

DUTCH TREATS: THE LESSONS THE U.S. CAN LEARN FROM HOW THE NETHERLANDS PROTECTS LESBIANS AND GAYS

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Imagine the following: a small militant religious group led by the Reverend Goeree publishes a journal entitled *Evan*. An article in the journal's most recent edition attacks homosexuals under the banner headline "Sodom is Everywhere." Reverend Goeree reprints the article in pamphlets and distributes it widely throughout the country. Included in the article are the following statements:

Now that homosexuality has been legalized, the new death appears. It is the result of sin: AIDS!

A consequence of homosexuality is AIDS which, without possibility of appeal, brings about death.

Being a lesbian is rewarded. AIDS passes by the door of lesbian women. At the moment, anyway. Ten years ago, the homosexuals were rewarded like this.

They didn't have AIDS. God lets no-one (sic) ridicule him.

Those who practice homosexuality incurs a blood-guilt comparable to a murderer. He deserves the death penalty.

Homosexuality leads irrevocably to damnation. Legalization of homosexuality is the product of a reprehensible government leading the country into ruin.

Fred, a gay man, is distressed after reading one of Reverend Goeree's pamphlets. As head nurse at a local hospital, Fred is

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constantly confronted with AIDS-related deaths. Although he does not have AIDS, he fears that readers of the pamphlet will accuse him of being responsible for its existence and transmission. Fred knows that Goeree's message is untrue. Nevertheless, it is insulting, derogatory, and injurious. The words encourage hatred of, and discrimination against, homosexuals. Consequently, Fred believes that Reverend Goeree should be made to stop publishing the pamphlets and be prohibited from the future publication of untruthful and unnecessarily offensive views concerning homosexuals. In particular, Fred wants the Reverend to stop claiming that homosexuals are responsible for AIDS and to formally apologize in the major national newspapers. Fred thinks that the Reverend should pay him \$1,200 for each day that a correction is not published, and a lump sum payment of \$25,000 for telling lies about AIDS and causing him emotional harm. As a member of an oppressed minority, Fred feels that he should not have to be the victim of verbal terror. He believes that freedom of speech should not include the freedom to harass and propagate discriminatory hatred.

Does Fred have a legal remedy for the actions of the Reverend Goeree? Can he sue Goeree for emotional distress or for defamation, or are Goeree's words protected as religious speech? Can an appeal be made to international treaty rights? The answers to these questions may be dependant upon where Goeree passes out the pamphlets and where Fred lives.

The facts regarding Fred are real and form the basis of an important Dutch Supreme Court decision involving hate speech against gays and lesbians. One purpose of this article is to compare Dutch and American legal approaches to such issues. Therefore, the first section will explore freedom of speech from both countries' perspectives. In order to give Fred's narrative contextual meaning, section two will describe the cultural and political milieu in which Fred exists and compare it to its American counterpart. The last section will offer possible new legal arguments against hate speech based on Dutch law. The purpose of this article is to provide American lesbians and gays with legal ammunition to combat harassing speech that frequently causes severe emotional distress and discrimination, and defames the lesbian and gay community.

I. FREEDOM OF SPEECH

A. *The Dutch Approach*

In the Netherlands, Frederick Van Zijl ("Fred") was able to bring suit against Reverend Goeree and subsequently received relief. In *Van Zijl v. Goeree*,¹ the Hoge Raad (Dutch Supreme Court), issued an injunction against the further publication of Goeree's article, which harassed and degraded gays and lesbians. Further, he was fined 5,000 Dutch guilders for every time a part of the article appeared in print after the date of the decision.²

Reverend Goeree's article, "Sodom is the Netherlands," was distributed throughout the country.³ The article included warnings that lesbians, as well as gays, would be punished by God with AIDS, and that the practice of homosexuality warranted the death penalty.⁴ As indicated, Fred, a gay nurse who cared for AIDS patients, was personally distressed by the article. Although not a direct target of the hate filled messages, Fred feared that others would hold him responsible for the existence and transmission of AIDS.⁵

Fred argued before the Zwolle County Court of Summary Proceedings that the articles were insulting, derogatory and distressing.⁶ He asserted that the words used were unnecessarily wounding and that they propagated and encouraged hatred of and discrimination against

1. 1990 RvdW Nr.41 (HR Neth) (highest Netherlands court) (drs. Alan Reeve, trans.) [translation on file with journal] (finding no new interpretation of what constitutes freedom of religion). The Dutch Supreme Court several years before decided a case that involved the same defendants, the Goerees. *Goeree v. Centrum voor Informatie en Documentatie Israel*, 1987 NJ 1988 Nr.702 (HR Neth). In that case, the Goerees had published an article in *Evan* accompanied with photographs of prisoners in internment camps. The Goerees had maintained that the Holocaust was deserved because Jews were "Christ Killers." Their conclusion was that the death of Jews was inevitable; that they had brought on their own destruction. The Goerees believed that the Jews could have saved themselves by accepting Jesus as a Savior, but their failure to do so caused their death.

Similar to *Van Zijl*, the Dutch Court in *Goeree* observed that the Goerees were guaranteed freedom of religion, but that freedom was limited by responsibilities the Goerees owed to others. A Dutch lawyer, Den Boer, observed that the Supreme Court was clearly following the Revised 1983 Constitution. Freedom of religious speech does not provide people, such as the Goerees, the license to commit crimes. Since it is illegal to discriminate according to the Dutch Constitution, then the Goerees could not, in the name of religion, publish materials that would encourage others to hate and discriminate against Jews. Thus, the Court came to the same conclusions as it did in *Van Zijl* and the anti-homosexual message of the Goerees. 1987 NJ 1988 Nr.702 (HR Neth).

2. *Van Zijl v. Goeree*, 1990 RvdW Nr.41 (HR Neth). The facts considered by the Hoge Raad and the lower courts are those proposed at the beginning of this article.

3. *Van Zijl v. Goeree*, 1987 NJCM Nr.101 at 317 (Neth Court of Summary Proceedings).

4. *Id.*

5. *Id.*

6. *Id.* at 305.

homosexuals.⁷ Goeree, on the other hand, argued that words he used regarding homosexuals and AIDS were based on his interpretation of the Bible. Any injunction to stop him from publishing this material, he insisted, would violate his Constitutional right of Freedom of Religion.⁸

In spite of Goeree's defense based on freedom of religious speech, Fred prevailed because Dutch equal protection analysis forbids discrimination "on any grounds whatsoever."⁹ This phrase is specifically designed to protect homosexuals and other groups.¹⁰ Dutch law makes it clear that non-discriminatory principles apply to the private, as well as, the public sector, which is distinct from the laws of most European countries where non-discriminatory principles apply only to the government.¹¹

With approval by the Court of Appeals, the County Court Judge noted that all people have a constitutional right to freely express their religious beliefs.¹² Naturally, this freedom includes the right to

7. Van Zijl v. Goeree, 1987 NJCM Nr.101 at 305 (Neth).

8. *Id.* at 305.

9. GRW. NED. art. 1 (Neth) (Netherlands Constitution). All persons in the Netherlands shall be treated equally in equal circumstances. *Id.* Discrimination on the grounds of religious belief, political opinion, race or sex, or on any other grounds whatsoever, shall not be permitted. *Id.*

10. ASTRID MATTIJSSSEN EN MARTIN MOERINGS, WET GELIJKE BEHANDELING IN PERSPEKTIEF at 11 (Publicatiereeks Homostudies Utrecht, dl. 15 (1983)). During Parliamentary consideration of the constitutional revision, the first draft only covered discrimination as it related to religious belief, political opinion, race, or sex. The debate concerning these categories focused on extending the provision to prevent discrimination based on sexual orientation. At that juncture, the draft was reworded to protect all from discrimination and the revised Dutch Constitution took effect in 1983. Kees Waaldijk, *The Legal Situation in the Member States, in HOMOSEXUALITY: A EUROPEAN COMMUNITY ISSUE 77-78* (K. Waaldijk & A. Clampham eds., 1993). See also A. Mattijssen, *Wie Niet Waagt, Die Niet Wint, in HOMOSEXUALITEIT EN RECHT*, 14-15 (M. Moerings & A. Mattijssen eds., 1992).

11. Amsterdam Court of Appeal, 10 December 1987 14 NJCM bulletin 305, 315 (1989); Mattijssen, *supra* note 10, at 14-15; see, e.g., Germany, SCHWULE IN RECHT, 314 (1992); Kees Waaldijk, *The Legal Situation in the Member States, in HOMOSEXUALITY: A EUROPEAN COMMUNITY ISSUE* (K. Waaldijk & A. Clampham eds., 1993).

12. GRW. NED. art. 6, sub. 1 (Neth). Every person, individually and in community with others, has the right to freedom of religion or philosophical belief, practice and propagation except "ieders verantwoordelijkheid voor de wet" (each person's responsibility before the law). *Id.* See also The European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), Nov. 4, 1950, art. 9 (1) EUROP. T.S. No. 5, 213 U.N.T.S. 221 (*reprinted in INTERNATIONAL LAW AND WORLD ORDER* (Burns H. Weston, Richard A. Falk, & Anthony D'Amato eds., 1990) [hereinafter ECHR]). Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance. ECHR, *supra*, art. 9(1). Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others. ECHR, *supra*, art. 9(2).

publish these beliefs. This right, however, is not absolute.¹³ The Dutch Constitution recognizes the tension that can exist between preserving the right of free speech and ensuring that all citizens receive the equal protection of the law. In *Goeree*, the Hoge Raad held that the harm caused to the plaintiff by the widespread distribution of untruthful, anti-gay propaganda diminished the plaintiff's position in society and, therefore, his right to equal treatment.¹⁴ Based on this rationale, the Court held that the Plaintiff's right to equal treatment outweighed the evangelical's right to freely express his religious beliefs.¹⁵

B. Freedom of Speech - U.S. Style

Unlike the Netherlands, freedom of speech and equal treatment under the law are treated as separate rights in the United States.¹⁶ The interpretation of these rights is essentially that all laws must be drafted to treat people equally, and freedom of speech preserves to all people the freedom to express their beliefs, within certain limitations. United States lawmakers and courts do not recognize any connection between these two rights except under Title VII.¹⁷

13. GRW. NED. art. 6, sub. 1 (Neth). "Behoudens ieders verantwoordelijkheid voor de wet" (each person's responsibility before the law).

14. *Van Zijl v. Goeree*, 1990 RvdW Nr.41 (HR Neth).

15. *Id.*

16. U.S. CONST. amend. I and amend. XIV, §1.

17. See *Harris v. Forklift Systems, Inc.*, 114 S. Ct. 367 (1993) (holding that conduct need not "seriously affect an employee's psychological well-being" or lead the plaintiff to "suffer injury" to be actionable as a hostile or abusive environment for purposes of Title VII). The hostile environment in this case included statements by a male boss toward a female in the presence of other employees, such as: "[y]ou're a woman, what do you know," "we need a man as the rental manager," "[you are] a dumb ass woman", "what did you promise the guy. . . some [sex] Saturday night?" and "[why don't we] go to Holiday Inn to negotiate [your] raise?" *Id.* at 369. The Court noted that as long as the environment would reasonably be perceived as hostile or abusive, there was no need for it to also be psychologically injurious. *Id.* at 371. Whether an environment is "hostile" or "abusive" is determined by looking at all the circumstances. *Id.*

The Court listed the following as potential factors to be considered: the frequency of the conduct, its severity, whether the conduct is physically threatening or humiliating or a mere offensive utterance, and whether it unreasonably interferes with the employee's work performance. *Id.* at 369. Psychological harm may also be a relevant factor, but is not decisive. *Id.*

See Kingsley R. Browne, *Title VII as Censorship: Hostile-Environment Harassment and the First Amendment*, 52 OHIO ST. L.J. 481 (1991) (arguing that all speech in the workplace has inherent free speech value and should be protected. When workplace speech is restricted because it may discriminate or be offensive to a protected group, it results in the suppression of even protected speech.); Jennifer L. Conn, *Sexual Harassment: A Thirteenth Amendment Response*, 28 COLUM. J.L. & SOC. PROBS. 519 (1995) (discussing how the Thirteenth Amendment could be used as a means to regulate sexually harassing speech in the workplace as harassment which subjugates its victims. The author draws parallels between women and blacks and sees sexual harassment as a "badge of slavery." This would give the government constitutional authority to act against work place harassment and harmful speech in a specific context); Richard H. Fallon, Jr., *Sexual Harassment, Content Neutrality, and the First Amendment Dog That Didn't Bite*, 1994 SUP. CT. REV. 1 (stating that

Content-based speech enjoys the highest protection possible under the First Amendment.¹⁸ The legal deference given to free speech stems from the United States' historical origins and is perpetuated by the American fixation with individual rights and freedoms. American youth are taught that they are free to criticize their government, free to form their own opinions, and free to practice the religion of their choice. This, they are told, is the beauty of the democracy into which they are born.

