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First Amendment Protection of Homosexual Conduct

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FIRST AMENDMENT PROTECTION OF HOMOSEXUAL CONDUCT

INTRODUCTION

The Supreme Court found, in *Bowers v. Hardwick*,[1] that homosexual sodomy is not protected by the Due Process Clause of the Constitution. The decision provoked outrage in the gay community: "*Bowers* is to the growing gay rights movement what *Plessy v. Ferguson* was to the civil rights movement, and what *Dred Scott v. Sandford* was to the abolitionists. Each of these decisions reflects the Court's failure to recognize the equal humanity and personhood of members of a minority group."[2]

However, a finding that homosexual sodomy is unprotected by the Due Process Clause does not necessarily mean that homosexual conduct is without constitutional protection. For example, Cass Sunstein has asserted that, despite *Bowers*, the Equal Protection Clause protects both homosexual orientation and homosexual conduct.[3] According to Sunstein:

> Each constitutional provision must be taken on its own. It would hardly be odd to find that one constitutional provision invalidates practices about which another provision has

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[1] 478 U.S. 186 (1986).

[2] David Cole & William N. Eskridge, Jr., *From Hand-Holding to Sodomy: First Amendment Protection of Homosexual (Expressive) Conduct*, 29 HARV. C.R.-C.L. L. REV. 319, 323 (1994) (citations omitted).

[3] *See* Cass R. Sunstein, *Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection*, 55 U. CHI. L. REV. 1161, 1166 n.26 (1988). Sunstein stated:

> [A] statute discriminating on the basis of sexual orientation should be subject to special scrutiny under the Equal Protection Clause; the same considerations also support the view that statutes should be subject to such scrutiny if they discriminate on the basis of participation in homosexual acts, though I do not argue that point in detail here.

Id.

> nothing to say. The Fourth Amendment, for example, does not disable the state from regulating activities that the First Amendment protects, and vice versa. The fact that the Fourth Amendment does not prevent the state from regulating all speech-related activities could not plausibly be a reason to immunize speech from special First Amendment scrutiny.[4]

This Note argues that, in fact, the First Amendment provides Constitutional protection for homosexual conduct. It argues this proposition in three parts. First, it looks at the protections offered sexual speech in public and private contexts and at the current test used to analyze the extent to which First Amendment protection is offered to expressive conduct, such as sexual conduct. Second, the Note analyzes the competing public and private interests in prohibiting or protecting private homosexual conduct and weighs those interests against each other. Third, the Note argues that, given this analysis, the state's interest in prohibiting private homosexual conduct is insufficient to justify prohibiting that expressive conduct.

I. BACKGROUND

A. Sexual Speech and the Public v. Private Dichotomy

Historically, public speech has received greater First Amendment protection than private speech.[5] This has largely been due to the kinds of philosophies which have been brought to bear to justify freedom of expression.

The oldest philosophical justification for free speech contends that speech must be protected because only the competition of varied points of view in the "marketplace of ideas" distinguishes truth from error.[6] This philosophy advocates that "though all the winds of doctrine were let loose to play upon the earth, so Truth be in the field, we do injuriously by licensing and prohibiting to misdoubt her strength. Let her and Falsehood grapple; who ever knew Truth put to worse in a free and open encounter."[7] Its most eloquent expression as a Constitutional doctrine was voiced by

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[4] *Id.* at 1167.

[5] *See* Cole & Eskridge, *supra* note 2, at 345-47.

[6] *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-1, at 785-86 (2d ed. 1988) (summarizing the position briefly).

[7] JOHN MILTON, *Areopagitica*, *in* JOHN MILTON: COMPLETE POEMS AND MAJOR PROSE 717, 746 (1957); *see also* John Milton, *On Liberty*, *in* THE PHILOSOPHY OF JOHN STUART MILL 185, 203-48 (1961) (advocating free speech as a way to determine truth).

Justice Holmes:

> [W]hen men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market; and that truth is the only ground upon which their wishes safely can be carried out. That, at any rate, is the theory of our Constitution.[8]

Such a philosophy protects speech because doing so protects the search for truth.

A similar philosophy argues that speech must be protected because free speech is essential to democracy.[9] The best-known advocate of this philosophy, Alexander Meikeljohn, uses the New England town meeting as a paradigm of democracy.[10] In such a system:

> [C]onflicting views may be expressed, must be expressed, not because they are valid, but because they are relevant. If they are responsibly entertained by anyone, we, the voters, need to hear them. When a question of policy is "before the house," free men choose to meet it not with their eyes shut, but with their eyes open. To be afraid of ideas, any idea, is to be unfit for self-government.[11]

Such a philosophy protects speech because doing so is necessary for democracy to function.

Both theories emphasize the value of *public* speech: speech in

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[8] Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting); *see also* David M. Rabban, *The Emergence of Modern First Amendment Doctrine*, 50 U. CHI. L. REV. 1205 (1983) (describing the emergence of the Chafee-Holmes-Brandeis line of First Amendment thought); David M. Rabban, *The First Amendment in Its Forgotten Years*, 90 YALE L.J. 514 (1981) (sketching the pre-World War I free speech views of certain judges and scholars).

[9] *See* JOHN H. ELY, DEMOCRACY AND DISTRUST 105-34 (1980); ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948); ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM (1960) [hereinafter MEIKLEJOHN, POLITICAL FREEDOM]; Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521; Harry Kalven, Jr., *The New York Times Case: A Note on "The Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191; Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245 [hereinafter Meiklejohn, *Absolute*].

[10] *See* MEIKLEJOHN, POLITICAL FREEDOM, *supra* note 9, at 24-28.

[11] *Id.* at 28.

the public marketplace or in the public forum. For this reason, public speech has become the paradigm of that speech which is given the greatest First Amendment protection.[12]

Sexual expression, however, enjoys more private protection than public protection.[13] Generally, sexually explicit expression which is not obscene and does not involve minors is protected by the First Amendment.[14] However, public sexual expression which involves nudity may be prohibited by laws which prohibit public nudity generally, as long as those laws are not aimed at limiting sexual expression in particular.[15] Also, the Court has found that

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[12] *See* Cole & Eskridge, *supra* note 2, at 345. The authors note, however, that First Amendment protection may also frequently extend to public speech for a more mundane reason: It is far more likely to be widely noticed, easily investigated, and successfully prosecuted than private speech. *See id.*

[13] According to David Cole:

> [P]ublic representations of sex are more subject to regulation than sexual behavior. This reverses the usual relationship between conduct and expression. While it is illegal, for example, to rob a bank, it is not illegal to publish a novel or make a movie about robbing a bank. . . . As construed by the Supreme Court, the First Amendment not only fails to protect representations of *illegal* sexual conduct; it permits the state to criminalize the representation of sexual conduct that is itself legal to engage in. Obscenity doctrine, for example, permits the proscription of prurient depictions of "patently offensive" sexual conduct, whether or not the underlying conduct is (or could be) unlawful. Similarly, while private nude dancing has never been banned, its public display may be extensively regulated.

David Cole, *Playing by Pornography's Rules: The Regulation of Sexual Expression*, 143 U. PA. L. REV. 111, 113-14 (1994).

[14] *See* United States v. X-Citement Video, Inc., 513 U.S. 64 (1994) (discussing statute that prohibited transportation of sexually explicit material involving minors); Miller v. California, 413 U.S. 15 (1973) (invalidating statute that prohibited mailing of sexually explicit, but not necessarily obscene, material); *see also* Fort Wayne Books, Inc. v. Indiana, 489 U.S. 46 (1989) (noting that non-obscene, pornographic material is protected). For limits as regards sexual expression by minors, see *New York v. Ferber*, 458 U.S. 747 (1982) and *American Library Ass'n v. Reno*, 33 F.3d 78 (D.C. Cir. 1994). Obscene material is not protected by the First Amendment; it may be regulated or prohibited. *See* Alexander v. United States, 509 U.S. 544 (1993). The test for obscenity is:

> (a) whether the "average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

Miller, 413 U.S. at 24 (citation omitted). Also, material which is not obscene when distributed to adults may be obscene when distributed to minors, under a statute which makes it an offense to knowingly distribute to minors material "harmful to minors." *See* Interstate Circuit, Inc. v. City of Dallas United Artists Corp., 390 U.S. 676 (1968); Ginsberg v. New York, 390 U.S. 629 (1968).

[15] *See, e.g.*, Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991) (deciding that public indecency statute aimed at adult entertainment establishment did not violate the First Amendment).

public sexual expression may be regulated by laws directed at suppressing undesirable secondary effects, such as neighborhood deterioration, as long as the law is not directed at suppressing the sexual expression.[16] Further, "indecent" material, including indecent sexual expression, may be regulated in the broadcast media even when it is not obscene.[17]

It is even possible that public sexually explicit expression, *as* expression, may enjoy less protection than other protected speech. A plurality, in *Young v. American Mini Theatres, Inc.*,[18] found sexually explicit expression to be of lesser value than other protected expression.[19] The Court stated that "society's interest in protecting [such speech] is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate."[20] However, this may be because, as is the case with commercial speech, the sources of this expression "do not profess to convey their own personal messages."[21] A different plurality, in *Barnes v. Glen Theatre, Inc.*,[22] found nude dancing to be "within the outer perimeters of the First Amendment," but "only marginally so."[23]

Public sexual expression which is merely "offensive" is generally protected. In such a case, "the burden is generally on the observer or listener to avert his eyes or plug his ears."[24] But even merely offensive expression may be regulated if it is part of "an assault upon individual privacy by publication in a manner so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it."[25]

Most of these limits on protection of sexual expression recede as that expression becomes more private. The possession and use of even obscene material is protected in the home. In *Stanley v. Georgia*,[26] the Court held that the government's valid interest in

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16. *See* City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986) (holding that an ordinance restricting location of adult movie theatres comports with the First Amendment).

17. *See* Federal Communications Comm'n v. Pacifica Found., 438 U.S. 726, 740 (1978) (finding that "indecent" material is material which does not conform to accepted standards of morality).

18. 427 U.S. 50 (1976).

19. *See id.* at 70.

20. *Id.*

21. *Id.* at 78 n.2 (Powell, J., concurring).

22. 501 U.S. 560 (1991).

23. *Id.* at 566.

24. TRIBE, *supra* note 6, § 12-19, at 948 (citing Erznoznik v. Jacksonville, 422 U.S. 205, 211, 212 (1975); Cohen v. California, 403 U.S. 15, 21 (1971)).

