ROBSON, *supra* note 25, at 73-77; Susan J. Becker, *The Immorality of Publicly Outing Private People*, 73 OR. L. REV. 159 (1994); Jon E. Grant, Note, “Outing” and Freedom of the Press: Sexual Orientation's Challenge to the Supreme Court's Categorical Jurisprudence, 77 CORNELL L. REV. 103, 104-08 (1991); David H. Pollack, Comment, *Forced Out of the Closet: Sexual Orientation and the Legal Dilemma of “Outing,”* 46 U. MIAMI L. REV. 711, 715-16 (1992). Kendall Thomas, among others, has noted that, in the context of a constitutional right to privacy, “gay men and lesbians are aware that the chief value of the language of privacy is that it can be used not so much to provide a space for self-discovery, but to provide against the dangers of disclosure.” Kendall Thomas, *Beyond the Privacy Principle*, 92 COLUM. L. REV. 1431, 1455 (1992). On the costs of keeping sexual nonconformity hidden, see, e.g., Jeffrey S. Byrne, *Affirmative Action for Lesbians and Gay Men: A Proposal for True Equality of Opportunity and Workforce Diversity*, 11 YALE L. & POL'Y REV. 47, 59-61 (1993).

IV. WHAT WE PREACH

Let us take a closer look at the nature of our society's limited acceptance of sexual nonconformity. Late Twentieth Century Anglo-European society preaches toleration and love (or at least toleration). Tolerance is defined by dominant culture as "[t]he capacity for or practice of recognizing and respecting the opinions, practices, or behavior of others."⁴⁸ The United States is a nation, we have been told repeatedly, built on toleration.⁴⁹ However, toleration is not a word of unitary meaning. Tolerance also has another definition: "The permissible deviation from a specified value of a structural dimension."⁵⁰ That is, toleration need not be an infinitely elastic principle and tends to cluster around a norm.⁵¹ The norm itself assumes critical importance as the referent for determining whether and to what extent a given form of expression is to be suppressed. The operative norm in Western Europe and North America is heterosexual vaginal intercourse within a state-recognized marriage relationship.⁵²

But in the occasional case where the issue of our custom and mores is specifically presented to the court the community's idealized judgment concerning the kind of morality it desires is likely to weigh more heavily upon the prosecutor or the judge's decision than the data of the Kinsey Report. This may be wrong, but it is society in action.⁵³

48. AMERICAN HERITAGE DICTIONARY 1275 (2d college ed. 1982).

49. See, e.g., JOHN M. SWOMLEY, RELIGIOUS LIBERTY AND THE SECULAR STATE: THE CONSTITUTIONAL CONTEXT 9 (1987); Franklin D. Roosevelt, Address of the President of the United States Before a Joint Session of Congress (Jan. 6, 1941), in 77 CONG. REC. 44-47 (1941) (providing the text of President Roosevelt's "Four Freedoms" Speech).

50. AMERICAN HERITAGE DICTIONARY 1275 (2d college ed. 1982). This is a definition at once technical (defining a term with scientific or mathematical applications), and as I argue in this article, jurisprudential as well.

51. The norm is the standard model or pattern regarded as typical for a specific group. Applied to the societal interaction of different peoples, the reference, of course, is to status or conduct norms. These are determined by the dominant group in society. "A legal system is based upon a few primary postulates. Thus, in our society we recognize, among others, . . . the institution of the family." Frank E. Horack, Jr., *Sex Offenses and Scientific Investigation*, 44 ILL. L. REV. 149, 150 (1949) (discussing the impact of the Kinsey Report on the enforcement of sexual conduct laws); see also Schnably, *supra* note 25, at 865-68 (noting the problematic nature of the role of the courts in divining and elaborating fundamental social values, that is, the traditional values of the dominant group); cf. Selznick, *supra* note 26, at 445 (discussing the tension within contemporary or welfare liberalism).

52. For a critical history of the development of this norm over two millennia, see generally JAMES A. BRUNDAGE, LAWS, SEX AND CHRISTIAN SOCIETY IN MEDIEVAL EUROPE (1987); ERIC FUCHS, SEXUAL DESIRE AND LOVE: ORIGINS AND HISTORY OF THE CHRISTIAN ETHIC OF SEXUALITY AND MARRIAGE 84-171 (Marsha Daigle trans., 1983).

53. Horack, *supra* note 51, at 157-58. The Kinsey Report presented empirical evidence that social realities deviated significantly from the idealized norm of proper sexual conduct. For the complete Kinsey Report referenced in the quoted material, see ALFRED C. KINSEY ET AL., INSTITUTE FOR SEX

Our antecedent, the principles set forth in the Wolfenden Report, proceeded on the basis of the second definition. The Wolfenden Report is the primogenitor of criminal regulation of sexual conduct in late Twentieth Century America. The Wolfenden Report's core teachings about the criminalization of sexual conduct, particularly sexual conduct not conducted within the marriage relationship,⁵⁴ has found its way into the Model Penal Code.⁵⁵

Incorporating the notions of John Stuart Mill,⁵⁶ the Wolfenden Report drew a distinction between private sexual morality and sexual conduct which could be criminal.

There remains one additional counter-argument which we believe to be decisive, namely, the importance which society and the law ought to give to individual freedom of choice and action in matters of private morality. Unless a deliberate attempt is to be made by society, acting through the agency of the law, to equate the sphere of crime with that of sin, there must remain a realm of private morality and immorality which is, in brief and crude terms, not the law's business.⁵⁷

This language is the stuff of a toleration fantasy, a potentially limitless libertarian emancipation proclamation.⁵⁸ But wait, there is more. "To say

RESEARCH, SEXUAL BEHAVIOR IN THE HUMAN MALE (1948) and ALFRED C. KINSEY ET AL., INSTITUTE FOR SEX RESEARCH, SEXUAL BEHAVIOR IN THE HUMAN FEMALE (1953).

54. See MODEL PENAL CODE § 213.0(3) (1980) ("Deviate sexual intercourse"). It is this conduct, and the states of being flowing from the desire to engage in this conduct, with which I am concerned.

55. See MODEL PENAL CODE § 213.2 cmt. 2, at 371-73 (1980); H.L.A. HART, LAW, LIBERTY AND MORALITY 13 (1963); PACKER, *supra* note 28, at 306.

56. JOHN S. MILL, ON LIBERTY (David Spitz ed., 1975) (1st ed. 1859). John Stuart Mill argued that "the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant." *Id.* at 68. For a discussion of the political and moral philosophy of John Stuart Mill, see generally WENDY DONNER, THE LIBERAL SELF: JOHN STUART MILL'S MORAL AND POLITICAL PHILOSOPHY (1991).

57. THE WOLFENDEN REPORT, *supra* note 9, para. 61.

58. Thus, in disputing the arguments of Lord Devlin, H.L.A. Hart argues:

This (the alternative of permissiveness) is what Lord Devlin seems to envisage or to fear when he says: "The enemy of society is not error but indifference," and "Whether the new belief is better or worse than the old, it is the interregnum of disbelief that is perilous." On the other hand the alternative may be not permissiveness but *moral pluralism* involving divergent submoralities in relation to the same area of conduct.

H.L.A. Hart, *Social Solidarity and the Enforcement of Morality*, 35 U. CHI. L. REV. 1, 12 (1967) (footnote omitted) (quoting PATRICK DEVLIN, THE ENFORCEMENT OF MORALS 114 (1965)); see also DWORKIN, *supra* note 34, at 240-58 (critically examining Lord Devlin's assertion respecting the duty of society to enforce community morality); Carrington, *supra* note 25, at 579-85 (discussing the use of moral sanctions to condemn behavior as effectively as criminal penalties). *But see* William N.

[that some conduct is beyond the criminal law] is not to condone or encourage private immorality.”⁵⁹ In this manner, the Wolfenden Report was quick to disabuse those who feared that decriminalization of private conduct implied any sort of public expression of toleration of the conduct decriminalized. “It seems to us that the law itself probably makes little difference to the amount of homosexual behavior which actually occurs; whatever the law may be there will always be strong social forces opposed to homosexual behavior.”⁶⁰ Thus, the lofty ideal of decriminalizing private expression should not bar society from continuing to marginalize that which is offensive, but to merely tolerate that which appears not worth the economic effort to eradicate.

To ensure that the strong social forces opposed to homosexual behavior would neutralize the danger of the proselytizing homosexual,⁶¹ the Wolfenden Committee was quick to enlist the power of the state. Through the criminal law, the state retains the power to regulate public expression of this immoral conduct.⁶² “[The] function [of the criminal law], as we see it, is to preserve public order and decency, to protect the citizen from what is offensive or injurious, and to provide sufficient safeguards against exploitation and corruption of others. . . .”⁶³ As such, the state retains the traditional power to define and defend public morality. “It is also part of the function of the law to preserve public order and decency. We therefore hold that when homosexual behavior between males takes place in public it should continue to be dealt with by the criminal law.”⁶⁴ As long as British sexual nonconformists were content to keep their sexual personae to themselves, the Commission was willing to extend to them only relief from direct criminal liability for their hidden sexual conduct. The Commission refused any sort of positive toleration, for that would have implied an acceptance of such conduct which the Commission was unwilling to make!

The Model Penal Code provisions expressed in legal form the

Eskridge, Jr., *A Social Constructionist Critique of Posner's Sex and Reason: Steps Toward a Gaylegal Agenda*, 102 YALE L.J. 333, 383-85 (1992) (book review) (commenting on the ineffectiveness of traditional libertarian liberalism to address the real needs of sexual nonconformists).

59. THE WOLFENDEN REPORT, *supra* note 9, para. 61.

60. *Id.* para. 58. For a discussion of the manner in which negative social and legal attitudes towards sexual nonconformity are best understood as preserving traditional gender roles and the social meaning attached to these roles, see Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187, 187-96.

61. THE WOLFENDEN REPORT, *supra* note 9, para. 58.

62. *Id.* para. 64 (stating the conception of the difference between public and private conduct). This notion reflects the traditional understanding of the regulatory role of law. See Louis Henkin, *Privacy and Autonomy*, 74 COLUM. L. REV. 1410, 1430-32 (1974).

63. THE WOLFENDEN REPORT, *supra* note 9, para. 13; *accord id.* para. 257.

64. *Id.* para. 49.

Wolfenden Report's underlying public-private dichotomy. On the one hand, the Model Penal Code decriminalized certain forms of sexual non-conformity.⁶⁵ The decriminalization represented a fundamental departure from existing law at a time when every state criminalized sodomy,⁶⁶ especially sodomy engaged in by people of the same sex.⁶⁷ The authors of the Model Penal Code took the position that private homosexual conduct ought to be decriminalized because of "uncertainty about the morality of such conduct."⁶⁸

The drafters of the Model Penal Code considered, and rejected as either unfounded or irrelevant, the notion that homosexual sodomy was a sin or a disease.⁶⁹ They also noted, but refused to embrace, the notion that homosexuality "is simply a matter of personal preference and is devoid of any normative content whatever."⁷⁰ Instead, a number of practical considerations appeared to influence the drafters' conclusion that decriminalization was appropriate.⁷¹ The Wolfenden Report supplied the decisive factor favoring decriminalization: "the importance which society and the law ought to give to individual freedom of choice and action in matters of private morality."⁷²

On the other hand, the drafters of the Model Penal Code went to great lengths to confirm the state's authority to control public nonconformist sexual expression.⁷³ They were quick to reassure that "the exclusion [of criminal liability for consensual adults' acts of sodomy] does not reach open display, which is covered by Section 251.1 . . . nor public solicitation, which is proscribed by Section 251.3."⁷⁴ To resolve any potential

65. MODEL PENAL CODE § 213.2 (1980).

66. MODEL PENAL CODE § 213.2 cmt. 1, at 360 n.11 (1980).

67. See MODEL PENAL CODE § 213.2 cmt. 2, at 362-63 (1980).

68. MODEL PENAL CODE § 213.2 cmt. 2, at 367 (1980).

69. MODEL PENAL CODE § 213.2 cmt. 2, at 367-68 (1980). The comments to the Model Penal Code rejected these notions, not because they disagreed, but because they were unconvinced that there existed a national consensus on either point. *Id.*

70. MODEL PENAL CODE § 213.2 cmt. 2, at 369 (1980). It noted that this was the position of the "gay rights movement, and it may be gaining support in the community at large." *Id.* (footnote omitted).

