

## The Public Expression of Lesbian/Gay Personhood as Protected Speech

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### I. The Problem

Lesbians and gays<sup>1</sup> in the United States, because of their sexual orientation,<sup>2</sup> are routinely denied rights unquestioningly accorded heterosexuals. They are victimized not only in private,<sup>3</sup> but also in

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1. The term lesbian in this article refers to women who are "woman-identified." Lesbian, defined as a woman-identified woman, encompasses an emotional, personal, and political commitment to and for women, as well as a sexual orientation toward women. Radicalesbians, *The Woman Identified Woman*, 14 *Ladder*, Aug.-Sept., 1970, at 6. Brown, *Take a Lesbian to Lunch*, *A Plain Brown Rapper* 79-95 (1976). Cooke, *The Historical Denial of Lesbianism*, *Radical Hist. Rev.*, Spring-Summer 1979, at 64. The term gay in this article refers to males with commitments, bonds, and sexual orientation toward men. Although many people use the term gay as a synonym for homosexuals of either gender, this article distinguishes the terms in recognition of and respect for the ideological, political, and social differences between lesbians and gay men. For a detailed discussion of these differences see, T. Marotta, *The Politics of Homosexuality* 48-68, 229-55 (1981). This distinction proves to be necessary because the term gay in the Gay Rights Movement and society in general tends to erase and exclude lesbians and lesbians' feminist concerns. Rich, *Compulsory Heterosexuality and Lesbian Existence*, 5 *Signs: J. Women in Culture & Soc'y* 631 (1980). Because genital sexuality embraces only one component of total lesbian and gay personality, this article also distinguishes these terms from the word homosexual. The term homosexual in this article means "relating to, or exhibiting, sexual desire toward a member of one's own sex." *Webster's New Collegiate Dictionary* 544 (1981).

2. The term sexual orientation, often used interchangeably with "sexual preference" refers to one's inclination or interest to direct her/his sexuality homosexually, heterosexually, or bisexually.

3. *E.g.*, *Doe v. Commonwealth's Attorney*, 403 F. Supp. 1199 (E.D. Va. 1975). *aff'd mem.*, 425 U.S. 901 (1976) (constitutional right to privacy does not extend to sodomy).

public.<sup>4</sup> As professionals, they have been impeded from pursuing careers as doctors,<sup>5</sup> teachers,<sup>6</sup> and lawyers.<sup>7</sup> As military personnel, they have been discharged, sometimes dishonorably.<sup>8</sup> As skilled civil servants, they have had their security clearances revoked.<sup>9</sup> As resident aliens, they have been deported<sup>10</sup> and denied naturalization.<sup>11</sup> As parents, they have been denied custody of their own children.<sup>12</sup> As students, they have been denied use of school facilities,<sup>13</sup> and their organizations have been denied

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4. EEOC Dec. No. 76-67, 2 Empl. Prac. Guide (CCH) ¶ 6493 (Mar. 2, 1976) (employer's refusal to hire male applicant on ground that he is homosexual does not violate Title VII); EEOC Dec. No. 76-75, 2 Empl. Prac. Guide (CCH) ¶ 6495 (Mar. 2, 1976) (where person was discharged due to newspaper article stating that he was arrested for homosexual activity, employer's refusal to rehire him on ground that he is homosexual does not violate Title VII); *Smith v. Liberty Mut. Ins. Co.*, 395 F. Supp. 1098 (N.D. Ga. 1975) (Civil Rights Act of 1964 not violated by employer's refusal to hire male applicant on ground that he was effeminate); *but see Gay Law Students Ass'n v. Pacific Tel. & Tel.*, 24 Cal. 3d 458, 595 P.2d 592, 156 Cal. Rptr. 14 (1979) (equal protection clause of the California Constitution proscribes discrimination by public utility based on homosexual orientation).

5. *E.g.*, *McLaughlin v. Board of Medical Examiners*, 35 Cal. App. 3d 1010, 111 Cal. Rptr. 353 (1973) (court upheld license revocation of a physician who had engaged in proscribed homosexual conduct in public; revocation was suspended on condition that the physician see a psychiatrist).

6. *E.g.*, *Acanfora v. Board of Educ.*, 491 F.2d 498 (4th Cir. 1974) (teacher transferred to an administrative position could not maintain a constitutional challenge under the first and fourteenth amendments seeking return to his teaching post when he withheld information concerning his homosexuality on his application), *cert. denied*, 419 U.S. 836 (1974).

7. *E.g.*, *State v. Kimball*, 96 So. 2d 825 (Fla. 1957) (attorney disbarred for behavior contrary to good morals and in violation of state laws, thus demonstrating his unfitness to practice law).

8. *E.g.*, *Saal v. Middendorf*, 632 F.2d 788 (9th Cir. 1980) (Navy's discharge of plaintiff because of her sexual relations with another Navy enlisted woman did not violate due process), *cert. denied*, 102 S. Ct. 304 (1981).

9. *E.g.*, *Gayer v. Schlesinger*, 490 F.2d 740 (D.C. Cir. 1973) (court suggests that if a rational nexus is found between an individual's homosexual activity and the individual's ability to safeguard classified information, a security clearance could be denied).

10. *E.g.*, *Velez-Lozano v. Immigration and Naturalization Serv.*, 463 F.2d 1305 (D.C. Cir. 1972) (consensual sodomy is a crime of moral turpitude within scope of statute providing for deportation of aliens convicted of crimes involving moral turpitude within five years after entry into the United States).

11. *E.g.*, *In re Schmidt*, 56 Misc. 2d 456, 289 N.Y.S.2d 89 (1968) (alien denied naturalization because of her lesbian practices).

12. *E.g.*, *Chaffin v. Frye*, 45 Cal. App. 3d 39, 119 Cal. Rptr. 22 (1975) (evidence sufficient to sustain trial court's finding that award of custody of children to lesbian mother would be detrimental to children).

13. *Wood v. Davison*, 351 F. Supp. 543 (N.D. Ga. 1972) (university had denied members of a student homosexual organization the use of university facilities for a conference and dance because it was a homosexual organization; the court overturned the university's action, finding that such denial infringed on the students' first amendment rights).

recognition.<sup>14</sup> As criminal defendants, they have been denied fair trials.<sup>15</sup> As prisoners, they have been subjected to cruel and unusual punishment.<sup>16</sup> As tenants, they have been evicted.<sup>17</sup> As patrons seeking food, shelter, and recreation, they have been denied enjoyment of public accommodations.<sup>18</sup> As lovers and committed life companions, they have not been allowed to legitimize their unions under law.<sup>19</sup>

Lesbians and gays seeking redress for violations of their civil rights are often not afforded statutory, judicial, and political recognition or protection. Federal and state anti-discrimination legislation does not proscribe discriminatory practices based on sexual orientation. For example, Title VII of the Civil Rights Act of 1964,<sup>20</sup> which prohibits unlawful employment practices, including those by private employers, does not list sexual orientation as a protected characteristic. Congressional efforts to amend the Act to prohibit sexual orientation as a basis for discrimination,<sup>21</sup> as well as judicial efforts to interpret the Act to include

14. *E.g.*, *Gay Lib v. University of Mo.*, 416 F. Supp. 1350 (W.D. Mo. 1976) (district court sustained university's refusal to recognize Gay Lib as a campus organization on ground that recognition would result in commission of felonious acts of sodomy in violation of Missouri law), *rev'd*, 558 F.2d 848 (8th Cir. 1977), *cert. denied*, 434 U.S. 1080 (1978).

15. *E.g.*, *State v. Frentz*, 354 So. 2d 1007 (La. 1978) (conviction of aggravated crime against nature with a person under 17 years old reversed because evidence of defendant's reputation as a homosexual and his alleged homosexual acts with other persons was prejudicial).

16. *E.g.*, *Williams v. People*, 43 A.D.2d 531, 349 N.Y.S.2d 86 (1973) (court was not precluded from transferring an inmate to an institution with accessible rehabilitative services and resentencing him for an additional year, when the inmate had been segregated, without rehabilitative services, due to his homosexuality), *rev'd*, 34 N.Y.2d 657, 355 N.Y.S.2d 578, 311 N.E.2d 650 (1974).

17. No court cases have been found on this issue. However, evictions based on sexual orientation were brought to the attention of the author when he clerked for Gay and Lesbian Advocates and Defenders (GLAD), a Boston-based law firm. In addition, government fair housing offices and human rights commissions routinely receive such complaints. *See, e.g.*, San Francisco Human Rights Commission, Sexual Orientation Complaint, Annual Fiscal Year Report 1981-1982 (Sept. 17, 1982) (unpublished); Human Rights Commission, Report to the Lesbian/Gay Advisory Committee, Quarterly Complaint Reports, July-Sept. 1982, Oct.-Dec. 1982 (Jan. 25, 1983) (unpublished memoranda).

18. *E.g.*, *Inman v. City of Miami*, 197 So. 2d 50 (Fla.) (court held valid a Miami ordinance prohibiting liquor licensee from knowingly employing a lesbian or gay or serving them), *cert. denied*, 389 U.S. 1048 (1967).

19. *See, e.g.*, *Baker v. Nelson*, 291 Minn. 310, 191 N.W. 2d 185 (1971) (Minnesota's "marriage" statute not interpreted to include same-sex marriages; the court held this does not violate the equal protection clause of the fourteenth amendment), *appeal dismissed*, 409 U.S. 810 (1972).

20. 42 U.S.C. § 2000e to 2000e-17 (1976 & Supp. V 1981).

21. Legislation to amend the Civil Rights Act of 1964 to include sexual orientation as a protected classification has been introduced in Congress annually since 1975. The latest

lesbians and gays as a protected group,<sup>22</sup> have been unsuccessful. At the state level, only Wisconsin<sup>23</sup> has a law that proscribes discrimination on the basis of sexual orientation. Other state legislative<sup>24</sup> and judicial efforts<sup>25</sup> have failed.

Beyond omitting lesbians and gays from protective legislation, some federal and state regulations compel their exclusion. For example, Department of Defense regulations require the discharge of homosexuals or persons who commit homosexual acts.<sup>26</sup> Oklahoma<sup>27</sup> provides for

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attempt in the United States House of Representatives is H.R. 427, 98th Cong., 1st Sess. (1983), which includes protection in the areas of employment, housing and public accommodation. The Senate version, S. 430, 98th Cong., 1st Sess. (1983), would provide protection only in employment.

22. *De Santis v. Pacific Tel. & Tel.*, 608 F.2d 327 (9th Cir. 1979) (employer's refusal to hire or promote a person who prefers sexual partners of the same sex does not violate Title VII); *Smith v. Liberty Mut. Ins. Co.*, 395 F. Supp. 1098 (N.D. Ga. 1975) (Civil Rights Act of 1964 not violated by employer's refusal to hire male applicant on ground that he was effeminate). However, Title VII has been interpreted to cover sexual harassment in a same-sex context. See *Wright v. Methodist Youth*, 511 F. Supp. 307 (N.D. Ill. 1981). "While recognizing that same-sex discrimination can be sex-based, this is not exactly a gay rights ruling. It protects a man's right to be free from homosexuality, not to prefer it." MacKinnon, *Introduction, Symposium: Sexual Harassment*, 10 Cap. U.L. Rev. i, vii n.23 (1981).

23. This law, which took effect in 1982, prohibits discrimination in employment, housing, and public accommodations on the basis of sexual orientation. See Wis. Stat. Ann. § 111.32(5)(j) (West Supp. 1982) (housing), Wis. Stat. Ann. § 924.04(1) (West 1982) (public accommodations), as enacted by Act of Mar. 2, 1982, ch. 112, 1982 Wis. Laws 901.

