There May be Harm in Asking: Homosexual Solicitations and the Fighting Words Doctrine

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NOTES

THERE MAY BE HARM IN ASKING:
HOMOSEXUAL SOLICITATIONS AND THE
FIGHTING WORDS DOCTRINE

A homosexual solicitation, most often a circumspect and consensual occurrence, is nevertheless a crime in many jurisdictions. This Note examines the legitimacy of such statutory proscriptions within the context of judicial lines drawn between merely offensive speech, which may fall within the guarantees of the first amendment, and "fighting words," which are not accorded first amendment protection. The Note evaluates devices available to a court faced with a constitutional attack on a solicitation statute, concentrating on the doctrines of vagueness and overbreadth, and concludes with specific proposals for reform of such legislation to promote legitimate state interests while protecting the first amendment rights of homosexuals.

INTRODUCTION

A solicitation to engage in homosexual activity\(^1\) is often a clandestine and discreet occurrence. The two people involved usually know one another, know of each other's sexual preference, and exchange positive assurances—either verbal or nonverbal—before a proposition is actually made.\(^2\) Such solicitations are rarely the subject of judicial inquiry, for neither party to a consensual proposition is likely to protest. Yet such solicitation is a crime in most jurisdictions, and may be brought to the attention of law enforcement authorities by either party if the relationship goes awry, by an offended addressee, or by an addressee who is a police decoy.\(^3\) A court may then subject the solicitor to criminal liability for importuning, breaching the peace, or loitering for the purpose of soliciting.\(^4\)

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1. Throughout this Note, the term "homosexual solicitation" refers to a request to engage in noncommercial, consensual sexual activity, spoken by an adult actor, the solicitor, to another adult of the same sex, the addressee. Unless otherwise noted, the sex of the parties is immaterial, although most of the cases considered here involve males. This Note does not deal with solicitation for prostitution, which is generally treated under separate legislation and constitutional doctrine.

2. See note 169 infra and accompanying text.


4. For a discussion of statutes imposing liability on these grounds, see notes 149–65 infra and accompanying text.

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Kenneth Phipps was one such solicitor, whose proposition to a plainclothes Cincinnati policeman was vulgar as well as badly timed. He was convicted of homosexual solicitation under Ohio Revised Code section 2907.07(B), which prohibits “solicit[ing] a person of the same sex to engage in sexual activity with the offender, when the offender knows such solicitation is offensive to the other person, or is reckless in that regard.” On appeal to the Ohio Supreme Court, Phipps challenged the constitutionality of the statute on the grounds that it inhibited his freedom of speech in violation of the first amendment. He argued that the statute was both vague because its language was ambiguous, and overbroad because it regulated both protected and unprotected speech. The Ohio Supreme Court rejected the vagueness claim, and skirted the overbreadth claim by construing the statute to apply only to “fighting words”—those words which by their utterance incite a breach of the peace.

State v. Phipps provides a convenient point of departure for an examination of the legal sanctions against homosexual solicitation. First, it invokes the fighting words doctrine to avoid conflict with first amendment guarantees. Consequently, this Note begins by tracing judicial interpretations of “fighting words” to show how an initially broad exception to first amendment protections is of more limited application today. Second, Phipps raises two significant first amendment issues: vagueness and overbreadth. Each doctrine defines a specific con-

5. Phipps drove up to a street corner and, from his automobile, said to the decoy policeman, “Hop in, let’s go have sex.” The decoy looked into the back seat and Phipps retorted, “You look paranoid, come on in, I want to suck your dick.” State v. Phipps, 58 Ohio St. 2d 271, 389 N.E.2d 1128, 1130 (1979).


7. The vagueness doctrine is discussed at notes 60–73 infra and accompanying text.

8. The overbreadth doctrine is discussed at notes 74–115 infra and accompanying text.

9. 58 Ohio St. 2d at 273, 389 N.E.2d at 1130.

10. Id. at 275–80, 389 N.E.2d at 1133–34. Invoking the notion of “fighting words,” the court cited the Committee Comment to § 2907.07(B), which states that “[T]he rationale for prohibiting indiscriminate solicitation of deviate conduct is that the solicitation itself can be highly repugnant to the person solicited, and there is a risk that it may provoke a violent response.” Id. at 279, 389 N.E.2d at 1134 (emphasis by the court). The validity of this rationale is discussed at note 202 infra and accompanying text.

11. See notes 16–78 infra and accompanying text.
stitutional infirmity and serves as a tool either to invalidate or to limit the applicability of a statute which regulates speech. This Note examines each doctrine in light of the fighting words exception and discusses its application, limitations, and current utility.\(^\text{12}\)

Third, *Phipps* deals with a statute which makes homosexual solicitation a crime. This Note analyzes legislation regulating homosexual solicitation—both by an investigation of the policy underpinnings of such legislation and the statutory techniques which characterize it.\(^\text{13}\) This analysis includes an evaluation of the options available to a court faced with a constitutional attack on a solicitation statute. Finally, the Note proposes specific statutory reforms which, it is suggested, will both promote legitimate state interests and protect the first amendment rights of homosexuals.\(^\text{14}\)

I. THE CONSTITUTIONAL FRAMEWORK

A. The Fighting Words Doctrine

The fighting words doctrine evolved from the notion that the first amendment's broad prohibition against laws "abridging the freedom of speech" is not absolute.\(^\text{15}\) The Supreme Court has long suggested that speech which unjustifiably endangers the public or some other superior interest\(^\text{16}\) may legitimately be regulated. This notion, grounded in common sense, is exemplified by Justice Holmes' observation that "[t]he most stringent protection of free speech would not protect a man in falsely shouting fire in a theater and causing a panic."\(^\text{17}\)

However, a standard based on common sense alone provides

\(^{12}\) See notes 59–116 infra and accompanying text.

\(^{13}\) See notes 117–201 infra and accompanying text.

\(^{14}\) See notes 202–12 infra and accompanying text.

\(^{15}\) For a thoughtful analysis of the evolution of the fighting words doctrine, see Shea, *Don't Bother to Smile When You Call Me That—Fighting Words and the First Amendment*, 63 Ky. L.J. 1 (1974).

\(^{16}\) National security is sometimes said to be an interest superior to first amendment interests, and the holding in Whitney v. California, 274 U.S. 357 (1927), is sometimes cited as support. This is immaterial as Whitney was overruled in Brandenburg v. Ohio, 395 U.S. 444 (1969). Dictum in prior restraint cases leads to the suggestion that under some circumstances—never fully articulated—national security may preempt first amendment guarantees. "[T]he protection even as to previous restraint is not absolutely unlimited . . . . No one would question but that a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops." Near v. Minnesota, 283 U.S. 697, 708 (1930). See also New York Times Co. v. United States, 403 U.S. 713, 724 (1971) (Brennan, J., concurring); id. at 727, (Stewart, J., concurring).

\(^{17}\) Schenck v. United States, 249 U.S. 47, 52 (1919).
the judiciary with little if no guidance. Thus, in 1942, the Supreme Court in *Chaplinsky v. New Hampshire*\(^\text{18}\) delineated the classes of speech which could legitimately be proscribed: obscenity,\(^\text{19}\) libel,\(^\text{20}\) and "fighting words."

At issue in *Chaplinsky* was the constitutionality of a New Hampshire statute which prohibited the use of "offensive, derisive, or annoying" words in public places.\(^\text{21}\) Chaplinsky was a minister of Jehovah's Witnesses who, in the course of street corner evangelizing, described organized religion as a "racket"\(^\text{22}\) and continued his harangue despite a policeman's warning to "go slow."\(^\text{23}\) According to Chaplinsky, a marshal who escorted him from the scene referred to him as a "damned bastard,"\(^\text{24}\) to which Chaplinsky responded, "You are a God damned racketeer and a damned Fascist and the whole government of Rochester are Fascists or agents of Fascists."\(^\text{25}\) Because of this response, Chaplinsky was charged and convicted under the New Hampshire statute.\(^\text{26}\)

The New Hampshire Supreme Court, in affirming the conviction, limited the application of the statute to speech which would "cause acts of violence by the person to whom, individually, the remark is addressed."\(^\text{27}\) The United States Supreme Court, however, took a broader view. Justice Murphy, speaking for a unanimous court, insisted that

> [t]here are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words—those which *by their very utter-

\[^{18}\text{18. 315 U.S. 568 (1942).}\]
\[^{19}\text{19. Id. at 572. Homosexual solicitation may be analyzed exclusively as obscenity. Compare Silva v. Municipal Court, 40 Cal. App. 3d 733, 115 Cal. Rptr. 479 (1974) with Pryor v. Municipal Court, 25 Cal. 3d 238, 599 P.2d 636, 158 Cal. Rptr. 330 (1979) (overruling Silva on other grounds, but referring to obscenity analysis as a "misunderstanding," id. at 249, 599 P.2d at 642, 158 Cal. Rptr. at 336). However, analysis of homosexual solicitation as obscenity is beyond the scope of this Note.}\]
\[^{20}\text{20. 315 U.S. at 572.}\]
\[^{22}\text{22. 315 U.S. at 570.}\]
\[^{23}\text{23. State v. Chaplinsky, 91 N.H. 310, 313, 18 A.2d 754, 758 (1941).}\]
\[^{24}\text{24. Id. at 316, 18 A.2d at 759. The marshal apparently denied making the statement.}\]
\[^{25}\text{25. 315 U.S. at 569.}\]
\[^{26}\text{26. Id.}\]
\[^{27}\text{27. 91 N.H. at 313, 18 A.2d at 758. This construction foreshadowed the doctrine of Gooding v. Wilson, 405 U.S. 518 (1972), discussed at notes 89–96 infra and accompanying text.}\]
ance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas . . . .

One commentator has suggested that this passage delineates the three elements of what has come to be called the fighting words doctrine. The first element is the notion that expression must be an "essential part of [the] exposition of ideas" to merit protection. The classes of speech cited in Chaplinsky formed "no essential part of any exposition of ideas" and were of "slight social value as a step to truth." This narrow conception of constitutionally protected expression was eroded seven years after Chaplinsky when, in Winters v. New York, the Court reversed the obscenity conviction of a crime-magazine peddler. Justice Reed stated: "The line between the informing and the entertaining is too elusive [to be constitutionally distinct]," thus extending the protection of the first amendment to a form of "entertainment" which scarcely constituted an "essential part of any exposition of ideas" as required by Chaplinsky.

The second element of the fighting words doctrine consists of the types of injury such language may cause, against which the language's value must be weighed. Justice Murphy spoke first of words "which by their very utterance inflict injury," or, as one commentator has characterized the harm, "injury to the 'sensibilities' of addressees or auditors." These emotional or psychic injuries have no physical manifestations—a factor which may present the problem of proving an intangible injury. However, as this Note will argue, the use of language which inflicts severe emotional injury is surely within legislative reach.

The third element of the doctrine is the tendency of the utterance "to incite an immediate breach of the peace." This in-
volves a behavioral assumption of some magnitude—that an average citizen may be incited to violence by mere words.\textsuperscript{39} Though this assumption may be challenged,\textsuperscript{40} it is the linchpin of the fighting words doctrine. Moreover, the assumption runs a neat arc around the first amendment: if mere words may trigger an uncontrollable violent response, the only method of avoiding such response is to prohibit the words themselves.\textsuperscript{41} Thus, the focus of state regulation is shifted from the addressee who responds violently to the "cause" of his violence, the speaker's utterance.

The strength of this assumption was diminished somewhat in \textit{Terminiello v. City of Chicago,}\textsuperscript{42} which recognized that not all provocative speech may be regulated. Terminiello, a priest, had lambasted Jews and blacks in an address to a veterans group, and some 1000 demonstrators outside the hall reacted violently.\textsuperscript{43} In reversing Terminiello's conviction for inciting a breach of the peace, the Court noted that "[s]peech is often provocative and challenging . . . [and] is nevertheless protected against censorship or punishment."\textsuperscript{44} The Court's recognition of the value of emotionally stirring speech undercut the nice logic of the "incitement" element of \textit{Chaplinsky}, for it indicates that notwithstanding the uncontrollable violence such speech elicits, the state may not punish the speaker.

The interests \textit{Chaplinsky} sought to protect—that of the listener's sensibilities and that of the state in the peace of its streets—were served by the fighting words doctrine well through the 1960's.\textsuperscript{45} In 1971, however, the Supreme Court's decision in \textit{Cohen v. California}\textsuperscript{46} drastically curtailed the states' ability to shelter those interests. In \textit{Cohen}, the Court first drew a distinction

\begin{itemize}
    \item \textsuperscript{39} Rutzick, \textit{supra} note 29, at 8.
    \item \textsuperscript{40} See, e.g., Cohen v. California, 403 U.S. 15, 23 (1972), discussed at notes 46-58 infra and accompanying text.
    \item \textsuperscript{41} Rutzick, \textit{supra} note 29, at 8.
    \item \textsuperscript{42} 337 U.S. 1 (1948).
    \item \textsuperscript{43} \textit{Id}. at 3.
    \item \textsuperscript{44} \textit{Id}. at 4.
    \item \textsuperscript{45} E.g. Williams v. District of Columbia, 419 F.2d 638 (D.C. Cir. 1969), where the court, reversing the conviction of a man who called a policeman a "son of a bitch," nevertheless recognized the state's "legitimate interest in stopping one person from 'inflict[ing] injury' on others by verbally assaulting them." \textit{Id}. at 646. Despite this affirmation of an interest in the addressee's sensibilities, the court required that the communication be "grossly offensive" in order to sustain a conviction. \textit{Id}. For an elaboration of this concept, see note 206 infra and accompanying text. See also Karp v. Collins, 310 F. Supp. 627 (D.N.J. 1970) (requiring that "offensive" words be spoken with intention of disturbing listener in order to invoke sensibilities interest).
    \item \textsuperscript{46} 403 U.S. 15 (1971).
\end{itemize}
between language which is merely offensive and language which constitutes "fighting words," holding the former to be within the protection of the first amendment. Kenneth Cohen was observed outside a California courtroom with the words "Fuck the Draft" emblazoned on his jacket.\footnote{Id. at 16. Upon entering the courtroom, Cohen removed his jacket and stood with it folded over his arm so that the words at issue were visible to no one. Meanwhile, a policeman sent the presiding judge a note suggesting that Cohen be held in contempt of court. The judge declined to do so, and Cohen was arrested by the officer only after he emerged from the courtroom. Id. at 19 n.3.} Although he neither included nor threatened violence, Cohen was arrested and convicted under California's breach of the peace statute.\footnote{The statute, CAL. PENAL CODE § 415 (West 1970), prohibits "maliciously and wilfully disturb[ing] the peace . . . by . . . offensive conduct." 403 U.S. at 16.} The California Court of Appeals upheld the conviction, holding that "'offensive conduct' means 'behavior which has a tendency to provoke others to acts of violence or to in turn disturb the peace.' "\footnote{1 Cal. App. 3d 94, 99, 81 Cal. Rptr. 503, 506 (1969).}

The Supreme Court reversed, holding that in certain instances seemingly offensive expression deserves first amendment protection. As Justice Harlan noted: "We cannot lose sight of the fact that, in what may seem a trifuling and annoying instance of individual distasteful abuse of a privilege, these fundamental societal values are truly implicated."\footnote{403 U.S. at 25.} Further, the Cohen court introduced the requirement that the offended hearer be the actual addressee\footnote{See Rabinowitz, Nazis in Skokie, Fighting Words or Heckler's Veto?, 28 Depaul L. Rev. 259 (1979).} of the offensive speech,\footnote{403 U.S. at 20. Accord, Cantwell v. Connecticut, 310 U.S. 296, 309 (1940).} rather than merely an anonymous auditor. Justice Harlan pointed out that there was "no showing that anyone who saw Cohen was, \textit{in fact}, violently aroused . . .,"\footnote{403 U.S. at 20 (emphasis added).} suggesting for the first time that regulation of offensive expression cannot depend on the presence of a merely "hypothetical coterie of the violent and lawless. . . ."\footnote{Id.} Justice Harlan could find nothing on the record in Cohen indicating that "substantial numbers of citizens are standing ready to strike out physically at whoever may assault their sensibilities . . . ."\footnote{Id.}

In short, offensive expression could no longer be prohibited simply because it created an undifferentiated fear of harm; there had to be an objectively legitimate affront to the actual addressee's
sensibilities. A majority of the Court found no such affront in Cohen's case: "No individual actually or likely to be present [in the courthouse] could reasonably have regarded the words on appellant's jacket as a direct personal insult." By this logic, Cohen drastically limited the degree to which states might defer to a listener's sensibilities. The Supreme Court's holding was a logical consequence of the realization that "one man's vulgarity is another man's lyric."

Yet, Cohen went even further: it recognized that the emotive content of offensive speech deserves just as much first amendment protection as its cognitive content. After Cohen, vulgar or offensive expression is admissible to the protected class of "ideas" leading to "truth", from which it had been excluded in Chaplinsky.

Thus, after Cohen, only one of the elements of the Chaplinsky doctrine remains intact: the interest of the state in preventing a breach of the peace. As a result of the limitations drawn by the Cohen majority on the original doctrine, the interest in the listener's sensibilities appears emasculated, if not eliminated altogether. Moreover, the speaker need not tread so lightly upon his listener's emotions: so long as cognitive content is perceptible, the emotive component merits protection.