71. MODEL PENAL CODE § 213.2 cmt. 2, at 370-71 (1980). Among the reasons were finite economic resources resulting in a diversion from more serious crimes, the difficulty of detecting the crime, and the resulting opportunities for the proliferation of other crime related to the lack of adequate enforcement (blackmail, official extortion, and increasing resort to entrapment as (an unsavory) means of enforcement), and the futility of punishment (it would neither deter nor inhibit the conduct proscribed). *Id.*

72. MODEL PENAL CODE § 213.2 cmt. 2, at 372 (1980) (quoting THE WOLFENDEN REPORT, *supra* note 9, para. 61).

73. See MODEL PENAL CODE §§ 251.1, .3 (1980) (dealing with the protection of community standards of public decency).

74. MODEL PENAL CODE § 213.2 cmt. 2, at 363 (1980). Interesting, in this respect, is the almost casual basis on which these prohibitions, ancient in origin, and closely related to the proscriptions of

misunderstanding, the drafters explicitly retained the ancient equating of public nonconformist sexual expression with public nuisance.⁷⁵

The condemnation of tolerated conduct could not have been more open. The creation or expression of a (positive) public identity was suppressed; the possibility of a positive public identity was not even suppressed as a political act.⁷⁶ Instead, it was treated like any other revolting nuisance, like one traditionally treated the operation of a nearby animal glue factory spewing noxious odors. Why? Because the problem was not with private behavior in matters of morals, but with the positive exhibition of those behaviors, with even the slightest flouting.

Persons who publicly seek or make themselves available for deviate sexual relations openly flout community standards. Moreover, indiscriminate solicitation in public streets, parks, and transportation facilities is not only an affront to moral and aesthetic sensibilities; it is also a source of annoyance to, and harassment of, members of the public who do not wish to become involved.⁷⁷

the crime of sodomy, survived at the time that the Model Penal Code Reporters were self-consciously taking the "radical" step of decriminalizing private acts of sodomy. The comments to MODEL PENAL CODE § 251.3 (1980) (criminalizing "Loitering to Solicit Deviate Sexual Relations") explained that this provision had originally been part of a comprehensive provision on sodomy and related offenses. MODEL PENAL CODE § 251.3 cmt. 2, at 475 (1980). But even after the decision to decriminalize private acts of sodomy, the Reporters determined that the public nuisance rationale was sufficiently persuasive to retain the prohibition on public acts of solicitation. MODEL PENAL CODE § 251.3 cmt. 2, at 476 (1980).

75. MODEL PENAL CODE § 251.3 cmt. 2, at 476 (1980). The rationale for retaining the criminal offense of public solicitation of deviate sexual relations was "the suppression of public nuisance." *Id.* On the origins of this relationship between nuisance and sexual expression in the law, see ILL. ANN. STAT. ch. 720, para. 5/11-9 (Smith-Hurd 1993) (public indecency). Professor Feinberg, among liberal thinkers, has also opted for a nuisance approach to the regulation of disgusting conduct, distinguishing it from a privacy/property approach by arguing that the latter lends itself overmuch to the creation of boundaries between the private domains of individuals and between the private domains of persons and the outside world. 2 FEINBERG, *supra* note 29, at 24. Though nuisance lends itself to balancing, *id.*, and on that basis is more appealing, the result of balancing and boundary drawing is still the same. In the end, by whatever route is taken, nausea will condemn certain conduct to outlawry, that is, to existence without the protection (from concepts like nuisance) extended as a matter of course to other (approved) conduct.

76. Contrast, for instance, the manner in which society debates the criminalization of another species of antisocial activity which is said to threaten the social order—subversive activities. See, e.g., Vasiliiy A. Vlasihin, *Legal Theory: Political Rights and Freedoms in the Context of American Constitutionalism: A View of a Concerned Soviet Scholar*, 84 NW. U. L. REV. 257, 257-61 (1990); Graham Zellick, *Spies, Subversives, Terrorists and the British Government: Free Speech and Other Casualties*, 31 WM. & MARY L. REV. 773, 773-75 (1990); David Berry, Note, *The First Amendment and Law Enforcement Infiltration of Political Groups*, 56 S. CAL. L. REV. 207, 208-20 (1982); Steven J. Burt, Comment, *Immigration and the First Amendment*, 73 CAL. L. REV. 1889, 1926-27 (1985).

77. MODEL PENAL CODE § 251.3 cmt. 2, at 476 (1980) (loitering to solicit deviate sexual relations). The same rationale supported the criminalization of "open lewdness." See MODEL PENAL CODE § 251.1 cmt. 2, at 449 (1980) ("Section 251.1 reaches the open flouting of community standards re-

It was more than that. The drafters also aimed the antisolicitation provisions at “suppressing indiscriminate seeking or availability for deviate sexual relations.”⁷⁸ The open lewdness provisions may include many acts of affection of a nonconformist nature.⁷⁹

The Model Penal Code drafters were most concerned with the violation of the public space by sexual nonconformists. Both statutes criminalizing sexual nonconformity criminalized only acts occurring in public.⁸⁰ The adopting jurisdiction had the discretion to determine what constituted public space.⁸¹ It was clear, though, that the term could be quite broadly construed.⁸² The overriding concern with the protection of the public space overrode even concerns about problems of entrapment in private sexual nonconformity.⁸³ In this way, punishment remains “a cul-

garding sexual and related matters.”). For a discussion of the problem of flouting, see Fajer, *supra* note 3, at 587-91.

78. MODEL PENAL CODE § 251.3 cmt. 3, at 476 (1980). Thus, it seems, the toleration furthered by decriminalization was meant to extend only to private consensual conduct between people of “prior acquaintance.” *Id.* Otherwise, the state could use the law of criminal solicitation to suppress even the invitation to potentially sexual (or merely affectionate) conduct unless this conduct was effected in hiding. *Id.* The casual conversation, the invitation or suggestion, occurring in the societal space reserved for sexual conformists was forbidden—representing as it did a (false) claim to legitimacy of conduct that the state clearly condemned (though did not suppress if conducted in the small private space reserved for it).

79. MODEL PENAL CODE § 251.1 cmt. 2, at 452 (1980). “The term ‘lewd’ has been chosen to designate the forbidden quality of acts covered by Section 251.1. It has the advantage of being the term commonly found in prior legislation and of being more specifically sexual in connotation than is the word ‘indecent,’ for example.” MODEL PENAL CODE § 251.1 cmt. 2, at 450 (1980). The comments to § 251.1, interestingly enough, appear more concerned with whether or not nudist camps would (wrongly) be brought within the meaning of the provision than with any other concern raised by this provision. *See id.*

80. *See* MODEL PENAL CODE §§ 251.1 cmts. 1-2, .3 cmts. 1-2 (1980).

81. *See* MODEL PENAL CODE §§ 251.1 cmt. 2, at 452, .3 cmt. 3, at 478 (1980).

82. Thus, the open lewdness provision “recasts this element of the offense in terms of the known likelihood of observation by persons who would be affronted or alarmed.” MODEL PENAL CODE § 251.1 cmt. 2, at 452 (1980). The loitering to solicit deviate sexual relations provision defines public places as including anywhere where the public or a substantial group has access. MODEL PENAL CODE § 251.3 cmt. 3, at 478 (1980). The comment noted that places such as gay bars might easily fit into this definition, but suggested that the affirmative defense of assumption of the risk (note the negative connotations of the activity implicit in the assumption of this “defense”) might apply. *Id.*; *see also* THE WOLFENDEN REPORT, *supra* note 9, para. 64 (stating that “in private” as used in the Wolfenden Report is intended to apply to places where the public could not see or be offended).

83. *See* MODEL PENAL CODE § 251.3 cmt. 3, at 476-77 (1980) (noting that the Colorado Supreme Court had determined that a similar provision was constitutionally infirm, but with dissenters urging an interpretation requiring that an actor engage in conduct strongly corroborative of a purpose to solicit, which would save the statute). The entrapment concerns implicit in an approach like this were largely ignored. For a discussion of the entrapment problem with sexual solicitation statutes, see Mitchell B. Nisonoff & Evan Wolfson, *The Defense of Consensual Sodomy, Public Lewdness and Related Criminal Cases*, in THE PROSECUTION AND DEFENSE OF SEX CRIMES § 7.05[2] (B. Anthony Morosco ed., 1994); Steven A. Rosen, *Police Harassment of Homosexual Women and Men in New York City 1960-1980*, 12 COLUM. HUM. RTS. L. REV. 159, 159-90 (1980-81).

tural art[i]fact, embodying and expressing society's cultural forms."⁸⁴

Indeed, the very language of even this idealized form of law making carefully conveys the full expressive weight of condemnation, even as it speaks the name of the crime. Thus, for example, the Model Penal Code still speaks of deviate sexual intercourse as any intercourse other than heterosexual vaginal intercourse.⁸⁵ Even the most well meaning drafters unconsciously used the language of subordination. The law is crafted to insult and to bring the full weight of moral opprobrium to bear on the sexual nonconformist, even as it suppresses. Thus, the law punishes "lewdness" and "public indecency" related to "deviate sexual intercourse." These are both words of insult in the popular idiom and words of description. The drafters consciously used the words to insult, carrying over the meaning from traditional (moral) legislation.⁸⁶ Insult serves to further closet and to enforce the private/public boundaries of sexual nonconformity. This, then, is a toleration chained to a nausea born of disgust. Sexual nonconformity may no longer be an abominable crime against nature, but it remains a sign of social (and perhaps even medical) deviance, even in the eyes of the law.⁸⁷ And this language of tolerance, perhaps, makes it more pernicious.⁸⁸

Thus, the decriminalization of private sexual conduct amounts to something other than a desire to ameliorate the subordinate social position of sexual nonconformists. Decriminalization does little more than acknowledge the reality that enforcing laws suppressing certain forms of private consensual activity is largely impossible,⁸⁹ and may create more

84. DAVID GARLAND, PUNISHMENT AND MODERN SOCIETY 193 (1990). For a discussion of the theory of punishment as cultural artifact and expression of cultural norms, see *id.* at 193-211.

85. See MODEL PENAL CODE § 213.0(3) (1980) (defining deviant sexual intercourse as oral or anal sexual intercourse between people who are not married to each other and any sexual intercourse between people and animals). This is self-consciously a creature of the old morality based criminal law from which it tells us it is liberating society. See MODEL PENAL CODE § 213.2 cmt. 2 (1980).

86. MODEL PENAL CODE § 251.1 cmt. 2, at 450 (1980).

87. Courts have traditionally turned a deaf ear to arguments that the very descriptions of these crimes are inflammatory and prejudicial. See, e.g., Larry C. Baker, *Raping Sodomy and Sodomying Rape: A Morality Tale About the Transformation of Modern Sodomy Jurisprudence*, 21 AM. J. CRIM. L. 37, 62-63 (1993).

88. See SAMUEL G. KLING, SEXUAL BEHAVIOR AND THE LAW 97-128 (1965) for an example of this type of language. Mr. Kling writes that sexual nonconformists are "inverts whose conduct is judged by reference to normal individuals." *Id.* at 100. They are the product of castrating mothers and stand in stark contrast to normal people. *Id.* at 101. A good example of this use of the language of condemnation in an ostensibly neutral setting is the discussion by Mr. Kling of the reasons that gay men and lesbians are barred from the armed forces. *Id.* at 105; see also ROBSON, *supra* note 25, at 87 ("We must prove the discrimination that we suffer with reference to a heterosexual norm. We exist in the discourse of discrimination as victims, as deviants."); Halley, *supra* note 2, at 946-63 (discussing the imposition of identity on sexual nonconformists by the dominant group—from whom deviance, and the need for differentiation, arises).

89. See, e.g., Ploscowe, *supra* note 25, at 218, 221 (noting that the author was the associate re-

crime than it prevents.⁹⁰ Public manifestations of sexual nonconformity, on the other hand, might be worthy of psychiatric treatment.⁹¹ The marginalizing power of the legal language of toleration has not been lost on its targets (others might label them beneficiaries, rather than targets—after all, those released from *total* condemnation should show a certain amount of gratitude). The 1980s and 1990s have seen an intense effort to transform words of subordination into words of positive power.⁹²

Decriminalization does nothing to soften the notion that the conduct decriminalized is undesirable; the ideology underlying the Model Penal Code and the Wolfenden Report reinforces the notion of undesirability.⁹³ Indeed, the selling of the decriminalization provisions appeared to the drafters of the Model Penal Code to be dependant on acknowledging the

porter of the Model Penal Code during the 1950s).

90. This notion figured prominently in the calculus of the drafters of the Model Penal Code and the Wolfenden Report. See THE WOLFENDEN REPORT, *supra* note 9, paras. 109-13, 121-23 (blackmail and police misconduct); MODEL PENAL CODE § 251.3 cmt. 3, at 476-78 (1980). It was also emphasized by contemporary commentators. See Morris Ploscowe, *Sex Offenses in the New Penal Law*, 32 BROOK. L. REV. 274, 284-85 (1966) (noting illegal sexual conduct creates a climate for blackmail and police misconduct); *Project—The Consenting Adult Homosexual and the Law: An Empirical Study of Enforcement and Administration in Los Angeles County*, 13 UCLA L. REV. 643, 701-07 (1966) [hereinafter *Project*] (detailing police misconduct).

