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The First Amendment and Homosexual Expression: The Need for an Expanded Interpretation

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NOTES

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I. INTRODUCTION

> Homosexuality is today essentially a form of political, social, and moral dissent on par with the best American traditions of dissent and even subversive advocacy. . . . Those that support criminalization find today in homosexuality what they found before in the family planning of Sanger, the atheism of Darwin, the socialism of Debs, or the Marxist advocacy of the American Communist Party.[1]

Ostensibly, the First Amendment guarantees all people freedom of expression of every belief. The free exchange of ideas forms the basis of a democratic government.[2] Only citizens with unhindered access to the famed "marketplace of ideas" can participate meaningfully in a dialogue and achieve political and social solutions that the community will respect.[3] For this reason, courts balk at even the suggestion of limiting expression that might function as political or social advocacy.

Despite the seemingly boundless tolerance our judiciary purports to extend to all ideas, however, courts deny much expression the full protection of the First Amendment because of the expression's

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1. David A.J. Richards, *Constitutional Privacy and Homosexual Love*, 14 N.Y.U. Rev. L. & Soc. Change 895, 905 (1986).

2. See Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 Yale L. J. 877, 882-84 (1963); Donald Meiklejohn, *Public Speech and the First Amendment*, 55 Georgetown L. J. 234, 235, 262 (1966).

3. First Amendment theory has described free speech as a "marketplace of ideas" for many years. This metaphor suggests that every individual has the right to sell her ideas to the masses. Success or failure is dependent on the value that the buyers ascribe to the product. This model of the First Amendment suggests that a maximum amount of speech on a given issue will allow people the opportunity to judge the merits of various ideas and, consequently, achieve enlightonment as to the most preferential. Melville B. Nimmer, *Nimmer on Freedom of Speech* § 1.02[A] at 1-7 to 1-9 (Matthew Bender, 1984). As a result, courts review speech advocating a view of political or societal organization more carefully than other noncore speech.

Significant support exists for another rationale of free speech—the self-fulfillment function. Id. § 1.03 at 1-49 to 1-52. This concept suggests that the importance of the First Amendment derives not only from the ability of speech to persuade others but also from the need to express our own personal identities and grow to enlightenment. C. Edwin Baker, *The Scope of the First Amendment Freedom of Speech*, 25 UCLA L. Rev. 964, 990-92 (1978).

Although this Note assumes the "classical" model of the First Amendment embodied in Nimmer's Enlightenment Model, incorporation of the Self-Fulfillment Model would not weaken the argument for expanding the interpretation of expression. In fact, this change would add greater weight to the ideas that follow. For a further discussion of the similarities and differences between these two views of the First Amendment, see Gerald Gunther, *Constitutional Law* 998-1002 (Foundation, 12th ed. 1991).

form and content. Specifically, courts exclude from protection speech deemed not to contribute significantly to the civil discourse of ideas that the First Amendment seeks to maintain. For example, the Supreme Court has excluded from protection "fighting words,"[4] obscenity,[5] sexual harassment,[6] and the advocacy of illegal acts.[7] Thus, the Supreme Court has determined that certain classes of speech, although arguably expressive, do not advocate concepts protected by the First Amendment.

The First Amendment does not protect those messages viewed as mere words or conduct without any expressive content.[8] Accordingly, the Court has held that some speech is not advocacy, but mere words or acts without expressive significance. This distinction ensures that the might of the First Amendment is not invoked in the name of mere words not representing advocacy of some political or social belief.

Inherent in these limitations on the freedom of expression is the line drawn between reasonable, rational expression intended to spark civil debate and irrational ranting viewed as outside the bounds of true expression. Rational speech is protected as a form of political

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4. The category of "fighting words" is speech that prevents the free exchange of ideas by directly provoking an individual to conflict. The Court views this speech as adding nothing to the exchange of ideas. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942) (upholding the constitutionality of a state statute forbidding statements that may arouse the addressee to violence). The Court in *Chaplinsky* noted: "It has been well observed that such utterances . . . are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." Id. (footnote omitted).

For a more thorough description of the "fighting words" doctrine, see notes 86-88 and accompanying text. See Part III.A.2 for the criticism of this exclusion.

5. The Court denies First Amendment protection to obscenity under the belief that this sort of expression adds nothing of value to the rational exchange of ideas. Speech is defined as "obscene" if it fails the test adopted in *Miller v. California*, 413 U.S. 15, 23-24 (1973) (denoting "patently offensive" descriptions of sexual conduct, appealing to the "prurient interest in sex," that lack "serious . . . value"). For a further description of this test, see notes 103-09 and accompanying text.

6. Courts perceive that sexual harassment has such slight value to the advocacy of beliefs that it may be excluded from protection.

7. The advocacy of illegal acts undermines lawful behavior. Illegal conduct is contrary to the rational advocacy of ideas that the marketplace theory presupposes. Consequently, the Court has denied protection to speech that meets the test outlined in Justice Holmes's dissent in *Abrams v. United States*, 250 U.S. 616, 627-28 (1919) (Holmes, J., dissenting) (formulating the "clear and imminent danger" test). See, for example, *Dennis v. United States*, 341 U.S. 494, 508-10 (1951); *Scales v. United States*, 367 U.S. 203, 229-30 (1961); *Noto v. United States*, 367 U.S. 290, 298 (1961).

8. *Chaplinsky*, 315 U.S. at 572 (categorizing fighting words as outside the protection of the First Amendment); *R.A.V. v. City of St. Paul*, 112 S. Ct. 2538, 2545 (1992) (analogizing fighting words to the sound of a noisy truck); *FCC v. Pacifica Found.*, 438 U.S. 726, 746 (1978) (refusing to recognize any significant message in George Carlin's "Filthy Words" monologue). But see *Cohen v. California*, 403 U.S. 15, 25-26 (1971) (recognizing the expressive value inherent in an offensive slogan). See generally Nimmer, *Nimmer on Freedom of Speech* § 3 (cited in note 3).

or social advocacy. Irrational speech is denied First Amendment protection on the grounds that it expresses ideas unprotected by the First Amendment or that it is not true expression at all. By drawing this arbitrary line between rational and irrational, however, advocates of this interpretation of the First Amendment often foreclose the expression of others who seek to advocate unreasonable or irrational beliefs. The definition of "Reason"[9] is invariably one that espouses a view of civil discourse that rationally weighs the values of competing beliefs.[10] The civil discourse model of speech envisions a moderated political debate searching for the truth. This interpretation does not tolerate expression falling outside its model of rationality.[11] Expression such as that of black activists staging lunch counter sit-ins and freedom rides seems anathema to this ideal of rationality. This expression frustrates any attempt to engage in civil discourse aimed at a solution. It exhibits "irrational" defiance of the majoritarian rule and consequently is denied First Amendment protection.[12] Yet, these actions are just as expressive as other, more fully protected modes of speech.

Instead of ensuring that the First Amendment is not prostituted in the name of activities that are nonexpressive, these prohibitions actually frustrate the basic tenets of the Constitution. Expression that runs counter to the basic beliefs of society often is denied protected status and instead is viewed as the bastard child of true speech. Much expression that the majority considers irrational is

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9. "Reason" and "Unreason" are capitalized to represent the view of these concepts as socially constructed categories of speech. See Kenneth L. Karst, *Boundaries and Reasons: Freedom of Expression and the Subordination of Groups*, 1990 U. Ill. L. Rev. 95, 100 (describing the terms "Reason" and "Unreason" as social constructs).

10. See id.

11. See *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (expressing a noble and eloquent argument in favor of an unhindered discourse of all opinions and exhortations); *Debs v. United States*, 249 U.S. 211, 215 (1919) (affirming an espionage conviction for Socialist, anti-war speech); *Schenck v. United States*, 249 U.S. 47, 52 (1919) (affirming the defendant's conviction for printing and mailing a circular to draftees urging them to assert their Thirteenth Amendment rights and their opposition to the Conscription Act). See also *Cantwell v. Connecticut*, 310 U.S. 296, 308-10 (1940) (finding the defendant's playing of an anti-Catholic recording, with permission, and without any intent to provoke violence, protected by the First Amendment despite subsequent threats from listeners that caused him to depart peacefully); *Thornhill v. Alabama*, 310 U.S. 88, 94-95 (1940) (finding the defendant's peaceful picketing and inducing other workers to join him in a strike at a "company town" to be within the First Amendment's protection of the "processes of education" and "fearless reasoning"). See generally Lee C. Bollinger, *The Tolerant Society* ch. 2 (Oxford U., 1986). In some instances, the Court has been willing to move beyond the civic debate model that Karst outlines, but rarely does it offer full protection to truly fringe forms of speech.

12. The Court in *Garner v. Louisiana*, 368 U.S. 157 (1961), upheld the right to political protest by means of a sit-in, but this mode of expression continued to suffer at the hands of its detractors.

the very sort of speech the First Amendment must protect. Courts, however, often are unable and unwilling to recognize and accept some valid forms of expression. Instead of protecting these speakers of Unreason, courts have devalued their messages and allowed the eradication of their voices and beliefs.

The problem facing speakers of Unreason is especially acute in the context of the struggle of gay men and lesbian women[13] to achieve liberation from the dominant culture's prison of heterosexuality.[14] Because theirs is often the most silent minority with aims so disparate from the beliefs of the rest of society, the expression of homosexual men and women is particularly susceptible to the majority's brand of Unreason.[15] This Note exposes the inherent difficulties faced by gay men and lesbians in their struggle to express values and beliefs particular to their orientation. Although it is inherently difficult for someone in the majority to recognize as rational expression it may consider the language of Unreason,[16] the legal system must confront this task. Only by an expansive interpretation of the First

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13. Many writers have debated how te identify most accurately members of the homosexual community. See *Developments in the Law—Sexual Orientation and the Law*, 102 Harv. L. Rev. 1508, 1512 nn.5-6 (1989) (discussing various conceptions surronnding the terms "homosexuality," "sexual orientation," and "gay men and lesbians"). This Note makes no attempt te resolve this issue definitively. However, this Note often intentionally uses the words "gay," "lesbian," and "homosexual" as adjectives rather than nouns te emphasize the expression involved in this aspect of an individual's personality.