B. The Vagueness and Overbreadth Doctrines: Tools of Judicial Control

The fighting words doctrine, as enunciated in Chaplinsky and redefined in Cohen, limits the power of a legislature to regulate speech with respect to the particular incident to which the doctrine is applied. However, in reviewing a statute which regulates expression, a court may look beyond the legitimacy of its application in an individual case. As a result of legislative zeal to regulate certain kinds of expression, a statute may be facially unconstitutional, irrespective of the facts of a particular case, because its language is either vague or overbroad. Although they overlap considerably in practice, vagueness and overbreadth are distinct .

56. Id. at 20.
57. Id. at 25.
58. Id. at 26. The Court rejected "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." Id. Cf., e.g., Terminiello v. City of Chicago, 337 U.S. 1 (1948), discussed in text accompanying notes 42-44 supra.
I. The Doctrine of Vagueness

A statute designed to restrict expression may be held void for vagueness when its language is not specific enough to inform the average person of precisely what activity is prohibited. In *Grayned v. City of Rockford*, the Supreme Court noted that the doctrine of vagueness, grounded upon the notice element of due process, protects three interests. First, a defendant must be able to ascertain precisely what conduct is prohibited. A statute which is so vague that "men of common intelligence must ordinarily guess at its meaning" deprives the defendant of that certainty, and may trap an unintentional violator by providing insufficient warning of that which is prohibited. Second, the citizenry must be free from arbitrary or discriminatory enforcement of law. Vague laws, by failing to provide explicit standards of conduct, open wide the door for official harassment. Finally, any statute which restricts first amendment freedoms necessarily has a "chilling effect" on the exercise of those freedoms: citizens will be deterred from expressing themselves for fear of capricious enforcement. A vague statute intensifies the chilling effect by inducing citizens to "steer far wider of the unlawful zone" than if the boundaries of the law had been clearly marked.

It is difficult to determine precisely how specific a statute must be to survive a vagueness challenge; there are a number of factors to be weighed in the decision. On one hand, it has long been recognized that it is impossible to set a rigid standard of

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60. 408 U.S. 104 (1972).
61. *Id.* at 108.
62. *Zwickler v. Koota*, 389 U.S. 241, 249 (1967) (holding that a statute requiring the name of a "printer" on all handbills was unconstitutionally vague).
63. 408 U.S. at 108.
64. *Id.*
65. *Id.* at 109 (quoting *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964)).
66. Even a statute which quite clearly prohibits the defendant's acts can be subject to a vagueness attack by that same defendant. *See Coates v. City of Cincinnati*, 402 U.S. 611 (1971), where Justice White, dissenting on other grounds, noted that "[a]lthough a statute may be neither vague, overbroad, nor otherwise invalid as applied to the conduct charged against a particular defendant, he is permitted to raise its vagueness or unconstitutional overbreadth as applied to others." *Id.* at 619. Such an approach has necessitated a relaxation of the general rules of standing. The Burger Court has, however, intimated that one who violates the "hard core" of a statute—that conduct that a reasonable person would know would be prohibited under the statute—may be estopped from asserting its vagueness. *See Smith v. Goguen*, 415 U.S. 566 (1974). *But see Parker v. Levy*, 417 U.S. 733 (1974). *See generally Note, supra note 59, at 629–34.
specificity; the limits of the English language and of the legislature's ability to anticipate possible fact patterns make near-absolute precision an unfair demand. Moreover, a court may have trouble perceiving the distinction between a merely ambiguous statute — which can be rescued from invalidation by a narrowing construction — and a statute which plainly is vague and must fall because it is not susceptible of any meaning.

On the other hand, despite sympathy for the limitations on precision in statutory craftsmanship, the first amendment demands great specificity whenever expression is the target of the legislation. The Supreme Court has stated that "stricter standards of permissible statutory vagueness may be applied to a statute having a potentially inhibiting effect on speech; a man may the less be required to act at his peril here, because the free dissemination of ideas may be the loser."

Faced with the demand for, and absence of, the requisite specificity in statutory language, the Supreme Court often takes into account the judicial gloss which state courts may have placed on a given statute. As a result, a state court construction which narrows the meaning of an otherwise vague statute may protect that statute from a vagueness challenge. However, if the state does not so construe its statutes, the Supreme Court is not obligated to do so, and may strike down the statute altogether.

2. The Doctrine of Overbreadth

The doctrine of overbreadth, like that of vagueness, seeks to alleviate the chilling effect inherent in regulation of speech, as well as the threat of arbitrary and discriminatory enforcement. How-

68. W. LaFave & A. Scott, CRIMINAL LAW 84 (1972).
71. Compare Winters v. New York, 333 U.S. 507 (1948), discussed in note 31 supra, with Rose v. Locke, 423 U.S. 48 (1975), where the Court defined the "crime against nature" language of a Tennessee sodomy statute according to an interpretation of the same language by the Supreme Judicial Court of Maine.
72. Since all citizens are assumed to know the law, they also are assumed to know of a court's limiting construction of a law. For criticism of this logic, see Note, supra note 69, at 73.
73. Id. at 86. See, e.g., Smith v. Goguen, 415 U.S. 566 (1974) (contempt-of-flag statute, not construed by Massachusetts courts, held void for vagueness); Coates v. City of Cincinnati, 402 U.S. 611 (1971) (loitering ordinance, not construed by Ohio courts, held void for vagueness).
ever, overbreadth and vagueness have their origins in theoretically distinct foundations. The vagueness doctrine analyzes the meaning of the words of a statute, while overbreadth is concerned with the coverage of the statute. The overbreadth doctrine is founded on the notion that "a governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms."\textsuperscript{74} Thus, a statute may be sufficiently precise in its terms to survive a vagueness challenge, yet those terms may encompass both protected and unprotected expression within the statute's prohibition. This is the paradigm of unconstitutional overbreadth.

As with vagueness, the requirements for standing to bring an overbreadth challenge are relaxed.\textsuperscript{75} Classic overbreadth scrutiny considers only the scope of the statute as it applies to the defendant's particular expression.\textsuperscript{76} However, since 1940 the Court has considered hypothetical unconstitutional applications as well,\textsuperscript{77} and has held the nature of the defendant's own conduct to be immaterial to the inquiry.\textsuperscript{78}

The pivotal question in an overbreadth challenge is whether the measure of protected expression encompassed by the statute must be minimal or substantial for the statute to be struck down. Until 1973, a statute which was overbroad to the slightest degree, regulating any protected expression, was sufficiently overbroad to be invalidated.\textsuperscript{79} However, in 1973, the Court announced a new standard: "[P]articularly where conduct and not merely speech is involved, we believe that the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep."\textsuperscript{80} This shift to a requirement of substantial overbreadth is founded on the notion that where the degree of overbreadth is de minimus, there will rarely be occasion

\textsuperscript{74} NAACP v. Alabama, 377 U.S. 288, 307 (1964) (holding that registration requirements for foreign corporations, applied to prohibit NAACP activities, were overbroad). For the most comprehensive survey of the overbreadth doctrine, see Note, The First Amendment Overbreadth Doctrine, 83 Harv. L. Rev. 844 (1970).

\textsuperscript{75} See note 66 supra.

\textsuperscript{76} See Note, supra note 74, at 844.

\textsuperscript{77} See Thornhill v. Alabama, 310 U.S. 88, 97 (1940) in which a loitering statute as applied to labor picketing was judged on its face, not on the merits of its application.


\textsuperscript{80} Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973).
for it to chill protected expression. 81

Traditionally, an overbroad statute has been held facially invalid and struck down in its entirety. 82 This policy is consistent with the chilling effect rationale—that first amendment freedoms should not be exercised at the citizen’s peril. However, the recent trend has been to avoid facial invalidation 83 by remanding the case to the state court for a limiting construction of the statute. Although this practice permits the legitimate aims of the legislation to be left intact, consistent with the goal of judicial restraint, 84 it also leaves certain questions unanswered. First, state courts may be unable to attach a constitutional construction to a statute with unconstitutional underpinnings. 85 Moreover, constitutionally protected expression may remain illegitimately regulated while the state court is deliberating on a limiting construction of the statute. 86 Irrespective of these difficulties, remands for a limiting construction are now the dominant judicial remedy for overbreadth. 87

Since 1972, the Court has used the overbreadth doctrine as its primary tool to implement the rule of Cohen v. California, 88 that offensive speech does not, without more, amount to “fighting words.” The Court first invoked the overbreadth doctrine in Gooding v. Wilson, 89 where the defendant, during a scuffle with police who were breaking up an antiwar demonstration, exclaimed to an officer: “White son of a bitch, I’ll kill you” and

81. The Broadrick Court reasoned that “there comes a point where [a chilling effect]—at best a prediction—cannot, with confidence, justify invalidating a statute on its face and so prohibiting a state from enforcing the statute against conduct that is admittedly within its power to proscribe.” Id.