25. Redrup v. New York, 386 U.S. 767, 769 (1967).

26. 394 U.S. 557 (1969).

regulating obscenity could not invade the privacy of the home.[27] The Court stated that "[i]f the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch."[28] Any right which a state might assert to protect the individual's mind from obscenity is utterly inconsistent with the First Amendment, even if the material is devoid of any ideological content.[29] According to the Court, our founders "sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized man."[30]

Greater protection for private sexual expression than for public sexual expression makes little sense if justification for freedom of speech rests on protecting the "marketplace of ideas" or protecting democratic processes. David Cole, puzzling over the extension of greater protection to private sexual expression, observed:

> The First Amendment protects public values; one of its central purposes is to protect an "uninhibited, robust, and wide-open" *public* debate. . . .
>
> Public *sexual* expression, however, receives none of this protection: indeed, the more sexual expression seeks to enter the public arena, the more the Court sanctions its suppression. Social regulation of sexual expression is driven by a moral judgment that certain sexual expression should remain a private matter. Yet the First Amendment generally

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[27] *See id.* at 568.

[28] *Id.* at 565.

[29] *See id.*

[30] *Id.* at 564 (quoting Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)). The mere possession of pornography which involves minors is not constitutionally protected; this is a consequence, however, of protecting minors from sexual exploitation, distinguishing it from private possession of other sexual materials. *See* Osborne v. Ohio, 495 U.S. 103 (1990) (upholding Ohio statute that banned the possession and viewing of child pornography); New York v. Ferber, 458 U.S. 747 (1982) (holding state statute prohibiting persons from knowingly promoting a "sexual performance" by a child under sixteen years old constitutional). Note that even though the government may not prohibit the possession and use of obscene material in the home, it may prohibit transportation of that material to the home. The Supreme Court has consistently upheld laws barring distribution and importation of obscene material, even when intended for private, personal use. *See* United States v. Orito, 413 U.S. 139 (1973) (affirming a statute barring obscenity intended for personal use when it passes through channels of interstate commerce); United States v. 12, 200-Ft. Reels of Super 8mm. Film, 413 U.S. 123 (1973) (affirming a statute barring importation of obscenity for personal use); United States v. Reidel, 402 U.S. 351, 352 (1971) (affirming a statute barring mailing of obscenity between consenting adults).

> precludes the regulation of expression on any moral grounds and holds especially suspect the particular moral judgment enforced here: namely, that speech should be selectively suppressed precisely because it has been expressed in public. The moral judgment that drives the sexual speech doctrine is thus doubly antithetical to the First Amendment tradition.[31]

Indeed, the matter is even more puzzling than Cole described. If sexual expression makes no contribution to "uninhibited, robust, and wide-open debate," then why must the government refrain from punishing the possession and use of obscenity in the home? Surely, such protection cannot be justified by a philosophy of protecting the marketplace of ideas nor one of protecting democratic processes.[32] If protection of private sexual expression is not derived from these philosophies, then from what philosophy is that protection derived?

One answer is a philosophy of self-expression/self-fulfillment.[33] Such a philosophy values individual expression as an end in itself and as a means to personal development:

> Those who won our independence believed that the final end of the State was to make men free to develop their

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[31] Cole, *supra* note 13, at 152-53.

[32] Alexander Meiklejohn argues that self-education in all forms, including education in art and belles-lettres, *contributes* to intelligent voting. *See* Meiklejohn, *Absolute*, *supra* note 9, at 263. However, it is difficult to see how obscene material, which by definition is without socially redeeming value, falls within "the range of human communications from which the voter derives the knowledge, intelligence, sensitivity to human values: the capacity for sane and objective judgment which, so far as possible, a ballot should express." *Id.* at 256. If the material were capable of enhancing "sane and objective judgment," it could not be described as obscene. The question remains: Why does private obscene expression enjoy *any* First Amendment protection?

[33] For descriptions, analyses, and criticisms of varieties of justifications for First Amendment protection based on a philosophy of self-fulfillment/self expression, see C. EDWIN BAKER, HUMAN FREEDOM AND LIBERTY OF SPEECH (1989), RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1977), MARTIN H. REDISH, FREEDOM OF EXPRESSION: A CRITICAL ANALYSIS (1984), C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964 (1978), C. Edwin Baker, *The Process of Change and the Liberty Theory of the First Amendment*, 55 S. CAL. L. REV. 293 (1981), Meir Dan-Cohen, *Freedoms of Collective Speech: A Theory of Protected Communications by Organizations, Communities, and the State*, 79 CAL. L. REV. 1229 (1991), Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877 (1963), Martin H. Redish, *Self-Realization, Democracy, and Freedom of Expression: A Reply to Professor Baker*, 130 U. PA. L. REV. 678 (1982), and Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591 (1982). For a discussion of the similarities and differences between the "classical" view of the First Amendment and the self-fulfillment/self-expression model, see GERALD GUNTHER, CONSTITUTIONAL LAW 998-1002 (12th ed. 1991).

> faculties, and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty.[34]

Simply, expression should be protected not merely because doing so protects important public values, but also because "no other approach would comport with the premise of individual dignity and choice upon which our political system rests."[35] Moreover, protection grounded in a recognition of the value of individual self-expression does not protect speech merely because it is a vehicle for ideas: "We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech, has little or no regard for that emotive function which, practically speaking, may often be the more important element of the overall message sought to be communicated."[36] In sum, discourse ought to be considered for protection to the extent that it is heartfelt expression or an exploration or construction of individuality.

First Amendment protection for expression grounded in a philosophy of self-fulfillment/self-expression is a necessary complement to protection based on a philosophy of idea-testing or democratic action. We cannot limit First Amendment protection only to speech which a single philosophy finds worthy: "Any adequate conception of freedom of speech must instead draw upon several strains of theory in order to protect a rich variety of expressional modes."[37] First Amendment theory must explain which expression is worth protecting in all of human experience, not merely within some artificially crabbed conception of humanity's range. A theory of the First Amendment which protects only public or only private expression betrays human complexity, and a theory which finds nothing in intimate life worth sheltering from the hand of the state is either dangerous or silly.[38] For these reasons, First Amendment protection based on a philosophy of self-fulfillment/self-expression is a natural complement to protection springing from traditional philosophies which defend public communication.

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[34] Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

[35] Cohen v. California, 403 U.S. 15, 24 (1971) (Harlan, J.).

[36] *Id.* at 26.

[37] TRIBE, *supra* note 6, § 12-1, at 789.

[38] *See, e.g.*, Cynthia L. Estlund, *Speech on Matters of Public Concern: The Perils of an Emerging First Amendment Category*, 59 GEO. WASH. L. REV. 1, 40-46 (1990) (examining the problems of a regime which requires that speech involve "matters of public concern" to warrant First Amendment protection).

Greater protection for private than public sexual expression makes more sense if that protection is grounded in a philosophy of self-fulfillment/self-expression. Public acts, such as graduations and other public rituals, can profoundly shape or announce who we are, but they announce a public persona that we share with other participants in the ritual.[39] Many intimate acts, however, such as acts of self-disclosure[40] and intimate play,[41] are individuating acts which reveal or explore the singular mystery of who we are. Indeed, intimate interactions are the predominant means by which we create, discover, and project our selves.[42]

Sex is the ultimate intimacy, whether playful or passionate, contentious or caring. Intimacy is important to fulfilling sex partly because we send sexual messages by nuanced sounds, facial expressions, and touches whose interpretation deepens as we come to more intimate knowledge about our lover.[43] Further, nonverbal acts, such as sexual acts, seem more intimate because they are especially effective in communicating feelings, rather than in communicating more impersonal cognitions.[44] Finally, the intimate proximity of sex is rich in emotional leakage, revelatory of feelings which the lover may be trying to hide or cannot express verbal-

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[39] *See, e.g.*, James F. Walsh, Jr., *Rhetoric in the Conversion of Maoist Insurgency Cadres: Rhetoric and the Social Component of Conversion in Radical Social Movements*, WORLD COMM., Spring 1985, at 27, 33-34 (describing Maoist insurgents' use of public ceremonies as part of process for altering the self).

[40] *See, e.g.*, B. Davidson et al., *Affective Self-disclosure and Marital Adjustment: A Test of Equity Theory*, 45 J. MARRIAGE & FAM. 93 (1983) (examining the role of self-disclosure in marriage); Lawrence R. Wheeless, *A Follow-Up Study of the Relationships Among Trust, Disclosure, and Interpersonal Solidarity*, 4 HUM. COMM. RES. 4 (1978) (examining the role of disclosure in close relationships).

[41] *See* Leslie A. Baxter, *Forms and Functions of Intimate Play in Personal Relationships*, 18 HUM. COMM. RES. 336 (1992) (analyzing the contributions of intimate play in developing and maintaining relationships).

[42] For a sampling of general theoretical perspectives on the development, understanding, and projection of self in interpersonal interaction, see JOHN P. HEWITT, SELF AND SOCIETY: A SYMBOLIC INTERACTIONIST SOCIAL PSYCHOLOGY (3d ed. 1984); MICHAEL LEWIS & JEANNE BROOKS-GUNN, SOCIAL COGNITION AND THE ACQUISITION OF SELF (1979); Daryl J. Bem, *Self-Perception Theory*, 6 ADVANCES IN EXPERIMENTAL SOC. PSYCHOL. 1 (1972); Charles Horton Cooley, *Looking-Glass Self*, *in* SYMBOLIC INTERACTION: A READER IN SOCIAL PSYCHOLOGY 231 (Jerome G. Manis & Bernard N. Meltzer eds., 2d ed. 1972); and Andrew J. Lock, *The Role of Relationships in Development: An Introduction to a Series of Occasional Articles*, 3 J. SOC. & PERS. RELATIONSHIPS 89 (1986).

[43] *See* DOMINIC A. INFANTE ET AL., BUILDING COMMUNICATION THEORY 267-68 (2d ed. 1993) (regarding our cultural expectation that sexual messages be expressed non-verbally); *see also* IRWIN ALTMAN & DALMAS A. TAYLOR, SOCIAL PENETRATION: THE DEVELOPMENT OF INTERPERSONAL RELATIONSHIPS (1973) (describing an evolution of relationships in which accuracy of prediction and interpretation of meaning in behavior increases with intimacy).