91. See, e.g., Ploscowe, *supra* note 90, at 283-85 (arguing that longer sentences and medical treatment were appropriate for people convicted of sexual solicitation, even where private adult consensual sodomy was decriminalized). For a contemporary account of the medical explanation for the disease of “sexual deviance,” see Bernard Glueck, Sr., *Sex Offenses: A Clinical Approach*, 25 LAW & CONTEMP. PROBS. 279, 279 (1960). For a discussion of the use of language of psychiatry by the courts in applying the criminal sex laws against sexual nonconformists, see, e.g., Backer, *supra* note 87, at 81-85.

92. For example, the emergence of groups like Queer/Nation. This group was described in a national gay and lesbian publication as follows:

They are trying to combine contradictory impulses: to bring together people who have been made to feel perverse, queer, odd, outcast, different and deviant, and to affirm sameness by defining a common identity on the fringes. . . . These contradictions are locked in the name Queer Nation:

QUEER = DIFFERENCE
 NATION = SAMENESS

Allan Bérubé & Jeffrey Escoffier, *Queer/Nation*, OUT/LOOK, Winter 1991, at 12, 14, reprinted in Sheila Foster, *Community and Identity in a Postmodern World*, 7 BERKELEY WOMEN'S L.J. 181, 193 (1992) (reviewing MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION AND AMERICAN LAW (1990)). In this effort, ironically enough, Queer/Nation mimicked the very contradictions at the heart of liberal toleration. The effectiveness of these groups and the manner and force of societal response to their efforts is beyond the scope of this article.

93. Indeed, the continued societal imprimatur of nausea with regard to the manifestation of this conduct was a significant selling point for the sodomy decriminalization reform effort. It is “in accord with [the] goal of distinguishing behavior that is merely undesirable from that which ‘is sufficiently threatening to society to require the specialized effort of the criminal law to prevent it.’” Judy R. Potter, *Sex Offenses*, 28 ME. L. REV. 65, 92 (1976). Of course, any form of public expression of nonconformist sexual proclivity is the type of threatening conduct which is left to the specialized mercies of the criminal law.

critical separation between hidden conduct (largely ineradicable in any case) on the one hand, and public conduct (which is threatening to the basic social order—that is, of “normality” and “correct civic conduct”) on the other.⁹⁴

The mainstream writings of the period were sympathetic to the Wolfenden/Model Penal Code Project and the form of sexual liberation it enunciated. Liberal popularizing commentators of the 1960s were quick to embrace the dual standard of the Wolfenden Report and the Model Penal Code as an equitable way of dealing with sexual nonconformists; “Only when the homosexual act threatened the public good, did the matter become the responsibility of the law enforcement agencies.”⁹⁵ Indeed, the proponents of this approach felt that they were probably doing gay men and lesbians a favor—dominant society was convinced that sexual nonconformists preferred a life in the shadows. “The homosexual is isolated from the mainstream of our society. To a large extent, the homosexual is still considered a pariah, an outcast. He thus tends to live in isolation, accepting companionship only among fellow homosexuals.”⁹⁶

The implication is obvious—as far as “normal” society is concerned, even sexual nonconformists admit to both the unsavoriness of their conduct and the resulting need to exhibit their true natures only in the shadows. The dominant culture has abandoned this kind of talk in the 1990s, substituting the language of flouting for that of disgust. But notions of disgust, and perhaps the continuing belief in the sexual nonconformist’s self-disgust, also sustain the belief in the underlying notion that sexual nonconformists serve as accomplices to their own marginalization.⁹⁷ The law merely confirms what appears to be the agreement of all parties concerned. This is meant to be the contribution of the criminal law to the closeting of sexual nonconformists. The next part examines the reality of such externally induced closeting.

94. Compare MODEL PENAL CODE § 213.2 cmt. 3, at 370-71 (1980) (discussing the practical reasons for decriminalization) with MODEL PENAL CODE § 251.1 cmts. 1-2, at 448-50 (1980) (supporting criminalization of open lewdness as a means of suppressing “the open flouting of community standards”) and MODEL PENAL CODE § 251.3 cmt. 2, at 476 (1980) (suppressing public solicitation on the same grounds).

95. KLING, *supra* note 88, at 126 (citing the Wolfenden Report in support of the conclusion that private sexual practices ought to be decriminalized). Sam Kling was a relatively free-thinking legal popularizer of the 1960s. His work provides a good example of the way nonesoteric liberal thought operated to accept the decriminalization of sodomy but maintain substantial barriers to the legitimization of sexual nonconformists.

96. *Id.* at 111-12. And again, gay men and lesbians are characterized as despising the company of, and being despised by, normal folk. “The homosexual is a creature apart, a social outcast.” *Id.* at 105.

97. There exists a substantial amount of commentary on this notion. See Fajer, *supra* note 3, at 587-95; Halley, *supra* note 2, at 956-63.

V. WHAT WE PRACTICE

The liberal ideal of limited and grudging toleration of private (hidden) conduct has not been unanimously adopted; almost half of the states continue to proscribe even hidden nonconformist sexual conduct by consenting adults.⁹⁸ How is the model of liberal toleration implemented in those jurisdictions adopting the approach of the Model Penal Code? True to the liberal ideal, those jurisdictions continue suppressing public expression of nonconformity through solicitation, public indecency, loitering and disorderly conduct legislation.⁹⁹ The legislatures have not acted alone; state courts have served as willing handmaidens (to use a Biblical term) of the Model Penal Code scheme.¹⁰⁰ Thus, as states have increasingly opened a small private area in which sexual nonconformists can exist without the fear of the criminal law, states have continued to use the criminal law to

98. Currently, 25 states and the District of Columbia arguably continue to proscribe sodomy in one form or another. See ALA. CODE § 13A-6-65(a)(3) (1994); ARIZ. REV. STAT. ANN. §§ 13-1411 to -1412 (1989); ARK. CODE ANN. § 5-14-122 (Michie 1993); D.C. CODE ANN. § 22-3502 (1989 & Supp. 1994); FLA. STAT. § 800.02 (1993); GA. CODE ANN. § 16-6-2 (Michie 1992); IDAHO CODE § 18-6605 (1987); KAN. STAT. ANN. § 21-3505 (Supp. 1993); KY. REV. STAT. ANN. § 510.100 (Baldwin 1993); LA. REV. STAT. ANN. § 14:89 (West 1986); MD. CODE ANN. art. 27, §§ 553-554 (1992); MASS. GEN. L. ch. 272, §§ 34-35 (Law. Co-op. 1980); MICH. COMP. LAWS ANN. §§ 750.158, .338, .338b (West 1991); MINN. STAT. ANN. § 609.293 (West 1987); MISS. CODE ANN. § 97-29-59 (1972); MO. ANN. STAT. § 566.090 (Vernon 1979); MONT. CODE ANN. § 45-5-505 (1993); NEV. REV. STAT. § 201.190 (Supp. 1993); N.C. GEN. STAT. § 14-177 (1994); OKLA. STAT. ANN. tit. 21, § 886 (West Supp. 1995); R.I. GEN. LAWS § 11-10-1 (1981); S.C. CODE ANN. § 16-15-120 (Law. Co-op. 1985); TENN. CODE ANN. § 39-13-510 (1991); TEX. PENAL CODE ANN. §§ 21.01(1), .06 (West 1994); UTAH CODE ANN. § 76-5-403 (1990); VA. CODE ANN. § 18.2-361 (Michie Supp. 1994). *But see* *Wasson v. Kentucky*, 842 S.W.2d 487, 501 (Ky. 1992) (holding that application of the statute to consensual homosexual activity was unconstitutional under the Kentucky Constitution); *Commonwealth v. Balthazar*, 318 N.E.2d 478, 481 (Mass. 1974) (holding that § 35, which criminalized unnatural and lascivious acts, was unconstitutional as applied to private consensual adult behavior); *Morales v. State*, 826 S.W.2d 201, 205 (Tex. App. 1992) (holding that the statute was unconstitutional). On the increasingly problematic nature of sodomy jurisprudence in these jurisdictions, see Backer, *supra* note 87, at 86-117.

99. Indeed, the Model Penal Code approach to the criminalization of private conduct and the continued suppression of public expression of a preference for that conduct spurred a tremendous amount of debate at the state level. See Gordon B. Fields, *Privacy "Rights" and the New Oregon Criminal Code*, 51 OR. L. REV. 494, 501-04 (1972); Robert G. Fisher, *The Sex Offender Provisions of the Proposed New Maryland Criminal Code: Should Private, Consenting Adult Homosexual Behavior be Excluded?*, 30 MD. L. REV. 91, 102-08 (1970); Victor S. Johnson, III, *Crimes Against Nature in Tennessee: Out of the Dark and Into the Light?*, 5 MEM. ST. U. L. REV. 319, 323-39 (1975); Ploscowe, *supra* note 90, at 277-79; Potter, *supra* note 93, at 65; Louis B. Schwartz, *Morals Offenses and the Model Penal Code*, 63 COLUM. L. REV. 669, 670-82 (1963); Ralph Slovenko, *Sex Mores and the Enforcement of the Law on Sex Crimes: A Study of the Status Quo*, 15 KAN. L. REV. 265, 271-81 (1967); Don P. Stimmel, *Criminality of Voluntary Sexual Acts in Colorado*, 40 U. COLO. L. REV. 268, 268 (1968); Von Beitel, *supra* note 3, at 23; Irv S. Goodman, Comment, *The Bedroom Should Not Be Within the Province of the Law*, 4 CAL. W. L. REV. 115, 116 (1968).

100. See *People v. Superior Court (Caswell)*, 758 P.2d 1046, 1047 (Cal. 1988) (upholding the constitutionality of a law prohibiting loitering in a public toilet for the purpose of engaging in lewd acts).

shut nonconformists out of any public area. Suppressing solicitation has been a traditional means of regulating sexual nonconformity by states and localities.¹⁰¹ Why? Because, other than the performance of the act itself, solicitation (usually in a public place) to participate in even the expression of sexual nonconformity constitutes the most self-aware and public form of expression of the right not to hide.¹⁰²

Classical antisolicitation laws generally follow the pattern suggested by the Model Penal Code. The Model Penal Code did not attempt to break new ground in the penal law.¹⁰³ More interesting, from the perspective of analyzing the ways society actually protects its public space from sexual nonconformists, is the solicitation jurisprudence of those truly progressive states where the crime of solicitation has been substantially narrowed. Let us examine these progressive decisions more closely.

In *People v. Uplinger*,¹⁰⁴ the New York Court of Appeals invalidated the state's loitering statute on the same basis on which it had earlier invalidated the sodomy laws (at least as the statute involved private consensual conduct).¹⁰⁵ The court of appeals did not, however, abandon the public/private distinction of the Model Penal Code or the Wolfenden Report.¹⁰⁶ Rather, the court left open the door for enactment of a constitutionally valid harassment statute based on the nuisance and annoyance principles underlying the Model Penal Code approach.¹⁰⁷ One of the significant disputes between the majority and Judge Jasen's dissent in *Uplinger* revolved around whether the statute could be properly characterized as a harassment statute.¹⁰⁸ The opinions imply that any changes

101. *Project*, *supra* note 90, at 691 n.30.

102. Indeed, in some states without a solicitation statute, solicitation is criminalized as an attempt crime—attempt to violate the sodomy laws. *See, e.g.*, *State v. Walsh*, 713 S.W.2d 508, 508 (Mo. 1986). For a discussion of the public element of solicitation, and its effects on nonconformist identity, see Bell, *supra* note 15, at 98-101. For a lyrical expression of these notions, see JOHN RECHY, *THE SEXUAL OUTLAW* (1977).

103. *See* MODEL PENAL CODE § 251.3 cmt. 2 (1980) (examining the origins of the solicitation statute). For a critical discussion of solicitation laws, see Bell, *supra* note 15, at 97-114; *Developments in the Law—Sexual Orientation and the Law*, 102 HARV. L. REV. 1508, 1537-40 (1989) (discussing applied and facial challenges to state solicitation statutes).

104. 447 N.E.2d 62 (N.Y. 1983), *cert. dismissed*, 467 U.S. 246 (1984).

105. *Id.* at 63.

106. *Id.* "Inasmuch as the conduct ultimately contemplated by the loitering statute may not be deemed criminal, we perceive no basis upon which the State may continue to punish loitering for that purpose. This statute, therefore, suffers the same deficiencies as did the consensual sodomy statute." *Id.* (referring to the decision in *People v. Onofre*, 415 N.E.2d 936 (N.Y. 1980)).

107. *Id.* "We do not hold that the Legislature cannot enact a law prohibiting a person from accosting another in an offensive manner or in an inappropriate place even if the underlying purpose is not a violation of the law." *Id.*

108. Thus, Judge Jasen, in dissent, and arguing from the Model Penal Code, saw no basis for not treating the statute like a harassment statute.