It is apparent that the Broadrick analysis was largely grounded in the critique of traditional overbreadth doctrine found in Note, supra note 74, at 859. Despite contentions that the substantial overbreadth doctrine is not susceptible of easy definition and that it is really little different from traditional doctrine, 413 U.S. at 622 (Brennan, J., dissenting), the test of Broadrick is law, and despite the more stringent standard, statutes have fallen in its wake. See, e.g., Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975) (city ordinance banning exhibition of films containing nudity at drive-in theatres when the screen is visible from a public street or place voided for substantial overbreadth).

83. See Note, supra note 59, at 616–20.
86. For a more detailed criticism of the remand-for-limitation policy, see Note, supra note 59, at 623–25.
87. See note 111 infra and accompanying text.
89. 405 U.S. 518 (1972).
"You son of a bitch, I'll choke you to death."90 He was convicted under a Georgia breach of the peace statute which read: "Any person who shall, without provocation, use to or of another, and in his presence . . . opprobrious words or abusive language, tending to cause a breach of the peace . . . shall be guilty of a misdemeanor."91

Faced with a claim that the Georgia statute was overbroad, the Supreme Court reversed Wilson's conviction, holding that a "statute must be carefully drawn or authoritatively construed to punish only unprotected speech and not be susceptible of application to protected expression."92 The Court applied the *Chaplinsky* and *Cohen* distinction between unprotected "fighting words" and protected "offensive" expression, finding that the terms "opprobrious and abusive" in the Georgia statute, as construed by the Georgia courts, went beyond fighting words to include protected speech. The statute was thus held to be void for overbreadth.93

The *Gooding* decision raises several noteworthy points. First, by combining the overbreadth and fighting words doctrines, the Court provided a model for adjudicating constitutional challenges to laws regulating offensive expression.94 Second, the Court's analysis reinforced the substantive changes in the fighting words doctrine already articulated in *Cohen*. The Georgia Court of Appeals had construed the statute as expressly protecting the listener's sensibilities;95 by invalidating that construction, the Supreme Court underscored *Cohen's* repudiation of that interest. In addition, the Court seemed to emphasize the necessity of violent reaction by the actual addressee,96 an essential feature of the *Cohen* modification of *Chaplinsky*. In short, *Gooding* provided the means by which *Cohen* could be effectuated: a method of stat-
utory construction which applied overbroad statutes only to un-
protected expression—"fighting words" as defined by Cohen.

Shortly after Gooding the Court again took the opportunity to
apply its overbreadth analysis to "fighting words." It summarily
vacated and remanded for reconsideration three cases, one in light
of Gooding, and the other two in light of Cohen. In the first of this
trilogy of cases, Rosenfeld v. New Jersey,97 the defendant had ad-
dressed a local school board, using the word "motherfucker" re-
peatedly. He was convicted under a New Jersey statute prohbiting "loud or offensive or profane or indecent language."98
The New Jersey Supreme Court had construed the statute to ap-
ply only to language which provoked a breach of the peace or
disturbed the sensibilities of the listener.99

The United States Supreme Court's remand in light of Good-
ing reflected its apparent displeasure with a construction that pro-
tects listener sensibilities.100 Content with the New Jersey
Supreme Court's construction, Justice Powell argued in dissent
that "Chaplinsky is not limited to words whose mere utterance en-
tails a high probability of an outbreak of physical violence. It also
extends to the willful use of scurrilous language calculated to offend
the sensibilities of an unwilling audience."101 Thus, Justice Powell
would restore Chaplinsky in its original form to the extent of pro-
tecting sensibilities, though only where they are offended will-
fully.102

The second case of the trilogy, Lewis v. City of New Orleans
(Lewis I),103 involved a mother who addressed police officers ar-
resting her son as "God damn motherfucking police." She was
convicted under a city ordinance which prohibited any person
from wantonly cursing, reviling, or using "obscene or opprobrious
language" toward a police officer on duty.104 Since the Louisiana
courts had not construed the ordinance, the Court remanded the
case for reconsideration in light of Cohen, apparently for its anal-

97. 408 U.S. 901 (1972).
98. Id. at 904 (Powell, J., dissenting) (quoting N.J. Rev. Stat. § 2A:170-29(1) (1971)).
99. Id. (quoting State v. Profasci, 56 N.J. 346, 266 A.2d 579 (1970)).
100. The New Jersey Supreme Court shared the Supreme Court's displeasure with the
protection of sensibilities when, upon reconsideration, it held the statute to be overbroad.
101. 408 U.S. at 905 (Powell, J., dissenting) (emphasis added).
102. As this Note contends, Justice Powell's observations may have merit in the area of
homosexual solicitation. See notes 207-09 infra and accompanying text.
103. 408 U.S. 913 (1972).
104. Id. at 909-10 (Rehnquist, J., dissenting).
ysis of "fighting words," and Gooding, to provide the overbreadth analysis. Justice Powell concurred in this result, stating that although Lewis' utterance would be "fighting words" if addressed to a citizen, "the situation may be different where such words are addressed to a peace officer trained to exercise a higher degree of restraint than the average citizen."\(^{105}\)

*Lewis v. City of New Orleans* again reached the Supreme Court after the Louisiana Supreme Court, following the command of *Lewis I*, authoritatively construed the New Orleans ordinance. On remand, the Louisiana court narrowed the purview of the ordinance to "'fighting words' uttered to specific persons at a specific time . . . ."\(^{106}\) In *Lewis II*,\(^{107}\) however, the Supreme Court held that the ordinance was still overbroad, and reversed. Justice Brennan, writing for the majority, stated that the Louisiana court made no "meaningful attempt to limit or properly define—as limited by Chaplinsky and Gooding—'opprobrious' or indeed any other term" in the statute.\(^{108}\) The *Lewis II* decision leaves unanswered the question how, short of invalidation, the New Orleans ordinance could have been "meaningfully" limited in its construction. Consequently, it is questionable whether "authoritative construction" which leaves facially overbroad language intact could survive scrutiny.

The final case of the trilogy, *Brown v. Oklahoma*,\(^{109}\) involved a member of the Black Panther party who referred to police as "motherfucking fascist pig cops" during a political meeting. The Court vacated his conviction for using "obscene or lascivious" language\(^{110}\) and, since the statute had not been previously con-

\(^{105}\) *Id.* at 913 (Powell, J., concurring). In distinguishing police from other citizens, Justice Powell apparently would add yet another proviso to the protection of sensibilities: an inquiry into the status of the addressee and whether it equips him or her with a special degree of self-restraint. *Cf.* Coates v. City of Cincinnati, 402 U.S. 611 (1971), where Justice Stewart indicated that conduct may not be constitutionally regulated "through the enactment and enforcement of an ordinance whose violation may entirely depend on whether or not a policeman is annoyed." *Id.* at 614.

\(^{106}\) City of New Orleans v. Lewis, 263 La. 809, 826, 269 So. 2d 450, 456 (1972).


\(^{108}\) *Id.* at 133. The Court, as it had in Gooding, dwelled on the word "opprobrious," holding it to be clearly more broad than a fighting words construction would permit. An unspoken premise of the reversal seems to be the Supreme Court's apparent disagreement with the Louisiana court's conclusion that Lewis' language was within the bounds of "fighting words."

\(^{109}\) 408 U.S. 914 (1972).

\(^{110}\) *Id.* at 911 (Rehnquist, J., dissenting) (quoting OKLA. STAT. ANN. tit. 21, § 906 (1958)).
strued, remanded for reconsideration in light of both *Cohen* and *Gooding*.

Since Gooding and the *Rosenfeld-Lewis-Brown* trilogy, the Court has been less deferential to the state courts, occasionally summarily reversing convictions for "using profane language" and rarely commenting on its remands for reconsideration in light of *Gooding*. A notable exception was *Lucas v. Arkansas*, where the defendant was overheard to say "look at that chicken-shit motherfucker" in reference to a police officer. Defendant's conviction for using "profane, violent, vulgar, abusive or insulting language," was vacated and remanded for reconsideration in light of *Lewis II*, with two Justices dissenting from the remand. Justice Blackmun argued that the Arkansas Supreme Court's construction of the statute sufficiently met the demands of *Gooding*, while Justice Douglas found nothing to be gained by remanding the case; he felt the statute was not salvageable and argued for summary reversal.

The frequency of summary decisions suggests that the *Cohen* modification of the doctrine and the *Gooding* mode of analysis are now firmly entrenched in the jurisprudence of vulgarity. The Ohio Supreme Court's understanding of the current relationship, between offensive expression and "fighting words" is illuminating: "[N]o matter how rude, abusive, offensive, derisive, vulgar, insulting, crude, profane or opprobrious spoken words may seem to be, their utterance may not be made a crime unless they are fighting words . . . ."  