[44] *See* INFANTE ET AL., *supra* note 43, at 248.

ly.[45] The subtlety, emotionality, and seeming transparency of sexual expression make it a unique ground for creating, finding, and revealing self.

Protection of private sexual expression does not require any special protection for public sexual expression. Indeed, one may argue that certain kinds of public sexual expression deserve little or no constitutional protection *because* they are public. Harry Clor, for example, contends that "the essence of the obscene is its invasion of privacy."[46] According to Clor, "obscenity consists in making public that which is private; it consists in an intrusion upon intimate physical processes and acts or physical-emotional states."[47] A violation of intimacy is obscene because it reveals what should be shared with one or a few close persons to the harsh light of public scrutiny, often making the private self which lies revealed seem too silly or too tawdry to be worth protecting. Any public sexual expression which cheapens sexual intimacy, thus devaluing the self-fulfillment and self-expression possible in sex, cannot appeal to a philosophy of self-fulfillment and self-expression for protection.

Indeed, some argue that a public sexual taboo is an essential part of private sex as we know it: "[T]he public/private line . . . is . . . central to maintaining the mystery, sanctity, and (indeed) sexiness of sex."[48] There may be some truth to this argument. But if we choose to limit the public appearance of sexual expression, then *it becomes doubly important to protect sexual expression in private life.* Otherwise, we risk diminishing a unique and irreplaceable ground for revealing and finding the self.

The philosophy by which sexual expression is protected is an important consideration in deciding whether any particular sexual act is protected and to what extent it is protected. However, sexual communication is more than just speech. Sexual acts fall within the rubric of "expressive conduct," a kind of communication which is speech plus a physical component which may be regulated for reasons having nothing to do with the act's semantic component. Consequently, an analysis of the protection extended to some sexual act must be shaped by the Court's approach to analyzing expressive conduct generally.

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[45] *See id.* at 250, 253.

[46] HARRY M. CLOR, OBSCENITY AND PUBLIC MORALITY 225 (1969).

[47] *Id.*

[48] Cole & Eskridge, *supra* note 2, at 36. The assumptions underlying this view and some of its implications is the theme of Cole, *supra* note 13.

B. First Amendment Analysis of Expressive Conduct

Some nonverbal conduct is considered "expressive conduct" or "symbolic speech," and it is given the constitutional protection of the First Amendment. Such conduct, to the extent that it is communicative, may be protected under the First Amendment.[49] For example, conduct such as "the wearing of an armband for the purpose of expressing certain views is . . . closely akin to 'pure speech.'"[50] Courts have protected a wide variety of expressive conduct: *Stromberg v. California*[51] struck down a law which barred display of the Communist flag, *West Virginia State Board of Education v. Barnette*[52] protected a refusal to salute the American flag, *NAACP v. Button*[53] found a lawsuit to be a "form of political expression,"[54] *Brown v. Louisiana*[55] extended First Amendment protection to a sit-in, *Shuttlesworth v. City of Birmingham*[56] determined that "picketing and parading [are] . . . methods of expression, entitled to First Amendment protection,"[57] *Spence v. Washington*[58] allowed a protestor to attach a peace symbol to a flag, and *Texas v. Johnson*[59] upheld the burning of an American flag as a form of expression.

The lines between speech, expressive conduct, and conduct which is not expressive are not always clear.[60] To some extent, all

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[49] *See* West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 632 (1943) (Jackson, J.) (finding symbolic speech to be "a primitive but effective way of communicating ideas").

[50] Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 505 (1969).

[51] 283 U.S. 359 (1931).

[52] 319 U.S. 624 (1943).

[53] 371 U.S. 415 (1963).

[54] *Id.* at 429.

[55] 383 U.S. 131 (1966).

[56] 394 U.S. 147 (1969).

[57] *Id.* at 152.

[58] 418 U.S. 405 (1974) (per curiam).

[59] 491 U.S. 397 (1989).

[60] *See* Mabey v. Reagan, 537 F.2d 1036, 1045 (9th Cir. 1976) (separating conduct and speech requires an "analytical scalpel"); Women Strike for Peace v. Morton, 472 F.2d 1273, 1282 (D.C. Cir. 1972) ("[V]irtually all communication—from the faintest whisper to a large demonstration—is a compound of 'speech' and 'conduct.'"); TRIBE, *supra* note 6, § 12-7, at 827 ("All communication except perhaps that of the extrasensory variety involves conduct."); John Hart Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482, 1495 (1975) ("The . . . Court thus quite wisely dropped the 'speech-conduct' distinction as quickly as it had picked it up."); Louis Henkin, *The Supreme Court, 1967 Term—Foreword: On Drawing Lines*, 82 HARV. L. REV. 63, 79-80 (1968) (cautioning against drawing rigid lines between speech and other symbolic conduct); Laurie Magid, *First Amendment Protection of Ambiguous Conduct*, 84 COLUM. L. REV. 467 (1984) (arguing that the distinction between speech and conduct is unworkable). *Compare* Cox v. Louisiana, 379

human conduct communicates, since all acts hint at the attitudes of the actors who performed them.[61]

Yet, the Court does not regard all conduct as constitutionally-protected speech.[62] In deciding whether it should extend First Amendment protection to expressive conduct, the Court uses a two-step analysis of that conduct.

First, it asks whether the conduct is expressive. Specifically, the Court asks whether the conduct is intended to communicate or likely to be understood as communicative.[63] As a rule, the Court extends First Amendment protection to conduct only if the actor intended the conduct as a message:

> Whatever else may or may not be true of speech, as an irreducible minimum it must constitute a communication. That, in turn, implies both a communicator and a communicatee—a speaker and an audience. . . . [W]ithout an actual or potential audience there can be no first amendment speech right. Nor may the first amendment be invoked if there is an audience but no actual or potential "speaker. . . ." [U]nless there is a human communicator intending to convey a meaning by his conduct, it would be odd to think of it as conduct constituting a communication

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U.S. 559 (1965) (holding a statute banning demonstration near a courthouse constitutional), *with* Edwards v. South Carolina, 372 U.S. 229 (1963) (holding common law crime of breach of the peace unconstitutionally vague). For a comparison of the two cases, see also Harry Kalven, Jr., *The Concept of the Public Forum:* Cox v. Louisiana, 1965 SUP. CT. REV. 1.

[61] For the most recent round of debate regarding the extent to which human action generally can be regarded as communication, see Peter A. Andersen, *When One Cannot Not Communicate: A Challenge to Motley's Traditional Communication Postulates*, 42 COMM. STUD. 309 (1991), Janet Beavin Bavelas, *Behaving and Communicating: A Reply to Motley*, 54 W.J. SPEECH COMM. 593 (1990), Theodore Clevenger, Jr., *Can One Not Communicate? A Conflict of Models*, 42 COMM. STUD. 340 (1991), and Michael T. Motley, *On Whether One Can (Not) Communicate: An Examination via Traditional Communication Postulates*, 54 W.J. SPEECH COMM. 1 (1990).

[62] While it is arguable that all conduct could be construed as speech, doing so quickly leads to a *reductio ad absurdum*. *See* Stephen L. Carter, *Does the First Amendment Protect More Than Free Speech?*, 33 WM. & MARY L. REV. 871, 871-72 (1992) (illustrating the possibility and absurdity of extending free speech to conduct generally). According to Louis Henkin, "[t]he meaningful constitutional distinction is not between speech and conduct, but between conduct that speaks, communicates, and other kinds of conduct. If it is intended as expression, if in fact it communicates, especially if it becomes a common comprehensible form of expression, it is 'speech.'" Henkin, *supra* note 60, at 79-80.

[63] *See* Texas v. Johnson, 491 U.S. 397, 404 (1989); Spence v. Washington, 418 U.S. 405, 409 (1974).

protected by the first amendment.[64]

Since a great deal of conduct can have some communicative dimension to it, this is a low threshold.[65] However, if the Court finds the conduct is not expressive, then the First Amendment is not implicated.[66]

Second, if the conduct is found to be expressive, the Court applies the following test:

> [G]overnment regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.[67]

Expressive conduct "remains conduct, subject to regulation by the state."[68] If the government's interest in the regulation is related to the expressive element of the conduct, then the regulation will probably be invalidated. Generally, "[c]ourts will review even incidental infringements carefully for any constitutional infirmity."[69] If infringement on expression is an incidental effect of the regulation, then the regulation may be sustained.[70] The current version of the test balances the state's interest in regulations which impinge upon expression against the actor's interest in the expression, and it considers whether there are alternatives available to either party.[71]

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[64] Mellville B. Nimmer, *The Meaning of Symbolic Speech Under the First Amendment*, 21 UCLA L. REV. 29, 36 (1973).

[65] *See* Cole & Eskridge, *supra* note 2.

[66] *Compare* Barnes v. Glen Theatre, Inc., 501 U.S. 560, 565 (1991) (holding that erotic dancing is communicative), *with* Dallas v. Stanglin, 490 U.S. 19, 24-25 (1989) (holding that purely recreational dancing is not communicative, so long as its goal is nothing more than calisthenic).

[67] United States v. O'Brien, 391 U.S. 367, 377 (1968).

[68] East Hartford Educ. Ass'n v. Board of Educ., 562 F.2d 838, 848 (2d Cir. 1977) (Meskill, J., dissenting); *see also* Mark D. Schneider, Note, *Peaceful Labor Picketing and the First Amendment*, 82 COLUM. L. REV. 1469, 1488-95 (1982) (separating the physical and communicative aspects of picketing).

[69] Brent Hunter Allen, *The First Amendment and Homosexual Expression: The Need for an Expanded Interpretation*, 47 VAND. L. REV. 1073, 1086 (1994); *see also supra* notes 51-59 and accompanying text.

[70] *See, e.g.*, Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984) (rejecting protection for sleeping in a public park as expressive protest of the plight of the homeless); *O'Brien*, 391 U.S. at 376-77 (upholding a law prohibiting the burning of draft cards); Yurkew v. Sinclair, 495 F. Supp. 1248, 1254 (D. Minn. 1980) (rejecting protection for tattooing in public as expressive conduct), *aff'd mem.*, 657 F.2d 274 (8th Cir. 1981).