On a conceptual level, freedom of speech allows all people to participate in the political process. Without fear of official retribution, an American can criticize the government and public leaders. She is free to express her religious faith and her social values. In theory, all Americans have access to "the marketplace of ideas," and it is believed that through their free exchange, "truth" will prevail.¹⁹

the doctrine of restricting workplace speech could be interwoven into existing First Amendment limits. Speech that is intended to offend, directed at a specific target, stigmatizes because of gender, and which foreseeably interferes with the workplace, should be regulated. This specific type of limitation of workplace speech fits easily within the limits that the Court has already placed on other types of speech.); George Rutherglen, *Sexual Harassment: Ideology or Law?*, 18 HARV. J.L. & PUB. POL'Y 487-88 (1995) (arguing that because of the fluidity of gender roles, only the most offensive forms of speech should be restricted. If harassment actions are limited to severe and pervasive types of discriminatory speech then most First Amendment concerns can be avoided. The courts should impose a reasonable woman standard for determining what is severe and pervasive.); Keith R. Fentonmiller, Note, *Verbal Sexual Harassment as Equality Depriving Conduct*, 27 U. MICH. J.L. REF. 565-69 (1994) (discussing how sexual harassment is more than pure speech—it is conduct that deprives the individual of equality. In a workplace context this equality depriving conduct needs to be understood in the historical context of how women have been treated. Sexual harassment in the workplace, by definition, defines women as inferior, and as not belonging in there. Regulation of sexually harassing speech in the workplace is Constitutional. Using the balancing test, the author weighs the interests of free speech against equality interests); James H. Fowles, III, Note, *Hostile Environment and the First Amendment: What Now After Harris and St. Paul?*, 46 S.C. L. REV. 471 (1995) (discussing the Supreme Court's analysis of hostile environment as discrimination and how this analysis offers no standard for analyzing First Amendment concerns. The author looks at *Harris v. Forklift*, 114 S. Ct. 367 (1993) [merely offensive], *United States v. O'Brien*, 391 U.S. 367 (1968) [expressive conduct], and *R.A.V. Petitioner v. St. Paul*, 112 S. Ct. 2538 (1992) [content-based] to analyze how the Court might limit or extend freedom of speech protections.).

18. See *Turner Broadcasting Sys., Inc. v. Federal Communications Comm'n*, 114 S. Ct. 2445, 2478 (1994) (O'Connor, J., concurring in part and dissenting in part) (stating that to justify content-based speech, "[t]here must be some pressing public necessity, some essential value that must be preserved. . ."); *Boos v. Barry*, 485 U.S. 312 (1988) (holding that content-based speech restrictions are generally unconstitutional unless they are narrowly tailored to a compelling state interest); *Police Dep't of Chicago v. Mosley*, 462 U.S. 92, 94-95 (1972) (finding that "the government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views").

19. See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 12-1, at 786 (2d ed. 1988) (citing *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., concurring):

But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas — that the best test of truth is the power of the thought to get itself accepted in the competition of the free market and that truth is the only ground upon which their wishes can be safely

Even in American society, however, freedom of speech is not absolute. Some speech is considered of such low value that it does not receive protection from the First Amendment and the government may regulate this speech in the interest of public safety and quality of life.²⁰ Contemporary First Amendment jurisprudence allows content-based restrictions of speech when the speech qualifies as obscenity, "fighting words" or represents "a clear and present

carried out.

20. See *Paris Adult Theatre v. Slaton*, 413 U.S. 49, 58 (1973) (elaborating the obscenity position by claiming that regulation of obscene materials serves legitimate state interests in maintaining the quality of life and the total community environment, the tone of commerce in the great city centers, and possibly, the public safety itself); *Roth v. United States*, 354 U.S. 476 (1957) (holding specifically that obscenity was not within the realm of constitutionally-protected speech); see also Jeffrey M. Shaman, *The Theory of Low Value Speech*, 48 SMU L. REV. 297 (1995) (analyzing how the Supreme Court applies the concept of "low value" to different genres of speech. The Court's application is dubious because restrictions on speech are really based on harm, not value.); Carl F. Stychin, *Exploring the Limits: Feminism and the Legal Regulation of Gay Male Pornography*, 16 VT. L. REV. 857-58 (1992) (discussing how feminists erroneously classify gay male pornography in the same categories as all heterosexual pornography. In this vein, feminism is guilty of a pure gender analysis that may not necessarily apply here. Gay male pornography as gay male culture has a history of being suppressed and censored; therefore, it is really more akin to political expression than sexual expression); Cass R. Sunstein, *Pornography and the First Amendment*, 1986 DUKE L.J. 589 (1986) (arguing that pornography is a social problem that is of significant legal concern and as compared with other types of speech that invoke First Amendment protection, it is of "low value" and not entitled to full protection); Nicholas Wolfson, *Eroticism, Obscenity, Pornography and Free Speech*, 60 BROOK. L. REV. 1037 (1994) (arguing that the Court must limit free speech in the context of pornography because society finds it fundamentally dangerous and offensive).

See generally Andrea Dworkin, *Against the Male Flood: Censorship, Pornography and Equality*, 8 HARV. WOMEN'S L.J. 1 (1985) (discussing the Feminist view as espoused by MacKinnon and Dworkin, finding that pornography is a threat to the safety and interests of women and thus to the community at large); Caryn Jacobs, *Patterns of Violence: A Feminist Perspective on the Regulation of Pornography*, 7 HARV. WOMEN'S L.J. 5 (1984) (examining pornography and its use as a tool of violence and discussing potential methods of regulation); Catherine A. MacKinnon, *Pornography, Civil Rights and Speech*, 20 HARV. C.R.-C.L. L. REV. 1 (1985) (arguing that pornography is a civil rights violation); Tamara Packard and Melissa Schraibman, *Lesbian Pornography: Escaping the Bonds of Sexual Stereotyping and Strengthening Our Ties to One Another*, 4 UCLA WOMEN'S L.J. 299 (1994) (citing examples of queer theories); *But see*, James R. Branit, *Reconciling Free Speech and Equality: What Justifies Censorship?*, 9 HARV. J.L. & PUB. POL'Y 429 (1986) (arguing that pornography should have full free speech protection. Pornography can be regulated when it is conduct that causes harm.); David Cole, *Playing by Pornography's Rules: The Regulation of Sexual Expression*, 143 U. PA. L. REV. 111 (1994) (discussing how the regulation of pornography/sexual expression is an essential part of the actual construction of sexuality because by making pornography illegal it increases its appeal and its seductiveness. To eradicate pornography more speech is needed, not more restraints, to bring it into public discussion and to find positive ways to affirm the exploration of sex.); Mary C. Dunlap, *Sexual Speech and the State: Putting Pornography in its Place*, 17 GOLDEN GATE U. L. REV. 359 (1987) (arguing that pornography has a place in society and the government should not be allowed to decide the boundaries of our sexual communications and our private consensual sexual acts. This is especially true in the age of AIDS, teen pregnancies, and gay/lesbian rights, when the emphasis should be on more discussion and more openness about sexual issues.).

danger."²¹ Goeree's article "Sodom is Everywhere," however, is none of these.

II. THE CONTEXT

The temptation of many Americans is to conclude that the Dutch can support homosexual rights because they are either abnormally tolerant²² or because they do not respect the value of free speech and freedom of religion.²³ Americans may believe that Dutch toleration is the result of the country's homogeneity—that the Dutch have a more developed sense of community because there are fewer differences.²⁴ Others may believe that Dutch constitutional rights are subject to the whims of their Parliament and, consequently, that the Dutch have an undeveloped frame of reference regarding free speech because governmental interference is commonplace.²⁵

The *Goeree* decision, however, cannot be dismissed as a product of either restrictive attitudes toward speech, or a society which automatically grants protection to lesbians and gays. As with any other legal rights extended to outsiders, the momentum is frequently started by core interest groups. After World War I, the Dutch Parliament passed

21. The right to free expression is not absolute. The Court recognizes certain categories of unprotected speech. *Paris Adult Theatre*, 413 U.S. at 49 (holding that speech that is obscene is not protected); *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (stating that certain categories of unprotected speech include speech or association which present a "clear and present danger"); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942) (including speech that falls within the category of "fighting words" as being unprotected speech).

22. Dutch homosexual couples have the same rights as heterosexuals in the areas of rent protection, income tax, and social security. Rob Tielman & Hans Hammelburg, *World Survey on the Social and Legal Position of Gays and Lesbians*, in *THE THIRD PINK BOOK: A GLOBAL VIEW OF LESBIAN AND GAY LIBERATION AND OPPRESSION* 249, 308 (Aart Hendriks, Rob Tielman, & Evert van der Veen eds., 1993). However, Dutch lesbians and gays do not have the same rights as heterosexuals with regard to pensions, inheritance tax, and adoption rights. *Id.* Recently, legislators in the Dutch Parliament proposed that lesbian mothers or gay fathers be allowed to share parental authority with their same sex partners. Tweede Kamer, 1993-94, 23714, Nrs.1-3. An additional proposal, which was sent to Parliament, would make registered partnerships possible. Registered Partnerships would give almost all legal rights and duties concerning marriage to couples who cannot legally marry. The Registered Partnership would cover not only gays and lesbians, but sisters, mothers, grandparents or any other two-person relationship. The proposal does not grant adoption rights or other parental rights. Tweedkamer, *supra*, at Nrs. 1-3.

23. See GRW. NED. art. 6, sub. 1 (Neth) An odd claim given that the Dutch Constitution affords freedom of speech and of religion.

24. Netherlands Demographics. Pop. (1992 est.) 15,112,000. Age distribution - (0-14) - 18%; (15-60) - 64.2%; (60+) - 17.0%; *NATIONS OF THE WORLD AS OF MID-1993, THE WORLD ALMANAC BOOK OF FACTS* at 793 (Funk and Wagnalls eds., 1993). Ethnic/religious - 432,000 Muslims, 81,000 Hindu or Buddhist; Religion - Roman Catholic - 38%; Dutch Reformed - 18% - Reformed 10% - Others 4% - Non-religious 29%. First Dutch Report to the Committee on the Elimination of All Forms of Discrimination Against Women ("CEDAW"), at 20 (Nov. 1992).

