PERFORMANCE AND POLITICS: AN ARGUMENT FOR EXPANDED FIRST AMENDMENT PROTECTION OF HOMOSEXUAL EXPRESSION

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"Congress shall make no law . . . abridging the freedom of speech."[1] These ten words comprise "the bedrock legal instrument which governs communication in America."[2] They have spawned a complex jurisprudence much belied by the seeming simplicity of the Framers' text. Constitutional scholars seeking to explicate First Amendment law are careful to qualify their categorizations[3] of "protected" and "unprotected" speech as ever fluid and replete with subcategories and case-by case exceptions that render their study a confusing journey through an "endless maze."[4] But the maze is not without guideposts. While scholars differ as to the precise purposes of the First Amendment,[5] all agree that one overarching goal is to foster free and open debate. Even when the judiciary places new obstacles in the First Amendment maze to prevent harm to others or to benefit the collective over the individual good, the goal of free and open debate remains. The central difficulty of First Amendment jurisprudence then is not one of defining the endpoint, but of determining how best to reach it while balancing countervailing interests.[6]

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1 U.S. CONST. amend. I.

2 FRANKLYN S. HAIMAN, SPEECH AND LAW IN A FREE SOCIETY 3 (1981).

3 DANIEL A. FARBER, THE FIRST AMENDMENT 14-15 (1998). HAIMAN, *supra* note 2, at 4 (Referring to Supreme Court decisions on First Amendment issues Professor Haiman writes, "To say that those decisions have left something to be desired in terms of consistency, predictability, and logical adequacy would be an understatement."). *See also* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLITICS 757 (1997) ("[I]t is not possible to comprehensively flow chart the First Amendment as a defined series of questions . . . [t]here are many ways of approaching and evaluating government actions restricting expression.").

4 STEVEN H. SHIFFRIN, THE FIRST AMENDMENT, DEMOCRACY AND ROMANCE 9 (1990).

5 CHEMERINSKY, *supra* note 3, at 751-56. Professor Chemerinsky divides the various scholarly approaches into four major categories, emphasizing the importance of First Amendment protection to self-governance, the discovery of truth, the advancement of autonomy and the promotion of tolerance. *See also* OWEN M. FISS, THE IRONY OF FREE SPEECH 3 (1996) ("Speech is valued so importantly in the Constitution, I maintain, not because it is a form of self-expression or of self-actualization but rather because it is essential for collective self-determination."). For analysis of the Framers' intent, *see* FARBER, *supra* note 3, at 8-10 (concluding that though the original intent is unclear, the Framers were almost certainly concerned with the specter of too much centralized power).

6 FISS, *supra* note 5, at 5. HAIMAN, *supra* note 2, at 4 ("[T]hough we have a theoretical commitment . . . to freedom of expression as a near absolute, reality forces us to recognize many competing rights and interests that tempt us . . . in the direction of restraints . . . ").

Dissenting voices are those most in need of protection and are among those whose expression our Constitution was most intended to shield.[7] In today's society, homosexuals[8] are perhaps the most persecuted and devalued of dissidents.[9] While the shifting sands of First Amendment doctrine have afforded the homosexual community some protections, they have also denied protection in areas where it should be extended. Part I of this note discusses the historical evolution of First Amendment jurisprudence and its treatment of the free speech claims of gays and lesbians. Part II critiques one proposal for expanded First Amendment protection of homosexual expression and then offers an alternative suggestion.

I. FIRST AMENDMENT JURISPRUDENCE

This note provides a brief sketch of only a few categories of speech that are traditionally favored or disfavored under our nation's First Amendment jurisprudence. From this sketch, several patterns emerge. Speech characterized by its ability to incite others to engage in imminent illegal conduct or violence typically is not extended the full protection of the First Amendment.[10] Neither do courts look favorably upon speech that meets the Supreme Court's most recently articulated definition of obscenity.[11] Further, "pure speech" is considered more worthy of First Amendment protection than speech that also contains an element of conduct.[12] The difficulties inherent in making what are necessarily subjective determinations within these disfavored categories are perhaps most

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7 HAIG A. BOSMAJIAN, DISSENT: SYMBOLIC BEHAVIOR AND RHETORICAL STRATEGIES 15 (1972). ("In the United States, under our Constitution, the question is not 'may I dissent?' or 'may I oppose a law or a government?' I *may* dissent. I *may* criticize. I *may* oppose. Our Constitution and our courts guarantee this."). *See also* SHIFFRIN, *supra* note 4, at 88 (describing the social and political power of the First Amendment as "a shining symbol of a country that values and protects dissent" that extends beyond its legal force).

8 It has been brought to my attention that some gays and lesbians may be offended by the use of the terms "homosexual" and "homosexual expression" as they appear throughout this note. I use these terms not to give offense but for reasons of economy of phrasing and because "homosexual" is largely the term used in case law to refer to gays and lesbians.

9 Bill Reel, *Current Events Tell Us Differences Aren't Funny*, NEWSDAY, Oct. 21, 1998, at A45 (indicating that, though crime in New York City is down generally, crimes against homosexuals are on the rise); Bettina Boxall, *Long Arm of Hatred*, L.A. TIMES, Nov. 6, 1998, at B2 (describing anti-gay attacks in Los Angeles County and noting that 220 anti-gay incidents were reported within the county in 1997); Jose Martinez, *Climate of Fear Haunts Gays*, BOSTON HERALD, Oct. 18, 1998, at 3 (indicating a 42% increase in reports of gay-bashing in Boston between 1996 and 1997). Not the least among those who persecute homosexuals through the homophobic structuring of their opinions are the members of the modern judiciary. *See* Kendall Thomas, *Corpus Juris (Hetero)sexualis: Doctrine, Discourse, and Desire in Bowers v. Hardwick*, 1 GLQ 33 (1993), *reprinted in* WILLIAM K. ESKRIDGE, JR. & NAN D. HUNTER, SEXUALITY, GENDER AND THE LAW 66-71 (1997).

10 *See infra* notes 22-41 and accompanying text.

11 *See infra* notes 42-58 and accompanying text.

12 *See infra* notes 59-82 and accompanying text.

acute when courts, distinguishing pure speech from speech as conduct, determine whether language is so patently offensive to community standards as to be obscene. It is in these areas that individual members of the judiciary are most free to adulterate opinions with their own biases. Hence, it is not surprising to find that most of the decisions (though certainly not all) that have stifled homosexual expression characterized the speech in question as either obscene or merely as "conduct" not worthy of full First Amendment protection.

With societal prejudices reflected so strongly in decisions concerning disfavored areas of First Amendment protection, we might expect to see a similar suppression of gay and lesbian expression within categories of traditionally favored speech. However, the personal biases of certain members of the Supreme Court notwithstanding,[13] courts have been fairly consistent in protecting political or performative speech. Thus, performances of those who cater to predominantly homosexual audiences may not be prohibited.[14] The government may not prevent gay and lesbian activists from publishing newspapers or associating freely for purposes of discussing sexual orientation discrimination and/or the raising of social consciousness.[15] And in some cases, even self-identification as a homosexual may be constitutionally protected political expression.[16]

A. HISTORICALLY UNPROTECTED SPEECH

First Amendment jurisprudence has always recognized the need for some limits on freedom of speech.[17] Speech that incites illegal activity or provokes hostility, obscenity, sexually oriented speech, defamatory speech, conduct (as opposed to verbal speech), commercial speech, speech by government employees and/or attorneys, and labor protests typically have not been extended full First Amendment protection.[18] However, speech that might seem to be disfavored under First Amendment analysis may be protected on occasion[19] just as speech normally favored may be restricted in certain contexts.[20] In determining whether First Amendment protection attaches to specific types of speech, courts

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13 *See infra* note 100.

14 *See infra* notes 103-04 and accompanying text.

15 *See infra* notes 109, 115-117 and accompanying text.

16 *See infra* notes 112-13 and accompanying text.

17 CHEMERINSKY, *supra* note 3, at 750. ("[T]he Supreme Court never has accepted the view that the First Amendment prohibits all government regulation of expression.").

18 *Id.* at 757. *See also* FARBER, *supra* note 3.

19 *See* Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1983) (suggesting that sleeping on a park bench might be a form of constitutionally protected expression when done for the purpose of political protest).

20 The most prominent example in this category is the wide latitude given to the military to violate what might otherwise be constitutionally protected rights. *See, e.g.,* Watson v. Perry, 918 F.Supp. 1403, 1417 (1996) ("[J]udicial review of military regulations challenged on

consider a myriad of factors whose application requires subjective value judgments that are often fatal to the expression of ideas outside the popular mainstream.[21] As discussed below, application of these factors has had the effect of alternately promoting and stifling homosexual expression.