The remainder of this Note will focus on one type of expression, homosexual solicitation, to explore whether it may be regulated under the "fighting words" standard of *Cohen*, and how courts may approach its vagueness and overbreadth problems according to *Gooding*.

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113. *Id.* n.1 (Blackmun, J., dissenting) (quoting ARK. STAT. ANN. § 41–1412 (1964)).
114. *See* *Lucas v. Arkansas*, 254 Ark. 584, 494 S.W.2d 705 (1973). The *Lucas* dissents reflect doubt about the efficacy of remanding in light of *Lewis II* which, as has been demonstrated, provides virtually no guidelines to state courts. *See* notes 107–08 *supra* and accompanying text.
115. 416 U.S. at 924.
116. City of Cincinnati v. Karlan, 39 Ohio St.2d 107, 110, 314 N.E.2d 162, 164 (1974) (holding the defendant's statement, "I hate all you fucking cops" to be "fighting words").
II. THE REGULATION OF HOMOSEXUAL SOLICITATION

Proscription of homosexual solicitation is part of a broad system of regulation of homosexual activity which directly affects a significant minority of the population. Although no state makes homosexuality per se criminal, sexual preference is nonetheless the subject of discrimination under the law. Laws regulating teaching qualifications, marriages, and corporations often discriminate on the basis of sexual orientation. Further, employment discrimination against homosexuals contributes

117. Owing to the often circumspect nature of a homosexual's sexual identity, accurate data concerning the number of homosexuals in the United States are lacking. However, at least one research study indicates that the number is significant, and that there are more homosexual men than women. See Chaitin & Lefcourt, Is Gay Suspect?, 8 LINCOLN L. REV. 24, 31 (1973). It has been estimated that only 15% of male, and 5% of female, homosexuals would be recognized as such by the average person. Poméry, Homosexuality, in THE SAME SEX, AN APPRAISAL OF HOMOSEXUALITY 11 (R. Weltge ed. 1969).

118. The criminal status of homosexuality may be compared to that of drug addiction: though the addiction itself is not illegal, the procurement, possession, or sale of narcotics is. See Robinson v. California, 370 U.S. 660 (1962). In a like manner, though it is not criminal to be homosexual, it may be criminal to engage in or solicit homosexual acts.


In reviewing a homosexual's discharge from a teaching position, courts may require a rational nexus between the teacher's homosexuality and his or her unfitness for teaching. See, e.g., Morrison v. State Bd. of Educ., 1 Cal. 3d 214, 461 P.2d 375, 82 Cal. Rptr. 175 (1969). However, where sexual behavior, whether heterosexual or homosexual, is flagrant, this alone may constitute unfitness to teach. See, e.g., Pettit v. State, 10 Cal. 3d 29, 513 P.2d 889, 109 Cal. Rptr. 665 (1973) (school teacher held unfit to teach because of her participation in, and public discussion of, "non-conventional" heterosexual behavior). See also Board of Educ. of Long Beach v. Jack M., 19 Cal. 3d 691, 566 P.2d 602, 139 Cal. Rptr. 700 (1977).


to their disfavored status.\textsuperscript{122}

More significant to this inquiry is the use of sodomy statutes to suppress homosexual activity. These laws, once universal and still in force in twenty-nine states,\textsuperscript{123} are the historical tools of such suppression. Although their use of the terms "sodomy," "unnatural and lascivious act," and "abominable crime against nature,"\textsuperscript{124} may render them definitionally infirm, sodomy laws have nevertheless withstood vagueness attacks\textsuperscript{125} and continue to make homosexual acts a crime.\textsuperscript{126}

\textsuperscript{122} Discrimination against homosexuals in private sector employment is thought to be quite common though documentation is difficult because homosexuals are not readily identifiable. Rivera, \textit{supra} note 119, at 806. Litigation resulting from such discrimination is rare.

The civil service has been the target of what little employment discrimination litigation there has been. Again, some courts require a challenged employer to show a rational nexus between the prospective or former employee's homosexuality and job performance. See, e.g., Norton v. Macy, 417 F.2d 1161 (D.C. Cir. 1969) (homosexuality of NASA employee did not impair his job efficiency); Society for Individual Rights, Inc. v. Hampton, 63 F.R.D. 399 (N.D. Cal. 1973) (possibility of a public contempt charge an invalid justification for dismissal of homosexual civil servants). \textit{But see} Singer v. United States Civil Serv. Comm'n, 530 F.2d 247 (9th Cir. 1976), \textit{vacated and remanded}, 429 U.S. 1034 (1977) (employee's open flaunting homosexuality per se constitutes "rational nexus").


\textsuperscript{124} These definitional infirmities include determining which acts are covered by a particular statute and to whom the statute applies. \textit{See generally} Note, \textit{Sodomy Statutes—A Need for a Change}, 13 S.D. L. Rev. 384 (1968).


\textsuperscript{126} The Supreme Court tacitly approved such statutes in Doe v. Commonwealth's Attorney, 425 U.S. 901 (1977), by summarily affirming the lower court's ruling that Virginia's sodomy statute did not violate due process. The summary affirmance may suggest
Statutes which regulate homosexual solicitation, unlike sodomy statutes, regulate speech rather than conduct. As such, they fall directly within the purview of the first amendment and must be analyzed quite differently from sodomy laws. Yet, it must be recognized that regulating solicitation is the primary means of concomitant regulation of homosexual activity. Because of the traditionally discreet nature of consensual homosexual acts, arrests for violation of sodomy statutes are extremely rare. In California, for example, almost all homosexual arrests result from violations of public solicitation statutes. Thus, the control of lawful homosexual activity through the regulation of speech deserves critical inspection.

A. Proscription of Homosexual Solicitation: A Policy Analysis

There are three purposes underlying proscription of homosexual solicitation: protection of society from a criminal sexual act, protection from the social effects of homosexuality, and protection from the effects of the solicitation itself.

The first of these purposes—protecting society from the crime of engaging in homosexual acts—is served by the common law crime of solicitation. The crime is not derived from tort, as are most crimes, for the dominant tort rule regarding sexual proposals is the familiar “there is no harm in asking.” Rather, the crime proceeds from the assumption that since sodomy is criminal, solicitation to engage in sodomy is incitement to perform a criminal act. At common law any such solicitation, regardless of the underlying crime involved, was in and of itself criminal. This ra-
tionale has been extremely durable in some jurisdictions, withstanding all constitutional challenges to convictions for soliciting criminal sodomy. Conversely, it provides challengers with ammunition to challenge solicitation statutes in jurisdictions where sodomy is no longer illegal: if the act for which the solicitation is made is not a crime, then common law solicitation falls of its own weight.

The second purpose of proscribing homosexual solicitation—protection of society from undesirable social effects—flows from homosexuality itself. Prohibition of homosexual solicitation, the argument runs, will inhibit homosexuality, and its undesirable social effects, by depriving homosexuals of partners. These purported undesirable effects include the corruption of minors, the decay of the family unit, the eventual extinction of the human race, the general degradation of moral welfare, the spread of venereal disease, and the tension and discord between homo-


132. See, e.g., Pryor v. Municipal Court, 25 Cal. 3d 238, 254, 599 P.2d 636, 645, 158 Cal. Rptr. 330, 339 (1979), where the California Supreme Court construed CAL. PENAL CODE § 647 (West 1979), which prohibits solicitation for "lewd or dissolute conduct," to apply only to solicitation for criminal sexual acts.


134. See Chaitin & Lefcourt, supra note 117, at 30 (labeling decay of the family unit "an emotion-laden argument with no basis in fact.") See also W. BARNETT, supra note 133, at 103; Note, Constitutional Protection of Private Consensual Conduct Among Consenting Adults: Another Look at Sodomy Statutes, supra note 126, at 586-87; Note, The Constitutionality of Laws Forbidding Private Homosexual Conduct, supra note 123, at 1634; Note, Private Consensual Homosexual Behavior: The Crime and Its Enforcement, supra note 133, at 628.

135. See W. BARNETT, supra note 133, at 108; Note, Constitutional Protection of Private Consensual Conduct Among Consenting Adults: Another Look at Sodomy Statutes, supra note 126, at 588.

136. See Note, supra note 135, at 587. See also Richards, Commercial Sex and the Rights of the Person: A Moral Argument for the Decriminalization of Prostitution, 127 U. PA. L. REV. 1195, 1232-34 (1979) (contending that an individual's moral right to individuality is safeguarded by the Constitution from the majority view of what is moral); Note, The Constitutionality of Laws Forbidding Private Homosexual Conduct, supra note 126, at 1635-36.