[71] *See Clark*, 468 U.S. at 293 (noting that content-neutral restrictions must be "justi-

In applying the test, courts regard some expressive conduct as being of "slight social value" even if it is not characterized as "fighting words," obscene, or illegal advocacy. For example, *Young v. American Mini Theatres, Inc.*[72] found non-obscene sexual materials to be of relatively slight social value:[73] "[T]here is surely a less vital interest in the uninhibited exhibition of material that is on the borderline between pornography and artistic expression than in the free dissemination of ideas of social and political significance. . . . "[74] In such cases, regulators invoke the state's police power to protect public health, safety, and morals; the relatively slight value of the speech or expressive conduct which is curtailed is unable to withstand the interest which the state has invoked.[75]

A philosophy of self-fulfillment/self-expression urges that sexual expression be protected as unique expressive conduct for creating, finding, and revealing self. If homosexual conduct is protected under that philosophy, regulations limiting or banning such conduct must not intentionally regulate the expressive aspects of the conduct, must be narrowly tailored to further some significant governmental interest, and must leave open ample alternative channels for the communication. In practice, the interest of the government in regulating the non-expressive, communicative aspects of the conduct must outweigh the private interest in the communication. Otherwise, the regulation of the conduct must be overturned. The following section shows that laws which limit or ban homosexual sodomy fail these tests.

II. MORALITY V. IDENTITY: THE INSUFFICIENCY OF STATE INTERESTS IN BANNING HOMOSEXUAL SODOMY

Laws limiting homosexual sodomy fail an "expressive conduct" analysis. Even making the dubious assumptions that such laws do not intentionally regulate the expressive aspects of the conduct,[76]

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fied without reference to the content of the regulated speech, . . . narrowly tailored to serve a significant governmental interest, and . . . leave open ample alternative channels for communication of the information").

[72] 427 U.S. 50 (1976).

[73] *See id.* at 71.

[74] *Id.* at 61; *see also* City of Renton v. Playtime Theatres, 475 U.S. 41, 49 n.2 (1986) (noting that "it is manifest that society's interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate" (quoting *Young*, 427 U.S. at 70)).

[75] *See* Paris Adult Theatre I v. Slaton, 413 U.S. 49, 61 (1973) (noting "the social interest in order and morality") (quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942)).

[76] *See generally* Cole & Eskridge, *supra* note 2, for an argument that, in fact, such

and that the laws leave open ample alternative channels for the communication, it is impossible to determine whether or not the regulation is narrowly tailored because it is unclear what the government's interest is in regulating the conduct. Generally, advocates justify laws banning homosexual sodomy by reference to the state's interest in morality. But what the nature of this moral interest is, how it is justified, or what weight it ought to be given remains unexplained. Further, even the slight attempts made to describe and justify the state's moral interest in banning homosexual conduct make it clear that the state's interest is far outweighed by the actors' interests in engaging in the conduct.

A. The State's Interest in Morality

In one sense, debate as to whether law may be based on morality is futile, since even if we decide for the negative, morality will necessarily insinuate itself into law. According to Calvin Woodard:

> [E]ven where the authority of the law-giver has been unquestioned and unquestionable, the meaning of the promulgated law has inevitably remained, in certain circumstances, unclear. . . . [T]he interpreters (or exegetes) of law inevitably infuse into law their own sense of what the law ought to be, and how it should be interpreted. They thereby add a moral gloss to the blackest black-letter.[77]

To admit that moral precepts will guide selection of competing interpretations of black letter law differs from admitting that something should be black letter law because it is a moral precept. It is the latter half of the antithesis with which we are concerned here.

The weight which should be given the state's interest in enforcing morality in any balancing test must depend on the nature of that interest. There are two competing theories of the nature of the state's interest in legislating morality in Supreme Court jurisprudence.[78]

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laws are aimed directly at the expressive aspects of the conduct.

[77] Calvin Woodard, *Thoughts on the Interplay Between Morality and Law in Modern Legal Thought*, 64 NOTRE DAME L. REV. 784, 785 (1989); *see also* Stephen Macedo, *Morality and the Constitution: Toward a Synthesis for "Earthbound" Interpreters*, 61 U. CIN. L. REV. 29, 29 (1992) ("Morality must play some role in legal interpretation. . . . [T]he question there is not *whether* moral theory but *which* moral theory."); Don Welch, *The State As a Purveyor of Morality*, 56 GEO. WASH. L. REV. 540, 542-46 (1988) (arguing that the state inevitably legislates morality).

[78] This analysis is based on the discussion in D. Don Welch, *Legitimate Government Purposes and State Enforcement of Morality*, 1993 U. ILL. L. REV. 67, 86-91.

1. The Teleological Position

The first position, the teleological position, holds that government has an interest in legislating morality because public, immoral behavior injures the general welfare. According to Chief Justice Burger:

> The issue in this context goes beyond whether someone, or even the majority, considers the conduct depicted as "wrong" or "sinful." The States have the power to make a morally neutral judgment that public exhibition of obscene material, or commerce in such material, has a tendency to injure the community as a whole, to endanger the public safety, or to jeopardize . . . the States' "right . . . to maintain a decent society."[79]

A line of cases refers to the "social interest in order and morality" as a legitimate justification for legislation.[80]

In these cases, the behavior is harmful partly because it is public:

> Although the legitimate interests of the state include the interest of the public in the "quality of life," Burger's distinction between public and private activity and his focus on the undesirable consequences of the behavior in question established a legitimate purpose quite different than simply enforcing the community's morality. According to Burger, a man may be entitled to read an obscene book in his room or expose himself indecently there. It is when he demands to do so in "public places" that are "accessible to all" that he affects "the world about the rest of us" and his action legitimately becomes a state concern.[81]

In each case, the theory is that the effect of public, immoral behavior is damage to the general welfare. Legislation seeking to prevent this effect is justified.[82]

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[79] *Paris Adult Theatre I*, 413 U.S. at 69 (quoting in part Jacobellis v. Ohio, 378 U.S. 184, 199 (1964) (Warren, C.J., dissenting)).

[80] *See id.* at 61; Roth v. United States, 354 U.S. 476, 485 (1957); Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942); *see also* Young v. American Mini Theaters, Inc., 427 U.S. 50, 50 (1976) (allowing an ordinance aimed at avoiding harmful effects of neighborhood deterioration).

[81] Welch, *supra* note 78, at 89 (footnote omitted) (quoting 413 U.S. at 58, 59).

[82] *See id.* (contending that both the public nature of the behavior and its harmful effects are integral to justifications under this theory).

2. The "Constitutional Populist" Position

The second position, the "constitutional populist" position, holds that government has an interest in legislating morality *per se*.[83] According to Chief Justice Rehnquist, writing for a plurality in *Barnes v. Glen Theatre, Inc.*,[84] there is a legitimate government interest in protecting social morality for its own sake under a state's police power, which has been defined as "the authority to provide for the public health, safety, and morals."[85] Justice Scalia simply stated the constitutional populism position in a concurrence in the same case: "Our society prohibits, and all human societies have prohibited, certain activities not because they harm others but because they are considered, in the traditional phrase, '*contra bonos mores*,' i.e., immoral."[86]

This theory is "constitutional" because it holds that a law which enforces a moral code is presumptively valid when it does not conflict with a specific constitutional prohibition.[87] The theory is "populist" because, presumably, the moral code which will serve as the justificatory basis of such legislation will be that of the majority.[88] Thus, Justice White could aver in *Bowers v. Hardwick*:

> [R]espondent asserts that there must be a rational basis for the law and there is none in this case other than the presumed belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable. This is

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[83] The term "constitutional populism" is Welch's. *See id.* at 68.

[84] 501 U.S. 560 (1991).

[85] *Id.* at 569 (citing 413 U.S. at 61 as authority).

[86] *Id.* at 575. For another opinion based on this position, see the majority opinion in *Bowers v. Hardwick*, 478 U.S. 186 (1986). Lord Devlin is sometimes cited as a source of this theory. See the analysis in Anne B. Goldstein, *History, Homosexuality, and Political Values: Searching for the Hidden Determinants of* Bowers v. Hardwick, 97 YALE L.J. 1073, 1093-96 (1988), for a discussion of the influence of both Devlin and H.L.A. Hart on this debate. Devlin's position is actually a teleological one. Ultimately, Devlin justifies state enforcement of morality by arguing that such enforcement increases social cohesion (and, conversely, that failure to enforce results in social disintegration). For discussions of this view, see Chai R. Feldblum, *Sexual Orientation, Morality, and the Law: Devlin Revisited*, 57 U. PITT. L. REV. 237 (1996), and Kent Greenawalt, *Legal Enforcement of Morality*, 85 J. CRIM. L. & CRIMINOLOGY 710, 722-23 (1995). *But see* Robert P. George, *Social Cohesion and the Legal Enforcement of Morals: A Reconsideration of the Hart-Devlin Debate*, 35 AM. J. JURIS. 15, 31 (1990) (arguing that Devlin addressed interpersonal integration, not social cohesion).

[87] *See* Welch, *supra* note 78, at 89.

[88] Judge Bork would go further and contend that a law enforcing morality is *constitutional* because it enforces the morality of the majority. *See* Dronenburg v. Zech, 741 F.2d 1388, 1397 (D.C. Cir. 1994) (finding that legislative acts are "conclusively valid" because they are majoritarian), *reh'g denied*, 746 F.2d 1579 (D.C. Cir. 1984).

said to be an inadequate rationale to support the law. . . . We do not agree . . . ."[89]

3. The Inadequacy of Both Positions

If the theory used to justify state enforcement of morality is the teleological theory, then the government cannot prohibit private homosexual behavior. The teleological theory justifies prohibitions against "immoral" behavior only when that behavior is public. Therefore, it cannot justify prohibiting private "immoral" behavior, such as private, consensual homosexual conduct.

But even if the teleological theory is not found to require public conduct before "immoral" behavior may be prohibited, private, consensual homosexual conduct cannot be prohibited under the theory because such conduct has no significant harmful effects. Private, consensual homosexual conduct does not encourage others to become homosexual (assuming that most Americans would regard this as being undesirable) for two reasons. First, sexual orientation is not something which an individual can choose, whether in imitation of others or for some other reason.[90] Second, since the

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[89] 478 U.S. at 196.