25. It must be noted that the Dutch Parliament cannot easily change the Dutch Constitution. It takes two-thirds majority of both chambers to propose and finalize an amendment to the Constitution. STATUUT NED. art. 137 (Neth).

legislation that made all homosexual contact illegal.²⁶ As a result of that legislation, the Dutch Scientific Humanitarian Committee ("NWHK") was organized.²⁷ This group was a forerunner of the Nederslandse Vereniging tot Integratie van Homoseksualiteit COC (Cultuur-en-ontspannings Centrum), the largest lesbian and gay organization. The theoretical base of the COC is to spread information to key decision makers. This theoretical base is well-suited to the Dutch scene, where issues are "pillarized." That is, the issues are formalized and supported by certain groups.²⁸ However, before the COC could have the same status as other interest groups, the organization had to apply for association recognition called "Koninklijke Goedkeuring" (Royal Permission). COC was in a battle with the government during the early 1960's and into the 1970's as it attempted to gain association recognition. Finally, the minister of Internal Affairs granted their request in 1973. This grant meant that the COC could act as an official association, with the same legal powers as an individual to contract.²⁹

During the late 1960's and early 1970's, the COC combined its strategy of influencing important people with other friendly organizations, such as the women's rights groups, the movement for sexual freedom, and other organizations focusing on the promotion of human rights. These groups advocated establishing anti-discrimination legislation in which sex was given a broad definition, including marital status, parenthood, and sexual orientation.³⁰ As a result of the status and influence of these groups, changes were made during the last twenty years concerning the legal status of lesbians and gay men in the Netherlands.

These successes did not occur, however, without fierce opposition. In fact, there was an extraordinary vocal resistance from the more conservative religious political parties and institutions regarding every small step lesbians and gays made in attaining their legal rights. In 1971, when the criminal statute prohibiting homosexual acts³¹ was abolished, a small number of Dutch conservatives were horrified.³²

26. PENAL CODE, art. 248-bis (Neth 1911). From 1811 until 1911 homosexual conduct was legal. ROB TIELMAN, *HOMOSEXUALITEIT IN NEDERLAND* (1982).

27. TIELMAN, *supra* note 26, at 76-77.

28. TIELMAN, *supra* note 26, at 76-77.

29. TIELMAN, *supra* note 26, at 173-80.

30. Marianne Hoogma, *The Netherlands: A Fifteen Year Fight for Equal Rights*, in *THE SECOND ILGA PINK BOOK*, at 130-31 (1988). An example of such a group is the "Man-Vrouw. Maatschappij" (Man-Woman Society).

31. PENAL CODE, art. 248-bis (Neth 1911).

32. Roelof Haveman & Martin Moerings, *De homogeniteit in het strafrecht*, in *HOMOSEXUALITEIT EN RECHT* 1, 39 (M. Moerings & A. Mattijssen eds., 1992).

Five members of Parliament, influenced by the Evangelical Alliance, were able to forestall any proposed legislation for more than twenty years. This was so despite the fact that an overwhelming majority of the Parliament supported the Labor Party's motion which asked the Dutch government to pass legislation forbidding discrimination based on sex, homosexuality and marital status.³³ Finally, in 1993, the Christian Democratic and Labor Party proposed another Equal Treatment Law which passed and went into effect in September 1994.³⁴

The 1994 Equal Treatment Law grants further protection to the criminal laws that forbid hatred, discrimination, insult, or violence directed at lesbians and gays.³⁵ These equal treatment laws already existed for racial discrimination; however, after the 1994 Act, it became discriminatory to abuse people based on their sexual orientation. Discrimination that hindered a person in his or her work or profession would also be included.³⁶ Furthermore, it became illegal to promote discrimination against people on account of their sexual orientation.³⁷ Promotion would include public remarks and participation in acts of discrimination. Thus, in the Netherlands, not only is it a crime to discriminate generally, but it is also a crime to specifically discriminate against gays and lesbians in the employment context or in the performance of a public office.³⁸

As in the Netherlands, the gay and lesbian movement in the United States gathered momentum in the sixties and early seventies.³⁹ The

33. *Id.*

34. Stb. § 230 1994 (Neth.). The legislation protects against discrimination based on religious belief, political opinion, race, sex, nationality, sexual orientation, or civil status.

35. PENAL CODE, art. 137c (Neth) ("Anyone who in public, orally or through writing or illustration, insults a group of persons on account of their race, religion or belief, or sexual orientation, shall be punished with imprisonment of up to one year or with a fine of the third category."). PENAL CODE, art. 137d ("Anyone who in public, orally or through writing or illustration, hatred or discrimination against persons or to violence against the bodies or good of persons on account of their race, religion or belief, sex or hetero- or homosexual orientation, shall be punished with imprisonment of up to one year or with a fine of the third category."). PENAL CODE, art. 137e ("Anyone who takes part or gives financial or other material support to activities aimed at discrimination against persons because of their race, sex or hetero- or homosexual orientation, shall be punished with detention of up to six months or a fine of the third category.").

36. PENAL CODE, art. 137 (Neth.).

37. *Id.*

38. *Id.* at art. 429 quarter (Neth.). ("Anyone who, in the performance for public office, a profession of a business, distinguishes between persons on account of their race, sex or hetero- or homosexual orientation, shall be punished with detention of up to two months or a fine in the third category."). (10,000 guilders).

39. See generally BARRY D. ADAM, *THE RISE OF A GAY AND LESBIAN MOVEMENT*, 81-124 (rev. ed. 1995) (relating gay liberation and lesbian feminism); Andrew M. Jacobs, *The Rhetorical Construction of Rights: The Case of the Gay Rights Movement, 1969-1991*, 72 NEB. L. REV. 723 (1993) (reviewing the changes in discourse concerning gay rights).

catalyst was a police raid in 1969 on a New York City bar, the Stonewall.⁴⁰ One of the methods legal institutions used to harass homosexuals before the 1970's was to have the police conduct ritualized raids of gay bars.⁴¹ At the Stonewall, the police attempted to eject a drag queen crowd and met with resistance.⁴² The resulting riot and eventual burning of the bar is credited as the turning point in the current gay liberation movement.⁴³

What started as a unified protest movement of lesbians and gays soon diverged. For men, the emphasis was on sexual freedom, mirroring the sexual revolution that had taken place for non-gays in the 1960's.⁴⁴ To facilitate the gay revolution, gay men focused their political energy on stopping police harassment of patrons of bath houses, bars and discos.⁴⁵ Lesbians, on the other hand, were much more likely to take their cues from the women's movement.⁴⁶ Their political energy was focused on woman's issues, such as controlling one's body or even setting up separatist communities organized in a non-hierarchical manner.⁴⁷

Much in the same way that the Dutch homosexual rights movement caused the religious right to become vocal in its opposition, Stonewall

40. ADAM, *supra* note 39, at 81.

41. ADAM, *supra* note 39, at 81.

42. ADAM, *supra* note 39, at 81.

43. ADAM, *supra* note 39, at 81 (describing the events at Stonewall); JOHN D'EMILIO, MAKING TROUBLE 234 (1992) (chronicling gay activism after Stonewall); Martha Shelley, *Gay is Good*, in OUT OF THE CLOSETS: VOICES OF GAY LIBERATION 31 (Karla Jay & Allen Young eds., 1972) (noting the importance of Stonewall); Jacobs, *supra* note 39, at 723 (summarizing how the rhetoric on gay rights has evolved); *Symposium, Stonewall at 25*, 29 HARV. C.R.-C.L. L. REV. 277 (1993) (describing the radicalization of the gay rights movement after Stonewall).

44. The "Playboy Pathos," with an emphasis on sexual freedom, was an impetus to the sexual revolution.

The world that he [Hefner] invented for himself and retailed in the pages of *Playboy*, was a potent period blend of consumerist and sexual fantasy. . . . Hefner associated sex with money and class. . . . [Playboy] played upon this nexus of sexual desire and social aspiration. . . . [Playboy was responsible for] purvey[ing] a . . . lifestyle to suggest a non-shameful, non-furtive context in which it might be consumed.

Zoe Heller, *King Rabbit in Retirement*, in THE INDEPENDENT, May 1, 1994, at 15.

45. ADAM, *supra* note 39, at 99.

46. See generally INTRODUCTION TO LESBIANISM AND THE WOMEN'S MOVEMENT (Nancy Myron & Charlotte Bunch eds., 1975) (explaining the complex dynamic between the feminist and lesbian movements). This collection of articles from *The Furies*, a lesbian-feminist collective and newspaper, explores feminist misconceptions of lesbian-feminists, as "(1)lesbian chauvinists, (2)into oppressive sex roles, or (3)divisive to the women's movement." *Id.* at 11.

47. The ideology was toward a "lesbian utopia—a nonviolent, fairly androgynous, often separatist community struggling for social justice and freedom for ourselves and other oppressed people." Barbara Hart, *Preface to NAMING THE VIOLENCE: SPEAKING OUT ABOUT LESBIAN BATTERING* 9, 13 (Kerry Lobel ed., 1986). See generally *Leaving the Gay Men Behind*, COME OUT!, Dec. 1970-Jan. 1971, reprinted in OUT OF THE CLOSETS: VOICES OF GAY LIBERATION 290-92 (Karla Jay & Allen Young eds., 1972) (commenting on the non-hierarchical structures of "Radical-Lesbians" as they broke away from the mainstream Gay Liberation Front).

gave rise to a conservative backlash.⁴⁸ This growing conservatism continues. For instance, in the 1992 presidential campaign Pat Buchanan told an applauding Republican Convention that homosexuals were a threat to family values.⁴⁹

Throughout American history free speech such as Buchanan's has harmed unpopular minorities. Minorities, due to their unprivileged status, have fewer resources with which to make their voices heard. This is especially true for gays and lesbians. Unlike many other minority groups, gays and lesbians have no distinguishable physical characteristic. Thus, homosexuals can hide their orientation, and often do so for fear of losing their jobs, being disowned by their families, being evicted from their houses, and being ostracized by their communities.⁵⁰

Hiding their orientation, gays and lesbians are easy targets of hate speech because they are often silent and invisible. The price of fighting back—of making their voices heard—is often too dear a price to pay for becoming a part of the political process. Consequently, other groups are free to promulgate hatred and spread lies about gays and lesbians with very little opposition.

The harm that unfettered hate speech causes to homosexuals is evident in the social and legal status that American gays and lesbians endure. For example, the United States Supreme Court ruling in *Bowers v. Hardwick*⁵¹ is wrought with common homophobic misinformation and prejudice. In *Bowers*, Chief Justice Burger premised his concurring opinion on a "millenia of moral teaching," that sodomy

48. ADAM, *supra* note 39, at 109-27.

49. "The agenda that Clinton would impose on America . . . homosexual rights . . . [t]hat's not the kind of change America needs. It's not the kind of change America wants. And it is not the kind of change we can abide in a nation that we still call God's country." Pat Buchanan, *The Election is About Who We Are: Taking Back Our Country*, in VITAL SPEECHES, Sept. 15, 1992, at 712-13. Buchanan reminded convention delegates that the Democrats let a "militant leader of the homosexual rights movement . . . rise at the convention and exult, 'Bill Clinton and Al Gore represent the most pro-lesbian and pro-gay ticket in history.' And so they do." *Id.* Buchanan went on to say that at least George Bush doesn't endorse "the amoral idea" that gay people should be allowed to marry. *Id.* at 714. It is not solely the radical right which has trouble with homosexual groups. In his 1996 presidential campaign, Bob Dole returned \$1,000 to the Log Cabin Republicans, a gay political group. This was done despite the fact that Dole's national finance chair had solicited the Log Cabin executive director to turn out members for fund-raising work. Dole was aware of who the "Log Cabin Republicans" were, even to the point of assuring a member at a fund raiser that he (Dole) was helping to re-authorize the Ryan White Care Act, which funds AIDS research. Christopher Matthews, *Log Cabin Fund-Raising Problems Raise Questions About Dole*, ARIZONA REP., Editorial, Sept. 6, 1995, at B5.

50. Charlene L. Smith, *Undo Two: An Essay Regarding Colorado's Anti-Lesbian and Gay Amendment 2*, 32 WASHBURN L.J. 367, 370-74 (1993).