137. See W. BARNETT, supra note 133, at 100; Note, supra note 135, at 585-86; Note,
sexuals. The reality of such effects, and a state's concomitant right to legislate against them, is debatable. Further, the presumption that homosexual solicitation will promote homosexuality among the populace has been criticized repeatedly. As one author has stated: "As a mechanism for diminishing the practice or the spread of homosexuality, such [solicitation] laws are patently ineffective."

The third purpose of proscribing homosexual solicitation focuses upon the effects of the solicitation itself—either the offense it may cause to the addressee or the threat of a breach of the peace.

These three rationales for proscription of homosexual solicitation do not neatly align themselves with the statutory means by which states control such solicitation. In fact, it would appear that more often than not the states regulate first and justify the regulation later.

B. Proscription Through Liquor Control Regulations

A good example of the incongruence between policy and actual proscription is the administrative device of liquor control regulations. Many states have regulations which prohibit the holders of liquor licenses from allowing "persons of ill repute" on the premises and which forbid "lewdness and . . . indecent or obscene language or conduct." Purportedly, such regulations flow from the broad sweep of moral control allowable under the twenty-first amendment. In practice, however, these regulations have been used to restrict or eliminate homosexual solicitation at a common source—the homosexual bar. Although state alcoholic beverage control authorities have held that mere congregation of homosexuals or isolated solicitations are sufficient to in-

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The Constitutionality of Laws Forbidding Private Homosexual Conduct, supra note 126, at 1631.


139. See Note, supra note 135, at 587.


141. Rules 4 and 5 of the New Jersey Division of Alcoholic Beverage Control, quoted in One Eleven Wines and Liquors Inc. v. Division of Alcoholic Beverage Control, 50 N.J. 329, 331, 235 A.2d 12, 14 (1967).

142. See California v. LaRue, 409 U.S. 109, 114-15 (1972) in which regulations prohibiting explicit live sexual entertainment in establishments of licensees were held to be a valid exercise of power under the twenty-first amendment. Section 2 of the twenty-first amendment reads: "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." U.S. Const. amend. XXI, § 2.
voke the regulations, some courts have required a showing of "disorder" or behavior amounting to a nuisance before revoking the license of the proprietor of a homosexual bar.

The significance of these regulations is not in the evidentiary requirements imposed by them—such as a showing of "disorder"; it is in the rationales which courts have relied upon to justify these regulations. Rather than relying exclusively on the power of the states to regulate morals, courts have suggested that liquor control can be accomplished through regulation of offensive expression: "[A] fair and sensible regulation...[can prohibit] overtly indecent conduct and public displays of sexual desires manifestly offensive to currently acceptable standards of propriety."146

Court rulings on liquor control regulation illustrate the shotgun approach to justification: the courts speak in terms of "morality," "disorder" (meaning a breach of the peace) and "offense." This approach fails to pair the justification with the harm to be prevented. If a state agency is to protect the solicitee's sensibilities, then it is justified in prohibiting offensive conduct; if lawmakers wish to maintain order, then they are justified in prohibiting "breach of the peace;" but if public morality is the target, courts ought not to allow it to be regulated under the guise of liquor control. By allowing a regulation to overreach its putative purpose, a court sanctions overbreadth. Although a state may legitimately regulate "immoral conduct" it may not, without

143. See Johnkol, Inc. v. License Appeal Comm'n, 42 Ill. 2d 371, 247 N.E.2d 901 (1969) (overruling a revocation of a liquor license based entirely on isolated solicitations occurring on the premises); One Eleven Wines and Liquors Inc. v. Division of Alcoholic Beverage Control, 50 N.J. 329, 340, 235 A.2d 12, 16 (1967) (overruling a revocation of a liquor license based solely on congregation of homosexuals on the premises).


146. One Eleven Wines and Liquors Inc. v. Division of Alcoholic Beverage Control, 50 N.J. 329, 342, 235 A.2d 12, 19 (1967). See also Vallerga v. Department of Alcoholic Beverage Control, 53 Cal.2d 313, 319, 347 P.2d 909, 912, 1 Cal. Rptr. 494, 497 (1959) ("There are many things that can be done in the privacy of the home which may not be illegal, but if done in a public tavern are offensive. . .").

147. State power to regulate "immoral conduct" may also be subject to constitutional qualification. As Justice Marshall stated: "There is not a word in [the history] of the twenty-first amendment which indicates Congress meant to tamper in any way with First Amendment rights." California v. LaRue, 409 U.S. 109, 134 (1972) (Marshall, J., dissenting).
more, concomitantly regulate offensive speech.\textsuperscript{148} Thus, when a liquor control regulation is construed by a court to permit license revocation because homosexual solicitation takes place on the licensee's premises, that court improvidently muddles the regulation's constitutionality.

Notwithstanding constitutional difficulties, reliance on liquor control regulations may be an ineffective manner by which to carry out \textit{any} of the three purposes of proscribing homosexual solicitation. One author has questioned the causal connection between gay bar crackdowns and the elimination of homosexual activity: "Although an increase in homosexuality may increase the demand for homosexual bars, the bars can scarcely be said to produce homosexuals."\textsuperscript{149} The predominantly homosexual clientele of such bars is not likely to take umbrage at the goings-on there. Moreover, outsiders who may happen upon these bars are not a captive audience; they may, in the words of the Cohen Court, "effectively avoid further bombardment of their sensibilities simply by averting their eyes,"\textsuperscript{150} or more likely, by going elsewhere.

Although the liquor control device suffers from the foregoing practical and constitutional infirmities, it is nonetheless grounded in the liquor control authority accorded the states by the twenty-first amendment, and delegated by the states to their administrative agencies. Statutory devices for controlling homosexual solicitation, which have no such constitutional foundation, must be analyzed separately.

\textbf{C. Other Statutory Devices for Proscribing Homosexual Solicitation}

One statutory device which, like liquor control, indirectly attacks solicitation is the codified common law of nuisance. For example, in \textit{Harris v. United States},\textsuperscript{151} the proprietor of a "homosexual health club" was convicted of "keeping a bawdy or disorderly house."\textsuperscript{152} The court observed that the "disorderly house" provisions were a codification of common law nuisance


\textsuperscript{149} E. Schur, Crimes Without Victims 87 (1965).

\textsuperscript{150} 403 U.S. at 21.

\textsuperscript{151} 315 A.2d 569 (D.C. App. 1974).

\textsuperscript{152} D.C. Code Encycl. § 22–2722 (West 1973).
Ruling that the acts in question were public, not private, and consequently a nuisance, the court applied the statute in order to sustain the proprietor's conviction.

Loitering or disorderly conduct legislation is a more generalized means of proscribing homosexual solicitation. The Model Penal Code provides a ready example: "A person is guilty of a petty misdemeanor if he loiters in or near any public place for the purpose of soliciting or being solicited to engage in deviate sexual relations." As the comment to the provision notes, it is designed to prevent "open flouting of prevailing moral standards as a sort of nuisance in public thoroughfares and parks."

The language of the Model Penal Code has been adopted in a number of states. However, in People v. Gibson, Colorado's version of the Model Penal Code provision was struck down. The Colorado Supreme Court held that because the statute by its terms did not require the loitering to include an overt act, such as soliciting, it unconstitutionally prohibited the mere state of mind of a person who wished to solicit another "to engage in deviate sexual relations."

An interesting variation on the use of loitering legislation is contained in the disorderly conduct section of the Final Report of the National Commission on Reform of Federal Criminal Laws, which prohibits "loitering in a public place for the purpose of soliciting sexual contact [and] solicit[ing] such contact." The Final Report designates this offense a misdemeanor, whereas all other disorderly conduct is accorded the status of an infraction. Nevertheless, the Final Report requires overt conduct in the form

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153. Common law nuisance per se is defined in Harris as "a nuisance at all times and under any circumstances." 315 A.2d at 572 (quoting Bader v. Iowa Metropolitan Sewer Co., 178 N.W.2d 305, 306 (1970)).
158. For a discussion of other constitutional problems of the Model Penal Code, see notes 186–87 infra and accompanying text.
160. FINAL REPORT, supra note 159, at § 1861(1)(f).
161. Id. § 1861(2).
of an actual solicitation. Even more significantly, it requires that any arrest under the statute be preceded by a complaint from a solicitee who is not a police decoy. This requirement may well alleviate any due process challenges to such a statute.

Of course the most direct method of dealing with homosexual solicitation is simply to prohibit it, as Ohio has done: "No person shall solicit another person of the same sex to engage in sexual activity with the offender when the offender knows such solicitation is offensive to the other person or is reckless in that regard." The Ohio statute is unique in two respects: first, it directly forbids solicitation without relying on theories of loitering, disorderly conduct, or nuisance; second, its sole justification seems to be protection of the sensibilities of the solicitee. However, the Ohio statute has not been construed consistently with this justification. Rather, the Ohio Supreme Court, in State v. Phipps, construed the statute to apply to "fighting words," and relied on the threat of a breach of the peace as its justification.