[90] *See* Marsha Jones, *When Private Morality Becomes Public Concern: Homosexuality and Public Employment*, 24 HOUS. L. REV. 519, 537 (1987) ("[H]omosexuality has not been proven to be a matter of choice at all, moral or otherwise. . . . [T]he evidence is strong that a person's sexual preference is determined at a very early age and that, once determined, it is difficult or impossible, to alter."); *see also* Major Jeffrey S. Davis, *Military Policy Toward Homosexuals: Scientific, Historical, and Legal Perspectives*, 131 MIL. L. REV. 55, 106 (1991) (reviewing the data regarding the causes of sexual orientation and concluding that "[t]here seem to be a number of causes for the continuum of sexual orientation, almost all of which occur prior to birth. People do not choose their place on the continuum of sexual preference"); Suzanne B. Goldberg, *Gay Rights Through the Looking Glass: Politics, Morality and the Trial of Colorado's Amendment 2*, 21 FORDHAM URB. L.J. 1057, 1065-67 (1994) (recounting testimony by a researcher at the National Institutes of Health as to genetic determinants of sexual orientation and by a psychiatry professor at the University of California, Los Angeles, who specializes in human sexuality and psychosexual development in children, that the accepted view in the medical community is that sexual orientation is not consciously chosen). Many other legal articles and notes have argued that sexual orientation is fixed early, is largely biological, or is immutable. *See* RICHARD GREEN, SEXUAL SCIENCE AND THE LAW 85-86 (1992) (discussing immutability and sexual orientation); *see also, e.g.*, Elvia Rosales Arriola, *Sexual Identity and the Constitution: Homosexual Persons as a Discrete and Insular Minority*, 10 WOMEN'S RTS. L. REP. 143, 154-55 (1988); Richard Delgado, *Fact, Norm, and Standard of Review—The Case of Homosexuality*, 10 U. DAYTON L. REV. 575, 583-85 (1985); Kenneth Lasson, *Civil Liberties for Homosexuals: The Law in Limbo*, 10 U. DAYTON L. REV. 645, 656-57 (1985); Sharon G. Portwood, *Employment Discrimination in the Public Sector Based on Sexual Orientation: Conflicts Between Research Evidence and the Law*, 19 LAW & PSYCHOL. REV. 113 (1995); Stacey Lynne Boyle, Note, *Marital Status Classifications: Protecting Homosexual and Heterosexual Cohabitors*, 14 HASTINGS CONST. L.Q. 111, 127-28 (1986); Harris M. Miller II, Note, *An Argument for the Application of Equal*

behavior in question is private behavior, it is hard to see how it can exert much influence over any supposed choice as to sexual orientation among the population generally. This is especially true, given public disgust with homosexual conduct[91] and the limited deterrent effect of current sodomy laws, due to the difficulty in detecting the act. Surely, whatever marginal deterrence against "choosing" homosexual conduct might be lost by invalidating sodomy laws would be insignificant compared to the enduring deterrence of public distaste of homosexual practices.

Despite popular mythology, consensual homosexual conduct does not have other significant harmful effects. Homosexuals are not child molesters: they are proportionately less disposed to molest children than heterosexuals.[92] Although homosexual men have a higher rate of HIV infection than the general population because they tend to have multiple partners and engage in anal intercourse,[93] condom use can largely eliminate the problem. AIDS is "not a gay disease."[94] Generally:

> Data from studies using a variety of psychological measures do not indicate that lesbians and gay men are more likely than heterosexuals to possess any psychological characteristics that would make them less capable of controlling their sexual or romantic urges, of refraining from the abuse of power, of obeying rules and laws, of interacting effectively with others, or of exercising good judgment in handling authority.[95]

Protection Heightened Scrutiny to Classifications Based on Homosexuality, 57 S. CAL. L. REV. 797, 817-21 (1984). *But see* Janet E. Halley, *Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability*, 46 STAN. L. REV. 503 (1994) (arguing that these arguments tend to be somewhat overstated and, in any case, are legally irrelevant).

[91] Even among "more supposedly 'liberal' groups, discrimination against gay men and lesbians is rampant, despite the expression of positive attitudes toward sexual minorities." Portwood, *supra* note 90, at 126-27.

[92] *See* David Cramer, *Gay Parents and Their Children: A Review of Research and Practical Implications*, 64 J. COUNSELING & DEV. 504, 505 (1986); A. Nicholas Groth & Thomas S. Gary, *Heterosexuality, Homosexuality, and Pedophilia: Sexual Offenses Against Children and Adult Sexual Orientation*, *in* MALE RAPE: A CASEBOOK OF SEXUAL AGGRESSION 143, 146-47 (Anthony M. Sacco, Jr. ed., 1982); Gregory M. Herek, *Myths About Sexual Orientation: A Lawyer's Guide to Social Science Research*, 1 L. & SEXUALITY 133, 152-56 (1991).

[93] *See* Davis, *supra* note 90, at 70.

[94] Goldberg, *supra* note 90, at 1066 (quoting the court testimony of a leading medical expert on the treatment and care of people afflicted with HIV/AIDS).

[95] Gregory M. Herek, *Sexual Orientation and Military Service: A Social Science Perspective*, 48 AM. PSYCHOLOGIST 538, 541 (1993).

In sum, "[o]ther than sexual preference, there are no discernible differences between those who are exclusively heterosexual and everyone else."[96]

Since private, consensual homosexual conduct is not public behavior, and since, in any case, it does not have any significant harmful effects, it cannot be prohibited under a teleological theory of legal enforcement of morality.

If the theory used to justify state enforcement of morality is the "constitutional populist" theory, then there are serious questions as to what constitutes a moral position under this theory and what weight any position ought to be given.

The disgust or condemnation which a practice arouses does not, of itself, constitute a moral judgment. Disgust or revulsion can arise, for example, in matters of taste as well as in matters of morality.[97] Such a reaction might be in whole or in part an expression of moral outrage or an aesthetic response. Thus, if popular disapprobation toward a practice is to be the foundation for a practice's suppression, justified by the state's power to enforce morality, there must be some explanation of the extent to which the reaction is a *moral* response.[98] Such an explanation would, presumably, elucidate the moral ground for that response.[99]

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[96] Davis, *supra* note 90, at 106.

[97] Clearly, if we are disgusted or revolted when we see another eat fish eyes or maggots, we would not necessarily claim that such behavior is immoral. Lord Devlin argues that to justify eradicating a practice on moral grounds, "general abhorrence" toward the practice is not enough. One must ask "whether, looking at it calmly and dispassionately, we regard it a vice so abominable that its mere presence is an offence." PATRICK DEVLIN, THE ENFORCEMENT OF MORALS 17 (1965).

[98] Otherwise, according to Ronald Dworkin:

> It remains possible that the ordinary man could produce no reason for his view, but would simply parrot his neighbor who in turn parrots him, or that he would produce a reason which presupposes a general moral position he could not sincerely or consistently claim to hold. If so, the principles of democracy we follow do not call for the enforcement of the consensus, for the belief that prejudices, personal aversions and rationalizations do not justify restricting another's freedom itself occupies a critical and fundamental position in our popular morality.

Ronald Dworkin, *Lord Devlin and the Enforcement of Morals*, 75 YALE L.J. 986, 1001 (1966).

[99] Since "constitutional populism" denies the need for a teleological ground, the ground would be deontological, probably arising as a consequence of some idealist, essentialist, or religious philosophy of morality. As the discussion below indicates, the Supreme Court has offered no such ground for the legal enforcement of moral prohibitions against sodomy, in particular, or for the enforcement of morality in general. Only two recent articles have offered a defense of moral prohibitions against sodomy on superficially deontological ground: John M. Finnis, *Law, Morality, and "Sexual Orientation,"* 9

However, it may be that we are asked to accept that the reaction to homosexual behavior is a *moral* reaction merely because the authors of the reaction *say* it is moral, with no further explanation as to the nature and origins of the moral response. In that case, determining the weight which ought to be given the state's interest in enforcing whatever notion of morality might lurk beneath this unexplained moral gush is problematic.[100] Without an understanding of how and why the response is a *moral* response, that is, understanding what is at stake in the matter, it is impossible to determine the seriousness of the "immorality" which provoked the response or the gravity of the threat which it poses. If we are given only the size and intensity of public response as an indication of the weight of the state's interest, we are reduced to

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NOTRE DAME J.L. ETHICS & PUB. POL'Y 11 (1995) and Arthur A. Murphy et al., *Gays in the Military: What About Morality, Ethics, Character, and Honor?*, 99 DICK. L. REV. 331 (1995). However, the Murphy et al. article, upon closer examination, never actually provides any firm ground for its contention that homosexual behavior is essentially immoral. It justifies its conclusion on the basis of the "moral" convictions of service personnel and the service codes' prohibition of such behavior. *See id.* at 334, 340. The article notes that religious codes and social mores are probably the source of these points of view. *See id.* at 339. Thus, other than some grounding in an unspecified religious philosophy, the article begs the question as to how its moral judgment is grounded. Finnis's article offers an idealist-essentialist philosophical grounding for a moral position against sodomy. However, the argument is not terribly persuasive because it is ultimately grounded in an assumption that homosexual behavior is morally wrong because contracepted sex is morally wrong. See Michael J. Perry, *The Morality of Homosexual Conduct: A Response to John Finnis*, 9 NOTRE DAME J.L. ETHICS & PUB. POL'Y 41 (1995), for an analysis and critique of Finnis's argument which reduces the argument to this assumption. Such an assumption is not likely to be greeted with widespread cries of joy. For general discussions of differing approaches to morality and their philosophical grounding, see C.D. BROAD, FIVE TYPES OF ETHICAL THEORY (1956) and MAURICE MANDELBAUM, THE PHENOMENOLOGY OF MORAL EXPERIENCE (1955). Finally, Kent Greenawalt notes that some superficially deontological moral positions are actually reducible to teleological ones:

> Claims about moral structures and structures of life seek to answer why the community may enforce its own morality. Both claims come down to the idea that members of a community have some interest in preserving forms of life familiar to them. If the argument is not to reduce either to a bald contention that a community can enforce its morality or to an assertion that offense justifies restraint, then it must be based on the value of continuity and psychological security in people's lives. This is a kind of consequentialist basis, although one that would need to be strong if it is to override the liberty of people to choose their own ways of life.

Greenawalt, *supra* note 86, at 724. If any particular deonotological position is reducible in this way, then its proponents should cite the harms which follow from a failure to enforce the moral standards at issue, before we can reasonably be asked to decide whether those standards ought to be enforced.

[100] See the distinction between a descriptive and a normative morality and a discussion of the problems of a moral ground which does not reference norms in Timothy W. Reinig, Comment, *Sin, Stigma & Society: A Critique of Morality and Values In Democratic Law and Policy*, 38 BUFF. L. REV. 859, 878-84 (1990).

determining the weight of the state's interest by measuring the popular gonadal firestorm which is its symptom.