1. *Incitement of Illegal Activity*

In deference to the overarching goal of maximizing freedom of expression, the Supreme Court narrowly defines speech that incites illegal activity. The leading case in this area is *Brandenburg v. Ohio*,[22] in which the Supreme Court ruled that a Ku Klux Klan member's racist and anti-Semitic speech was protected under the First Amendment despite the fact that it advocated illegal conduct.[23] With this decision, the Court narrowed its previous holdings on incitement of illegal activity, announcing that a state cannot "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 incite or produce such action."[24]

While some courts have held that homosexual expression can constitute imminent incitement to commit what is still (in most states) the illegal act of "sodomy," most post-*Brandenburg* decisions have not recognized this defense to restrictions on homosexual expression. In *Gay Students Organization of the University of New Hampshire v. Bonner*, the University of New Hampshire restricted the activities of a gay students' group after a dance sponsored by the group drew negative media attention to the University.[25] Finding in favor of the students, the First Circuit rejected the University's argument that condoning the group's activities would promote illegal activity including "'deviate' sex acts, 'lascivious carriage' and breach of the peace."[26] The court reasoned that "mere 'undifferentiated fear or apprehension' of illegal conduct, is not enough to overcome First Amendment rights, and speculation that individuals might at some time engage in illegal activity is insufficient to

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First Amendment grounds is far more deferential than constitutional review of similar laws or regulations designed for civilian society.").

21 A detailed discussion of each of the factors considered under First Amendment jurisprudence is beyond the scope of this note. I will therefore discuss only a few of the many factors courts consider when determining whether speech should be protected by the First Amendment. For a detailed treatment of all aspects of First Amendment analysis, *see* CHEMERINSKY, *supra* note 3, at 757-1036.

22 395 U.S. 444 (1969).

23 *Id.*

24 *Id.* at 447.

25 509 F.2d 652, 652-55 (1st Cir. 1974).

26 *Id.* at 662.

justify regulation by the state."[27] Citing *Bonner*, the Fifth Circuit rebuffed a similar argument made by Texas A&M University as the basis for denying recognition to a student services organization committed to assisting homosexual students.[28] While a repeal of all sodomy statutes would certainly be a larger victory for the homosexual community than an admission that congregated homosexuals are not presumptively poised to commit "deviant" and illegal sex acts, the favorable application of the *Brandenburg* test represented by these circuit court decisions is at least a partial victory for gay and lesbian rights.

2. *Fighting Words*

The Supreme Court first delineated the "fighting words" exception in 1942, excluding from First Amendment protection certain classes of statements, including "the lewd and obscene, the profane, the libelous, and the insulting or fighting words – those which by their very utterance inflict injury or tend to incite an immediate breach of the peace."[29] Such statements, the Court reasoned, formed "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."[30] Subsequent refinements of the "fighting words" test have narrowed its applicability to only those words that are directed at a specified target[31] and which, given their context, are unexpected by the listener.[32] The most recent authority from the Supreme Court on "fighting words" is *R.A.V. v. St. Paul, Minnesota*,[33] in which the defendant burned a cross on an African-American family's lawn in violation of a city ordinance banning the display of any symbol that "arouses anger, alarm, or resentment in others on the basis of race, color, creed, religion, or gender."[34] The Court held the statute invalid because it targeted only *some* "fighting words."[35] Thus, in order to con-

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27 *Id.*

28 Gay Student Serv. v. Texas A&M Univ., 737 F.2d 1317, 1328 (5th Cir. 1984). Earlier cases in the Fifth Circuit, however, did not apply the *Brandenburg* test with the same rigor. In *Mississippi Gay Alliance v. Goudelock*, an off-campus homosexual group sued a state university newspaper editor for refusing to publish a proposed paid advertisement. The Court of Appeals sustained the judgment for defendant, holding that, since Mississippi condemns "intercourse which is unnatural, detestable and abominable . . . [t]he editor of [the newspaper] had a right to take the position that the newspaper would not be involved, even peripherally, with this off-campus homosexually-related activity.ö Mississippi Gay Alliance v. Goudelock, 536 F.2d 1073, 1075-76 (5th Cir. 1976).

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

30 *Id.* at 572.

31 Cohen v. California, 403 U.S. 15 (1971).

32 Gooding v. Wilson, 405 U.S. 578 (1972).

33 505 U.S. 377 (1992).

34 *Id.* at 380.

35 *Id.* at 391-92.

stitutionally regulate fighting words, legislatures must draft statutes that do not distinguish among types of speech based on content.[36]

Some commentators worry that the subjective determinations judges must make when applying the fighting words doctrine (i.e., whether the words form "no essential part of any exposition of ideas") may lead to discriminatory bars against homosexual expression by a biased judiciary.[37] However, courts have tended to use "fighting words" as a shield for those engaged in "anti-gay" speech rather than as a sword to strike down provocative forms of homosexual expression. For example, in *State v. Macholz*, the Supreme Court of Minnesota determined that the defendant's anti-gay statements made while riding horseback and allegedly swinging a lead rope through a group of people assembled at a gay and lesbian celebration were not equivalent to fighting words and therefore were protected under the First Amendment.[38] On occasion, however, the courts *have* found gay-bashing speech threatening enough to constitute "fighting words." In *People v. Rockiki*, the defendant violated a hate crime statute by screaming epithets at a restaurant server he perceived to be gay.[39] The state court determined that Rockiki's conduct "exceeded the bounds of spirited debate, and [that] the First Amendment does not give him the right to harass or terrorize anyone."[40]

In addition to using the "fighting words" rationale to both defend and condemn speech offensive to the homosexual community, courts have used it to protect certain forms of homosexual expression. An Ohio appeals court recently overturned a homosexual defendant's conviction for solicitation of a member of the same sex, in part because "[t]he likelihood that, in these circumstances, appellant's words would incite the average person to immediate violence is . . . remote."[41] Thus, while the potential exists for courts to abuse the post-*R.A.V.* "fighting words" doc-

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36 Some commentators have pointed out that drawing statutes non-specific enough to meet the *R.A.V.* requirement yet not so amorphous as to be overturned on grounds of overbreadth or vagueness will be difficult if not impossible. CHEMERINSKY, *supra* note 3 at 820-21. However, it is worth noting that, one year after *R.A.V.* was decided, the Supreme Court upheld a Wisconsin hate crime statute that punished "bias-motivated" conduct rather than the expression of ideas. Wisconsin v. Mitchell, 508 U.S. 476 (1993).

37 Brent Hunter Allen, *The First Amendment and Homosexual Expression: The Need for an Expanded Interpretation,* 47 VAND. L. REV. 1073, 1089-90 (1994).

38 574 N.W.2d 415, 422 (Minn. 1998.) ("In the present case, Machholz made the following statements: 'You're giving us AIDS!'; 'You're spreading your filth!'; 'There are no homosexuals in heaven!'; and 'You're corrupting our children!' While we may find these statements offensive and obnoxious, they do not per se constitute fighting words.")

39 718 N.E.2d 333 (Ill. App. 2d 1999).

40 *Id.* at 339. *See also* People v. Dupont, 107 A.D.2d 247, 486 N.Y.S.2d 169 (1985) (Defendant's conduct in harassing his former attorney by distributing a magazine depicting the attorney as a homosexual did not amount to "fighting words.").

41 State of Ohio Metroparks v. Lasher, No. 73085, 1999 WL 13971, at 15 (Ohio Ct. App. 8th Jan. 14, 1999).

trine to the detriment of homosexual speech, present case law indicates a fairly balanced application that protects speech both celebrating and denigrating the homosexual lifestyle.

3. *Obscenity*

As indicated in the above quote from *Chaplinsky v. New Hampshire*,[42] the Supreme Court does not extend First Amendment protection to speech it chooses to characterize as lewd or obscene because such words are deemed incapable of contributing to social discourse.[43] In other words, obscene speech is not really speech. In *Roth v. United States*,[44] the Supreme Court formalized its condemnation of obscenity, defining it as "material which deals with sex in a manner appealing to prurient interest"[45] and further defining prurient as "having a tendency to excite lustful thoughts."[46] The Court struggled to clarify *Roth's* subjective and vague framework for years until, in 1973, it announced the three-prong test for obscenity that persists to the present day. Material is considered obscene, and is therefore excluded from First Amendment protection, if: (1) the average person would find that it appeals to "prurient interests" in light of "community standards"; (2) it presents "sexual conduct" in a "patently offensive" manner as defined by "applicable state law"; and (3) "taken as a whole, [it] lacks serious literary, artistic, political or scientific value."[47] Obviously, even this more lucid incantation of the obscenity test requires courts to make subjective value judgments as to what material appeals to "prurient interests," what is "patently offensive," and what lacks redeeming value.[48]

The majority of case law on the obscenity exception to free speech involves decisions not to extend protection to books or films which depict explicit sexual acts of *either* a homosexual or heterosexual nature.[49]

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42 *See supra* note 29 and accompanying text.

43 Some commentators, such as David Richards, argue that courts should not be in the business of defining and regulating obscenity at all while others, such as Catherine MacKinnon, consider state regulation of prurient materials essential to prevent anti-social behaviors that subordinate women. For a good summary of arguments pro and con the regulation of obscene materials, *see* CHEMERINSKY, *supra* note 3, at 829-31.

44 354 U.S. 476 (1957).

45 *Id.* at 487.

46 *Id.* at n.20.