Nor is it irrational for the Legislature to have decided that the presence of people soliciting

in the notion of what constitutes actionable harassment could reopen the door to validating statutes closer to the statute overturned in *Uplinger*. Defining the distinction between a harassment and a nonharassment statute becomes a function of caselaw. There can be little comfort in that. Preserving the *Uplinger* court's view becomes dependent on the values of the members of that court. A different court could, consistent with the broad themes of *Uplinger*, adopt the perspective of Judge Jasen.

In *Pryor v. Municipal Court*,¹⁰⁹ the California Supreme Court narrowed, but did not overturn, the solicitation statute at issue.¹¹⁰ However, one can argue that the new interpretation substantially eviscerated the provision's effect, so much so that the provision could be treated as, in effect, repealed.¹¹¹ Two cautionary notes, however, serve to emphasize that the court's decision is not all that far from its Model Penal Code roots. First, the touchstone for regulation after *Pryor* remains public offense.¹¹² Second, the legislature, or the court as in *Pryor*, retains the power to determine what conduct is likely to offend.¹¹³ While the second note is comforting to nonconformists in a case like *Pryor* in which the court was sympathetic to sexual nonconformity, the point that judges tend to change with surprising rapidity and that legislatures may more likely than not reflect strongly held views of dominant society needs re-emphasis. Another court might define conduct likely to cause offense very differently. Though the *Pryor* court indicated that substantial constitutional problems existed with any attempt to bring conduct which was itself lawful within the solicitation definition (like private consensual acts of sod-

in public to engage in sexual conduct is in and of itself annoying. In addition, such conduct can be annoying, offensive and even threatening to those who are not directly solicited but merely observe such conduct.

Id. at 64 (Jasen, J., dissenting) (referring to MODEL PENAL CODE § 251.3 cmt. 2, at 476 (1980)).

109. 599 P.2d 636 (Cal. 1979). It is interesting to note that the Massachusetts Supreme Judicial Court adopted the California Supreme Court's approach in *Pryor* to narrow the construction of its own lewdness statute. *See Commonwealth v. Sefranka*, 414 N.E.2d 602, 607-08 (Mass. 1980).

110. *Pryor*, 599 P.2d at 636.

111. The court held that the conduct criminalized under the statute

involves the touching of the genitals, buttocks, or female breast for the purpose of sexual arousal, gratification, annoyance or offense, if the actor knows or should know of the presence of persons who may be offended by his conduct. The statute prohibits such conduct only if it occurs in any public place or in any place open to the public or exposed to public view; it further prohibits the solicitation of such conduct to be performed in any public place or in any place open to the public or exposed to public view.

Id. at 647.

112. "The statute thus serves the primary purpose of protecting onlookers who might be offended by the proscribed conduct." *Pryor*, 599 P.2d at 646. The court's job is to construct a "constitutionally specific definition . . . limited to conduct of a type likely to offend." *Id.* at 647.

113. *See id.* at 644-46 (exercising the court's power to construe a statute to avoid constitutional infirmity).

omy), it did not absolutely foreclose the possibility. By not foreclosing the possibility, the *Pryor* court's ruling suggests approval of the Model Penal Code approach.¹¹⁴ Another court, perhaps one with a less developed sense of theoretical constitutional niceties, might find itself up to the task.

That other court might well have been the California Supreme Court in its 1988 manifestation in *People v. Superior Court (Caswell)*.¹¹⁵ In *Caswell*, the court rejected a constitutional challenge to the California loitering statutes, under which the state charged several people with criminally loitering in a public toilet for purposes of engaging in or soliciting lewd, lascivious, or unlawful acts.¹¹⁶ While the acts themselves were limited to those defined in *Pryor*,¹¹⁷ the *Caswell* court rejected the notion put forward by the *Pryor* court that the "task of defining with constitutional specificity which forms of private lawful conduct, protected by the Brown Act, are lewd or dissolute conduct, the solicitation of which is proscribed by this statute" is probably impossible.¹¹⁸

Instead, relying on the language and commentary of Model Penal Code section 251.3, the majority asserted that they "can readily envision numerous situations where noncriminal conduct may legitimately give rise to probable cause to believe an individual is in violation of" the statute.¹¹⁹ "Thus to be vulnerable to prosecution, a person must linger near a restroom and think or fantasize about improper sexual acts or any other crime on the books. No overt act. No advances toward any other person. Just thoughts."¹²⁰ Not just thoughts, but public thoughts that evidence

114. *See id.* at 646. "First, we need not attempt the probably impossible task of defining with constitutional specificity which forms of private lawful conduct, protected by the Brown Act, are lewd or dissolute conduct, the solicitation of which is proscribed by this statute." *Id.* The court, moreover, avoided what it perceived to be a difficult First Amendment problem posed by a statute the scope of which was uncertain, "for uncertainty concerning its scope may then chill the exercise of protected First Amendment rights." *Id.* at 643. *But see* Richard Delgado & Jean Stefancic, *Images of the Outsider in American Law and Culture: Can Free Expression Remedy Systemic Social Ills*, 77 CORNELL L. REV. 1258, 1284-88 (1992) (arguing that our system of free speech fails to correct the repression and abuse of subjected groups, but instead contributes to their subjection). The First Amendment has not proven to be much of a problem for other courts. *See State v. Phipps*, 389 N.E.2d 1128, 1134 (Ohio 1979) (stating that the solicitation statute applies to "fighting words" but the very act of solicitation might be likely to provoke the average person).

115. 758 P.2d 1046 (Cal. 1988).

116. *Id.* at 1048.

117. *See id.* at 1050 (citing *Pryor v. Municipal Court*, 599 P.2d 636, 646-47 (Cal. 1979)).

118. *Pryor*, 599 P.2d at 646.

119. *Caswell*, 758 P.2d at 1053. Thus, "complaints by citizens who have used a certain restroom that an individual was lingering inside engaging in suggestive conduct—not amounting to an actual solicitation or indecent exposure—may legitimately give rise to a reasonable inference that the individual harbors the illicit intent." *Id.* This, the dissenting opinion was quick to note, revealed "one of the ways in which this vague statute can be—and probably is—misused." *Id.* at 1059 (Mosk, J., dissenting).

120. *Id.* at 1060 (Mosk, J., dissenting).

social undesirability and the need to suppress will render a person vulnerable to prosecution.¹²¹ For judges who lack empathy and lack any desire to understand the different life experiences of the objects of their judging, such a decision confirms the tendency of "sex" law to give with one hand and take away with the other in matters affecting sexual outsiders.¹²²

Neither *Uplinger*, *Pryor*, nor *Caswell* were decided in a vacuum. The results in the long line of Supreme Court privacy jurisprudence support the notion that the state can enforce a duty to control the public conduct of sexual nonconformists. For my purposes, that line of cases reduces to the proposition that while the courts have had trouble determining what forms of private conduct the right of privacy does not protect,¹²³ the courts have had no problem determining what forms of public conduct violate dominant group conduct taboos. Thus, for instance, federal constitutional privacy rights may not extend to people engaging in open adultery,¹²⁴ to the consensual viewing of pornographic films in public places,¹²⁵ or to fornication.¹²⁶ The Supreme Court has never tired of stressing that the

121. "[V]agrancy statutes are useful to the police. . . . [T]hey are nets making easy the roundup of so-called undesireables." *Papachristou v. City of Jacksonville*, 405 U.S. 156, 171 (1972).

122. For a discussion of empathy and moral error in judging, see generally Richard Delgado & Jean Stefancic, *Norms and Narratives: Can Judges Avoid Serious Moral Error?*, 69 TEX. L. REV. 1929 (1991).

123. *Compare Eisenstadt v. Baird*, 405 U.S. 438, 453-54 (1972) (holding that unmarried heterosexuals had a privacy right with respect to private consensual sexual practices) with *Bowers v. Hardwick*, 478 U.S. 186, 191 (1986) (holding no privacy right to private consensual sexual activity exists between people of the same sex). The Supreme Court's privacy jurisprudence has been subject to furious criticism from almost every perspective known to man. See, e.g., THOMAS C. GREY, *THE LEGAL ENFORCEMENT OF MORALITY* 37 (1983) (detailing the liberal criticism of privacy jurisprudence); Hafen, *supra* note 26, at 463; Halley, *supra* note 14, at 351; Allen Ides, *Bowers v. Hardwick: The Enigmatic Fifth Vote and the Reasonableness of Moral Certitude*, 49 WASH. & LEE L. REV. 93, 99-105 (1992); Donald E. Lively, *Equal Protection and Moral Circumstance: Accounting for Constitutional Basics*, 59 FORD. L. REV. 485, 485-92 (1991); Sandel, *supra* note 26, at 521 (citing the Conference on Community, Law and Moral Reasoning); Thomas, *supra* note 47, at 1431.

124. See Martin J. Siegel, *For Better or Worse: Adultery, Crime and the Constitution*, 30 J. FAM. L. 45, 58-86 (1991-92) (discussing the current state of the law and arguing for the extension of constitutional protections for adulterous conduct); Note, *Constitutional Barriers to Civil and Criminal Restrictions on Pre- and Extramarital Sex*, 104 HARV. L. REV. 1660, 1674-78 (1991) (arguing that statutes criminalizing adultery are unconstitutional).

125. *Compare Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 58-66 (1973) (holding no privacy right exists to view obscene materials in a public movie house) with *Stanley v. Georgia*, 394 U.S. 557, 568 (1969) (reversing a conviction for possession of obscene material in home). I note, but take no position in this article on, the question of pornography and the necessity of its regulation as conduct and not speech. Those issues, subtle and complex, lie outside the scope of this article. See generally Catharine A. MacKinnon, *Pornography as Defamation and Discrimination*, 71 B.U. L. REV. 793 (1991) (discussing pornography and the necessity of its regulation).

126. The "means for achieving the same basic purpose of protecting marital fidelity are available to Connecticut without the need to 'invade the area of protected freedoms.'" *Griswold v. Connecticut*, 381 U.S. 479, 498 (1965) (Goldberg, J., concurring) (quoting *NAACP v. Alabama*, 377 U.S. 288, 307 (1964)); see also Note, *supra* note 124, at 1663-71 (noting that the Supreme Court has never ruled on

state has a legitimate interest in advancing the moral welfare of its citizenry and protecting public decency.¹²⁷

Equally troublesome is that solicitation statutes are not the only means by which the power of the state is employed to keep sexual nonconformists out of sight. For instance, the state has used loitering statutes to round up undesirables—people who offend the public decency (the meaning of which remains unchanged even after the decriminalization of private consensual nonconformist sexual conduct).¹²⁸ Through such roundups, the state may make sexual nonconformists yet again invisible by hiding them from public view.¹²⁹ Additionally, in a number of jurisdictions, state licensing statutes authorize the closing of the few public meeting places open to sexual nonconformists. Thus, especially before the 1970s, a number of states effectively kept tight control on gay bars by threatening to revoke bar owners' liquor licenses where the existence of the nature of the bar's patrons became notorious.¹³⁰ More pernicious, perhaps, is the growing use of newly enacted sexual battery statutes to control nonconformist sexual conduct.¹³¹

Unfortunately, then, the problem of solicitation and the stark rendering of the public/private distinction peculiarly applicable to sexual nonconfor-

the issue, but arguing that in light of current privacy jurisprudence, fornication ought to be constitutionally protected).

127. See, e.g., *Bowers*, 478 U.S. at 190 (noting that law is based on notions of morality); *Jacobellis v. Ohio*, 378 U.S. 184, 187 (1964) (noting that a state has the authority to "maintain a decent society"). For a discussion of the federal courts' acceptance of the legitimacy of the use of the police power to provide for the public morality, see D. Don Welch, *Legitimate Government Purposes and State Enforcement of Morality*, 1993 U. ILL. L. REV. 67, 86-91.

128. See *Papachristou v. City of Jacksonville*, 405 U.S. 156, 171 (1972).

129. See *Bell*, *supra* note 15, at 97-114; *Project*, *supra* note 90, at 664-68. This marginalizing (in quite the literal sense) use of loitering law has been applied to African-Americans and former criminals, as well as gay men and lesbians. See William O. Douglas, *Vagrancy and Arrest on Suspicion*, 70 YALE L.J. 1, 7-14 (1960); Forrest W. Lacey, *Vagrancy and Other Crimes of Personal Condition*, 66 HARV. L. REV. 1203, 1218-19 (1953); Gary V. Dubin & Richard H. Robinson, Note, *The Vagrancy Concept Reconsidered: Problems and Abuses of Status Criminality*, 37 N.Y.U. L. REV. 102, 128-33 (1962).

130. See, e.g., *Project*, *supra* note 90, at 725-34 (discussing the methods used by police and state licensing agencies against the owners of establishments in which sexual nonconformists congregated). A more comprehensive view of this strategy for control of the public space lies outside the scope of this article. For a dated but fairly thorough review of the law in this regard, see M.J. Greene, Annotation, *Sale of Liquor to Homosexuals or Permitting Their Congregation at Licensed Premises as Ground for Suspension or Revocation of Liquor License*, 27 A.L.R. 3d 1254 (1969); Rosen, *supra* note 83, at 166-67 (discussing harassment by New York City police at meeting places frequented by homosexuals during the 1960s).

