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Queers Anonymous: Lesbians, Gay Men, Free Speech, and Cyberspace

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Anonymity is a shield from the tyranny of the majority. It exemplifies the purpose behind the Bill of Rights and of the First Amendment in particular: to protect unpopular individuals from retaliation—and their ideas from suppression—at the hand of an intolerant society.

— *McIntyre v. Ohio Elections Commission* [1]

Pseudonymity allows people who are experimenting with different sorts of interests to do so without social repercussions. People can temporarily obscure their real life and play with a different conception of what their life might be.

—Professor Jerry Kang, UCLA Law School[2]

I. Introduction

In the past decade or so, the development and expansion of the Internet and other forms of cyberspace have created unprecedented opportunities for communication in various forms both across the globe and across the street. As a result of this technological development, individuals now have a greater opportunity for anonymous or pseudonymous communication. We can now interact with others without the traditional constraints of time, place, and manner of communication.

As both the number of people using cyberspace and the ways they can use it have dramatically increased, governments have attempted to regulate speech in cyberspace in various ways. In the United States, most notable among these attempts are the Communications Decency Act (CDA),[3] the Child On-Line Protection Act (COPA),[4] and

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[1] 514 U.S. 334, 357 (1995).
[2] Ben Greenman, *Liar Liar*, YAHOO! INTERNET LIFE, March 1999, at 89.
[3] 47 U.S.C. §223(a)-(e) (Supp. 1997). This law was held unconstitutional by ACLU v. Reno, 929 F. Supp. 824 (E.D. Pa. 1996), *aff'd* 522 U.S. 844 (1997) (*ACLU v. Reno I*).
[4] 47 U.S.C. §231 (1998). This law was held unconstitutional by ACLU v. Reno II, 31 F. Supp. 2d 473 (E.D. Pa. 1999), *aff'd* 217 F.3d 162 (2000) (*ACLU v. Reno II*) *vacated and remanded* Ashcroft v. ACLU, 00-1293, 2002 U.S. Lexis 3421 (U.S. May 13, 2002).

the Children's Internet Protection Act (ChIPA).[5] Several states have also passed laws or instituted policies that attempt to regulate speech in cyberspace.[6] Further governmental attempts to regulate cyberspace can be expected.[7] Although attempts to regulate cyberspace have been subject to judicial and scholarly scrutiny, this article focuses on people who will be particularly effected by attempts to regulate speech in cyberspace,[8]

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[5] 20 U.S.C. § 7001 (2001); 20 U.S.C. § 9134 (2001); 47 U.S.C. § 254(h) 2001. This law is being challenged by Am. Library Ass'n v. United States, No. 01-1303, 2002 U.S. Dist. LEXIS 9537 (E.D. Pa. May 31, 2002).

[6] *See, e.g.*, N.Y. PENAL LAW § 235.21(3) (1997) (law modeled on CDA prohibiting intentionally engaging in communication with a minor that "depicts actual or simulated nudity [or] sexual conduct . . . and which is harmful to minors"; law found unconstitutional in ALA v. Pataki, 969 F. Supp. 160 (S.D.N.Y 1997) on grounds it ran afoul of the Commerce Clause); MICH. STAT. ANN. § 25.254(5)(1) (1999) (law banning distribution of sexually explicit material to minors over the Internet; found unconstitutional in Cyberspace Communications Inc. v. Engler, 55 F. Supp.2d 737 (E.D. Mich. 1999), *aff'd and remanded*, 238 F.3d 420 (6th Cir. 2000) on grounds it violated First Amendment and Commerce Clause); N. M. STAT. ANN. § 30-37-3.2(A) (1998) (law modeled on CDA prohibiting dissemination by computer of material that is harmful to a minor; held unconstitutional in ACLU v. Johnson, 4 F. Supp.2d 1029 (D.N.M. 1998) *aff'd* 194 F.3d 1149 (10th Cir. 1999) on grounds that it violated First Amendment and Commerce Clause); VA. CODE ANN. § 18.2-391 (Michie Supp. 1999) (law prohibiting knowing display of sexually explicit material to minors for commercial purposes; held constitutional on First Amendment grounds in PSINet, Inc. v. Chapman, 108 F. Supp.2d 611 (W.D. Va 2000); VA. CODE ANN. §§ 2.1-340.1 – 2.1-346.1 (law prohibiting state employees from accessing sexually explicit material on computers owned or leased by the state; found unconstitutional but then found constitutional on appellate review in Urofsky v. Allen, 995 F. Supp. 634 (E.D.Va. 1998) *rev'd* 216 F.3d 401 (4th Cir. 2000) (en banc) on First Amendment grounds); GA. CODE ANN. §16-9-93.1(a) (Harrison Supp. 1997) (law prohibiting the use of a computer to falsely identify the user; held unconstitutional in ACLU v. Miller, 977 F. Supp. 1228 (N.D. Ga. 1997) on free speech grounds). *See also* Mainstream Loudoun v. Bd. of Tr. of the Loudoun County Library, 24 F. Supp.2d 552 (E.D. Va. 1998) (finding a library's policy requiring the use of filtering software on computers available for public access to be unconstitutional).

[7] *See, e.g.*, S.B. 3414, 224th Sess. (N.Y. 2001) (prohibiting the use of a library computer to access obscene material or child pornography); A.B. 151, 2001-2002 Reg. Sess. (Ca. 2001) (state law similar to ChIPA); H.B 8, 124th Sess. (Ohio 2001-02) (law expanding definition of material in sex offense laws to include, inter alia, any image appearing on a computer monitor, recorded on a computer disk or transmitted using the Internet).

[8] Legal scholars have examined the effects of cyberspace on women and racial minorities. *See, e.g.*, Margaret Chon, *Erasing Race?: A Critical Race Feminist View of Internet Identity-Shifting*, 3 J. GENDER RACE & JUST. 439 (2000); Anita Allen, *Gender and Privacy in Cyberspace*, 52 STAN. L. REV. 1175 (2000); Jerry Kang, *Cyber-Race*, 113 HARV. L. REV. 1131 (2000). Somewhat related to some of the themes discussed herein is

namely lesbians, gay men and other sexual minorities.[9] This article argues that the protection of the speech of lesbians, gay men and other sexual minorities is at the heart of the First Amendment and that attempts to regulate such speech in the context of cyberspace should be closely scrutinized. Laws that regulate speech in cyberspace will likely have great impact on lesbians and gay men in particular. The failure to protect against such impact will have the result of suppressing the speech of sexual minorities.

As evidence of this impact, it is significant that among the litigants challenging almost every attempt to regulate speech in cyberspace in the United States have been lesbians and gay men, the businesses that serve them, or the organizations that represent them. Among those challenging the CDA in *ACLU v. Reno I* were the Queer Resources Directory, an on-line resource for lesbians, gay men and other sexual minorities, and an AIDS education group that maintains a web site.[10] Among those challenging COPA in *ACLU v. Reno II* were A Different Light Bookstore, a gay and lesbian bookstore that

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Seth Kreimer, *Technologies of Protest: Insurgent Social Movements and the First Amendment in the Era of the Internet*, 150 U. PA. L. REV. 119, 130 (2001).

[9] In addition to particularly effecting lesbians and gay men, the regulation of speech in cyberspace will also have distinctive impact on bisexuals, transgendered people—people whose sex and sexual identity (that is, the sex that they feel they belong to) are discordant—and intersexuals—people who have some male and some female physical/anatomical characteristics—(*see* EDWARD STEIN, THE MISMEASURE OF DESIRE: THE SCIENCE, THEORY AND ETHICS OF SEXUAL ORIENTATION (2000) at 24-38, for a discussion of the differences among these sexual minorities). *See generally* Kenji Yoshino, *The Epistemic Contract of Bisexual Erasure*, 52 STAN. L. REV. 353 (2000); SUZANNE KESSLER, LESSONS FROM THE INTERSEXED (1998); BERNICE HAUSMAN, CHANGING SEX, TRANSEXUALISM, TECHNOLOGY, AND THE IDEA OF GENDER (1995). In this paper, I focus for the most part on lesbians and gay men, but will often use the phrase "lesbians, gay men, and other sexual minorities" to encompass these other groups of people. Typically, even when I use the more restrictive phrase, I mean to include sexual minorities generally. For reasons discussed *infra* note 119, I do not include people who engage in sex between adults and children. Whether and to what extent other sexual minorities, for example, people who engage in sadomasochistic sex, are similarly situated to lesbians and gay men is a question beyond the scope of this paper. I do not include these other sexual minorities in the analysis that follows.

maintains a website, Blackstripe, a web-based resource for African-American lesbians and gay men, *Philadelphia Gay News*, a newspaper serving the lesbian and gay community that also publishes on line, and Planet Out, an on-line content provider serving the lesbian and gay community.[11] Among those challenging ChIPA in *American Library Association v. United States* are Planet Out, Out in America, a company that runs over sixty websites for lesbians, gay men and other sexual minorities, and a young lesbian who accesses the Internet from a public library.[12] The same is true of the litigants in several of the cases challenging state laws and policies.[13]

Attempts to regulate cyberspace are of special concern to sexual minorities. Many lesbians and gay men find cyberspace to be an important source of information, a useful

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[10] *ACLU v. Reno I*, 929 F. Supp. at 827 n.2. The Queer Resource Directory can be found at <http://www.qrd.org> and The Critical Path AIDS Project can be found at <http://www.critpath.org>.

[11] *ACLU v. Reno II*, 31 F.Supp.2d 473. The web sites of the organization mentioned in the text can be located, respectively, at <http://www.adlbooks.com>, <http://www.blackstripe.com>, <http://www.epgn.com>, and <http://www.plantetout.com>.

[12] *See* Am. Library Ass'n v. United States, 2002 U.S. Dist. LEXIS 9537, *32 & *34-*35.

[13] *See, e.g.*, Am. Libraries Ass'n v. Pataki, 969 F. Supp. 160, 162 (listing as among the plaintiffs New York City Net, a for-profit Internet service provider catering primarily to lesbians and gay men in the New York area <http://www.nycnet.com>); Cyberspace Communications Inc. v. Engler, 55 F. Supp.2d 737, 746 (listing as among the plaintiffs GLAD Day Bookstore, a store specializing in lesbian and gay books, which maintained a website, and the AIDS Partnership of Michigan <http://www.aidspartnership.org>); ACLU v. Johnson, 4 F. Supp.2d 1029, 1032 (D.N.M. 1998) (noting that among the activities in the plaintiffs engage is providing on-line resources for lesbian and gay youth; additionally, one of the plaintiffs was a gay man); *Mainstream Loudoun*, 24 F. Supp. 2d. at 557 (listing as among the plaintiffs the Books for Gay and Lesbian Teens/Youth <http://www.youth.org/yao/docs/books.html> and the Renaissance Transgender Association <http://www.ren.org>); ACLU v. Miller, 977 F. Supp. 1228 (N.D. Ga. 1997) (listing Atlanta Veterans Alliance, a group for gay veterans as among its plaintiffs); Urofsky v. Allen, 995 F. Supp. 634, 635 (E.D.Va. 1998) (listing as among the plaintiffs Professor Heller, who conducted research on lesbian and gay studies using a state university's computer); PSINet, Inc. v. Chapman, 108 F. Supp.2d 611, 613 (W.D. Va. 2000) (listing as among the plaintiffs A Different Light Bookstore and Lambda Rising Bookstore, both gay and lesbian bookstores with websites, and Susie Bright, a columnist who writes about lesbian sex and other gay issues and maintains a website <http://www.susiebright.com>).

way of community and political organizing, a congenial and entertaining way of spending time, and a potential medium for meeting friends, lovers and sexual partners.[14] For some lesbians and gay men isolated from other lesbians and gay men in the "real" (that is, physical, non-cyber) world, cyberspace provides a virtual community that constitutes an emotional lifeline. Especially for lesbians and gay men who are not open about their sexual orientation and for people who are exploring their sexuality, the relative anonymity of cyberspace is ideal. Cyberspace provides opportunities for which lesbians and gay men as a group, more than heterosexuals as a group, have a particular need. Because cyberspace has particular significance to lesbians and gay men, this article focuses on the intersection of the First Amendment, cyberspace, and the social and legal circumstances of lesbians and gay men.

The protection of the speech of lesbians, gay men, and other sexual minorities in cyberspace is at the heart of the First Amendment. Laws that restrict the expression of lesbians and gay men cut to a core purpose of the First Amendment, namely "to protect . . . unpopular individuals from retaliation . . . and their ideas from suppression."[15] The speech of lesbians and gay men is so important because of the contemporary social situation for sexual minorities. Notably, the importance of these protections is amplified by the context of cyberspace. While other groups such as women and racial minorities are affected in particular ways by the structure and nature of cyberspace and attempts to regulate it,[16] as I explain below, in virtue of the "closet" and the secrecy associated with it, such regulations affect lesbians, gay men and other sexual minorities in substantially

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[14] *See* Jennifer Egan, *Lonely Gay Teen Seeking Same*, NY TIMES (Magazine—Section 6) Dec. 10, 2000, at 110; JEFF DAWSON, GAY AND LESBIAN ONLINE (3d ed. 1999); Leo Jakobson, *A Site of Their Own*, SILICON ALLEY REPORTER #36 (2000) at 118; Steve Friess, *Cyberactivism*, THE ADVOCATE, Mar. 2, 1999, at 35.
[15] McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 357 (1995).
[16] *See, e.g., supra* note 8.

distinct ways. As a result, when governments attempt to regulate cyberspace, they need to consider the impact that such legislation will have on lesbians, gay men, and other sexual minorities. Laws that are crafted without consideration of the unique ways that sexual minorities use cyberspace are unlikely to protect against the suppression of unpopular groups and their ideas and, thereby, will undercut core values of the First Amendment. When courts are evaluating laws that trench on the free speech rights of lesbians and gay men in cyberspace, they should carefully scrutinize such laws.

My discussion will proceed as follows. In Part II, I discuss cyberspace and attempts to regulate it. In Part III, I survey the social and legal conditions for lesbians, gay men and bisexuals in the United States and look at how these conditions are manifest in cyberspace. In Part IV, I examine how courts have dealt with the speech of sexual minorities. I show that since the middle of the twentieth century, speech concerning homosexuality and the speech of lesbians and gay men have, for the most part, been protected by the First Amendment, but I focus on the exceptions to this protection. In Part V, I discuss anonymous speech, in particular, the Supreme Court's holding that the protection of at least some anonymous speech is an important part of the right to free speech and the strong theoretical foundations of this protection. In Part VI, drawing on the three preceding Parts, I argue that, at the heart of the First Amendment, are principles that entail the protection of lesbians and gay men who speak "from the closet," that is, who speak anonymously or pseudonymously. Given the structure of cyberspace and the ways that lesbians, gay men, and other sexual minorities use it, the speech of sexual minorities in cyberspace warrants special protection. In Part VII, I argue that when lesbians and gay men speak not from the closet but as open lesbians and gay men, their speech is of a political nature, and thus also central to the First Amendment. In Part VIII, drawing on by applying the conclusions of the two previous Parts to cyberspace, I argue

that the speech of lesbians and gay men in cyberspace, whether anonymous or not, deserves special protection. I show how these conclusions fit with and build upon judicial responses to governmental attempts to regulate cyberspace. I argue that restrictions on the speech of lesbians and gay men in general and in cyberspace in particular undermine the very essence of the First Amendment. Future attempts to regulate cyberspace need to take the distinctive social situation of lesbians and gay men into consideration. Laws that regulate speech in cyberspace should be given heightened scrutiny in order to protect the tenuous free speech rights of lesbians and gay men.

II. Cyberspace and Attempts to Regulate It

A. Cyberspace Defined

Cyberspace is a catchall phrase for the "virtual reality" of computer-mediated communication, the "location" of various electronic interactions. Cyberspace includes communication on and through the Internet, the World Wide Web, electronic mail, Usenet discussion groups, chat rooms, the exchange of digitized images, video and sounds, as well as other modes of communication. In cyberspace, individuals can, *inter alia*, shop, bank, conduct research, make friends, keep in touch with family, and engage in political activism. The activities in which one can engage in cyberspace and the ways that one can engage in them are expanding rapidly.[17]

One can participate in almost all of the activities in cyberspace either anonymously or pseudonymously.[18] A user of cyberspace can adopt a pseudonym and not "attach" any

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[17] For the canonical judicial discussion of cyberspace, *see ACLU v. Reno I*, 929 F. Supp. at 830 (containing extensive findings of fact concerning the nature of cyberspace); *ACLU v. Reno I*, 521 U.S. at 849-857 (containing a summary of same).

[18] Pseudonymity allows some one to use a name other than her own in cyberspace. This provides limited anonymity because pseudonyms can typically be traced back to the user (with varying degrees of difficulty). Something closer to complete anonymity can be

information (or any true information) about herself (such as her name, hometown, race, or sexual interests) to this pseudonym. It is usually possible for the state or a motivated, cyber-savy individual to locate the person behind the pseudonym. There are, however, currently available various privacy tools that make such tracing difficult.[19]

B. Attempts to Regulate Cyberspace

In the face of increases in both the amount of services available in cyberspace and the number of people making use of them, Congress has attempted to limit certain types of communication in cyberspace. In 1996, Congress enacted the Communications Decency Act (CDA). In general, this Act aimed at the protection of minors from indecent and patently offensive communications in cyberspace by prohibiting anyone from sending or displaying indecent or obscene messages to people under the age of eighteen.[20] In *ACLU*

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provided through various technological means, including so-called anonymous remailers. *See* Noah Levine, note, *Establishing Legal Accountability for Anonymous Communication in Cyberspace*, 96 COLUM. L. REV. 1526, 1528 n.9 (1996). Henceforth, I use the word "anonymity" to encompass pseudonymity.

[19] The Anonymizer, a web site <http://www.anonymizer.com>, allows users to send email, post messages, and access Web sites completely anonymously, that is, without allowing for the possibility that the user can be traced. Many of its services are provided free of charge. *See, e.g.*, Shawn C. Helms, *Translating Privacy Values with Technology*, 7 B.U. J. SCI. & TECH. L. 288, 316 (2001), available at <http://www.bu.edu/law/scitech/volume7/Helms.pdf>.