51. 478 U.S. 186 (1986) (holding that the Constitution does not protect the fundamental right to engage in homosexual sodomy).

is an "offense of 'deeper malignity' than rape, a heinous act 'the very mention of which is a disgrace to human nature.'"⁵²

The "millenia of moral teaching" to which Chief Justice Burger referred would be more correctly characterized as a millenia of misconception and ignorance. In determining that homosexuality involves acts more heinous than rape, the Court looked to Blackstone's *Commentaries* for support.⁵³ In Blackstone's time, homosexuals were often burnt at the stake or hanged, and rape was not a crime against a woman, but against her father.⁵⁴ Relying on such antiquated rhetoric to decide homosexuals' constitutional rights is as absurd as relying on the moral teachings of the Spanish Inquisition to determine the constitutional rights of Jews.

A further example of the power that myth and distortion of truth holds is the brouhaha caused by President Clinton's attempt to openly integrate homosexuals into the armed forces.⁵⁵ Despite the number of service people, both gay and straight, who testified that sexual orientation had no impact on the quality of work performed, many Senators clung to homophobic prejudice. They felt that homosexuals pose a threat to troop morale and safety in much the same way that they felt blacks in the 1940's were a threat.⁵⁶ Some Senators gave more credence to the paranoia of enlisted soldiers who did not want to shower with gays than they did to evidence demonstrating that closeted gay and lesbian soldiers have historically served this country with honor.⁵⁷ It seemed not to worry Senators that the government wastes millions of dollars dismissing fine soldiers from the military,

52. *Id.* at 197.

53. TRIBE, *supra* note 19, § 15-21, at 1426 n.45.

54. "With the adoption of the English common law, this rule [that rape was a crime against a woman's father] was followed in this country for almost 200 years. . . . [one justification] was that the woman was considered to be property of her husband or father. Under this premise, the early rape laws sought compensation for the husband or father, rather than the victim, for the damages incurred to the 'property.'" Shunn v. State, 742 P.2d 775, 777 (Wyo. 1987) (discussing why a husband could not be guilty of a rape committed upon his lawful wife); see also State v. Smith, 426 A.2d 38 (N.J. 1981) (explaining why three common law justifications for keeping intact the marital exception in rape laws do not apply in the modern context).

55. For a report on gays in the military, from Clinton's 1992 election campaign promise through the new policy and recent Supreme Court decisions, see *New President Faces Gay-Soldiers Conflict*, in 49 CONG. Q. ALMANAC 454, 454-62 (Jan Austin ed., 1994) [hereinafter *New President*]. "Ultimately, Clinton settled for a modest revision of the policy under which homosexual conduct still would be prohibited, but recruits no longer would be asked if they were gay." *Id.* at 454.

56. *New President*, *supra* note 55, at 456. Senator Helms stated in a floor speech "[t]his attempt to remove the military's ban . . . is the No. 1 priority of the homosexual political movement. . . . They know that the armed forces are the last bastion of traditional morality in this country." *Id.*

57. *New President*, *supra* note 55, at 456.

regardless of their conduct or individual merit, solely because they are gay.⁵⁸

The fury over gays in the military indicates the intolerance that exists against gays and lesbians in American society. It also shows how much of this intolerance is premised on unfounded prejudice rather than fact. Bigotry is not born in a vacuum, instead it develops out of hatred and misinformation.

Despite opposition, American lesbians and gays have had some success and have slowly acquired political power. Many cities and eight states now have laws that protect lesbians and gay men from discrimination.⁵⁹ Distinct from the Netherlands, however, there has never been an attempt to nationalize anti-discrimination rights that would protect lesbians and gays.

One explanation as to why the Netherlands is ahead of the United States with regard to its national protection of homosexuals is the openness of its communication networks. Unlike the United States, where the media is privately-owned and reflects capital interests, the Dutch communication system is government run. One would suppose that the government might restrict information, but the opposite has shown to be true. All interest groups, ranging from the religious right to the humanist league, broadcast their own programs. The result is that the Dutch can view and listen to a variety of opinions including those of lesbians and gays. Hence, homosexuals are given the

58. "According to the General Accounting Office, chasing suspected homosexuals out of military service costs the Pentagon about \$27 million annually. That estimate . . . does not reflect the human cost of ruined careers, disrupted lives and widespread fears of gay bashing." Tom Morganthau, *Gays in the Military*, NEWSWEEK, Feb. 1, 1993, at 52, 54.

59. Eight states, over 100 municipalities, and many employers in the United States prohibit discrimination based on sexual orientation. See LAMBDA LEGAL DEFENSE & EDUCATION FUND, A NATIONAL SUMMARY OF ANTI-DISCRIMINATION LAWS (1992). The states include California, Connecticut, D.C., Hawaii, Massachusetts, Minnesota, New Jersey, Vermont, and Wisconsin. CAL. CIV. CODE § 51.7 (West Supp. 1994); CONN. STAT. ANN. § 46a-81a-r (West Supp. 1991); D.C. CODE ANN § 1-2501, 2502, 2512 (Michie 1992 & Supp. 1995); HAW. REV. STAT. § 378-2 (Supp. 1992); MASS. ANN. LAWS ch. 151B, § 4 (Law Co-op. Supp. 1990); MASS. ANN. LAWS ch. 272, § 92A (Law. Co-op. 1992); MINN. STAT. ANN. § 363.03(1-5,7,8,8a); N.J. STAT. ANN. § 10:5-12 (West 1993); VT. STAT. ANN. tit. 3, § 963 (Supp. 1993); VT. STAT. ANN. tit. 8, § 1211 (Supp. 1993); VT. STAT. ANN. tit. 8, § 1302 (Supp. 1993); VT. STAT. ANN. tit. 8, § 4724 (1993); VT. STAT. ANN. tit. 9, § 2362 (1993); VT. STAT. ANN. tit. 9, § 2488 (1993); VT. STAT. ANN. tit. 9, § 4502 (1993); VT. STAT. ANN. tit. 9, § 4503 (1993); VT. STAT. ANN. tit. 21, § 495 (Supp. 1993); VT. STAT. ANN. tit. 21, § 1726 (Supp. 1993); WISC. STAT. ANN. § 16.765 (West 1986); WISC. STAT. ANN. § 21.35 (West 1986); WISC. STAT. ANN. § 66.395 (West 1990); WISC. STAT. ANN. § 66.432 (West 1990); WISC. STAT. ANN. § 101.22 (West 1988); WISC. STAT. ANN. § 111.31 (West 1988); WISC. STAT. ANN. § 230.18 (West 1987). Some of the municipalities which have enacted sexual-orientation based discrimination laws include Berkley, Cal. ch. 13.29 et seq.; Denver, Colo. 28-91 et seq.; Atlanta, Ga. City Charter (1973 Ga. Laws 2188); Chicago, Ill. ch. 199 et seq.; Baltimore, Md., Art. 4, § 9 (16), 12 (8); Boston, Mass., Title 12, Ch. 40; Minneapolis, Minn. Title 7, Chs. 139, 141; Austin, Tex., ch. 7-4, arts. II, III, IV; Seattle, Wash., chs. 14.04 & 14.08, Ord. No. 111714; Milwaukee, Wis., ch. 109-15.

opportunity to dispel many of the myths and to correct misinformation regarding homosexuals. American lesbians and gays do not have the same media access and must even contend with networks owned by religious conservatives which spew forth a barrage of attacks.⁶⁰

Another salient factor might be the organizational structure of the Dutch gay and lesbian groups. The "Dutch Organization for the Integration of Homosexuality COC" (Cultuur-en-Ontspannings Centrum) is a national organization with more than fifty⁶¹ affiliate chapters.⁶² The United States has no counterpart.⁶³ Furthermore, the COC has always been willing to promote bonds with other groups that have similar goals. In many instances, other groups in the United States have been unwilling and even fearful of aligning with lesbians and gays.⁶⁴ The fact that there was a specific anti-homosexual national law that Dutch lesbians and gays could focus on meant that there was cohesion. In the United States, it is rare that lesbians and gays work together. Frequently, the two groups find more to divide them than to unite them.⁶⁵

Some commentators observe that a possible explanation of why the Dutch are ahead in protecting lesbians and gays is due to increased tolerance and a less religious society.⁶⁶ It is noteworthy that a consortium of Catholics, Conservative Jews and religious fundamentalists frequently lead the effort to forestall any American request for

60. ADAM, *supra* note 39, at 110, 179.

61. Tielman and Hammelburg, *supra* note 22 at 309.

62. The COC has 10,000 members. A. Mattijssen, M. Turksma & I. de Vries, *Lesbian Life in the Netherlands*, in UNSPOKEN RULES, SEXUAL ORIENTATION AND WOMEN'S HUMAN RIGHTS, (R. Rosenbloom ed., 1994).

63. There is some attempt to network at a national level. The National Gay & Lesbian Task Force ("NGTF") is the prime example. But, homosexuals primarily organize at local levels. ENRIQUE RUEDA, *THE HOMOSEXUAL NETWORK* 153 (1982). It is estimated that there are 3,000 such local organizations. *Id.* There have been a few recent groups that have spawned metropolitan counterparts such as Queer Nation and ACT-UP, but they did not appeal to "assimilated" and "respectable" lesbians and gays. ADAM, *supra* note 39, at 161-64.

64. For instance, Betty Friedan, who was the national president of NOW, denounced lesbians as a "lavender menace" in a 1970 newsletter. See ADAM, *supra* note 39, at 97. Since that time, NOW has progressed and created a National Task Force on Sexuality and Lesbianism. ADAM, *supra* note 39, at 98.

65. ADAM, *supra* note 39, at 99 (observing that lesbians became frustrated working with gay men who were occupied with their own issues and ignored problems that lesbians faced). "Many lesbians suspected that gay men would be happy to accept the place befitting their sex and class while leaving the system of male domination intact." ADAM, *supra* note 39, at 46. The advent of AIDS may have made gays and lesbians somewhat less divisive: "[l]esbian and gay groups took responsibility for doing something about AIDS in the mid-1980's when the larger society was either panicking or denying the threat . . ." ADAM, *supra* note 39, at 157.

66. ADAM, *supra* note 39, at 159-60; see also Hoogma, *supra* note 30, at 54-57 (noting that Dutch Society has become secularized).

equal rights for lesbians and gays.⁶⁷ In the Netherlands, by contrast, a third of the population exists which identifies itself as non-religious, and is a political force that supports protection from speech which harasses and promotes discrimination against homosexuals.⁶⁸

III. PROPOSALS

The Dutch can offer the following lessons or "treats" for American lesbians and gays. What is needed in the United States is more speech when that speech leads to informed public opinion and voting, and less speech when the speech promotes hatred and discrimination. Harassing speech that victimizes gays and lesbians could be legally challenged by revitalizing Supreme Court decisions that pre-date *R.A.V. Petitioner v. St. Paul*.⁶⁹ Further, a worthy Dutch example lies in utilizing group defamation concepts, or extending emotional distress claims buttressed by international law. These ideas are all inherent in *Van Zijl*, even though the primary focus for the Dutch decision was an equal protection argument.⁷⁰

A. *Speech Lessons*

Under Dutch law, Fred could recover damages. Both the Dutch Constitution and Penal Code forbid discrimination against people because of their sexual orientation.⁷¹ Under Dutch law, "anyone who in public, orally or through writing or illustration, insults a group of persons on account of their race, religion or belief or hetero- or homosexual orientation," is subject to one year in prison and a fine.⁷²

67. ADAM, *supra* note 39, at 136 (stating as an example the incidence of one such religious consortium which pursued a "lengthy court challenge to nullify the [New York City] mayor's executive order barring discrimination against gay people. . .").

68. ADAM, *supra* note 39, at 136. (describing the Dutch political and religious sentiment of many. In 1985, "Pope John Paul II met the most vocal public resistance to his antigay and antifeminist pronouncements during his worldwide tours.")

69. 112 S. Ct. 2538 (1992).

70. *Van Zijl v. Goeree*, 1990 RvdW, Nr. 41 (HR Neth).