131. See OKLA. STAT. ANN. tit. 21, § 1123B (West Supp. 1995). The Oklahoma statute defines sexual battery as the "intentional touching, mauling or feeling of the body or private parts of any person sixteen (16) years of age or older, in a lewd and lascivious manner and without the consent of that person." *Id.* Undercover police have arrested people for sexual battery when, in the course of their decoy work, a target has touched the officers.

mity (even when the courts have watered down that distinction, as in the cases discussed) continues to pose a significant threat to both the public and private existence of sexual nonconformists. These supplementary modes of control of ostensibly public, and therefore potentially offensive, conduct, constitute a greater threat than the old sodomy statutes. Like a Damoclean Sword, the potential for separation and the possibility of a more sharpened view of difference constantly hangs over the head of those who believe that substantial public progress is being made in opening the public sphere.¹³² As long as offense, and particularly moral offense, remains a legitimate source of governmental power to regulate, no decision of any court will truly liberate sexual nonconformists from the darkness of the private spaces the government and society have assigned them. For this reason, some commentators have turned away from the allure of balancing the relative rights of parties toward the security of boundaries and bright line rules for protecting the habits, inclinations, and identity of nonconformists.¹³³

VI. WHAT WE REALLY PREACH

The touchstone of decriminalization—of toleration on a broader plane—is public offense. Neither the Wolfenden Report nor the Model Penal Code sought to soften or devalue the state's interest in permitting the punishment of morally offensive conduct. The only concession is to limit punishment of moral offenses under the criminal law to public manifestations of such conduct. As long as one concealed one's nonconformity from every member of the dominant group, one's conduct was private and inoffensive; otherwise, one's conduct could be branded public and punished. The liberal canon, therefore, preserves, substantially undisturbed, the core traditional purpose of morals legislation—the restraint of official (public) conduct both sinful and, on that basis, irredeemably offensive.¹³⁴

132. Indeed, as the *Caswell* case demonstrates, the sword occasionally has fallen even in the most "progressive" of states. *Caswell*, 758 P.2d at 1046-47. It is even easier for the sword to fall in states where sodomy remains a criminal offense. In those states, the courts have had little problem upholding solicitation statutes on the basis of the criminality of the conduct being solicited. *See, e.g., Pedersen v. City of Richmond*, 254 S.E.2d 95, 98-99 (Va. 1979) (sustaining conviction of defendant charged with sodomy).

133. *See Dalton*, *supra* note 25, at 881, 900 ("But flexibility is purchased at a price—namely highly unpredictable outcomes. Because Feinberg cares very much about substantive outcomes, and seeks principles that will assist legislatures to draft morally justified penal laws, the indeterminacy of his scheme [based on the balancing of a nuisance model] ought to give him fits. . . . I would therefore rather cast my lot with privacy/property analysis, and the safety of a well-marked border."). Of course, this well-marked border may enclose an especially small area. Ironically, that is also the thrust of the Model Penal Code and Wolfenden formulations; which limit nonconformists to the publicly nonexistent world of the closet.

134. *See Henkin*, *supra* note 25, at 392-95; *Schwartz*, *supra* note 99, at 670.

The difference between the liberal canon, which gives free rein to inclination to suppress immoral (nondominant group) conduct, and the conservative canon is merely one of degree.¹³⁵ Traditionalists are equally offended by both public and private conduct.¹³⁶ Liberals are not. The distinctions between public and private expression of sexual nonconformity under the Model Penal Code and the Wolfenden Report represent “nothing but differences in the intensity of the aversion with which the different kinds of behavior are regarded.”¹³⁷ Liberals are able to make a distinction between public and private conduct, and they can justify different treatment of each based upon practicality and expediency considerations.¹³⁸ They do not justify the protection for private conduct because that conduct is good. For conservatives the inability to concede that the conduct is “good” makes it difficult to justify different treatment of public conduct based on economic considerations.

Let us examine this aversion more closely. The aversion is twofold. First, the conduct itself produces an aversion. To that aversion, the Wolfenden Report and the Model Penal Code suggest that aversion alone is insufficient to criminalize the nonconformity, absent other aggravating factors.¹³⁹ The second aversion is to the appearance, whether public or private, of condoning or approving either the conduct of sexual nonconformity or sexual nonconformity as a state-of-being. The second aversion feeds on a fundamental unwillingness to empathize with the object of toleration.¹⁴⁰ To that aversion, and to disinterest in empathy, both the

135. Compare the difference between the voice of the liberal canon and that of the traditionalist. For the traditionalist, “[t]he prevention of a sinful act is good, both for the society at large and for the individual who refrains, even if such restraint is merely external, having been produced by the fear of punishment, and produces no change in the human heart.” David M. Smolin, *The Enforcement of Natural Law by the State: A Response to Professor Calhoun*, 16 U. DAYTON L. REV. 381, 402 (1991). The liberal canon would give greater latitude to individual freedom of choice at the margin—in matters of private morality, privately practiced. THE WOLFENDEN REPORT, *supra* note 9, paras. 61-62; MODEL PENAL CODE § 213.2 cmt. 2, at 371-72 (1980). Everything else is potentially punishable, not merely as an affront to moral and aesthetic sensibilities, but as a nuisance punishable under the laws of society. THE WOLFENDEN REPORT, *supra* note 9, para. 49; MODEL PENAL CODE § 251.3 cmt. 2, at 476 (1980). Is there really much difference between the two? I believe there is not.

136. See, e.g., Smolin, *supra* note 135, at 402.

137. Schwartz, *supra* note 99, at 675 (attempting to explain why some conduct was punishable whether or not public, such as desecration of a corpse, and some only when public, such as sodomy, under the Model Penal Code).

138. See *id.* at 676.

139. See THE WOLFENDEN REPORT, *supra* note 9, para. 61; MODEL PENAL CODE § 213.2 cmt. 2, at 371-72 (1980).

140. “There is actually a body of emerging writing that says empathy only goes so far, that we cannot identify with or love anyone who is too different from us, cannot resonate to a ‘story’ too unlike the one we usually hear.” Richard Delgado, *Rodrigo’s Third Chronicle: Care, Competition, and the Redemptive Tragedy of Race*, 81 CAL. L. REV. 387, 413 (1993) (reviewing ANDREW HACKER, *TWO NATIONS: BLACK AND WHITE, SEPARATE, HOSTILE, UNEQUAL* (1992)).

Model Penal Code and Wolfenden Report have given free rein. "The conviction that homosexual conduct is 'bad' quickly translates into the conclusion that it therefore should be punished, and there is a corresponding fear that removing criminal sanctions would amount to implied endorsement of a kind of behavior that majoritarian sentiment finds abhorrent."¹⁴¹

As long as sexual nonconformity is hidden, it need not appear to exist. Public existence poses a problem for a dominant culture whose mores compel suppression of the nonconformity tolerated. If the dominant culture cannot, *with the complicity of the object of their toleration*, pretend that sexual nonconformity does not exist, then that very nonconformity becomes a threat to the dominant culture. Traditionalists have long recognized this, and, as a consequence, have declared war on all nonconformity.¹⁴² By contrast, liberals compromise, dissatisfied with tradition but unwilling to embrace the alternatives.

Moreover, for marginalized groups to take control of their identity and pursue public recognition of a positive self-identity is a danger for a dominant culture built, in some measure, on the notion that there is value, especially an economic value, in conformity.¹⁴³ Control of identity is

141. MODEL PENAL CODE § 213.2 cmt. 2, at 366 (1980). Indeed, this aversion to appearing to approve the conduct or lifestyle of sexual nonconformists plays a significant role even in the reticence of legislatures to decriminalize even private adult consensual sexual activity. This appearance of approval had been a fear of a large group of the Model Penal Code Advisory Committee who had opposed decriminalization of private acts of "deviate sexual intercourse." MODEL PENAL CODE § 213.2 cmt. 2, at 372 (1980). Those opposed to decriminalization "thought that the Reporters' recommendation was rationally correct, but feared that failure to make a concession to violent emotional hostility among legislators and the public at large might jeopardize acceptance of the Model Penal Code as a whole." *Id.* That fear had been the reason why Texas originally refused to decriminalize private acts of sodomy. *See* Von Beitel, *supra* note 3, at 44-46. The same fear permeates the public debate over the inclusion of noncloseted gay men and lesbians into the armed forces. *See, e.g.,* Judith H. Steihm, *Managing the Military's Homosexual Exclusion Policy: Text and Subtext*, 46 U. MIAMI L. REV. 685, 691-95 (1992). It suffused the decision in *Bowers v. Hardwick*, 478 U.S. 186 (1986). In that regard, see Lynne N. Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574, 1638-49 (1987). *Cf.* Delgado & Stefancic, *supra* note 122, at 1929 (noting the inability of the judiciary to identify with litigants who are too "different" from them, and the effects of this perception of difference on litigation).

142. *See, e.g.,* BORK, *supra* note 26, at 10-11, 110-26.

143. For a discussion of dominant group identity as property in the context of race, see Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1709, 1715-45 (1993). Professor Harris argues that there exists a set of assumptions, privileges, and benefits that accompanies the status of being white which has become a valuable asset, akin to property rights, which whites have sought to protect. *Id.* at 1713. The conflation of race and property have made it possible for historical forms of domination to evolve to reproduce subordination in the present. *Id.* at 1758; *see also* Julianne Malveaux, *Gender Difference and Beyond: An Economic Perspective on Diversity and Commonality Among Women*, in THEORETICAL PERSPECTIVES ON SEXUAL DIFFERENCE 226, 227-38 (Deborah L. Rhode ed., 1990) (arguing that feminism theory and policy should consider differences in race, class, and family circumstances among women). In a similar vein, Professor Alan Freeman has argued that civil rights law creates a facade of racial fairness that facilitates continuing white domination. *See* Alan D. Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doc-*

thus a conscious act of the controlling group, critical for setting the acceptable parameters of the toleration of nonconforming conduct. The importance of the power to control image is conscious. Consider what was important to the people considering the decriminalization of sodomy in Texas:

The second concern of Committee members favoring criminalization of these acts dealt with keeping the homosexually-oriented person in his or her place and out of the public sight. These Committee members were concerned that if the private homosexual acts of consenting adults were decriminalized, then the gay subculture would become increasingly more visible—to the aesthetic discomfort of the heterosexual majority—which could no longer deny the existence of the massive and pervasive gay segment of society.¹⁴⁴

Perhaps the Texas legislators of the 1970s were right. Certainly they were right to believe that allowing any kind of positive public identity could seriously erode the dominant group's power to marginalize its nonconformists and to use nausea as a means of covert suppression. By bidding for public approval, nonconformity may become respectable. Respectability reduces the dominant group's ability to express its revulsion through the agency of the criminal law. Respectability is a consequence to be avoided; it is a proxy for political power.¹⁴⁵ Thus, for example, the

trine, 62 MINN. L. REV. 1049, 1050-52 (1978). Derrick Bell has argued that the structures of racial domination have remained intact from the days before the abolition of slavery in the United States. Consequently, moral and legal advances toward social justice in racial matters are no more than manifestations of white self-interest. See DERRICK BELL, *FACES AT THE BOTTOM OF THE WELL* (1992); Derrick Bell, *Forward: The Final Civil Rights Act*, 79 CAL. L. REV. 597, 602-11 (1991). This notion may also have a certain force in the context of sexual nonconformity. See Von Beitel, *supra* note 3, at 45 (explaining that the Texas Bar Penal Code Revision Committee wanted to continue the criminalization of sodomy, in part, to preserve the economic power of sexual conformists). The author explained: "This factor of employment discrimination is very important in explaining why some members wanted these acts criminalized, since the criminalization of the private homosexual acts of consenting adults is a means of precluding a cause of action arising out of discrimination on the basis of sexual orientation in employment." *Id.*

144. Von Beitel, *supra* note 3, at 44-45. Mr. Von Beitel also explained that those who favored criminalization feared that decriminalization would result in greater public displays of disapproved conduct, and as such, the "crime rate" would increase. *Id.* at 43.

145. Professor Louis Schwartz has addressed how this political power might be gained:

I do not mean to suggest a particular percentage test of substantial unanimity. It is rather a matter of when an ancient and unquestioned tenet has become seriously debateable in a given community. This may happen when it is discovered that a substantial, although inarticulate, segment of the population has drifted away from the old belief. It may happen when smaller numbers of articulate opinion-makers launch an open attack on the old ethic. When this kind of beach-head has been established in the hostile country of traditional

power of dominant culture to impose on lesbians the images of “predatory, possessive, promiscuous, jealous, sadistic, masochistic, unhealthy, bitter, man-hating, masculine, aggressive, frustrated, over-sexed” people¹⁴⁶ is the power to effect legal results on the basis of this negative image in matters ranging from child custody to employment.¹⁴⁷

Liberal toleration, therefore, permits the dominant culture to maintain control of the image and identity of sexual nonconformists. Dominant culture will use whatever is handy to advantage its image control. Consider AIDS¹⁴⁸ in this regard. Dominant culture has managed to use AIDS to craft an image of gay men as something apart—as a group whose sexual conduct condemns them to difference and death.¹⁴⁹ In a manner of

faith, then, and only then, can we expect constitutional principles to restrain the fifty-one percent majority from suppressing the public flouting of deeply held moral views.