14. José Gómez argues that cultural biases often force homosexual men and women to hide their sexual orientation under a veneer of heterosexuality te avoid social and legal ramifications. He refers to this state of affairs as "compelled heterosexuality." José Gómez, *The Public Expression of Lesbian/Gay Personhood as Protected Speech*, 1 Law & Ineq. J. 121, 134 (1983).

15. John D'Emilio, *Sexual Politics, Sexual Communities: The Making of a Homosexual Minority in the United States, 1940-1970* at 13-15 (U. of Chicago, 1983). See *Doe v. Commonwealth's Attorney for Richmond*, 403 F. Supp. 1199, 1201-02 (E.D. Va. 1975) (refusing te extend the constitutional right te privacy to cover sodomy); *Velez-Lorzano v. INS*, 463 F.2d 1305, 1307 (D.C. Cir. 1972) (finding consensual sodomy te be a crime of moral turpitude sufficient to demand deportation); *In re Schmidt*, 56 Misc. 2d 456, 289 N.Y.S.2d 89, 92 (N.Y. Sup. Ct. 1968) (denying naturalization to an alien who admitted lesbian practices). See also *McConnell v. Anderson*, 451 F.2d 193, 196 (8th Cir. 1971) (referring te homosexuality as a "repugnant moral concept"); *State v. Bonanno*, 245 La. 1117, 163 S.2d 72, 74 (1964) (describing homosexual acts as "loathsome and disgusting"); *State v. Stokes*, 274 N.C. 409, 163 S.E.2d 770, 774 (1968) (citing to the Bible as evidence that homosexuality has been condemned since ancient times).

16. Kenneth Karst describes this problem quite perceptively: "Ignoring that our own perspectives *are* perspectives, 'we' simply think of them as neutral and abstract Reason." Karst, 1990 U. Ill. L. Rev. at 100 (cited in noto 9) (emphasis in original). Witness the concept of false consciousness in feminist argument, suggesting that a male-centered view of the world has shaped and defined many women's perception of reality. See Catharine MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudenee*, 8 Signs 635, 636-37 (1983). It is common for those who disagree with a particular viewpoint to try to suppress that opinion. A conflict with someone whose world view is entirely inconsistent is frustrating and difficult because it goes against common sense. Karst, 1990 U. Ill. L. Rev. at 100.

Amendment's definition of "expression" may the homosexual community enjoy the true protections mandated by the Constitution.

Part II of this Note explores the underlying concepts of the First Amendment and its unflagging protection of all forms of valid expression. It also highlights those limitations on the civil discourse model that the Court deems necessary to ensure an ordered society. Finally, Part II chronicles the First Amendment's struggle to define the line between valid expression and the speech of Unreason.

Part III examines the dangers to free expression posed by the current interpretation of the First Amendment, suggesting that "valid" and "reasonable" are arbitrary, if not entirely inappropriate, labels to attach to expression. The judiciary's inability to comprehend, and consequently shield, expression of the homosexual community from the winds of the democratic ideal demonstrates these problems. When challenged by majoritarian influences, a great deal of the homosexual community's expression receives inadequate First Amendment protection from the courts. Part III also argues that the current view of the First Amendment creates a chilling effect on this type of expression, discouraging even initial expression of disfavored ideas.

Part IV argues for an expansive interpretation of protected expression and suggests methods through which the legal community can implement this approach. Only an expansive notion of expression will give heretofore limited forms of speech the full credence of the marketplace. In addition, Part IV responds to other commentators' criticisms.

Finally, this Note advocates an expansive interpretation of expression to abolish many of the current restraints on fringe expression. The marketplace would benefit from the broader class of ideas that would result when previously silent voices begin to speak. A more liberal view of expression would open the doors not only for homosexual expression, but also for other fringe beliefs. The buyers and sellers in a truly free market, and not the courts, are in the best position to value speech.

II. THE FIRST AMENDMENT'S PROTECTIONS AND LIMITS

A. Protections on Speech

1. The Purpose and Scope of the First Amendment

The First Amendment ensures that people may air all speech and that the majority will not attempt to silence speech that challenges its power. This view relies on the classical interpretation of the First Amendment as a tool in the search for political and social truth.[17] Some scholars who emphasize the importance of speech to the individual challenge this view.[18] Under any interpretation of the First Amendment, the expression of homosexual individuals must receive full protection. This expression certainly advances the goal of self-fulfillment and growth. Free speech also affects society's valuation of gay men and lesbians and political decisions on homosexual issues.

Before seeking to delve into the theory of the First Amendment and to expose its flaws, it is important to examine the underpinnings of this doctrine carefully. At its core, the First Amendment fully protects all actions and words that the judiciary determines to be within the definition of expression.[19] This is an inclusive category, covering much that the general populace may not consider to be true speech.[20] In addition to a broad interpretation of protected speech, the

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17. The "classical" view suggests that free speech is a necessary element to allow people to make informed decisions about political issues. Most scholars recognize a broad realm of political issues requiring free speech. Alexander Meiklejohn, *Free Speech and Its Relation to Self-Government* 94 (Harper, 1948) (arguing for First Amendment protection of all speech on matters of public interest). See also Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 Am. Bar Found. Res. J. 521, 631 (suggesting that nonpolitical speech should be protected, but at a lower level than political speech). Others, however, maintain a narrow view of speech that is necessary to the political process. See Rebert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 Ind. L. J. 1, 20 (1971) (according protection only to speech that is "explicitly political"). The Supreme Court also clearly protects nonpolitical speech concerning public issues. *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 231-32 (1977) (protecting the rights of teachers to engage in collective bargaining); *Time, Inc. v. Hill*, 385 U.S. 374, 388 (1967) (upholding the First Amendment protection of reports on matters of public intorest, even if negligently false).

18. See Nimmer, *Nimmer on Freedom of Speech* § 1.03 at 1-51 (cited in note 3); Laurence H. Tribe, *American Constitutional Law* § 12-1 at 788-89 (Foundation, 1988).

19. Nimmer, *Nimmer on Freedom of Speech* § 3.06[B][1] at 3-38 to 3-43 (cited in note 3) (discussing the courts' treatment of symbolic speech). See also *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1983) (finding sleeping in a park to constitute protected expression).

20. "The First Amendment literally forbids the abridgment only of 'speech,' but we have long recognized that its protection does not end at the spoken or written word." *Texas v. Johnson*, 491 U.S. 397, 404 (1989) (defining burning of the United States flag as a form of

Court has construed the First Amendment to ensure the freedom of expression against regulation that only accidently hinders speech.[21] The First Amendment states that "Congress shall make no law . . . abridging the freedom of speech."[22] This language creates a broad negative proscription against any intrusion on speech. All speech is presumptively valid; government shall deny none.[23] The Supreme Court interprets this imperative to create a broad zone of protection, ensuring that all valid speech will escape unlawful suppression.[24]

Although courts and theorists have recognized that some exclusions from protection are imperative to ensure the continued validity of the First Amendment and the Constitution itself,[25] other exceptions mirror the vague desire of society to limit certain expression that it considers particularly offensive.[26] Consequently, the Court expressly has construed the First Amendment to overprotect speech.[27] To ensure that no fringe expression is suppressed, the Court inter-

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expression). The Court has recognized that certain conduct is expressive. See, for example, *Brown v. Louisiana*, 383 U.S. 131 (1966) (demonstrations); *Tinker v. Des Moines Community Sch. Dist.*, 393 U.S. 503 (1969) (wearing an armband); *Barnes v. Glen Theatre*, 501 U.S. 560 (1991) (nude dancing); *Cornelius v. NAACP Legal Defense and Educ. Fund*, 473 U.S. 788 (1985) (fundraising); *Shuttlesworth v. Birmingham*, 394 U.S. 147 (1969) (civil rights demonstrations); *Thornhill v. Alabama*, 310 U.S. 88 (1940) (labor picketing); *United States v. Grace*, 461 U.S. 171 (1983) (distribution of pamphlets). See also Tribe, *American Constitutional Law* § 12-7 at 827-28 (cited in note 18) (discussing the expression-conduct distinction and its limitations); Laura L. Goodman, *Shacking Up with the First Amendment: Symbolic Expression and the Public University*, 64 Ind. L. J. 711, 717-21 (1989).

21. Some laws regulating nonexpressive activities also may interfere with the right to free speech. See, for example, *Schneider v. State*, 308 U.S. 147, 163 (1939) (invalidating an ordinance that prohibited the distribution of leaflets in an effort to prevent litter and clogged storm drains).

22. U.S. Const., Amend. I.

23. Some textualists carry this position to extremes. See Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 Harv. L. Rev. 1189, 1243-44 (1987) (arguing that the text of the Constitution should be dispositive when a coherent interpretation cannot be achieved).

24. See *Terminiello v. Chicago*, 337 U.S. 1, 4-5 (1948) (holding that the First Amendment protects a speaker from conviction for breach of the peace).

25. See, for example, Bork, 47 Ind. L. J. at 24-35 (cited in note 17). "Speech advocating violent overthrow [of the government] is thus not 'political speech' as that term must be defined by a Madisonian system of government. It is not political speech because it violates constitutional truths about processes and because it is not aimed at a new definition of political truth by a legislative majority." Id. at 31. See *Dennis v. United States*, 341 U.S. 494, 503-11 (1951) (finding no First Amendment violation in the defendant's conviction for conspiring to organize the Communist Party and for teaching Marxist-Leninist doctrine); *Gitlow v. New York*, 268 U.S. 652, 666 (1925) (upholding a conviction for publishing a Socialist newspaper calling for "revolutionary mass action").

26. Society's desire to limit beliefs it considers antithetical to a common moral, logical, and social baseline relates back to its inability te recognize any value in Unreason. See note 16. See, for example, *FCC v. Pacifica Found.*, 438 U.S. 726, 748-50 (1978) (denying First Amendment protection to comedian George Carlin's "Filthy Words" monologue).

27. See Nimmer, *Nimmer on Freedom of Speech* § 3.03[B][2] at 3-18 te 3-19 (citod in noto 3) (discussing the Court's protection of false information).

prets the First Amendment to eliminate the danger of over-regulation and the self-censorship that may result.

Judges applying the First Amendment's prohibitions to specific instances of expression may be compelled to allow the limitation of speech that the majority may wish to suppress. Consequently, the Supreme Court often protects seemingly unworthy speech to prevent any hint of over-regulation.[28] For example, the Court routinely protects literature and art under the First Amendment even though much of this speech contains no element of political or social advocacy.[29] The Court, however, insists on drawing the circle of protected material broadly to ensure that anything deserving protection will be included within it. The danger of excluding any valid speech overshadows the costs of protecting some invalid speech.