The foregoing survey of statutory schemes has served to introduce variations on the theme of regulating homosexual solicitation. A more detailed constitutional analysis of the different statutory schemes follows.

D. Solicitation and Constitutional Guarantees

Statutory devices of regulating solicitation—except for liquor control, which has its source in the twenty-first amendment—must be reconciled with a variety of constitutional guarantees. This subsection focuses on the due process clause of the fifth and fourteenth amendments, and on the first amendment's protection of speech.

162. Id. § 1861(4).
163. See notes 167–71 infra and accompanying text.
164. OHIO REV. CODE § 2907.07(B) (Page 1976). Ohio is a jurisdiction where homosexual conduct is not prohibited by law.
165. 58 Ohio St. 2d 271, 389 N.E.2d 1128 (1979), discussed at notes 5–10 supra and accompanying text.
166. This Note does not examine the impact of the equal protection guarantee of the fourteenth amendment on the regulation of homosexuality. Equal protection problems do exist, however, where a state directly prohibits homosexual solicitations, see, e.g., OHIO REV. CODE § 2907.07(B) (Page 1976), but not heterosexual solicitations, though they are equally likely to be "offensive" to an unwilling solicitee.

Another issue in this area is whether homosexuality should be considered a "suspect classification." For a forceful argument that it should be so considered, see Chaitin & Lefcourt, supra note 117. See generally Note, The Constitutionality of Laws Forbidding Private Homosexual Conduct, supra note 126.
The statutes and ordinances discussed previously are difficult to enforce simply because homosexual solicitations are generally discreet and circumspect, and citizen complaints are rare. Therefore, in order to make arrests, it has become common for police to pose as "decoy" solicitees.\(^{167}\) This practice arguably violates the solicitor's right of procedural due process. Consequently, some courts have ruled that the testimony of a single officer who witnessed the solicitation is insufficient for a conviction. Other courts have gone so far as to label decoy arrests "entrapment,"\(^{168}\) arguing that any solicitation requires at least some affirmative response—in words or gestures—from the decoy-addressee.\(^{169}\)

The practice of using police decoys, coupled with its potential for entrapping offenders, not only denies procedural due process\(^{170}\) but more generally undermines public confidence in police. It has also been suggested that the victimless character of a homosexual solicitation makes such solicitation an unworthy object of police attention.\(^{171}\) Consequently, procedural due process can be preserved by a narrowly drawn statute which requires a citizen complaint. Such a statute would eliminate any issue of police entrapment.

Less easily remedied are the constitutional problems of controlling homosexual solicitation through regulation of speech. The Supreme Court has allowed generous breathing space for the exercise of first amendment freedoms to foreclose any deterrent chilling effect.\(^{172}\) Thus, any statute which restricts speech—such

\(^{167}\) See D. MacNamara & E. Sagarin, supra note 140, at 130.

\(^{168}\) E.g. Rittenauer v. District of Columbia, 163 A.2d 558 (D.C. App. 1960), where a police decoy phoned the defendant, went to his home, and led the defendant to believe he was homosexual. Such encouragement of the defendant's subsequent solicitation for sodomy was termed entrapment.

Generally, entrapment occurs "when the criminal design originates with the officials of the government, and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they might prosecute." Sorrell v. United States, 287 U.S. 435, 442 (1932). Entrapment constitutes a defense even if the defendant is otherwise guilty of the crime, since its purpose is to deter enforcement officials from such conduct. See generally W. LaFave & A. Scott, Criminal Law 369-74 (1972).

\(^{169}\) See D. MacNamara & E. Sagarin, supra note 140, at 136, where it is suggested that solicitations seldom take place without some encouragement on the part of the solicitee—presumably in the form of the solicitee's bearing, body language, or facial expression.

\(^{170}\) See Note, Private Consensual Homosexual Behavior: The Crime and Its Enforcement, supra note 133, at 635.

\(^{171}\) See Note, Constitutional Protection of Private Sexual Conduct Among Consenting Adults: Another Look at Sodomy Statutes, supra note 126, at 589.

\(^{172}\) See note 61 supra and accompanying text.
as a solicitation provision—should be viewed unfavorably ab initio.

However, the presumption against the constitutionality of a regulation of speech may be unwarranted where the chilling effect on protected speech is de minimis. While some commentators have contended that homosexual solicitation provisions do little if anything to chill protected speech, data concerning homosexuality are still too incomplete to support this conclusion. Thus, it would be premature to suggest that the presumption raised against homosexual solicitation laws in deference to “breathing space” is unwarranted and improper. Moreover, where the rationale underlying a solicitation statute is offense to the sensibilities of the hearer, the presence of a chilling effect is immaterial. After Cohen, close scrutiny is required because the offensive expression itself may be protected by the first amendment.

A special constitutional problem is presented by the regulation of homosexual solicitation in reformed jurisdictions where consensual homosexual acts are no longer criminal. The logical inconsistency is obvious: how can two people perform a legal consensual act without one first asking the other to do so? In con-

173. See the quotation in text accompanying note 65 supra.
174. D. MacNamara & E. Sagarin, supra note 140, at 131–32.
175. See note 114 supra.
176. Cf. the “substantial overbreadth” argument in Note, supra note 75, at 859 (asserting that while even the most carefully drawn statutes may have a chilling effect on protected activity, only substantial overbreadth creates the minimum degree of chilling to raise a presumption of invalidity).
179. But see notes 130–31 supra and accompanying text.
stitutional terms, how can an act (solicitation) which is a prerequisite to a legal act (homosexual relations) be illegal and remain within the bounds of due process?

One court has confronted this problem and refused to validate its state's solicitation statute in the face of decriminalization of homosexual relations.180 Another court has limited application of its state's law to solicitation for public, not private acts.181 In reformed jurisdictions, common law criminal solicitation simply is inapplicable to a solicitation for private consensual sodomy because the underlying criminal act is not a crime, and the solicitor therefore lacks the requisite, criminal mental element. Likewise, such jurisdictions can hardly cite the untoward social effects of homosexuality as justification for their solicitation provisions when their legislatures have decriminalized homosexual relations.

Yet solicitation provisions continue to be upheld in reformed jurisdictions. State v. Phipps,182 for example, was decided in Ohio, which repealed its consensual sodomy legislation in 1974.183 The Ohio Supreme Court's affirmance was grounded in the fighting words doctrine—apparently the only rationale which had any conceptual consistency.

E. Solutions: The Vagueness and Overbreadth Doctrines

The vagueness doctrine184 is not generally useful in scrutinizing the constitutional defects of homosexual solicitation statutes. Those statutes which regulate solicitation directly are not "so vague that men of common intelligence must necessarily guess at their meaning."185 For example, the Model Penal Code direct regulation provision, which prohibits loitering in a "public place" for the purpose of soliciting "deviate sexual relations," defines both terms.186 Consequently, state enactments of the Code provision are not prone to vagueness attacks; courts confronted with them may well be confined to reversing isolated convictions in which due process has been denied rather than facially invalidat-

182. 58 Ohio St. 2d 271, 389 N.E.2d 1128 (1979), discussed in text accompanying notes 5–10 supra.
184. See text accompanying notes 60–73 supra.
186. Model Penal Code § 251.3 (Proposed Official Draft 1962). The terms "public place" and "deviate sexual relations" are defined in §§ 251.2 and 213.2, respectively.
ing such a statute. Similarly, the Ohio statute involved in *Phipps* speaks unambiguously, using such terms as "same sex" and "sexual activity," and thus, with the exception of the term "offensive," cannot be considered vague.

The term "offensive" may create difficulties under the rule of *Cohen* that offensive expression is not per se unprotected. Such problems arise, however, only when an individual is prosecuted for making offensive statements which *Cohen* protects; thus, the word "offensive" is the basis of an attack for overbreadth, not vagueness.

In general, a challenge based on overbreadth, which questions whether the regulation includes within its ambit protected as well as unprotected activity, is likely to prove more fruitful. Initially it must be determined whether the actor's conduct falls within the regulation's legitimate sweep. If so, the defendant may be required to assert that the regulation is substantially overbroad. After *Gooding*, the question is likely to be framed as follows: does a homosexual solicitation statute legitimately proscribe "fighting words," or does it sweep too broadly by including the use of language calculated not to offend but to endear?

To sustain an overbreadth analysis, a court invoking *Gooding* as precedent would likely assume that some homosexual solicitation to some solicitee could constitute "fighting words." The most liberal definition appears in Justice Powell's dissent in *Rosenfeld v. New Jersey*, where "fighting words" extends to "the willful use of scurrilous language calculated to offend the sensibilities of an unwilling audience." However, it should be clear that Justice

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State enactments of the Model Penal Code provision suffer from conceptual invalidity in reformed jurisdictions. *See* notes 178–81 *supra* and accompanying text. Moreover, such provisions may violate due process by failing to require an actual solicitation; they have been held to punish a mere state of mind. *See* notes 154–57 *supra* and accompanying text. *See*, e.g., People v. Gibson, 184 Colo. 444, 446, 521 P.2d 774 (1974).