Schwartz, *supra* note 99, at 672; cf. Deborah H. Rhode, *Definitions of Difference*, in THEORETICAL PERSPECTIVES ON SEXUAL DIFFERENCE, *supra* note 143, at 197, 212 (“Disputes over abstract legal principles can divert energy from concrete political struggles, and incremental reforms can deflect attention from the more basic economic and social problems that remain.”). This notion has been echoed in recent judicial opinions, particularly those refusing to limit the power of the state to criminalize sodomy on constitutional grounds. See, e.g., *State v. Walsh*, 713 S.W.2d 508, 511 (Mo. 1986) (holding that classification based on sexual preference constitutionally permissible). The irony, of course, is that illegality may create uncontrollability. Like the trade in liquor during the period of Prohibition in this country, the suppression of sexual nonconformity makes it impossible for the state to govern and regulate the nonconformists. See *infra* note 175.

146. Anne B. Goldstein, *Representing Lesbians*, 1 TEX. J. WOMEN & L. 301, 302 (1992).

147. Halley, *supra* note 2, at 947-61; Law, *supra* note 60, at 186-96.

148. AIDS is an acronym for Acquired Immune Deficiency Syndrome, and is evidenced by the presence of antibodies to the Human Immunodeficiency Virus (HIV) in the blood. BLACK'S MEDICAL DICTIONARY 18 (35th ed. 1987).

149. See, e.g., ROGER J. MAGNUSON, ARE GAY RIGHTS RIGHT?: MAKING SENSE OF THE CONTROVERSY 47-54 (1990). This is primarily the case in the area of insurance. See, e.g., Clifford & Iuculano, *supra* note 8, at 1806-08. Indeed, the dominant culture of late appears interested in gay men primarily in connection with AIDS. Thus, American cinema (even with good intentions) tends to portray gay men as touched by the tragedy of AIDS. See, e.g., PHILADELPHIA (Tri-Star Pictures 1994). This, of course, is not to trivialize that tragedy—the point, however, is that gay men are viewed almost exclusively through the prism of that disease to differentiate and isolate gay men from dominant heterosexual society. When sexual nonconformists are not portrayed as touched by AIDS, they are invariably portrayed as somewhat deranged and threatening. See, e.g., BASIC INSTINCT (Tri-Star Pictures 1992) (telling a story about a woman with lesbian tendencies who is compelled to murder heterosexual men). Interestingly enough, while female sexuality in pictures such as this is threatening, heterosexual cravings, even when overheated, are perfectly acceptable traits for social heroes. “Gay and lesbian organizations have been protesting the film [Basic Instinct] because all of the bad guys are bisexuals, but the truth is, all of the bad guys are women. . . . Our villains are prowling harpies who can't be trusted, while our hero is a violence-prone man who can't keep his rocket in his pocket long enough to solve the crimes.” Karla Peterson, *Basically, “Instinct” Is Disturbing Thriller*, SAN DIEGO UNION-TRIB., Mar. 21, 1992, at E5. Otherwise, they provide the comic element in light-hearted comedies. See, e.g., LA CAGE AUX FOLLES (Dama Produzione and Les Productions Articles Associates 1978) (portraying a gay male couple raising a heterosexual son of one of the partners). As one reviewer noted, “There's nothing like homosexuality for still raising hackles among large sectors of straight middle- and upper-class society. . . . Fierstein knows that pounding the table for gay rights will send them up the aisles. Wrap it in a musical, with music and lyrics by that supreme middlebrow, Jerry Herman, and they'll

speaking, the accommodationist approach of liberal toleration might well have facilitated the use of AIDS by the dominant culture to transform gay men into our modern equivalent of premodern lepers and syphilitics.¹⁵⁰

The aversion to the conduct “decriminalized” through the model of toleration implicit in the Model Penal Code and Wolfenden Report finds official expression in the law itself. Statutes continue to speak the language of moral opprobrium, emphasizing the official image of sexual nonconformists, whose private conduct has been decriminalized, as disapproved. Liberal toleration borrows heavily from the traditionalist approach it seeks to supplant; there is a strong tie between the traditional means of identifying nonconformists’ sexual acts—detestable and abominable crimes against nature—and crimes, the identity of which is dependant upon an opprobrious characterization.¹⁵¹

There is, therefore, some measure of truth to arguments that “[p]ervasive prejudice, unfounded stereotypes, and invidious public and private discrimination severely victimize gay males and lesbians in the United States. . . . State and federal institutions . . . are prime instigators and facilitators of this invidious discrimination.”¹⁵² Such discrimination is the payment society will continue to extract for its official decriminalization of private sexual acts. This “deal” works well for society, but it provides little to its supposed beneficiaries.¹⁵³ The deal ensures that all

hum along.” Robert Koehler, *Stage Review; An Overblown “Cage Aux Folles” in Long Beach*, L.A. TIMES, Oct. 12, 1988, pt. 6, at 3.

150. Thus, for instance, the repeated calls, dutifully reported in the popular press, for mandatory testing for the HIV antibody (to identify sexual nonconformists) or the isolation of gay men in order to control this new disease, or both. See, e.g., DAVID F. GREENBERG, THE CONSTRUCTION OF HOMOSEXUALITY 479 (1988) (describing the calls to isolate, quarantine, or even tattoo people exposed to the HIV virus). On the responses of Western European society to syphilis during the Renaissance, see generally Bruce T. Boehrer, *Early Modern Syphilis*, in FORBIDDEN HISTORY: THE STATE, SOCIETY, AND THE REGULATION OF SEXUALITY IN MODERN EUROPE 11 (John C. Fout ed., 1992). Sylvia Law has noted that AIDS has simultaneously increased (1) awareness of “homosexuality,” and (2) compassion for those afflicted with AIDS, and (3) disapproval and public fear of sexual nonconformists. Law, *supra* note 60, at 194-95; accord GREENBERG, *supra*, at 478-81.

151. See *supra* text accompanying notes 85-92.

152. John Charles Hayes, Note, *The Tradition of Prejudice Versus the Principle of Equality: Homosexuals and Heightened Equal Protection Scrutiny After Bowers v. Hardwick*, 31 B.C. L. REV. 375, 375 (1990).

153. The ban on private conduct is difficult and expensive to enforce, and does little to inhibit such conduct. This is the thrust of the rationale supporting decriminalization of sodomy in the Model Penal Code. See MODEL PENAL CODE § 213.2 cmt. 2, at 370-71 (1980). But see David L. Shapiro, *Courts, Legislatures, and Paternalism*, 74 VA. L. REV. 519, 532 (1988) (stating that movement to decriminalize private consensual acts of sodomy “cannot be explained simply in terms of a decision about the best uses of limited judicial and prosecutorial resources; the arguments for decriminalization emphasize the inherent value of individual autonomy in matters of choice”). But any public manifestation of the desire for or the positive expression of any facet of sexual nonconformity is a “public nuisance.” See, e.g., MODEL PENAL CODE § 251.3 cmt. 2, at 476 (1980). The boogeyman is “indiscriminate solicitation in public streets, parks, and transportation facilities [which] is not only an affront to

of the constitutional due process and equal protection analysis in the world¹⁵⁴ will contribute little to the ability of sexual nonconformists to come out of their societally imposed hiding places. The elimination of the sodomy laws and other legal proscriptions on *private* sexual nonconformity grants society the authority to continue to *publicly* suppress the idea of sexual nonconformity, permits the use of the law to express public nausea with conduct tolerated, and creates an official state policy the implications of which are that it is proper to treat sexual nonconformists as people whose public existence amounts to little more than a public nuisance.

Indeed, some have argued that this form of liberal toleration has enabled dominant society to marshal basic constitutional protections, such as the First Amendment guarantee of freedom of expression, as a vehicle for the vilification of nondominant groups.¹⁵⁵ The better view, I believe, is that freedom of expression provides a means of vilification only because those vilified have abandoned the field. This, perhaps, is the most ironic part of the deal which liberal toleration, that of the Model Penal Code variety, has extracted from sexual nonconformists. Liberal toleration works only through and to the extent of the complicity of those tolerated. "It is a truism in the gay and lesbian communities that such self-identified heterosexuals [who totally deny the importance of their own homosexual desires and behavior], in order to maintain their counterfactual denial of their own homoerotic experience, zealously foment the very stigma they are so concerned to avoid."¹⁵⁶

Much like the dust in the parable (and what is the dust; certainly the

moral and aesthetic sensibilities; it is also a source of annoyance to, and harassment of, members of the public who do not wish to become involved." *Id.* Such conduct is easy to police and control—and ensures that even tolerated conduct remains private and hidden from view; permitting society the luxury of believing it does not exist. Apparently, though, the deal is not reciprocal—annoyance to and harassment of sexual nonconformists by people representing the dominant view is not perceived as an equivalent nuisance, worthy of suppression. That is the ever present problem of balancing at the core of our notions of nuisance—and in the balancing, the weight of the disgust of the majority, it would seem, might always overpower that of the minority.

154. And there has been an abundance of this type of analysis over the last 30 years, and especially after *Bowers v. Hardwick*, 478 U.S. 186 (1986). See, e.g., POSNER, *supra* note 45, at 341-50; Goldstein, *supra* note 14, at 1081-87; Nan B. Hunter, *Life After Hardwick*, 27 HARV. C.R.-C.L. L. REV. 531, 531-54 (1992); Ides, *supra* note 123, at 93; Frank Michelman, *Law's Republic*, 97 YALE L.J. 1493, 1493 (1988) (giving a republican critique of *Bowers v. Hardwick*); Thomas B. Stoddard, *Bowers v. Hardwick: Precedent by Personal Predilection*, 54 U. CHI. L. REV. 648, 648-56 (1987).

155. See Delgado & Stefancic, *supra* note 114, at 1284-88 (explaining that a free market of racial depiction resists change because the dominant-group-generated pictures of the subordinated group are usually negative, and that these negative pictures are internalized by both the dominant and the subordinated group, creating an atmosphere in which, when the subordinated group attempts to speak, they have little credibility); Kenneth L. Karst, *Boundaries and Reasons: Freedom of Expression and the Subordination of Groups*, 1990 U. ILL. L. REV. 95, 95 (stating that "[t]he freedom of expression is the freedom to contribute to the social definition of other people").

156. Halley, *supra* note 2, at 946.

creature has never figured that out, and it is not clear that the dust has), those who cooperate in their own oblivion can, in some measure, blame themselves for the resulting oblivion. Indeed, the creature tends to rouse itself only when what it considers dust shows itself in space the creature has taken on for itself. It is only that which becomes public in this fashion that exists, that can demand attention, and that can maintain its right to the use of societal space. This grabbing of some part of the public space may be the most significant legacy of Stonewall. The active self-consciousness of sexual nonconformists which grew substantially after 1969 represents the intrusion of sexual nonconformists directly into the dialogue with the dominant society respecting both its space and its image.¹⁵⁷ However, twenty-five years has brought only tentative steps and partial recognition. For the moment, the vision of the Model Penal Code and the Wolfenden Report, based on a dialogue by dominant heterosexual society with itself, will continue to be imposed on those for whose good this dialogue has allegedly occurred.

VII. AN ENDING BUT NOT A CONCLUSION

Abandoning direct suppression does not imply tolerance, certainly not positive tolerance. That sexual nonconformity is no longer actively suppressed is a mark of the indecisiveness of the sexually dominant group in America respecting the acceptability of the types of sexual conduct practiced (now more openly) between people of the same sex as well as between people of different sexes. Even the authors of the Wolfenden Report recognized that their conclusions were possible only in a world of cultural conduct-norm indecisiveness, "for on the matters with which we are called upon to deal we have not succeeded in discovering an unequivocal 'public opinion.'" ¹⁵⁸ The drafters of the Model Penal Code also based their toleration of private conduct on the inability to find consensus about how society ought to treat the problem of sexual nonconformity.¹⁵⁹ Ironically, by affirming the power to use the state to affirm dominant sexual conduct mores, our forms of toleration imply its opposite.

[T]he freedom to despise our fellows may be a liberty which is entitled to protection, but when this freedom is exercised conspira-

157. Thus, gay men and lesbians have begun to attempt to take control of the agenda of the manner in which their existence poses a problem for dominant society, and what is to be done about it. See, e.g., MOHR, *supra* note 5, at 315-17 (suggesting a strategy for gay and lesbian activism). This attempt to obtain even partial control of identity has been significant enough to require both recognition and refutation by the dominant culture. See, e.g., Magnuson, *supra* note 149, at 9-19, 37-62.