A hidden danger confronting free speech is the chilling effect of over-regulation. People wishing to express counter-majoritarian beliefs often may stifle their own speech out of fear of prosecution. If the distinction between protected and punishable speech is a fine one, the potential penalty for crossing that line will deter fringe expression. For example, there is little doubt that others were deterred from similar advocacy[30] after the Supreme Court affirmed Anita Whitney's conviction of a felony under California's Criminal Syndicalism Act of 1919 for her participation in the Communist Labor Party.[31] Thus, to ensure the full range of expression, the Court seeks to minimize the First Amendment's exclusions and overprotect fringe expression.

Protected speech may contain ideas that arouse fear, disgust, and even anger and hatred. The First Amendment, however, protects speech that the majority may reject so that everyone is assured the opportunity to participate in the free exchange of ideas.[32] Thus, de-

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28. See *Gertz v. Welch*, 418 U.S. 323, 340-41 (1974) (protecting false statements to ensure against any chilling effect).

29. See *Schad v. Mount Ephriam*, 452 U.S. 61, 65-66 (1981) (protecting "live entertainment," including nude dancing); *Young v. American Mini Theatres*, 427 U.S. 50, 87 (1976) (Stewart, J., dissenting) (emphasizing the First Amendment's applicability to topics lacking "ideas of social and political significance").

30. See generally Ellen Schrecker, *No Ivory Tower: McCarthyism and the Universities* (Oxford U., 1986) (discussing the silencing of academic debate that resulted from fear of accusations of Communist activity).

31. *Whitney v. California*, 274 U.S. 357, 371-72 (1927). Although current scholars may criticize the Court's decision, nothing can change the time Anita Whitney spent in jail for treason. See also *Dennis v. United States*, 341 U.S. 494, 516-17 (1951) (affirming the defendant's conviction for advocating the overthrow of the government and organizing a society for that purpose).

32. In *Abrams v. United States*, 250 U.S. 616 (1919), Justice Holmes stated: "[W]hen 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 ultimato good desired is bettor reached by free trade in ideas—that the best test of truth is the power of the thought to get itself

spite widespread opposition to their position, even such unabashed hatred as the anti-Semitic marches of Nazis in Skokie, Illinois has received First Amendment protection.[33] The voting power of those having majoritarian and reasonable viewpoints ensures them a forum for their opinions. The First Amendment, however, exists to protect the voiceless and disempowered who may be silenced by the community's intolerance.[34]

2. Different Levels of First Amendment Protection

The Supreme Court affords disparate levels of protection to different classes of speech. Pure political speech receives absolute protection from governmental interference.[35] Political speech, as a means of achieving political truth, is the very sort of expression that the Framers envisioned the First Amendment protecting.[36] The continuing vitality of the democratic system relies on the free exchange of ideas between its constituents.

Courts have granted full protection even to speech of an obviously minority viewpoint on the political spectrum.[37] The speech of the minority is especially deserving of protection because otherwise it will not be articulated or even considered by majoritarian legislatures. The First Amendment is the only hope for those who wish to espouse radical ideas.

The Court also has granted nonpolitical speech First Amendment protection.[38] This category includes such forms of expression as literature and art, although people increasingly have used these modes to express political themes.[39] The Court considers speech that expresses some view of the nature of society to be closely akin to

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accepted in the competition of the market, and that the truth is the only ground upon which their wishes safely can be carried out." Id. at 630 (Holmes, J., dissenting).

33. *Collin v. Smith*, 578 F.2d 1197, 1201 (7th Cir. 1978). The predominantly Jewish town of Skokie obtained an injunction preventing the National Socialist Party from parading in uniform, displaying the swastika, and distributing leaflets that promote racial hatred and violence. The Seventh Circuit stayed the injunction, albeit "with extreme regret." Id. at 1210.

34. See Blasi, 1977 Am. Bar Found. Res. J. at 549-50 (cited in note 17) (citing diversity of opinion as a core aim of the First Amendment).

35. See *Texas v. Johnson*, 491 U.S. 397, 415 (1989).

36. *Whitney v. California*, 274 U.S. 357, 375-76 (1927) (Brandeis, J., concurring) (discussing the Framers' goal in amending the Constitution). See Gunther, *Constitutional Law* at 997-98 (cited in note 3) (analyzing the intent of the First Amendment).

37. See *Collin*, 578 F.2d at 1203 (upholding rights of Nazi supporters to march in a predominantly Jewish neighborhood).

38. See generally Nimmer, *Nimmer on Freedom of Speech* § 3.01 (cited in note 3) (discussing the Court's treatment of nonpolitical speech).

39. Marjorie Heins, *Sex, Sin and Blasphemy* 6 (New Press, 1993) (discussing the purpose and scope of artistic freedom). See notes 108-09 and accompanying text (concerning the use of art by those in the homosexual community).

the political warrants of First Amendment protection:[40] "[O]ur cases have never suggested that expression about philosophical, social, artistic, economic, literary, or ethical matters . . . is not entitled to full First Amendment protection."[41]

In addition, this type of speech often invokes the First Amendment's guarantee of liberty and self-fulfillment. The free exchange of ideas as a means of seeking truth and a democratic consensus is not the only purpose of the First Amendment. Individual self-realization and self-autonomy are equally important, if less tangible, goals. Self-realization is the process of defining and expressing oneself. Self-autonomy entails the community respecting individuals as equal, rational, and autonomous beings.[42] Individuals gain respect for their community in the same way.

The Court has granted First Amendment protection even to speech that operates only on a commercial level, such as advertising.[43] In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Counsel,*[44] the Counsel challenged a state statute prohibiting the advertising of prescription drug prices. A consumer organization claimed that the First Amendment entitled buyers to information about drug prices. The board of pharmacists argued that because the advertising in question did not seek to espouse any political or social views, the Court should deny it First Amendment protection. The Court responded that the economic nature of speech will not remove it from the umbrella of the First Amendment.[45] The free flow of commercial information is of greater public interest than many political debates.[46] The Court consequently held that the First Amendment demands free access to information, in spite of the state's admittedly strong interests in consumer health and professional

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40. It is often difficult to differentiate between political speech and that speech which is purely social. The Court consequently offers protection to much speech that exhibits only marginal political value. See, for example, *American Booksellers Ass'n v. Hudnut,* 771 F.2d 323, 331 (7th Cir. 1985); *New York Times v. Sullivan,* 376 U.S. 254, 266 (1964); *Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Counsel,* 425 U.S. 748, 763-65 (1976).

41. *Abood v. Detroit Bd. of Educ.,* 431 U.S. 209, 231 (1976). See also *Hudnut,* 771 F.2d at 329-30 (suggesting that the proven power of pornography to affect the socialization of its viewers merely exhibits the power of its message).

42. Baker, 25 UCLA L. Rev. at 991 (cited in note 3). In fact, Professor Baker argues that the primary goal of the First Amendment is te ensure freedom from government restriction on self-realization and self-autonomy. Id.

43. *Virginia Bd. of Pharmacy,* 425 U.S. at 762 (granting First Amendment protoction to advertisements); *Gaudiya Vaishnava Soc'y v. San Francisco,* 952 F.2d 1059, 1064 (9th Cir. 1990) (holding that the sale of itoms emblazoned with a message is accorded First Amendment protection).

44. 425 U.S. 748 (1976).

45. Id. at 761.

46. Id. at 763.

expertise.[47] In subsequent cases, the Court has reaffirmed its broad protection of all speech, including that of an economic nature.[48]

3. Freedom of Association

Even beyond the pure expression of viewpoints, the Court has interpreted the First Amendment to include broad protection for the right to associate for the purpose of engaging in expression.[49] The Court considers this protection necessary to encourage political action because different groups can attain success only by expressing their opinions.[50] Individuals must be able to form effective opinion blocs in order to participate in a democratic system. This freedom is an important corollary to the right to free speech. Without the freedom to associate, individuals cannot organize into politically effective groups or achieve self-fulfillment as a society. The Court, however, has carefully distinguished between the privacy right to pure association and the speech right to expressive association.[51] The right to intimate association flows from the right to privacy.[52] Expressive association,

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47. Id. at 770.

48. See, for example, *Bates v. State Bar of Arizona*, 433 U.S. 350, 364 (1977) (extending First Amendment protection to advertising for legal services); *In re Primus*, 436 U.S. 412, 432 (1978) (requiring exacting scrutiny of any restriction on advertising that contains political content). But see *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978) (upholding restrictions on advertising that are motivated by a compelling state interest).

Although the Court ensures First Amendment protection to commercial speech, the degree of protection often has slipped to "intermediate scrutiny." *Central Hudson Gas v. Public Serv. Comm'n*, 447 U.S. 557, 564 (1980). Some scholars have argued that commercial speech is irrelevant to the representative government and individual self-fulfillment rationales of the First Amendment. See Thomas H. Jackson and John Calvin Jeffries, Jr., *Commercial Speech: Economic Due Process and the First Amendment*, 65 Va. L. Rev. 1, 5-6 (1979) (arguing that the First Amendment should not protect commercial speech from government regulation).

49. *NAACP v. Alabama*, 357 U.S. 449, 460 (1958). The Court stated: "[I]t is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters, and state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny." Id. at 460-61. See also *Bates v. Little Rock*, 361 U.S. 516, 523 (1960) (overturning convictions for refusal to furnish NAACP membership lists to city authorities as violative of the freedom of association); *Abood*, 431 U.S. at 234 (finding compelled membership in a union to violate freedoms of association and speech); *NAACP v. Button*, 371 U.S. 415, 428-29 (1963) (invalidating under the First Amendment a state statute prohibiting solicitation of lawyers by intermediaries acting on behalf of an organization).

50. See Tribe, *American Constitutional Law* § 12-26 at 1013-15 (cited in note 18) (discussing the modern conception of the freedom of assembly).

51. See *Roberts v. United States Jaycees*, 468 U.S. 609, 617-18 (1984) (finding no infringement on a civic association's freedom of intimate association or freedom of expressive association by a state's anti-gender discrimination law); *Board of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 544-45 (1987) (rejecting a claim that the society's policy of excluding women is protected by either intimate or expressive association rights).