24. In several states, legislation which would amend anti-discrimination statutes has failed to pass year after year. For example, in California the gay employment bill, A.B.1, was introduced on Dec. 6, 1982 by Assemblyperson Art Agnos for the fourth year in a row. Attempts at the local level have been more successful. E.g., Minneapolis, Minn., City Ordinances ch. 139 (Supp. No. 6 1982) (discrimination based on affectional preference prohibited).

25. In *Gay Law Students Ass'n*, the California Supreme Court held that California's Fair Employment Practices Commission, created by the Fair Employment Practices Act, did not have jurisdiction to address complaints of employment discrimination based on sexual orientation because it is not gender-based discrimination. Nevertheless, this case stands as a landmark in lesbian and gay civil rights litigation for its favorable ruling for the plaintiffs on two other grounds. The court held that employment discrimination based on sexual orientation violated the state constitution's equal protection clause. This was the first time an equal protection clause was extended to proscribe discrimination against lesbians and gays. The court also held that such discrimination violated the Cal. Lab. Code §§ 1101, 1102 (West 1971), which protects political activity. The court recognized "coming out of the closet" as an important aspect of the struggle for equal rights and therefore protected political conduct. *Gay Law Students Ass'n*, 24 Cal. 3d at 488, 595 P.2d at 610-11.

In *Macauley v. Massachusetts Comm'n Against Discrimination*, 21 Fair Empl. Prac. Cas. (BNA) ¶ 30,552 (1979), the Supreme Judicial Court held that the Commission had no jurisdiction to entertain discrimination complaints based on sexual orientation.

26. For example, in final rules issued by the Department of Defense, separation from military service is mandatory for homosexual status or for engaging in a homosexual act. *Enlisted Administrative Separation*, 32 C.F.R. § 41.13 (1981).

dismissal of teachers who are homosexual or who advocate homosexual rights.<sup>28</sup>

Foreclosed from statutory relief, lesbian and gay plaintiffs have pursued constitutional claims with few positive results. Courts have refused to consider lesbians and gays a suspect class,<sup>29</sup> even though they seem to present all the indicia such a classification requires.<sup>30</sup> Consequently, courts subject to minimal scrutiny laws, regulations, and policies which lesbians and gays challenge through this line of equal protection theory.<sup>31</sup> Required only to articulate a rational basis for their

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27. Okla. Stat. Ann. tit. 70, § 6-103.15 (West 1972).

28. The statute permits the firing of teachers, student teachers, or teachers' aides who have "engaged in public homosexual conduct or activity." Public homosexual conduct is defined as "advocating, soliciting, imposing, encouraging, or promoting public or private homosexual activity in a manner that creates a substantial risk that such conduct will come to the attention of school children or school employees." *Id.*

The U.S. District Court for the Western District of Oklahoma has upheld this statute's constitutionality against a free speech, privacy, freedom of religion, due process, and equal protection challenge. In rejecting the equal protection claim, the court pointed out that homosexuals are clearly not members of a yet-identified suspect class, or possessed of some fundamental right. The court readily found a rational relationship between the statute and the state's legitimate interest in furthering the fitness of public school teachers. This case is on appeal to the Court of Appeals for the Tenth Circuit. *National Gay Task Force v. Board of Educ.*, No. CIV-80-1174-E (W.D. Okla., June 29, 1982).

29. *E.g.*, *Doe v. Commonwealth's Attorney*, 403 F. Supp. 1199 (E.D. Va. 1975) (using legitimate interest and rational relationship tests, court upheld against due process and other challenges the constitutionality of Virginia sodomy statute), *aff'd mem.*, 425 U.S. 901 (1976). In *De Santis*, a statutory claim brought under the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (1976), and 42 U.S.C. § 1985(3) (1976 & Supp. IV 1980), the court gave some weight to the fact that "[t]he courts have not designated homosexuals a 'suspect' or 'quasi-suspect' classification so as to require more exacting scrutiny of classifications involving homosexuals." 608 F.2d at 333. The court cited *Doe v. Commonwealth's Attorney* for support. One federal district court has strongly suggested that sexual preference may be suspect under the equal protection clause of the fourteenth amendment. *See Acunfora*, 359 F. Supp. at 852-53, a statutory action under 42 U.S.C. § 1983 (1976).

Ironically, in two California appellate cases involving issues unrelated to sexual orientation, the courts cited *Gay Law Students Ass'n*, 24 Cal. 3d 458, 595 P.2d 592, as having recognized homosexuality or sexual preference as a suspect classification. *Halford v. Alexis*, 126 Cal. App. 3d 1022, 1032-33, 179 Cal. Rptr. 486, 491 (1982); *Kubik v. Scripps College*, 118 Cal. App. 3d 544, 549-50, 173 Cal. Rptr. 539, 541 (1981). However, the issue of suspectness is nowhere addressed in the California Supreme Court opinion in *Gay Law Students Ass'n*. In fact, strict scrutiny is not applied. Applying instead a rationality standard, the court recognized freedom of opportunity to work as a fundamental liberty, holding that the arbitrary exclusion of homosexuals from numerous employment opportunities by a public utility violated the state equal protection provision.

30. For a discussion of how lesbians and gays satisfy criteria of "suspectness" recently articulated by the Supreme Court in *Matthews v. Lucas*, 427 U.S. 495, 505 (1976), see L. Tribe, *American Constitutional Law* 944-45 n.17 (1978).

31. Some courts have invalidated statutes despite this minimal scrutiny. *People v. Onofre*, 72 A.D.2d 268, 424 N.Y.S.2d 566 (statute prohibiting oral and anal sex between persons of same sex violated the right to privacy, and distinguishing between married and unmarried

classification,<sup>32</sup> states prevail with justifications such as "promotion of morality and decency"<sup>33</sup> and ensuring the "efficiency" of government.<sup>34</sup> In the employment area,<sup>35</sup> for example, courts have upheld dismissals of homosexuals by ignoring or misapplying the "rational nexus" test.<sup>36</sup> Too often states have not even had to justify their practices by showing a connection between homosexuality and the undermining of the state's

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persons violated equal protection guarantee), *aff'd*, 51 N.Y.2d 476, 415 N.E.2d 936, 434 N.Y.S.2d 947 (1980), *cert. denied*, 451 U.S. 987 (1981); *Baker v. Wade*, 553 F. Supp. 1121 (N.D. Tex. 1982) (statute prohibiting homosexual conduct violates the right to privacy and violates equal protection because there was no rational basis for the classification). The *Baker* court noted that had it reached the issue of suspectness, it would have held that "homosexuals are not a 'suspect class' for equal protection purposes—since the Supreme Court has not even concluded yet that sex is a suspect class." 553 F. Supp. at 1144 n.58.

32. The rational basis test is reviewed in *Village of Belle Terre v. Borras*, 416 U.S. 1, 7-8 (1974), and in *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 17 (1973).

33. *E.g.*, *Doe v. Commonwealth's Attorney*, 403 F. Supp. at 1202.

34. *E.g.*, *Dew v. Halaby*, 317 F.2d 582, 587 (D.C. Cir. 1963) (removal of employee for homosexual conduct held not arbitrary or capricious because such conduct could be detrimental to efficiency of employee), *cert. dismissed per stipulation*, 379 U.S. 951 (1964).

35. It should be noted that the United States Civil Service Commission has revised its regulations to preclude exclusion of lesbians and gays solely on the basis of homosexual status. 5 U.S.C. § 2302(b)(10) (Supp. V 1981). A United States Office of Personnel Management Memorandum (May 12, 1980), states that employees should not be questioned about matters unrelated to employment, including sexual orientation.

On the state level, employment discrimination based on sexual orientation has been banned in government employment by executive order in California, Exec. Order No. B-54-79 (Apr. 4, 1979), and in Pennsylvania, Exec. Order No. 1975-5 (amended Feb. 11, 1978).

36. The rational nexus test was first applied by Chief Justice Bazelon in *Norton v. Macy*, 417 F.2d 1161 (D.C. Cir. 1969), to protect the rights of lesbian and gay federal employees. This test requires the government to establish a rational connection between the employee's conduct and the employee's poor job performance before an employment sanction or penalty can be justified. In *Society for Individual Rights, Inc. v. Hampton*, 63 F.R.D. 399 (N.D. Cal. 1973), *aff'd on other grounds*, 528 F.2d 905 (9th Cir. 1975), the court found no such connection and therefore ordered the Civil Service Commission of the federal government "to forthwith cease excluding or discharging . . . any homosexual person . . . solely because the employment of such a person . . . might bring [government service] into . . . public contempt." 63 F.R.D. at 402. This ruling led the Commission to revise its regulations relating to job suitability criteria, *see supra* note 35. *But see* *Richardson v. Hampton*, 345 F. Supp. 600 (D.D.C. 1972) (former employee denied employment because he refused to give Civil Service Commission information about his status as a homosexual); *Singer v. United States Civil Serv. Comm'n*, 530 F.2d 247 (9th Cir. 1976) (*possible* embarrassment to government from employing an "out-of-the-closet" homosexual constituted the rational nexus necessary to deny employment), *vacated*, 429 U.S. 1034 (1977); *McKeard v. Laird*, 490 F.2d 1262 (9th Cir. 1973) (plaintiff's homosexuality and government's denial of his security clearance were rationally related because homosexuals *may* be a target of coercion or pressure causing them to act contrary to national interest; record contained no actual showing of such coercion or contrary acts).

alleged interest.<sup>37</sup>

Judicial willingness to extend constitutional protections to lesbians and gays may depend as much on the individual judge's view of homosexuality as on the requisites of doctrine. In official opinions denying claims by lesbians and gays, judges have called lesbians and gays "advocates of repugnant social concepts"<sup>38</sup> and "queers."<sup>39</sup> Others have described homosexuality as "loathsome and disgusting,"<sup>40</sup> "grossly repugnant,"<sup>41</sup> "foul,"<sup>42</sup> and "unfit to be named among Christians."<sup>43</sup> The Supreme Court is not immune to such bigotry. In *Ratchford v. Gay Lib*,<sup>44</sup> Justice Rehnquist analogized a university's refusal to recognize a gay student group to a measles quarantine:<sup>45</sup> "The question is more akin to whether those suffering from measles have a constitutional right, in violation of quarantine regulations, to associate together and with others who do not presently have measles, in order to urge repeal of a state law providing that the measles [sic] sufferers be quarantined."<sup>46</sup>

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37. *E.g.*, *Safransky v. State Personnel Bd.*, 62 Wis. 2d 464, 215 N.W.2d 379 (1974) (discussions about homosexuality which offended some employees and prompted questions by clients constituted enough adverse on-job performance to deny homosexual employment under the rational nexus test); *McConnell v. Anderson*, 451 F.2d 193 (8th Cir. 1971) (court failed to address whether a teacher's homosexuality was rationally connected to job performance; rather, the court adjudicated only whether the state university's board of regents had acted within its power as an administrative agency to deny employment). For a comprehensive review of the history and application of the rational nexus test to lesbian and gay employment situations, see Rivera, *Our Straight-Laced Judges: The Legal Position of Homosexual Persons in the United States*, 30 Hastings L.J. 699, 818-74 (1979), updated in Rivera, *Recent Developments in Sexual Preference Law*, 30 Drake L. Rev. 311 (1980-1981).

38. *McConnell v. Anderson*, 451 F.2d 193, 196 (8th Cir. 1971).

39. *United States v. Coffeerville Consol. School Dist.*, 513 F.2d 244, 251 (5th Cir. 1975). In one case, United States District Judge Andrew Hauk (S.D. Cal.), upon sentencing an alien who was in the United States illegally, commented that, "I don't know what's happening. We let all these Iranian ignoramus in, but not this young man who wants to support his child. And he isn't even a fag, like all those faggots from Cuba we're letting in." *Washington Post*, Oct. 8, 1980, at A15, col. 2. Judge Hauk was referring to the large percentage of lesbians and gays among the refugees who entered the United States illegally during the summer of 1980.