The grounding for the moral judgment may be religious. This was the only philosophical ground referenced by the majority or the concurrences in *Bowers*[101] or by the various opinions in *Barnes*.[102] If so, there is at least a potential objection that laws embodying that position conflict with the Establishment Clause.[103] Even if a religiously-grounded moral judgment does not run afoul of the Establishment Clause *per se*, we ought to be cautious about giving a great deal of weight to any state interest which privileges a particular religious point of view over other religious points of view or over secular points of view. This is especially important with regard to homosexuality, since religious communities, including Jewish and Christian religious communities, are sharply divided over whether or not homosexuality is immoral.[104]

So far, the proponents of constitutional populism have referenced only religious grounds in elucidating the nature of the state's interest in enforcing morality. The reference to the "Judeo-Christian tradition" in *Bowers*[105] was so vague that it lent little clarity to understanding what the state's interest was (and the dangers of privileging a particular religious point of view caution us against giving great weight to any state interest explained and justified in

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101. *See* 478 U.S. 186, 196-97 (1986).

102. *See* 501 U.S. 560, 568-69 (1991).

103. See Reinig, *supra* note 100, for a discussion of this problem. *See also* Welch, *supra* note 78, at 103 ("The distance between moral belief and religious conviction is often a very short one: potentially, enforcing morality could become, in effect, enforcing religion."). However, as Laurence Tribe observes, "that view appears to give too little weight to the value of allowing religious groups freely to express their convictions in the political process . . . and makes the unrealistic assumption that a constitutional ruling could somehow disentangle religion from future public debate on the question." TRIBE, *supra* note 6, § 15-10, at 1350 (footnote omitted).

104. As Michael J. Perry, *supra* note 99, at 66, notes, "no biblically-based argument against homosexual conduct fails to be deeply problematic even for those who accept the authority of the Bible." Not all Jews or Christians, for example, believe that the Judeo-Christian tradition requires the moral condemnation of homosexual conduct. *See* JOHN BOSWELL, CHRISTIANITY, SOCIAL TOLERANCE, AND HOMOSEXUALITY 91-166 (1980) (discussing the origin and depth of condemnation of homosexuality by Christians and Jews); RICHARD P. MCBRIEN, 2 CATHOLICISM 993-97 (rev. ed. 1994) (explaining the Catholic Church's intolerant position towards gays and lesbians); RICHARD A. MCCORMICK, S.J., REFLECTIONS ON MORAL DILEMMAS SINCE VATICAN II 300 (1989); Gerald D. Coleman, S.S., *The Vatican Statement on Homosexuality*, 48 THEOLOGICAL STUD. 727 (1987) (interpreting the Catholic Church's stance regarding homosexuality); Jeffrey S. Siker, *How to Decide?: Homosexual Christians, the Bible, and Gentile Inclusion*, THEOLOGY TODAY, July 1994, at 219 (questioning the reasoning behind the Catholic Church's position against homosexual behavior).

105. 478 U.S. at 196.

such a way). Otherwise, those using the constitutional populist theory have merely cited a popular outpouring of dislike of homosexuality, have told us that this was a moral response, and have not told us what that means. There can be precious little "balancing" if one pan of the scale contains only a syllogistic delirium tremens.

B. The Private Interest in the Expressive Behavior: Speech, Conduct, and Identity

Legally compelling gay citizens to repress homosexual conduct in private as well as in public causes them psychological and emotional harm generally.[106] This Note will focus, however, on one particular private interest in expressive homosexual conduct and the harm which prohibiting that conduct causes: The interest in forming, changing, and maintaining identity.

Any identity is embedded in a particular understanding of reality.[107] Any particular identity makes sense and is legitimized only in the context of a particular symbolic order, "an all-embrac-

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[106] Research indicates that significant harm results when gays repress their homosexual behaviors or when they privately express homosexual behavior but deny their identity or behavior in public. *See* ALAN P. BELL & MARTIN S. WEINBERG, HOMOSEXUALITIES: A STUDY OF DIVERSITY AMONG MEN AND WOMEN 121-27, 139-215 (1979) (studying the problems with social and psychological adjustment encountered by gays and lesbians); LAUD HUMPHREYS, OUT OF THE CLOSETS: THE SOCIOLOGY OF HOMOSEXUAL LIBERATION (1972); EDWARD A. JONES ET AL., SOCIAL STIGMA: THE PSYCHOLOGY OF MARKED RELATIONSHIPS (1984); Sue Kiefer Hammersmith & Martin S. Weinberg, *Homosexual Identity: Commitment, Adjustment, and Significant Others*, 36 SOCIOMETRY 56-79 (1973) (providing an empirical study of homosexual development).

[107] The following analysis of identity and its interrelations with both a particular social order and a particular understanding of reality is based most immediately upon PETER L. BERGER & THOMAS LUCKMANN, THE SOCIAL CONSTRUCTION OF REALITY: A TREATISE IN THE SOCIOLOGY OF KNOWLEDGE (1966). However, the general themes of Berger & Luckmann's work relied on here (*viz.*, that perception of self, perception of reality, and the meanings and activities given to the individual by the social order are interdependent) are neither unique nor currently controversial. The roots of this view of identity go back at least as far as Edmund Husserl and Max Weber. *See* REINHARD BENDIX, MAX WEBER: AN INTELLECTUAL PORTRAIT 473-78 (1960) (discussing Weber's role in the development of phenomenology); Joseph J. Kockelmans, *Husserl's Original View on Phenomenological Psychology*, *in* PHENOMENOLOGY: THE PHILOSOPHY OF EDMUND HUSSERL AND ITS INTERPRETATIONS 418 (Joseph J. Kockelmans ed., 1967) (referring to the original work done by Husserl). Seminal applications of "meaningful intersubjectivity" to the problem of identity include: CHARLES HORTON COOLEY, HUMAN NATURE AND THE SOCIAL ORDER (1902); GEORGE HERBERT MEAD, MIND, SELF, & SOCIETY FROM THE STANDPOINT OF A SOCIAL BEHAVIORALIST (Charles W. Morris ed., 1934); and CARL R. ROGERS, CLIENT-CENTERED THERAPY (1951). An overview of historical and current psychological and communication theories adopting this perspective may be found in Charles R. Berger & Nancy J. Metzger, *The Functions of Human Communication in Developing, Maintaining, and Altering Self- Image*, *in* HANDBOOK OF RHETORICAL AND COMMUNICATION THEORY 273 (Carroll C. Arnold & John Waite Bowers eds., 1984).

ing frame of reference, which . . . constitutes a universe in the literal sense of the word, because *all* human experience can . . . be conceived of as taking place *within* it."[108] An identity as a "woman," "child," "lawyer," or "businesswoman" is possible and takes a certain shape because some culture tells us that these are possible things to be and tells us what it means to be these things.[109]

A social order does not only tell us what identities are possible and what they mean, but it also justifies these descriptions.[110]

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[108] BERGER & LUCKMANN, *supra* note 107, at 96.

[109] Clearly, what meaning our culture attaches to being a "woman" is not the same meaning that it attached to being a "woman" one hundred years ago, when Susan B. Anthony declared:

> [T]he married woman has no right to the custody and control of her person. The wife belongs to the husband[]. . . . And since, in the nature of things, the vast majority of married women never earn a dollar by work outside their families, or inherit a dollar from their fathers, it follows that from the day of their marriage to the day of the death of their husbands not one of them ever has a dollar, except it shall please her husband to let her have it.

Susan B. Anthony, *Women's Right to Vote*, *in* THE AMERICAN READER: WORDS THAT MOVED A NATION 160, 163-64 (Diane Ravitch ed., 1990). What it means to be a "woman" in the United States also differs from what it means to be a "woman" in, for example, the Arab world. *See* RAPHAEL PATAI, THE ARAB MIND 118-42, 327-35 (3d ed. 1983) (describing Arab women's limited freedom in terms of education, social status, and sexual expression).

Likewise, an understanding of what it means to be a "child" is culture-specific, and "the social implications of childhood may vary greatly from one society to another." BERGER & LUCKMANN, *supra* note 107, at 136. For example, the Japanese family does not encourage children to be self-reliant in the American sense, but rather to be dependent. Interlocking dependencies within the *ie* (family and ritual kinship group) produce *on* ("indebtedness"), which governs interpersonal relationships. *See* Dolores Cathcart & Robert Cathcart, *Japanese Social Experience and Concept of Groups*, *in* INTERCULTURAL COMMUNICATION: A READER 186, 188-89 (5th ed. 1986). Such relationships include especially the *oyabun-kobun* relationship of protection and support in return for service and loyalty characteristic of father-son or boss-employee. *See id.* at 189. Dependency also fosters *amae*, which (while not entirely translatable) can mean a sweet and warm dependency felt when one is surrounded by loving family or, as a verb (*ameru*), to depend on or presume upon the love of another. *See id.* at 190-91. If one is an American "child," then, one has an identity with a very different meaning than that of a Japanese "child." And both understandings differ from those of the Arab world. There are no Arabic words for "child," "baby," "infant," or "toddler." *See* PATAI, *supra*, at 27 (noting that a census-taker cannot simply ask how many children an individual has, but must separately ask how many *awläd* (boys) and *banät* (girls) the individual has). Rather, there are only gender-specific words for children of differing ages, reflecting tremendous differences in what it means to be a boy-child or a girl-child. *See id.* at 27-36. "Child" is not merely a biological relation, but is also a social construct.

If such apparently biologically-given classifications as "woman" and "child" (and, equally, "man") are in large part social constructs, then what of such entities as "scientist," "businesswoman," "student," "uncle," "Rotarian," "Methodist," and "psychologist?" These, too, are culture-specific categories, each with its own peculiar meanings which, when internalized, become part of identity. *See* BERGER & LUCKMANN, *supra* note 107, at 138-47 (describing processes of secondary socialization).

[110] *See* BERGER & LUCKMANN, *supra* note 107, at 92-128. For example, we not only

Identities are inextricably linked with how a culture understands reality. To be an "employee" presumes one system of social types and way of understanding the world; to be a "proletarian" presumes other types and another way of understanding the world. Similarly, to be "lesbian/gay," "homosexual," "queer," or a "pervert" each presumes differing social types and differing ways of understanding the world. Each implicates a different meaningful reality.