[20] The statute reads in part:

> Whoever (1) in interstate or foreign communications . . . (B) by means of a telecommunications device knowingly (i) makes, creates, or solicits, and (ii) initiates the transmission of, any comment, request, suggestion, proposal, image, or other communication which is obscene or indecent, knowing that the recipient of the communication is under 18 years of age, regardless of whether the maker of such communication placed the call or initiated the communication; (2) knowingly permits any telecommunications facility under his control to be used for any activity prohibited by paragraph (1) with the intent that it be used for such activity, . . . shall be fined under Title 18, or imprisoned not more than two years, or both. 47 U.S.C.A. § 223(a) (Supp. 1997).
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> Whoever (1) in interstate or foreign communications knowingly (A) uses an interactive computer service to send to a specific person or persons under 18 years of age, or (B) uses any interactive computer service to display in a manner available to a person under 18 years of age, any comment, request, suggestion, proposal, image, or other communication that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs, regardless of whether the user of such service placed the call or initiated the communication; or (2) knowingly permits any telecommunications facility under such

v. Reno I, the Supreme Court upheld the decision of a three-judge panel, finding the CDA unconstitutional on the grounds that it violated the First Amendment's protections of the freedom of speech.[21] The Court held that the CDA was overly broad because it unduly restricts adult access in order to protect children[22] and because it regulates merely indecent speech, which *is* protected by the First Amendment, along with obscene speech (that is, explicitly sexual speech that primarily appeals to prurient interest in sex, is offensive to community standards, and lacks serious literary, scientific, artistic or political value[23]), which is not protected by the First Amendment.[24]. Further, the Court held that the CDA violated the First Amendment because, although the government's interests in protecting children are compelling, there are less restrictive ways of attempting to protect children than those adopted by the CDA.[25]

Congress responded the Supreme Court's decision in *ACLU v. Reno I* with the Child On-Line Protection Act (COPA). This act prohibited the following conduct:

> Whoever knowingly, . . . in interstate or foreign commerce by means of the World Wide Web, makes any communication for commercial purposes that is available to any minor and that includes material that is harmful to minors shall be fined not more than $50,000, imprisoned for six months, or both.[26]

COPA defines material harmful to minors as:

> [A]ny communication, picture, image, graphic image file, article, recording, writing, or other matter of any kind that is obscene or that (A) the average person, applying contemporary community standards, would find, taking the material as a whole and with respect to minors, is designed to appeal to, or is designed to pander to, the prurient interest; (B) depicts, describes, or represents, in a manner patently offensive with respect to minors, an actual or simulated sexual act or sexual contact, an actual or simulated normal or perverted sexual act, or a lewd exhibition of the genitals or post-pubescent

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> person's control to be used for an activity prohibited by paragraph (1) with the intent that it be used for such activity, shall be fined under Title 18, or imprisoned not more than two years, or both. *Id.* § 223(d).

[21] ACLU v. Reno I, 522 U.S. at 870.
[22] *Id.* at 874-75.
[23] *See, e.g.*, Miller v. California, 413 U.S. 15 (1973).
[24] *Id.* at 871.
[25] *Id.* at 878.
[26] 47 U.S.C. § 231.

> female breast; and (C) taken as a whole, lacks serious literary, artistic, political, or scientific value for minors.[27]

Various plaintiffs filed suit to prevent the enforcement of COPA, arguing that the statute was unconstitutional. The district court granted a preliminary injunction prohibiting the enforcement of COPA on the grounds that it violates the First Amendment,[28] finding that COPA imposes a significant burden on the speech of people who make use of cyberspace and that it fails to use the least restrictive means for doing so. The Court of Appeals for the Third Circuit affirmed on the grounds that the statute was overbroad in virtue of the use of contemporary community standards to determine whether speech in cyberspace would be harmful to minors.[29]

In a highly fractured opinion, the Supreme Court vacated the decision of the court of appeals and remanded the case to the appeals court. Justice Thomas' opinion, only part of which commanded a five-judge majority, focused on the "narrow question [of] whether [COPA's] use of 'community standards' to identify 'material that is harmful to minors' violates the First Amendment."[30] The Court found that COPA's use of

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[27] 47 U.S.C. § 231(e)(6).

[28] *ACLU v. Reno II*, 31 F.Supp.2d 473.

[29] *ACLU v. Reno II*, 217 F.3d at 173-74. The Third Circuit explicitly did not reach other issues addressed by the district court below: "We do not find it necessary to address the District Court's analysis of the definition of 'commercial purposes'; whether the breadth of the forms of content covered by COPA could have been more narrowly tailored; whether the affirmative defenses impose too great a burden on Web publishers or whether those affirmative defenses should have been included as elements of the crime itself; whether COPA's inclusion of criminal as well as civil penalties was excessive; whether COPA is designed to include communications made in chat rooms, discussion groups and links to other Web sites; whether the government is entitled to so restrict communications when children will continue to be able to access foreign Web sites and other sources of material that is harmful to them; what taken 'as a whole' should mean in the context of the Web and the Internet; or whether the statute's failure to distinguish between material that is harmful to a six year old versus a sixteen year old is problematic." *Id*. at 174 n.19. On remand, the Third Circuit will no doubt address these issues.

[30] Ashcroft v. ACLU, 122 S.Ct. 1700, 1703 (U.S. 2002). Joining all of Justice Thomas' opinion were Chief Justice Rehnquist and Justice Scalia. Justice O'Connor joined parts I,

community standards did not render it facially unconstitutional and remanded the case for further constitutional analysis of COPA. While eight of the justices concurred in the result, only two judges joined Justice Thomas in the most substantive sections of his opinion.[31]

Because of the fractured nature of the Court's decision and the narrowness of its holding, it is difficult to discern what the Court will do if, as seems likely, the Third Circuit, on remand, affirms the district court's conclusion that COPA is unconstitutional on grounds other than the role community standards play in COPA. Justice Kennedy's concurring opinion suggests that he and Justices Souter and Ginsburg have serious doubts about COPA's constitutionality.[32] Justice Stevens, who dissented, would have affirmed the decision of the court of appeals. At a minimum, then, Justices Breyer and O'Connor are likely to be the swing votes when, as seems inevitable, COPA again reaches the Supreme Court. Their separate concurrences, both of which focus on the constitutionality of a national standard for obscenity, do not provide much indication of their views on COPA as a whole.[33]

Various states have passed laws like the CDA or COPA. For example, in 1999 Michigan passed a law that banned the distribution of sexually explicit material to minors

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II, IV as well as part III-B. Justice Breyer joined parts I, II and IV.

[31] *See id*. at 1708-13 (Part III, sections A, B, and D of Justice Thomas's opinion were joined only by Rehnquist and Scalia); *id*. at 1714 (O'Connor, J., concurring in part and concurring in judgment); *id*. at 1715 (Breyer, J. concurring in part and concurring in judgment); *id.* at 1716 (Kennedy, J. concurring in judgment) (joined by Justices Souter and Ginsburg).

[32] *Id*. at 1716 (Kennedy, J., concurring in judgment) ("There is a very real likelihood that [COPA] is overbroad and cannot survive [a facial] challenge."); *id*. at 1722 ("The Court of Appeals['] . . . ultimate conclusion may prove correct. There may be grave doubts that COPA is consistent with the First Amendment.").

[33] *See id.* at 1715 (O'Connor, J., concurring in part and concurring in judgment), *id*. at 1716 (Breyer, J. concurring in part and concurring in judgment).

over the Internet.[34] In *Cyberspace Communications Inc. v. Engler*, this law was overturned on the grounds that it violated the First Amendment and the Commerce Clause.[35] Other such state laws have been found unconstitutional on similar grounds.[36]

C. Filtering

Various courts, in addressing the constitutionality of the CDA, COPA and other state laws that are similar to them have found that the use of filtering software that blocks access to certain web sites is a less restrictive means of fulfilling the legitimate government interest in preventing children from accessing obscene and indecent material in cyberspace.[37] The supposed virtue of individuals using such software to "protect" their children is that, because individual parents will control their children's access to cyberspace, the state is neither restricting speech in cyberspace nor restricting access to cyberspace.

There are various types of filtering methods, of which the two most frequently used are "dirty word" (or keyword) blocking filters and site-blocking filters. The less sophisticated type of filters search for certain undesirable ("dirty") words or phrases and then remove these words or phrases from the page or, alternatively, block pages containing such words. Such "dirty word" filters are unsophisticated because they unintentionally block out many sites. For example, a filter that attempts to prevent access to sexually explicit web sites by screening out the word "sex" would also screen out web pages with information about musical sextets, sextuplets as well as sexual orientation and perhaps even the Mars Explorer (which has the letters "s", "e" and "x" next to each

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[34] MICH. STAT. ANN. § 25.254(5)(1)(1999).
[35] 55 F. Supp.2d 737 (E.D. Mich. 1999) *aff'd and remanded* 238 F.3d 420 (6th Cir.).
[36] *See supra* note 6.
[37] *See, e.g., ACLU v. Reno I*, 522 U.S. at 877.

other).[38]

More sophisticated are programs that use site-blocking filters (or programs that combine such filters with "dirty word" blocking filters). These types of filtering programs maintain lists of web sites and either (a) prohibit access to all the sites on the list ("black-list" filters) or (b) permit access to only those sites on the list ("white-list" filters). Each of these two types of site-blocking filters has advantages and disadvantages. White-list filters provide greater assurance that the filtered sites will be free of offending material, because each site has been screened and then specifically included on the list of accessible sites. AOL uses a white-list filter in its "Young Teen" area.[39] A site-blocking program that uses a white list is limited in that it only provides access to a very limited number of sites. New web pages that have not yet been scrutinized will also be blocked.

Both white-list and black-list filters need to be constructed and maintained through human intervention and thus are faced with the overwhelming size of the world wide web. Someone has to determine that a web site passes muster to put it on the white list or that the web site does not pass muster to put it on the black list. Additionally, white-list

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[38] A version of the filtering program CYBERsitter did not actually block access to a web page because the page contained a bad word, but would simply display the page with the bad word omitted. So, for example, a web page that contained the sentence "The Catholic Church opposes homosexual marriage." was rendered by CYBERsitter as "The Catholic Church opposes marriage." because this version of the program, has "homosexual" as one of its "dirty words." Peacefire, *CYBERsitter Examined* <http://peacefire.org/censorware/CYBERsitter>. *See also*, Gay & Lesbian Alliance Against Defamation, *Access Denied, Version 2.0: The Continuing Threat Against Internet Access and Privacy and Its Impact on the Lesbian, Gay, Bisexual and Transgender Comuunity* (1999) at 17, available at <www.glaad.org>.

[39] *Digital Chaperones for Kids*, CONSUMER REPORTS, March 2001. A similar filtering method was used in 1996 by the library in Westerville, OH. Computers in the children's section of the library were restricted to a few thousand sites chosen by librarians. After three years, the library stopped using this system because it dramatically constrained the material children could access in cyberspace. *See* Am. Library Ass'n v. United States, 2002 U.S. Dist. Lexis 9537, *61-*62.

filters require frequent maintenance to make sure that sites that were originally approved do not add offending content. Without frequent maintenance, white-list filters will fail to provide the pristine content they are supposed to deliver. A huge staff would be necessary to evaluate even a significant portion of existing web sites to determine which ones should be filtered. Even if such a staff could be assembled, the people who do the screening would have to make subjective determinations about each site they screen. To do their job properly, the screeners would have to assess whether each site's content is appropriate for different age groups and in light of varied filtering criteria. Because of the size of the web and the difficulties involved in rating each website and keeping the ratings up-to-date, neither type of filter will be effective. A site-blocking program that uses a black-list filter will probably not screen out most offensive content. For example, in a independent study, the filtering program Cybersnoop failed to block ninety percent of objectionable sites.[40] Similarly, a white-list filter will not allow access to most websites that have no offensive content and will allow access to many sites with offensive content. Additionally, in general, most site-blocking software blocks access to some lesbian and gay material, much of which is clearly not offensive.[41]

Despite the technological problems with filters, in light of the negative judicial assessment of CDA, COPA and similar statutes, many states and the Federal government have turned to filtering software as an alternative way to control access to material in

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[40] *Id*.

[41] *See, e.g.*, Am. Library Ass'n v. United States, 2002 U.S. Dist. Lexis 9537, at *123-*128 (listing several websites with gay and lesbian content in its discussion of erroneously blocked websites); *Access Denied*, *supra* note 38; Lisa Guernsey, *Sticks and Stones Can Hurt, but Bad Words Pay*, NY TIMES, Apr. 8, 1999, G1 (discussing filtering software and mentioning one widely-used program that prohibits access to any site that includes the phrase "gay rights"). *See also Digital Chaperones*, *supra* note 39 (noting that most filters are likely to curb access to web sites that discuss political and social issues). For detailed general discussion of the limitation of filter software, *see* Am. Library Ass'n v. United States, 2002 U.S. Dist. Lexis 9537, *passim*.

cyberspace. For example, the public libraries in Loudoun County, Virginia, as part of providing Internet access to its patrons, installed such a program (a filtering program called X-STOP) on its public terminals. The library's policy for Internet access provided, in part, that:

> all library computers would be equipped with site-blocking software to block all sites displaying child pornography and obscene material and material deemed harmful to juveniles; . . . all library computers would be installed near or in full view of library staff; [and that]. . . patrons would not be permitted to access pornography . . . [42]

A non-profit organization, several county residents, and two web pages directed at sexual minorities filed a suit in federal court challenging the library's Internet policy, arguing that it violated their free speech rights. The district court ruled in favor of the plaintiffs, holding that, the library's Internet access policy violated the First Amendment because, in part, it restricted the access of adult patrons in order to protect minors and because it was neither necessary for nor narrowly tailored to any compelling state interest.[43]

The decision in *Mainstream Loudon* did not discourage Congress from passing a law requiring use of filtering software. In 2000, Congress passed the Children's Internet Protection Act ("ChIPA"),[44] which requires public schools and libraries to install filtering software that protects against access to obscene material, child pornography, or material that is harmful to minors, in order to be eligible for certain federal funding. Specifically, the portion of ChIPA codified at 47 U.S.C. § 254 requires public libraries that receive federal funds through a program designed to provide access to information services such as the Internet to install filtering technology to prohibit access to obscene material, child pornography and, if the computers involved are used by minors, material that is harmful to minors. Additionally, the portion of ChIPA codified at 20 U.S.C. § 9134 requires

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[42] Mainstream Loudoun v. Bd. of Tr. of the Loudoun County Library, 24 F. Supp.2d 552 (E.D. Va. 1998).
[43] *Id.* at 570.
[44] Children's Internet Protection Act, Pub. L. No. 106-554, 114 Stat. 2763 (2000)

similar measures be taken by libraries that receive funds from the Library Services and Technology Act to pay for computer equipment or Internet access. Both provisions provide that library or school personnel may disable the filtering software for certain adult users who can demonstrate that they are engaged in a "bona fide research program"[45] that requires unfiltered access to cyberspace, but neither provision defines a bona fide research program or says how library or school personnel can make the necessary assessments of the proposed research and do so in a way that protects the users' privacy.

A three-judge panel recently found ChIPA unconstitutional, applying strict scrutiny to content-based restrictions on library patrons' access to cyberspace.[46] Applying strict scrutiny, the court found that the use of such programs is unconstitutional because such programs are not narrowly tailored to a compelling government interest and because there are less restrictive ways of satisfying that interest.[47] Specifically, the court found that the filtering software, because of its technological limitations, "block[s] access to substantial amounts of constitutionally protected speech."[48] Further, although the court found that libraries do disable the filtering software, or at least will allow access to blocked sites when a library patron requests, the court held that this method of dealing with the technological limitations of filtering programs "deter[ed] many patrons because they are embarrassed or desire to protect their privacy or remain anonymous."[49] The fact that libraries will disable filtering on request does not, according to the court, "cure the

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(codified in various scattered sections of the U.S. Code.)
[45] 47 U.S.C. § 254(h)(5)(D) (2001); 20 U.S.C. § 9134(f)(1)(B)(3) (2001).
[46] Am. Library Ass'n v. United States, 2002 U.S. Dist. Lexis 9537 at *146-*197 (discussing the level of scrutiny applicable to library use of filtering software).
[47] *Id*. at *197-*240 (applying strict scrutiny).
[48] *Id*. at *18.
[49] *Id*. at *20.

constitutional deficiencies in public libraries' use of Internet filters."[50] The court concluded that ChIPA was facially invalid on First Amendment ground and enjoined its enforcement.

III. The Social Situation of Lesbians and Gay Men and Its Legal Enforcement

As background for the discussion of the impact on sexual minorities of attempts to regulate cyberspace, I consider some features of the social situation of lesbians, gay men and other sexual minorities in the United States and their legal enforcement. In the United States, lesbians and gay men face a hostile social environment. Although this seems beyond dispute, Justice Scalia seemed to deny this, saying that homosexuals have both "high disposable income" and "political power much greater than their numbers [that] . . . they devote to achieving not merely a grudging social toleration, but full social acceptance, of homosexuality."[51] The discussion of the current social situation for lesbians and gay men also serves to address Justice Scalia's skepticism about how negative the situation for lesbians and gay men in the United States is.

A. The Legal Situation of Lesbians and Gay Men

One way to assess the situation of lesbians and gay men is to look at the laws that are directed at them in particular. In the United States, depending on how one counts, thirteen states as well as the military (which is a separate criminal jurisdiction) have laws that criminalize most forms of same-sex sexual activity.[52] Although no state regularly

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[50] *Id.*

[51] Romer v. Evans, 517 U.S. 620, 645 (1996) (Scalia, J. dissenting).