71. PENAL CODE, art. 137, 137d, 137e, 137f (Neth) (Art. 1, Dutch Const.).

72. *Id.* However, in the United States, Goeree's words would not be protected per se. Goeree's remarks are untrue and therefore, defamatory. The Constitution does not protect defamation, *Beauharnais v. Illinois*, 343 U.S. 250 (1952), fighting words, *Chaplinsky v. New Hampshire*, 315 U.S. 563 (1942), or obscenity, *Roth v. United States*, 345 U.S. 476 (1957). These exceptions to First Amendment protection are, however, narrowly construed. Defamation must be directed toward a particular individual. *Beauharnais*, 343 U.S. at 256-57. Fighting words must "by their very utterance inflict injury," be addressed to one specific individual, and must have a "direct tendency" to provoke immediate violence from the listener. *Chaplinsky*, 315 U.S. at 571-72. Goeree's words would not qualify. Although the utterance arguably inflicted injury, the words were not directed to Van Zijl individually nor could they effectively incite immediate violence.

A law of this kind in the United States would presumably contradict the First Amendment. In the United States, statutes may limit the use of fighting words, but must also be content-neutral.⁷³ In *R.A.V. Petitioner v. St. Paul*,⁷⁴ the Supreme Court held as unconstitutional a Minnesota statute that prohibited the public display of symbols, such as swastikas and burning crosses, that provoked "anger, alarm or resentment in others on the basis of race, color, creed, religion or gender . . ."⁷⁵ on the ground that it prohibited hate-speech against some groups and not others.⁷⁶ Justice Scalia, writing for the majority, noted that under the St. Paul statute "one could hold up a sign saying, for example, that all 'anti-Catholic bigots' are misbegotten; but not that all 'papists' are, for that would insult and provoke violence 'on the basis of religion'."⁷⁷ He stated that the St. Paul statute effectively licensed "one side of a debate to fight free style, while requiring the other to follow the Marquis of Queensbury Rules."⁷⁸

In *R.A.V.*, the majority lists numerous exceptions to the First Amendment's protection of speech.⁷⁹ Among these exceptions the Court lists defamation, citing to *Beauharnais v. Illinois*.⁸⁰ In *Beauharnais*, the Court upheld an Illinois statute prohibiting the dissemination or display of materials that "expose the citizens of any race, color, creed or religion to contempt, derision, or obloquy or which is productive of breach of the peace or riots."⁸¹ It also held that

73. *R.A.V.*, 112 S. Ct. at 2545.

74. *Id.*

75. The St. Paul Bias-Motivated Crime Ordinance, ST. PAUL, MINN. STAT. §§ 292.02 (1990) reads in full: "Whoever places on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion, or gender commits disorderly conduct and shall be guilty of a misdemeanor."

76. *R.A.V. Petitioner v. St. Paul*, 112 S. Ct. 2538, 2547 (1992).

77. *Id.* at 2548.

78. *Id.* Marquis of Queensbury Rules refer to "a boxing code of fair play developed in 1869 by the eight Marquis of Queensbury." THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 801 (New College ed. 1978).

79. *R.A.V.*, 112 S. Ct. at 2543 (listing various forms of unprotected speech, including defamation, fighting words and obscenity).

80. 343 U.S. 250 (1952).

81. *Beauharnais*, 343 U.S. at 258. The Illinois statute section at issue, § 224a of Division 1 of the Illinois Criminal Code, reads in full: "It shall be unlawful for any person, firm, or corporation to manufacture, sell, or offer for sale, advertise or publish, present or exhibit in any public place in this state any lithograph, moving picture, play, drama or sketch, which publication or exhibition portrays depravity, criminality, unchastity, or lack of virtue of a class of citizens, of any race, color, creed or religion which said publication or exhibition exposes the citizens of any race, color, creed or religion to contempt, derision, or obloquy or which is productive of breach of the peace or riots." 38 ILL. REV. STAT. § 471 (1949).

individuals may be held liable for defamation of groups as well as individuals.⁸²

The Court found that *Beauharnais*' dissemination of leaflets stating that all black people were "rapists and robbers" was libelous and fell outside the protection of the First Amendment.⁸³ The Court further held that state regulation of libelous speech is justified by the state's interest in public peace and the judgment that an individual's dignity and participation in public life depends on the social standing of the racial or religious group to which that person belongs.⁸⁴

The *R.A.V.* Court's citation of *Beauharnais* is curious given the similarity between the statutes at issue in each case. Both statutes prohibit forms of expression that subject suspect classes to contempt and derision. The narrow difference rests on the fact that the hate speech at issue in *R.A.V.* is opinion and thus, its truth is of no concern to the courts.⁸⁵ In contrast, the speech at issue in *Beauharnais* which is declared as fact, is blatantly untrue.⁸⁶ Technically, a Minnesota statute could prohibit the publication of *untruthful* propaganda against social, racial or religious groups that gives rise to public ridicule or discrimination.⁸⁷ Such a law would satisfy the content-neutral requirement of *R.A.V.*,⁸⁸ and would be constitutionally acceptable under the *Beauharnais* analysis.⁸⁹ Some might argue that subsequent case law has eroded the strength of the *Beauharnais* opinion. This erosion would be due, in large part, to the fact that the Illinois statute in question in *Beauharnais* was designed to thwart actions capable of inducing violence.

82. *Beauharnais*, 343 U.S. at 258 (holding that: ". . . if an utterance directed at an individual may be the object of criminal sanctions, we cannot deny State power to punish the same utterance directed at a defined group. . . .").

83. *Id.* at 266.

84. *Id.* at 263.

85. *R.A.V. Petitioner v. St. Paul*, 112 S. Ct. 2538, 2548-49 (1992).

86. *Beauharnais*, 343 U.S. at 265-66.

87. Accepting this analysis and conclusion that libel, as untrue propaganda, is not protected under *Beauharnais*, one should arrive at the conclusion that Minnesota could prohibit the publication of such propaganda as libel; see also *New York v. Ferber*, 458 U.S. 747, 763 (1982) (stating that the content of speech does to some extent effect whether it will be protected or not under the First Amendment). "A libelous publication is not protected by the Constitution." *Id.*

88. 112 S. Ct. at 2545. "The government may not regulate use based on hostility—or favoritism—towards the underlying message expressed."

89. *Beauharnais v. Illinois*, 343 U.S. 250, 265 (1952). "Illinois in common with many States requires a showing not only that the utterance state the facts, but also that the publication be made 'with good motives and for justifiable ends'."

For example, in *Collin v. Smith*,⁹⁰ the Seventh Circuit struck down a Village Ordinance in Skokie, Illinois that prohibited public demonstrations that would "incite violence, hatred, abuse or hostility toward a person or group of persons by reason of reference to religious, racial, ethnic, national or regional affiliation."⁹¹ The statute was passed in order to stop a Nazi parade through Skokie, a Jewish suburb of Chicago that was home to large numbers of Holocaust survivors.⁹² The United States Supreme Court stayed a state court injunction, holding that although a Nazi parade would emotionally and mentally upset many Skokie residents, speech which invites dispute and induces "a condition of unrest," and creates "dissatisfaction with conditions as they are, or even stirs people to anger is among the highest purposes of the First Amendment."⁹³

However, the premise in *Beauharnais* that a person's social standing contributes to their ability to participate in the political process, is nonetheless, still valid.⁹⁴ Justice Frankfurter's observation still rings true that a person's job, educational opportunities and "the dignity accorded him may depend as much on the reputation of the racial and religious group to which he . . . belongs as on his own merits."⁹⁵

This is true not only for racial and religious minorities, but also for gays and lesbians. Homosexuals often lose their jobs or are not hired at all because of misguided perceptions and prejudice about them as a group.⁹⁶ Many people are told, and believe, that homosexuals are sex-starved degenerates who molest children as a matter of course.⁹⁷

90. 578 F.2d 1197, 1199 (7th Cir. 1978), *cert. denied* 439 U.S. 916 (1978). Village Ordinance No. 77-5-N-994 requires marchers to obtain permits that contain certain content-based speech prerequisites and require high-cost insurance policies.

91. *Id.*

92. Village Ordinance No. 77-5-N-995 (May 2, 1977). This ordinance prohibited "[t]he dissemination of any materials within the Village of Skokie which promotes and incites hatred against persons by reason of their race, national origin, or religion, and is intended to do so." This ordinance, along with two others, was enacted specifically in response to attempts by the National Socialist (Nazi) Party of America to demonstrate in Skokie.

93. National Socialist Party of Am. v. Village of Skokie, 432 U.S. 43 (1977). The opinion in *Collin v. Smith*, 578 F.2d 1197 (1978), teamed with such Supreme Court opinions as *Cohen v. California*, 403 U.S. 15 (1971) and *Brandenburg v. Ohio*, 394 U.S. 444 (1969), has lead noted constitutional scholars to conclude that *Beauharnais* has been vitiated.

94. *Beauharnais v. Illinois*, 343 U.S. 250, 263 (1952).

95. *Id.*

96. See National Gay Task Force, *Employment Discrimination in New York City: A Survey of Gay Men and Women, in LESBIANS, GAY MEN, AND THE LAW* 244-48 (William B. Rubenstein, ed. 1993) (chronicling the work experiences and prejudices inflicted upon gays and lesbians in New York City).

97. This incendiary attribute, wrongly linked to gays and lesbians, is subtly pervasive not only throughout society broadly, but also runs insidiously as an undercurrent through many legal cases involving homosexuals. See, e.g. *Bowers v. Hardwick*, 478 U.S. 186 (1986); *Baker v. Wade*, 769 F.2d 289, n.9 (5th Cir. 1985) (en banc), *cert. denied*, 478 U.S. 1022 (1986).

The result of these lies and misconceptions is that not only are many gays and lesbians psychologically harmed, but they are often relegated to a position of political and legal second-class citizenship.⁹⁸ In *Bowers*, the United States Supreme Court deemed gays and lesbians guilty of a crime "more malignant than rape" and then ruled they have no fundamental right to privacy under the Constitution.⁹⁹ This holding is based solely on prejudice, however the consequence is legal and social apartheid for gays and lesbians.

In the Netherlands, by contrast, people cannot be alienated from the political process. This mandate is the foundation of the Hoge Raad's opinion in *Van Zijl*.¹⁰⁰ In holding that Goeree's untruthful article harmed the plaintiff by diminishing his position in society and, consequently, violated his right to equal treatment, the Dutch opinion parallels the United States Supreme Court's opinion in *Beauharnais*.¹⁰¹ Key to the Hoge Raad's reasoning is the fact that Goeree's published remarks were untrue, just as the dishonesty of the defendant's remarks was also key in the *Beauharnais* decision.¹⁰²

Therefore, instances where speech is untrue and clearly libelous may trigger a valid contemporary application of *Beauharnais*. Despite constitutional limitations on laws that prohibit speech likely to incite violent reactions, as in *Collin*,¹⁰³ that offend certain audiences, as in *Cohen*,¹⁰⁴ or must be content neutral, as in *R.A.V.*,¹⁰⁵ no case has limited *Beauharnais* in instances where the speech at issue is blatantly untrue. In fact, the Supreme Court has held that states may impose their own standards of liability for defamatory speech against private persons.¹⁰⁶

98. Denied the right to legal recognition of their relationships and protection against discrimination, how else can gays and lesbians see their legal status in the United States? Indeed, the main point of *Evans v. Romer*, involving a Colorado referendum to repeal any existing anti-discrimination laws based on sexual orientation, is that the referendum effectively shuts gays and lesbians out of the political process regarding issues of sexual orientation. See also *Smith*, *supra* note 50 (explaining Colorado's anti-gay amendment and a historical basis of discrimination against homosexuals in the United States).

99. *Bowers v. Hardwick*, 478 U.S. 1039 (1986).