52. See *Roe v. Wade*, 410 U.S. 113, 152 (1973) (affirming a fundamental right to privacy). But see *Bowers v. Hardwick*, 478 U.S. 186, 190-01 (1986) (denying a privacy right te engage in sodomy).

on the other hand, is the grouping of individuals for the purpose of advocating a particular belief.[53]

In *Bates v. City of Little Rock*,[54] members of the NAACP challenged city ordinances requiring disclosure of membership lists to government officials.[55] They argued that providing the lists would subject members to harassment and threats.[56] The Court invalidated the ordinances, affirming the First Amendment right of citizens to assemble "for the purpose of advancing ideas and airing grievances. . . ."[57] Thus, courts grant additional protection to activities under the First Amendment when people join together for the purpose of expression.

4. Contont-Neutral Restrictions on Speech

The right to speech also protects expression from those laws that only incidentally impinge on this right. Some laws, with otherwise valid objectives, unwittingly infringe on speech.[58] For example, in *Schneider v. State*,[59] the Court invalidated laws prohibiting the posting of signs and the distribution of leaflets to prevent litter because the laws denied the expressive rights of those seeking to propagate their ideas in this manner.[60] These cases often pose particular difficulty for courts because almost every regulation may restrict speech on some level,[61] yet the freedom of speech must not preempt government's ability to pass laws concerning society's conduct efficiently.

The *O'Brien* test, which balances the government's non-speech interests in certain activities against the corresponding interests of those challenging the laws, has helped to solve these dilemmas. In

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53. This concept is best recognized in the protection of political demonstrations. See *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 907-08 (1982) (recognizing the protected elements of expressive association in an organized boycott of merchants).

54. 361 U.S. 516 (1960).

55. Id. at 521-22.

56. Id. at 522.

57. Id. at 522-23. See also Gunther, *Constitutional Law* at 1408-09 (cited in note 3) (discussing *Roberts v. United States Jaycees*, 468 U.S. 609 (1984)).

58. See, for example, *Young v. American Mini Theatres*, 427 U.S. 50, 62 (1976) (challenging zoning ordinances that restrict the location of adult movie theaters); *Renton v. Playtime Theaters, Inc.*, 475 U.S. 41, 48 (1986) (same).

59. 308 U.S. 147 (1939).

60. Id. at 163.

61. For example, in *Metromedia, Inc. v. San Diego*, 453 U.S. 490 (1981), companies that owned and rented billboard spaces challenged a city ordinance that restricted many forms of outdoor advertising to prevent visual pollution. Id. at 493-97. Although the regulation appeared content-neutral, the Court held that the law's list of content-specific exceptions violated the First Amendment. Id. at 513.

United States v. O'Brien,[62] four men challenged their convictions for knowingly burning their draft cards.[63] They argued that although their conduct was illegal, the First Amendment protected the symbolic speech involved in their activity.[64] The Court held that a sufficiently important governmental interest in regulating non-speech activities may justify an incidental limitation of First Amendment protection.[65]

The Court subsequently refined its method of balancing.[66] The current test weighs the content-neutral goals of the government's infringements against the limited speech interests and considers whether any reasonable alternatives are available to either party.[67] If the court determines that the infringement on speech is content-based, it is deemed per se invalid.[68] The *O'Brien* balancing exhibits the power of the First Amendment's proscription of all infringements on speech. Courts will review even incidental infringements carefully for any constitutional infirmity.

5. Protecting Homosexual Speech

The speech of homosexual individuals and groups provides an example of expression that should fall squarely within the protection provided by the First Amendment. They are a social minority whose views are particularly susceptible to suppression because of the poten-

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62. 391 U.S. 367 (1968).

63. Id. at 369-70.

64. Id. at 376. The Court noted that not all conduct may be labeled "speech" but did not base its decision on this aspect of the case. Id.

65. The Court stated: "[A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." Id. at 377.

66. See *Tinker v. Des Moines Community Sch. Dist.*, 393 U.S. 503, 508-11 (1969) (finding a school's prohibition of black armbands in protest of the Vietnam War to violate the First Amendment).

67. For example, in *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1983), the Court stated: "We have often noted that [content-neutral] restrictions are valid provided that they are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information." Id. at 293. See generally Nimmer, *Nimmer on Freedom of Speech* § 2.06 (cited in note 3).

68. *United States v. O'Brien*, 391 U.S. 367, 377 (1968) (requiring that the government interest be "unrelated to the suppression of free expression"). See Nimmer, *Nimmer on Freedom of Speech* § 2.06[A][3] at 2-88 (cited in note 3) (discussing the requirement of content neutrality). But see John Hart Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 Yale L. J. 1205, 1327-28 (1970) (examining the impurity of legislative incentives and the mixed-motive problem).

tial hazards of expressing their views.[69] To combat this social discrimination, the judicial system must ensure the constitutional rights of homosexual men and women. In the realm of political and social speech, some courts have sought to ensure gay men and lesbians the freedom of expression accorded to all American citizens by the First Amendment.

In *Fricke v. Lynch*,[70] Aaron Fricke sought the right to attend his high school's prom with a male escort. The school argued that Fricke's attendance was not the type of speech the First Amendment was intended to protect.[71] Alternatively, the school argued that even if Fricke's attendance was protected expression, the interest in preventing violence was sufficient to deny Fricke's right.[72] The court ruled, however, that the First Amendment demanded that Fricke and his dato be admitted.[73] After noting the expressive qualities of Fricke's actions,[74] the court held that attending a prom could be considered political in certain instances.[75]

The First Amendment guarantees the right to speak on political and social issues. The equal protection function of the First Amendment[76] prevents any regulations impinging on free expression from discriminating on the basis of content.[77] When homosexual ex-

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69. Attacks on gays and lesbians have been increasing at an alarming rate in recent years, in terms of frequency and viciousness. See, for example, Nat Hentoff, *A Case of Loathing: Gay-Bashing Is Out of the Closet. Again.*, 38 Playboy 94 (May 1991); Susan M. Barbieri, *Gay-Bashing: The Hate, Fear; Attacks on Gays Increasing*, Orlando Sentinel Tribune E1 (Mar. 31, 1993).

According te Martin Hiraga, director of the anti-violence project for the National Gay and Lesbian Task Force: "The continuing rise [in violence against homosexual men and women], particularly in cities with long-established victims' services, indicates to us it [results from] not just increasing awareness, but increasing incidence of hate violence." Arlene Levinson, *Threat of Violence Other Longtime Companion for Gay Men, Women*, L.A. Times A8 (July 18, 1993).

70. 491 F. Supp. 381 (D.R.I. 1980).

71. Id. at 384-85.

72. Id. at 383-84. This was an attempt to frame Fricke's action in *O'Brien* terms as an incidental restriction, but this restriction was intentional.

73. Id. at 388.

74. The proposed activity has expressive content: "Aaron testified that he wants to go [to the prom] because he feels he has a right to attend and participato just like all the other students and that it would be dishonest to his own sexual identity to take a girl to the dance. . . . [H]e feels his attendance would have a certain political element and would be a statoment for equal rights and human rights." Id. at 384-85. Although *Fricke* is hailed as a victory for gay rights, it is important to note the specific type of expression involved. Aaron wished to attend the prom "just like all the other students." Id. at 385. An alternative reading of *Fricke* suggests that homosexual expression portraying a message of assimilation of the wider hetorosexual culture often is granted recognition, while that which runs counter to society's beliefs is devalued.

75. Id. at 384-85.

76. *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 94-95 (1972) (finding no appropriate government intorest to be furthered by an ordinance that differentiatod between labor pickets and other peaceful demonstrations).

77. *Carey v. Brown*, 447 U.S. 455, 461-62 (1980) (finding an equal protoction violation in a statute's differentiation between demonstrations at a personal dwelling and labor picketing).

pression unquestionably falls in the category of political or social speech, most courts protect it from state-imposed restrictions.[78] The equality of these protections breaks down, however, when expression strays from the majoritarian path of civil discourse.[79]

B. Limits on Speech

Despite the seemingly boundless protection of the First Amendment, some speech must be excluded. In an ordered society, not all speech rationally may receive the absolute protection of the First Amendment. The need for effective regulation of society must temper the importance of free speech in some instances. The cliché about shouting "Fire!" in a crowded theater remains a part of First Amendment law. The *O'Brien* balancing test permits some content-neutral[80] infringements on speech. Courts also have recognized other content-based exclusions.[81]

1. Limits on Expression

Content-based exclusions stem from the belief that although the First Amendment is near the top of the hierarchy of rights in the system of government, certain other values must prevail even over free speech.[82] These exclusions fall into two general categories: (1)

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78. *Gay Activists Alliance v. WMATA*, No. 78-2217, 5 Media L. Rep. (BNA) 1404, 1408 (D.D.C. July 5, 1979) (requiring a subway to sell advertising space for a poster stating "Someone in Your Life is Gay"); *Toward a Gayer Bicentennial Comm. v. Rhode Island Bicentennial Found.*, 417 F. Supp. 632, 639 (D.R.I. 1976) (allowing a homosexual group to participate in state-sponsored festivities).

79. Part of the argument in this Note is that First Amendment equality for homosexual expression may require that standards of judging homosexual speech differ from those used to judge the expression of heterosexuals. This concept does not posit additional protection for homosexual speakers; this reverse discrimination would destroy the free market of ideas embodied in the First Amendment. Instead, a subjective view of the value of expression te the individual speaker would recognize the multiplicity of beliefs and modes of expression in our society. A subjective evaluation of expression may impact First Amendment theory most directly in the area of the *O'Brien* analysis. See Part IV.B.

The law has begun to recognize difference theory in other areas. See *Rabidue v. Osceola Refining Co.*, 805 F.2d 611, 620 (6th Cir. 1986) (asserting a "reasonable victim" standard in a Title VII claim). See also Catharine MacKinnon, *Difference and Dominance: On Sex Discrimination*, in *Feminism Unmodified* 32, 33 (Harvard U., 1987); Constance Peuley, *The Future of an Illusion* xii-xiv (U. of Minnesota, 1989).

80. Stato legislatures censequently may disguise intentional infringements as content-neutral ones.

81. For example, the Court excludes obscenity on the basis of its content. *Miller v. California*, 413 U.S. 15, 23 (1973). See Part III.A for a discussion of content-based exclusions.