[52] Of these states, three (Kansas, Texas, and Oklahoma) have laws that criminalize certain sexual acts only when committed by two people of the same sex. *See* KAN. STAT. ANN. § 21-3505 (1995); OKLA. STAT. tit. 21, § 886 (West 1983 & Supp. 2001); TEX. PENAL CODE ANN. § 21.06 (Vernon 1994). *See, e.g.*, the state-by-state sodomy map published by Lambda Legal Defense and Education Fund available at <http://www.lambdalegal.org/cgi-bin/pages/states/sodomy-map>.

enforces these laws (often called "sodomy" laws or laws regarding "unnatural" sex acts), they are selectively enforced by some states. Further, the Supreme Court has ruled, in *Bowers v. Hardwick*,[53] that the Constitution allows states to prohibit consensual homosexual activity (although it does not seem to allow states to prohibit comparable forms of heterosexual activity). Even in states where such laws are not generally enforced, laws against sexual activity between people of the same sex are used to support and justify other laws and social practices relating to homosexuality.[54] Criminal prohibitions relating to sexual activity between people of the same-sex restrict sexual behaviors and embody as well as enforce the general negative attitudes that exist toward lesbians and gay men.[55]

Not only is sex between people of the same sex criminalized, lesbians, gay men and bisexuals are also subject to a multitude of discriminatory practices. For example, it is legal in thirty-nine states for a non-state entity to discriminate in terms of hiring and housing against a person in virtue of sexual orientation.[56] A gay man or lesbian—even if

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[53] 478 U.S. at 186.

[54] For example, in *Padula v. Webster*, to defend a ban on lesbians and gay men working for the Federal Bureau of Investigation against an equal protection challenge, the D.C. Circuit Court cited the Supreme Court's decision in *Bowers v. Hardwick*. 822 F.2d 97 (D.C. Cir. 1987). The circuit court said that "[i]t would be quite anomalous, on its face, to declare status defined by conduct that states may constitutionally criminalize as deserving of strict scrutiny under the equal protection clause." *Id.* at 103.

[55] *See, e.g.*, Christopher Leslie, *Creating Criminals: The Injuries Inflicted by Unenforced Sodomy Laws*, 35 HARV. C.R.-C.L. L. REV 103 (2000).

[56] *See, e.g.*, Edward Stein, *Evaluating the Sex Discrimination Argument for Lesbian and Gay Rights*, 49 UCLA L. Rev 471, 475 n.13 (2001). Title VII does not prevent private employers from discriminating on the basis of sexual orientations. *See, e.g.,* Smith v. Liberty Mutual Ins. Co., 569 F.2d 325 (5th Cir. 1978) (holding that Title VII does not prohibit discrimination on the basis of effeminacy); DeSantis v. Pac. Tel. & Tel., Co., 608 F.2d 327 (9th Cir. 1979) (Title VII does not prohibit discrimination on the basis of sexual orientation); Ruth v. Children's Med. Ctr., 1991 WL 151158 (6th Cir. 1991); Williamson v. A.G. Edwards & Sons, Inc., 876 F.2d 69 (8th Cir. 1989) (per curiam); Dillon v. Frank, 1992 WL 5436 (6th Cir. 1992). Various scholars have argued against this interpretation of Title VII. *See, e.g.*, Samuel Marcosson, *Harassment on the Basis of Sexual Orientation: A Claim of Sex Discrimination Under Title VII*, 81 GEO. L. J. 1

he or she can prove that sexual orientation was used as a reason not to hire him or her for a job—has no legal recourse in most states. In many states, lesbians and gay men face difficulties (often insurmountable) adopting children and, in Florida, they are simply prohibited as a matter of law from adopting.[57] Additionally, no state provides lesbian and gay relationships with the same legal recognition it provides heterosexual marriages, although Vermont comes close with civil unions.[58] However, a same-sex couple who obtains a civil union in Vermont cannot get the federal benefits that accrue to married couples[59] and their relationship may not be recognized in other states.[60] In states besides Vermont, while a heterosexual couple can legally formalize their relationship by getting married and thereby obtain the rights and privileges that flow from marriage, a same-sex couple can get few if any of these benefits for their relationship.[61]

The legal asymmetries surrounding sexual orientation do not stop with the rights and privileges withheld from gay and lesbian individuals. They affect lesbian and gay institutions and lesbian and gay community structures. For example, lesbian and gay

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(1992); Bennett Capers, *Sex(ual) Orientation and Title VII*, 91 COLUM. L. REV. 1158 (1991). For now, legislative change seems the most promising strategy for protecting against employment discrimination on the basis of sexual orientation. *See* Employment Non-Discrimination Act, HR 2692, 107th Cong. (2001) (proposing to amend Title VII to prohibit sexual-orientation discrimination in most employment contexts).

[57] FLA. STAT. ANN. § 63.042(3). This law has recently upheld against a constitutional challenge in Lofton v. Kearney, 157 F.Supp.2d 1372 (S.D. Fla. 2001). This case has been appealed. No. 01-16723-00 (11th Cir. 2002).

[58] *See, e.g.*, WILLIAM ESKRIDGE, JR., EQUALITY PRACTICE: CIVIL UNIONS AND THE FUTURE OF GAY RIGHTS (2001); WILLIAM ESKRIDGE, JR., THE CASE FOR SAME-SEX MARRIAGE (1996).

[59] 1 U.S.C. § 7 (2001) ("the word marriage means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or wife.").

[60] *See* 28 U.S.C. § 1738C (Supp. V 1999) (a state does not have to give full faith and credit to a same-sex marriage legally performed in another state); Burns v. Burns, No. A01A1827, 2002 WL 87652 (Ga. App. Jan. 23, 2002) (holding that a Gerogia woman who obtained a civil union in Vermont with her same-sex partner was still bound by a court decree preventing her from having visitation with her children from a previous marriage while "cohabiting" with an adult to whon she is neither married nor related).

students in public schools have been denied funding for their organizations.[62] In addition, plays, photographs, and other forms of artistic expression that reflect lesbian and gay culture have been banned from receiving government support.[63] In fact, representation of and by lesbians and gay men have played a central role in debates over government funding of the arts and public standards of "decency."[64]

Finally, despite the discrimination faced by lesbians and gay men, past and present, under current Supreme Court case law regarding the Equal Protection clause of the Fourteenth Amendment, sexual-orientation classifications do not receive the heightened scrutiny that racial classifications, ethnic classifications, and classifications associated with national origin, sex, alienage, and legitimacy receive.[65] While the Supreme Court has not directly ruled on the question of whether laws that make use of sexual-orientation

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[61] *See, e.g,.* ESKRIDGE, CASE FOR SAME-SEX MARRIAGE, *supra*, note 58, at 66-67.

[62] See, e.g., E. High Gay/Straight Alliance v. Bd. of Educ. of Salt Lake City Sch. Dist., 81 F. Supp. 2d 1166 (D. Utah 1999) (finding no violation of "Equal Access Act," 20 U.S.C. § 407, where, in response to formation of gay high school student group, school board barred all "non-curriculum-related" student groups); Colin v. Orange Unified Sch. Dist., 83 F. Supp. 2d 1135 (C.D. Cal. 2000) (finding school board's denial of gay group's request for recognition violated Equal Access Act); E. High Sch. Prism Club v. Seidel, 95 F. Supp. 2d 1239 (D. Utah 2000) (holding that gay student group was curriculum-related).

[63] *See, e.g.*, Nat'l Endowment for the Arts v. Finley, 524 U.S. 569 (1998) (upholding a "decency" clause in the NEA's governing statute against a First Amendment challenge by some artists, including some lesbian and gay artists).

[64] *See, e.g.*, Nancy Knauer, *Homosexuality as Contagion: From the Well of Loneliness to theBoy Scouts*, 29 HOFSTRA L. REV. 401, 495-96 ("Congress and executive agencies have imposed conditions on state-funded speech mandating that it cannot be offensive or outside the bounds of 'general standards of decency.' Often, the decision to include such a subjective standard was intentionally designed to disqualify expressions of same-sex desire.").

[65] *See, e.g.*, Yick Wo v. Hopkins, 118 U.S. 356 (1886) (interpreting the Fourteenth Amendment as requiring heightened scrutiny for ethnic classification); Hernandez v. Texas, 347 U.S. 475 (1954) (the same with respect to national origin); Plyler v. Doe, 457 U.S. 202, 218-23 (1982) (alienage), Levy v. Louisiana, 391 U.S. 68 (1968) (legitimacy); Miss. Univ. for Women v. Hogan, 458 U.S. 718, 723-24 (1982) (gender).

classifications deserve heightened scrutiny, most U.S. courts that have considered this question have denied that sexual-orientation classifications deserve heightened scrutiny.[66]

The closest the Supreme Court has come to addressing this question in a way that carries precedential weight is *Romer v. Evans*,[67] in which the Court overturned an amendment to the Colorado Constitution. The amendment, which was approved by a state-wide voter referendum, repealed various city ordinances in Colorado that prohibited discrimination on the basis of sexual orientation and, further, prohibited any state or local government from passing laws that would protect lesbians, gay men, and bisexuals from such discrimination.[68] The Court explicitly did not reach the question of whether sexual orientations deserve heightened scrutiny under the Equal Protection Clause of the Fourteenth Amendment but rather held that the proposed Colorado constitutional

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[66] Among the cases that explicitly refused to grant heightened scrutiny for sexual-orientation classifications are Ben-Shalom v. Marsh, 881 F.2d 454, 464 (7th. Cir. 1989) (refusing to grant heightened scrutiny for sexual-orientation classifications in the context of military's policy on homosexuality); Woodward v. United States, 871 F.2d 1068, 1076 (Fed. Cir. 1989) (same); *Padula*, 822 F.2d at 103 (same in the context of the FBI); and Thomasson v. Perry, 80 F.3d 915 (4th Cir. 1996) (en banc) (same in the context of military's "Don't Ask, Don't Tell" policy). Among the exceptions to these decisions Watkins v. United States Army, 847 F.2d 1329 (9th Cir. 1988) (holding that sexual-orientation classifications deserve heightened scrutiny and, under this standard of review, that the U.S. military's pre-1992 policy of discharging homosexuals was unconstitutional), *vacated and aff'd on other grounds*, 875 F.2d 699 (9th Cir. 1989) (en banc); High Tech Gays v. Defense Indus. Sec. Clearance Office, 668 F. Supp. 1361 (N.D. Cal. 1987) (holding that homosexuals or those perceived as homosexuals deserve heightened scrutiny under equal protection), *rev'd* 895 F.2d 563 (9th Cir. 1990); and Jantz v. Muci, 759 F. Supp. 1543, 1546 (1991) (same), *rev'd* 976 F.2d 623 (10th Cir. 1992). All of these decisions have been either vacated or reversed. *See also*, *Rowland*, 470 U.S. 1009 (1985) (Brennan, J., dissenting) (dissenting from denial of writ of certiorari on grounds that discrimination against homosexuals raises significant equal protection concerns).

[67] Romer v. Evans, 517 U.S. 620 (1996).

[68] COLO. CONST. art. II, § 30b, the amendment at issue in *Romer*, read, in part:

> No Protected Status Based on Homosexual, Lesbian, or Bisexual Orientation. Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any

amendment failed to pass constitutional muster even under rational review, a weaker standard of judicial scrutiny. Justice Kennedy, writing for the majority, said:

> First, the amendment has the peculiar property of imposing a broad and undifferentiated disability on a single named group, an exceptional and, as we shall explain, invalid form of legislation. Second, its sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class that it affects; it lacks a rational relationship to legitimate state interests.[69]

Some scholars have read *Romer* as suggesting that the Court is in fact applying a somewhat heightened standard of review to sexual-orientation classifications, one either equivalent to the intermediate standard of review it applies to gender classifications,[70] (which is a somewhat less searching review than strict scrutiny[71]) or a standard *in between* mere rational review and intermediate scrutiny, what some have called "rational review with bite"[72]). Traditionally, the requirement that a statute or state action be rational is very weak: almost any justification is enough to establish rationality. Given how weak the mere rationality requirement is, the Court in *Romer* must have had more than this weak test in mind. Perhaps *Romer* indicates that heightened scrutiny for sexual orientation is just around the corner. Whether this proves to be true remains to be seen. For now, it is worth noting that various federal courts have used the rational review standard to scrutinize state action relating to sexual orientation. Using this test, courts will sometimes invalidate sexual-orientation discrimination.[73] However, other courts,

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person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination.

[69] Romer, 517 U.S. at 632.

[70] *See, e.g.*, Craig v. Boren, 429 U.S. 190 (1976) (striking down on equal protection grounds a state law that had different age requirements for boys and girls to but low-alcohol beer because it makes use of sex-based classifications).

[71] *But see* United States v. Virginia, 518 U.S. 515, 531 (1996) (holding that the justification of laws that make use of sex-based classifications must be "exceedingly persuasive").

[72] *See, e.g.*, Gayle Lynn Pettinga, *Rational Basis with Bite: Intermediate Scrutiny by Any Other Name*, 62 IND. L. J. 779 (1987).

[73] Among the courts that have used the rational review standard to overturn laws that make use of sexual-orientation classifications are Nabozny v. Podlesny, 92 F.3d 446 (7th

applying the rational review standard, will find some instances of discrimination on the basis of sexual orientation to be constitutionally legitimate.[74] In any event, under rational review, it is easier for a law to survive constitutional scrutiny than to survive the scrutiny applied to race or gender classifications.

B. Social Attitudes Towards Lesbians and Gay Men

Legal matters aside, social attitudes towards lesbians and gay men and other sexual minorities, while improving in some quarters, remain negative. Violence against lesbians and gay men is not uncommon: more bias-related hate crimes are committed against people because of their sexual orientation than for any other reason.[75] Such violence is often quite severe as several hate-crime murders of gay men and lesbians in the past few years have graphically demonstrated. Society's attitudes towards lesbians and gay men are also manifest in how some lesbians and gay men, especially young ones, feel about themselves. Among the most striking evidence of this is that lesbian and gay teenagers are three times more likely to attempt suicide than their heterosexual counterparts.[76]

While public opinion as measured by national opinion polls indicates that attitudes towards lesbians and gay men are becoming more favorable over time, it is still the case that over forty percent of the population believes that homosexuality is not an acceptable

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Cir. 1996) (holding, in part, that there was "no rational basis for permitting one student to assault another based on the victim's sexual orientation"); Stemler v. City of Florence, 126 F.3d 865, 873 (6th Cir. 1997) (holding that selective prosecution based on sexual orientation fails rational review); Glover v. Williamsburg Sch. Dist. Bd. of Educ., 20 F. Supp. 2d 1160 (S.D. Ohio 1998) (holding that the decision not to rehire a teacher based solely of sexual orientation fails rational review); Weaver v. Nebo Sch. Dist., 29 F. Supp. 2d 1279 (D. Utah 1998) (holding that the decision not to reassign a public school teacher to coach volleyball team based on her sexual orientation fails rational review).

[74] *See, e.g.*, Equal. Found. of Greater Cincinnati, Inc. v. Cincinnati, 128 F.3d 289 (6th Cir. 1997), *cert. denied* 119 S. Ct. 365 (1998); Beller v. Middendorf, 632 F.2d 788 (9th Cir. 1980); Ben-Shalom v. Marsh, 881 F.2d 454, 464 (7th Cir 1989).

[75] *See, e.g.*, GARY DAVID COMSTOCK, VIOLENCE AGAINST LESBIANS AND GAY MEN (1991).

lifestyle and that same-sex sexual relations between consenting adults should be illegal.[77] Further, over half of the population opposes laws that would give same-sex couples some of the legal rights of married couples.[78] Perhaps more telling is a poll that found fifty-six percent of adult Americans disapprove of homosexual couples adopting children.[79] Also revealing is a poll that found that eighty percent of adult Americans would be "upset" or "very upset" if a college-aged child of theirs said he or she was gay or lesbian.[80] Read together, these polls show that even people who are sympathetic to lesbian and gay rights and who do not think homosexual conduct should be illegal think that homosexuality is a trait worth avoiding and that lesbians and gay men are not to be trusted. In fact, parents

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[76] Paul Gibson, *Gay and Lesbian Youth Suicide in* SEXUAL ORIENTATION AND THE LAW (William Rubenstein ed., 1997).

[77] Frank Newport, *American Attitudes Toward Homosexuality Continue to Become More Tolerant*, GALLUP POLL NEWS, June 4, 2001, <http://www.gallup.com/poll/releases/pr010604.asp> (poll finding that in May 2001 fifty-two percent of those surveyed said that "homosexuality should be considered an accepted alternative lifestyle" compared to thirty-four percent in 1982 and that fifty-four percent said that "homosexual relations between consenting adults should . . . be legal" compared to forty-three percent in 1977). Note that a 1997 Gallup poll found that fifty-nine percent of American adults believe "homosexual behavior is morally wrong." GEORGE GALLUP, JR. THE GALLUP POLL: PUBLIC OPINION 1997, 221 (1998). This question does not seem to have been asked more recently.

[78] *See* Newport, *supra* note 77 (finding that fifty-two percent of those surveyed in 2001 would "oppose a law that would allow homosexual couples to legally form civil unions, giving them some of the legal rights of married couples").

[79] Humphrey Taylor, *Attitudes Towards Gays and Lesbians Have Become More Accepting, but Most People Still Disapporve of Single Sex Marriages and Adoption by Same-Sex Couples*, THE HARRIS POLL #9, Feb. 9, 2000, <http://www.harrisinteractive.com/harris_poll/index.asp?PID=1> (reporting results of poll of over a thousand adults taken in January 2000). This result is similar to a 1997 poll that found fifty-six percent of adult Americans think that it was a bad thing for society that lesbian and gay couples were raising children. Richard Berke, *Chasing the Polls on Gay Rights*, NY TIMES, Aug. 2, 1998, Week in Review, at 2.

[80] Jeffrey Schmalz, *Poll Finds Even Split on Homosexuality's Cause*, NY TIMES, Mar. 5, 1993, at A14.

are often willing to go to extreme measures to ensure that their children do not grow up to be lesbians or gay men.[81]

C. The Closet

There is, however, a further (related) feature of lesbian and gay existence in the United States that warrants attention: lesbians, gay men, and bisexuals are, in a variety of ways—some subtle, some not—encouraged to keep their sexual orientations secret, that is, "in the closet." The closet is a distinctive, pervasive, and, some have argued, singular feature of lesbian and gay existence.[82] Its effects are easily underestimated. People remain in the closet who are financially and professionally secure enough to survive the negative ramifications that might follow the disclosure of their homosexuality. They do this despite the energy and emotional stress involved in hiding an important part of their lives from family, friends, neighbors and coworkers. Even when lesbians and gay men "come out," that is, make their sexual orientations known, the closet continues to play a central role in their lives; even open lesbians and gay men must also worry about the closet. On the one hand, since, in many contexts, people are presumed to be heterosexual, the question of who to tell about one's homosexuality or bisexuality continually arises. If, for example, you are a lesbian and your mail carrier asks you how your sister is, when the woman he is referring to is your lover, should you "come out" to him? Similarly, lesbians and gay men may find themselves having to worry about protecting the secrets of other lesbians and gay men: you may know that someone is a lesbian but you do not know who else knows and whom she wants to know. Some have argued that being forced or obliged by social conventions or by "unwritten rules" of the

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[81] Timothy Murphy, *Redirecting Sexual Orientation: Techniques and Justifications*, 29 J. SEX RES. 501 (1992); Edward Stein, *Choosing the Sexual Orientation of Children*, 12 BIOETHICS 1 (1998); Stein, *supra* note 9, at 305-27.