100. *Van Zijl*, 1990 RvdW NR41 (HR Neth) (holding that freedoms, such as religious propagation, while important rights, nonetheless are still bound by the responsibilities of each individual before the law to respect others in exercising their freedoms).

101. *Id.*

102. *Beauharnais v. Illinois*, 343 U.S. 250, 267 (1952). Indeed, the Court held that not only were defendant's remarks untruthful, they were, in fact, put forth as if true and thus not "with good motives and for justifiable ends."

103. *Collin v. Smith*, 578 F.2d 1197, 1202-03 (7th Cir. 1978).

104. *Cohen v. California*, 403 U.S. 15, 21 (1971).

105. *R.A.V. Petitioner v. St. Paul*, 112 S. Ct. 2538, 2545 (1992).

106. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) (establishing that a publisher is liable for defamatory statements that she knows are untrue, or reasonably should know are untrue); see also *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758-59 (1985)

Dutch law dramatically departs from its United States counterpart in its inclusion of homosexuals into legally protected classes. Unlike the current trend in United States First Amendment jurisprudence which requires that statutory restrictions on speech be content neutral, Dutch law officially recognizes that some groups require more protection than others.¹⁰⁷ Giving these groups legal protection is not considered giving them special rights, but rather affording them the equal protection granted to people who have not been the traditional targets of persecution. Dutch law recognizes the importance of free speech; that freedom, however, does not include the freedom to harm others.¹⁰⁸

B. Group Defamation

A libelous statement such as "the consequence of homosexuality is AIDS," certainly causes harm to the reputation of all homosexuals.¹⁰⁹ In most instances, American victims of such hate speech must

(declaring that in cases where the plaintiff is a private figure and the statement does not regard a "public concern," the proof of actual malice, as required in *New York Times v. Sullivan*, 376 U.S. 254 (1964), is not necessary to be held liable for defamation).

107. See *supra* notes 34-38 and accompanying text (explaining the expansion of anti-discrimination legislation to specifically protect against persecution based on sexual orientation).

108. PENAL CODE, arts. 137c, 137d (Neth) (providing protection from both oral and written invectives based on sexual orientation).

109. Other lies are frequently told about gays and lesbians. One is that by their proximity or example, lesbians and gays convert heterosexual children into homosexuals. If this were so, homosexual parents would have homosexual children. Susan Golombok, Ann Spencer & Michael Rutter, *Children in Lesbian and Single-Parent Households: Psychological and Psychiatric Appraisal*, 24 J. CHILD PSYCHOL. PSYCHIATRY 551, 570-71 (1983) (finding in a study of children in both homosexual and heterosexual households no atypical psychosexual development). Studies have shown that single lesbian mothers are no more likely to affect the gender identity of their children than heterosexual single mothers. *Id.* at 569. In fact, it was found that lesbian mothers are more concerned about providing male role models than their heterosexual counterparts. *Id.* at 569-70. According to the studies, what really matters is if the mother had a partner in the home. So, as with heterosexual families, children have better self-confidence, self-acceptance and independence if the family has two emotionally available and supportive adults. The sexual orientation of the parent has no effect on the sexual identity of their children). *Id.* at 571. See Martha Kirkpatrick, *Lesbian Mothers & Their Children: A Comparative Study*, 51 AM. J. ORTHOPSYCHIATRY 545, 550 (1981) (indicating that there are very little differences in either the childrearing methods of gay or straight parents or the gender role development or sexual orientation of children). Furthermore, new studies indicate that there is no psychologically adverse effect from being raised by a homosexual parent. Daniel D. Coleman, *Gay Parents Called No Disadvantage*, N.Y. TIMES, Dec. 2, 1992, at B7, col. 4. See also Smith, *supra* note 50, at fns. 10-11 and accompanying text (refuting the rhetoric of antigay groups, who erroneously maintain that homosexuals are seeking "special rights." Smith also outlines the various forms of discrimination gays and lesbians experience.). Akin to the misbelief of homosexual contagion of heterosexual children is the belief that all gay men will molest young male children. In fact, heterosexual men are more likely to sexually abuse children. A. Nicholas Groth & H. Jean Birnbaum, *Adult Sexual Orientation and Attraction to Underage Persons*, 7 ARCHIVES OF SEXUAL BEHAVIOR 175, 180 (1978) (finding that the vast majority of child sex offenders are heterosexual men who are attracted to perceived "feminine" features in young boys). Child abuse, child battering, sexual attacks and molestations most often are

show that the untrue statement harms them personally.¹¹⁰ The Dutch are not saddled with the same incumbrance. The Hoge Raad, for example, found that the pronouncements made by Goeree were unscrupulous with respect to the plaintiff's interest despite the fact that the reference made was about all homosexuals.¹¹¹ The Reverend Goeree, the Court held, has community obligations that include not publishing incorrect statements about the connection between homosexuality and AIDS.¹¹² Although it is true that gays comprise a large portion of those with AIDS, the Court noted that such data does not justify a claim that homosexuality inexorably leads to AIDS.¹¹³ The Court observed that it is a well-known fact that AIDS can be transmitted by many vectors including heterosexual contact and intravenous drug use, and furthermore, that homosexuals can have sexual contact without being infected with AIDS.¹¹⁴

The Court drew attention to the fact that the Goerees must have known their statements were untrue when they wrote them and distributed their journal and leaflets.¹¹⁵ Even if they did not, the Court said the Goerees had a responsibility to avail themselves of such knowledge.¹¹⁶

The United States has a limited legal history concerning the treatment of speech that uses defamatory language against large groups of people. There is an assumption in American law that a protected interest more easily accrues to an individual, and not a group.¹¹⁷ The right to live one's life with a maximum amount of individual freedom is a popular concept in the United States. American society enjoys individual freedom, however, at a cost to

committed by heterosexual men within a household. U.S. Dep't of Health, Education & Welfare; National Center on Child Abuse & Neglect, Publ. No. (OHD) 75-30074, *Child Abuse & Neglect: The Problem and its Management* 3 (1976) (noting that in the United States, 90% of all sexual child abuse is committed by heterosexual males on minor females).

110. See *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 57 (1988) (holding that a plaintiff cannot recover under an action for intentional infliction of emotional distress if the statement "could not reasonably be understood as describing actual facts about [respondent]"); *Old Dominion Branch No. 496 v. Austin*, 418 U.S. 264, 284 (1974) (holding that words used in "a loose, figurative sense" cannot support an action for defamation; instead, there must be something more precise that embodies conveyance of false idea).

111. *Van Zijl v. Goeree*, 1990 RvdW Nr. 41 (HR Neth).

112. *Id.*

113. *Id.* at 2 (affirming the findings of the lower court).

114. *Id.* at 7.

115. *Van Zijl v. Goeree*, 1990 RvdW Nr.41 (HR Neth).

116. *Id.*

117. David Riesman, *Democracy and Defamation: Control of Group Libel*, 42 COLUM. L. REV. 727, 730-31 (1942) (writing that traditions of individualism are more powerful in the United States than elsewhere. Consequently, our "thinking is still in terms of the 'individual' and the 'state,' and our law of defamation, such as it is, is conceived of only as a protection against individual injury.").

protection for collective forces. There is an implicit assumption that group membership is reflective of a collective interest, which has minimal value and is consequently subordinated to individual interests.¹¹⁸

As such, even though the lesbian and gay population is less than ten percent,¹¹⁹ it is unlikely that an American court would find statements, such as those bandied around by the Reverend Goeree, to be defamation. Further, public speech such as speech involving the defamation of large groups, is more likely to involve the First Amendment because the courts believe that the public has a right to know.¹²⁰

Despite these restrictions, limited possibilities exist for individual gays and lesbians to sue as members of a group. Although courts maintain that size does not make the difference, they have discouraged large groups from bringing defamation suits.¹²¹ One of the largest groups recognized by the courts was the sixty man football squad at Oklahoma University.¹²² The plaintiff, who was a player on the team, had a cause of action when a newspaper untruthfully stated the team used amphetamines. The court held that the entire Oklahoma University team was exposed to public hatred and ridicule and the exposure "tend[ed] to deprive the team and its membership of public confidence."¹²³ Since the plaintiff was well known and identified as an Oklahoma University football player, the group libel defamed him personally as well.¹²⁴

In contrast, when a doctor of osteopathy in Oklahoma claimed group libel, the court denied him recovery even though the defendant publication said that osteopaths are trained in an inferior manner and that osteopathy is unscientific.¹²⁵ There were 19,686 osteopaths in the United States at that time and, according to the

118. *Id.*

119. SAMUEL S. JANUS & CYNTHIA L. JANUS, *THE JANUS REPORT ON SEXUAL BEHAVIOR* 69-71 (1993) (stating that nine percent of men are gay, and five percent of women are lesbian).

120. Under these circumstances, the right to know seems arguable. "Not all speech is [of equal] First amendment importance. . . ." *Dun and Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758-59 (1985) (stating that the First Amendment was enacted to protect speech regarding matters of public concern rather than speech between private individuals).

121. *Neiman Marcus v. Lait*, 13 F.R.D. 311 (S.D.N.Y. 1952) (quoting from *RESTATEMENT OF TORTS* § 564(c), "[w]here the group or class disparaged is a large one, absent circumstances pointing to a particular plaintiff as the person defamed, no individual member of the group or class has a cause of action.").

122. *Fawcett Publications, Inc. v. Morris*, 377 P.2d 42 (Okla. 1962), *appeal dismissed per curiam*, 376 U.S. 513 (1964).

123. *Id.* at 48.

124. *Id.* at 42.

125. *McCullough v. Cities Serv. Co.*, 676 P.2d 833, 834 (Okla. 1984).

court, the reference to the group did not affect the reputation of every individual member. Unlike the Oklahoma University football player, the individual osteopath had no cause of action.¹²⁶

As with *Van Zijl*, American lesbians and gays should be mindful of what exactly the courts are saying. If the claim is that gays cause AIDS, then this is an untruthful statement, as the Dutch Supreme Court clearly recognizes.¹²⁷ But when this lie is told in the United States, it must be aimed at a more narrowly defined group in order to be accepted by the courts. Thus, if a Reverend such as Goeree claims that a specific AIDS task force is comprised of gays, and that gays cause AIDS, then a defamation cause of action is more likely to succeed. The circuitous route American lesbians and gays must take in comparison to their Dutch counterparts pointedly illustrates how difficult it is for victims to have any legal recourse against hate speech in the American system, even when that hate speech is untruthful.¹²⁸

IV. EMOTIONAL DISTRESS

Defamation greatly jeopardizes the reputation of gays and lesbians, but it also causes emotional harm. The emotional distress caused by these lies is an important factor in the high rates of suicide, drug, and alcohol abuse and general low self esteem in the gay community.¹²⁹ In their equal protection analysis, the Dutch recognize that emotional distress results from harassing speech and can consequently form a basis for a legal claim.¹³⁰ The lower court in *Van Zijl* described the hate messages delivered as religious speech beyond the boundary "of reasonable propagation of religious belief"¹³¹ The Reverend Goeree could not cloak such speech as religious belief because the lies "injuriouly" distressed the homosexual community.¹³² In the United States, compensation for emotional distress resulting from similar religious speech would be difficult to achieve.

Because emotional distress, like defamation, is a harm to one's dignity, the American courts make stringent demands of proof for a

126. *Id.* at 837.

127. *Van Zijl v. Goeree*, 1990 RvdW Nr.41 (HR Neth).

128. *See Rasmussen v. South Florida Blood Serv., Inc.*, 500 So. 2d 533, 537 (Fla. 1987) (making an analogy that AIDS is the "modern day equivalent of leprosy" in terms of the stigma that attaches to those who have the disease or are in high-risk groups for its contraction).