47 Miller v. California, 413 U.S. 15, 24 (1973).

48 The Supreme Court's subsequent cases have not been significantly helpful in further defining these terms. *See, e.g.*, Jenkins v. Georgia, 418 U.S. 153, 161 (1973) (declaring that nudity alone is not enough to make a film "patently offensive" under the *Miller* standard); Pope v. Illinois, 481 U.S. 497, 500-01 (1987) (establishing that the standard for determining whether allegedly obscene material has redeeming value is that of a reasonable person rather than a community standard).

49 *See e.g.*, Tipp-It, Inc. v. Conboy, 596 N.W. 2d 304 (Neb. 1999) (holding that photographs hanging on the wall of a bar and depicting graphic sexual acts were obscene and not

However, there have been some instances in which the courts have singled out modes of homosexual expression that were *not* sexual in character as being "obscene." For example, the Ninth Circuit characterized a magazine containing an article about a lesbian woman's choice between denying and embracing her homosexuality as "nothing more than cheap pornography calculated to promote lesbianism" (as if this were itself "obscene"). The Ninth Circuit further noted that "social standards are fixed by and for the great majority and not by or for a hardened or weakened minority."[50] And a Fifth Circuit dissenting judge argued in dicta that a newspaper might legally refuse to print an advertisement that "expressly solicited 'unnatural intercourse.'"[51] In another case brought by prisoners challenging the censorship of their mail, the Fifth Circuit held that, while a prisoner's First Amendment rights should be honored to the extent they are consistent with the objectives of the penal system,[52] the "legitimate rehabilitation interest of prison authorities" in preventing homosexual acts rendered the prison's censorship of magazines depicting homoerotic acts constitutionally acceptable.[53] Implicit in each of these decisions is the assumption that homosexual orientation itself, not just the act of sex, is "obscene," an indulgence of the "hardened and weakened" minority, an unnatural deviation from the correct path that requires "rehabilitation" to fix and definitely not speech (or a lifestyle) the First Amendment should protect.

Such extreme views have been tempered with some judicial reluctance to draw majoritarian value judgments regarding the relative worth of speech. For example, some courts have acknowledged that gay and lesbian expression is protected by the First Amendment, even when such

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protected by the First Amendment); Kaplan v. California, 413 U.S. 115 (1973) (upholding the conviction of an 'adult' bookstore owner for selling an un-illustrated book that explicitly described both homosexual and heterosexual sex acts the Court described as "offensive to the point of being nauseous"); United States v. American Theater Corp., 526 F.2d 48 (8th Cir. 1975) (holding that films depicting both homosexual and heterosexual couples engaged in sexual acts were not protected by the First Amendment); State v. Downtown Books, Inc. 196 Neb. 473 (Neb. 1976) (upholding conviction of a bookstore owner who sold magazines with explicit sexual content); Lakin v. United States, 363 A.2d 990 (D.C. 1976) (upholding similar convictions of bookstore clerk and manager); Sedelbauer v. State, 455 N.E.2d 1159 (Ind. Ct. App. 1983) (while the conviction here was for distribution of a homoerotic film, the applicable obscenity statute banned distribution of films depicting heterosexual sex acts as well). *But see* Calderon v. City of Buffalo, 397 N.Y.S.2d 655 (1977) (striking an obscenity statute prohibiting sales displays of sexually explicit material without regard to content as unconstitutionally overbroad).

[50] One, Inc. v. Olesen, 241 F.2d 772, 777 (9th Cir., 1957). Though the Supreme Court subsequently overruled this decision, it serves as a reminder of the power with which the obscenity doctrine vests the courts to determine the members of the "majority" and the "hardened or weakened minority."

[51] Mississippi Gay Alliance v. Goudelock, 536 F.2d 1073, 1078, n.6 (5th Cir. 1976).

[52] *See* Guajardo v. Estelle, 580 F.2d 748, 760 (5th Cir. 1978).

[53] *Id.* at 762.

expression may be "distasteful to the majority."[54] The Supreme Court has prohibited regulation of private tastes by distinguishing between public distribution of obscene materials and private possession, holding that the state cannot regulate the latter.[55] Further, some courts have held that the viewpoints of gays and lesbians themselves may be admitted into evidence as a way of gauging the community's standards of "prurient interest" under the *Miller* test, thus at least acknowledging that homosexuals are a part of the legal community whose views matter when determining what speech should and should not be constitutionally valued.[56] Justice Douglas even argued that idea-laden speech should not be regulated at all.[57] In a dissenting opinion from 1966, Justice Douglas reasoned that

> the First Amendment allows all ideas to be expressed – whether orthodox, popular, offbeat, or repulsive. I do not think it permissible to draw lines between the 'good' and the 'bad' and be true to the constitutional mandate to let all ideas alone. . . .
>
> Government does not sit to reveal where the 'truth' is. People are left to pick and choose between competing offerings. . .[and] we have no business acting as censors or endowing any group with censorship powers.[58]

Justice Douglas seems to have acknowledged the judiciary as an inappropriate arbiter of morality. However, the cases cited above reflect a disturbing tendency of too many judges to act in just this capacity. As determinations of obscenity are among the most subjective in First Amendment jurisprudence, they are likely the ones most susceptible to abuse and, therefore, among the most dangerous to those who wish to safeguard gay and lesbian expression.

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54 Norma Kristie, Inc. v. Oklahoma City, 572 F.Supp.88, 92 (W.D. Okla. 1983) (holding that the First Amendment required that plaintiff, a corporation seeking to stage the "Miss Gay America" pageant, be allowed to lease space in an Oklahoma City Convention Center).

55 Stanley v. Georgia, 394 U.S. 557, 566 (1969) ("Whatever the power of the state to control public dissemination of ideas inimical to the public morality, it cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts.").

56 United States v. Bagnell, 679 F.2d 826, 834-835 (11th Cir. 1982) (upholding the use of testimony from a gay pastor at a predominantly homosexual church as to the Miami homosexual community's standards regarding pornography and whether certain sexually explicit films would be considered arousing to the prurient interest).

57 *See* Ginzburg v. United States, 383 U.S. 463, 491-92 (1966) (Douglas, J. dissenting).

58 *Id.* It is worth noting that this case involved censorship of advertisements that employed "sex symbolsö to sell products. *Id.*

4. *Conduct*

Another way in which jurists can deny First Amendment protection to speech whose value they find questionable is to characterize the speech as conduct. Traditionally, the Supreme Court has afforded greater protections to acts defined as "pure speech" than acts that include some element of conduct, or "speech plus." Thus, in drawing the line between "speech" and "conduct," courts subjectively decide which speech/acts merit First Amendment protection and which do not.[59]

The majority of the Supreme Court first made reference to a distinction between speech and conduct in *Teamsters Local 695 v. Vogt*, where it declared picketing to be "speech plus" that could be regulated by the state.[60] While no real basis for the distinction between "speech" and "speech plus" has been set forth,[61] there are certain areas in which speech and conduct are inevitably intertwined but the message conveyed by the combined speech and conduct is political in nature or representative of a minority viewpoint. In these instances, courts will almost invariably afford the speech/conduct some form of First Amendment protection.[62] However, as Professor Tribe points out, "[a]ll that follows is that the government must meet some version of the least restrictive test – a relaxed version. . .when the Court does not deem the activities in question particularly significant to the system of free expression. When the conduct is more closely linked to the expression . . . a tighter version of the test is appropriate."[63]

The series of legal challenges to the U.S. military's "don't ask, don't tell" policy dramatically exemplifies the effects that the speech/conduct dichotomy can have on homosexual expression. The current controversial policy on homosexuality within the U.S. military is only the latest manifestation of a deeply entrenched discrimination against gays in military service dating back to the Revolutionary War.[64] To serve in the military today, a gay or lesbian service-member must refrain from engaging in homosexual "conduct" and must also refrain from making any statements that suggest a "propensity" to engage in "homosexual conduct."[65] Such statements raise a rebuttable presumption that can lead

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59 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 826-27 (2d ed. 1988) (Professor Tribe discusses the problems associated with separating speech from conduct and, in footnote 7, notes Kalven's criticism of "the distinction between speech and conduct serving as a sub rosa tool to escape the rigidity of the absolutist position so as to produce the desired result.").

60 *See* Teamsters Local 695 v. Vogt, 354 U.S. 284, 289, 290, 292 (1957).

61 *See* TRIBE, *supra* note 59, at 827.

62 *See id.* at 829-32.

63 *Id.* at 832.

64 *See* ESKRIDGE & HUNTER, *supra* note 9, at 366-407.