[82] *See, e.g.*, EVE KOSOFSKY SEDGWICK, EPISTEMOLOGY OF THE CLOSET (1990).

lesbian and gay community to keep some one else's homosexuality secret is an assault on one's dignity as a gay man or lesbian.[83]

The closet is a social creation but it is enforced in various ways by laws and judicial decisions. Courts have interpreted laws to construct various social and legal "double binds"[84] for sexual minorities with respect to their identity and their expression. On the one hand, lesbians and gay men are (implicitly or explicitly) told to keep their sexual orientation secret, while, on the other hand, they are told (implicitly or explicitly) to confess it. Similarly, on the one hand, they are told that their identity is protected (although their behavior may be restricted), while on the other hand, they are discriminated against in certain contexts even when they keep quiet about their identity.

Consider the case of Joseph Acanfora.[85] Several weeks after he was hired as a public school teacher, school officials learned Acanfora was gay. Acanfora was thereafter transferred to an administrative position that did not involve any contact with students. After his transfer, Acanfora sued the school system demanding his return to the classroom. He also granted several television and newspaper interviews to discuss his situation.

The trial court held that Acanfora's removal from the classroom was reasonable, especially in light of his interviews, which showed a lack of the sort of propriety teachers ought to show.[86] The Court of the Appeals for the Fourth Circuit upheld Acanfora's removal but on different grounds. They held that Acanfora's interviews concerned "matter[s] of public interest," including the difficulties that homosexuals encounter in

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[83] *See, e.g.*, Richard Mohr, *The Outing Controversy: Privacy and Dignity in Gay Ethics in* GAY IDEAS: OUTING AND OTHER CONTROVERSIES (1992). *See generally*, LARRY GROSS, CONTESTED CLOSETS: THE POLITICS AND ETHICS OF OUTING (1993).
[84] Sedgwick, *supra* note 82.
[85] Acanfora v. Bd. of Educ. of Montgomery County, 491 F.2d 498 (4th Cir. 1974).
[86] *Acanfora*, 359 F.Supp 843 (D. Md. 1973).

families, in employment, and in the community at large. His speech in these contexts was, therefore, protected under the First Amendment and did not "justify . . . the action taken by the school system."[87] The court, however, found that Acanfora's removal *was* justified because he lied to school officials by withholding the information that, in college, he had been involved in a "homophile" organization, "which had as its purpose the development of public understanding about homosexuality."[88] Although the school officials admitted that they would have refused to hire Acanfora on the basis of his membership in such an organization, the Fourth Circuit found that his failure to mention his membership in this organization disqualified him from challenging his dismissal. The trial court justified Acanfora's removal from the classroom because he was open about his homosexuality, while the appellate court justified his removal because he kept it secret.

To make matters more complex, consider two other court rulings about homosexuality and public school teachers. In *National Gay Task Force (NGTF) v. Board of Education of the City of Oklahoma*,[89] the Court of Appeals for the Tenth Circuit held that, under *Brandenburg v. Ohio*,[90] a teacher cannot be fired for advocacy of homosexual activity (for example, advocacy of same-sex sodomy, which was at the time illegal in Oklahoma), although a teacher can be fired for public homosexual activity. Contrast this holding with *Rowland v. Mad River Local School District*,[91] decided by the Court of Appeals for the Sixth Circuit in the same year as *NGTF*. In *Rowland*, a guidance

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[87] *Acanfora*, 491 F.2d at 501.
[88] *Id.* at 500.
[89] 729 F.2d 1270 (10th Cir. 1984), *aff'd by an equally divided court*, 470 U.S. 903 (1985). *See also* Aumiller v. Univ. of Del., 434 F. Supp. 1273 (D. Del. 1977) (holding that a teacher may not be fired for speaking out on homosexuality when such speech is not intended to generate publicity).
[90] 395 U.S. 444 (1969) (holding that, under the First Amendment, the mere advocacy of illegal activity may not be criminalized).

counselor was suspended and subsequently not rehired when she told a secretary, an assistant principal, and several teachers that she was bisexual and involved in a relationship with another woman. The district court found that Rowland's firing violated her freedom of speech.[92] The Sixth Circuit reversed, holding that Rowland's speech did not involve "a matter of public concern."[93]

According to the Fourth Circuit, Acanfora's homosexuality is a matter of public concern; but according to the Sixth Circuit, Rowland's bisexuality is not. Given such a tangle of rulings, what was a gay teacher supposed to do after 1985? In this situation and others like it, lesbians, gay men and bisexuals find themselves in a "double bind" or a "Catch-22" situation.[94] Although the situation for lesbian and gay teachers may have improved,[95] the closet and the associated double bind have continuing vitality in our culture.

Consider, for example, the current law regarding lesbians and gay men in the United States Armed Forces, which reads, in relevant part:

> A member of the armed forces shall be separated from the armed forces . . . if one or more of the following findings is made and approved in accordance with procedures set forth in such regulations:
> (1) That the member has engaged in, attempted to engage in, or solicited another to engage in a homosexual act or acts unless there are further findings . . . that the member has demonstrated that
> (A) such conduct is a departure from the member's usual and customary behavior;
> (B) such conduct, under all circumstances, is unlikely to recur;
> (C) such conduct was not accomplished by the use of force, coercion, or intimidation;

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[91] 730 F.2d 444 (6th Cir. 1984), *cert. denied*, 470 U.S. 1009 (1985).
[92] *Id.* at 456-460 (appendix to appellate decision that contains the special verdicts of the district court).
[93] *Id*. at 449.
[94] SEXUALITY, GENDER AND THE LAW 629 (William Eskridge, Jr. & Nan Hunter, eds. 1997).
[95] *See, e.g.*, Glover v. Williamsburg Sch. Dist. Bd. of Educ., 20 F. Supp.2d 1160 (S.D. Ohio 1998) (holding that decision not to renew a gay teacher's contract was motivated by animus and thus violated equal protection); Weaver v. Nebo Sch. Dist., 29 F. Supp.2d 1279 (D. Utah 1998) (holding that firing of lesbian volleyball coach in virtue of her sexual orientation violated equal protection).

> (D) under the particular circumstances of the case, the member's continued presence in the armed forces is consistent with the interest of the armed forces in proper discipline, good order, and morale; and
> (E) the member does not have a propensity or intent to engage in homosexual acts.
> (2) That the member has stated that he or she is a homosexual or bisexual, or words to that effect, unless there is a further finding . . . that the member has demonstrated that he or she is not a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts.
> (3) That the member has married or attempted to marry a person known to be of the same biological sex.[96]

Within months of the codification of this policy, the Department of Defense issued various regulations for following this policy.[97] According to these regulations, the military is not, in general, allowed to ask a service member about his or her sexual orientation or to investigate a service member's sexual orientation *unless* there is "credible information that there is a basis for a discharge."[98] However, if there is any indication of homosexual activity or actions or speech that indicate a propensity to engage in such activity, the service member may be discharged. Various federal appellate courts have upheld the constitutionality of this policy.[99] In particular, several courts have held that the restrictions on speech involved in the military's policy on homosexuality are justified because they are closely related to a strong government interest.[100] Under this policy, lesbians and gay men in the military live in a legally-enforced closet.[101]

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[96] 10 U.S.C. § 654 (b) (1994).
[97] *See, e.g.,* Separation of Regular Commissioned Officers, Dep't of Def. Directive 1332.30 (Feb. 5, 1994); Qualification Standards for Enlistment, Appointment, and Induction, Dep't of Def. Directive 1304.26 (Feb. 5, 1994); Enlisted Administrative Separations, Dep't of Def. Directive 1332.30 26 (Feb. 5, 1994).
[98] Guidelines for Fact-Finding Inquiries into Homosexual Conduct, Dep't of Def. Directive No. 1332.14.
[99] Able v. U.S., 88 F.3d 1280 (2d Cir. 1998); Thomasson v. Perry, 80 F.3d 915 (4th Cir. 1995); Richenberg v. Perry, 97 F.3d 256 (8th Cir. 1996); Holmes v. Cal. Nat'l Guard, 124 F.3d 1126 (9th Cir. 1997).
[100] *See, e.g., Thomasson*, 80 F.3d at 932l; *Able*, 88 F. 3d at 1292.
[101] For useful discussions of the military's policy, *see* JANET HALLEY, DON'T: A READER'S GUIDE TO THE MILITARY'S ANTI-GAY POLICY (1999); Kenji Yoshino, *Assimilationist Bias in Equal Protection: The Visibility Presumption and the Case of "Don't Ask, Don't Tell,"* 108 YALE L. J. 485 (1998); Tobias Wolfe, *Compelled*

For this reason, as well as because military service involves a significant relaxation of First Amendment protections—in general, a civilian has much stronger First Amendment protections than does a person serving in the military—military policies restricting speech of servicemembers are usually upheld.[102] Further, the military's policy concerning homosexuality makes the military an especially difficult environment for lesbians and gay men, especially because a single utterance by a service member suggesting that he or she is gay or lesbian may result in his or her discharge.[103]

Lest one think that the legal closet is a relic of the past or an eccentricity of the military, consider the case of *Shahar v. Bowers*.[104] In 1990, Robin Shahar was offered a job working for the Attorney General of the State of Georgia, Michael Bowers (of *Bowers v. Hardwick* fame). On her application for the job, Shahar listed her marital status as "engaged" and indicated that her future spouse was a woman. Before she began working, Shahar and her partner held a ceremony in which they exchanged vows and rings. They also openly changed their last names to Shahar, obtained the married rate on

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Affirmations, Free Speech, and the U.S. Military's Don't Ask, Don't Tell Policy, 63 BROOK. L. REV. 1141 (1997).

[102] Although courts widely cite Chief Justice Warren's admonition that "our citizens in uniform may not be stripped of basic rights simply because they have doffed their civilian clothes"—*see, e.g.*, Chappell v. Wallace, 462 U.S. 296, 304 (1983), *quoting* Chief Justice Earl Warren, *The Bill of Rights and the Military*, 37 N.Y.U. LAW REVIEW 181, 188 (1962)—often they do not seem to heed it. For example, the Supreme Court has held that the Air Force may prevent a service member from wearing a yarmulke while on duty and in uniform, Goldman v. Weinberger, 475 U.S. 503 (1986), and that the Army may prohibit political speeches and demonstrations on base, Greer v. Spock, 424 U.S. 828 (1976). For a case in which a service member won a challenge to the military, *see* McVeigh v. Cohen, 983 F. Supp. 215 (D.D.C. 1998), discussed *infra* text accompanying notes 110-15.

[103] One district court has held that the military's policy concerning homosexuality violates principles of free speech, arguing that the policy "burdens speech based solely on its content by subjecting the member to a discharge process [in virtue of speech that states a homosexual orientation] in which the member has only at best a hypothetical chance to escape separation." *Able*, 880 F. Supp. 968, 976 (1995). The district court's decision in *Able* was vacated and remanded, 88 F.3d 1280 (2nd Cir. 1996), and eventually overruled. *Able*, 155 F.3d 628 (2nd Cir. 1998). *See infra* text accompanying notes 161-166.

their insurance, and openly cohabited. Bowers claimed that, in light of their public ceremony, which Shahar herself called a wedding, he withdrew his offer of employment to Shahar because her employment would lead to public confusion about the Attorney General's stand on same-sex marriage and other controversial issues. A divided *en banc* panel of the Court of Appeals for the Eleventh Circuit held that the withdrawal of Shahar's employment offer was justified by Bowers' concern about the public perception and the internal consequences of having Shahar work in his office. The Court held that, under the *Pickering* balancing test,[105] Georgia's interest "as an employer in promoting the efficiency of the Law Department's important public services" outweighed Shahar's First Amendment interests.[106] If Bowers' rationalization is to be believed, Shahar was refused a job not because of her homosexuality or her openness about it, but for openly engaging in a same-sex wedding ceremony. If this is true, had Shahar kept her same-sex ceremony a secret, she would have been hired. Apparently, had Shahar remained in the closet, the failure to hire her would have been unconstitutional.

D. Sexual Minorities and Cyberspace

Because of the social and legal situation for lesbians and gay men and, in particular, the social structure of the closet, cyberspace is an ideal environment and a "virtual lifeline"[107] for lesbians, gay men, and other sexual minorities. The following three examples illustrate this point.

1. Emmalyn Rood

Emmalyn Rood is a teenager who lives in Portland, Oregon. Starting when she

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[104] 114 F.3d 1097 (11th Cir. 1997) (en banc).
[105] Pickering v. Bd. of Educ., 391 U.S. 563 (1968) (articulating a balancing test whereby a government employee's rights as a citizen to speak on matters of public interest are to be weighed against government's interest in having employees perform public services).
[106] *Shahar*, 114 F.3d. at 1110.
[107] *Access Denied*, *supra* note 38, at 4.

was approximately fourteen years old, she began to think she might be a lesbian. Emmalyn wanted to understand the issues relating to homosexuality and her own sexual orientation. Afraid that her mother would discover her if she pursued this project at home, Emmalyn turned to her local public library. Among the resources available at this library were computers that provided free access to the Internet. Emmalyn used these computers to visit web sites providing information about sexuality and to take advantage of interactive modes of cyberspace communication, such as email and chat rooms. Emmalyn was able to find a supportive community in cyberspace to help embrace her own sexuality and, subsequently, was able to come out a lesbian, first to herself and then to her family and friends.[108]

2. Jeffrey

> In the summer of 1999, when he was 15, . . . Jeffrey . . . admitted to himself that he was gay. This discovery had been coming on for some time; he had noticed that he felt no attraction to girls and that he became aroused when showering with other boys after physical education class. But Jeffrey is a devout Southern Baptist, attending church several times each week where, he says, the pastor seems to make a point of condemning homosexuality. Jeffrey knew of no homosexuals in his high school or in his small town in the heart of the South. . . . He prayed that his errant feelings were a phase. But as the truth gradually settled over him, . . . he became suicidal. . . . He called a crisis line for gay teenagers, where a counselor suggested he attend a gay support group in a city an hour and a half away. But being 15, he was too young to drive and afraid to enlist his parents' help on what would surely seem a bizarre and suspicious errand.
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> It was around this time that Jeffrey first typed the words "gay" and "teen" into a search engine on [his] computer . . . and was staggered to find himself in a teeming online gay world, replete with resource centers, articles, advice columns, personals, chat rooms, message boards, porn sites and—most crucially—thousand of closeted and anxious kids like himself. That discovery changed his life.[109]

3. Timothy McVeigh

Helen Hajne, the wife of a non-commissioned officer in the Navy, was organizing a toy drive for the children of members of the crew of the ship on which her husband was posted. She had been in contact by email with various individuals including Senior Chief

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[108] Brief of Petitioners in Multnomah County Pub. Library v. United States, 01-1322, (E.D. Pa. July 26, 2001) at 47 (available at <http://www.aclu.org/court/multnomah.pdf>).
[109] *See* Egan *supra* note 14 at 110, 113.

Timothy McVeigh (no relation to the convicted Oklahoma City bomber) using her America Online (AOL) account. On September 2, 1997, she received an email message through her AOL account concerning the toy drive from another AOL user with the email address "boysrch@aol.com" signed by "Tim." The evocative email address piqued her interest, so she searched for and read her correspondent's "member profile," an on-line file containing an AOL user's self-description. According to the information in the profile, the sender of the message was "Tim," a person who worked in the military, lived in Hawaii, and who listed his marital status as "gay." The profile also listed the sender's hobbies as "boy watching" and "collecting pics [digitized photographs] of other young studs." Hajne passed the email message and the profile on to her husband; eventually, this information was passed on to the ship's commanding officer.[110]

Suspecting that the sender of this email was McVeigh and inferring that McVeigh was gay, the ship's legal advisor, a member of the Judge Advocate Generals' Corps, the military's "in house" legal team, initiated an investigation. A Navy investigator contacted AOL through its technical services department and, without self-identifying as a member of the Navy or as part of an investigation of McVeigh, inquired whether the "boysrch" account in fact belonged to Timothy McVeigh. The customer service representative confirmed that it did.

Twenty days after Hajne received the email message from "Tim," the Navy began discharge proceedings against McVeigh under the "Don't Ask, Don't Tell" policy[111] because of his "homosexual conduct, as evidenced by [his] statement that [he is] a homosexual."[112] On the ground that McVeigh had engaged in "homosexual conduct"—presumably, this "homosexual conduct" was that he identified himself as gay in his AOL

[110] McVeigh v. Cohen, 983 F. Supp 215, 217 (D.D.C. 1998)
[111] 10 U.S.C §654(b)(2) (1994).

member profile—the Navy scheduled McVeigh for discharge.[113] Before this occurred, McVeigh filed in federal court for a preliminary injunction to bar his discharge. The court held that the Navy had violated the military's "Don't Ask, Don't Tell" policy by initiating an investigation of McVeigh without sufficient evidence of prohibited behavior and that the Navy had probably also violated the Electronic Communications Privacy Act of 1986[114] by obtaining information from an online service provider without following the appropriate procedures.[115]

An on-line news magazine for lesbians and gay men aptly described the importance of cyberspace as follows:

> For countless gay men and lesbians across all age groups, the Internet has provided a means of escape from the emotional and social isolation that for so many people is part of being gay. Deeply personal issues of sexual identity could, for the first time, be explored in almost total anonymity without threat of rejection or violence. The medium was embraced early and strongly by gay people and it is widely acknowledged that gay men and lesbians have a presence on the Internet disproportionate to their numbers.[116]

Given the environment in the military, especially in light of the military's policy concerning homosexuality, lesbians and gay men in the military, like McVeigh, are especially drawn to cyberspace as a way to express and explore their sexual orientation.[117] Further, cyberspace is especially significant for gay and lesbian teenagers

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[112] *McVeigh*, 983 F. Supp at 217.