82. See generally Nimmer, *Nimmer on Freedom of Speech* § 2.01 (cited in note 3) (discussing the absolutist position and highlighting its flaws).

those based on objective tests and (2) those excluded by categorization.[83]

The first category of exclusions poses fewer problems of interpretation than the second. This exclusion most often is witnessed in the application of the "clear and present danger test" to speech having the potential to incite illegal conduct.[84] The Court justifies its denial of First Amendment protection to inciteful speech on the ground that some speakers intentionally disrupt the marketplace of ideas by compelling listeners to commit actions of civil unrest. The classic theory of the First Amendment touts a rational discourse of ideas. Speech that may appeal to the emotional, irrational desires of listeners is contrary to the civil discourse model.[85] The possibility of over-regulation and self-censorship is minimized by the strict limits on the exclusion of this speech from protection.

The second, and far broader, category of exclusions offers no specific test.[86] The belief that some speech adds nothing to and actually may frustrate the marketplace also justifies these exclusions.[87] These exclusions rely on purely definitional determinations by the courts.[88] The potential for abuse is high, and the specter of over-regulation and self-censorship thus returns.

2. Dangers Inherent in These Limits

Definitional exclusions are particularly susceptible to the majoritarian influences of society. Because they are based on the belief that some speech is not truly expressive, but only conduct or

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83. See Gunther, *Constitutional Law* at 1006-07 (cited in note 3).

84. As demonstrated by the Court in *Brandenburg v. Ohio*: "[T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incito or produce such action." 395 U.S. 444, 447 (1969).

85. See Bork, 47 Ind. L. J. at 31 (cited in note 17) (stating that "[a]dvocacy of law violation is a call to set aside the results that political speech has produced").

86. Foremost among these are the exclusion of obscenity and "fighting words" from the protection of the First Amendment.

87. See, for example, *American Booksellers Ass'n v. Hudnut*, 771 F.2d 323, 328-29 (7th Cir. 1985) (noting the power of beliefs and images to affect and control the subconscious).

88. *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942), remains the seminal example of this definitional exclusion:

> There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words. . . . It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.

Id. at 571-72 (footnotes omitted).

thoughts unworthy of protection, speech on the fringes of acceptability is that most often excluded. This unworthiness is based on the reasonableness of the speech as defined by the courts. Consequently, once the presumption that judges are apolitical, socially neutral, and not susceptible to any constructed viewpoint is overcome, the precarious position of this speech becomes apparent.[89] Because of inherent biases, any definition of Reason is suspect, yet also irrefutable.

This arbitrary line between the protected speech of Reason and the excluded expression of Unreason has produced particularly troublesome results in recent years. For example, when courts seek to identify the speech interests of those who dance,[90] or simply live,[91] in the nude, judges' inherent biases necessarily influence their determination of what is a reasonable and rational means of expression. As demonstrated by the disparate outcomes of these cases, protection depends on the trier of law's perspective.[92] This is the true danger posed by definitional exclusions from protection—they rely on the majoritarian-constructed beliefs of courts to identify and weigh the counter-majoritarian concepts of speakers properly.

III. DANGERS TO EXPRESSION POSED BY THE FIRST AMENDMENT

The current interpretation of the First Amendment offers unswerving protection to some judicially recognized forms and contents of expression. Because of the inherent beliefs and concepts of the judges, however, who apply First Amendment doctrine to ambiguous fact patterns, the freedom of speech often is perverted to deny protection to the very groups it is intended to protect. Individuals and groups advocating non-majoritarian beliefs do not receive complete protection. Judges, and the courts they comprise, interpret the expression of others through a filter of what they themselves consider to be reasonable contributions to the marketplace of ideas; therefore,

89. See Joshua Dressler, *Judicial Homophobia: Gay Rights Biggest Roadblock*, 5 Civ. Liberties Rev. 19 (Jan.-Feb. 1979).

90. *Barnes v. Glen Theatre*, 501 U.S. 560 (1991).

91. *South Florida Free Beaches, Inc. v. City of Miami*, 734 F.2d 608 (11th Cir. 1984).

92. In refusing to accept the articles of incorporation proposed by the Greater Cincinnati Gay Society, the Ohio Supreme Court stated that "[a]lthough homosexual acts between consenting adults are no longer statutory offenses . . . the promotion of homosexuality as a valid lifestyle is contrary to the public policy of the state." *State ex rel. Grant v. Brown*, 39 Ohio St. 2d 112, 313 N.E.2d 847, 848 (1974).

they often are blind to expression that is contrary to the rational norms of society.[93]

In valuing other systems of sexual mores, courts should use particular caution and an extremely broad notion of acceptability. Courts, however, have particular difficulty in recognizing the expressive values in other forms of sexual orientation.[94] Consequently, the current interpretation of the First Amendment often fails to protect many "others,"[95] foremost among these individuals who are homosexuals.

A broad view of First Amendment expression is particularly important for gay men and lesbian women.[96] Homosexual speakers have a heightened need for truly free expression because of the isolation that society has forced on them and the instrumental role speech plays in defining the lives of this "invisible minority."[97] Homosexual expression consistently is demeaned by the current interpretation of the First Amendment because of the inability of majoritarian courts to comprehend and accord value to the expressive qualities of homosexual interaction.[98]

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93. Rhonda R. Rivera, *Our Straight-Laced Judges: The Legal Protection of Homosexual Persons in the United States*, 30 Hastings L. J. 799, 804-05, 820-25 (1979). See *FCC v. Pacifica Found.*, 438 U.S. 726, 746 (1978) (allowing regulation of comedic satire because of its offensive content). See generally Amy M. Adler, Note, *Post-Modern Art and the Death of Obscenity Law*, 99 Yale L. J. 1359, 1375-78 (1990) (suggesting that any judicial attempt to differentiate between expression that possesses "serious artistic value" and that which does not invariably will undervalue much art).

94. See *McLaughlin v. Bd. of Medical Examiners*, 35 Cal. App. 3d 1010, 111 Cal. Rptr. 353, 358 (1973) (upholding the revocation of the license of a physician who engaged in public homosexual conduct); *Acanfora v. Bd. of Educ. of Montomery County*, 491 F.2d 498, 503-04 (4th Cir. 1974) (upholding the transfer of a teacher to administrative duties because he withheld information about his gay activism from his application); *Gaylor v. Tacoma Sch. Dist. No. 10*, 88 Wash. 2d 286, 559 P.2d 1340, 1343-46 (1972) (upholding the discharge of a teacher on charges of immorality and known homosexuality); *Singer v. U.S. Civil Serv. Comm'n*, 530 F.2d 247, 252-54 (9th Cir. 1976) (upholding removal of an employee for "flaunting" his homosexuality).

95. The concept of "the other" refers to the tendency to define unreasonableness in terms of what is different from ourselves. See Karst, 1990 U. Ill. L. Rev. at 109-11 (cited in note 9).

96. Paul Siegal, *Lesbian and Gay Rights as a Free Speech Issue: A Review of Relevant Caselaw*, 21 J. Homosexuality 203, 204 (1983).

97. Id.

98. See, for example, *City of New York v. New Saint Mark's Baths*, 130 Misc. 2d 911, 497 N.Y.S.2d 979, 982-83 (N.Y. Sup. Ct. 1986) (upholding a city's injunction to close baths because of a fear about the spread of AIDS); *M.P. v. S.P.*, 169 N.J. Super. 425, 404 A.2d 1256, 1259, 1263 (1979) (allowing a lesbian mother to retain custody of her child because evidence showed no involvement in any homosexual organization); *Singer v. Hara*, 11 Wash. App. 247, 522 P.2d 1187, 1197 (1974) (upholding a state's refusal to sanction same-sex marriages).

A. Devaluing Speech Because of Its Content

1. Obscenity

One of the most common forms of public expression employed by homosexual men and women is art. Art is a medium often used to criticize and reform society. Art and literature have become modes of expression for outsiders. Yet the courts often deny First Amendment protection to artists who address homosexual issues.[99]

This loss of protection results from the exclusion of obscene material from the First Amendment's definition of expression.[100] The Court denies First Amendment protection to speech it considers obscene because that speech contributes nothing of value to the marketplace of ideas.[101] In fact, obscene material is considered doubly antithetical because it actively frustrates the civil exchange of ideas by appealing directly to biological urges and undermining rational discourse.[102]

In *Miller v. California*,[103] the Court articulated the current test for determining whether speech should be excluded from First Amendment protection as obscenity. The appellant challenged his conviction under California's criminal obscenity statute for conducting a mass mailing of materials depicting adults engaged in explicit sexual activity.[104] The Supreme Court reaffirmed its exclusion of obscene material from First Amendment protection.[105] The Court noted five elements that, if fulfilled, may remove speech from the protection of the First Amendment and abandon it to the regulation of state laws:[106] (1) it is a description or depiction of sexual conduct; (2) it is conduct that is "patently offensive;" (3) there is a specific prohibition in state

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99. See, for example, *Mishkin v. New York*, 383 U.S. 502, 513-14 (1966) (affirming a conviction for distribution of obscene books emphasizing homosexual acts); *Pope v. Illinois*, 481 U.S. 497, 501, 504 (1987) (remanding *People v. Pope*, 138 Ill. App. 3d 726, 486 N.E.2d 350 (1985), and adopting a "reasonable person" standard of review in considering the literary value of a work, but sustaining the conviction for selling obscene literature); *In re Pacifica Found.*, 2 FCCRcd. 2698, 2700-01 (1987) (finding excerpts of an AIDS-related drama broadcast over radio to violate the prohibition against indecency, and opining that these excerpts also constitute obscenity).

100. See *Miller v. California*, 413 U.S. 15, 23 (1973); *Roth v. United States*, 354 U.S. 476, 483 (1957).

101. See *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942).

102. See Cass R. Sunstein, *Pornography and the First Amendment*, 1986 Duke L. J. 589, 617.

103. 413 U.S. 15 (1973).

104. Id. at 16.

105. The Court stated: "To equate the free and robust exchange of ideas and political debate with commercial exploitation of obscene material demeans the grand conception of the First Amendment and its high purposes in the histeric struggle for freedom." Id. at 34.