65 National Defense Authorization Act for Fiscal Year 1994, 10 U.S.C. § 654 (1995).

to discharge from the military "if the member fails to demonstrate that he or she in fact does not engage in homosexual acts and is not likely to do so."[66] Courts have upheld this policy's constitutionality in the face of numerous challenges.[67] In one case filed the day after the Navy implemented Department of Defense directives to carry out the new policy,[68] Lt. Paul Thomasson argued, *inter alia*, that the policy violated his First Amendment right to free speech by making his verbal acknowledgement of homosexuality alone, rather than any conduct, the basis for his discharge. In rejecting this argument, the court emphasized that the reason for his discharge was not his speech alone but rather speech (i.e. his admission of being a homosexual) *combined with* an "entirely reasonable presumption that as a homosexual he will engage in homosexual conduct. . . . Thus, the basis for separation is acts and the likelihood of acts, not 'speech.'"[69] This reasoning is difficult to understand. First the court *links* speech to conduct by indicating that the former establishes a presumption of the latter. Then, the court says that conduct *alone*, or its likelihood, is the basis for discharge. However in this case, there *is* no conduct to serve as the basis for Thomasson's discharge but only the "likelihood" of prohibited conduct and *that* itself is only established because of a presumption attached to the plaintiff's own *speech*. The link between conduct and speech here is hardly attenuated. If speech does not become conduct as Thomasson alleges, it at least stands in for conduct, for the only reason Thomasson was discharged was because of his statement. There simply was no "conduct" to punish other than the statement. The court's perplexing reasoning may reflect a tension between its desire to both defer to the military[70] and yet remain true to the principles of free speech. Better to characterize the discharge as based on conduct, traditionally not accorded much constitutional protection, than to admit that the military's policy in fact is designed to punish either speech (professions of homosexual orientation) *or* conduct (homosexual acts).

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66 *Id.*

67 The military's prior policy on homosexuality, which did not significantly differ from the present one, has also been upheld as constitutional. *See* Pruitt v. Cheney, 963 F.2d 1160 (9th Cir. 1991) (In a newspaper article, plaintiff, an army reserve officer, acknowledged being a lesbian. The court rejected her First Amendment challenge, holding that plaintiff's discharge was based not upon her speech but upon her "being a homosexual."); Ben-Shalom v. Marsh, 881 F.2d 454, 462 (7th Cir. 1989) (upholding military dismissal based upon the *act* of identification as a homosexual though speaking about homosexuality in itself alone would be protected by the First Amendment).

68 *See* Thomasson v. Perry, 895 F.Supp. 820, 823 (E.D.Va. 1995).

69 *Id.* at 825.

70 The *Thomasson* court gave a nod to the Supreme Court's recognition that "the judiciary's 'review of military regulations challenged on First Amendment grounds is far more deferential than constitutional review of similar laws or regulations designed for civilian society.'" *Id.* (citation omitted).

Other courts have exhibited similar difficulties in reconciling the First Amendment with the military's policy but have ultimately validated "don't ask, don't tell" as constitutional. In *Able v. United States*, a group of six lesbian and gay service members challenged the policy in federal district court.[71] The court concluded that statements professing homosexuality contain both speech and "nonspeech" elements, reasoning that the statement itself is speech but it is also an *act* of identification and can thus be regulated in deference to a "sufficiently important governmental interest."[72] The district court went on to hold that the military's policy violated the First Amendment because it amounted to content-based censorship of speech that subjects members of the military to discharge "regardless of whether they have engaged in or demonstrated a likelihood of engaging in prohibited acts."[73]

On appeal, however, the Second Circuit disagreed with the district court's First Amendment ruling.[74] Noting the need for deference to military policies and the "substantial government interest"[75] to be served in banning homosexual conduct, the Second Circuit accepted the argument that had won the government's case in *Thomasson*, i.e., that "don't ask/ don't tell" does not burden speech at all but rather "the Act burdens homosexual conduct and only uses the speech as evidence that tends to prove homosexual conduct."[76] The case was then remanded to the district court for further consideration of whether a ban on homosexual conduct itself violates the Constitution.[77] Accordingly, the district court then denounced the military's policy as unconstitutional on equal protection grounds, holding that "the private prejudices of heterosexual service members are illegitimate reasons for government-sanctioned discrimination against gay and lesbian service members."[78] On appeal again, the Second Circuit reversed, finding that the military's stated objectives of promoting unit cohesion, enhancing privacy, and reducing sexual tension

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71 847 F. Supp. 1038 (E.D.N.Y. 1994).

72 *Id.* at 1041.

73 Able v. United States, 880 F. Supp. 968, 976 (E.D.N.Y. 1995).

74 Able v. United States, 88 F.3d 1280 (2d Cir. 1996).

75 *Id.* at 1295-96.

76 *Id.* at 1293.

77 *Id.* at 1300.

78 Able v. United States, 968 F. Supp. 850, 859 (E.D.N.Y. 1997). In an impassioned plea for an end to gay and lesbian discrimination, Judge Nickerson wrote, "[a] court should ask itself what it might be like to be a homosexual. For the United States government to require those self-identifying as homosexuals to hide their orientation and to pretend to be heterosexuals is to ask them to accept a judgment that their orientation is in itself disgraceful and they are unfit to serve. To impose such a degrading and deplorable condition for remaining in the Armed Services cannot in fairness be justified on the ground that the truth might arouse the prejudice of their fellow members.ö

were enough to survive rational basis scrutiny and overcome the equal protection challenge.[79]

But it is not only the military that may dismiss employees on the basis of sexual orientation. Other employers have also been permitted to discriminate against lesbians and gays with constitutional impunity. Steven Childers, for example, was denied employment in the property department of the Dallas Police Department "at least in part because of his gay activist activities."[80] Using language eerily reminiscent of the Second Circuit's rationale in *Able*, the court held that the Dallas Police Department had not violated Childers' constitutional rights since open homosexuality "undermines the legitimate needs of obedience and discipline within the police department."[81] The court reasoned that since a homosexual employee's "gay activities would have promoted unrest and disharmony among his co-workers," the police department was more than justified in refusing employment to an openly gay man.[82]

Thus, First Amendment case law provides an alarming amount of latitude for stifling gay and lesbian expression by empowering courts to define what "expression" is; conduct may be unprotected if the court feels that it does not merit protection. We see in the military cases and in the *Childers* case a consistent pattern of denying First Amendment protection to gays and lesbians the moment they declare their homosexuality. Such statements are not statements in the eyes of the courts but *acts* unworthy of constitutional protection.[83]

However, even assuming, as we really ought not do, that the characterization of such statements as conduct is logically correct, surely there is room within First Amendment jurisprudence for the safeguarding of certain types of conduct when it is deemed sufficiently political or expressive of a minority viewpoint. In a judicial universe where the *act* of sleeping on a park bench outdoors may be considered a form of political protest against homelessness,[84] where the *act* of distributing leaflets is constitutionally defensible,[85] and where the *act* of a civil rights boycott is

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79 Able v. United States, 155 F.3d 628, 634 (2d Cir. 1998).

80 Childers v. Dallas Police Dep't, 513 F. Supp. 134, 139 (N.D. Tex. 1981).

81 *Id.* at 142.

82 *Id.* The court distinguished this case of "publicly advocating homosexuality" from other cases where homosexual persons were refused employment on the basis of privately practiced homosexuality. Evidently, the court did not find any equal protection or other constitutional problems with sanctioning discrimination against vocal homosexuals but not against those who remain closeted.

83 *See* JUDITH BUTLER, EXCITABLE SPEECH: A POLITICS OF THE PERFORMATIVE 128 (1997) ("To claim that certain speech is not speech and, therefore, not subject to censorship is already to have exercised the censor.").

84 Clark v. Community for Creative Non-Violence, 468 U.S. 288 (1984).

85 United States v. Grace, 461 U.S. 171 (1983); Schneider v. Irvington, 308 U.S. 147 (1939).

protected as social activism,[86] why is it that the *act* of identifying oneself as a homosexual is not protected conduct? If we grant First Amendment scrutiny and protection to acts that constitute expression of a disfavored position,[87] why would we not recognize in a courtroom what is sadly true outside of it, that homosexuality is a "disfavored" life choice in today's society, one whose advocates are persecuted every day?[88]

Courts today, with rare exceptions, merely nod in the direction of the need for heightened First Amendment protection homosexual expression. They acknowledge that homosexuals are persecuted for speaking out and they concede the implication of First Amendment issues but then find some way to rationalize extending less protection to gay and lesbian expression than to other forms of speech (e.g., "it's obscene" or "it's conduct, not speech."). Thus, in the disfavored categories of First Amendment protection, expression by gays and lesbians is often *more* disfavored than other types of expression.

B. HISTORICALLY PROTECTED SPEECH

Having examined several areas of disfavored speech, I will now discuss two areas of speech the First Amendment is most designed to protect, or those categories of speech within which courts are least likely to tolerate restrictions. Legal commentators, as well as the Supreme Court, have declared the "central meaning" of the First Amendment to be "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open."[89] Justice Brandeis viewed freedom of speech as "indispensable to the discovery and spread of political truth."[90] Of course, political speech is not the only form of speech that is protected and for this reason, some argue that the politically based theory of the First Amendment is a hollow one.[91] However, there can be no doubt that if the First Amendment was not designed to protect only political speech, it was certainly designed to protect primarily political speech. For that reason, if for no other, courts are reluctant to censor speech that can reasonably be characterized as political. Full

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86 NAACP v. Claiborn Hardware Co., 458 U.S. 886 (1982).

87 TRIBE, *supra* note 59, at 827-28.

88 *See supra* note 9.

89 New York Times Co. v. Sullivan, 376 U.S. 254, 270, 273 (1964). This politically-centered view of the First Amendment harmonized perfectly with that of contemporary commentators who likewise felt that "the principle of freedom of speech . . o is a deduction from the basic American agreement that public issues shall be decided by universal suffrage." ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM 27 (1960).