40. *State v. Bonanno*, 245 La. 1117, 1123-24, 163 S. 2d 72, 74 (1964), quoted in *State v. Lindsey*, 310 So. 2d 89, 91 (La. 1975).

41. *People v. Rodriguez*, 63 Cal. App. 3d Supp. 1, 4, 133 Cal. Rptr. 765, 766 (1976), quoted in Knutson, *Homosexuality and the Law: Introduction*, 5 J. Homosexuality 7 (1979-1980).

42. *Silva v. Mun. Court*, 40 Cal. App. 3d 733, 739, 115 Cal. Rptr. 479, 484 (1974), quoted in Knutson, *supra* note 41, at 7.

43. *State v. Stokes*, 274 N.C. 409, 163 S.E.2d 770 (1968), quoted in Knutson, *supra* note 41, at 7.

44. 434 U.S. 1080 (1978) (Rehnquist, J., dissenting from *cert. denied*) (University of Missouri denied recognition to homosexual organization).

45. *Id.* at 1084.

46. *Id.*

The social discrimination and barriers to legal redress encountered by lesbians and gays illustrate the need for alternative legal strategies to achieve equal rights under law.<sup>47</sup> This article offers an alternative legal theory toward that end. It argues that the first amendment covers the public expression of lesbian/gay personhood as protected speech. Lesbian/gay personhood, compared with its heterosexual counterpart, is burdened in its public expression by official acts. The public expression of heterosexual personhood is, by contrast, favored socially and legally by tacitly being seen neither as sexual nor as speech. This occurs because it is dominant in both arenas. The first amendment equal protection right<sup>48</sup> to lesbian/gay public expression argues that official indulgence of one and sanctioning of the other is discrimination. This approach casts the heterosexual mode as but one sexuality's mode of expressing its personhood.<sup>49</sup> Once the expression of lesbian/gay personhood is seen as speech, the alternative to protecting it is seen to chill expression,<sup>50</sup> stifle advocacy, and dictate "affirmation of a belief"<sup>51</sup> in the content of heterosexuality. No exception to protected speech then appears clearly

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47. A comprehensive study of this discrimination and the response of the judiciary is beyond the scope of this article and would duplicate the many scholarly works which survey this problem. See, e.g., Rivera, *supra* note 37, at 799.

48. *Police Dep't of Chicago v. Mosley*, 408 U.S. 92 (1972) (court held a regulation which exempted peaceful labor picketing from its general prohibition on picketing near a school violates the equal protection clause: "The Equal Protection clause requires that statutes affecting first amendment interests be narrowly tailored to their legitimate objectives"). *Id.* at 101; *Carey v. Brown*, 447 U.S. 455 (1980) (using the analysis applied in *Mosley*, the Court held unconstitutional a regulation which exempted peaceful picketing of a place of employment involved in a labor dispute from a general ban on picketing of residences); see also Karst, *Equality as a Central Principle in the First Amendment*, 43 U. Chi. L. Rev. 20 (1975).

49. Law professor Kenneth Karst warns of the dangers of transforming the first amendment into a "generalized protection of freedom to express oneself through one's behavior." Such a doctrinal approach, Karst claims, would stretch the first amendment to cover all constitutional freedoms, encumbering it with new limits and exceptions. "From these decisions, a doctrinal infection would spread, touching even traditional First Amendment concerns." Karst, *Freedom of Intimate Association*, 89 Yale L.J. 624, 654-55 n.140 (1981). This view is not as inconsistent with the theory set forth in this article as it might seem. Karst refers principally to self-expression which flows from intimate association, which he defines as "a close and familiar personal relationship with another that is in some significant way comparable to a marriage or family relationship," *id.* at 629. This article concerns expression which may not be so contextually intimate yet is no less close to the core of the personal self. Further, while the public expression of lesbian/gay personhood, as defined *infra*, stems from a homosexual orientation, it involves freedoms that have more in common with the closeness and familiarity of that intimacy thought to characterize marriage and family than it does with "behavior," sexual or otherwise.

50. See *infra* text accompanying notes 203-06.

51. See *infra* text accompanying notes 207-11.



applicable.<sup>52</sup> No state interest outweighs either this right,<sup>53</sup> or the fundamental right to the expression of lesbian/gay personhood, a right derived from the first amendment.<sup>54</sup>

## II. Expression of Lesbian/Gay Personhood

Since the Supreme Court recognized<sup>55</sup> and extended<sup>56</sup> the right to privacy,<sup>57</sup> legal literature, in its attempt to delineate the parameters of protection provided by that right, has offered tortured philosophical definitions of concepts such as selfhood, identity, personality and personhood.<sup>58</sup> According to Professor Laurence H. Tribe,<sup>59</sup> these definitions have two serious limitations. First, they "leave essentially unspecified the substance of what is being protected."<sup>60</sup> Second, "by focusing on the inward-looking face of privacy, [they] slight those equally central outward-looking aspects of self that are expressed less through demanding secrecy, sanctuary, or seclusion than through seeking to project one identity rather than another upon the public world."<sup>61</sup> Tribe adds that this public projection of identity, "the freedom to have impact on others," is "central to any adequate conception of the self."<sup>62</sup>

52. See *infra* text accompanying notes 177-200.

53. See *infra* text accompanying notes 140-76.

54. See *infra* text accompanying notes 220-29.

55. *Griswold v. Connecticut*, 381 U.S. 479 (1965) (Connecticut statute which made use of any drug, medicinal article, or instrument to prevent contraception illegal held an unconstitutional invasion of the right of privacy).

56. See *Roe v. Wade*, 410 U.S. 113 (1973) (right to privacy encompasses a woman's decision whether or not to terminate her pregnancy); *Doe v. Bolton*, 410 U.S. 179 (1973) (state procedural requirements restricting decision whether or not to terminate a pregnancy held invalid); *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (right to privacy encompasses access of unmarried persons to contraceptives).

57. The right to privacy and the right publicly to express one's personality are complementary interests of personhood. See *infra* notes 93-94 and accompanying text. This article, while focusing on public expression of lesbian/gay personhood, complements writings on lesbians' and gays' right to privacy. See Richards, *Sexual Autonomy and the Constitutional Right to Privacy: A Case Study in Human Rights and the Unwritten Constitution*, 30 *Hastings L.J.* 957 (1979); Richards, *Unnatural Acts and the Constitutional Right to Privacy: A Moral Theory*, 45 *Fordham L. Rev.* 1281 (1977); Richards, *Homosexual Acts and the Constitutional Right to Privacy*, 5 *J. Homosexuality* 43 (1980).

58. E.g., Comment, *A Taxonomy of Privacy: Repose, Sanctuary, and Intimate Decision*, 64 *Calif. L. Rev.* 1447 (1976); Gerety, *Redefining Privacy*, 12 *Harv. C.R.-C.L. L. Rev.* 233 (1977); Thomson, *The Right to Privacy*, 4 *Phil. & Pub. Aff.* 295 (1974-1975); Craven, *Personhood: The Right to be Let Alone*, 1976 *Duke L.J.* 699, cited in L. Tribe, *supra* note 30, at 887-91.

59. L. Tribe, *supra* note 30.

60. *Id.* at 887.

61. *Id.* at 887-88.

62. *Id.* at 888.

Tribe's analysis suggests that prior students of personhood have addressed only the private side, to the neglect of the public side, of personhood:

[S]uch seemingly disparate matters as the protection of one's good name, the selection of one's appearance or apparel, the choice of symbols one publicly endorses, and the choice of one's companions—many of which have received widespread judicial protection from too easy a habit of governmental interference—are all reflections of [the] outward-looking dimension of selfhood or personality and yet seem artificially severed from the more introspective side of the 'right to be let alone' in the categorizations attempted to date.<sup>63</sup>

An adequate definition of personhood must encompass the public, as well as the private, dimensions of social being. Personhood in this article includes, but is not limited to, one's identity, intimacy,<sup>64</sup> intellect, interest, tastes, and personality,<sup>65</sup> in their outward projection to the public world<sup>66</sup> as well as in their introspective relegation to secrecy, sanctuary, and seclusion.<sup>67</sup>

Under this definition, sexual orientation is an integral component of personhood.<sup>68</sup> Sexual orientation refers to the direction of one's sexuality or erotic feelings, whether heterosexual, homosexual, bisexual, or some combination of these over time. Courts which have struck down sodomy statutes as unconstitutional violations of the right to privacy have recognized the centrality of intimate sexual conduct—heterosexual or homosexual—to the human personality.<sup>69</sup> In perhaps the most far-reaching opinion on the right to privacy, a New York appellate court,<sup>70</sup>

63. *Id.*

64. Gerety, *supra* note 58, at 236.

65. Ben Shalom v. Secretary of the Army, 489 F. Supp. 964, 975 (E.D. Wis. 1980) (Army regulation permitting discharge of any soldier with homosexual tendencies, desire, or interest but who had committed no overt homosexual acts, violated first amendment and the constitutional right to privacy).

66. L. Tribe, *supra* note 30, at 888.

67. *Id.* at 887.

68. Theories abound on the causes of homosexuality. See L. Tribe, *supra* note 30, at 944-45 n.17; J. Hart & D. Richardson, *The Theory and Practice of Homosexuality* 5-37 (1981). None has been conclusively proven. Scientific consensus at the moment seems to be that the individual does not control the development of sexual orientation. *Id.* Furthermore, most scientists agree that, with rare exceptions, an individual cannot change a homosexual orientation once it is established. *Id.* Available evidence cannot establish the determinants of sexual orientation for public policy purposes, however, because so long as heterosexuality is compulsory, it will be impossible to separate any innate factors from social compulsion from free choice.

69. *E.g.*, *People v. Onofre*, 72 A.D.2d 268, 271, 424 N.Y.S.2d 566, 568, *aff'd*, 51 N.Y.2d 476, 415 N.E.2d 936, 434 N.Y.S.2d 947 (1980), *cert. denied*, 451 U.S. 987 (1981).

70. *People v. Onofre*, 72 A.D.2d 268, 424 N.Y.S.2d 566 (1980).

later upheld by the state's highest court,<sup>71</sup> declared that:

Personal sexual conduct is a fundamental right protected by the right to privacy because of the transcendental importance of sex to the human condition, the intimacy of the conduct, and its relationship to a person's right to control his or her own body. . . . The right is broad enough to include consensual acts between non-married persons and intimate consensual homosexual conduct.<sup>72</sup>

A dual private-public characterization of personhood recognizes that private expression of a homosexual orientation carries with it significant free speech implications. "The right to speak and the right to refrain from speaking are complementary components of the broader concept of 'individual freedom of mind.'"<sup>73</sup> One federal court has recognized the importance to lesbian/gay personhood of its public expression:

The ninth amendment protects the privacy of one's personality, while the first amendment protects manifestations of that personality, and it is only when one's personality, no matter how bizarre or potentially dangerous, actually manifests itself in the form of unlawful conduct, that government may intercede in an effort to control personality or restrict its manifestation. *A homosexual personality—formed genetically or by human experience, the product of deliberate choice or predetermination—may be displeasing, disgusting, and immoral to many. These, however, are social judgments, not ingredients for gauging constitutional permissibility.*<sup>74</sup>

People should be able to control their own social being, unfettered by governmental regulation absent the most compelling state interests. This article argues that the outward expression of this two-dimensional personhood, as an expressive or communicative manifestation of a lesbian/gay personhood, is protected under the first amendment.<sup>75</sup>

Freedom of speech is important not only as a means to an end, but as an end in itself—something commentators usually fail to recognize. Professor Tribe points out the inadequacy of Holmes' "marketplace of

71. *People v. Onofre*, 72 A.D.2d 268, 424 N.Y.S.2d 566, *aff'd* 51 N.Y.2d 476, 415 N.E.2d 936, 434 N.Y.S.2d 947 (1980), *cert. denied*, 451 U.S. 987 (1981).