106. Id. at 25-26.

law; (4) it is appealing to the prurient interest, as defined by contemporary community standards; and (5) it is lacking in "serious literary, artistic, political, or scientific value."[107]

Homosexual art involves themes that are particular to the genre. Almost by definition, it will portray same-sex love and suggest homoerotic sex acts that may disturb the typical viewer.[108] The elements common to homoerotic art closely parallel the criteria that define obscenity under the First Amendment. The only element that may save homoerotic art from the obscenity exclusion is a determination of its artistic value.[109]

2. Fighting Words

The fighting words exclusion provides another danger to the speech of homosexual citizens. Courts may abuse the fighting words exclusion to deny First Amendment protection to homosexual expression. When a homosexual man expresses or flaunts his status, he may face the hatred and violence of others. "Coming out" involves more than just confiding one's sexual preference to others; it often includes living an openly gay lifestyle. The open expression of homosexuality in a predominantly heterosexual community may result in fear and anger. Homosexual men and women may experience retaliation from neighbors who resent this invasion of their world by "queers."[110] Unfortunately, confrontation and violence all too often are the result.[111] The fighting words exclusion poses the potential danger that individuals perceived by the courts as flaunting their sexuality[112] will

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107. Id. The Court specifically did not embrace the "utterly without redeeming social value" standard adopted in *Memoirs v. Massachusetts*, 383 U.S. 413, 418 (1966). See *Miller*, 413 U.S. at 24-25.

108. Some theorists claim that homosexual art need not portray sex acts and that homosexuality is defined by viewpoint and status rather than specific acts of sex. See Anne B. Goldstein, *History, Homosexuality, and Political Values: Searching for the Hidden Determinants of* Bowers v. Hardwick, 97 Yale L. J. 1073, 1079-91 (1988). Because homosexuality is the "invisible minority," however, it is defined by the majority of the population in terms of sex. Those seeking to address a mass audience must reciprocate by expressing many messages on the same terms.

109. See Adler, Note, 99 Yale L. J. at 1375-78 (cited in note 93) (concerning the fallacies of any such determination).

110. Although this term was once used derogatorily, the homosexual community has recaptured it. See generally Michelangelo Signorile, *Queer in America: Sex, the Media, and the Closets of Power* (Random House, 1993).

111. See Barbieri, Orlando Sentinel Tribune at E1 (cited in note 69) (discussing increasing levels of violence and victimization in major metropolitan areas).

112. "Flaunting" implies a value judgment of rationality or irrationality itself.

be disciplined for their expression. It may be argued that by their expression, they are inciting others to violence.[113]

Some courts also abuse the fighting words exclusion to allow the "heckler's veto" to remain a part of First Amendment jurisprudence.[114] The heckler's veto perverts the fighting words exclusion by denying protection on the theory that expression may so incense listeners that they will harm the speaker. Although few other courts have accepted this argument, the concept has yet to be laid to rest definitively.[115] The continued existence of this exclusion, and its application to deny homosexual speech, exhibits courts' inability to recognize this type of expression as worthy of First Amendment protection.

3. Low-Value Speech

Another method by which courts consistently deny First Amendment protection to homosexual speech is by classifying it as "low-value" speech. Justice Stevens promoted this concept in *Young v. American Mini Theatres*[116] and *FCC v. Pacifica Foundation*.[117] In *Young*, he noted that a Detroit ordinance excluding adult theaters and bookstores from specific zones within the city was a content-based restriction, and not an issue for the content-neutral *O'Brien* analysis.[118] Instead of invalidating the ordinance, Justice Stevens wrote that the city's interest in preserving the character of its neighborhoods was sufficient justification to restrict this type of speech.[119] Without articulating any objective standards, the Court allowed restrictions on the content of some speech on the recitation of a relatively minimal governmental interest based on the perceived value of that content.[120]

Identifying low-value speech is particularly troublesome because the social construct of the listener defines the value. The discourse of homosexuals relies on value judgments and base tenets dissimilar to those of heterosexuals; therefore, what is considered of

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113. But see S. Adele Shank, *Sticks and Stones: Homosexual Solicitations and the Fighting Words Doctrine*, 41 Ohio St. L. J. 553, 573 (1980) (suggesting that the frequency of homosexual activity in society refutes any argument that the average person would be incited to violence).

114. *Feiner v. New York*, 340 U.S. 315 (1951), which upheld regulation of speech because of a hostile audience, has yet to be definitively reversed.

115. See *State v. Phipps*, 58 Ohio St. 2d 271, 389 N.E.2d 1128, 1134 (1979) (allowing the "heckler's veto" to deny gay speech); *Solmitz v. Maine Sch. Admin. Dist.*, 495 A.2d 812, 818 (Me. 1985) (upholding a school's right to cancel "Tolerance Day" because of fear of violent protest).

116. 427 U.S. 50 (1976).

117. 438 U.S. 726 (1978).

118. *Young*, 427 U.S. at 70. See Part II.A.4 (concerning the balancing test for incidental restrictions on speech).

119. *Young*, 427 U.S. at 71-73.

120. See id. at 70.

low value by one group may be common and necessary to the other. For example, within the homosexual community, explicit intimations to sexual activity may be considered acceptable, even common in some situations, and certainly not of low value.[121] Within heterosexual dialogue, however, this speech may be defined simply as sexual harassment, or unreasonable and unworthy of the First Amendment's protection.[122] Consequently, despite its homosexual context, courts refuse this speech the First Amendment's protection.

B. Devaluing Speech Because of Its Mode of Expression

Majoritarian nonrecognition of homosexual expression's value also is exhibited by the distinction between the protection of true expression and that of conduct. It generally is accepted that conduct may be expressive. The protection of the First Amendment extends beyond pure speech to encompass other forms of expression.[123] However, those seeking to restrict speech often label the expression of others as conduct unprotected by the Constitution.[124]

1. Symbolic Speech

By defining some expression as mere conduct, majoritarian influences may deny adequate protection to much of the homosexual community's expression. Conduct emulating the expression of the straight world and attempting to assimilate gay men and lesbians into acceptable, reasoned speech patterns receives First Amendment

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121. See, for example, *McLaughlin v. Bd. of Medical Examiners*, 35 Cal. App. 3d 1010, 111 Cal. Rptr. 353, 355-56 (1973) (describing a solicitation scene); *Pacifica*, 2 FCCRcd. at 2700 (transcribing a fictional homosexual encounter in a drama).

122. The following description of a gay bar in an undercover investigater's testimony exhibits the alien nature of homosexual expression for many heterosexuals:

> They were conversing and some of them in a lisping tone of voice, and during certain parts of their conversations they used limp-wrist movements te each other. One man would stick his tongue out at another and they would laugh and they would giggle. They were very, very chummy and close. When they drank their drinks, they extended their pinkies in a very dainty manner. They teok short sips from their straws; [it] took them quite a long time te finish their drinks.

One Eleven Wines & Liquors, Inc. v. Division of Alcoholic Beverage Control, 50 N.J. 329, 235 A.2d 12, 15 (1967).

123. See *Texas v. Johnson*, 491 U.S. 397, 404 (1989) (holding that burning the United States flag is expression protected by the First Amendment, if not speech in the absolute sense). But see Frederick Schauer, *Must Speech Be Special?*, 78 Nw. U. L. Rev. 1284, 1297-99 (1983) (arguing against the inclusion of expressive cenduct under the First Amendment's protection).

124. See *Cohen v. California*, 403 U.S. 15, 27 (1971) (Blackmun, J., dissenting) (wearing a jacket emblazoned with an offensive message); *Street v. New York*, 394 U.S. 576, 610 (1969) (Black, J., dissenting) (burning the United States flag).

protection.[125] Because the homosexual community often seeks to remain silent about its defining characteristic, however, much homosexual activity takes the form of conduct.[126] For example, the wearing of a particular hairstyle or piece of clothing may signal to other members of this invisible minority that the speaker is gay.[127] Theoretically, this selective disclosure implies to the receiver of the message that he is not alone.[128] This overt conduct expresses a message of silent unity and consequently should fall squarely within the protection of the First Amendment.[129]

Similar conduct by a member of the straight world, however, is not expressive; it is only conduct.[130] This dichotomy holds the seed of devaluation. When the straight world faces conduct that is considered expressive by homosexual actors, it often is unable or unwilling to accept the expressive elements within this conduct.[131] Consequently, heterosexual judges may fail to recognize the expressive elements in homosexual conduct.

2. Status

The distinction between expression and status mirrors the distinction between expression and conduct.[132] In differentiating between the expression of beliefs and status, the courts refuse First Amendment protection to speech that exemplifies homosexuality. This dichotemy fails to recognize the expression of status itself as protected speech. The cases challenging this dichotomy almost in-

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125. See notes 70-75 and accompanying text (concorning Aaron Fricke).

126. Indeed, even when silence is not at issue, the one characteristic that differentiates homosexuals from the straight world is conduct. Thus, much homosexual conduct may be viewed as political and social dissent. See note 1 and accompanying text.

127. Michael H. Hodges, *We Are Every Wear*, Gannett News Service (Apr. 25, 1993) (available in LEXIS, NEWS library, GNS file) (discussing the gay culture's styles and symbols).

128. See Siegal, 21 J. Homosexuality at 241 (cited in note 96).

129. For an interesting parallel, see Paul D. Murphy, *Restricting Gang Clothing in Public Schools: Does a Dress Code Violate a Student's Right to Free Expression?*, 64 S. Cal. L. Rev. 1321, 1360-61 (1991) (suggesting that schools may regulate students' dress in the name of safety).

130. See *Jarman v. Williams*, 753 F.2d 76, 77-78 (8th Cir. 1985) (holding that student dancing is not protected by the First Amendment because it does not carry any message).

131. *National Gay Task Force v. Bd. of Educ.*, 729 F.2d 1270, 1274-75 (10th Cir. 1984) (invalidating a statute that provided for dismissal of teachers engaging in any homosexual conduct); *Gay Students Org. v. Bonner*, 367 F. Supp. 1088, 1091-93 (D.N.H. 1974) (requiring a university to recognize officially both educational and social activities of a gay student group). Although both of these cases resulted in protection of the homosexual conduct involved, they exhibit the potential for abuse of the expression-conduct distinction. See also Laurie Magid, *First Amendment Protection of Ambiguous Conduct*, 84 Colum. L. Rev. 467, 475-76 (1984) (analyzing what type of expressive conduct may receive First Amendment protection).