[113] *Id.* at 215.

[114] 18 U.S.C. § 2703(b)(1)(A)-(B), (c)(1)(B). §2703 (c)(1)(B) reads:

> A provider of electronic communication service or remote computing service shall disclose a record or other information pertaining to a subscriber to or customer of such service . . . to a government entity only when the government entity (i) obtains a warrant issued under the Federal Rules of Criminal Procedure or equivalent State warrant; (ii) obtains a court order for such disclosure . . . ; (iii) has the consent of the subscriber or customer to such disclosure; or (iv) submits a formal written request to a law enforcement investigation concerning telemarketing fraud for the name, address, and place of business of a subscriber or customer of such provider, which subscriber or customer is engaged in telemarketing.

[115] *McVeigh*, 983 F.Supp. at 215.

[116] *Internet Issues*, The Data Lounge (visited August 23, 1999) <http://www.datalounge.com/cgi-bin/datalounge/issues/index.html?storyline=286>. *See also*, DAWSON, *supra* note 14.

[117] Web sites devoted to lesbians and gay men in the military include Servicemen's Legal Defense Network, available at <http://www.sldn.org>, and Homobase, available at

who, like Jeffrey and Emmalyn Rood (before she came out), are living with their families while keeping their sexual orientations a secret and for whom physically entering the lesbian and gay community may be difficult.

> For homosexual teenagers with computer access, the Internet has, quite simply, revolutionized the experience of growing up gay. Isolation and shame persist among gay teenagers, of course, but now, along with the inhospitable families and towns in which many find themselves marooned, there exists a parallel online community--real people like them in cyberspace with whom they can chat, exchange messages and even engage in (online) sex. . . . What [is] most critical to . . . gay kids . . . [is] the simple revelatory discovery that they [are] not alone.
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> [G]ay teenagers surfing the Net can find Web sites packed with information about homosexuality and about local gay support groups and counseling services, along with coming-out testimonials from young people around the world. Gay pornography, too, can be a valuable resource; [for some youths,] male and female . . . the availability of online porn [was] critical to their discovery of their sexual orientation.[118]

In light of the social and legal situation for lesbians, gay men and other sexual minorities, especially the pervasive institution of the closet, cyberspace is an important refuge—a virtual lifeline—for many lesbians and gay men.[119] It is because of the important role that cyberspace plays for many sexual minorities that lesbians, gay men, and the organizations that represent them are among the plaintiffs who have challenged

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<http://www.homobase.com>. Timothy McVeigh's web site can be found at <http://www.geocities.com/Pentagon/9241>.

[118] Egan, *supra* note 14, at 113.

[119] A possible worry concerning the claims in this Part stems from a common observation among opponents of lesbian and gay rights: perhaps many of the claims I make about lesbians and gay men are true about pedophiles; pedophiles are also typically closeted, might find cyberspace an important refuge, and so on. The worry takes the form of a *reductio ad absurdum*: clearly the pedophile's speech in cyberspace does not deserve heightened scrutiny; if the relationship of the pedophile to speech in cyberspace is like that of lesbians and gay men, then the speech of lesbians and gay men in cyberspace similarly does not deserve heightened scrutiny. This worry does not constitute a serious objection to the argument of this paper. The distinctive problem with a pedophile's use of cyberspace is that he will use it to arrange sexual encounters with children, encounters that are illegal and often non-consensual and hence immoral. For discussion, *see, e.g.*, Donald S. Yamagami, *Prosecuting Cyber-pedophiles: How Can Intent Be Shown in a Virtual World in Light of the Fantasy Defense*, 41 SANTA CLARA L. REV. 547 (2001). Fully articulating this disanalogy between pedophiles' speech in cyberspace and gay men and lesbians' speech in cyberspace is beyond the scope of this paper.

attempts to regulate speech in cyberspace. Further, as I shall argue in what follows, it is in virtue of this role that cyberspace plays for lesbians and gay men, that attempts to regulate speech in cyberspace should be carefully examined for their impact on sexual minorities.

IV. Free Speech and Sexual Minorities

A. Free Speech Generally

The First Amendment begins "Congress shall make no law abridging the freedom of speech."[120] Despite the simplicity and seeming breadth of the protections of speech, the First Amendment is not absolute; it does not protect any and all speech. No one thinks that a person can appeal to the First Amendment to protect oneself from being charged with perjury or conspiracy to murder. In this century, the Supreme Court has interpreted the First Amendment as more limited when applied to some types of expression (for example, obscene speech,[121] libel,[122] and the advocacy of violence[123]) and in certain contexts (for example, in certain broadcast media,[124] certain public fora,[125] and in the context of military employment[126]). Speech may be restricted under circumstances in

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[120] U.S. CONST. amend. I. The Supreme Court has held that the Due Process Clause of the Fourteenth Amendment extends this prohibition on the abridgement of the freedom of speech to states as well. *See, e.g.*, Gitlow v. New York, 268 U.S. 652, 666 (1925); Thornhill v. Alabama, 310 U.S. 88, 95 (1940); Young v. Am. Mini Theatres, Inc., 427 U.S. 50, 52 n.1 (1976).

[121] Roth v. United States, 354 U.S. 476 (1957).

[122] N.Y. Times v. Sullivan, 376 U.S. 254 (1964).

[123] Brandenburg v. Ohio, 395 U.S. 444 (1969).

[124] FCC v. Pacifica Found., 438 U.S. 726 (1978).

[125] Connick v. Myers, 461 U.S. 138 (1983) (holding that government employee may be discharged for private speech that interferes with government services); and Bethel Sch. Dist. v. Fraser, 478 U.S. 675 (1981) (holding that a school may prohibit a student from giving a sexually explicit speech at a school assembly).

[126] *See, e.g.*, Greer v. Spock, 424 U.S. 828 (1976); and Goldman v. Weinberger, 475 U.S. 503 (1986).

which significant lawless action is likely to result from it.[127] Additionally, in *FCC v. Pacifica*,[128] the Supreme Court held that non-obscene but indecent speech, such as the "seven dirty words"[129] of George Carlin's comedy routine, could be regulated in the context of broadcast media like radio. According to a majority of the court, there is a hierarchy within protected speech: some speech, for example, speech concerning matters of contemporary political concern,[130] gets very strong protection and any attempt to regulate such speech will be strictly scrutinized, while other speech, such as indecent speech and commercial speech,[131] may receive limited First Amendment protection in certain contexts.

Constitutional theorists have offered various justifications for the freedom of speech. Among the most prominent are that free speech encourages and protects the robust public debate necessary for democracy,[132] that it advances knowledge,[133] and that it promotes and ensures individual autonomy.[134] Various scholars have criticized each of these theoretical justifications. Depending on which justification for free speech one embraces, one might have a different account of what sorts of speech deserves strict scrutiny and what gets protected by the First Amendment. The Court often appeals to various justifications for

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[127] *See, e.g.*, *Brandenburg*, 395 U.S. 444; Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).
[128] *Pacifica*, 438 U.S. at 726.
[129] The seven words are shit, piss, fuck, cunt, cocksucker, motherfucker, and tits.
[130] *See, e.g.*, ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948); OWEN FISS, LIBERALISM DIVIDED: FREEDOM OF SPEECH AND THE MANY USES OF STATE POWER (1996).
[131] *See, e.g.*, Va. Pharmacy Bd. v. Va. Citizens Consumer Council, 425 U.S. 748 (1976) (holding that commercial speech is protected by the First Amendment but that it received somewhat weaker protection than most other types of speech).
[132] *See, e.g.*, N.Y. Times v. Sullivan, 376 U.S. 254 (1964); Meiklejohn, *supra* note 130; Fiss, *supra* note 130.
[133] *See, e.g.*, JOHN STUART MILL, ON LIBERTY (1859); Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting); and Whitney v. California, 274 U.S. 357, 375 (Brandeis, J., concurring).

the First Amendment, sometimes in the same opinion.[135] Partly as a result, it is not clear which justification, if any, is the most important for the Court.

B. The Speech of Sexual Minorities

The speech of lesbians, gay men, and other sexual minorities has received different treatment throughout this century and its status remains unclear in certain contexts today. Until 1958, speech that had a "tendency to corrupt morals" was deemed obscene. The decision of the Court of Appeals for the Ninth Circuit in *One v. Olesen* is an example of how courts typically applied the corruption-of-morals test to speech relating to homosexuality.[136] *One* was perhaps the first gay and lesbian magazine (although the publishers and readers of *One* would not have used that phrase to describe it).[137] A copy of an issue of *One* was confiscated under a statute prohibiting the use of Post Office to transmit obscene publications.[138] Applying the tendency to corrupt morals test, the Ninth Circuit held that the magazine was obscene and that the Post Office could not deliver it. In deciding to censor *One*, the Ninth Circuit focused in particular on a story describing a young woman who was coming to grips with her homosexuality (the court deemed this story "cheap pornography calculated to promote lesbianism"[139]) and a poem concerning public sex in England (the court considered this poem "dirty, vulgar, and offensive to the

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[134] *See, e.g.*, *Whitney*, 274 U.S. at 375 (Brandeis, J., concurring); Timothy Scanlon, *A Theory of Freedom of Expression*, 1 PHIL. & PUB. AFFAIRS 204 (1972).
[135] *See, e.g.*, FIRST AMENDMENT LAW 8 (Kathleen Sullivan & Gerald Gunther, eds. 1999) ("The Court . . . relies upon an amalgam of [philosophical] theories [to justify free speech.").
[136] One v. Olesen, 241 F.2d. 772 (9th Cir. 1957), *rev'd* 355 U.S. 371 (1958).
[137] *See* SEXUALITY, GENDER AND THE LAW, *supra* note 94 at 411.
[138] The statute prohibited the mailing of any "obscene, lewd, lascivious or filthy book, pamphlet, picture, paper, letter, writing, print, or other publication of indecent character." 18 U.S.C. § 1461 (1949).
[139] *One*, 241 F.2d. at 777.

moral senses"[140]). Discussions and portrayals of homosexuality before 1958 in the United States typically received this sort of judicial treatment.

In 1958, the Supreme Court overturned the Ninth Circuit's decision in *One* in a one sentence *per curiam* ruling,[141] holding that the magazine was not obscene under the criteria articulated in *Roth v. United States*.[142] In *Roth*, the Supreme Court explicitly held that obscene material is not protected speech, defining obscene material as that which "deals with sex in a manner appealing to prurient interest"[143] and "material that appeals to prurient interest" as material "having a tendency to excite lustful thoughts."[144] The Court went on to explain that "sex and obscenity are not synonymous."[145] The Court said that it is vital to the freedom of speech to protect materials that deal with sex in a manner that does not appeal to prurient interest including "the portrayal of sex . . . in art, literature and scientific works."[146] Given its *per curiam* opinion in *One*, the Court presumably thought that the publication fit one of these classifications.

The test for obscenity developed in *Roth* has been modified over time. In *Miller v. California*,[147] the Court articulated the test for obscene speech as:

> (a) whether the average person, applying contemporary community standards, would find that the work 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 . . . state law, and
> (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.[148]

Following this test, much speech concerning homosexuality has been held to be deserving of First Amendment protection. Recall, for example, *NGTF*, in which the

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[140] *Id*.
[141] *One*, 355 U.S. at 371.
[142] 354 U.S. 476 (1957).
[143] *Id.* at 487.
[144] *Id.* at 488, n. 20.
[145] *Id.* at 487.
[146] *Id.*
[147] 413 U.S. 15 (1973).

Tenth Circuit held that a public employee may not be fired for advocating or promoting homosexual conduct. [149] Similarly, in *Van Ooteghem v. Gray*, the Court of Appeals for the Fifth Circuit held that a public employee could not be fired for speaking publicly in favor of civil rights for lesbians and gay men. [150]

There are, however, some limits to the protection of the speech of lesbians and gay men that are distinct from general limits on free speech. For example, in *Singer v. U.S. Civil Service*, the Court of Appeals for the Ninth Circuit held that it did not violate the First Amendment for a public employee to be fired for "openly and publicly flaunting his homosexual way of life."[151] The Ninth Circuit reasoned that although speech concerning homosexuality was protected in some cases, this protection did not extend to "open and public flaunting or advocacy of homosexual conduct."[152] Although *Singer* was vacated by the Supreme Court after new Civil Service regulations were developed, [153] some courts continued to cite the Ninth Circuit's decision in *Singer* for the principle that while public

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[148] *Id.* at 24 (quotation marks and citations omitted).
[149] Nat'l Gay Task Force v. Bd. of Ed. of the City of Oklahoma, 729 F.2d 1270 (10th Cir. 1984), *affirmed by an equally divided court*, 470 U.S. 903 (1985).
[150] Van Ooteghem v. Gray, 654 F. 2d 304 (5th Cir. 1981).
[151] Singer v. U.S. Civil Serv., 530 F.2d 247, 255 (9th Cir. 1976). *See also* McConnell v. Anderson, 451 F.2d 193 (1971).
[152] *Singer*, 530 F.2d at 256.
[153] *Singer*, 530 F.2d 247, *vacated by* 429 U.S. 1034 (1977). A new personnel manual was developed on December 21, 1973 and new regulations, 5 C.F.R. Part 73 (1975), became effective on July 2, 1975. The manual was modified in light of the decision in Soc'y for Individual Rights v. Hampton, 63 F.R.D. 399 (N. D. Cal. 1973) (holding that the government must stop discharging homosexuals "solely" because the employment of such a person might result in public contempt of the government and thereby reduce confidence in government). The Ninth Circuit did not consider these changes on procedural grounds: the new personnel manual was not part of the record before the district court and the new regulations were adopted after the judgment of the district court. *Singer*, 530 F. 2d at 255. The Supreme Court, at the suggestion of the Solicitor General, remanded the case to the Civil Service Commission for consideration in light of the new regulations. Ultimately, the Federal Employee Appeals Authority dismissed the case against Singer. For discussion, *see* Aumiller v. Univ. of Del., 434 F. Supp. 1273, 1294 (D. Del. 1977); Rhonda Rivera, *Sexual Preference Law*, 30 DRAKE L. REV. 317 (1980-81).

employees may not be subject to penalties because of their homosexuality, they may be penalized for being open about their homosexuality.[154] The more recent cases of *Rowland*[155] and *Shahar*[156] can be understood as fitting roughly into the *Singer* paradigm. Neither Rowland nor Shahar lost her job because of sexual orientation *per se.* Rowland was fired because of her private speech (telling some of her co-workers that she was bisexual). Shahar was not hired because of her "expressive conduct" (having a public wedding with another woman). Another example of the view that it is permissible to restrict the speech of lesbians and gay men when they are "flaunting" their sexual orientation is the decision of organizers of the St. Patrick's Day parade in Boston (which was in effect validated by the Supreme Court) to prohibit lesbians and gay men from marching in the parade carrying signs identifying themselves as Irish lesbians and gay men.[157]

Additionally, the military's policy concerning homosexuality[158] is akin to the *Singer* paradigm in restricting the speech of lesbians and gay men. There is a seemingly straightforward argument that this policy violates free speech: there are strong sanctions against a service member saying things like "I am gay" or "I am a lesbian." Although such speech is not supposed to lead directly to the service member's discharge from the

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[154] *See, e.g.*, Beller v. Middendorf, 632 F.2d 788, 808 (9th Cir. 1980); Childers v. Dallas Police Dep't, 513 F.Supp. 134 (N.D. Tex. 1981) (police officer not promoted because he was not discreet about his homosexuality).

[155] Rowland v. Mad River Local Sch. Dist., 730 F.2d 444 (6th Cir. 1984).

[156] Shahar v. Bowers, 114 F.3d 1097 (11th Cir. 1997) (en banc).

[157] Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, 515 U.S. 557, 572 (1995) (holding that parade organizers had a free speech right not to be compelled to include openly lesbian and gay Irish people in their parade). For discussion of *Hurley*, *see infra* text accompanying notes 250-53. *See also* Darren Hutchinson, *Accommodating Outness: Hurley, Free Speech, and Gay and Lesbian Equality*, 1 U. PA. J. CONST. L. 85 (1998).

[158] 10 U.S.C. § 654 (1994). *See also supra* text accompanying notes 96-103.

military,[159] it does create a strong but rebuttable presumption that the service member is likely to violate the law against homosexual conduct.[160]

District Judge Eugene Nickerson held that this part of the military's policy concerning homosexuality violated the First Amendment.[161] Nickerson noted that lesbian and gay service members who make statements about their sexual orientation are making statements that deserve the strongest protection of the First Amendment;[162] their "coming out" statements are "important speech" because they are "expression[s] of personal dignity and integrity."[163] As such, the government may regulate such speech only if it "promotes a compelling interest" and if the regulation promotes that interest using "the least restrictive means."[164] After a discussion of the military policy and its justifications, Nickerson concluded that "under the First Amendment, a mere statement of homosexual orientation is not sufficient proof of intent to commit acts as to justify the initiation of discharge proceedings."[165] The Court of Appeals for the Second Circuit overturned Nickerson's decision,[166] holding that, in the military context, the test for whether a statute was consistent with the First Amendment was weaker than outside the military context. Under this weaker test, the court reasoned that the military's policy satisfied the compelling interest and least restrictive means tests.

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[159] In many cases, like McVeigh's, the military violates its own policy. *See McVeigh*, 983 F. Supp. 215. *See also* SERVICE MEMBER'S LEGAL DEFENSE NETWORK, CONDUCT UNBECOMING: THE SIXTH ANNUAL REPORT ON "DON'T ASK, DON'T TELL, DON'T PURSUE" (2000), available at <http://www.sdln.org/templates/law/record.html?section=22&record=256>.
[160] 10 U.S.C. § 654 (1994).
[161] *Able*, 880 F. Supp. 968 (1995).
[162] I argue for this conclusion applied to lesbians and gay men general, not just applied to gay and lesbian service members, *infra* Part VII.
[163] *Able*, 880 F. Supp. at 973.
[164] *Id*.
[165] *Id*. at 976.
[166] *Able*, 88 F.3d 1280 (2nd Cir. 1998).