72. *Onofre*, 72 A.D.2d. at 271, 424 N.Y.S.2d at 568.

73. *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943), *quoted in* *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (state statute which compels individual to disseminate an ideological message by displaying it on his private property violates first amendment).

74. *Ben Shalom v. Army*, 489 F. Supp. at 976 (emphasis added).

75. Although this article focuses on the public expression of lesbian/gay personhood, pursuing the argument that public and private aspects of personhood cannot arbitrarily be severed, it is necessary to keep in mind the private dimension of personhood as well.

ideas" and Meiklejohn's "speech-as-essential-to-self-government" theories, both of which regard speech as a means to an end.<sup>76</sup> He criticizes them for focusing too much on intellect and rationality and, as a result, failing to accommodate the emotive role of free expression in the evolution, definition, and proclamation of individual and group identity.<sup>77</sup> A better vision of free speech, Tribe argues, is set forth by Justice Brandeis' concurrence in *Whitney v. California*:<sup>78</sup> "Those who won our independence believed that the final end of the State was to make men free to develop their faculties. . . . They valued liberty both as an end and as a means."<sup>79</sup> The Tribe-Brandeis vision of free speech accommodates and supports the public expression of lesbian/gay personhood. This vision includes speech as "an expression of self,"<sup>80</sup> enhancing "personal growth and self-realization,"<sup>81</sup> and as "a constitutive part of personal and group autonomy."<sup>82</sup>

Lesbians and gays already project their personhood to the public world through an infinite number of expressive activities, in a variety of settings, as they interact with others outside their private spheres. In a social context, lesbians and gays may choose to visit public or semi-public places where only other lesbians and gays congregate. In an appropriate public forum, they may choose to express themselves through activities such as same-sex dancing.<sup>83</sup>

In a political context, lesbians and gays express personhood through such actions as discussions about homosexuality, demonstrations or marches in support of lesbian or gay rights, statements to the news media about the rights of lesbians and gays, and testimony before a political body in support of favorable civil rights legislation. They may choose to engage in symbolic speech, such as wearing insignia of the lesbian and gay struggle for equal rights, or expressive conduct, such as publicly displaying affection<sup>84</sup> to protest a city ordinance proscribing such activity.

76. L. Tribe, *supra* note 30, at 579.

77. *Id.* at 578.

78. 274 U.S. 357 (1927). In *Whitney v. California* the majority of the Supreme Court held that the California Criminal Syndicalism Act did not violate the equal protection or due process clauses of the fourteenth amendment. Brandeis concurred on procedural grounds because the arguments necessary to reverse the lower court had not been made until appeal.

79. L. Tribe, *supra* note 30, at 578, quoting *Whitney v. California*, 274 U.S. at 375 (Brandeis, J., concurring).

80. L. Tribe, *supra* note 30, at 577.

81. *Id.* at 578.

82. *Id.*

83. One court has recognized that it is a first amendment violation for high school officials to prohibit a male homosexual high school student from bringing a male escort to the prom. *Fricke v. Lynch*, 491 F. Supp. 381 (D.R.I. 1980).

84. *Id.*

In a cultural setting, lesbians and gays may express their personhood by attending lectures on some aspect of homosexuality or by giving such a lecture. They may choose, and indeed find it necessary, to acquire literature to help understand their sexual condition, to help others understand theirs, or to help society in general to learn about homosexuality. In a religious context, lesbians or gays may choose to worship with a congregation or religious society which does not view homosexuality as inconsistent with the tenets of Christianity, Judaism, or other faiths.<sup>85</sup>

The right to the public expression of personhood is inextricably bound to the complementary right to private expression. Only together do these components of personhood allow the person to be whole. This concept of personhood is the necessary response to those who claim to support the right of lesbians and gays to be themselves, while advocating that lesbian and gay lifestyles be left "in the closet."<sup>86</sup> This concept of personhood is also necessary to respond to judges who fail to recognize that disadvantaging lesbians and gays because they "flaunt"<sup>87</sup> their lifestyles is a discriminatory abridgment of free speech in its most invidious form.

While by some definitions sexual conduct can be confined to the bedroom, sexual orientation—homosexual or heterosexual—hence, sexual personhood, does not stay in the closet. Heterosexual society revolves around its sexual orientation. Only persons of the opposite sex are granted marriage licenses. Employees are expected to take their opposite-sex spouses to summer picnics and holiday parties. Politicians parade with their opposite-sex spouses, and may kiss them in public to win a few votes. High school students boast about the opposite-sex dates they are accompanying to the prom. Adults at the office cafeteria table talk about their opposite-sex social lives. Indeed, heterosexual society unabashedly "flaunts" its lifestyle, its personhood. Yet lesbians and gays similarly situated must often confine their lifestyles to the silence of the closet.

A society which allows lesbians and gays to express their personhood only in private forces them to live a public lie. Such compelled deceit takes a great psychological toll<sup>88</sup> on those forced to wear a heterosexual

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85. The All God's Children Metropolitan Community Church, for example, with 178 congregations throughout the world, is a church established by lesbian and gay clergy for the spiritual needs of lesbians and gays.

86. For one such view see 67 Harv. L. Rec., Nov. 16, 1978, at 11, col. 3. In a letter to the editor, a Harvard Law School graduate suggests that gay persons should stay in the closet so that children will not see them as role models.

87. See *Singer v. United States Civil Serv. Comm'n*, 530 F.2d 247, 256 (9th Cir. 1976), *vacated*, 429 U.S. 1034 (1977).

88. See generally, B. Adam, *The Survival of Domination: Inferiorization and Everyday Life* (1978); A. Bell, *Homosexualities: A Study of Diversity Among Men and Women* (1978); C. Tripp, *The Homosexual Matrix* (1975).

mask. Compelled heterosexuality<sup>89</sup> requires "affirmation of a belief and an attitude of mind"<sup>90</sup> and denies lesbians and gays the "right of self-determination in matters that touch individual opinion and personal attitude."<sup>91</sup> Such compelled speech "invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control."<sup>92</sup>

Forcing public expression of a belief is an affront to personal integrity. It can indeed be considered an invasion of the constitutional right to privacy, established in *Griswold v. Connecticut*, as well as an abridgment of freedom of expression.<sup>93</sup>

If the guarantees of the first amendment are to extend to the expression of lesbian/gay personhood, majoritarian heterosexual society must learn to appreciate the truthful expression of personhood and decry its false profession. Heterosexual society must judge lesbian and gay couples by at least the same standards it uses to judge heterosexual couples in their public expression of sexual orientation.<sup>94</sup> Lesbian and gay employees must feel free to take persons of the same sex to office parties and feel free to introduce them as lovers or whatever term may evolve in a freer society. Lesbian and gay high school students must be free to take persons of the same sex to the prom.<sup>95</sup> Lesbian and gay politicians must feel free to introduce their companions at political rallies. Lesbians and gays at the office cafeteria must feel free to discuss their same-sex social lives with others who discuss their heterosexual social lives. In essence, lesbians and gays must be accepted or rejected, agreed or disagreed with, voted for or against, ignored or listened to, laughed or cried with or at as persons.

### III. Public Expression of Lesbian/Gay Personhood as Constitutionally Protected Speech

#### A. Regulation of Lesbian/Gay Speech is Content-Based

There are now many policies and regulations which, facially or implicitly, disallow or discourage public expressions of lesbian/gay

89. Rich, *Compulsory Heterosexuality and Lesbian Existence*, *supra* note 1.

90. *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 633 (1943) (requiring Jehovah Witness children to salute flag and give pledge of allegiance as prerequisite to continued attendance at public school violates their freedom of speech and freedom of religion).

91. *Id.* at 631.

92. *Id.* at 642.

93. T. Emerson, *The System of Freedom of Expression* 30 (1970).

94. Perhaps, in light of the perspective and experiences of lesbians and gays, these standards also need to be reconsidered.

95. *Fricke v. Lynch*, 491 F. Supp. 381.

personhood. The first amendment must protect such expressions either as pure speech, or as symbolic or expressive conduct with sufficient "communicative content [to fall] within the ambit of the first amendment."<sup>96</sup> The cases which recognize a first amendment equal protection right envision equal protection interests "intertwined with"<sup>97</sup> or "in its intersection with"<sup>98</sup> first amendment interests. This doctrine protects equality rights in speech under "the Equal Protection clause, not to mention the First Amendment itself."<sup>99</sup> Once an interest is seen to fall within first amendment bounds, the equal protection clause requires that state regulations that impinge on it not be discriminatory as to content, but rather "be narrowly tailored to their legitimate objectives."<sup>100</sup> Disallowing a regulation that "discriminate[d] between lawful and unlawful conduct based upon the content of the demonstrator's communication,"<sup>101</sup> the Court said:

When government regulation discriminates among speech-related activities in a public forum, the Equal Protection clause mandates that the legislation be finely tailored to serve substantial state interests and the justification offered for any distinction it draws must be carefully scrutinized.<sup>102</sup>

Dissenting in that case, Justice Rehnquist would have held the state to a different substantive standard—whether an "appropriate governmental interest [is] suitably furthered by the differential treatment"<sup>103</sup>—but, like the majority, applied "Equal Protection requirements in the First Amendment context."<sup>104</sup> Some courts have been receptive to claims by lesbians and gays under the first amendment in a way that points to an incipient recognition consistent with the more extensive equal protection to lesbian/gay personhood urged in this article. This fuller protection from discrimination is essential for realizing the social value of individual self-fulfillment and full human character and potential<sup>105</sup> that the first amendment rests upon.

State agents who authorize, enforce, and uphold regulations which suppress the public expression of lesbian/gay personhood unwittingly undermine the first amendment. In their haste to label such expression

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

97. *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95 (1972).

98. *Id.* at 101.

99. *Id.* at 96.

100. *Id.* at 101.

101. *Carey v. Brown*, 447 U.S. 455, 460 (1980).

102. *Id.* at 461-62.

103. *Id.* at 481 (Rehnquist, J., dissenting).

104. *Id.*

105. T. Emerson, *supra* note 93, at 6.

offensive and abhorrent,<sup>106</sup> some courts seem to have forgotten that the stifling of advocacy is also offensive and abhorrent.<sup>107</sup> Others have recognized, sometimes reluctantly, that the first amendment does not except lesbians and gays from its protections. Perhaps in response to lesbian and gay activism, a few courts have even begun to recognize the importance of protecting the broader panoply of rights included in lesbian/gay personhood under the first amendment.<sup>108</sup> The first amendment guarantees that government ordinarily cannot restrict expression because of its message, ideas, subject matter, or content. State action aimed at suppressing some communication, while allowing other communication to be free, is at odds with the first amendment.<sup>109</sup> Yet, states suppress communication, and restrict its impact, when they restrict the public expression of lesbian/gay personhood.

States frequently attempt to regulate the *message* of lesbian/gay personhood, even when conveyed through pure speech or expressive conduct. In many such instances, courts have recognized, although not yet adequately, that such regulation is unconstitutional. The federal government has fired employees for displaying personality traits considered unsuitable for government workers<sup>110</sup> and for "flaunting" a gay lifestyle.<sup>111</sup> One job seeker's offer of employment was withdrawn because he insisted on the "right to pursue an activist role in implementing his unconventional ideas concerning the societal status to be accorded homosexuals and thereby to foist tacit approval of [a] socially repugnant concept upon his employer."<sup>112</sup> School districts have fired teachers because they are homosexual,<sup>113</sup> and for creating publicity through

106. See *supra* notes 40-43.

107. "[T]he ideas advocated by an association may to some or most of us be abhorrent, even sickening. The stifling of advocacy is even more abhorrent, even more sickening." *Gay Alliance of Students v. Matthews*, 544 F.2d 162, 168 (4th Cir. 1976) (Markey, C.J., concurring).