132. See Janet E. Halley, *The Politics of the Closet: Towards Equal Protection for Gay, Lesbian, and Bisexual Identity*, 36 UCLA L. Rev. 915, 966-67 (1989).

variably involve the removal of homosexual men and women from military service.[133] When a member of the armed forces chooses or is forced to come out, she faces discharge on the grounds of her status as a homosexual.[134] When confronted with the argument that the speech involved in coming out is protected by the First Amendment, courts usually agree that action against an individual on the basis of speech alone would be unconstitutional.[135] Courts always uphold these discharges, however, on the grounds that they are the result of the homosexual's status *qua* homosexual.[136]

This result fails to recognize that for a member of the invisible minority, expression is by its very nature a required element of status.[137] Only by some expression of beliefs may homosexual status be identified. By upholding discharge based on homosexual status, courts deny First Amendment protection to expression. A false dichotomy has been erected between speech and status as a result of the inability to recognize certain speech as that which reasonably may be made by a member of the military.

3. Association

In order te coalesce as a community and break the tradition of silence that has contributed to their subordination, homosexual men and women must express their orientation. This goal also is fulfilled by the gathering of gay men and lesbians.[138] These gatherings do not always fit the straight model of a political rally. Those gatherings that do fit the model receive First Amendment protection even though they may have different purposes.[139]

Before they can achieve political recognition, homosexual men and women first must defy their isolation and begin to form liaisons with others similarly situated. For many years, the gay bar and the

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133. See, for example, *Ben-Shalom v. Marsh*, 881 F.2d 454, 462 (7th Cir. 1989) (finding that Army regulations against homosexual members do not violate the First Amendment because the rules address status rather than speech).

134. Even under the current policy of "don't ask, don't tell," this punishment remains in force.

135. *Ben-Shalom*, 881 F.2d at 460, 462.

136. Id. at 462.

137. Those who are silently homosexual without ever exposing their status to the world may constitute one exception to this statement. Requiring people who are homosexual to remain in this state is tantamount to denying their existence and demanding assimilation.

138. See D'Emilio, *Sexual Politics* at 57-58, 114-15, 148 (cited in note 15).

139. See *Student Coalition for Gay Rights v. Austin Peay State Univ.*, 477 F. Supp. 1267, 1272 (M.D. Tenn. 1979) (confirming a gay student organization's right to university recognition and benefits to which other student organizations are entitled).

bathhouse have provided this type of centralized forum.[140] Since the 1950s, however, these pseudo-political gatherings have faced intense attacks from the straight government and police force.[141] Although political pressure has halted many police raids, attempts to prevent the harassment in court have had only marginal success.[142] These legal losses resulted in part from the Court's refusal to grant associational privacy rights to the gatherings of homosexual men and women. Privacy is a protected right under the Constitution.[143] To receive this protection, however, certain requirements of selectivity and intimacy must be met. The gay bar or bathhouse is unable to fulfill these criteria.[144]

The true value of these gathering places to the homosexual community is not based on their associational privacy aspects, but on their expressive potential. The First Amendment protects expressive association.[145] To achieve complete expression, people must be free to gather for this purpose. Yet, the legal system has been unable to accept homosexual gatherings as more than simple association; therefore, the courts consider the gatherings unrelated to expression.[146] To fulfill the goals of the First Amendment, courts must recognize the expressive association of homosexual groups as valid on its own terms rather than the pigeonhole perspectives of the majority.

4. Content-Neutral Expression

All of the preceding examples of the devaluation of speech intermingle in the context of content-neutral restrictions on speech.[147] Restrictions that may infringe incidentally on expression pose particular danger to marginalized groups. Majoritarian legislatures often

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140. See Bruce Mailman, *The Battle for Safe Sex in the Baths*, N.Y. Times A31 (Dec. 5, 1985) (discussing the need for gay bathhouses as a "safe haven" for assembly of gay men).

141. See D'Emilio, *Sexual Politics* at 231-39 (cited in note 15); Marvin Liebman, *Stonewall Revisited: Witnesses to the Birth of the Gay Revolution*, Wash. Post D2 (May 24, 1993) (discussing the three-day riot in New York in 1969 in response to police harassment).

142. See *City of New York v. New Saint Mark's Baths*, 130 Misc. 2d 911, 497 N.Y.S.2d 979, 983 (N.Y. Sup. Ct. 1986) (rejecting freedom of association claims of members); *Freeman v. Hittle*, 747 F.2d 1299, 1302-03 (9th Cir. 1984) (requiring a church-affiliated club with gay clientele to provide membership lists to the stato).

143. *Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965).

144. See *New Saint Mark's Baths*, 497 N.Y.S.2d at 982-83 (refusing to extend privacy rights to a commercial venture).

145. See Part II.A.3.

146. See *New Saint Mark's Baths*, 497 N.Y.S.2d at 983.

147. See Part II.A.4.

enact but do not recognize, or choose to disregard, the results of these laws.[148] This ignorance replicates the subordination of the past.[149]

When courts review First Amendment challenges to these "accidental" restrictions on speech, they apply the *O'Brien* method of balancing the interests of the government against the interests of the speaker. Yet, courts often undervalue the speech interests of homosexual men and women in this equation, not recognizing the expressive value inherent in another culture. In *Singer v. United States Civil Service Commission*,[150] the plaintiff challenged a decision to terminate his employment because of his "flaunting and advocacy of a controversial lifestyle."[151] In addressing Singer's First Amendment claim, the court noted the government's interest in avoiding "public contempt"[152] and held that "promoting the efficiency of the public service"[153] outweighed Singer's interest in exercising his First Amendment rights.[154] Significantly, at no point in its opinion did the court actually discuss Singer's interest.[155]

Although the dangers of nonrecognition and devaluation by the courts are strong, these concerns are even more resonant in expressly majoritarian legislatures. The expression of the homosexual community, or any other minority, will suffer under these circumstances. Instead of protecting fringe speech, courts often may consider a relatively low-value government interest sufficient to overcome important homosexual speech rights.[156]

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148. Note that intentional restrictions on particular content are per se invalid. But see *Young v. American Mini Theatres*, 427 U.S. 50, 70 (1976) (allowing content-based restrictions on "low-value" speech).

149. In response, Laurence Tribe proposed that homosexual men and women should be recognized as a suspect class. Tribe, *American Constitutional Law* § 16-33 at 1616 (cited in note 18).

150. 530 F.2d 247 (9th Cir. 1976).

151. Id. at 251. An investigator from the Commission noted several instances, including embracing a man in front of his prior place of employment, indicating by his clothing that he intended to remain homosexual, seeking to obtain a marriage license with another man, organizing a symposium on gay issues in Seattle, and displaying homosexual messages on his automobile. Id. at 249.

152. Id. at 254.

153. Id. at 256 (quoting *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968)).

154. *Singer*, 530 F.2d at 256.

155. See id. at 251.

156. A particularly disturbing development in this area has been the push by Justice Scalia to eliminate entirely First Amendment protection for expression that is limited by content-neutral restrictions. As Justice Scalia views it, these limitations on expression, if truly content-neutral, should be upheld as valid exercises of legislative prerogative. See *R.A.V. v. City of St. Paul*, 112 S. Ct. 2538, 2546-47 (1992).

5. Right to Silence

A final area in which the current narrow interpretation of expression may undermine the First Amendment involves the right not to speak.[157] Just as the First Amendment guarantees all people the right to express beliefs before the public, it also protects the right to keep those views private.[158] This element of the First Amendment is particularly meaningful to the homosexual community, some of whose members may wish to retain their status as closet gays and lesbians.[159]

The Court's current view of First Amendment reasonableness may seriously threaten the homosexual community's right to silence. The registration of sex offenders by the police is one such infringement.[160] Although forced registration serves goals of community welfare and helps identify repeat offenders,[161] it also trammels the rights of gay men and lesbians who live in states in which sodomy is a crime to be secure in their private sexual identities. The government's nonspeech goals in registering those who violate sodomy laws with consenting partners may seem minimal to some; however, the Court may consider the interests in maintaining silence insufficient to counterbalance the government's aims.[162] The true value of anonymity to homosexual men and women cannot be measured by the standards of the straight world. The Court must measure the interests of the homosexual community subjectively.

The recent trend of "forced outing" of homosexual men and women also threatens the First Amendment's guarantee of silence.[163]

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157. See *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 234-35 (1977) (holding that teachers cannot be compelled to contribute to a union that expresses ideas they do not support).

158. See Nimmer, *Nimmer on Freedom of Speech* § 4.10[B] at 4-144 (cited in note 3) (discussing the general protection of this right, but noting specific instances in which it has been abridged).

159. In fact, the concept of keeping one's status a secret te the world may involve certain political elements because it implies criticism and mistrust of the current social norms and the reaction te counter-majoritarian views. In addition, the right to anonymity also allows the formation of potentially expressive associations without fear of government reprisals.

160. See, for example, Tennessee Code Annotated § 38-6-110 (1991), which states:

> (a) The Tennessee bureau of investigation shall establish a central registry of sexual offenders modeled after statutes enacted in other states. The registry shall include all validatod offenders from files maintained by the department of human services, all persons who have been arrested for the commission of a sexual offense, and all persons who have been convicted of a sexual offense.

161. The issue of whether sodomy should be considered a criminal act is beyond the scope of this Note. Although the sex act itself may have some expressive elements, it is more clearly related to private conduct.

162. See notes 62-68 and accompanying text (concerning the *O'Brien* test).

163. Outing involves "identifying, by name, in print, and with as many details as possible, people who are believed to be homosexual, hoping to force them out of the closet." Cheryl Lavin,

Forced outing pits free speech rights against the right not to speak. The central debate should focus on the injury to reputation and privacy. Speech on a public issue is protected by the First Amendment unless it is maliciously and willfully false.[164] Arguably, because of society's marginalization of the homosexual community, an individual's sexual preference is a matter of public concern.[165] This result denies the expressive elements of the victim's silence.[166] Ultimately, neither the problem of forced outing, nor any other restrictions on the homosexual community's expression, may be resolved satisfactorily until courts recoguize and value homosexual speech.

IV. THE NEED FOR A BROADER INTERPRETATION OF THE FIRST AMENDMENT

The specific abuses of the First Amendment doctrine share a common element—they undervalue expression that the majority cannot recognize as reasonable. Consequently, because courts see it as the speech of Unreason, they exclude this expression from First Amendment protection. When homoerotic art is compared to the obscenity doctrine, it must meet the majoritarian community's standard of morality.[167] In defining a community-based model, the First Amendment becomes a tool of the majority to suppress the speech of the minority rather than a shield to ensure open expression.