188. 58 Ohio St. 2d 271, 389 N.E.2d 1128 (1979), discussed in text accompanying notes 5–10 *supra*.

190. Though the term "offensive" seemingly is vague, the *Phipps* court insisted that it is "commonly understood by men of common intelligence." 58 Ohio St. 2d at 274, 389 N.E. 2d at 1131.

191. But see City of Columbus v. Scott, 47 Ohio App. 2d 287, 353 N.E.2d 858 (1975) (ordinance having language nearly identical to that of the Ohio statute in *Phipps* held void for vagueness).

Powell’s definition is simply the converse of a homosexual proposition. Regardless of how vulgar or crude the solicitor’s words may be, the end is not to offend; on the contrary, the solicitor’s intent is to stimulate or to persuade the solicitee. As one court has characterized it, a homosexual solicitation is closer to “loving words” than “fighting words.”

Under the more restrictive definition in *Cohen* it is equally difficult to imagine a solicitation which constitutes “fighting words.” *Cohen* required a showing of an objectively legitimate affront to the actual addressee’s sensibilities, sufficiently strong to provoke an immediate violent reaction. Certainly the average heterosexual may be disgusted rather than sexually stimulated by a homosexual proposition, but it is a great leap to say that a homosexual proposition will trigger the uncontrollably violent response contemplated by *Cohen*. As offensive as a homosexual solicitation might be to a heterosexual, it is unlikely to incite an average listener to a breach of the peace.

The *Gooding* decision allows a court to rescue an overbroad statute by construing it so as to apply only when constitutionally proper. When so construed, a solicitation statute may well not shield the sensibilities of the hearer since, under *Cohen*, expression which offends but does not reach the level of “fighting words” is sheltered by the first amendment. The statute prohibits only solicitations which are proven as a matter of fact to amount to “fighting words.” It is difficult to conceive of the “loving words” of a solicitation as “fighting words,” but the Ohio Supreme Court in *Phipps* apparently has done so.

Once a solicitation is construed to equal “fighting words,” the question arises whether that construction will escape invalidation upon review. The decision in *Lewis II* suggests not. There, on remand of *Lewis I* in light of *Gooding*, the Supreme Court of Louisiana construed its breach of the peace statute to apply to any

194. 403 U.S. 15, 23 (1971), discussed in text accompanying notes 46–58 supra.
195. 403 U.S. at 571–72.
196. One writer notes: “Although little is known of the impact of such disgust [at homosexuality] it is probably occasional and fleeting, and not so upsetting to significant numbers that it interferes with their daily lives.” Note, Private Consensual Homosexual Behavior: The Crime and Its Enforcement, supra note 133, at 628.
197. 58 Ohio St. 2d 271, 389 N.E.2d 1128 (1979), discussed in text accompanying notes 5–10 supra.
199. Lewis v. City of New Orleans, 408 U.S. 913 (1972), discussed in text accompanying notes 98–100 supra.
expression found by a jury to be “fighting words.” The Supreme Court in *Lewis II* overruled this construction and struck down the statute in its entirety, commenting only that the construction was not “meaningful.”200 More instructive, perhaps, is Justice Douglas’ dissent in *Lucas v. Arkansas*,201 where he argued that any construction of an overbroad statute was insufficient and that a remand in light of *Gooding* was pointless deference to state courts.

In short, a court faced with an apparently overbroad solicitation provision has two options: holding as a matter of law that all homosexual solicitations are “fighting words”202 or construing the provisions to apply only to “fighting words” as determined by a jury. The former option strains reality; the latter may not survive appellate review. Precisely which path a court should follow is discussed below.

III. PROSCRIPTION OF HOMOSEXUAL SOLICITATION: CONCLUSIONS AND PROPOSALS

Most solicitation statutes are construed to prohibit offensive expression which, because it does not amount to “fighting words,” should be protected under *Cohen*203 and *Gooding*.204 Such situations are rare. Further, since most arrests occur through the use of a police decoy,205 due process may require that convictions be limited to those in which a private citizen is the solicitee.206

Such cases as *Cohen* and *Gooding* may, however, share a consideration articulated first in *Chaplinsky* and reiterated by Justice Powell, dissenting in *Rosenfeld v. New Jersey*:207 the protection of

200. See note 108 supra and accompanying text.
203. See note 127 supra and accompanying text.
204. See notes 89-96 supra and accompanying text.
205. See notes 167-69 supra and accompanying text.
206. It is possible to avoid such limitations by holding as a matter of law that a homosexual proposition constitutes “fighting words.” However, such a decision would produce serious inequity—any solicitation, no matter how discreet, would be criminal. See Pryor v. Municipal Court, 25 Cal. 3d 238, 254-55 n.11, 599 P.2d 636, 646 n.11, 158 Cal. Rptr. 330, 340 n.11 (1979). Furthermore, to equate homosexual solicitation with fighting words as a matter of law would be a repudiation of the limitations imposed by *Cohen* on the purview of “fighting words.”
207. 408 U.S. 901, 909 (1972) (Powell, J., dissenting), discussed in text accompanying note 104 supra.
citizens from intentional, severely offensive, and emotionally debilitating language.

Certainly, Justice Harlan was correct when he observed that "one man's vulgarity is another man's lyric." But when that vulgarity seriously offends the listener or causes him emotional distress, the state has a legitimate interest in punishing the speaker. At most times and in most places, a homosexual's proposition to a heterosexual is annoying at worst, and quite unlikely to constitute "fighting words." But should an indiscreet or outrageous proposition cause serious damage to an unwilling solicitee, the solicitor should not be shielded from liability by the first amendment. Indeed, the Restatement (Second) of Torts recognizes a distinction between "sensibilities" and emotional stability: when "[o]ne who by extreme or outrageous conduct intentionally or recklessly causes severe emotional distress to another . . .", he is liable to the victim. Arguably, any speaker whose solicitation causes "severe emotional distress" should also be criminally liable to the state.

It is apparent that the Gooding decision, in effectuating the Cohen definition of "fighting words," was aimed at curbing the abuses which an overbroad statute invites by narrowing its application to specified constitutional limits. A legislature may achieve the same result—and avoid judicial invalidation—by enacting legislation which is narrowly drawn to protect this single legitimate "sensibilities" interest, and which is enforceable only against heedless violators, not homosexuals in general. What follows are proposals for such legislation.

First, the statute should be drafted to prohibit only those solicitations which cause severe emotional disturbance, perhaps incorporating a speech-related variation of the Restatement of Torts language quoted above. This statutory language is far more precise than "offensive" or "opprobrious"—words which have been held to be overbroad.

Second, in order to guard against discriminatory enforcement


209. RESTATEMENT (SECOND) OF TORTS § 46(1) (1965). Whether or not a given homosexual solicitation constitutes "extreme and outrageous conduct" would be a question of fact. However, the comment to § 46 indicates that the standard is fixed at the point at which "the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim 'Outrageous!' " Id. comment d.

210. Several of these proposals were suggested by Mr. Arthur Warner of the National Committee for Sexual Civil Liberties in a telephone conversation October 15, 1979.
and to assure congruence between the legislature's objective and its means of control, the statute should require a private citizen's complaint containing specific allegations of emotional injury.\textsuperscript{211} Such a requirement would shelter the statute from charges of official harassment and entrapment which arise from the use of police decoys. Similarly, by requiring an actual solicitation rather than simple loitering with intent to solicit, the problem of punishing a mere state of mind would be alleviated.\textsuperscript{212}

Finally, the statute should be properly characterized as an "harassment" prohibition, unrelated to particular disorderly conduct or sexual offenses. The purpose of this designation would be to prohibit intentional infliction of emotional damage regardless of the sexual proclivities of the speaker. As a further step, homosexual solicitation should be excised from "public lewdness" provisions and placed in narrow solicitation statutes which would prohibit language, not conduct.

By following such guidelines, a legislature can produce a precisely drafted statute directed toward a reasonable and constitutional end: the security of citizens from severely offensive or emotionally distressing sexual propositions. Should such propositions prove to be "fighting words," an unlikely event, they would be better prosecuted under a disorderly conduct provision designed to guard against a breach of the peace. By thus correlating a state's legitimate interest in the peace of its streets with specific statutory language, a legislature can supplant antiquated prejudice with respect for the established position of homosexuals in society, yet maintain the fundamental priorities of a civilized legal system.

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\textsuperscript{211} \textit{See} Final Report, \textit{supra} note 159, at \S\ 1861(4).

\textsuperscript{212} \textit{See} notes 156-58 \textit{supra} and accompanying text.