If an identity is embedded in a particular understanding of reality, then acquiring or changing identity implies acquiring or changing a way of looking at the world in which identity is embedded. The processes by which identity is acquired or changed are long or arduous or both.[111]

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know that there are lawyers and what it means to be a lawyer, but we can find justifications for why there *ought* to be lawyers. Such justifications are tied to justifications for the society's institution of law, which are in turn tied to society's beliefs about justice, order, human nature, and so on. Compare, for example, the differing descriptions of and justifications for law in RONALD DWORKIN, LAW'S EMPIRE (1986), LON FULLER, THE MORALITY OF LAW (1964), H.L.A. HART, THE CONCEPT OF LAW (1961), with Norman Kretzmann, *Lex Iniusta Non Est Lex: Laws on Trial in Aquinas' Court of Conscience*, 33 AM. J. JURIS. 99 (1988).

Similarly, justifications of what it means to be a "woman," "man," or "child," (or "scientist," "businesswoman," "student," "uncle," "Rotarian," "Methodist," or "psychologist") are also embedded in a larger understanding of reality. They implicate theories of what it means to be human, about humanity's place in the universe, about humanity's relationship to a god, and about the nature of the universe. *See* BERGER & LUCKMANN, *supra* note 107, at 96 ("The symbolic universe is conceived of as the matrix of *all* socially objectivated and subjectively real meanings; the entire historic society and the entire biography of the individual are seen as events taking place *within* this universe.").

[111] Identity may be acquired through primary socialization, sudden conversion, or evolutionary change. Primary socialization is an intense, emotionally-charged process by which a child first acquires identity. *See* BERGER & LUCKMANN, *supra* note 107, at 129-37 (describing primary socialization generally).

Sudden conversion alters identity by subjecting candidates for conversion to an analog of primary socialization. *See generally* Walsh, *supra* note 39; James F. Walsh, Jr., *Rhetoric in the Conversion of Maoist Insurgency Cadres: Rhetoric and the Conceptual Component of Conversion in Radical Social Movements: Part II*, WORLD COMM., Spring 1990, at 131 [hereinafter Walsh, *Conceptual Component*]; James F. Walsh, Jr., *Rhetoric in the Conversion of Maoist Insurgency Cadres: Rhetoric and the Emotional Component of Conversion in Radical Social Movements: Part III*, WORLD COMM., Fall 1990, at 1 [hereinafter Walsh, *Emotional Component*] (providing a case study of such a conversion). Sudden conversion is a rigorous, exhausting, and sometimes violent process designed to break down the candidate's original world view and identity and replace them with a new world view and identity. *See* Walsh, *Conceptual Component*, *supra*.

Identity may also be transformed more slowly, over years. *See* James F. Walsh, Jr., Social Movements and Social Reality: Rhetorical Discourse in Revolutionary Guerrilla Warfare 287-329 (1982) (unpublished Ph.D. dissertation, Purdue University) (on file with the Purdue University Library) [hereinafter Walsh, *Social Movements*] (discussing a case study in the gradual transformation of revolutionaries' world view and sense of identity). Although this process is not necessarily as intense as primary socialization or sudden

Any process of identity acquisition or identity change includes certain essential elements.[112] Three essential elements of identity acquisition or change are relevant to the present discussion: the presence of one or more "significant others," emotional reorientation, and participation in a plausibility structure.

Primary socialization, by which we first acquire an identity as children, is controlled and mediated by "significant others," usually parents.[113] These significant others are persons for whom the

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conversion, it is still an emotional process. *See, e.g., id.* at 292-97, 324-28 (discussing how revolutionaries arouse hatred and resentment in those whom they seek to convert).

[112] Generally, processes of identity acquisition or change can be said to have three components: a conceptual component, a social component, and an emotional component. *See* Walsh, *supra* note 39, at 32-37; Walsh, *Conceptual Component*, *supra* note 111, at 136-45; Walsh, *Emotional Component*, *supra* note 111, at 6-13. The model described in these articles is synthesized from two very different approaches to the problem of conversion, one phenomenological and the other neurophysiological.

The conceptual component of identity acquisition or change consists primarily of an ideology. *See* Walsh, *Conceptual Component*, *supra* note 111, at 134. An ideology gives believers a cognitive map for understanding the social world. It may include types of actors (entrepreneurs/capitalist exploiters), actions (defending democracy/imperialism), and characteristics (working class/proletarian) for viewing and understanding the world. *See id.* This typology must be made available to potential converts as part of the conceptual component. When it is internalized by the candidate, it becomes the believer's subjective reality. *See id.*

The social component consists of participation in an appropriate "plausibility structure." *See* Walsh, *supra* note 39, at 31. A plausibility structure is the ideology's system of types given concrete form. *See id.* For example, a fully-functioning free enterprise system or a fully functioning Marxist-Leninist system would be the ideal plausibility structures for those respective ideologies. A plausibility structure is the world of the ideology made real so far as this is possible. *See id.* For a description of measures which may be taken to provide surrogates for plausibility structures when participation in the complete structure is not possible, see BERGER & LUCKMANN, *supra* note 107, at 158-59.

The emotional component consists of emotional experiences which help fix identity. Although we tend to regard emotion and cognition as two very separate things, cognitions are implicated in affective states, and affective states guide cognitions. According to Heidegger, "[a] state-of-mind always has its understanding." MARTIN HEIDEGGER, BEING AND TIME 182 (John Macquarrie & Edward Robinson eds. & trans., 1962). An emotion includes a particular understanding of a thing, as Heidegger's analysis of fear demonstrates. *See id.* ¶ 30, at 179-82. Similarly, a mood "colors the whole world and . . . the specific ways things and possibilities show up as mattering." HUBERT L. DREYFUS, BEING-IN-THE-WORLD: A COMMENTARY ON HEIDEGGER'S BEING AND TIME, DIVISION I 174 (1991). Heidegger is hardly unique in insisting that affect is cognitive. Aristotle observed over two thousand years ago that "things do not appear the same to those who love and those who hate, nor to those who are angry and those who are mild." ARISTOTLE, THE ART OF RHETORIC, *reprinted in* 22 ARISTOTLE IN TWENTY-THREE VOLUMES 1377b, 4, at 171 (John Henry Freese trans., 1982) (although the translation provided here is by the author of this Note). Similarly, modern cognitive psychology holds that "emotions are perceptual processes . . . in the full sense of processes that have definite cognitive content." R.W. Leeper, *The Motivational and Perceptual Properties of Emotions as Indicating Their Fundamental Character and Role*, *in* FEELINGS AND EMOTIONS: THE LOYOLA SYMPOSIUM 151, 156 (M.B. Arnold ed., 1970).

[113] *See* BERGER & LUCKMANN, *supra* note 107, at 131-32.

child feels emotional attachment. Indeed, "there is good reason to believe that without such emotional attachment to the significant others the learning process would be difficult if not impossible."[114] Sudden conversion, too, includes persons for whom the candidate for conversion comes to feel an emotional attachment and identification.[115] These "significant others" mediate the new world view which the candidate is to acquire. Even in gradual transformation of identity, the person to be transformed identifies with individuals who help mediate the new way of looking at the world and at self.[116]

An important part of the acquisition or transformation of identity is emotion.[117] This includes emotions directed at other persons and things in ways congruent with the ideology in which identity is to be based; for example, an entrepreneur admires free enterprise and loathes socialism. It also includes feelings of emotional attachment for a person or persons who will serve as a "significant other" and help mediate the internalization of ideology necessary to acquire identity. An emotion is a way of being conscious of the world that orients one toward the world in a particular way.[118] If

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[114] BERGER & LUCKMANN, *supra* note 107, at 131. Significant others mediate between the child and the system of social beliefs, attitudes, values, and norms which the child must absorb to become socialized. *See id.* Implicitly and explicitly, their words and actions tell the child who the child is, what the world is like, how the child should behave, and why these things are as they are: "Their definitions of his situation are posited for him as objective reality." *Id.* The child comes to identify with significant others as the child feels emotional attachment for them. *See id.* at 131-32. When identification occurs, the child internalizes the significant others' view of who and what the child is, their ways of looking at the world, and their ways of behaving. *See id.* at 131-34. In other words, the child acquires an identity, a socially-shared world view, and a set of socially-approved behavioral norms through attachment for, and identification with, significant others.

[115] *See* Walsh, *Emotional Component*, *supra* note 111, at 12. The "positive and dependent feelings [which] resemble childhood feelings for parents" essentially transform the indoctrinator and other group members into "significant others" for the candidate for conversion. *Id.*

[116] *See, e.g.*, J.F. Walsh, Jr., *An Approach to Dyadic Communication in Historical Social Movements: Dyadic Communication in Maoist Insurgent Mobilization*, 53 COMM. MONOGRAPHS 1, 5-8 (1986) (describing the methods of creating identification between the population to be transformed and revolutionary cadres).

[117] *See* Walsh, *Emotional Component*, *supra* note 111. For a description of this function of emotion, see generally Michael J. Hyde, *Emotion and Human Communication: A Rhetorical, Scientific, and Philosophical Picture*, 32 COMM. Q. 120 (1984) [hereinafter Hyde, *Emotion and Human Communication*], Michael J. Hyde, *The Experience of Anxiety: A Phenemenological Investigation*, 66 Q.J. SPEECH 140 (1980), and Michael J. Hyde & Craig R. Smith, *Rethinking "The Public": The Role of Emotion in Being-with-Others*, 77 Q.J. SPEECH 446 (1991).

[118] *See* Hyde, *Emotion and Human Communication*, *supra* note 117, at 128 ("The experience of emotion is a fundamental way of apprehending the world."). When the emotion results from the unexpected, "[e]motional consciousness is an experience that

emotions are maintained and "become moods encouraging people to interpret and understand the world in specific ways, these moods take on an ideological value."[119]

A successful acquisition of identity also depends on at least minimal participation in some plausibility structure appropriate to the ideology which is to be acquired by the candidate. Plausibility structures are objective entities which support systems of belief. The ideal plausibility structure for a capitalist ideology is a fully-functioning capitalist economic and social system; the ideal plausibility structure for a Marxist-Leninist ideology is a fully-functioning Marxist-Leninist economic and social system, and so on. Plausibility structures constantly reassure believers who participate in them that their way of looking at things is, indeed, the way reality really is.[120] By participating in an appropriate plausibility structure, the candidate's new system of belief is illustrated, validated, and reinforced.