158. THE WOLFENDEN REPORT, *supra* note 9, para. 16.

159. MODEL PENAL CODE § 213.2 cmt. 2, at 367-69 (1980).

torially by the community, powerful sanctions are unleashed which are just as capable of destroying individual freedom as any sanctions of law or economics. The creativity of the individual is as effectively quashed by the hatred, contempt and rejection of the community as by a jail sentence or the loss of a job.¹⁶⁰

Liberal toleration and sexual liberation of the contemporary liberal variety steals the power of identity from the beneficiaries of its beneficence.¹⁶¹ It preserves, in the dominant society, the power to create identity. Dominant culture dictates the existence of groups; having constructed them ("us" and "them"), it then creates the descriptive differences between the "us" and "them" created. Dominant culture explains as fact that sexual nonconformists are sinful,¹⁶² are sick,¹⁶³ or are otherwise not the equal of normal folk.¹⁶⁴ Dominant culture takes for itself the power to describe the characteristics of these groups, where they live and what they do.¹⁶⁵ This is as destructive as the threat of any criminal punishment for mere conduct. The supreme irony, of course, is that the victims of this toleration cheerily (through increasingly less so) participate in this theater of the absurd. "The transformation of silence into language and action is an act

160. Carrington, *supra* note 25, at 580 (addressing the context of rehabilitative versus deterrence models of criminal law).

161. For an excellent analysis of the social construction of sexual identity, and the imposition of a persona of identifiable and subordinated characteristics on sexual nonconformists, see MICHEL FOUCAULT, *HISTORY OF SEXUALITY* (Robert Hurley trans., Pantheon Books 1978) (1976); GREENBERG, *supra* note 150 (giving a sociological explanation of the construction of the notion of homosexuality). For a discussion on the social construction of a gay or lesbian identity by the dominant culture and its imposition on those so characterized in the United States, see Fajer, *supra* note 3, at 512-15 and Halley, *supra* note 2, at 916 n.5. Cf. PETER L. BERGER & THOMAS LUCKMAN, *THE SOCIAL CONSTRUCTION OF REALITY* 5 (1966) (arguing that "reality is socially constructed and that the sociology of knowledge must analyze the processes in which this occurs").

162. MOBERLY, *supra* note 26, at 27-39. The acceptance of the identity of sexual nonconformists as sinful, moral reprobates, explains in some small way the reluctance by African-American and Hispanic community leaders and institutions to more forcefully respond to the AIDS epidemic among people of color. For a discussion of this issue, which lies outside the scope of this article, see Paula C. Johnson, *Silence Equals Death: The Response to AIDS Within Communities of Color*, 1992 U. ILL. L. REV. 1075, 1079-81.

163. See, e.g., GREENBERG, *supra* note 150, at 397-433; POSNER, *supra* note 45, at 21-23, 53-54.

164. Law, *supra* note 60, at 192-93 ("Most Americans believe that homosexuals lead unhappy and insecure lives."); Timothy W. Reinig, Comment, *Sin, Stigma and Society: A Critique of Morality and Values in Democratic Law and Policy*, 38 BUFF. L. REV. 859, 884-92 (1990).

165. Thus, the picture of the average homosexual: he lives in large cities, prefers interior design, hair styling and the arts as occupation, prefers to stay with his own kind, is intelligent, quirky, neurotic, fashion conscious, and exhibits the mannerisms adopted by women in Western society. See KLING, *supra* note 88, at 102-03; POSNER, *supra* note 45, at 300-07. *But see* Dalton, *supra* note 25, at 903-05 (arguing that permitting a dominant group to define and punish disgusting behavior poses an unacceptable risk of cultural domination); Law, *supra* note 60, at 188-96 (discussing the ways in which dominant culture condemns homosexuals more harshly than it condemns heterosexuals for the same sexual acts).

of self-revelation, and is therefore dangerous; however, the alternative, remaining silent, is more dangerous, and eventually on some level, deadly."¹⁶⁶

In this manner the Wolfenden Report's brand of toleration has brought a large measure of protection against direct coercion by the criminal law, but the Report has done so at an extraordinary price. It cripples the ability of people who do not identify with the sexual moral traditions of the majority of Americans (and whose conduct may violate the conduct taboos of this group) to enjoy something even approaching equivalent status. In the guise of limiting the reach of the criminal law in matters of certain forms of overt sexual conduct regarded as private, the (so-called) liberal state of the last several generations continues to use its power, overtly and covertly, to enforce the notion that the conduct protected (in private) is wrong, awful, disgusting, and not indulged in by normal people.¹⁶⁷

The contradiction, the dysfunction, the power to give with one hand (and feel good about it) and take away with the other (and feel safe) is all too clear.¹⁶⁸ The contradiction permits consensual sexual activity between people irrespective of the sex or marital status of the participants, but punishes, in a sometimes severe and humiliating way, any public expres-

166. Angela Gilmore, *It Is Better to Speak*, 6 BERKELEY WOMEN'S L.J. 74, 80 (1990-91).

167. Two dated, but telling examples: In the first, the state of Ohio refused to permit the incorporation of a gay organization on the grounds that "promotion of homosexuality as a valid life style is contrary to the public policy" of Ohio, despite the fact that Ohio had previously eliminated its sodomy laws. *State v. Brown*, 313 N.E.2d 847, 848 (Ohio 1974). In the second, James McConnell sued to require the state of Minnesota to issue a marriage license to him and his partner. *Baker v. Nelson*, 191 N.W.2d 185, 185 (Minn. 1971). The Minnesota Supreme Court held that the state was not required to issue a marriage license except for heterosexual unions. *Id.* at 187. Thereafter, the University of Minnesota refused to hire Mr. McConnell as a librarian because of the notoriety of the same sex marriage case. *McConnell v. Anderson*, 316 F. Supp. 809, 814 (D. Minn. 1970), *rev'd*, 451 F.2d 193 (8th Cir. 1971), *cert. denied*, 405 U.S. 1046 (1972). Reversing the district court, the Eighth Circuit held that the University of Minnesota could refuse to hire Mr. McConnell on that ground, *McConnell v. Anderson*, 451 F.2d 193, 196 (8th Cir. 1971), *cert. denied*, 405 U.S. 1046 (1972), while not disagreeing with the district court that to justify dismissal from public employment "it must be shown that there is an observable and reasonable relationship between efficiency in the job and homosexuality." *McConnell*, 316 F. Supp. at 814. The Eighth Circuit concluded that Mr. McConnell had been denied a job for a perfectly good reason unrelated to his private homosexual inclinations. *McConnell*, 451 F.2d at 196. McConnell's public behavior—that is, the bringing of the lawsuit itself—constituted an attempt to force his potential employers to approve his homosexuality. *Id.* According to the court, by making his sexual orientation public, he placed his employer in the position of tacitly approving his "right to pursue an activist role in implementing his unconventional ideas concerning the societal status to be accorded homosexuals." *Id.* at 196. What appears to be a blatantly manipulative and "small" opinion, is really nothing more than the natural consequence of a philosophy that prides itself on a toleration of shame.

168. This contradiction, of course, is not limited to the sexual sphere. Thus, we are good at integrating our schools, but at the same time placing students, other than those of color, in special "advanced" classes, the net result of which is to separate (now within each school, rather than between schools) those which were at least theoretically brought together. As with sexual matters, consciousness of the contradiction can, at times, be explosive.

sion of even the most benign form of same-sex conduct. Thus, the liberal canon would permit private consensual sexual activity between people of the same sex,¹⁶⁹ but would suppress the open display of any physical attachment between people of the same sex¹⁷⁰ as well as the solicitation of any such consensual activity in a public place or the mere public congregation of people who may be amenable to such conduct in any public place, such as a park or a bar.¹⁷¹ Having given sexual nonconformists some private space, the dominant culture has defined its opposite, public space, so broadly as to substantially preserve its power to control nonconformist sexual expression.¹⁷² Nonmajority sexual conduct of certain types may occur, we are happily reassured, but only in private, and only if the acts—including their solicitation—can literally and figuratively be hidden from view (so that the rest of us can pretend they do not exist).

Liberal toleration instructs us that society ought not punish the commission of certain acts but ought to remain free to make indulgence in such acts difficult when such acts are believed (by the state, or those in control of the mechanisms thereof) to offend or contradict public (or publicly adopted) sexual conduct norms, norms for which society has reserved the code phrase “moral.”¹⁷³ The jurisprudence of the European Court of

169. See MODEL PENAL CODE § 213.2 cmt. 2, at 362-63 (1980) (“Section 213.2 of the Model Code makes a fundamental departure from prior law in excepting from criminal sanctions deviate sexual intercourse between consenting adults.”).

170. MODEL PENAL CODE § 251.1 (1980) (“A person commits a petty misdemeanor if he does any lewd act which he knows is likely to be observed by others who would be affronted or alarmed.”). The commentaries to this section indicate that the purpose of this statute is to punish “the open flouting of community standards regarding sexual and related matters.” MODEL PENAL CODE § 251.1 cmt. 1, at 448 (1980).

171. See MODEL PENAL CODE § 251.3 (1980) (“A person is guilty of a petty misdemeanor if he loiters in or near any public place for the purpose of soliciting or being solicited to engage in deviate sexual relations.”). Oblivious to the contradictory nature of its statement, the commentary to § 251.3 explains, “The rationale for retaining this offense is not the regulation of private morality but the suppression of a public nuisance. Persons who publicly seek or make themselves available for deviate sexual relations openly flout community standards.” MODEL PENAL CODE § 251.3 cmt. 2, at 476; see also *supra* note 36 (commenting that liberal reforms in some jurisdictions have not created a more permissive environment for nonconforming sexual behavior). For an earlier discussion of the use of solicitation statutes to defeat sexually expressive rights, see Bell, *supra* note 15, at 97-114. Marc Fajer’s stories of the invisibility of sexual nonconformists and the dangers of public life are also instructive. See Fajer, *supra* note 3, at 571-75.

172. Certainly, dominant culture definitions of public spaces can be substantially different from those of others. While public in the sense of the dominant culture, the places described are quite private in fact, at least to those who do not care to participate. See, e.g., HUMPHREYS, *supra* note 41, at 1-15; Project, *supra* note 90, at 795-96 (describing the private nature of public solicitation).

173. For a discussion of the use of the term “morality,” and its evolution over the last two centuries in Europe and North America, see Randolph Trumbach, *Sex, Gender, and Sexual Identity in Modern Culture: Male Sodomy and Female Prostitution in Enlightenment England*, reprint in FORBIDDEN HISTORY: THE STATE, SOCIETY, AND THE REGULATION OF SEXUALITY IN MODERN EUROPE, *supra* note 150, at 89, 89-106 (originally appearing in 2 J. HISTORY OF SEXUALITY (1991)); Dalton, *supra* note 25, at 881. For a discussion of notions of morality and emotional reactions to conduct, see

Human Rights, the supreme judicial tribunal under the Convention for the Protection of Human Rights and Fundamental Freedoms, is no different.¹⁷⁴ The result is that our traditional systems and attitudes can be preserved intact, without the messiness of social guilt and merely at the cost of creating a more subtle form of punishment for violation.¹⁷⁵ This form of punishment, mostly in the form of indirect conduct coercion, will ultimately be more debilitating than the older, cruder, and more direct traditional control of sexual conduct.¹⁷⁶ Thus, we come face to face with the fundamental intolerance of our system of tolerating sexual nonconformity. It is a tolerance at once medieval and corporate.¹⁷⁷ It has the character of the dhimmi of the Islamic world.¹⁷⁸ However, one need not search for

DWORKIN, *supra* note 34, at 248-53.

174. See Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222 [hereinafter *Convention*]. The Convention sets out the right of people "to respect for [their] private and family [lives]," *Convention*, art. 8(1), 222 U.N.T.S. at 230, but limits this right by state interests in the protection of morals. *Convention* art. 8(2), 222 U.N.T.S. at 230; *Handyside v. United Kingdom*, 24 Eur. Ct. H.R. (ser. A) at 22 (1976) (holding that states are permitted a wide degree of discretion in legislating to protect the morality of their citizens). The rights of sexual nonconformists are *private* rights; they are rights which end at the point that the window shades are open, or the public is permitted to become conscious of the act. See, e.g., *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (ser. A) (1981); Laurence R. Helfer, Note, *Finding a Consensus on Equality: The Homosexual Age of Consent and the European Convention on Human Rights*, 65 N.Y.U. L. REV. 1044, 1054-62 (1990). On the internationalization of human rights, see M. Cherif Bassiouni, *Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections in National Constitutions*, 3 DUKE J. COMP. & INT'L L. 235, 243-51 (1993) and Anthony D'Amato, *The Concept of Human Rights in International Law*, 82 COLUM. L. REV. 1110, 1127-47 (1982).