108. See, e.g., *infra* notes 116-19.

109. *L. Tribe, supra* note 30, at 581.

110. *Norton v. Macy*, 417 F.2d 1161 (D.C. Cir. 1969) (an employee's discharge from employment violated his constitutional rights to privacy and due process of law where the basis for the dismissal was possible embarrassment to a government agency relating to a single homosexual advance made by the employee in private during off-hours).

111. *Singer v. United States Civil Serv. Comm'n*, 530 F.2d 247, 256 (9th Cir. 1976) (government could deny an individual employment where he publicly announced his homosexual activities; individual's fifth amendment due process and first amendment free speech interest outweighed by the government's interest in efficient public service).

112. *McConnell v. Anderson*, 451 F.2d 193, 196 (8th Cir. 1971), *cert. denied*, 405 U.S. 1046 (1972) (emphasis omitted) (employee's fourteenth amendment rights to equal protection and due process were not denied when he was discharged because his active role in implementing his unconventional ideas gave his employer, the Board of Regents of the state university, grounds for his dismissal).

113. See *Burton v. Cascade School Dist. Union High School No. 5*, 353 F. Supp. 254 (D. Or.



statements about homosexuality to the press.<sup>114</sup> Others have required homosexual teachers to submit to psychiatric examinations.<sup>115</sup> Universities have refused to recognize lesbian and gay student organizations,<sup>116</sup> and have not allowed such organizations to hold social functions.<sup>117</sup> Universities have also denied such student groups the use of school facilities on the ground that it is not in the best interest of the university.<sup>118</sup> One state curtailed such group activities when the governor threatened to cut off all university funds unless the university's board of trustees purged the state's campuses of "indecent . . . filth" and "socially abhorrent activities."<sup>119</sup> Another state denied a group the right to advertise its counseling, legal aid, and library services in the student newspaper.<sup>120</sup> In Ohio, the secretary of state refused to incorporate a student organization because "the promotion of homosexuality as a valid life style" was contrary to state public policy.<sup>121</sup> While in many of these cases lesbians and gays have successfully challenged state actions aimed at curtailing

1973) (court held statute, pursuant to which school board dismissed a lesbian teacher, void for vagueness), *aff'd*, 512 F.2d 850 (9th Cir.) *cert. denied*, 423 U.S. 839 (1975); *contra*, *Gaylord v. Tacoma School Dist. No. 10*, 88 Wash. 2d 286, 559 P.2d 1340 (court upheld discharge of gay teacher because it found substantial evidence supported trial court's conclusions that the teacher was guilty of immorality and that, known as gay, his ability to teach was impaired), *cert. denied*, 434 U.S. 879 (1977).

114. *Aumiller v. University of Del.*, 434 F. Supp. 1273, 1277 (D. Del. 1977) (state university violated lecturer's first amendment rights of free expression and association by refusing to renew his contract because of his statements about homosexuality in newspaper articles).

115. *Gish v. Board of Educ.*, 145 N.J. Super. 96, 101-02, 336 A.2d 1337, 1339-40 (1976) (board of education's directive that a teacher submit to a psychiatric examination, predicated on the board's determination that the teacher's role as president of a gay rights organization displayed evidence of deviation from normal mental health which might affect his ability to teach, did not violate the teacher's first and fourteenth amendment rights).

116. *Gay Lib v. University of Mo.*, 558 F.2d 848, 853 (8th Cir. 1977) (university's refusal to recognize Gay Lib organization held an unconstitutional abridgment of first amendment rights), *cert. denied*, 434 U.S. 1080 (1978).

117. *Gay Students Org. of the Univ. of N.H. v. Bonner*, 509 F.2d 652, 662 (1st Cir. 1974) (court held that precluding gay student organization from holding social functions on campus of state university denied members of the organization their first amendment right of association).

118. *Wood v. Davison*, 351 F. Supp. 543, 545 n.5 (N.D. Ga. 1972) (court held denying gay student organization the use of school facilities for a conference and dance is an infringement on the members' first amendment rights of free speech, assembly and association).

119. *Gay Students Org. of the Univ. of N.H.*, 509 F.2d 652.

120. *Mississippi Gay Alliance v. Goudelock*, 536 F.2d 1073, 1074 (5th Cir. 1976) (refusal of editor of state university student newspaper to publish an off-campus gay organization's advertisement did not violate the organization's first amendment rights), *cert. denied*, 430 U.S. 982 (1977).

121. *State ex rel. Grant v. Brown*, 39 Ohio St. 2d 112, 113-14, 313 N.E.2d 847, 848 (1974) (secretary of state properly refused on public policy grounds to accept the articles of incorporation for the proposed nonprofit corporation which had as its purpose the

the right to publicly express lesbian/gay personhood, courts have not yet fully recognized the necessary scope of the first amendment interests implicated in them.

One area in which courts have been especially unwilling to overturn state action is liquor licensing. Courts have allowed states to deny and revoke liquor licenses of businesses that cater to a homosexual clientele<sup>122</sup> or admit patrons with characteristics evidencing homosexual propensities.<sup>123</sup> In an astonishing opinion which has not been overruled, a state court upheld revocation of a bar's license because the bar admitted clientele who "appeared to be homosexuals."<sup>124</sup> The court acknowledged that no evidence established that either the specified patrons were actually homosexuals<sup>125</sup> or that "licentious solicitations" occurred on the premises.<sup>126</sup> Enunciating a policy of "nipping reasonably apprehended evils in the bud," the court stated:

[I]f the evidence here failed adequately to prove that [the described patrons were in fact homosexuals, it certainly proved that they had the conspicuous guise, demeanor, carriage, and appearance of such personalities. It is often in the plumage that we identify the bird.<sup>127</sup>

The court was concerned that "public taverns [not] be converted into recreational fraternity houses for homosexuals."<sup>128</sup> In yet another case, a Florida court upheld the constitutionality of a city ordinance making it illegal for a licensed establishment to "knowingly sell to, serve, or allow a homosexual person to consume alcoholic beverages, or to knowingly allow two or more homosexual persons to congregate or remain in [the] place of business."<sup>129</sup>

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promotion of homosexuality as a valid life style), *appeal dismissed*, 420 U.S. 916 (1975).

122. *Paddock Bar, Inc. v. Division of Alcoholic Beverage Control*, 46 N.J. Super. 405, 134 A.2d 779 (1957) (suspension of liquor license of establishment admitting clientele who appeared to be homosexual upheld under the state alcoholic beverage control statute).

123. *Kerma Restaurant Corp. v. State Liquor Auth.*, 27 A.D.2d 918, 278 N.Y.S.2d 951 (although a mere congregation of homosexuals did not render an establishment disorderly within the meaning of the Alcoholic Beverage Control Law, where homosexual patrons were soliciting as homosexuals, and exhibiting characteristics and mannerisms evidencing homosexual propensities, revocation of establishment's liquor license was justified), *modified*, 21 N.Y.2d 111, 233 N.E.2d 833, 286 N.Y.S.2d 822 (1967).

124. *Paddock Bar, Inc.*, 46 N.J. Super. at 407, 134 A.2d at 779 (emphasis added).

125. *Id.* at 408, 134 A.2d at 780.

126. *Id.*

127. *Id.* at 408-09, 134 A.2d at 780.

128. *Id.* at 408, 134 A.2d at 780.

129. *Inman v. City of Miami*, 197 So. 2d 50, 51 (Fla. Dist. Ct. App.) (court held valid a Miami ordinance prohibiting liquor licensee from knowingly employing a lesbian or gay or serving them), *cert. denied*, 201 So. 2d 895 (Fla.), *cert. denied*, 389 U.S. 1048 (1967).

Homosexual status linked to what for any other group would be recognized as conventional first amendment activity has also been the justification for sanctions against lesbians and gays.<sup>130</sup> In *Gaylord v. Tacoma School District No. 10*,<sup>131</sup> the school district fired a twelve-year secondary school teacher with an outstanding record solely because of his homosexual status. The court criticized Gaylord for actively seeking out the company of other male homosexuals and participating in the Dorian Society, an organization with social and political goals.<sup>132</sup> By this activity, the court said, Gaylord assumed the risk that his homosexuality would be discovered.<sup>133</sup> In other "homosexual status" cases, individuals have been denied security clearances,<sup>134</sup> naturalization,<sup>135</sup> and admission to the state bar.<sup>136</sup>

These cases illustrate state regulations aimed at suppressing not only the advocacy of homosexuality, but also its outward expression—a form of its social existence—either through pure speech or expressive conduct. The state justifies the abridgment of this expression because it believes either that its content is offensive to majoritarian heterosexual social values or that its public projection would have a harmful impact on the goals of the majoritarian heterosexual society. In the liquor licensing

130. See *infra* text accompanying notes 202-19.

131. 88 Wash. 2d 286, 559 P.2d 1340, (court upheld discharge of gay teacher because substantial evidence supported trial court's conclusions that the teacher was guilty of immorality and that, known as gay, his ability to teach was impaired), *cert. denied*, 434 U.S. 879 (1977).

132. *Id.* at 294, 559 P.2d at 1344.

133. *Id.* at 297, 559 P.2d at 1346.

134. *Gayer v. Schlesinger*, 490 F.2d 740, 744-45 (D.C. Cir. 1973) (the court determined that "sexual perversion," one of the criteria set out by the Industrial Security Clearance Review Office to determine eligibility for a security clearance, includes homosexual activity; the court suggests that if a rational nexus is found between an individual's homosexual activity and the individual's ability to safeguard classified information, a security clearance could be denied).

135. *Boutilier v. Immigration & Naturalization Serv.*, 387 U.S. 118 (1967) (court held that an alien, who at the time of his entry into the United States was a homosexual, was not eligible for a visa and admission to the United States under § 212 (a) (4) of the Immigration and Naturalization Act of 1952 as one "affected with [a] psychopathic personality," a term in which Congress intended to include homosexuals). *Contra In re Labady*, 326 F. Supp. 924, 925 (S.D.N.Y. 1971) (naturalization could not be denied under 8 U.S.C. § 1427 (a) (1976) to a homosexual determined to be of good moral character under that provision where he had been lawfully admitted to the United States and was a lawful resident); *In re Brodie*, 394 F. Supp. 1208, 1210 (D. Or. 1975) (naturalization cannot be denied on grounds of homosexuality where individual was of lawful moral character within the meaning of naturalization provision 8 U.S.C. § 1427 (1976) and where the other requirements of that provision had been lawfully waived).

136. *Florida Bd. of Bar Examiners*, 358 So. 2d 7 (Fla. 1978) (admission to the state bar cannot be denied solely because of applicant's homosexuality; court limits its discussion to homosexual orientation and expressly does not address itself to circumstances where

cases, the state blatantly restricted the right of association; but these cases also implicate the right to free speech insofar as the state constrains expression.

This content-based abridgment of the expression of lesbian/gay personhood is impermissible unless the state can show either that the regulation is justified by a substantial state interest<sup>137</sup> or that the expression falls under one of the exceptions to protected speech. The challenged governmental act must be the narrowest means of achieving the government's permissible objectives.<sup>138</sup> Many courts recognize in a lesbian/gay context that the state cannot unnecessarily infringe expressive conduct protected by the first amendment.<sup>139</sup> These cases point to a recognition of, without yet satisfying the need for, first amendment protection for the public expression of lesbian/gay personhood.