90 Whitney v. California, 274 U.S. 357, 375 (1927).

91 *See* SHIFFRIN, *supra* note 4, at 49 ("Either a politically based theory excludes speech such as literature which virtually everyone (including the Founders) agrees is deserving of protection, or, by making adjustments to include such speech, it is unable to justify a stopping point.").

First Amendment protection is also generally accorded to art and literature, including live performances, films and photographic exhibitions.[92]

1. *Performance*

In light of the societal and jurisprudential trends mentioned thus far, the case law on performance issues under the First Amendment yields few surprises. As we might expect, nude dancing and pornographic staging, films and/or literature depicting heterosexual, bisexual *or* homosexual sex acts are not accorded First Amendment protection[93] although there have been some interesting variations on this theme.[94] Among the more interesting are those cases which denounce sexually explicit performance as obscene while at the same time conveying a particular distaste for homosexual sex acts.[95] In so doing, individual members of the judiciary simply reveal the bias toward gays and lesbians so prevalent in the rest of society. Nonetheless, while it may consider performances of homosexual sex acts to be more obscene than those of heterosexual sex acts, the judiciary has consistently and repeatedly refused to extend heightened First Amendment protection to sexual performance of *any* flavor and seems unlikely to alter this view anytime soon.

The courts have been more hesitant to withdraw First Amendment protection from other types of performance despite their designation as "obscene" or "offensive." The Supreme Court, for example, required the city of Chatanooga to allow a performance of "Hair" to proceed in its municipal theater, holding that the city's ban on the musical was an unconstitutional prior restraint on free expression.[96] The Fourth Circuit prohibited censorship of a police officer who performed an Al Jolson routine in "blackface" at a local tavern while off-duty, despite the fact that such performances were offensive to African-Americans in the community in which the officer served.[97] A California court refused to impose damages upon Ozzy Osborne's record label when a nineteen-year-

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92 Schad v. Borough of Mt. Ephraim, 452 U.S. 61, 65 (1981).

93 *See, e.g.*, Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991); Curtis v. City of Seattle, 639 P.2d 1370 (Wash. 1982); Misleh v. State, 799 P.2d 631 (Ct. Crim. App. Okla. 1990).

94 *See, e.g.*, Midtown Palace, Inc. v. City of Omaha, 229 N.W. 2d 56, 59 (Neb. 1975) (upholding revocation of a liquor license based on nude dancing, yet noting that nude dancing per se is not "obscene"); People v. Bercowitz, 308 N.Y.S. 2d 1, 15 (N.Y. Crim. Ct. 1970) (Schwalf, J., dissenting) (arguing that an off-off Broadway production replete with both homosexual and heterosexual sex acts, cannot be found constitutionally "obscene" because the play "presented ideas").

95 *See, e.g.*, Huffman v. United States, 470 F.2d 386, 391 (D.C. Cir. 1972) (referring to photographs of lesbian "homosexual activities" as "deviant" and employing the use of a psychiatrist to attest to the "prurient interests of Lesbians"); Mishkin v. New York, 383 U.S. 502, 505 (distinguishing "normal heterosexual relations" from "such deviations as . . . homosexuality").

96 Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975).

97 Berger v. Battaglia, 779 F.2d 992 (4th Cir. 1985).

old, inspired by Osborne's lyrics, committed suicide.[98] The court reasoned that "[t]he deterrent effect of subjecting the music and recording industry to such liability because of their programming choices would lead to a self-censorship which would dampen the vigor and limit the variety of artistic expression."[99]

Publicly funded performances pose special First Amendment problems. The Supreme Court has remained deferential to First Amendment principles while acknowledging the practical impossibility of gratifying every applicant for arts funding.[100] The Court seems to struggle with reconciling the inevitable subjectivity of a selection process that *must* deny funding to some applicants with the potential for unfair manipulation of selection criteria that could lead to suppression of minority viewpoints.[101] However, where the issue was one of allocating the resources of a *private* funding entity, the Court had no problem upholding the private entity's discriminatory decisions. In *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, the Court found that forcing a private St. Patrick's Day parade sponsor to allow a group of Irish-American gays and lesbians to march in the parade would violate the First Amendment rights of the *sponsors* to choose the content of the communication they sought to convey through their event.[102]

The courts have generally afforded constitutional protection to performances promoting or supporting homosexuality. In *Cinevision v. City of Burbank*, the Ninth Circuit unabashedly denied the city of Burbank the

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98 McCollum v. CBS, Inc., 202 Cal. App.3d 989 (1988).

99 *Id.* at 1003.

100 For example, in subduing a facial First Amendment challenge to the subjective selection criteria for the National Endowment of the Arts, the Supreme Court cautioned that "[i]f the NEA were to leverage its power to award subsidies on the basis of subjective criteria into a penalty on disfavored viewpoints, then we would confront a different case. We have stated that, even in the provision of subsidies, the Government may not 'aim at the suppression of dangerous ideas.'" Nat'l Endowment of the Arts v. Finley, 118 S.Ct. 2168, 2178 (1998), *quoting* Regan v. Taxation With Representation of Washington, 461 U.S. 540, 550 (1983). Frighteningly, Justice Scalia, in a concurring opinion in this case, had no problem explicitly stating what the majority did not – that denying NEA funds to "indecent and disrespectful art" is perfectly acceptable under the Constitution. *Id.* at 2182-83. Scalia describes the recent artistic endeavors of the plaintiffs, two of whom use monologues to express their personal experiences as homosexuals. While Justice Scalia's opinion is disturbing, a reading of the majority's opinion does not confirm his assertions. Were one of the plaintiffs in this case to have been denied funding solely because that person's chosen form of expression represented a minority viewpoint, the majority makes it clear that funding decision would be a ". . .pressing constitutional question" to which the Court would give serious consideration. *Id.* at 2178.

101 *Id.* at 2177, 2178. *See also* Advocates for the Arts v. Thomson, 532 F.2d 792 (1st Cir. 1976) (grappling with these same concerns with regard to a grant refusal of a literary magazine that a state Governor determined to be "obscene").

102 Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, 515 U.S. 557, 572-73 (1995). Interestingly, the Supreme Judicial Court of Massachusetts did find in favor of the marchers, reasoning that the First Amendment rights of the parade organizers would not be violated since the parade had no real expressive purpose. *Id.* at 563.

right to ban certain rock groups' concerts "because members of the [Burbank City] Council thought that their performances would attract homosexual crowds."[103] The court's words were a welcome endorsement of openness and tolerance: "Excluding a performer because of his [sic] political view, or those of the crowd that he [sic] might attract, or because the performer might say unorthodox things, as well as considering such arbitrary factors as the lifestyle or race of the crowd that a performer would attract, is not constitutionally permissible."[104] Neither does the First Amendment permit subjective judgments of the performative value of gay and lesbian expression to stifle that expression.[105]

2. *Political Speech*

As mentioned above, the category of political speech, or speech that relates to public issues, may be expanded to include speech that might not appear expressly political but which nonetheless "contribute(s) to the sophistication and wisdom of the electorate."[106] The Supreme Court has given content to this idea. In holding that wearing a jacket inscribed with the words "Fuck the Draft" was protected by the First Amendment,[107] the Court described freedom of expression as

> . . .putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests.[108]

Federal and state courts have remained true to this approach in large part, protecting even unpopular or minority viewpoints (like those of gays and lesbians) whose expression is deemed in any way to be political. For example, homosexual expression in the press has been extended

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103 Cinevision v. City of Burbank, 745 F.2d 560, 576 (9th Cir. 1984).

104 *Id.* at 577.

105 Norma Kristie, Inc. v. City of Oklahoma City, 572 F. Supp. 88, 91 (W.D. Okla. 1983) (ordering defendants to allow the "Miss Gay America Pageant" to proceed in their hall over objections that the pageant was not an artistic endeavor. "Such judgment is subjective. While this Court may agree that such a 'pageant' may not rise to the level of artistic endeavor that 'Hair' or 'La Cage aux Folles' represent, it is still expression. Defendants have failed to produce evidence, authority or argument that evaluations of the degree of 'art' in entertainment make a difference in the extent of constitutional protection. The First Amendment is not an art critic.").

106 TRIBE, *supra* note 59, at 787.

107 Cohen v. California, 403 U.S. 15, 17 (1971).

108 *Id.* at 24.

First Amendment protection as a form of political speech.[109] A "Gay Liberation Special" featured in a newspaper was protected "expression of political and social opinion" even where the publication also contained nude photographs of men and "discussion of sexual activity."[110] Other courts have held that educators may not be fired for statements made to the press in support of homosexuality.[111] In some cases, the expression of homosexual status itself has been acknowledged as a political statement worthy of First Amendment protection.[112] For example, the Maryland district court held that a homosexual teacher's employment status could not be altered on the basis of his self-identification as a homosexual, opining that "the time has come today for private, consenting, adult homosexuality to enter the sphere of constitutionally protectable interests."[113] Another district court held that a homosexual high school se-

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[109] It is important to note, however, that such protections only extend to printed speech when the denial of protection constitutes state action. *See* Sinn v. The Daily Nebraskan, 829 F.2d 662 (8th Cir. 1987) (denying First Amendment protection to plaintiffs advertising for roommates when a university newspaper refused to print their sexual orientation on the ground that the newspaper's refusal was not "state action").