129. Gay youths are two to three times more likely to attempt suicide in comparison to other youths. According to a recent study, homosexual youths may comprise up to 30% of completed youth suicides annually. Paul Gibson, *Gay Male and Lesbian Youth Suicide*, in REPORT OF SECRETARY'S TASK FORCE ON YOUTH SUICIDE 3-110, 3-128 (1989).

130. *Van Zijl v. Goeree*, 1990 RvdW Nr.41 (HR Neth).

131. *Van Zijl v. Goeree*, 1987 NJCM Nr.101 at 305 (Neth Court of Summary Proceedings).

132. *Id.*

cause of action based on emotional distress. If *Van Zijl* had taken place in the United States, Fred not only would have to be the subject of Goeree's article, but he also would have to suffer severe emotional distress in order to win a claim in most American courts. Indeed, some courts would require that Fred manifest physical symptoms resulting from the emotional distress. Hence, unless he develops a rash,¹³³ tics,¹³⁴ or requires hospitalization,¹³⁵ Fred is unlikely to have a successful claim.

Irrespective of how severely Fred experiences the emotional distress, most Americans would consider Reverend Goeree's language insufficiently outrageous to win a claim of emotional distress. American courts have ruled against emotional distress claims made by young African-American men who were called "knot-headed boy," "bastard," and "nigger" by their lawyer.¹³⁶ Likewise, the courts have not granted emotional distress claims to women workers whose co-workers call them "fat ass," "whore," and "cunt."¹³⁷

These are a few circumstances where American courts ruled in favor of emotional distress claims. Hateful epithets spoken to patrons by workers in businesses open to the public have yielded limited results for plaintiffs. For example, a black father and his son won an

133. See, e.g., *LaBrew v. Anheuser Ford, Inc.*, 612 S.W.2d 790, 794 (Mo. Ct. App. 1981) (connecting the plaintiff's development of a rash with the outrageous conduct of the defendants, which caused the plaintiff's emotional distress).

134. See, e.g., *Ford v. Revlon, Inc.*, 734 P.2d 580, 584 (Ariz. 1987) (stating that plaintiff developed "high blood pressure, a nervous tic in her left eye, chest pains, [and] rapid breathing," which substantiated her intentional infliction of emotional distress claim).

135. See, e.g., *Unruh v. Truck Ins. Exch.*, 498 P.2d 1063, 1066 (Cal. 1972) (explaining that the harsh emotional distress with which the defendants burdened the plaintiff caused her to be hospitalized).

136. *Bradshaw v. Swaggerty*, 563 P.2d 511, 512 (Kan. Ct. App. 1977) (ruling that such offenses were insufficiently outrageous in a case of emotional distress); see *Dawson v. Zayre Dep't Stores*, 499 A.2d 648, 649 (Pa. Super. Ct. 1985) (suing a department store for emotional distress because a clerk called the plaintiff a "nigger"); *Lay v. Roux Lab., Inc.*, 379 So. 2d 451, 452 (Fla. Dist. Ct. App. 1980) (calling plaintiff a "nigger" was not sufficiently outrageous to state a claim); *Irving v. J.L. Marsh, Inc.*, 360 N.E.2d 983, 984-86 (Ill. App. Ct. 1977) (denying a claim where a clerk inscribed the epithet, "arrogant nigger," on the return form presented to the plaintiff because it did not possess "the degree of severity that is necessary to establish a cause of action for intentional infliction of emotional distress").

See also *Leibowitz v. Bank Leumi Trust & Co.*, 152 A.D.2d 169, 181 (N.Y. App. Div. 1989) (ruling that ethnic slurs such as "Hebe" and "Kike" do not rise to the level of outrageous conduct necessary to state a claim for intentional infliction of emotional distress); *Logan v. Sears Roebuck & Co.*, 466 So. 2d 121, 123 (Ala. 1985) (holding there was no action for an admitted homosexual where store employee said he was "as queer as a three-dollar bill"); *Dominguez v. Stone*, 638 P.2d 423, 425-26 (N.M. Ct. App. 1981) (holding that where the plaintiff overheard the defendant call her a "Mexican" in a derogatory way, it was insufficient to state a cause of action).

137. *Rabidue v. Osceola Ref. Co.*, 805 F.2d 611, 624 (6th Cir. 1986) The dissent claimed however, that such derogatory words create a hostile work environment, and therefore violate Title VII.

emotional distress claim against a waitress because she responded to the father's question regarding his order by saying, "You can't talk to me like that, you black son-of-a-bitch. I will kill you."¹³⁸ She also repeatedly shouted on her way back to the kitchen that "they [were] nothing but a bunch of niggers."¹³⁹

Emotional distress claims are also marginally effective in employment situations when a superior uses hateful epithets against an employee or when the speaker knows that the listener is particularly susceptible.¹⁴⁰ If the listener has a heart condition or is mentally ill, for example, and the speaker knows this, chances of recovering for emotional distress are greatly improved.¹⁴¹ Unfortunately, none of this would help Fred if he filed suit in the United States, as he is not physically or mentally ill. Goeree is not his employer; nor were Goeree's attacks made in a place of public accommodation. In addition, Goeree's words were couched in religious language and would therefore receive the highest First Amendment protection.¹⁴²

There are those who offer new approaches that, if accepted, would increase a person's chance of recovery for emotional distress and approximate what happened in the Netherlands. For instance, it has been suggested that anti-discrimination legislation could serve as a basis for a cause of action for intentional infliction of emotional distress.¹⁴³ For anyone protected by legislation, discriminatory

138. *Wiggs v. Courshon*, 355 F. Supp. 206, 208 (S.D. Fla. 1973).

139. *Id.* at 211. Relief was denied to the wife and parents, however, even though they too witnessed the harassing speech. Furthermore, the judge reduced the jury award from \$25,000 to \$2,500 to ensure ethnic groups would not form lines to collect "balm." *Id.*

140. *Robinson v. Hewlett Packard Corp.*, 183 Cal. App. 3d 1108, 1115 (Ct. App. 1986) (finding a sufficient triable issue where supervisor stated that "she did not like blacks," "that black people in general don't like to work," "they try to get something for nothing," and that because plaintiff was black "he did not want to work and was faking his illness"); *Gomez v. Hug*, 645 P.2d 916, 917 (Kan. Ct. App. 1982) (finding that a Mexican-American county employee, called "fucking spic," "a fucking Mexican greaser," and "a pile of shit" by a County Commissioner had a cause of action for intentional infliction of emotional distress); *Agarwal v. Johnson*, 603 P.2d 58, 63 (Cal. 1979) (holding that "you black nigger" and other racial epithets are sufficient to support a verdict for intentional infliction of emotional distress where one element in determining whether behavior is outrageous is if the defendant knows the plaintiff is susceptible to injury through mental distress); *Alcorn v. Anbro Eng'g, Inc.*, 468 P.2d 216, 217 (Cal. 1970) (upholding complaint of intentional infliction of emotional distress where supervisor shouted "you goddamn niggers", "I don't want any 'niggers' working for me" and "I'm getting rid of all the 'niggers'").

141. *Anderson v. Prease*, 445 A.2d 612, 613 (D.D.C. 1982) (finding extreme and outrageous conduct where defendant-doctor who knew that plaintiff-patient was "peculiarly susceptible to emotional distress," cursed and screamed at the patient).

142. *See Molko v. Holy Spirit Ass'n for the Unification of World Christianity*, 762 P.2d 46 (Cal. 1988), *cert. denied*, 490 U.S. 1084 (1989) (holding that claims of intentional infliction of emotional distress are barred by the First Amendment to the extent that they are based on protected religious speech).

143. *See Jean C. Love, Discriminating Speech and the Tort of Intentional Infliction of Emotional Distress*, 47 WASH. & LEE L. REV. 123, 149-50 (1990) (suggesting that courts adopt "a rebuttable

speech would be rebuttably presumed to be outrageous.¹⁴⁴ Utilizing a rebuttable presumption would enhance a plaintiff's chance of recovery because she would not have to prove that the language was inappropriate.¹⁴⁵ Instead, it would be the defendant's burden to show that his discriminatory words are worthy of protection.¹⁴⁶

Unfortunately, such a proposal will not help Fred. Except in the few states and cities where civil rights protection have been extended to lesbians and gays, Fred would not be able to use a rebuttable presumption of outrageousness.¹⁴⁷ The suggestion, however, does offer a methodology that gays and lesbians could attempt to use. Gays and lesbians have characteristics in common with others who fall into the protected categories.¹⁴⁸

The harm that befalls lesbians and gays who suffer insulting, hateful language is similar to that suffered by members of other protected groups. Words like "dyke" and "fag" are serious transgressions of the principle of moral worth and dignity. Such words derogate a characteristic central to one's self-image.¹⁴⁹ The slurs imply that gays and lesbians are not worthy of respect and have a lesser claim to civil liberties than other citizens do. Thus, there should exist a tort for insults which would encompass insults against homosexuals similar to insults against other "outsiders."¹⁵⁰

presumption that all categories of discriminatory speech meet the extreme and outrageous conduct requirement").

144. *Id.*

145. *Id.*

146. *Id.*

147. *See supra* note 59 (referring to states and municipalities which ban discrimination based on sexual orientation).

148. *See Jantz v. Muci*, 759 F. Supp. 1543, 1548 (D. Kan. 1991), *rev'd and remanded*, 976 F.2d 623 (10th Cir. 1992), *cert. denied*, 113 S. Ct. 2445 (1993) (comparing characteristics of race, gender, alienage, and illegitimacy with sexual orientation).

149. *Id.* at 1548 (stating that discrimination against immutable characteristics such as homosexuality will cause "significant damage to the individual's sense of self").

150. *See* Elizabeth F. Defeis, *Freedom of Speech and International Norms: A Response to Hate Speech*, 29 STAN. J. INT'L L. 57 (1992) (examining how American courts have responded to the issue of hate speech and how in the context of international human rights conventions, the United States differs from other democratic nations. In international law, rights are interdependent, not absolute, and in the hate speech context, freedom of speech should not override the right to equality.); Richard Delgado, *Words that Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133, 146 n.72 (1982) (referring to M. DEUTSH, I. KATZ & A. JENSEN, SOCIAL CLASS, RACE AND PSYCHOLOGICAL DEVELOPMENT 175 (1968)); Mari J. Matsuda, *Public Responses to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320 (1989) (advocating the prosecution of racist speech through formal criminal or administrative procedures and seeking to give hate speech victims not only a voice, but a means to redress their grievances); Mayo Morgan, *Talking About Hate Speech; A Rhetorical Analysis of American and Canadian Approaches to the Regulation of Hate Speech*, 1994 WIS. L. REV. 1425 (1994) (arguing that the unofficial narrative dismantles the concept that free speech is a battle between the speaker and government suppression. Further, the unofficial narrative describes how hate speech affects the listener. The courts need to integrate the unofficial narrative of the victim's voice into their

Similar to arguments regarding race or religion, discrimination against lesbians and gays is invidious and unjustifiable. It is invidious because sexual orientation is immutable and, even if not immutable, is a trait which bears no relationship to the ability of a homosexual to work, to participate in society, or to seize opportunities available to others.¹⁵¹ As a class, homosexuals have historically suffered discrimination.¹⁵² Homosexuals in the United States have historically been subjected to discrimination both pervasive in its scope and intense in its impact.¹⁵³ Because of this vilification, lesbians and gays hide

opinions on free speech and look at how hate speech, in terms of its discriminatory context, causes harm). Comparatively, Morgan looks at how the Canadian Supreme Court, with support from international treaties, human rights doctrines, and with similar constitutional standards, upheld the regulation of hate speech. Morgan, *supra*, at 1497.