### B. *Scrutiny of Governmental Ends and Means*

Various state interests have been advanced to justify the regulation of the expression of lesbian/gay personhood, particularly in the sphere of private sexual conduct. Prominent among these asserted interests are the efficiency and security of government,<sup>140</sup> promotion of marriage and family life,<sup>141</sup> and preservation of decency and morality.<sup>142</sup> "Carefully scrutinized,"<sup>143</sup> these ends appear insufficiently tailored to their means—the suppression of expression—to pass constitutional muster.<sup>144</sup>

For example, employment discrimination against lesbians and gays is often based on a claim that lesbian and gay employees impair

evidence has established an individual engaged in homosexual acts).

137. See *infra* notes 140-76 and accompanying text.

138. *Dunn v. Blumstein*, 405 U.S. 330, 343-60 (1972) (state durational residency requirements for voting, challenged under the equal protection clause, not least restrictive means necessary for preventing fraud).

139. See *e.g.*, notes 116-19 *supra*.

140. *Norton v. Macy*, 417 F.2d 1161, 1166 (1969) (the court said in dicta homosexual conduct may create a potential for blackmail which jeopardizes the security of classified communications and homosexual conduct may in some circumstances be evidence of an unstable personality unsuitable for certain kinds of work).

141. *Doe v. Commonwealth's Attorney*, 403 F. Supp. 1199, 1201 (E.D. Va. 1975), *summarily aff'd*, 425 U.S. 901 (1976) (constitutional right to privacy does not extend to sodomy).

142. *Id.* at 1202.

143. *Carey v. Brown*, 447 U.S. 455, 462 (1980).

144. In *Baker v. Wade*, 553 F. Supp. 1121 (N.D. Tex. 1982), the court found that the sodomy statute was not even rationally related to the interests articulated by the state—morality and decency, public health, welfare, and safety, and procreation. The court said these alleged state interests were mere "assertions of general platitudes," wholly inadequate to impinge on the fundamental right of privacy and equal protection. *Baker*, 553 F. Supp. at 1142. These alleged state interests are even less compelling in the context of freedom of expression under the first amendment.

efficiency either by an inability to carry out their duties properly or by causing a general disruption of the workplace.<sup>145</sup> While the state has a substantial interest in efficiency, such an interest is not sufficient to override the right to freedom of expression. This is especially so where the state's end of efficiency does not narrowly relate to the means employed: the exclusion of all lesbians and gays from employment. There is no support for the claim that lesbians and gays share some inherent inability to perform their work.<sup>146</sup> Similarly, there is no evidence for claims that lesbians and gays, simply *per se*, are likely to disrupt the work setting by contributing to morale or disciplinary problems.<sup>147</sup> The state's interest in

145. *Norton v. Macy*, 417 F.2d at 1166.

146. Scientific data shows no relationship between individual ability and homosexuality *per se*. See, e.g., M. Freedman, *Homosexuality and Psychological Functioning* 35-45 (1971); H. Ruitenbeck, *Homosexuality: A Changing Picture* 67 (1973); Chance, *Facts That Liberated the Gay Community*, *Psychology Today*, Dec. 1975, at 52 (interview with Evelyn Hooker); *The Adjustment of the Male Overt Homosexual*, 31 *J. Psychology* 18 (1957). See generally, *Homosexuality: Social, Psychological, and Biological Issues* (W. Paul ed. 1982). The American Psychiatric Association trustees ruled in 1973 that homosexuality would no longer be included as a "mental disorder" in its official list of mental disorders. The APA on that day also adopted the following resolution:

Whereas homosexuality in and of itself implies no impairment in judgment, stability, reliability, or vocational capabilities, therefore, be it resolved, that the American Psychiatric Association deplores all public and private discrimination against homosexuals in such areas as employment, housing, public accommodation, and licensing, and declares that no burden of proof of such judgment, capacity, or reliability shall be placed upon homosexuals greater than that imposed on any other persons. Further, the APA supports and urges the enactment of civil rights legislation at local, state and federal levels that would insure homosexual citizens the same protections now guaranteed to others. Further, the APA supports and urges the repeal of all legislation making criminal offenses of sexual acts performed by consenting adults in private.

American Psychiatric Association Press Release (Dec. 15, 1973) (emphasis added). In resolutions with nearly identical language to that above, the American Psychological Association in 1975 voted to support the American Psychiatric Association's action. In addition, the former organization urged "all mental health professionals to take the lead in removing the stigma of mental illness that has long been associated with homosexual orientations." American Psychological Association Press Release (Jan. 24, 1975).

147. Similar arguments have been made regarding the integration of Blacks and Whites in school and work settings. *Lee v. Washington*, 390 U.S. 333 (1969) (per curiam) (racial integration in prisons ordered despite claims that integration would upset prison security and discipline); *Armstrong v. O'Connell*, 463 F. Supp. 1295, 1297, 1310 (court ordered desegregation despite arguments that integration would lower teacher morale), *settled sub nom.*, *Armstrong v. Board of School Directors*, 471 F. Supp. 800 (E.D. Wis. 1979), *aff'd*, 616 F.2d 305 (7th Cir. 1980); *Wheeler v. Durham City Bd. of Educ.*, 249 F. Supp. 145, 151, 154 (M.D.N.C. 1966) (court rejected plaintiff's argument that forced integration of faculty reduced teacher morale). *Accord Martin v. Charlotte-Mecklenburg Bd. of Educ.*, 475 F. Supp. 1318, 1347 (W.D.N.C. 1979) (school segregation implies inferiority and reduces incentive and morale), *aff'd*, 626 F.2d 1165 (4th Cir. 1980), *cert. denied*, 450 U.S.

avoiding disruption is substantial but insufficient without a showing of "clear and present danger"<sup>148</sup> to its functions.

To justify excluding lesbians and gays as such from state employment because they might disrupt office efficiency offends the first amendment in at least three ways. First, it is to act on "an undifferentiated fear or apprehension of disturbance,"<sup>149</sup> which alone cannot justify the abridgment of expression.<sup>150</sup>

Second, the feared disruptions are more likely to be created by those offended by homosexuality than by the lesbian or gay employee. Those who are offended by, or who disagree with, the expression of lesbian/gay personhood should not be allowed to veto it.<sup>151</sup> The personal right to expression is not contingent upon the approval of others.<sup>152</sup>

Third, state regulations aimed at preventing disruption by excluding all lesbians and gays are overbroad.<sup>153</sup> The government cannot achieve its purpose "by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms."<sup>154</sup> The constitutional problems presented by overbroad regulations aimed at stifling lesbian/gay expression of personhood resemble those problems presented by regulations aimed at excluding "subversives" from government em-

1041 (1981).

148. See *infra* text accompanying notes 194-200.

149. *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503, 508 (1969) (school officials' fear of a disturbance caused by students wearing armbands does not override the right to freedom of expression).

150. *Id.* at 509.

151. See *Fricke v. Lynch*, 491 F. Supp. 381 (D.R.I. 1980) (male students' expression of first amendment rights, for example, going to a high school prom together, could not be prohibited because of possible violence by other students).

152. Cf. *Stretton v. Wadsworth Veterans Hospital*, 537 F.2d 361, 369 n.19 (9th Cir. 1976) (exercise of rights should not be contingent on absence of adverse sentiment); *Wilson v. Southwest Airlines Co.*, 517 F. Supp. 292, 304 (D. Tex. 1982) (employer's female-only hiring policy violates Title VII of the 1964 Civil Rights Act; sex is not a bona fide occupational qualification for hiring flight attendants despite employer's allegation of "customer preference" for women).

153. Another feature of state regulations looking to efficiency compounds their impact upon freedom of expression:

[T]he restrictions are usually framed as administrative regulations rather than criminal offenses. Hence the safeguards of a criminal proceeding are lacking. Rules relating to the burden of proof, the admission of evidence, the necessity of a judicial tribunal, are all relaxed or abandoned. It is possible, moreover, to initiate a proceeding or disqualify an applicant on a showing substantially less than is required to commence a criminal prosecution.

T. Emerson, *supra* note 93, at 162-63.

154. *NAACP v. Alabama ex rel. Flowers*, 377 U.S. 288, 307 (1964) (individuals organized to prevent racial discrimination protected from governmental interference because the members of the organization were simply exercising their right to free association protected by the first amendment).

ployment.<sup>155</sup> The impact of such regulations on lesbians and gays is virtually identical to that on persons thought to be "subversives." The impact is direct when lesbians and gays feel compelled to forego expression of their personhood in order to qualify for employment.<sup>156</sup> The impact is indirect when they "seek to avoid future trouble by steering clear of controversial opinions or association. . . . The more extensive the restrictions and the longer they remain in operation the more pervasive becomes the dampening effect [on expression]."<sup>157</sup>

Another state interest argued to be compelling to justify regulation of lesbian/gay expression is the preservation of majoritarian heterosexual marriage and family arrangements. While such an interest is arguably substantial, it is not clearly true that homosexuality undermines conventional marriage and family life: one judge has termed such a claim "unworthy of judicial response."<sup>158</sup> Concern about defection from heterosexuality implies that "homosexual preference is so strong and heterosexual preference is so weak (and conventional family life so unattractive) that people would tend to abandon heterosexual marriage if homosexuality were legitimized."<sup>159</sup> One commentator observes alternatively that "the attractions of heterosexual marriages are deep-seated and permanent features of the human condition."<sup>160</sup> If this is true, it would be irrational to "suppose that to legitimize homosexuality as a way of life would detract from the family at all."<sup>161</sup>

Ironically, the suppression of homosexuality may contribute more to the deterioration of conventional marriage and family arrangements than its affirmation would. Lesbians and gays now prohibited from entering same-sex relationships may feel pressured into entering heterosexual marriages. Predictably, such marriages often end in

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155. See T. Emerson, *supra* note 93 at 161-204, for a first amendment analysis of internal security cases.

156. *Id.* at 162.

157. *Id.*

158. *Doe v. Commonwealth's Attorney*, 403 F. Supp. at 1205 (Merhge, J., dissenting).

159. Richards, *Homosexual Acts and the Constitutional Right to Privacy*, *supra* note 57, at 61 (1980).

160. *Id.*

161. *Id.* Underlying these divergent views is a controversy over the reality and meaning of "the family." Defenders of traditional values see it as a place of security, warmth, individuality, and autonomy; the crucible of personhood. When they adopt this view, lesbians and gays seek access to family values, the only change being that the partners are of the same—as opposed to different—sex. Feminists have criticized the family as a place of battery, marital rape, compulsory maternity, and forced unwaged labor; the crucible of male supremacy. In this view, undermining the structure of the family appears desirable, and carries different implications for women than for men, hence different resonances for lesbians than for gays.

divorce.<sup>162</sup> This is unfair to the parties involved and contributes to the breakdown, rather than the preservation, of the institution of marriage. There is thus little relationship between state suppression of the expression of lesbian/gay personhood and the promotion of majoritarian heterosexual family and marriage arrangements.