[110] Kois v. Breier, 312 F.Supp. 19, 24 (E.D. Wis. 1970).

[111] Aumiller v. Univ. of Delaware, 434 F. Supp.1273 (D.Del. 1977). In this case, a non-tenured lecturer had been fired from his position at the University of Delaware based upon statements he made in support of homosexuality that had been published in three newspapers. The court reasoned that "the fundamental purpose of the First Amendment is to protect from State abridgement the free expression of controversial and unpopular ideas." *Id.* at 1301. The court did concede that the University of Delaware could have surmounted the constitutional hurdle had it demonstrated that Aumiller's statements in support of homosexuality were false or recklessly made, impeded his job performance, violated an express need for confidentiality, etc. Nonetheless, the fact that the court did not seize upon any of the University's arguments in these areas when they might have done so speaks volumes.

[112] *But see* Tester v. City of New York, No. 95 Civ. 7972 (LMM), 1997 U.S. Dist. LEXIS 1937 (S.D.N.Y. Feb. 21, 1997) (holding that a gay police officer's First Amendment claim based upon repeated harassment by fellow officers could not be sustained because the "mere fact of Tester's sexual status does not constitute expression"). Interestingly, some courts are loath to extend First Amendment protection to those who express *opposition* to homosexual status. *See* Lumpkin v. Brown, 109 F.3d 1498 (9th Cir. 1997) (upholding the removal from the San Francisco Human Rights Commission of a conservative Reverend who had publicly advocated against homosexuality: "the First Amendment does not assure him job security when he preaches homophobia while serving as a City official charged with the responsibility of 'eliminat[ing] prejudice and discrimination'") *Id.* at 1500.

[113] Acanfora v. Board of Ed., 359 F. Supp. 843, 851 (D.Md. 1973). Apparently, however, in 1973 the time had not come to allow open endorsement of homosexuality on national television. The court held that, while Acanfora's transfer was inappropriate, so was his response of taking "his case to the people" by appearing on several television and radio shows to protest the injustice of his treatment by the school board. *Id.* at 856. However, the court was careful to note that "if private, consenting adult homosexuality is 'protectable,' it follows from the First Amendment that public speech, organization and assembly in support of that goal by ordinary citizens is also protectable." *Id.* at 854. Nonetheless, the court felt that, as a teacher, Acanfora was "not at liberty to ignore or hold in contempt the sensitivity of the subject to the school community" and therefore should have restrained his public protests to the minimum necessary to his self-defense. *Id.* at 856-57. In this respect, the court seems to want to have its cake and eat it too, i.e., recognize the right to speak out on homosexuality but only in limited

nior had a First Amendment right to attend the senior prom with a member of the same sex since this would be a "political statement."è[14] The right of gays and lesbians to associate for purposes of political advocacy is also protected by the First Amendment. Universities, for example, must recognize "'pro-homosexual' political organization[s] advocating a liberalization of legal restrictions against the practice of homosexuality"[115] and may not impinge upon the right of association of such groups because they "represent but another example of the associational activity unequivocally singled out for protection in the very 'core' of association cases decided by the Supreme Court."[116] Governmental agencies must likewise protect the rights of homosexuals to associate. In *Lesbian/Gay Freedom Day Committee, Inc. v. United States Immigration and Naturalization Service*, a California district court overturned the INS policy of excluding homosexual aliens from visiting the United States in order to attend a gay rights advocacy event in San Francisco.è[117] The right of expressive association can also cut the other way: the supreme court of New Jersey, for example, has held that the inclusion of gays and lesbians within a group that would prefer to exclude them does *not* violate the group members' First Amendment rights.[118]

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circumstances. Still, the court did acknowledge First Amendment protection for the status of homosexuality itself as a necessary component of the freedom of thought "imperative for self-development and social progress.ö *Id.* at 850. *But see* Rowland v. Mad River Local Sch. Dist., 730 F.2d 444, 449 (6th Cir. 1984) (denying First Amendment protection to a bisexual teacher who admitted her sexual orientation to several colleagues and was then fired). Ironically, in *Rowland*, the court rejected the First Amendment argument because the plaintiff's comments were not a matter of "public concern.ö *Id.* at 449. Yet when Mr. Acanfora attempted to make the issue one of public concern by speaking out in the media, that speech was deemed constitutionally disfavored for lack of discreetness. *See also* Nat'l Gay Task Force v. Board of Ed. of Okla. City, 729 F.2d 1270 (10th Cir. 1984) (upholding a state statute permitting the dismissal of public school teachers for "public homosexual conductö). Note that, in each of these instances, the courts might have construed any statements or conduct regarding a homosexual or bisexual orientation as constitutionally protected political speech.

114 Fricke v. Lynch, 491 F. Supp. 381,o385 (D.R.I. 1980).

115 Gay Alliance of Students v. Matthews, 544 F.2d 162, 164 (4th Cir. 1976). *See also* Gay Student Services v. Texas A&M Univ., 737 F.2d 1317 (5th Cir. 1984); Gay Lesbian Bisexual Alliance v. Sessions, 917 F. Supp. 1558 (M.D. Ala. 1996).

116 Gay Students Org. of the Univ. of N.H. v. Bonner, 509 F.2d 652, 660 (1st Cir. 1974).

117 541 F. Supp. 569 (N.D. Cal. 1982). The court recognized the event's purposes of sharing "information and ideas relating to the laws and attitudes regarding homosexuality in other countriesö with a view toward gaining "greater public acceptance for homosexual persons in the United Statesö as "well-recognized and compelling First Amendment arguments.ö *Id.* at 587.

118 Dale v. Boy Scouts of Am., 734 A.2d 1196, 1223 (N.J. 1999) (holding that the presence of a homosexual Boy Scout leader did not violate the organization's right to freedom of association because "members do not associate for the purpose of disseminating the belief that homosexuality is immoralö). *But see* Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, 515 U.S. 557 (1995) (holding that compelling a private group to permit Irish-American homosexuals to march in their parade would impose an unconstitutional con-

The judiciary's record on protecting the political speech of gays and lesbians is far from perfect but, overall, it is much better than the degree to which First Amendment protection is extended to many other areas of speech. It is also important to remember that political speech is not universally protected with regard to other groups either. While burning a flag in times of peace may be protected speech,[119] burning a draft card in times of war is not.[120] Nudity may be constitutionally protected as a form of artistic expression, yet not all jurisdictions will tolerate it as a form of political protest.[121]

The above picture of First Amendment jurisprudence confirms the obvious. Gay and lesbian expression is most likely to be sublimated when the court can relegate it to a subjectively determined category of disfavored speech and it is most likely to be defended when identified as political or performative in nature. In light of these realities, the strategy for widening the constitutional shield of gay and lesbian expression must appear equally obvious – get more courts to recognize homosexual expression as political or performative more often. A simple goal, but how does one guide it through the maze of First Amendment jurisprudence?

PART II: A MODEST PROPOSAL

A. REJECTING A NEW STANDARD OF REVIEW

At least one other commentator has suggested that the key to expanded protection for homosexual expression lies in revising the standard of review for First Amendment claims.[122] Brent Hunter Allen argues for a "hybrid" objective and subjective standard that would protect the speech of the counter-majority by forcing courts to "value those views as the speaker values them."[123] He feels that forcing the judiciary to analyze the quality of expressive speech from the point of view of the gay or lesbian speaker will lead to faster and more effective progress in the constitutional shielding of that speech.[124] The subjective component of Hunter Allen's standard (i.e., examining the expression from the expresser's point of view) would be balanced by an objective analysis: courts would be free to assess the available alternatives to the chosen

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tent-based restriction on the expression the private group sought to promote). *See supra* note 102 and accompanying text.

119 United States v. Eichman, 496 U.S. 310 (1989).

120 United States v. O'Brien, 391 U.S. 367 (1968).

121 State v. Turner, 382 N.W.2d 252 (Minn. Ct. App. 1986) (upholding defendant's conviction for violating a public nudity statute as a valid exercise of police power to uphold societal norms despite the fact that defendant appeared publicly topless as a form of political protest).

122 Brent Hunter Allen, *supra* note 37, at 1103-04.

123 *Id.* at 1103.