Certainly, there must be some limits to the protections afforded speech.[168] Not all expression adds to the marketplace of ideas; not all actions are expressive. Abolishing all limits would demean the First Amendment and erode its usefulness to society. To fulfill the constitutional mandate of the First Amendment, however, exclusions must be narrowly aimed darts rather than blunderbuss eliminations of speech that society considers unreasonable.

The Light in the Closet, Chicago Tribune C1 (June 8, 1993). See Signorile, *Queer in America* at xviii-xix (cited in note 110); Larry Gross, *Contested Closets: The Politics and Ethics of Outing* 1-6 (U. of Minnesota, 1993).

164. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342 (1974) (affirming the requirement of knowledge of falsity or reckless disregard, but reversing on grounds that the victim was not a public figure); *Hustler Magazine v. Falwell*, 485 U.S. 46, 56-57 (1988) (requiring proof of "actual malice" in addition to knowledge of falsity in order to support a claim of emotional distress resulting from an offensive parody of a public figure); *New York Times v. Sullivan*, 376 U.S. 254, 271-72, 279-80 (1963).

165. But see *Gertz*, 418 U.S. at 351-52 (finding that an attorney's participation in a civil suit against an alleged murderer did not render him a public figure).

166. See notos 157-59 and accompanying text.

167. See Part III.A.1.

168. See Part II.B.

The basis of the First Amendment lies in the validation of individual rights rather than the maintenance of majoritarian ideals. The majority is able to implement its goals and beliefs through the democratic legislative process. A majoritarian government, however, requires that all ideas receive equal access to the marketplace.[169] Thus, the majority may implement its wishes but cannot exclude other ideas.

In order to fulfill the First Amendment's purpose, the Court must expand its current interpretation of protected expression to include the expression of the counter-majority. The First Amendment's right to free expression should not be defined by the majority's relative beliefs. Forms of expression that do not fall within the standards of the majority, such as those of the homosexual community, will be overlooked consistently and devalued by this system. For heterosexual couples, walking down the street holding hands is a simple act of affection. For lesbians and gay men, it is both an act of affection and a criticism of society's sexual beliefs and expectations. It is an assault on those who condemn the gay lifestyle and, accordingly, may incite criticism, discrimination, and physical assault.

To ensure the continued variety of viewpoints within society, it is imperative that courts recognize that expression may assume a wide array of forms. Some fall neatly into the mold of traditional First Amendment speech. Others, however, bear an entirely new guise. Although it is difficult to discern these nontraditional elements, their diversity necessitates careful scrutiny by the courts.

Correcting the defects in the current interpretation of the First Amendment is a difficult task. In the long term, simply realizing that different modes of expression do exist may prove the most fruitful solution. A more controversial approach might involve a subjective analysis of the speaker claiming a First Amendment privilege. Each approach may be criticized, but ultimately, the courts must adopt some solution to revise the limits on expression.

A. Enhanced Objectivity

One approach is to continue to bombard the courts with images of homosexuality and those acts of the homosexual community that by their very nature are expressive. Continued exposure eventually will breed recognition. Every act that forces homosexuality into public

169. In much the same way, the economic free market uses antitrust law to ensure that no trade is suppressed by those with a majority share of market power.

view and the judicial arena enhances its recognition as an acceptable mode of expression.[170]

This process has occurred throughout the history of the First Amendment.[171] When the majoritarian legislative process restricts disreputable, unreasonable expression, those silenced invoke the First Amendment's protection. Initially, categories of exclusions have denied this speech access to the marketplace. As the frequency of this speech increases and attacks on the ill-fitting exclusions intensify, however, courts begin to recognize the expressive elements.

This process of evolution, however, is unsatisfactory. First, it essentially mirrors and reasserts the majoritarian process. Excluded speech is suppressed until a majority of the population accepts it as deserving of protection.[172] Another problem with this waiting approach is that until this enlightenment occurs, those who seek to express themselves face inordinate pressures to silence.[173]

B. Subjective Analysis

Re-evaluation of the First Amendment is required to recognize the full extent of expression. To offer First Amendment protection to counter-majoritarian views, courts must value those views as the speaker values them. This approach would require judges to offer valid alternative means to express ideas without running afoul of proscribed methods. In keeping with the presumption of validity that speech must entail, any expression would be considered valid and protected unless it is proven nonexpressive.

This proposition may seem too heavy a burden for judges to carry. Some would assert that courts must restrict themselves to evaluation of the law alone, not facts or alternatives. That claim dismisses the responsibility that the First Amendment places on courts, however. To protect individual rights, the judiciary must make some factual determinations. The majoritarian values of juries cannot limit this duty.

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170. Karst, 1990 U. Ill. L. Rev. at 116 (cited in note 9).

171. Cases involving criticism of the government and its officials demonstrate this evolution. Compare *Gitlow v. New York*, 268 U.S. 652 (1925) (refusing First Amendment protection to speech advocating the overthrow of the government), with *Street v. New York*, 394 U.S. 576 (1969) (overturning a conviction for publicly burning the United States flag).

172. For homosexual expression, this process might be less painful because a significant portion of society has begun to recognize it as valid.

173. See notes 30-31 and accompanying text (concerning self-censorship).

This hybrid of objective and subjective determination is not entirely radical. It already exists in the *O'Brien* test.[174] Courts must examine the possible alternatives for expression as part of an evaluation of the speaker's interest. Although the current test for expression is riddled with majoritarian exclusions,[175] an additional filter to identify alternatives would encourage more complete judicial awareness. For example, to come out, homosexuals must possess the freedom to live an openly gay lifestyle as a means of expression. Coming out is an inherently individual process. It cannot be attained by speaking as a group. Thus, forcing judges to realize that there are no alternatives to the expressive acts required in coming out may force them to realize the expressive quality of these acts and offer them adequate protection.

Of course, even this method does not ensure full protection. Fringe forms of expression may be denied protection because they could be communicated as effectively in a more traditional form. At the very least, however, this expansion would require the judiciary to confront these forms of expression rather than rely on stock exclusions.

Criticism may be leveled at this approach by those who consider it an unequal application of the laws. This criticism is misguided for two reasons. First, the First Amendment necessarily implies disparate treatment. It is intended to offer more protection to viewpoints lacking an equal opportunity to receive expression in the legislative process. In addition, a subjective approach would not apply a disparate standard to a minority view. It would require the same review for all. The difference would lie in the societal factors surrounding different expression. Those seeking to express themselves in a traditional manner would continue to receive protection, whereas others simply would receive equal protection.

V. CONCLUSION

If the courts take a broader view of the types of expression protected by the First Amendment, this recognition could greatly influence the development of the gay liberation movement, the drive for homosexual equality in society, and the relation of subordinated groups to society in general. This new fairness could affect the entire consciousness of liberation within the gay and lesbian communities. A

174. See notes 62-68 and accompanying text.

175. See Parts III.A.1 and III.A.2 (concerning the obscenity and fighting words exclusions).

new willingness to listen to the expressive subtext of society may relax the chilling effects of prior interpretations of the First Amendment. By allowing truly free access to the marketplace of ideas, the exchange would be the ultimate winner, enriched by the diversity of views. Potentially, other unheard voices also would begin to receive recognition from the courts.

Shifting the judicial interpretation of the First Amendment would alter the way in which the courts treat the First Amendment. Expression that majoritarian minds have been unable to comprehend in the past may be revitalized. For example, laws prohibiting solicitation may cease to be a tool for discrimination against gay men seeking companionship.[176] In addition, the current freeze on openly homoerotic art would begin to thaw as artists lose the fear that their expressions could cost them the possibility of government funding.[177]

As a result of the expanded voice that this revised interpretation of the First Amendment would give to marginal expression, those unheard by society may begin to join the community debate on level terms. The homosexual community especially would gain from this protection. Gay men and lesbians would gain the freedom to take their places in the constellation of ideas and have their beliefs examined and criticized by society. In addition, the new freedom of expression would end the role of silence that has kept homosexuals invisible for so long. Vocal gay activists represent only one small facet of homosexual expression. The true extent of homosexuality may be recognized and debated fruitfully only if it is exposed before the whole of society.

The self-cultivating nature of fringe concepts will limit the application of this expanded view of expression. Once the broadened horizons of expression are implemented, they will be filled by previously marginalized viewpoints. If these ideas are not accepted by the masses, they gradually will lose force and wither on their own accord.

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176. Because of the fear of violence in Ohio, the state legislature has codified a form of the "heckler's veto" in Ohio Revised Code Annotated § 2907.07 (Baldwin 1992), which provides:

> Importuning
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> . . .
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> (B) No person shall solicit a person of the same sex to engage in sexual activity with the offender, when the offender knows such solicitation is offensive to the other person, or is reckless in that regard.

See also 11 Del. Code Ann. § 1321 (1987), which provides:

> A person is guilty of loitoring when:
>
> . . . .
>
> (5) He loiters or remains in a public place for the purpose of engaging or soliciting another person to engage in sexual intorcourse or deviate sexual intercourse . . . .

177. See Adler, Note, 99 Yale L. J. at 1359-60 n.6 (cited in noto 93).

If they do gain a measure of acceptance, then new speech opportunities will present themselves. As the adherents to a concept receive societal acceptance, other methods of expression will become available because political constituencies will ensure legislative representation. Consequently, when courts question whether alternative means of expression exist, they will find less of a need to offer added protection to these views.

Criticism of this expanded model of free speech protection is likely to come from those who perceive the majoritarian process as the appropriate forum for fringe beliefs. These forces fear the danger that open expression may present to society.[178] This view ignores the fact that the impact of any fringe idea on society is directly proportional to the number of supporters it can accumulate. The answer to these fears is not to suppress dissent, but to encourage it.

The commitment to ensuring the freedom of speech has allowed the appearance of many counter-majoritarian beliefs. Because of the socially constructed view of Reason, however, those who apply the First Amendment often undervalue expression that they consider irrational. Instead of strangling these fringe beliefs in their infancy, courts must expand their horizons and grant these beliefs access to the marketplace of ideas. Only in this way may we fulfill the vision of the First Amendment.

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178. See, for example, *American Booksellers Ass'n v. Hudnut*, 771 F.2d 323, 329 (7th Cir. 1985) (describing the detrimental effects of pornography on women in society).

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