Yet another state interest asserted to proscribe homosexual conduct is the promotion of "morality and decency."<sup>163</sup> However, states cannot be allowed to use this justification to prohibit the public expression of lesbian/gay personhood if the "autonomous control over the development and expression of one's intellect, interests, tastes, and personality"<sup>164</sup> is to remain among the rights protected by the first amendment. Because the public expression of lesbian/gay personhood need not involve sexual conduct and need not appeal to any prurient interest,<sup>165</sup> it is not, by definition, obscene, and states cannot use this justification to prohibit it. At most, the public expression of lesbian/gay personhood advocates sexual conduct, but mere advocacy is protected speech.<sup>166</sup> Nor may a state abridge lesbian/gay expression because it finds the content of the views abhorrent.<sup>167</sup> The constitution's guarantee is not limited to the expression of conventional or majoritarian ideas. The Supreme Court has underscored this point: A state cannot, consistently with the constitutional guarantee of freedom of expression,

excise, as offensive conduct, one particular scurrilous epithet from the public discourse, either upon the theory that its use is inherently likely to cause violent reaction or upon a more general assertion that the states, acting as *guardians of public morality* may properly remove [an] offensive word from the public vocabulary.<sup>168</sup>

An earnest examination by the courts of the moral questions surrounding homosexuality must include moral implications on both sides. The courts could start by asking: What are the psychological and social consequences of denying lesbians and gays the right to express their identity?<sup>169</sup> Can intrusion into matters so integral to the personality

162. See D.J. West, *Homosexuality*, 68-69, 239 (3d ed. 1968).

163. *Doe v. Commonwealth's Attorney*, 403 F. Supp. at 1202.

164. *Doe v. Bolton*, 410 U.S. 179, 211 (1973) (Douglas, J., concurring).

165. See *Miller v. California*, 413 U.S. 15 (1973) (obscenity test includes the element that the work or act, taken as a whole, must appeal to the prurient interest in sex).

166. *Brandenburg v. Ohio*, 395 U.S. 444, 447-78 (1969) (state may not forbid advocacy of unlawful conduct unless such advocacy is directed toward inciting or producing imminent lawless action and is likely to produce such action).

167. *Healey v. James*, 408 U.S. 169, 187-88 (1972) (mere disagreement with student group's philosophy afforded no reason to deny official recognition to group).

168. *Cohen v. California*, 403 U.S. 15, 22-23 (1971) (emphasis added).

169. Cf. *Brown v. Board of Educ.*, 347 U.S. 483, 494 (1954) (segregation in schools generates feelings of inferiority in Black children and affects their motivation to learn).



be justified? Can a central component of the lesbian/gay personality be excised and lesbians and gays still be expected to function as productive members of society? May certain acts and expression be morally prohibited, knowing that such acts and speech are important to the dignity of lesbians and gays, as well as to their self-fulfillment? Do not these moral demands silence speech, when the right of lesbians and gays to speak out should be protected? Does society gain or lose anything from this imposed silence? Is not the state's "right to control the moral content of a person's thoughts," supposed to be "wholly inconsistent with the philosophy of the first amendment"?<sup>170</sup>

These questions reveal genuine issues which most courts that have had the chance have not faced. One federal court that has acknowledged the importance of both private and public expression of lesbian/gay personality dismissed moral considerations as "social judgments, not ingredients for gauging constitutional permissibility."<sup>171</sup> Too often, however, courts and legislatures, apparently driven by a desire to promote the majoritarian standard of morality, create and allow untold human suffering.<sup>172</sup>

The first amendment was adopted to prevent majoritarian values from suppressing unpopular speech, and to prevent state action from interfering with its expression, unless the state can show such expression is "directed at inciting or producing imminent lawless action and is likely to produce such action."<sup>173</sup> If the state feels that the unregulated expression of lesbian/gay personhood threatens its social interests, the state should foster more speech, not suppression. This principle, first declared by Justice Brandeis,<sup>174</sup> was recently reaffirmed by a unanimous court:

If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the process of education *the remedy to be applied is more speech, not enforced silence*. Only an emergency can justify repression.<sup>175</sup>

The state interests examined above collide with the first amendment because they are aimed at coercing lesbians and gays to conform to the social norms of the heterosexual majority. "[F]reedom of expression must receive full protection. . . . No matter how deviant the expression

170. *Stanley v. Georgia*, 394 U.S. 557, 565-66 (1969).

171. *Ben Shalom v. Secretary of the Army*, 489 F. Supp. 964, 976 (E.D. Wis. 1980).

172. *See supra* note 146.

173. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

174. *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J. concurring at 372).

175. *Linmark Assoc., Inc. v. Township of Willingboro*, 431 U.S. 85, 97 (1977), *quoting Whitney*, 274 U.S. at 377 (emphasis added).

may be—how obnoxious or intolerable it may seem—the expression cannot be suppressed.”<sup>176</sup>

### C. *Not an Exception to Protected Speech*

Lacking a substantial state interest, the content-based abridgment of the public expression of lesbian/gay personhood is permissible only if that expression falls under one of the narrow exceptions to protected speech. The Supreme Court has to date limited these exceptions to expression which can be characterized as “fighting words,”<sup>177</sup> obscene<sup>178</sup> or defamatory,<sup>179</sup> or which present a “clear and present danger.”<sup>180</sup> Only the “fighting words” and “clear and present danger” exceptions are relevant for analysis here, since the public expression of lesbian/gay personhood as defined here is not defamatory or obscene.<sup>181</sup>

The “fighting words” doctrine, first articulated by the Supreme Court in *Chaplinsky v. New Hampshire*,<sup>182</sup> placed outside the protection of the first amendment those expressions “which by their very utterance inflict injury or tend to incite an immediate breach of the peace.”<sup>183</sup> While some persons react violently to the mere expression of lesbian/gay personhood,<sup>184</sup> such occurrences are insufficient to classify such expression as “fighting words.”

An application of the “fighting words” doctrine<sup>185</sup> so broad as to prohibit speech merely because it might provoke a violent reaction is unconstitutional.<sup>186</sup> When an American flag was burned while uttering scornful words, the Court said:

Though it is conceivable that some listeners might have been moved to retaliate upon hearing appellant’s disrespectful words, we cannot say that appellant’s remarks were so inherently inflammatory as to come within that small class of fighting words which are ‘likely to

176. T. Emerson, *supra* note 93, at 45.

177. See *infra* text accompanying notes 182-93.

178. See *Miller v. California*, 413 U.S. 15 (1973) (the state can regulate “works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value”).

179. *E.g.*, *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); *New York Times v. Sullivan*, 376 U.S. 254 (1964).

180. See *infra* text accompanying notes 194-200.

181. The public expression of lesbian/gay personhood as defined in this article need not involve sexual conduct, a necessary element to establish obscenity. See *Miller v. California*, 413 U.S. 15, 24 (1973).

182. 315 U.S. 568 (1942).

183. *Id.* at 572.

184. See *Growing Terror of Gay Bashing*, *Newsweek*, Mar. 23, 1981, at 30.

185. See *Street v. New York*, 394 U.S. 576 (1969).

186. *Id.* at 592.

provoke the average person to retaliation and thereby cause a breach of the peace.<sup>187</sup>

The broad protection of speech, despite "public inconvenience, annoyance, or unrest,"<sup>188</sup> was recognized twenty years earlier<sup>189</sup> when Justice Douglas stated for the majority that "a function of free speech under our system of government is to invite dispute."<sup>190</sup> Indeed, said Justice Douglas, this function may "best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger."<sup>191</sup> Justice Douglas understood that speech is often provocative and challenging and that "[i]t may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea."<sup>192</sup> Expression is protected even in the face of retaliation by a hostile or disquieted listener or onlooker.

The Court has narrowed the application of the "fighting words" doctrine by requiring that the speech in question be directed specifically and personally at the individual who is incited to commit an immediate breach of the peace.<sup>193</sup> Lesbians and gays do not generally direct their expressions of personhood at any particular person, nor do they intend to incite an immediate breach of the peace.

Thus, the public projection of lesbian/gay personhood does not constitute "fighting words" merely because some persons react violently to it. Nor does its very utterance inflict injury because some persons exposed to it are offended. To prohibit speech on this basis undermines the first amendment which demands particularly vigilant judicial protection when opposition or violent reaction is based on majoritarian values. If the first amendment is to be meaningful, the Court must protect the expression of the homosexual minority against suppression by the heterosexual majority.

The "clear and present danger" rule,<sup>194</sup> as articulated by Holmes in

187. *Id.* quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 574 (1942).

188. *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949).

189. *Id.*

190. *Id.* at 4.

191. *Id.*

192. *Id.* (emphasis added).

193. See *Hess v. Indiana*, 414 U.S. 105 (1973); *Gooding v. Wilson*, 405 U.S. 518 (1972); *Cohen v. California*, 403 U.S. 15 (1971). In *Cohen*, one reason the Court gave for reversing the defendant's conviction for wearing a jacket bearing the words "Fuck the Draft" was that "[n]o individual actually or likely to be present could reasonably have regarded the words on appellant's jacket as a direct personal insult." *Id.* at 20. The Court also noted the lack of "showing that anyone who saw Cohen was in fact violently aroused or that appellant intended such a result." *Id.*

194. See *Schenk v. United States*, 249 U.S. 47 (1919) (mailing anti-draft circulars during World War I not protected by first amendment). This rule, since its birth in 1919, has been applied unevenly, influenced as much by political events as by the changing composition of

*Schenck v. United States*,<sup>195</sup> gives the state the right to proscribe words which "create a clear and present danger that they will bring about the substantive evil that Congress has a right to prevent."<sup>196</sup> Further, "the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished."<sup>197</sup> When unlawful acts are advocated, the Court held in *Brandenburg v. Ohio*,<sup>198</sup> that "[a] State [may not] forbid or proscribe advocacy of the use of force or of law violation [unless] such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."<sup>199</sup>

The *Brandenburg* test applies to situations in which the state seeks to prevent the violation of specific laws, such as statutes prohibiting homosexual conduct. Even assuming the constitutionality of such laws, states that wish to prohibit speech that advocates lesbian/gay personhood should be required to establish strict empirical causation between such speech and acts which violate state law. Such a showing should not even theoretically support suppression where consensual homosexual acts are not criminal.<sup>200</sup> Nor may a state determine which conduct is legal based upon the content of its communication.<sup>201</sup> If expression of sexual personhood involves protected speech, laws which regulate at least some of its more speech-like forms under the guise of regulating pure conduct are called into question.

#### *D. Speech Discrimination Based on Homosexual Status*

Unlike most minorities, lesbians and gays have no identifying features, such as skin color, visibly to set them apart from the general population. A person's homosexual orientation may be revealed by force, subterfuge, or inadvertance. Or it may be learned by peers, teachers, employers, and others as a result of expressive activity or proclamation.

the Supreme Court. See L. Tribe, *supra* note 30, at 608-17.

195. 249 U.S. 47 (1919).

196. *Id.* at 52.

197. *Bridges v. California*, 314 U.S. 252, 263 (1941) (conviction of labor leader for contempt of court based on his editorial criticizing a state judge held an unconstitutional violation of freedom of speech and of the press).

198. 395 U.S. 444 (1969).

199. *Id.* at 447.

200. *E.g.*, New York, see *People v. Onofre*, 72 A.D.2d 268, 424 N.Y.S.2d 566 (statute prohibiting oral and anal sex between persons of same sex and between unmarried males and females violated right to privacy and equal protection guarantees), *aff'd*, 51 N.Y. 2d 476, 415 N.E.2d 936, 434 N.Y.S.2d 947 (1980), *cert. denied*, 451 U.S. 987 (1981); California, 1975 Cal. Stat. 133 (effective July 1, 1976) (consensual homosexual acts decriminalized).

201. *Carey v. Brown*, 447 U.S. 455 (1980).

Either way, expression is involved. Any disadvantage which results because of such expression violates the first amendment. Often, however, it is difficult or impossible to link negative treatment to specific expressive activity; rather, the sole basis appears to be homosexual status. Damaging treatment on this basis should also violate the first amendment because of its "chilling effect" on the exercise of free speech, and the "affirmation of a belief"<sup>202</sup> which it compels.