124 *Id.*

form of expression and deny protection to "fringe forms of expression" where they could be "communicated as effectively in a more traditional form."[125] The court would thus retain discretion to determine what expression is, what "fringe expression" is, and how such messages would best be conveyed. In practice then, Hunter Allen's "hybrid standard" might be better termed a "reasonable homosexual" standard in that, if the court feels that a "reasonable homosexual" would express herself in a form other than that at issue, it may deny the speech protection.[126]

Understood in this way, I find Hunter Allen's approach unsatisfying for the same reasons others have found the "reasonable woman" standard in sexual harassment cases to be ineffective and even harmful to women.[127] In assessing whether the individual might have pursued a more "traditional" avenue of expression, Hunter Allen invites a judiciary composed of predominantly white, heterosexual men to develop a set of generalizations about the appropriate limits of expression for the reasonable homosexual. But how would these generalizations be made? Would the courts consult "expert witnesses" on homosexuality as they consult medical experts or others who have specialized knowledge outside of the judiciary's realm of experience? Who would such experts be? Psychologists? Psychiatrists? More likely the courts would apply their own conceptions of the "reasonable homosexual" which would more often than not be based on an individual judge's understanding of the community's standards of reasonableness, rather than personal experience as a gay or lesbian individual.[128] But whether the judge applies his or her own point of view or that of an "expert," the same problem ensues. The "reasonable homosexual" standard generalizes and limits the expressive possibilities for a group of people for whom "reasonable" expression takes on a variety of forms. In effect, it essentializes homosexual expression.[129]

Allen's proposal thus risks further enshrining existing biases and prejudices against the gay and lesbian community as "reasonable" and provides judges with additional ammunition to legally enforce the closet-

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125 *Id.* at 1104.

126 Hunter Allen argues that the objective prong of his test be used to determine only if alternative forms of the expression existed rather than to judge their reasonableness. *Id.* However, in assessing the alternatives to "coming out," for example, a court might be free to determine that an alternative forum to "coming out" publicly at work might be "coming out" at a private dinner party in one's home, thus effectively branding the former mode of expression "unreasonable" and the latter "reasonable."

127 Kathryn Abrams, *Social Construction, Roving Biologism, and Reasonable Women: A Response to Professor Epstein*, 41 DEPAUL L. REV. 1021, 1032-37 (1992).

128 *Id.* at 1033 (indicating a similar problem with judges applying the "reasonable woman" standard to sexual harassment claims since "the vast majority of federal judges hearing sexual harassment claims are white males").

129 *Id.* at 1035 (describing the critique of the "reasonable woman" standard as "falsely essentializ[ing] women").

ing and covering of homosexuality. Will holding the hand of a same-sex partner while walking down the street be considered protected speech or deemed an "unreasonable" alternative to confining such displays of affection to the home?[130] How about the expressive act of "coming out?" As discussed above, at present, the act of "coming out" in the military is denied constitutional protection in part because it is considered conduct rather than pure speech.[131] Would a "reasonable homosexual" come out only privately among friends rather than at work? Allowing courts to make such decisions would invest them with too much power to superimpose the majority viewpoint onto the counter-majority. Application of Allen's hybrid standard by today's judiciary, serving as it does as a microcosmic reflection of the biases and partialities of society as a whole, will not result in greater protection of gay and lesbian expression.

B. EVERYTHING OLD CAN BE NEW AGAIN: RE-EXAMINING EXISTING FIRST AMENDMENT STANDARDS

Rather than asking judges to apply a new standard of review that remains infused with the subjectivity of the old, I propose a re-characterization of complaints within existing First Amendment jurisprudence so as to remind the judiciary that application of the *existing* standard of review requires that First Amendment protection be afforded to many forms of lesbian and gay expression. As indicated earlier, courts generally are most receptive to homosexual (or any other type of) expression that is performative or political in nature. But what courts have failed to recognize in most cases is that "homosexuality is today essentially a form of political, social, and moral dissent on par with the best American traditions and even subversive advocacy."[132] As such, almost every act for which a homosexual individual might seek First Amendment protection, from holding the hand of a same-sex partner to publishing an editorial denouncing "gay-bashing," is a form of political expression. Furthermore, most of those same acts can also be characterized as performative. Just as we all may be said to "perform" the "gender roles"[133] assigned to us, so too do homosexuals "perform" their sexual orientation. And every gay or lesbian person who boldly "performs" his

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130 This hypothetical was mentioned in Hunter Allen's article as a "criticism of society's sexual beliefs and expectations . . . an assault on those who condemn the gay lifestyle . . ." Brent Hunter Allen, *supra* note 37, at 1102.

131 *See supra* notes 64-79 and accompanying text.

132 Brent Hunter Allen, *supra* note 37, at 1074.

133 JUDITH BUTLER, GENDER TROUBLE, FEMINISM AND THE SUBVERSION OF IDENTITY 134-141 (1990). Sarah Chinn points out that Butler later attempted to distinguish gender performances from theatrical productions. *See* Sarah E. Chinn, *Gender Performativity, in* LESBIAN AND GAY STUDIES, A CRITICAL INTRODUCTION (Andy Medhurst & Sally R. Munt, eds., 1997). Nonetheless, I do not think Butler would quarrel with a characterization of gender performance as a political statement if not a theatrical one.

or her sexual orientation launches a personal attack on the heterosexual norm as well as on the stereotypical perceptions of homosexuality. Such performances are no less performances than those put on at the "Miss Gay America pageant"[134] and no less political statements than a "Gay Liberation Special"[135] published in a newspaper. Because the performative element of homosexual expression is so inextricably bound up with its political message of challenging heterosexual normativity, we may use the performative and the political interchangeably almost as if they were synonymous (the performative expression discussed herein is political and the political is performative.)[136]

The term "performativity" was first used in academic study by the linguistic philosopher J.L. Austin[137] who distinguished performative language from merely descriptive language. Austin asserted that performative language "indicates that the issuance of the utterance is the performing of an action – it is not normally thought of as just saying something."[138] Examples include the agreement to marry as performed by the words "I do"[139] or the transference of ownership of a thing as performed by the words "I bequeath" in a will.[140] Each of these performative phrases not only describes the act in question but actually *does* the act in the sense that, without the utterance, the act would be incomplete or impossible. Such performances signify what people do because we as a society have already accepted the performances as natural, separate and apart from the performer or the performance; that is, when the groom says "I do," it means something because it has meant something in the past.[141] Other philosophers tell us that the meaning we attach to performative language and the reason we perform it derives from the self as socially constructed through institutions such as the legal system, religion and the family.[142]

Judith Butler has applied these ideas specifically to the construction of gender identity, noting that "gender" is an act in the same way that

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134 *See supra* note 105, at 90.

135 *See supra* note 110 and accompanying text.

136 The linkage of these two concepts is not uncommon and even appears in the title of a previously cited Judith Butler work. *See supra* note 83. *See also* JOSE ESTEBAN MUNOZ, DISIDENTIFICATIONS: QUEERS OF COLOR AND THE PERFORMANCE OF POLITICS (1999).

137 J.L. AUSTIN, HOW TO DO THINGS WITH WORDS (J.O. Urmson & Marina Sbisá eds., 2d ed. 1975).

138 *Id.* at 6-7.

139 *Id.* at 12-13.

140 *Id.* at 5.

141 JACQUES DERRIDA, LIMITED, INC. (Alan Bass trans., Northwestern Univ. Press 1988) (1972).

142 Chinn, *supra* note 133, at 297-98 (describing the work of Louis Althusser and Michel Foucault).

performative language is a speech act.[143] Each individual generally performs the "gender" assigned to him or her at birth (e.g. "it's a girl") in a seemingly natural way but in reality, there is "no subject underneath the gender, no universal self. Rather, the self is constructed through its strenuous performance of gender."[144] The performances of the gendered "male" and "female" continually replicate heterosexuality as the societal norm.[145] Therefore, when homosexuals contradict these normative performances, as when drag queens misperform their gender[146] for example, they are exposing gender as a construction.[147] Similarly, homosexual marriage ceremonies expose heterosexual marriage as a convention designed to reinforce the heterosexual norm.[148] I would argue that this performative aspect extends beyond gay marriage ceremonies and performances in drag. Virtually every public act of an openly gay or lesbian individual that is done in deliberate acknowledgement and celebration of that person's same-sex orientation[149] constitutes a performance that subverts heteronormativity and is, therefore, the very type of speech the First Amendment was most designed to protect. Such performances "can be experienced as an attack on the subject; baldly speaking, it makes people uncomfortable and they don't like it."[150] Thus, identifying oneself as a homosexual and performing that identity in an open and self-conscious manner is without question a political statement.

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143 Butler, *supra* note 133, at 25 ("There is no gender identity behind the expressions of gender; that identity is performatively constituted by the 'expressions' that are said to be its results.ö)

144 Chinn, *supra* note 133, at 300.

145 *Id.*

146 Jose Esteban Munoz would call such performances "disidentifications.ö *See supra* note 136, at 5-8.

147 Chinn, *supra* note 133, at 300-01 ("By performing gender in a hyperbolic, stylized way, drag queens don't simply imitate femininity, they reveal how women imitate femininity as well, and what hard work it is. Through parody, drag can expose the seeming naturalness and effortlessness of gender itself; it doesn't imitate an original, but reveals that there is no original, only layers of performance. Drag says, 'If you think my pretending to be a woman is hard, think what an effort it must be for a woman to do.'ö).

148 Chinn is careful to point out the ways in which such performances designed to subvert the heterosexual norm also reinforce it. For example, when the clearly "butchö man dresses in drag, he might appear ridiculous, thus reinforcing the notion that men are not "supposedö to act in that manner. *Id.* at 301.