In sum, although lesbians and gay men and their speech are protected by the First Amendment, courts have found that these protections are subject to various limitations. In particular, the social and legal construct of the closet interacts with the free speech rights of lesbians and gay men in certain contexts. Although in general, lesbians and gay men are free to speak about their sexual orientations, about lesbian and gay rights, and about other issues of interest and concern to them, their speech is still subject to some state and social sanctions. Further, speaking as a gay man or lesbian or about things relating to homosexuality is not yet without negative ramifications, especially when compared to speech relating to most heterosexual relationships, heterosexual lifestyles, and heterosexual sex.

VI. Anonymous Speech

A. Theoretical Perspectives on Anonymous Speech

i. Arguments in Favor of Protecting Anonymous Speech

Perhaps the most significant argument made by both courts and scholars in favor of protecting anonymous speech is that anonymity contributes to the type of public debate that is central to a democracy.[167] Anonymity has this effect because it encourages people to freely express their views. If a person must identify herself in order to express an opinion, then less popular opinions are less likely to be expressed. Given the importance of the expression of a multiplicity of viewpoints, especially controversial ones, for the preservation of a vibrant democratic nation, measures need to be taken to ensure that people are willing to express their views, especially with respect to matters of political

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[167] *See, e.g.*, Lee Tien, *Who's Afraid of Anonymous Speech? McIntyre and the Internet*, 75 OR. L. REV. 117 (1996); Amy Constantine, *What's in a Name?:* McIntyre v. Ohio Elections Commission*: An Examination of the Protection Afforded Free Speech*, 29

controversy or of significance to the general public. The desire for a robust public debate on important matters of political concern supports the protection of anonymous speech.

This argument for protecting anonymous speech is related to another argument that sees the failure to protect anonymous speech as an implicit form of content-based restrictions of speech. The Supreme Court has articulated different standards for evaluating laws that involve *content-based* restrictions as compared to those that involve *content-neutral* restrictions. Perhaps the most significant sort of content-based restriction involves restriction of speech based on the view it expresses. Consider, for example, *Kingsley International Pictures Corp. v. Regents.*[168] A state licensing law prohibited the showing of films that involved the positive portrayal of "acts of sexual immorality." On this justification, the state refused to grant a license to the film "Lady Chatterley's Lover" because it seemed to suggest that adultery was morally permissible behavior for some people in certain circumstances. The Supreme Court overturned the law because it prohibited speech on the basis of the point of view the speech expressed; the "very heart" of First Amendment protections is that these protections are not "confined to the expression of ideas that are conventional or shared by a majority."[169]

The prohibition on content-based discrimination, reaffirmed in *R.A.V. v. City of St. Paul*,[170] can be understood as justifying the protection of anonymous speech. If anonymous speech is not protected, then people who hold unpopular opinions on matters of controversy will, in some cases, withhold their expression of these opinions. In contrast, people who hold popular opinions will not similarly withhold their speech. As a result, the expression of unpopular viewpoints will be restricted. But this, it is argued,

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CONN. L. REV. 459 (1996); *see infra* text accompanying notes 180-206 (discussing cases).

[168] 360 U.S. 684 (1959).

[169] *Id.* at 688-689.

violates the First Amendment because it discriminates against speech on the basis of its content.

Further, protections for anonymous speech can be connected to the right to privacy. In a line of cases from *Griswold v. Connecticut*[171] to *Roe v. Wade*,[172] the Court has articulated a right to privacy, a right to have certain aspects of one's life be free from state interference. If the First Amendment protects the right to speak publicly and to participate in discussions of matters of political concern, in light of the right to privacy, a person should be able to speak without undermining his or her privacy. If the central goal of the First Amendment is full public debate, then the state should remove barriers from active participation. The requirement that a person give up a significant portion of her privacy in order to speak will reduce the scope of debate by decreasing the likelihood that certain people will participate in public discussions.

Protections for anonymous speech can be similarly defended on alternative justifications of the right to free speech. If free speech is justified because it is crucial for the quest for truth in the "market place of ideas,"[173] then the protections of anonymous speech can be justified as a way of ensuring the expression of multiple points needed to further this quest. The thought is that the expression of unpopular views is important not just for truth in politics, but in science[174] and philosophy as well.[175] In politics, as well as

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[170] 505 U.S. 377 (1992). For discussion, *see infra* text accompanying notes 244-46.
[171] 381 U.S. 479 (1965) (holding that the right to privacy includes the right of a married couples to purchase contraceptives).
[172] 410 U.S. 113 (1973) (holding that the right to privacy includes a woman's right to an abortion).
[173] For discussion, *see, e.g.*, Note, *The Constitutional Right to Anonymity: Free Speech, Disclosure and the Devil*, 70 YALE L. J. 1085 (1961).
[174] PAUL FEYERABEND, AGAINST METHOD (1988) (arguing that the best strategy for science is "anything goes").
[175] BERTRAND RUSSELL, PROBLEMS OF PHILOSOPHY (1965) (arguing that philosophy tries to "overthrow the tyranny of custom" and that doing so involves considering a wide range of points of view, even the most unpopular).

in various other realms, it is important that all viewpoints be considered. For this to be possible, all views must be expressed. Anonymous speech seems to be required for this to be possible.

ii. Arguments Against Protecting Anonymous Speech

There are, however, various arguments against protecting anonymous speech. One particularly strong argument, made by commentators and judges is that anonymity undermines accountability.[176] Accountability is especially important for preventing crimes and for insuring responsible contributions to public debate. An anonymous speaker can say anything without being worried about the consequences. There are two distinct sorts of consequences of anonymity that are related to accountability about which one might be worried: that anonymity will lead to crimes and that anonymity will undermine free speech rather than further it. I consider these in turn.

In Plato's *Republic*, while discussing what makes someone a just person, Socrates introduced the story of a ring that enabled its wearer to become invisible on demand.[177] Gyges used this ring to seduce the queen, kill the king, and usurp his power. The power of invisibility brought out the true nature of Gyges: without any accountability, Gyges' true and unjust nature was expressed. One might have the same worry about anonymity. Anonymity has the same potential for abuse that invisibility does. Just as an invisible person has the power to steal and murder almost at will, a truly anonymous speaker has the power to libel, slander, and defame at will. Both invisibility and anonymity prevent accountability. According to this argument, if the state grants a broad right to anonymity,

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[176] *See, e.g.*, Note, *Bans on Anonymous Political Leafletting*, 107 HARV. L. REV. 180 (1995); Mark Whitt, McIntyre v. Ohio Elections Commission*: "A Whole New Boutique of Wonderful First Amendment Litigation Opens It's Doors"*, 29 AKRON L. REV. 423 (1996); *see infra* text accompanying notes 187-89 and 197-201 (discussing dissenting opinions).

[177] Plato, *Republic*, Book 2, 359d.

there is little the state can do to prevent people from abusing their ability to speak without accountability. The possibility that crimes or harms are likely to result from this absence of accountability is a strong argument against protecting anonymity.

Anonymity will also, say its critics, undermine rather than improve public debate on important issues. A person who contributes to public debate anonymously lacks the accountability and reliability of a person who is identified. Without knowing who a person is, what her biases are, what her expertise is, and the like, people cannot evaluate a person's contributions to public debate. Because of this, anonymity creates a greater potential for deception and frivolity in public debate. Relatedly, anonymous contributions to public debate will lead more people to feel the need to be anonymous. As such, anonymity breeds more anonymity.

Critics of anonymity also say that it is possible to provide the protections needed by unpopular minorities without granting general protections for anonymity. Anonymity can be permitted and/or provided by the state when necessary to protect someone who needs such protection. Examples of the witness protection program and the rarely but occasionally used practice of masking the identity of certain guests on television news and talk shows suggest that anonymity can be selectively provided to people who truly need it in order to safely contribute to public discussion.[178]

Finally, anonymity undermines the role of free speech plays in contributing to individual speakers' autonomy and sense of self. A person who can only comfortably contribute to public debate by speaking anonymously must feel unsafe in relation to society at large. The thought is that there is intrinsic value to speaking openly for and as

[178] For further discussion of this argument against anonymity, *see* the discussion of Brown v. Socialist Workers '74 Campaign Comm., 459 U.S. 87 (1982), *infra* text accompanying notes 213-15.

oneself. Speaking through the veil of anonymity undermines the contribution that speech makes to a person's sense of self-worth and involvement in a democratic community.

iii. Responses to Arguments Against Anonymity

No one thinks that the protection of anonymous speech should be absolute. A person who commits a crime under the cloak of anonymity may thereby surrender her claim to anonymity. As some forms of anonymous speech can be traced to their source, the state can try to identify and punish someone who uses anonymity to commit a crime. In general, it is possible to balance the need for anonymity against the prevention of crimes.

Further, anonymity does not in fact undermine public discourse. People involved in public debate ultimately have to evaluate claims and arguments independent of the people who made them. If necessary in order to evaluative various claims, a listener can check the facts, ponder and discuss the arguments, and turn to people she knows for help. As a New York state court said in a 1978 case involving anonymous political speech:

> Don't underestimate the common man. People are intelligent enough to evaluate the source of anonymous writing. They can see it is anonymous. . . . They can evaluate its anonymity along with its message. . . . [O]nce they have done so, it is for them to decide what is responsible, what is valuable and what is the truth.[179]

Finally, if the power to determine who does and does not need to be anonymous resides with the state (as it does with the witness protection program), people who wish to express views that are critical of the state will be less likely to express such views. To receive a grant of anonymity from the state, a person would have to reveal herself to the state bureaucracy. Sometimes, however, the state itself may be the source of a person's sense of needing to be anonymous. For anonymity to empower people with unpopular views to speak, the decision to be anonymous should reside in those people, not in the state. The suggestion that general protections for anonymous speech are not needed

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[179] New York v. Duryea, 351 N.Y.S.2d 978, 996 (1978) (quoted by McIntyre v. Ohio Election Comm'n, 514 U.S. 334, 349 n.11 (1995)).

because the state may determine who needs to be anonymous underestimates the extent and nature of the unpopularity that would make a person need to speak anonymously.

B. Supreme Court Doctrine

Three Supreme Court cases have held that the First Amendment guarantee of free speech includes strong protection for anonymous speech, relying, in part, on the theoretical arguments in favor of protecting anonymous speech.[180] *Talley* concerned a Los Angeles municipal ordinance prohibiting the distribution of anonymous handbills.[181] Los Angeles defended its ordinance by saying that the law legitimately aimed at preventing fraud, libel and false advertising. Justice Black, writing for a six-judge majority, overturned the ordinance, arguing that the requirement that the author of a distributed handbill must be identified on the handbill "tends[s] to restrict . . . the freedom of expression"[182] and finding the ordinance to be broader than necessary to fulfill its legitimate aims.[183] Further, the Court observed that anonymity is often used for the "most constructive purposes,"[184] not simply for the nefarious purposes that Los Angeles was trying to prevent. The Court noted that "[p]ersecuted groups and sects from time to time throughout history have been able to criticize oppressive practices and laws either anonymously or not at all."[185] The Court offered the examples of religious minorities in England and the Founding Fathers (in *The Federalist Papers*) that involved people

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[180] Buckley v. Am. Constitutional Law Found., Inc., 525 U.S. 182 (1999); McIntyre, 514 U.S. 334; Talley v. California, 362 U.S. 60 (1960). Most recently, the Court reaffirmed *McIntyre* and *Buckley* in *Watchtower Bible & Tract Society of New York, Inc. v. Village of Stratton*, 122 S. Ct. 2080 (2002).

[181] The Los Angeles ordinance at issue, § 28.06 of the Municipal Code, said, in part, that "no person shall distribute any hand-bill in any place under any circumstances, which does not have printed on the cover, or the face thereof, the name and address" of the people who wrote (or printed) and distributed the handbill.

[182] *Talley*, 362 U.S. at 64.

[183] *Id.*

[184] *Id.* at 65.

[185] *Id*. at 64.

writing anonymously or using pseudonyms with positive results.[186] The *Talley* Court relied in particular on the idea that anonymity protects unpopular minorities and the benefits of free speech to a democracy.

Justice Clark, writing for the dissent, argued that the Constitution says nothing about the freedom of anonymous speech.[187] The ordinance at issue in *Talley*, he said, had the legitimate purpose of preventing fraud, libel, and other crimes. The ordinance, according to the dissent, was constitutionally legitimate in that it only requires a person "who exercises his right to free speech through writing or distributing handbills [to] identity himself just as does one who speaks from the platform."[188] The dissent argued that Talley had made no showing that he would suffer any injury or be subject to any restraint upon his freedom of speech if he had followed the ordinance by identifying himself on the handbill in question.[189] The dissent would have allowed the ordinance to stand because it had a legitimate purpose, it in no way infringed upon a constitutionally protected right, and, as applied, it did not cause any harm to plaintiff or any restraint on his speech. The *Talley* dissent thus appealed to the importance of accountability and emphasized that anonymity should be granted only when necessary.

In *McIntyre v. Ohio Election Commission*, the Court reaffirmed *Talley*.[190] *McIntyre* concerned an Ohio law against anonymous election leaflets.[191] Justice Stevens, writing

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[186] *Id*. at 65.
[187] *Id*. at 67 (Clark, J. dissenting).
[188] *Id.* at 71 (Clark, J. dissenting).
[189] *Id*. at 69 (Clark, J. dissenting).
[190] McIntyre v. Ohio Election Comm'n, 514 U.S. 334 (1995).
[191] The Ohio statute at issue, OHIO REV. CODE § 3599.09(a) (1988), prohibits the writing, printing, posting or distribution of material designed to influence an election "unless there appears on such form of publication . . . the name and residence of [an officer] . . . of the organization . . . or person" who issues the material.

for a six-judges majority (Justice Thomas concurred in judgment only[192]), argued that the prohibition on anonymous leaflets is a direct and impermissible regulation of the content of speech. Anonymity is a rhetorical tool for a writer; a writer's decision to make use of this tool by remaining anonymous is protected by the First Amendment.[193] The identity of the speaker is a part of a text's content and to prohibit anonymity is a constitutionally impermissible restriction on content. Further, advocates of unpopular causes are in particularly precarious situations; as a result, their viewpoints are especially burdened by laws restricting anonymous speech.[194] Anonymity, Stevens forcefully concluded, "is a shield from the tyranny of majority."[195] Without the possibility of speaking anonymously, unpopular viewpoints may be silenced. Protecting anonymity thereby "exemplifies the purpose behind . . . the First Amendment, . . . to protect unpopular individuals from retaliation—and their ideas from suppression—at the hand of an intolerant society."[196] The *McIntyre* Court thus emphasized the importance of protecting anonymous speech for preserving content-neutrality in law regulating speech.

Justice Scalia, in a dissent joined by Chief Justice Rehnquist, echoed Clark's dissent in *Talley*. Scalia argued that there is no "right-to-be-unknown while engaging in electoral politics"[197] and no general right to anonymity.[198] According to Scalia, the majority's opinion creates a new right that is unclear, vague, and leads to "silliness."[199] The Ohio law, Scalia argued, serves several important purposes: it promotes truthfulness in

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[192] *McIntyre*, 514 U.S. at 358 (Thomas, J., concurring in judgment only) (arguing that the Ohio statute should be overturned because the drafters of the First Amendment clearly believed that the right to publish anonymous political writings was included under the freedom of press).
[193] *McIntyre*, 514 U.S. at 342.
[194] *Id*. at 345, note 8.
[195] *Id.* at 357.
[196] *Id.*
[197] *Id.* at 371 (Scalia, J. dissenting).
[198] *Id.* at 379 (Scalia, J. dissenting).

campaign literature, civility in campaigns, and ensures accountability.[200] Although Scalia allowed that anonymity is required by the First Amendment when needed to "avoid threats, harassment, or reprisals,"[201] he argued that the general right to anonymity created by the majority in *McIntyre* is too broad with respect to this purpose.

Both *Talley* and *McIntyre* involved rather narrow statutes, but in each the Court gave a defense of anonymous speech that appealed to general arguments in favor of the right to anonymous speech and answered the respective dissents in part with theoretical arguments for protecting anonymous speech. Given the present composition of the Court compared to the *McIntyre* Court as well as the Court's commitment to *stare decisis*, it seems unlikely that *McIntyre* will be overturned or that the protections given to anonymous speech will be weakened in the near future.

This prediction is supported by the recent case of *Buckley v. American Constitutional Law Foundation, Inc.*[202] in which all nine justices reaffirmed the importance of anonymous speech. At issue in *Buckley* were various restrictions on the process for petitioning to get voter initiatives onto the ballot in Colorado. Among these restrictions was the requirement that a person circulating a petition to get an initiative on the ballot must wear a badge stating his or her name, status as "volunteer" or "paid," and, if paid, the name and telephone number of his or her employer.[203] The five-judge majority compared Colorado's badge requirement to the ordinance at issue in *McIntyre* and found that the

> restraint on speech . . . [involved in the badge requirement] is more severe [than that involved in *McIntyre* because p]etition circulation is [a] less fleeting encounter [in that] the circulator must endeavor to persuade electors to sign the petition. The injury to speech is heightened for the petition

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[199] *Id.* at 381 (Scalia, J. dissenting).
[200] *Id.* at 382-83 (Scalia, J. dissenting).
[201] *Id.* at 385 (Scalia, J., dissenting).
[202] 525 U.S. 182 (1999).
[203] COLO. REV. STAT. § 1-40-112(2)(1999).

> circulator because the badge requirement compels personal name identification at the precise moment when the circulator's interest in anonymity is greatest.[204]

Although the remaining four justices disagreed with some aspects of the majority's reasoning concerning other parts of Colorado's statutes, Justice O'Connor (joined by Justice Breyer), Justice Thomas, and Chief Justice Rehnquist, in separate opinions, concurred with the majority's evaluation of the Colorado badge requirement. Although sharply divided on other issues, the Court was unanimous in finding that the Colorado badge requirement was unconstitutional because of its requirement that circulators display their names.[205]

While the protection for anonymous speech that emerges from *Talley*, *McIntyre*, and *Buckley* prevents the state from requiring each individual to identify herself when speaking in public, the protection of anonymous speech is not absolute. For example, the Court has suggested that it is consistent with free speech to require a corporation engaged in political speech to identify itself. In *First National Bank of Boston v. Belotti*, the Court said, "Identification of the source of [corporate] advertising may be required as a means of disclosure so that people will be able to evaluate the arguments to which they are being subjected."[206] The rule of *Belotti* seems to be that the protections for anonymous speech do not extend to commercial speech. The Supreme Court has not, however, reached the question of the extent to which the protection of anonymous speech extends to non-political speech.