Grounded fear of retaliation on the basis of *being* homosexual inhibits lesbians and gays from *expressing* themselves. They fear that discovery will lead to consequences like loss of employment, eviction from an apartment or house, and physical violence. This "indirect inhibition or deterrence of the exercise of a constitutional right is as odious as the direct prohibition of the exercise of that right,"<sup>203</sup> because it discourages persons from engaging in expression central to being who they are. The Supreme Court has recognized the right to challenge governmental action which has "only an indirect effect on the exercise of First Amendment rights."<sup>204</sup>

This "chilling effect" on the expression of personhood leads many lesbians and gays to express a false heterosexual personhood to avoid discrimination and ostracism. Indeed, for those who desire dignified and equal treatment in heterosexual society, heterosexuality is compulsory.<sup>205</sup> Lesbians and gays are compelled to choose between the denial of merited benefits and the denial of a homosexual life. Such compulsion "invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control."<sup>206</sup>

This compelled expression of a false personhood infringes individual liberty even more drastically than does a compulsory flag salute found impermissible because it compelled an individual to "utter what is not in his mind."<sup>207</sup> The same rationale should extend to state action which compels lesbians and gays to utter what is not in their minds, not

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202. *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 633 (1943); *see infra* notes 206-07 and accompanying text.

203. *Valley Family Planning v. North Dakota*, 489 F. Supp. 238, 242 (D.N.D. 1980) (North Dakota statute prohibiting the funding of public agencies which make abortion referrals violates the first and fourteenth amendments because referring persons to physician who performs abortion is a form of speech protected by the first amendment).

204. *Laird v. Tatum*, 408 U.S. 1, 12-11 (1972) (allegations of "specific present objective harm or a threat of specific future harm" are sufficient for challenging the constitutionality of state action).

205. *Rich*, *supra* note 1.

206. *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. at 642.

207. *Id.* at 634.

only during a brief ceremonial moment, but throughout their entire public lives.

Compelled affirmation of a belief is always repugnant to first amendment values. Compelling lesbians and gays to be instruments for fostering the state's view of heterosexuality as the only acceptable sexual orientation is not significantly different from requiring the dissemination of an ideological point of view. In *Wooley v. Maynard*,<sup>208</sup> the Court found unconstitutional the state's use of individuals as instruments to foster a point of view which the individuals found morally, religiously, and politically objectionable.<sup>209</sup> Serving as an instrument to propagate the virtues of heterosexuality is equally objectionable to lesbians and gays who do not identify with it, who may even be politically critical of it. Such compelled duplicity has an impact upon the intellect and spirit of a lesbian or gay arguably more severe than is the impact of having to display "Live Free or Die" on one's license plates.<sup>210</sup> The *Maynard* court recognized that "the right to speak and the right to refrain from speaking are complementary components of the broader concept of individual freedom of mind."<sup>211</sup> Just as lesbians and gays have a right to express their personhood, they have a right to refuse to express a false one.

Upon discovering a person's homosexuality, a state often withdraws a benefit totally or partially. Lesbians and gays are often demoted or fired from state jobs, teaching for example.<sup>212</sup> If such action is taken under a statute that proscribes employment of lesbian and gay teachers as such,<sup>213</sup> lesbians and gays are given advance warning that the public expression of their personhood will result in heavy sanctions. To demote or fire lesbians and gays because they express their personhood is analogous to levying a press tax against persons who exercise their right to free speech. In *Grosjean v. American Press Co.*,<sup>214</sup> the Court found that the state's motive in levying a press tax was to stifle a particular point of view. The tax was an unconstitutional prior restraint. The motive of a state which sanctions or legislates policies and laws against lesbians and gays as such stifles a particular form of personhood.

208. 430 U.S. 705 (1977) (state statute making it a crime to obscure the words, "Live Free or Die," on state license plates violates first amendment).

209. *Id.* at 707.

210. *Id.* at 717.

211. *Id.* at 714.

212. *E.g.*, in *Acanfora v. Board of Educ.*, 491 F.2d 498 (4th Cir. 1974), the plaintiff teacher was transferred to an administrative job with no student contact when his sexual orientation was discovered. For other cases involving employment discrimination against lesbians and gays, see *Rivera*, *supra* note 37, at 805-74.

213. See *e.g.*, *supra* notes 27-28.

214. 297 U.S. 233 (1936).

Sometimes the restraint on expression in lesbian/gay situations is more direct. In *Gay Lib v. University of Missouri*,<sup>215</sup> the state university sought to have the Court uphold its denial of official recognition of a gay student organization. The Court viewed the university's "concern for the impact of recognition on the general relationship of the university to the public at large"<sup>216</sup> as insufficient to justify a denial of recognition solely on the basis of the homosexual status of the student members.

The restrictions imposed on the expression of lesbian/gay personhood should carry with them "a heavy presumption against [their] constitutional validity."<sup>217</sup> This presumption should be at least as great when the abridgment of freedom of speech has the effect of denying people the right to be themselves.

Sexual orientation forms an integral part of personhood<sup>218</sup> which one should have the right to express, with very limited exceptions, both privately and publicly. This expression involves first amendment activity which is commonplace; the *only* difference is that it is done in a lesbian/gay context. Examples of public expression of lesbian/gay personhood include discussing rights, wearing liberation insignia, frequenting recreational accommodations, subscribing to newspapers, marching in the streets, joining political or social organizations, and engaging in affectionate social conduct and/or interaction, such as dancing or holding hands on a park bench. The first amendment clearly protects such expressive activities for heterosexuals. These activities are part of the values and functions of freedom of expression which are an "essential . . . means of assuring individual self-fulfillment."<sup>219</sup> Yet, states frequently prohibit the public expression of lesbian/gay personhood by directly sanctioning it or by denying, or allowing to be denied, rights and benefits, such as employment, when participation in such expression leads to the discovery of homosexuality. Often states do not even link sanctions to specific expressive activity, but base such treatment on being homosexual itself.

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215. 558 F.2d 848 (8th Cir. 1977), *cert. denied*, 434 U.S. 1080 (1978).

216. *Id.* at 851.

217. Any system imposing prior restraint on expression carries with it a heavy presumption against its own constitutional validity. *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963), *cited with approval in New York Times v. United States*, 403 U.S. 713, 714 (1971) (*per curiam*) (where government sought to enjoin newspapers from publishing a classified study on ground of national security, Court held that government had not met its burden of showing justification for first amendment restraint).

218. *See text accompanying note 68 supra.*

219. *See T. Emerson, supra note 93, at 6.*

#### IV. Expression of Lesbian/Gay Personhood as a Fundamental Right

Courts critically examine complaints that a governmental classification burdens a fundamental right.<sup>220</sup> The government must then demonstrate that it has a legitimate and substantial interest in its policies and that its means do not "unnecessarily infringe" on the right protected.<sup>221</sup> This intensity of examination should be applied when courts assess policies and practices which are alleged to deny lesbians and gays their right to expression under the first amendment.

The public expression of lesbian/gay personhood is a fundamental right founded in the first amendment. The Supreme Court has inferred fundamental rights from the explicit and implicit provisions of the Bill of Rights.<sup>222</sup> In *San Antonio Independent School District v. Rodriguez*,<sup>223</sup> the Court stated that in determining whether a right is fundamental, "the answer lies in assessing whether [that right is] explicitly or implicitly guaranteed by the Constitution."<sup>224</sup> The right to privacy<sup>225</sup> and its

220. See e.g., *Zablocki v. Redhail*, 434 U.S. 374, 383 (1978) (Court "critically examined" Wisconsin statute which required Wisconsin residents "having minor issue not in his custody and which he is under obligation to support" to obtain court permission to marry; the Court found the freedom to marry to be "a fundamental liberty protected by the Due Process Clause"). Courts apply a strict scrutiny standard to government classifications when complainants demonstrate that a fundamental right is at stake. The Supreme Court has found the following rights to be fundamental: *Harper v. Virginia Bd.*, 383 U.S. 663 (1966) (voting); *Shapiro v. Thompson*, 394 U.S. 618 (1969) (travel); *NAACP v. Alabama*, 357 U.S. 449 (1958) (association); *NAACP v. Button*, 371 U.S. 415 (1963) (access to courts); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (privacy); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (education).

Courts also heighten scrutiny when complainants show that the rights of a suspect class are at stake. E.g., *Graham v. Richardson*, 403 U.S. 365 (1971) (alienage); *Korematsu v. United States*, 323 U.S. 214 (1944) (race); *Frontiero v. Richardson*, 411 U.S. 677 (1973) (plurality) (sex). See *supra* notes 29-30 and accompanying text. One federal district court has suggested that homosexuals constitute a suspect class. Noting that policies directed at private, consensual adult homosexuality might be suspect, the court found mere knowledge of a teacher's homosexuality to be insufficient justification for his transfer to an administrative position. *Acanfora v. Board of Educ.*, 359 F. Supp. 843, 852-53 (D. Md. 1973) (court ultimately denied relief under Civil Rights Act of 1871 as teacher's public statements and activities in response to transfer were not "protectable" speech; court viewed such speech as likely to incite or produce imminent affects deleterious to the educational process), *aff'd on other grounds*, 491 F.2d 498 (4th Cir.), *cert. denied*, 419 U.S. 836 (1974).

221. *Zablocki v. Redhail*, 434 U.S. 374 (1978).

222. See e.g., *NAACP v. Alabama*, 357 U.S. 449 (1958) (noting that freedom of association is a peripheral first amendment right), *Griswold v. Connecticut*, 381 U.S. 479 (1965) (holding that the right of privacy emanates from the Bill of Right's penumbras); *contra San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1 (1973) (Court refused to hold that the right to education is "fundamental"); see also cases cited *supra* note 220.

223. 411 U.S. 1 (1973).

224. *Id.* at 33-34.

225. See *Griswold v. Connecticut*, 381 U.S. 479 (1975).



progeny,<sup>226</sup> with the right of association,<sup>227</sup> are examples of rights the Court has deemed "fundamental" because they are implicitly contained in the Bill of Rights.<sup>228</sup> Unlike the rights to privacy and association, the right to publicly express lesbian/gay personhood, once seen as a form of speech, is protected by the *express* provisions of the first amendment.<sup>229</sup> Courts therefore must critically examine challenges to governmental classifications which impinge on it.

Because the public expression of lesbian/gay personhood is a fundamental right, founded in the first amendment, courts must heighten their scrutiny of practices against lesbians and gays when challenged under the equal protection or due process clauses of the fourteenth amendment. This level of scrutiny will safeguard many of the rights of lesbians and gays now set aside in deference to state interests.

## V. Conclusion

Sexual orientation is integral to personhood, both its private and public expression. Publicly, lesbian/gay personhood is manifested through expressive conduct, symbolic speech, and pure speech. This expression should be fully and equally protected by the first amendment in appropriate cases, when it undermines no substantial state interest nor falls under the narrow exceptions to protected speech. Most official burdens on sexual orientation also infringe on lesbians' and gays' fundamental right to express their personhood, a right founded on the first amendment. When such challenges are brought on these grounds, courts must strictly examine such state policies and practices.

Judicial recognition of the right to express a lesbian/gay personhood will give lesbians and gays the right to express, therefore to be, themselves. It will strengthen the foundation upon which the first amendment rests: assuring individual self-fulfillment. "For the achievement of this self-realization the mind must be free. Hence suppression of belief, opinion, or other expression is an affront to . . . [one's] dignity."<sup>230</sup>

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226. See *Roe v. Wade*, 410 U.S. 113 (1973); *Doe v. Bolton*, 410 U.S. 179 (1973); *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

227. See *NAACP v. Alabama*, 357 U.S. 449 (1958).

228. See *supra* note 222.

229. See *supra* text accompanying notes 96-139.

230. T. Emerson, *supra* note 93, at 6.