Identity is problematic for homosexuals because the only identities offered by straight society are undesirable.[121] This has negative effects both on the stability of identity and on cognition generally.[122]

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transforms the world." *Id.* at 129. When we experience emotions, we can orient ourselves toward the world in a new way, moving "out of the ordinary . . . to experience and understand differently any perceived object or situation." *Id.*

[119] *Id.*

[120] According to Berger and Luckmann:

> Subjective reality is . . . always dependent upon specific plausibility structures. . . . One can maintain one's self-identification as a man of importance only in a milieu that confirms this identity; one can maintain one's Catholic faith only if one retains one's significant relationship with the Catholic community; and so forth. . . . As long as he remains within the plausibility structure, the individual feels himself to be ridiculous whenever doubts about the reality concerned arise subjectively. He knows that others would smile at him if he voiced them. He can silently smile at himself, mentally shrug his shoulders—and continue to exist within the world thus sanctioned.

BERGER AND LUCKMANN, *supra* note 107, at 154-55. A key notion is that "others would smile at him" if doubts about the shared way of looking at things were voiced. The reality which we subjectively inhabit is a *shared* subjective reality. In our everyday interactions, that reality is reflected back at us as a matter of course in the casual, taken-for-granted behavior of the people around us. Thus, one individual's way of looking at the world is reaffirmed by casual interactions with other individuals who share the same subjective reality. *See id.*

[121] See Mark Strasser, *Unconstitutional? Don't Ask; If It Is, Don't Tell: On Deference, Rationality, and the Constitution*, 66 U. COLO. L. REV. 375, 452-56 (1995), and Harris M. Miller II, Note, *An Argument for the Application of Equal Protection Heightened Scrutiny to Classifications Based on Homosexuality*, 57 S. CAL. L. REV. 797, 821-25 (1984), for brief descriptions of the meaning of gay and lesbian identification to much of straight society.

[122] An individual offered only negative identities by a society and who becomes re-

The solution to the problem of homosexual identity is, first, to create stable, positive homosexual identities as alternatives to the negative identities offered by society and, second, to internalize them.[123] Creating such identities requires definitions of reality which run counter to those accepted in society.[124] Internalizing an alternative identity, as already noted, requires a certain cognitive component (here, alternative definitions of reality which explain and justify the new identity) and certain emotional and social components.

Sexual conduct is uniquely situated to help realize the emotional and social components needed for internalization of alternative homosexual identities and to maintain those identities once they are internalized. Acts of love between homosexual partners help create the feelings of attachment and dependence needed to establish a "significant other."[125] Sexual acts also help generate, shape, and maintain strong and appropriate emotions needed for the creation or

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sentful of them will not be socialized successfully:

> [T]hat is, there will be a high degree of asymmetry between the socially defined reality in which he is *de facto* caught, as in an alien world, and his own subjective reality, which reflects that world only very poorly. The asymmetry will, however, have no cumulative structural consequences because it lacks a social base within which it could crystallize into a counter-world, with its own institutionalized cluster of counter-identities. The unsuccessfully socialized individual himself is socially predefined as a profiled type—the cripple, the bastard, the idiot, and so on. Consequently, whatever contrary self-identifications may at times arise in his own consciousness lack any plausibility structure that would transform them into something more than ephemeral fantasies.

BERGER & LUCKMANN, *supra* note 107, at 165-66. The result is a socially-provided identity which is resented and rejected without any stable, positive identity available as an alternative (since counter-identities lack the plausibility structure necessary to give them stability). *See id.* at 147-56. But since identity is inextricably entangled with the world view which accompanies it, instability in one's identity necessarily results in instability in one's world view generally. *See id.* at 149-52; *see also* Walsh, *Social Movements*, *supra* note 111, at 122-23 (pointing out that the consequences of rejection of available identities can include *anomie*). Consequently, when a society offers an individual only negative identities and the individual struggles against them, both identity and cognition are likely to suffer instability.

[123] *See* BERGER & LUCKMANN, *supra* note 107, at 166-67.

[124] *See id.* at 166. *See generally* Walsh, *Conceptual Component*, *supra* note 111 (discussing the reasons why the definition of reality supporting the new identity must negate the old definition of reality). Thus, a socially accepted definition of reality which supports negative homosexual identities (for example, God created a natural order which is fundamentally heterosexual and deviation from that order is sinful) must be altered in some way so as to support a positive homosexual identity.

[125] *See* BERGER & LUCKMANN, *supra* note 107, at 131-32, 157-58 (describing the importance of significant others in the alteration of identity); *see also* Walsh, *Emotional Component*, *supra* note 111, at 4-6 (explaining how emotional arousal centered around a particular individual can transform that individual into a significant other).

alteration of identity.[126] Finally, lovemaking between homosexual partners is itself a plausibility structure which affirms and reifies a positive homosexual identity.[127]

In sum, private homosexual conduct can be of unique importance to those who engage in it. It can provide two of the three requirements necessary to support a stable, positive identity to persons who are likely to be in sore need of one. Consequently, it is expressive conduct which should not be easily trammeled.

C. Balancing the State's Interest in Prohibiting the Expressive Conduct and the Private Interest in the Expressive Conduct

Any reasonable balancing of the state's interesting in prohibiting expressive homosexual conduct and the private interest in the conduct must conclude that the state's interest is far outweighed by the private interest involved.

To call the state's interest in prohibiting homosexual conduct weak would be a kindness: It is hopelessly incoherent. The state's position cannot be explained or justified using a teleological theory, because the expressive behavior in question is neither public nor has any necessary negative effects. Thus, a "constitutional populist" theory must justify the prohibition. But the nature and weight of the state's interest under such a theory are confused. Advocates of prohibition cite popular revulsion toward homosexuality without explaining the connection between this response and anything resembling a system of morality. They also cite the "Judeo-Christian tradition" while steadfastly ignoring the divided contemporary Jewish and Christian views as to the morality of homosexuality. What the state's moral interest is, how it is justified, or the weight which that interest should have are unknown and unexplained.

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[126] *See* BERGER & LUCKMANN, *supra* note 107, at 131-32, 157-58 (describing the need for emotional arousal in the transformation of identity). It is for this reason that some philosophers consider emotional expression, particularly sexual expression, to be more important to generating identity than more rational expression. *See* Arthur Aron & Elaine Aron, *Love and Sexuality*, *in* SEXUALITY IN CLOSE RELATIONSHIPS 42 (Kathleen McKinney & Susan Sprecher eds., 1991).

[127] *See* BERGER & LUCKMANN, *supra* note 107, at 147-59 (explaining how ritual and routine affirms and sustains identity). Talking about and engaging in sex is essential to a person wanting to explore, discover, announce, and/or renounce her orientation. Since orientation is *the* fundamental component of homosexual identity, sexual conduct is essential to homosexual identity transformation. *See* Vivienne C. Cass, *The Implications of Homosexual Identity Formation for the Kinsey Model and Scale of Preference*, *in* HOMOSEXUALITY/HETEROSEXUALITY: CONCEPTS OF SEXUAL ORIENTATION 239 (David P. McWhirter et al. eds., 1990). For discussion of the distinctive nature of sexual orientation, see also Janet E. Halley, *Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability*, 46 STAN. L. REV. 503, 519-20 (1994).

If the state interest in prohibiting homosexual conduct is, at best, weak, the private interest in the expression is extremely strong. In *Planned Parenthood of Southeast Pennsylvania v. Casey*,[128] Justice O'Connor wrote: "At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under the compulsion of the State."[129]

Justice O'Connor was writing of the liberty interest under the Fourteenth Amendment. Her words, however, are even more apropos of First Amendment protection for expressive conduct which forms, maintains, and alters identity. Such conduct, in the most literal way imaginable, *does* define "existence, . . . meaning, . . . the universe, and . . . the mystery of human life." Identity defines who we are, and it is intertwined with a world view which defines for each of us the world beyond us.

At stake for many of those who engage in expressive homosexual conduct is the ability to form a stable identity, to effectively maintain a world-view which contradicts majoritarian assertions of fact and value, and to live fully in passionate, anchoring relationships which help hold identity and world-view together. Further, those who contend that strong constitutional protection should only be extended to public political discourse should note that identity and world-view form the cognitive ground upon which individuals build theory, including political theory.[130] These are interests which deserve robust constitutional protection. They should not be sacrificed for the sake of an incoherent moral claim which smacks more of bigotry than reason.

III. CONCLUSION

This Note has examined only one facet of why homosexual conduct is important to those who engage in it: It can serve an essential role in realizing identity, maintaining a world-view, and establishing "significant others." There are, of course, other reasons why such conduct is important that this Note has not examined, such as self-expression *per se*. This Note leaves to other scholars examination of these additional reasons for protecting homosexual conduct as expressive conduct. However, even this limited explora-

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[128] 505 U.S. 833 (1992).

[129] *Id.* at 851.

[130] *See* BERGER & LUCKMANN, *supra* note 107, at 82-104 (discussing the relationships between theories, including political theories, and the "symbolic universe" or world-view).

tion of the subject must conclude that private homosexual conduct is expressive conduct which deserves constitutional protection, given the strength of the private interests in the conduct and the failure of the state to elucidate any clear interest in prohibiting that conduct.

One commentator recently noted:

> When one considers the strength with which claims of religious or sexual preferences are held and their resistance to change by rational discourse or other decision-making processes, one senses that these are matters particularly ill suited for resolution by democratic voting or scientific investigation. . . . [M]ajority rule does not fit well with those kinds of beliefs; compromise does not fit a great deal better; and imposition by legal authority from above on such beliefs is not likely to be taken with equanimity. Consequently, government incursions into these areas tend to have a more devastating effect on individuals than intrusions on other, less defining areas.[131]

Prohibition will not stop private homosexual conduct, will not convince the unconverted that the conduct is wrong, is not needed to "prevent the spread" of homosexuality, and no longer expresses the overwhelming moral consensus of the nation. Given the damage that prohibition inflicts on a minority of Americans, it is long past time that advocates of prohibition put aside their interest in fiddling with other people's sex lives and find some useful (or at least less destructive) way of occupying their leisure.

J.F. WALSH, JR.[†]

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[131] David B. Salmons, Comment, *Toward a Fuller Understanding of Religious Exercise: Recognizing the Identity-Generative and Expressive Nature of Religious Devotion*, 62 U. CHI. L. REV. 1243, 1258 (1995) (footnote omitted).

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