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[204] *Buckley*, 525 U.S. at 199.

[205] *Id.* at 217 (O'Connor, J., concurring in judgment in part and dissenting in part) ("Requiring petition circulators to reveal their names while circulating a petition directly regulates the core political speech of petition circulators."); *id.* at 212 (Thomas, J., concurring in judgment); *id.* at 232 (Rehnquist, C.J., dissenting) (citing *McIntyre*).

[206] First Nat'l Bank of Boston v. Belotti, 435 U.S. 765, 792 n.32 (1978) (overturning a Massachusetts state law prohibiting corporations from making contributions to influence the vote on ballot questions that do not "materially affect" the corporation on the grounds

C. Conclusion

Current Supreme Court jurisprudence clearly protects anonymous political speech under the First Amendment. To determine whether or not a law is consistent with the right to free speech, the Court will look, in part, to whether and how such a law protects anonymous speech. In doing so, the Court will look to the theoretical arguments to support protecting anonymous speech, especially those relating to the anonymous speech of unpopular minorities or of those with unpopular views who risk harm when they speak openly about things unpopular. In light of the social situation of lesbians and gay men and the saliency of the closet to that situation, lesbians and gay men qualify as the sort of unpopular minorities whose speech deserves the protections anonymity affords. The Parts that follow develop this line of thought in the context of cyberspace: given the relative anonymity of speech in cyberspace and the role that such speech plays for gay men and lesbians, laws that restrict speech in cyberspace should be carefully examined for their effect on the speech of sexual minorities.

VI. Closetspeech and the First Amendment

In this Part, I argue that central to lesbians and gay men being able to fully exercise their right to free speech is not having to reveal their sexual orientations in order to fully participate in public discourse. Put somewhat differently, central to the free speech rights of gay men and lesbians is that, when they speak as a gay men or lesbian, they be allowed to speak anonymously, that is, to speak using a pseudonym or in some other way that

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that doing so would "abridge[] expression that the First Amendment was meant to protect.")

hides some aspect of their identity. As a shorthand, I call all such speech *closetspeech*.[207] I argue in what follows that, although the protections properly afforded closetspeech are not absolute, the social and legal facts of the closet, the First Amendment protections of anonymous speech, and the right to association together entail that closetspeech is at the core of the First Amendment. Attempts to restrict closetspeech should thus be subject to heightened scrutiny.

A. Closetspeech as Anonymous Speech

Starting in 1990 and continuing for a couple of years thereafter, a leaflet titled "Queers Read This" was distributed at lesbian and gay marches and in lesbian and gay venues.[208] The flyer indicated that it was written and published "anonymously by queers." The leaflet said, in part,

> How can I tell you[?] How can I convince you, brother, sister, that your life is in danger[?] That everyday you wake up, relatively happy, and a functioning human being, you are committing a rebellious act. You as an alive and functioning queer are a revolutionary. There is nothing on this planet that validates, protects or encourages your existence. It is a miracle that you are standing here reading these words. You should by all rights be dead. . . .
>
> Straight people are your enemy. They are your enemy when they don't acknowledge your invisibility and continue to live in and contribute to a culture that kills you. . . . I hate Jesse Helms. I hate Jesse Helms so much I'd rejoice if he dropped down dead. If someone killed him I'd consider it his own fault. I hate Ronald Reagan too, because he mass-murdered my people for eight years. . . . I hate him for mocking our grief. I hate the fucking Pope . . . and I hate the whole fucking Catholic Church . . .[209]

Despite its wide public distribution and its frequent use of "dirty words" and provocative speech, to my knowledge, no one was prosecuted for the publication or distribution of this anonymous flyer. In light of *Buckley*, *McIntyre*, *Talley*, and the discussion in Part VI above, this is the right result. The people who published and

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[207] Kang, *supra* note 8, refers to a similar phenomenon in cyberspace with respect to race as "cyber-passing."

[208] Anonymous, *Queers Read This; I Hate Straights* (1990), reprinted in WE ARE EVERYWHERE: A HISTORICAL SOURCEBOOK OF GAY AND LESBIAN POLITICS 773 (Mark Blasius and Shane Phelan, eds. 1997).

[209] *Id*. at 773-774, 776.

distributed this controversial political leaflet had the right to do so and to do so anonymously. The discussion of anonymous speech in Part VI shows that when sexual minorities speak anonymously as lesbians, gay men, and bisexuals, their speech is at the core of the speech protected by the First Amendment.

Even the justices who dissented in *McIntyre* would accept a specific form of this argument. While the dissenters in *McIntyre* denied that there is a general right to speak anonymously,[210] they allowed that a person is entitled to speak anonymously if necessary to avoid "threats, harassment, or reprisals" that might result if a person speaks non-anonymously.[211] The *McIntyre* dissenters seem to have had in mind instances like the following. The Federal Election Campaign Act of 1971 required that political candidates and political action committees record and make available to the Federal Election Commission the name and address of every person who contributes more than ten dollars a year to them.[212] In *Buckley v. Valeo*, the Court held that these requirements were constitutional because the government's interest in fair elections outweighs the possible infringement of the First Amendment rights of the parties involved.[213] However, the Court held out the possibility that minority parties might be exempted from these disclosure requirements if they could "show a reasonable probability that the compelled disclosure of a party's contributors' names will subject them to threats, harassment or reprisals from either government officials or private parties."[214] In *Brown v. Socialist Workers '74 Campaign Committee*, the Court granted just such an exemption. The Court

[210] *McIntyre*, 514 U.S. at 371 (Scalia, J. dissenting).
[211] *Id.* at 380.
[212] 2 U.S.C.A. § 456 (1974).
[213] Buckley v. Valeo, 424 U.S. 1 (1976).
[214] *Id*. at 74.

unanimously held that the risk of "threats, harassment or reprisals" was serious enough to exempt the Socialist Workers Party from disclosing the names of its contributors.[215]

Although both dissenters in *McIntyre* (Scalia and Rehnquist) also dissented in *Romer*, perhaps they would realize that in certain contexts, for reasons similar to those at play in *Socialist Workers*, lesbians and gay men might be subject to "threats, harassment or reprisals" for being open about their sexual orientation, for advocating lesbian and gay rights, or for engaging in provocative political speech (such as that contained in "Queers Read This"). Even the *McIntyre* dissenters should agree that lesbians and gay men are protected by the First Amendment when they speak anonymously about matters relating to lesbian and gay sexuality. Even if they do not, there remains a majority of the Court that would agree that closetspeech, as a type of speech on a controversial topic that is likely to inspire negative reactions, is at the heart of the First Amendment.

The protections afforded anonymous speech in general and the place that such speech has at the core of the First Amendment entail that closetspeech, the speech of lesbians and gay men from the closet, is near the core of the First Amendment. Further, even those who deny that anonymous speech has a special place in the First Amendment should allow that lesbians and gay men, because of their social situation, deserve special protections for their anonymous speech. For many gay men and lesbians, especially for lesbians and gay men living in the closest, lesbian and gay youth like Emmalyn Rood and Jeffrey, and those living in isolated contexts like rural areas or the military, cyberspace is an important, perhaps vital context for them to express themselves anonymously.

B. No Flaunting, "Don't Ask, Don't Tell" and Similar Rules

In Part III, I argued that it is a fairly well-entrenched legal fact that lesbians and gay men receive greater protection when their sexual orientations are kept private. For

[215] Brown v. Socialist Workers '74 Campaign Comm., 459 U.S. 87 (1982).

example, since the 1970's, judges, legislators, and officials of the executive branch have articulated rules that allow people to discuss homosexuality generally and/or to be homosexual without losing their government jobs. Under such rules, a lesbian or gay man is protected so long as he or she does not make his or her sexual orientation public. With respect to speech rights, according to such rules, the government cannot restrict the speech of a gay man or lesbian so long as he or she keeps quiet about his or her sexual orientation. For example, under the military's policy concerning homosexuality, so long as you "don't tell" (and don't engage in "homosexual conduct"), you will supposedly not be discharged from the military because of your homosexuality.[216] This policy did not develop in a vacuum. It is a well-accepted social custom that if a person keeps quiet about his or her sexual orientation, then he or she will face fewer problems with respect to his or her homosexuality.[217] Singer lost his job for "flaunting" his homosexuality,[218] Rowland for not keeping her bisexuality to herself,[219] and Shahar for "publicizing" her relationship with another woman.[220] If they had kept quiet about their sexual orientations, perhaps they would not have had the employment problems that they did; their speech would have been protected so long as they remained in the closet.

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[216] 10 U.S.C. § 654.

[217] There are still various possible problems that one might face even if one remains closeted. Insofar as some people know one's sexual orientation, there is a risk of being "outed" (that is, of having one's homosexuality or bisexuality revealed). For discussion of outing, see Gross, *supra* note 83; Mohr, *supra* note 83; John Elwood, *Outing, Privacy and the First Amendment*, 102 YALE L. J. 747 (1992). *See also* discussion of Sipple v. Chronicle Publishing Co., 154 Cal.App.3d 1040 (Cal. Ct. App. 1984), *infra* text accompanying notes 228-31.

[218] Singer v. U.S. Civil Serv., 530 F.2d 247 (9th Cir. 1976).

[219] Rowland v. Mad River Local Sch. Dist., 730 F.2d 444 (6th Cir. 1984).

[220] Shahar v. Bowers, 114 F.3d 1097 (11th Cir. 1997) (en banc).

I am not defending the holdings of *Singer*, *Rowland*, and *Shahar*, all of which are problematic from both an ethical and an equal protection perspective.[221] Rather, I am pointing to a thread that runs through a series of judicial decisions—many of which have results that are not especially friendly to lesbians and gay men—namely that lesbians and gay men receive greater First Amendment protection when they stay in the closet. This thread dovetails with a commonly-held ethical intuition that lesbians and gay men who keep quiet about their sexual orientation should be left alone by the law. This thread and the social intuition to which it is related are (as I shall argue below[222]) weak, but they are strong enough to ground a free speech right of significance to lesbians and gay men, namely the protection of closetspeech.

According to this line of thought, one source for the protection of closetspeech is that, over the years, society and the state, through the actions of its various branches, have created and sustained the closet. The laws, executive orders, and court rulings that created the legal institution of the closet in so doing created an obligation to protect people in the closet and their free speech rights. For example, the Ninth Circuit in *Singer*, by indexing the extent of Singer's First Amendment protections to whether he kept his homosexuality discreet or flaunted it,[223] essentially said that Singer's speech would be protected by the First Amendment so long as he stayed in the closet. To some extent, when the state takes away the free speech rights of some homosexuals (those who flaunt their non-heterosexuality), it implicitly supports the speech rights of others (those who keep their sexual orientation quiet).

C. The Right to Association

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[221] In fact, in Part VII, *infra*, I will argue that, in light of the considerations I discussed below, some aspects of the holdings of these cases are self-undermining.
[222] *See infra* Part VII, especially text accompanying note 254.
[223] *Singer*, 530 F.2d 247.

The Supreme Court has interpreted the First Amendment as providing strong protections for the right to free association, especially when such association has political and expressive purposes. The Court articulated this right in *NAACP v. Alabama*.[224] As part of an attempt to prevent the NAACP from operating there, Alabama demanded the names and addresses of the association's Alabama members. The NAACP refused and was fined one hundred thousand dollars (a great deal of money in the 1950's). The Supreme Court held that Alabama's request for the membership list was unconstitutional because the "compelled disclosure of affiliation with groups engaged in advocacy" restrains "the freedom to engage in association," "an inseparable aspect of the liberty [involved in] . . . the freedom of speech."[225] Further, the court held that

> compelled disclosure of [the NAACP's] membership is likely to affect adversely the ability of [the NAACP] and its members to pursue their collective effort to foster [their] beliefs . . . in that it may induce members to withdraw from the [NAACP] and dissuade others from joining it because of fear of exposure of their beliefs through their associations.[226]

Similar associational rights are involved in closetspeech. A person has a right to be a member of an association that advocates lesbian and gay rights, to subscribe to a gay or lesbian magazine, or to otherwise engage in associational activities related to sexual minorities without the risk of exposure. If a person's involvement in associational activities relating to her status as a sexual minority or her involvement in the lesbian and gay community puts her at risk of exposure or harm, then she would be more likely to restrict her involvement in the lesbian and gay community and, perhaps, retreat further into the closet. This shows that closetspeech is closely connected to free association.

Similarly, the First Amendment entails that the state cannot condition a person's right to speak on making her affiliations or beliefs known. For example, in *Shelton v. Tucker*,

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[224] 357 U.S. 449 (1958).
[225] *Id.* at 462. *See also* Bates v. Little Rock, 361 U.S. 516 (1960).
[226] *NAACP*, 357 U.S. at 462-463.

the Supreme Court held that the state could not require teachers to report all of the organizations with which they were affiliated because such a requirement would be an extreme and unjustified interference with the teacher's associational freedom.[227] The Court's holding in *Shelton* seems in tension with the holding of *Acanfora* (which did not cite *Shelton*, despite its apparent relevance). To require Acanfora to reveal his membership in a gay organization seems to violate his First Amendment right to free association. For the state to compel a person to come out of the closet similarly violates the First Amendment. Just as free association is central to the First Amendment, so too is the protection of closetspeech.

D. *Sipple v. Chronicle Publishing Co.*

Protection of closetspeech, while central to the First Amendment, is not absolute. Rather, an individual has a claim against the state not to force him or her to come out and not to condition a person's speech rights on whether or not she comes out of the closet. The First Amendment protection of closetspeech does not, in general, reach all actions of private individuals or non-state actors. Consider the case involving the outing of Oliver Sipple.

In 1975, there was an assassination attempt on President Gerald Ford during which Oliver Sipple grabbed the arm of the president's would-be assailant, preventing Ford from being harmed. Subsequently, Sipple was hailed as a hero in the national press. Various articles, including one published by the *San Francisco Chronicle,* suggested that Sipple was gay, an implication that came as a surprise to some members of Sipple's family (and, some have speculated, prevented Ford from inviting Sipple to the White House). Sipple sued *The Chronicle,* the reporter who wrote the article in *The Chronicle,*

[227] 364 U.S. 479 (1960).

and others charging a tortious invasion of privacy.[228] In upholding the trial court's grant of the defendants' motion for summary judgment, a California state appeals court identified three elements for a tort of invasion of privacy: (a) the facts disclosed must be private; (b) the facts must be disclosed in a public fashion; and (c) the facts disclosed must be offensive and objectionable to a reasonable person with ordinary sensibilities.[229] The court also noted that even a tortious invasion of privacy is exempt from liability if the facts published are true and newsworthy.[230] The court implicitly granted that the facts were disclosed in a public fashion and that they were offensive and objectionable to a reasonable person but went on to hold that Sipple's homosexuality was already public in that he "spent a lot of time in . . . well-known gay sections of San Francisco; that he frequented gay bars and other homosexual gatherings in [a variety of] cities; . . . that his friendship with . . . [a] prominent gay was well-known . . . ; and that his homosexual association and name had been reported in gay magazines . . . several times before [the assassination attempt]."[231] Further, the court held that Sipple's homosexuality was newsworthy. The court described Sipple as an "involuntary public figure" who, when he became a public figure, lost certain privacy protections that he would have had as a private citizen. For this reason, the First Amendment protections of Sipple's closetspeech did not trump the *Chronicle*'s free press rights.

E. Conclusion

In sum, the First Amendment protects closetspeech. Given the ways in which the legal institution of the closet is created and maintained by the state, it is unconstitutional to require lesbians and gay men to come out in order to exercise their right to free speech.

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[228] Sipple v. Chronicle Publishing Co., 154 Cal.App.3d 1040 (Cal. Ct App. 1984).
[229] *Id.* at 1045.
[230] *Id.* at 1046.
[231] *Id.* at 1047-1048.

Accordingly, just as the First Amendment protects anonymous speech, it protects the anonymous speech of lesbians and gay men. The protection of closetspeech is especially robust because of the unique social situation of lesbians and gay men. In light of the role cyberspace plays for lesbians and gay men—namely, it provides a context for them to speak freely, without identifying themselves, and without having to be physically present to communicate with others—laws that restrict the closetspeech of lesbians and gay men in cyberspace warrant careful and critical judicial evaluation.

VII. Coming Out as Political Speech

Although lesbians, gay men and other sexual minorities are in some ways safer and receive greater First Amendment protection when they are closeted, increasingly they are coming out of the closet and speaking out about issues of concern. When lesbians and gay men speak *outside* the closet, what happens to their free speech rights? In this Part, I argue that when lesbians and gay men speak *as* open lesbians and gay men—what I call *outspeech* (partly to emphasize the contrast with closetspeech)—their speech is political and thus deserving of strong protection under the First Amendment. I shall make this argument in two different ways. First, I argue that the act of coming out is political speech and thus it is at the heart of the First Amendment. Second, I build on the argument of Part VI. Given that closetspeech is paradigmatic of the speech that deserves the greatest protection of the First Amendment, it would be constitutionally impermissible viewpoint or content-based discrimination if outspeech, the speech of open lesbians and gay men, was not similarly protected.

A. "The Love That Dare Not Speak Its Name" Speaks

Not more than a hundred years ago, homosexuality was dubbed the "love that dare not speak its name." Today, whether to celebrate or deride it, people frequently discuss

homosexuality in public forums, on television, in court rooms, in legislatures, and in almost every other context. The "love that dare not speak its name" is now unwilling to keep quiet. In fact, issues relating to homosexuality are so contentious that Justice Scalia said there is a "culture war"[232] in this country about homosexuality. Given this and the social and legal situation of lesbians and gay men discussed in Part III above, *coming out*—openly identifying as a lesbian, gay man, or bisexual—is a form of political speech.[233] By coming out, one is effectively saying that being lesbian or gay is nothing to be ashamed of and, as such, coming out deserves the strongest protection of the First Amendment. More generally, *outspeech*—speaking as an open lesbian or gay mean—is political speech on a topic of great public concern. Because outspeech is political speech, any state interference with such speech deserves the most exacting scrutiny of the courts. As the discussion that follows will show, courts have held that outspeech is political speech and thus deserving of the strongest protection under the First Amendment.