175. When viewed in its proper context, then, it is puzzling that traditionalists expended such energy in opposition to the basic teachings of the liberal canon. See, e.g., Hafen, *supra* note 26, at 463; Smolin, *supra* note 135, at 381. The Wolfenden Report, after all, affirms the existence and power of traditional public morality and the right of the state to enforce that morality in public. See THE WOLFENDEN REPORT, *supra* note 9, para. 49.

176. This notion is becoming increasingly recognized. See, e.g., MOHR, *supra* note 5, at 54-57; Fajer, *supra* note 3, at 570-602 (discussing the concealment of gay life by nongay society and its costs to the people who are not permitted to join public society). Traditionally, public expression of sexual nonconformity was the easiest way to control deviates. See KLING, *supra* note 88, at 117 ("The vast majority of homosexuals are tried for 'soliciting males to perform lewd and indecent acts.'"); *Project*, *supra* note 90, at 657-67.

177. On the rise of the corporatist treatment of nondominant groups within society, especially in non-European and North American societies, see generally Rhoda E. Howard, *Cultural Absolutism and the Nostalgia for Community*, 15 HUM. RTS. Q. 315 (1993). Feminist essentialism has been criticized for treating individualism as "an unfashionable, if not reactionary, detraction from progressive social theory." Maia Ettinger, *Color Me Queer: An Aesthetic Challenge to Feminist Essentialism*, 8 BERKELEY WOMEN'S L.J. 106, 107 (1993). For a critical discussion of essentialism, see, e.g., Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 590-607 (1990). But see Leslie Bender, *From Gender Difference to Feminist Solidarity: Using Carol Gilligan and an Ethic of Care in Law*, 15 VT. L. REV. 1, 17-20 (1990) (supporting feminist theory which acknowledges women's gender differences). The debate over the value of gender difference theory is beyond the scope of this article, and by its reference here I do not intend to take a position on that debate.

178. For a discussion of the nature of the relationship between true believers and infidels devel-

the model in the lands of Islam; western history provides a number of analogous models for our toleration of sexual nonconformists.¹⁷⁹ Our toleration accepts the inability to completely extirpate conduct which the dominant group reviles (and in this appears tolerant) but remains committed to its marginalization. At its core, it is a toleration designed to emphasize the fundamental inferiority and subservient status of those tolerated and to ensure that members of the dominant group are not tempted to apostasy.¹⁸⁰ "The community and its members are entirely free to employ theological teaching, moral suasion, parental advice, psychological and psychiatric counseling and other noncoercive means to condemn the practice of consensual sodomy."¹⁸¹ And, when consensual sodomy is no longer private or discreet, the state itself may intervene to protect against the threat to the public, "many of whom would be offended by being exposed to the intimacies of others."¹⁸²

This closeted, corporate type of toleration is fundamentally illiberal,¹⁸³ though clothed in liberal garb. It is unstable; the history of minorities in Europe, Jewish people, and Gypsies,¹⁸⁴ provides a glimpse of the

oped during the classical period of Islam, see ANTOINE FATTAL, *LE STATUT LÉGAL DES NON-MUSULMANS EN PAYS D'ISLAM* (1958). *But see*, ABDULLAH AHMED AN-NA'IM, *TOWARD AN ISLAMIC REFORMATION: CIVIL LIBERTIES, HUMAN RIGHTS, AND INTERNATIONAL LAW* (1990) (searching for Qur'anic justifications for current notions of international human rights).

179. The corporate treatment of the Jewish population of Europe before the French Revolution provides, perhaps, the classic example. *See, e.g.*, MAX L. MARGOLIS & ALEXANDER MARX, *A HISTORY OF THE JEWISH PEOPLE 477-599* (2d ed. 1965). Currently, Europe is creating a new classic situation in the conflict which has marked the disintegration of that twentieth century delusion—the state of Yugoslavia. *See* Kenneth Anderson, *Illiberal Toleration: An Essay on the Fall of Yugoslavia and the Rise of Multiculturalism in the United States*, 33 VA. J. INT'L L. 385, 399-409 (1993) (arguing against the appeal of a corporatist approach to multi-culturalism in which individual based pluralism is sacrificed for community autonomy and control).

180. Thus, the necessity for the limitations on the dress, manners, and public displays of the faith of non-Muslims was justified by Hasan al Kafrawi, an Eighteenth Century professor of canon law in Cairo, on the grounds that such restrictions were required to prevent offense to "the sensibilities of poor Moslems and in order that their faith in their religion should not be shaken by this." *THE JEW IN THE MEDIEVAL WORLD: A SOURCE BOOK: 315-1791*, at 16 (Jacob R. Marcus ed., 1969) (1938). English law since 1988 has prohibited state institutions from promoting homosexuality or its acceptability as a family relationship. *See* Finnis, *supra* note 33, at 1050.

181. *People v. Onofre*, 415 N.E.2d 936, 940 n.3 (N.Y. 1980) (overturning the criminal proscription of private consensual sodomy).

182. *Id.* at 941.

183. *See* Anderson, *supra* note 179, at 385.

184. For a discussion of the treatment of Jewish people and Gypsies in Europe, see, e.g., ZYGMUNT BAUMAN, *MODERNITY AND THE HOLOCAUST* 39 (1989) (discussing the notion in European society of Jewish people as slime); DONALD KENRICK & GRATTAN PUXON, *THE DESTINY OF EUROPE'S GYPSIES* (1972) (describing European ambivalence to the Gypsies, viewing them as either ethnographic specimens of the "Noble Savage" or as unauthentic half-breeds). The most interesting thing that emerges from the history is the cyclical character of toleration. Both groups were subject to the whims of economy, prejudice, and the needs (often ephemeral and unprincipled) of the ruling elite. The result is a pattern of constant expulsion, resettlement, and expulsion, through all of which no

future of the toleration of sexual nonconformists. Indeed, the continued suppression of nonconformist sexual expression, the imperative of nausea to keep separate, distinct, and subordinate such nonconformists, can be seen as a necessary means of protecting the social and religious identity of the dominant group.

Where for any reason a group which highly values its primordial and/or religious identity comes to fear that that identity might be expunged, it is like to make the boundaries of that identity increasingly rigid and to perceive boundary-breaking sexual practices as a threat to the entire social order.¹⁸⁵

Sexual nonconformists are useful scapegoats, as an "other" through which group identity can be defined and preserved. Sexual nonconformists are foreigners (certainly social foreigners), and not individuals, to be dealt with as a group of undesirables who society cannot send back from whence they came. The Wolfenden Report and the Model Penal Code play an important role in this effort. Their approach to the criminalization of expressions of sexual nonconformity epitomizes "the underlying tendencies of Western culture to retreat from secularism, liberalism, and humanism into a romanticized past of order, stability, unchanging social roles, and complete social homogeneity."¹⁸⁶ Their approach makes it very easy to continue to treat the tolerated group as social freaks—vulnerable to state intervention for the protection of normal folk.¹⁸⁷ Furthermore, their approach makes it impossible to manage the increasingly unruly face of the public manifestation of nonconformity, a public face that refuses to accept

effort was made to soften the popular belief of the vileness of either group.

185. Christie Davies, *Religious Boundaries and Sexual Morality*, ANN. REV. SOC. SCI. RELIGION, Fall 1983, at 45, 72 (studying by way of example the increasing persecution of gay men and lesbians in early Medieval Visigothic Spain, in late Medieval Europe, and by the Latin Crusaders in the Kingdom of Jerusalem). Christie Davies has persuasively argued that the degree of hostility of Christianity and Christian society toward sexual nonconformity has varied considerably over place and time, largely as a function of the need to maintain or defend religious and ethnic boundaries. *Id.* at 71; see also JOHN BOSWELL, CHRISTIANITY, SOCIAL TOLERANCE AND HOMOSEXUALITY: GAY PEOPLE IN WESTERN EUROPE FROM THE BEGINNING OF THE CHRISTIAN ERA TO THE FOURTEENTH CENTURY 269-302 (1980) (describing the change in the popular conception of sexual nonconformity from a personal preference to a dangerous anti-social and extremely sinful aberration). RICHARD PLANT, THE PINK TRIANGLE: THE NAZI WAR AGAINST HOMOSEXUALS 22-52 (1986) (detailing the history of gay men and lesbians in Germany during the first half of the twentieth century).

186. Howard, *supra* note 177, at 334 (lamenting the worldwide rise of cultural absolutism because it "forgives cruelty on the grounds that acting in accordance with the customs of one's own group is a universal moral principle").

187. See Anderson, *supra* note 179, at 424-27. For an argument that it is necessary and legitimate to discuss God and the Judeo-Christian tradition in American legal discourse, and to base law-making on this tradition, see generally David M. Smolin, *The Judeo-Christian Tradition and Self-Censorship in Legal Discourse*, 13 U. DAYTON L. REV. 345 (1988).

its banishment to the dark corners of the private sphere.

Twenty-five years after the birth of the gay rights movement, progress remains an illusion. Progress is measured by the crumbs that are thrown out by the modern equivalent of the medieval princes who occasionally, and for a price, showed a certain degree of self-interested mercy to fashionably despised (and grateful) groups of an earlier day—the Jewish people or Gypsies.¹⁸⁸ This mercy is not structural; it will last until the dominant culture required to make up its mind decides that the people formerly suppressed and now tolerated in hiding require direct suppression again.¹⁸⁹ Toleration based upon the advancement of substantive constitutional values (for instance, antidiscrimination rules) may prove a weak reed.¹⁹⁰ The Wolfenden Report and the Model Penal Code provide clear warning of the future, a future that Pat Buchanan may have best described at the Republican Convention of 1992 when he exclaimed: “There is a religious war going on in this country. It is a cultural war, as critical to the kind of nation we shall be as the Cold War itself, but this war is for the soul of America.”¹⁹¹ Mr. Buchanan has discovered that the dust in

188. For an argument that sexual nonconformists ought to rely more heavily on our modern day princes—the state and federal governments—for protection from the effects of the disgust of dominant culture, see Eskridge, *supra* note 58, at 383-85.

189. For a discussion of the growth of indecisiveness within the American Protestant community about social problems like sexual nonconformity, see MARTIN E. MARTY, *PROTESTANTISM IN THE UNITED STATES: RIGHTEOUS EMPIRE* 247-66 (2d ed. 1986). For an attempt to formulate a progressive Christian (from a Catholic perspective) approach to the “problem” of sex, see RHODES, *supra* note 19, at 153-85. Ultimately even progressives wind up with no better solution than the ancient one—“[s]o I end up, reluctantly, favoring the continued exclusion from the sacraments at least of those who publicly embrace a manner of living inconsistent with chastity or with the indissolubility of marriage.” *Id.* at 184. The popular press has worried about the instability of social indecisiveness and the resulting social polarization as well. See, e.g., Michiko Kakutani, *Critic's Notebook; Books that Make a Case for Shades of Grey*, N.Y. TIMES, June 18, 1993, at C1; Kenneth L. Woodward, *Losing Our Moral Umbrella: Politicians Appeal to a Judeo-Christian Tradition, But Religious Scholars Say It No Longer Exists*, NEWSWEEK, Dec. 7, 1992, at 60.

190. Consider the troublesome nature of the balancing of religious liberties (at the margin) and the right to a public existence, where, for instance, gay student organizations seek official recognition from a Catholic University. See Linda J. Lacey, *Gay Rights Coalition v. Georgetown University: Constitutional Values on a Collision Course*, 64 OR. L. REV. 409, 448-54 (1986). Consider also cases like *Cooper v. French*, 460 N.W.2d 2 (Minn. 1990), where the court permitted a landlord to refuse to rent to an unmarried heterosexual couple on the basis of the landlord's religious views. The court determined that it must balance the religious sensibilities of the landlord against the right of the plaintiffs to cohabit without the benefit of marriage. *Id.* at 8-9. The problem with balancing, of course, is that you have to trust the person doing the balancing, and it presumes that even fundamental concepts, such as personal identity, can be sacrificed. In this assessment, I am more pessimistic than Professor Eskridge, who correctly, I believe, places little hope in the traditional Libertarian ideal (at least to the extent that it is represented by codices such as the Model Penal Code), but who places a substantially greater hope in the power of governmental institutions to turn cultural norms around. See Dalton, *supra* note 25, at 909-12; Eskridge, *supra* note 58, at 381-86.

191. Pat Buchanan, Address at the Republican Party National Convention, Houston, Texas (Aug. 17, 1992), available in LEXIS, Nexis Library, CNN file.

his house creates a nausea too great to bear. He and those like him are prepared to sweep it away again. He is convinced that the dust will kill him. Liberal toleration indulges also in nausea and disgust, shielding only that which remains hidden—"Don't ask, don't tell, don't pursue."¹⁹² Prepare.

192. I refer here again to that peculiar child of the liberal toleration promoted by the Model Penal Code—President Clinton's compromise formula for the toleration of sexual nonconformists in the military. See Krauss, *supra* note 45, at A-15.