See also 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, 377 (1990) (noting that "the risks attendant to identification as a homosexual are so severe and pervasive that homosexuals are often forced to hide their identities"). Homosexuals not only hide their homosexuality, but also, politically, they are unable to prevent discrimination or counter popular, unsupported stereotypes about homosexuals. Hayes, *supra*, at 378. The stereotypes regarding homosexuals frequently involve, and especially for men, the idea of preying on youth, or being sissy. Hayes, *supra*, at 384. Notably, the hatred of lesbians and gays is centered on the fact that homosexuals seem to defy the 'assigned' gender roles. Hayes, *supra*, at 384. Further, homosexuals traditionally have dealt with society's hatred by pretending they were straight. Hayes, *supra*, at 395, n.102. Moreover, pretending has allowed some lesbians and gays to make their way in the economic sphere, but at tremendous psychological costs. Hayes, *supra*, at 395.

See generally Harris M. Miller II, Note, *An Argument for the Application of Equal Protection Heightened Scrutiny to Classifications Based on Homosexuality*, 57 S. CAL. L. REV. 797, 821-24 (1984) (explaining how stereotypes, such as the belief that homosexuals will convert a heterosexual child to homosexuality, the belief that homosexuals are more likely to molest children, and the belief that homosexuality is a mental disease, disadvantage gays); John T. Nockleby, *Hate Speech in Context: The Case of Verbal Threats*, 42 BUFF. L. REV. 653, 699-713 (1994) (advocating the creation of a new tort remedy to deal with special incidents of hate speech that would consider whether the slur was a means of communicating a threat); Kim M. Watterson, Note, *The Power of Words: The Power of Advocacy Challenging the Power of Hate Speech*, 52 U. PITT. L. REV. 955 (1991) (emphasizing the need to more effectively advocate against hate speech by re-framing hate speech to show the victim's perspective. The victim's rights are too often lost and the perpetrator's rights are gloriously asserted. Hate speech is not an exercise of a fundamental right, but an assertion of power in the context of discrimination.).

151. See Jantz, 759 F. Supp. at 1548 (finding that based on the overwhelming weight of currently available scientific information, homosexual or heterosexual orientation is generally not subject to conscious change) (quoting Resolution of the American Psychological Association, Jan. 1985) "Homosexual orientation 'implies no impairment in judgment, stability, reliability or general social or vocational capabilities'". *Id.*

152. See Miller, *supra* note 150, at 824-25 (stating that private discrimination against gays has ranged from housing and employment discrimination to violence); see, e.g., Symposium, *Developments in the Law - Sexual Orientation and the Law*, 102 HARV. L. REV. 1508, 1575 (1989) [hereinafter Symposium] (stating that homosexuals face discrimination in military employment, employment that requires a security clearance, and civil service employment. Furthermore, the lack of legal protection for gay men and lesbians in the private employment sector remains, despite the fact that nearly one-third of gay men and nearly one-quarter of lesbians surveyed, reported that they have been discriminated against in the work force.).

153. Symposium, *supra* note 152, at 1549.

their sexual orientation and, as a result, become politically powerless.¹⁵⁴ This being so, homosexuals should be able to claim a rebuttable presumption of emotional distress in the same manner as other protected classes. Similar to what happens in the Netherlands, dignitary harm resulting from hatred should be a valid basis for tort recovery for those individuals traditionally singled out for society's opprobrium.

V. RIGHTS BASED ON INTERNATIONAL LAW

As a general principle, Americans view the Bill of Rights as a human rights model, superior to United Nation conventions, protocols or similar international treaties of North and South America.¹⁵⁵ In most instances, there is jurisprudential reluctance to use international principles when it relates to human rights.¹⁵⁶ To do so would imply that the Bill of Rights is underinclusive. However, when the United States finds that a treaty can be used to its advantage, it does so without hesitation. For instance, the United States felt free to call upon the human rights doctrines in the United Nations Charter, the Universal Declaration of Human Rights, and the International Covenant on Civil and Political Rights when informing Iran that it had an obligation to observe human rights under those treaties with respect to American hostages.¹⁵⁷

154. See *Jantz v. Muci*, 759 F. Supp. 1543, 1550 (D. Kan. 1991) (stating that homosexuals face severe limitations on their ability to protect their interests by means of the political process). Because of harsh societal penalties, many homosexual persons conceal their sexual orientation which effectively guarantees that homosexuals are politically silenced. *Id.* Refraining from open political activity diminishes any perspective or sensitivity by the heterosexual majority for concerns of the homosexual community. *Id.*

155. See Richard B. Lillich, *The Constitution and International Human Rights*, 83 AM. J. INT'L L. 851, 853-60 (1989) (noting that although the United States has contributed to the development of international human rights law, it has failed to ratify or adopt international human rights treaties).

156. See generally *United States v. Machain*, 502 U.S. 655, 669-70 (1992) (holding that while a forcible abduction by United States officials of a Mexican national alleged to have murdered a United States DEA agent may offend general principles of international law, such abduction is not in violation of a Mexico-United States Extradition Treaty where said treaty does not explicitly prohibit such kidnappings).

157. *United States v. Iran*, 1980 I.C.J. 3, 5-9. In this suit against Iran, the United States claimed that the failure to provide protection for United States nationals during the hostage taking at the embassy was a violation of fundamental rights. See Barbara D. Budros, Comment, *The Former American Hostages' Human Rights Claims Against Iran: Can They Be Waived?*, 4 HOUS. J. INT'L L. 101, 112 (1981):

The existence of such fundamental rights for all human beings gives rise to a corresponding duty on the part of every State to respect and observe them as reflected in the United Nations Charter, the Universal Declaration of Human Rights, the International Covenant of Civil and Political Rights, regional conventions and other instruments defining basic human rights. . . .

Other countries are not so cavalier with respect to human rights as defined by international treaties.¹⁵⁸ Certainly the courts in *Van Zijl* relied on international treaties in their decision.¹⁵⁹ Argued by scholars and impacted groups, treaties set a standard by which individual nation states must abide.¹⁶⁰ The intensity of this force cannot be ignored—even by our own legal system. Thus, advocates for the rights of lesbians and gays should present American courts with references to how countries like the Netherlands use international treaties to extend fundamental civil rights to homosexuals.¹⁶¹ This suggestion is made with full recognition that, unlike the

158. See *Van Zijl v. Goeree*, 1990 RvdW Nr.41 (HR Neth) (referring to The Treaty of Rome, Nov. 4, 1950 and The Treaty of New York, Dec. 16, 1966).

159. *Id.* at 6, 9.

160. See David Catania, *The Universal Declaration of Human Rights and Sodomy Laws*, 31 AM. CRIM. L. REV. 289, 291 (1994) (constructing, with international law as the foundation, a Federal Common Law framework to overturn sodomy laws in the United States); Defeis, *supra* note 150, at 74-75 (discussing numerous examples of international treaties that provide guidelines for the prohibitions of hate speech); see also Markus Dirk Dubber, Note, *Homosexual Privacy Rights Before the United States Supreme Court and the European Court of Human Rights: A Comparison of Methodologies*, 27 STAN. J. INT'L L. 189, 191-99 (1990) (presenting a comparative analysis of *Bowers v. Hardwick*, *Dudgeon v. United Kingdom*, and *Norris v. Ireland* as all three cases share similar fact patterns and faced similar court battles. In analyzing the differences in outcomes, the author found that the European Court of Human Rights was willing to take a much more dynamic view of homosexuality in present day culture. *Id.* at 210. Conversely, the U.S. Supreme Court placed homosexuality in a static, retrospective world-view. *Id.* A key factor in the European Court's decisions was their reliance on an explicit right to privacy which does not exist in the U.S. Constitution. *Id.* at 201-02.); Laurence R. Helfer, *Lesbian and Gay Rights as Human Rights: Strategies for a United Europe*, 32 VA. J. INT'L L. 157 (1991) (examining the impact of the European Convention for the Protection of Human Rights and Fundamental Freedom on European Law Reforms concerning the proposals and strategies that will benefit gay and lesbian Europeans); Brenda Sue Thornton, *The New International Jurisprudence of the Right to Privacy: A Head on Collision with Bowers v. Hardwick*, 58 ALB. L. REV. 725 (1995) (noting that the U.S. position on gay rights is in direct conflict with international law. The Human Rights Committee ruling in *Toonen v. Australia* reflects the willingness of the International Covenant on Civil and Political Rights to fully recognize gay rights as human rights. *Id.* at 757-65. The author explains the mechanisms that brought the *Toonen* case before the committee and how this might apply to an American case. *Id.* at 765-73.); James D. Willets, *International Human Rights Law and Sexual Orientation*, 18 HASTINGS INT'L & COMP. L. REV. 1, 6-8 (1994) (discussing how international law can be used in many areas to provide a higher standard of protection than is afforded under national law); Mark E. Wojcik, *Using International Human Rights Law to Advance Queer Rights: A Case Study for the American Declaration of the Rights and Duties of Man*, 55 OHIO ST. L.J. 649 (1994) (discussing how the American Declaration of the Rights and Duties of Man offers international recognition of gay rights and that it should be used to further validate state and federal constitutional arguments).

161. See generally Evert van der Veen & Astrid Mattijssen, *Lesbian and Gay Rights in Europe: Homosexuality and the Law*, in THE THIRD PINK BOOK: A GLOBAL VIEW OF LESBIAN AND GAY LIBERATION AND OPPRESSION 225-46 (Aart Hendriks, Rob Tielman, & Evert van der Veen eds., 1993) (noting that these treaties have given the Dutch courts a new position of power with respect to extending rights to gays and lesbians). In the Netherlands, the Dutch courts do not have the power to declare an Act of Parliament null and void on the grounds that it conflicts with the Dutch Constitution. The judiciary, however, can declare an Act of Parliament null and void on the grounds that the act conflicts with provisions of a ratified treaty, insofar as the treaty is binding on all persons. Thus, international treaties on human rights are especially important for establishing rights for Dutch lesbians and gays. *Id.*

Netherlands, the United States has signed no treaties which give an individual standing to claim rights against a state, the federal government, or an individual.¹⁶² Regardless, international human rights treaties have a moral authority which our own courts should respect and follow.

VI. CONCLUSION

The Dutch experience provides a legal model that may be used in an innovative way to decrease hate speech aimed at lesbians and gays in the United States. In the Netherlands, published lies, such as "gays cause AIDS," are subject to legal action. In addition, Dutch homosexual groups are aided by a constitutional provision and a criminal code which the highest Dutch court interprets as preventing speech that prejudices homosexuals. Hence, the Netherlands offer an example that American lesbians and gays can use. Even though the recent United States Supreme Court decision on hate speech¹⁶³ creates an uphill battle, gay and lesbian communities may lobby for a statute that authorizes a civil defamation and emotional distress suit for lies told to cause prejudice against a group. Moreover, as recognized by the courts and lawmakers in the Netherlands, support for these propositions can be found in international treaties.

All of these ideas present challenges that will meet stormy opposition in the United States. There is a long history of giving deference to speech rights even when speech promotes discrimination. The verbal terrorism that is created by lies, however, is not deserving of protection, and strides can be made to correct the balance between speech and non-discrimination principles.

162. Such a reference might include the *Van Zijl* decision in which the Dutch Supreme Court held, pursuant to the European Convention on Human Rights and Fundamental Freedoms ("ECHR") and the International Covenant on Civil and Political Rights ("ICCPR"), that restrictions on the right to religious freedom are permissible where such restrictions are in place to protect "against insulting, unnecessarily distressing and discrimination-encouraging comments. . . ." *Van Zijl v. Goeree*, 1990 RvdW Nr.41 (HR Neth). Article 9(2) of the ECHR guarantees freedom of religion, but allows for limitations of this freedom in order to protect public safety, order, health, morality, or to protect the rights and freedom of others. ECHR, *supra*, note 12. Similarly, Article 18(c) of the ICCPR guarantees freedom of religion, but those freedoms are not absolute. There too, limitations can be prescribed by laws which are necessary to protect the fundamental rights and freedoms of others. ICCPR, *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976).

163. *R.A.V. Petitioner v. St. Paul*, 112 S. Ct. 2538 (1992).