In 1980, Aaron Fricke, a high school student in Rhode Island, informed his principal of his desire to bring a same-sex date to the school's prom. The principal prohibited Fricke from doing this on the grounds that the presence of a same-sex couple would disrupt the prom and create a threat of physical harm to the couple and others. Fricke filed suit in federal court. The district court held that Fricke's act of attending the prom with another man was a "political statement" and, hence, was protected as speech under

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[232] Romer v. Evans, 514 U.S. 620, 652 (Scalia, J, dissenting).

[233] *See, e.g.*, Janet Halley, *The Politics of the Closet: Towards Equal Protection for Gay, Lesbian and Bisexual Identity,* 36 UCLA L. REV. 915 (1989); Bobbi Bernstein, *Power, Prejudice, and the Right to Speak: Litigating "Outness" under the Equal Protection Clause*, 47 STAN. L. REV. 269 (1995); David Cole & William Eskridge, Jr., *From Hand-Holding to Sodomy: First Amendment Protection of Homosexual (Expressive) Conduct*, 29 HARV. C.R.-C.L. L. REV. 319 (1994); Kenneth Karst, *Boundaries and Reasons: Freedom of Expression and the Subordination of Groups*, 1990 U. ILL. L. REV. 95, 117-20 (1990).

the First Amendment.[234] The court held that the principal's reasons for not allowing Fricke to bring a same-sex date to the prom failed to satisfy the "least restrictive means" prong of the test set forth in *U.S. v. O'Brien.*[235] Further, the court held that the primary justification given by the principal for restricting Fricke's political speech—the threat of a violent or hostile reaction to his speech—is almost never an appropriate justification for restricting speech.[236]

A similar view of the political nature of outspeech was expressed in the late 1970's when a group of four individuals and two gay rights organizations sued Pacific Telephone and Telegraph (PTT) under a California state law preventing employers from interfering with the political activities of their employees.[237] The California Supreme Court held that this law applied to open homosexuals:

> [T]he struggle of the homosexual community for equal rights, particularly in the field of employment, must be recognized as a political activity. Indeed the subject of the rights of homosexuals incites heated political debate today . . . The aims of the struggle for homosexual rights, and the tactics employed, bear a close analogy to the continuing struggle for civil rights waged by blacks, women, and other minorities.
>
> A principle barrier to homosexual equality is the common feeling that homosexuality is an affliction which the homosexual worker must conceal from his employer and his fellow workers. Consequently one important aspect of the struggle for equal rights is to induce homosexual individuals to "come out of the closet," acknowledge their sexual preferences, and to associate with others in working for equal rights.[238]

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[234] Fricke v. Lynch, 491 F. Supp. 381 (D. R.I. 1980).

[235] 391 U.S. 367 (1968) (upholding against a free speech challenge a statute prohibiting the mutilation or destruction of a selective service registration card).

[236] *Fricke*, 491 F. Supp. at 387 (citing Gregory v. Chicago, 394 U.S. 111 (1969) (holding that First Amendment protects a peaceful and orderly political demonstration even if onlookers become unruly because of the demonstration) and Terminiello v. Chicago, 337 U.S. 1 (1949) (holding that a city ordinance prohibiting the breach of peace invaded First Amendment when used to prosecute a person whose speech invited public dispute and aroused anger)).

[237] No employer shall make, adopt or enforce any rule, regulation or policy (a) forbidding or preventing employees from . . . participating in politics . . . [or] (b) controlling or directing or tending to control or direct the political activities or affiliations of employees.
No employer shall coerce or influence or attempt to coerce or influence his employees through or by means of threat of discharge or loss of employment to adopt or follow or refrain from adopting or following any particular course or line of political action or political activity.
CAL. LAB. CODE §1101-1102 (2001).

[238] Gay Law Students Ass'n v. Pac. Tel. & Tel., 595 P.2d 592, 616 (Cal. 1979).

In light of this, the court held that PTT's policy of discriminating against what the court called "manifest" homosexuals[239]—namely "open" homosexuals, that is, people who "make an issue" of their homosexuality—violated California's labor code.

The courts in *Fricke* and *PTT* both accepted that coming out of the closet and being out as a lesbian or gay man is political speech. Together, these two cases stand for the view that outspeech is the sort of speech that is at the core of the First Amendment.[240] Outspeech, like other political speech, especially speech concerning issues of current and contentious public debate, deserves the highest protection of the First Amendment and is paradigmatic of the type of speech that the First Amendment is designed to protect. Any attempt by the state to constrain or interfere with outspeech is highly suspect and should be carefully scrutinized by courts.

B. Viewpoint Discrimination

The Supreme Court has distinguished between content-based and content-neutral laws in evaluating the constitutionality of laws that regulate speech. A content-based law is one that regulates speech on the basis of its subject matter or whether it expresses a certain viewpoint. Such laws are subject to strict scrutiny and are typically struck down. For example, in *Police Department v. Mosley*,[241] the Court struck down a Chicago law prohibiting all picketing outside of a school except peaceful picketing concerning a labor dispute.[242] The Court held that the law impermissibly "restrict[ed] expression because of

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[239] *Id*. at 596.

[240] This view is further supported by a substantial body of legal and philosophical scholarship. *See, e.g.*, RICHARD MOHR, GAYS/JUSTICE (1988); and *supra* note 233.

[241] 408 U.S. 92 (1972).

[242] The ordinance at issue, CHICAGO, ILL., CODE § 193-1, says that a person commits disorderly conduct when he knowingly "pickets or demonstrates on a public way within 150 feet of any primary or secondary school building . . . provided that this subsection does not prohibit the peaceful picketing of any school involved in a labor dispute . . ."

its message, its ideas, its subject matter or its content."[243] Similarly, in *R.A.V. v. St. Paul*,[244] the Court struck down a St. Paul city ordinance prohibiting the placement of certain objects, symbols, and the like that arouse "anger, alarm, or resentment in others on the basis of race, color, creed, religion or gender."[245] The Court held that the ordinance was "facially unconstitutional in that it prohibits otherwise permitted speech solely on the basis of the subjects the speech addresses."[246]

The distinction between content-based and content-neutral laws can be coupled with the conclusion of Part VI—that laws restricting closetspeech cut against the central aims of the First Amendment—to provide further support for the conclusion that outspeech is paradigmatic of the speech protected by the First Amendment. A state prohibition of outspeech but not closetspeech would be a content-based restriction on speech. Such a restriction would, for this reason, deserve strict scrutiny.

This seemingly straightforward argument is open to three objections. First, one might reply that while content-based restrictions on speech are often held to be unconstitutional, status-based restrictions on speech are sometimes permissible. For example, in *Regan v. Taxation with Representation of Washington*, the Court held that it was not a content-based restriction on speech to withhold tax benefits from any organization that lobbies Congress unless it is a veterans' organization.[247] That the restriction applied to only non-veterans' groups was held to be a status-based restriction rather than viewpoint-based restriction.[248] Using similar logic, perhaps the differential treatment between the speech

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[243] *Mosley*, 408 U.S. at 95.
[244] 505 U.S. 377 (1992).
[245] ST. PAUL, MINN., CODE § 292.02 (1990).
[246] *R.A.V.*, 505 U.S. at 381.
[247] Regan v. Taxation with Representation of Wash., 461 U.S. 540 (1983).
[248] *Id.* at 548. *See also* Madsen v. Women's Health Ctr., 512 U.S. 753, 763 (1994) (holding that an injunction that restricted the speech of anti-abortion protestors was not a viewpoint based restriction).

of open lesbians and gay men and the speech of closeted lesbians and gay men might be seen as status based rather than viewpoint based.

This line of argument is not promising. Many instances of viewpoint-based restrictions on speech can be recast as isomorphic status-based restrictions on speech. For example, the law in *Mosley*[249] could be recast to allow only union members (a status-based regulation) to picket rather than to allow picketing concerning labor disputes (a content-based regulation). Such a status-based law would presumably be unconstitutional since it has the same effect on speech as the law overturned in *Mosley*; a content-based restriction of speech does not become permissible simply because it refers to a speaker's status. Even allowing that the line between a status-based and a content-based regulation is unclear, a regulation of speech that distinguishes between outspeech and closetspeech is, at root, based on content because it distinguishes speech on the basis of whether or not the speaker is open about his or her sexual orientation.

A second criticism of my argument that a state prohibition of outspeech but not closetspeech would be an impermissible content-based restriction appeals to the Supreme Court's decision in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, in which the court held that the state could not require the organizers of Boston's St. Patrick's Day parade to allow a group identified as lesbian and gay Irish people to march in the parade.[250] While the parade organizers said they were willing to allow lesbians and gay men to march in the parade, they were not willing to let them march under a banner identifying them as an Irish-American gay, lesbian, and bisexual group.[251] The Court held that the First Amendment gives the parade organizers the right to control

[249] 408 U.S. at 91.
[250] Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, 515 U.S. 557 (1995).
[251] *Id.* at 572.

the content of their parade as they see fit: they may decide to include only those groups and individuals that contribute the particular expressive content to the parade that they desire. In *Hurley*, the Court seems to accept a content-based distinction insofar as it says that it is legitimate for the parade organizers to distinguish between gay and lesbian marchers who are not identified as gay and lesbian, on the one hand, and gay and lesbian marchers who are so identified, on the other. If this distinction is legitimate in the context of *Hurley*, perhaps the distinction between outspeech and closetspeech is illegitimate in other contexts as well.

Hurley can, however, be distinguished on several grounds. First, the Court did not address the question of whether the parade organizers were state actors (it was accepted that they were not).[252] In light of this, *Hurley* can be distinguished from cases like *Singer*, *Shahar*, and *Acanfora* that clearly involve state action. It does not follow from the claim that private actors like Hurley and the South Boston Allied War Veterans Council, the organization he represented, may make a distinction between outspeech and closetspeech that a state actor can make such a distinction without thereby engaging in impermissibly viewpoint discrimination.

Further, it is not clear to what extent *Hurley* survives *Romer*.[253] Consider whether the Court would have ruled differently if parade organizers had refused to let a group of African-American marchers join the parade. Would the fact that racial classifications are subject to strict scrutiny have affected the outcome of such a case? If so, perhaps the Court's acknowledgement in *Romer* that sometimes classifications based on sexual orientations are impermissible would undermine the holding of *Hurley.*

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[252] *Id.* at 566.

[253] *See, e.g.*, Darren Hutchinson, *Accommodating Outness: Hurley, Free Speech and Gay and Lesbian Equality*, 1 UNIV. PA. J. CONST. L. 85 (1998) (arguing that restrictions on being openly gay, as in *Hurley*, are in tension with equality for sexual minorities).

A final criticism of my argument that the First Amendment protects outspeech is that this argument both *relies on* and *undermines* the logic of *Singer* and similar cases and is thereby an illegitimate form of argument. Recall, however, that my strategy here is to build on the conclusion of Part VII that the First Amendment protects closetspeech. In cases like *Singer*, courts essentially held that closetspeech is protected but outspeech is not. My argument here is that to protect closetspeech but not outspeech is an impermissible form of viewpoint regulation. I am taking one part of the holding of cases like *Singer* (that closetspeech is protected) and showing that, in light of other well-established principles of First Amendment doctrine (e.g., the rule against content-based regulation of speech), another part of the holding of such cases (that outspeech can be regulated) is undermined. To borrow a metaphor from Ludwig Wittgenstein, I am "throw[ing] away the ladder after [I have] climbed up on it."[254]

C. Conclusion

The preceeding part concluded that the First Amendment protects closetspeech and, thus, in light of the role cyberspace plays for lesbians and gay men, that the First Amendment strongly protects closetspeech in cyberspace. A parallel conclusion applies here. The First Amendment protects outspeech in virtue of its political character. Laws that constrain outspeech are subject to strict scrutiny under the First Amendment. In light of the role that cyberspace plays for lesbians and gay men, attempts to restrict outspeech in cyberspace should also be strictly scrutinized.

VIII. Conclusion

In Part V, I argued that anonymous speech, especially anonymous speech on matters of public controversy, is paradigmatic of the speech at the heart of the First Amendment.

[254] LUDWIG WITTGENSTEIN, TRACTATUS LOGICO-PHILOSOPHICUS 189 (1971).

The same arguments apply in cyberspace. If a present-day McIntyre decided to post on a web site her material arguing against a referendum on a school tax or to send electronic mail to her neighbors encouraging them to vote on a referendum, her "cyber-pamphleteering" would deserve the same sort of First Amendment protection as the traditional pamphleteering at issue in *McIntyre*. The protections afforded anonymous speech extend to cyberspace.[255] Further, the especially strong protection afforded the anonymous speech of unpopular minorities should be extended to the speech of lesbians and gay men in cyberspace.

As a illustration, consider the rest of Timothy McVeigh's story. After he discovered that AOL had illegally released his name to the Navy, McVeigh sent email messages to every AOL user with the word "gay" in his or her member profile. In his email message, McVeigh told the story of how AOL mistreated him. As news of what happened to McVeigh spread, many AOL users and others wrote to AOL, the White House, the Pentagon, and Congress. The dramatic response to McVeigh's "mass" email encouraged him to sue the Navy and ensured that his case would receive widespread media attention. It also forced AOL to clarify its policy with respect to the privacy of its customers.[256]

McVeigh's cyber-activism is a vivid example of the role cyberspace can play in the organization of political and social change in the lesbian and gay community. McVeigh's cyber-activism would not have been as effective as it was (if it would have occurred at all) if lesbians and gay men did not have the opportunity to communicate anonymously which cyberspace affords them. Specifically, without the capability to anonymously identify as "gay" or "lesbian" in their AOL profiles, far fewer people would list their sexual orientation in such a manner. If they did not self-identify in this way, the type of

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[255] *See, e.g.*, Tien, *supra* note 167; Branscomb, *supra* note 167.
[256] Steve Friess, *Cyberactivism*, THE ADVOCATE, Mar. 2, 1999, at 35.

cyber-activism in which McVeigh engaged would have been much less effective or impossible.

That the speech in cyberspace of lesbians, gay men, and other sexual minorities deserves strong protection does not entail that all anonymous speech in cyberspace is protected by the First Amendment any more than that all anonymous speech outside of cyberspace is. In fact, given the growth of computer viruses[257] and cyberstalking,[258] one might argue that the dangers of anonymous speech in cyberspace are greater than the dangers of anonymous speech in other contexts. Accountability is needed to prevent speakers in cyberspace from sending destructive viruses to other users and anonymity does undermine such accountability. This fails as a general argument against anonymity in cyberspace for the same reasons that such arguments fail in other contexts. Computer crimes can be deterred and punished without prohibiting anonymity in cyberspace. Anonymity in cyberspace deserves at least as much protection as anonymity in the physical (that is, non-cyberspace) world.

Further, because of the special role that cyberspace plays for lesbians and gay men, attempts to regulate cyberspace by preventing anonymity will have a differential impact on lesbians and gay men. The arguments of Parts VI and VII entail that, in the current social situation, the speech of lesbians and gay men—whether outspeech or closetspeech—is at the core of the protections afforded by the First Amendment. Because of the closet and other features of their social situation, lesbians and gay men

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[257] *See, e.g.*, Neal Kumar Katyal, *Criminal Law in Cyberspace*, 149 U. PA. L. REV. 1003, 1023-27 (2001) (defining computer viruses and other types of unauthorized disruptions to computers); Michael Edmund O'Neill, *Old Crimes in New Bottles: Sanctioning Cybercrime*, 9 GEO. MASON L. REV., 237 (2000).

[258] *See, e.g.*, Cyberstalking: A New Challenge for Law Enforcement and Industry: A Report from the Attorny General to the Vice President (August 1999), available at <http://www.usdoj.gov/criminal/cybercrime/cyberstalking.htm>; Katyal, *supra* note 257 at 1034-37 (defining cyberstalking).

have special needs for the sort of anonymity that cyberspace provides. Like contributors to a small and unpopular political party,[259] in various contexts lesbians and gay men face "threats, harassment, or reprisals"[260] if they identify themselves by coming out. As such, even judges who are skeptical of the right to anonymous speech—like the dissenters in *McIntyre*—should support anonymity for lesbians and gay men in hostile climates because they would see that protecting "persecuted groups . . . who criticize oppressive practices and laws"[261] is at the very core of the First Amendment.

Given the current structure of cyberspace and the current social situation for lesbians and gay men, cyberspace provides a unique context for lesbians, gay men and other sexual minorities to build community, engage in activism, exchange ideas, make friends, and build families. Many lesbians and gay men, especially lesbian and gay youth like Jeffrey and Emmalyn Rood and lesbians and gay men who live in geographically-isolated communities or in communities where they feel uncomfortable being open about their sexual orientation (for example, the military), make extensive use of cyberspace. The ability to use cyberspace anonymously is thus especially significant for lesbian and gay men. My argument that the values that undergird and animate the First Amendment justify seeing closetspeech and outspeech as paradigmatic of the speech protected by the First Amendment, and thus that attempts to restrict such speech should be carefully scrutinized, is particularly applicable to closetspeech and outspeech in the context of cyberspace.

The First Amendment, like the Constitution of which it is a part, is a living text that has to be adapted to situations its drafters could not have imagined. Although the drafters of the First Amendment could not have imagined either the development of cyberspace or

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[259] *Socialist Workers*, 459 U.S. at 87.
[260] *McIntyre*, 514 U.S. at 380 (Scalia, J. dissenting).

the particular social circumstances faced by sexual minorities, their text and the theories that informed it apply to both contexts. The speech of lesbians and gay men, and, in particular, their anonymous and political speech in cyberspace, deserve the strongest protection the First Amendment can provide. When legislatures craft statutes designed to regulate cyberspace, they need to keep in mind lesbians and gay men and the unique role that cyberspace plays in many of their lives. When courts evaluate the constitutionality of attempts to regulate cyberspace, they need, as most courts thus far have done, to protect the freedom of speech of sexual minorities. In particular, when courts face—as they so often have and will no doubt continue to—lesbian and gay litigants challenging attempts to regulate speech in cyberspace, they need to take special cognizance of the virtual lifeline that cyberspace provides lesbians and gay men and carefully scrutinize laws that trench on their First Amendment rights.

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[261] Talley v. California, 362 U.S. 60, 64 (1960).