149 Obviously, not *every* act of a homosexual's life is a performance protected by the First Amendment. For example, no gay or lesbian individual could reasonably pronounce the brushing of his or her teeth in the morning to be a constitutionally protected political performance of homosexuality. However, the political/performative model has tremendous potential to expand the range of homosexual speech and conduct that is perpetrated in deliberate defiance of the heterosexual norm. Brushing one's teeth does not constitute a counter-performance to the heterosexual norm but kissing a same-sex partner in public certainly does.

150 Chinn, *supra* note 133, at 301-02.

Since political speech is accorded the greatest degree of deference by the judiciary,[151] recognition of homosexual expression as political speech would alter the outcomes of many of the cases discussed above. For example, those instances where the First Amendment claims of homosexuals were disregarded on the basis that "mere status does not constitute expression"[152] would clearly be untenable in a judicial system that recognized homosexual status itself as a form of constitutionally protected political speech. Further, the application of the political/performative model would invalidate cases that *have* acknowledged a homosexual's right to *be* homosexual but not the right to draw attention to that status where doing so would offend the sensitivities of the community.[153] Political speech is protected under the First Amendment regardless of whether it offends.[154] Thus, forcing a gay or lesbian person to cover his or her homosexuality by abstaining from its public expression would no longer be constitutionally permissible.

Even conduct, which has traditionally been granted less constitutional protection than pure speech,[155] would have to be safeguarded if characterized as political. The constructed distinction between homosexual conduct and homosexual speech, used to uphold the military's "don't ask/don't tell" policy,[156] would thus disintegrate if homosexual conduct was revealed as a form of political expression – a counter-performance to the expected gender norms scripted by society. If, as Professor Tribe argues, the First Amendment protects conduct closely linked with expression,[157] then surely conduct that is itself synonymous with the expression must be protected under the First Amendment. Distinctions between "pure speech" and "conduct" simply no longer matter when the self-identifying actions of gays and lesbians are recognized as political expression.

The potential ramifications of a judiciary willing to fully embrace the concept of lesbian and gay expression as political/performative are quite significant. For example, courts might begin to realize that, if homosexual conduct is a constitutionally protected form of political expression, then anti-sodomy laws must be invalidated.[158] Of course, the

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151 *See supra* notes 106-121 and accompanying text.

152 Tester v. City of New York, No. 95 Civ. 7972 (LMM) 1997 U.S. Dist. LEXIS 1937 (S.D.N.Y. Feb. 21, 1997). *See supra* note 112.

153 *See supra* note 113 and accompanying text.

154 *See supra* notes 106-121 and accompanying text.

155 *See supra* notes 59-63 and accompanying text.

156 *See supra* notes 64-79 and accompanying text.

157 *See supra* notes 61-62 and accompanying text.

158 Indeed, since some commentators have gone so far as to suggest an equation between the act of sodomy and homosexual identity, anti-sodomy laws would have to be struck down under a theory that protected homosexual identity as political speech. *See* Janet E. Halley, *Reasoning About Sodomy: Act and Identity In and After* Bowers v. Hardwick, 79 VA L.

Supreme Court has, rather recently, refused to recognize anti-sodomy laws as unconstitutional,[159] and it is unlikely to invalidate statutes prohibiting sodomy in the short term. But, hopefully, in the near future, more courts will at least acknowledge that speech describing the homosexual lifestyle cannot be banned as obscene;[160] that an interest in discouraging homosexual relations cannot be deemed an adequate basis for censoring homosexual speech;[161] and that in general, "performing" one's homosexual identity should be a constitutionally protected form of political expression.

Of course, to ask the judiciary to protect speech that has hitherto been characterized as too private,[162] too obscene,[163] too conduct-oriented[164] or too something-else-other-than-speech[165] to warrant First Amendment protection, is to ask the legal system to shed biases against homosexual expression that have inspired it to shut down gay and lesbian speech in the past. If we do not believe the judiciary would be willing to do this when applying Brent Hunter Allen's "reasonable homosexual" standard, why should we expect they might agree to do so in applying an expansive conception of the political/performative test?[166] While it would be naïve enough to think that the majority of the bench will cast off their homophobic blinders immediately upon being told that we all "perform" our gender and that the counter-performances of the homosexual community must therefore be viewed as a form of political protest, there is good reason to hope that *some* will because some already have.

REV.1721, 1737 (1993) ("Sodomy in these formulations is such an intrinsic characteristic of homosexuals, and so exclusive to us, that it constitutes a rhetorical proxy for us.").

159 Bowers v. Hardwick, 478 U.S. 186 (1986) ("[R]espondent would have us announce, as the Court of Appeals did, a fundamental right to engage in homosexual sodomy. This we are quite unwilling to do.").

160 *See supra* notes 50-51 and accompanying text.

161 *See supra* notes 53 and accompanying text.

162 *See supra* note 109.

163 *See supra* note 50 and accompanying text (Ninth Circuit case that characterized as obscene an article describing a woman's experience as a lesbian, equating it with "cheap pornography.").

164 *See supra* notes 67-69 and accompanying text (cases upholding homosexual ouster from the military as constitutional because based on conduct rather than statements acknowledging homosexual orientation).

165 *See, e.g., supra* note 112 (case holding that sexual status alone does not constitute constitutionally protected expression).

166 Allen would likely disagree with my approach as yet another attempt to "bombard the courts with images of homosexuality" until the majority finally recognizes it as an acceptable form of expression. He finds this distasteful because it "mirrors and reasserts the majoritarian process" and because it takes too long to achieve. Brent Hunter Allen, *supra* note 37, at 1103. However, as mentioned above, I believe that his proposal too requires the approval of the majority in order to be effective. Until (if ever) a true subjective standard for homosexual expression can be implemented, I believe my proposal stands a better chance of being embraced more quickly by a judiciary so firmly steeped in traditional modes of First Amendment analysis.

Recall the District Court of Rhode Island's designation of a same-sex public date as constitutionally protected political expression.[167] Recall the Western District of Oklahoma's refusal to stamp out the "artistic expression" represented by a national contest of female impersonators despite the fact that the event might "be an open expression of homosexuality" in violation of "community standards."[168] Recall the District of Maryland's ruling that a homosexual teacher's profession of homosexual status is a "constitutionally protectable interest."[169] In short, unlike the application of the "subjective/objective hybrid" standard, there is already valid precedent in support of the proposition that homosexual expression is protected political/performative speech under the First Amendment. Therefore, I propose that future litigants force an expanded application of such precedent by arguing more often and more explicitly that gay and lesbian expression is political/performative in nature. This is not pushing the envelope of "free speech" jurisprudence so much as simply asking the judiciary to return to the corners of the envelope it has already explored.

CONCLUSION

The First Amendment is one of the most powerful legal tools available to disfavored, dissenting voices of this country. It has been used to protect neo- Nazi demonstrations,[170] racist and anti-Semitic speech at Ku Klux Klan rallies,[171] political acts that serve as statements such as the burning of the American flag,[172] and the burning of crosses on the lawns of African-Americans.[173] Speech is power. Extending expanded constitutional protection to homosexual expression means granting gays and lesbians that power and acknowledging them as part of the "human community"[174] whose contributions to the marketplace of ideas are worthy of

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167 Fricke v. Lynch, 491 F. Supp. 381, 385 (D.R.I. 1980). *See supra* note 114 and accompanying text.

168 Norma Kristie, Inc. v. Oklahoma City, 572 F. Supp. 88, 90 (W.D. Okla. 1983). *See supra* note 54.

169 Acanfora v. Board of Ed., 359 F. Supp. 843, 851 (D.Md. 1973). *See supra* note 113. Recall also that when a court *did* try to apply something similar to Hunter Allen's proposed standard, the second circuit immediately overturned it. *See supra* note 78 and text (In holding "don't ask, don't tell" as unconstitutional, Judge Nickerson for the Eastern District of New York said "a court should ask itself what it might be like to be a homosexual.").

170 Collin v. Smith, 578 F.2d 1197 (7th Cir.), *cert. denied*, 439 U.S. 916 (1978).

171 Brandenburg v. Ohio, 395 U.S. 444 (1969).

172 Street v. New York, 394 U.S. 576 (1969).

173 R.A.V. v. St. Paul, Minnesota, 505 U.S. 377 (1992).

174 RICHARD DELGADO & JEAN STEFANCIC, MUST WE DEFEND NAZIS? HATE SPEECH, PORNOGRAPHY AND THE NEW FIRST AMENDMENT 141 (1997) (Speaking of civil rights and feminist activists, the authors state the following: "The leaders of the reform movements just mentioned were asking for more than better treatment in material respects for certain people or things. They were also asking that terms like human, creature, decent, good, nice, precious,

respect, the same respect we already accord to racists, hate-mongers, and anti-patriots. Securing this respect need not require the special treatment of a new judicial standard. No new rules of the game need be devised, for the existing rules are more than sufficient to safeguard the First Amendment rights of gays and lesbians. Litigants need only show the judiciary what a few of their number have already conceded, that the existing protections for political and performative speech must be extended more broadly to cover more forms of homosexual expression.

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and worthy of respect apply to them. In short, they were asking for membership in the human community. Respectful speech . . .oindicates the degree to which we accept that person's humanity.").