

**SAYING, WEARING, WATCHING, AND DOING: EQUAL FIRST
AMENDMENT PROTECTION FOR COMING OUT, HAVING SEX,
AND POSSESSING CHILD PORNOGRAPHY**

*Megan Stuart**

I. INTRODUCTION

A few stories:

In the fall of his sophomore year of high school, Derek Henkle appeared on local cable television discussing his experience as a gay high school student.¹ After this appearance, Henkle wore buttons on his backpack that said “We are everywhere” and “Out.”² While at school, Henkle occasionally discussed his sexuality.³ In addition to receiving physical and verbal threats from other students, school administrators told Henkle he needed to keep quiet about his sexuality.⁴

On July 30, 2000, four men entered the Gilroy Garlic Festival wearing vests with a logo of a skull with wings and a top hat placed between the words “Top Hatters” and “Hollister.”⁵ The festival’s head of security noticed the matching vests and directed a police officer to escort the men back to the entrance gate.⁶ The officer explained to the Top Hatters that the festival promoters adopted an unwritten festival dress code that prohibited attendees from wearing “gang colors or other demonstrative insignia, including motorcycle club insignia.”⁷ The officer then asked the Top Hatters to remove their vests, a request

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¹ Henkle v. Gregory, 150 F. Supp. 2d 1067, 1069 (D. Nev. 2001).

² *Id.* at 1070.

³ *Id.*

⁴ *Id.* at 1069-70.

⁵ Villegas v. City of Gilroy, 484 F.3d 1136, 1138 (9th Cir. 2007).

⁶ *Id.*

⁷ *Id.*

*the men refused.*⁸ *The officer directed the Top Hatters to leave, and festival officials refunded their entrance fee.*⁹

*In an Internet chat room, Michael Williams posted a message claiming to have “good” pics of his daughter, which he was willing to exchange.*¹⁰ *An undercover special agent responded to the message and exchanged nonsexual pictures of actual and virtual minors with Williams.*¹¹ *After this initial exchange, Williams attempted to trade additional pictures with the agent by claiming he had hardcore pictures of his daughter engaging in sexual acts with adults.*¹² *The agent did not send more pictures, which caused Williams to accuse him of being a police officer.*¹³ *The special agent then accused Williams of being the same.*¹⁴ *In response, Williams again claimed to have hardcore child pornography and posted a link in the chat room, which led to pictures containing actual minors engaging in sexually explicit conduct.*¹⁵ *As a result of his Internet activities, police searched Williams’s home and computer.*¹⁶ *After the search uncovered child pornography depicting actual minors, police arrested Williams for violating the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today (PROTECT) Act’s prohibition of the possession and promotion of child pornography.*¹⁷ *The search of Williams’s computer did not reveal any pictures of his daughter; thus, while Williams had child pornography on his computer, he falsely advertised the type of images he possessed as being images of his toddler daughter.*¹⁸

⁸ *Id.*

⁹ *Id.*

¹⁰ *United States v. Williams (Williams I)*, 444 F.3d 1286, 1288 (11th Cir. 2006), *rev’d*, 128 S. Ct. 1830 (2008).

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.* at 1288-89.

¹⁶ *Id.* at 1289.

¹⁷ *Id.* (noting Williams was charged under 18 U.S.C. § 2252A(a)(3)(B), (5)(B) (2006)).

¹⁸ Respondent’s Brief at 5, *Williams I*, 444 F.3d 1286 (No. 06-694), *available at* http://www.abanet.org/publiced/preview/briefs/pdfs/07-08/06-694_Respondent.pdf.

Other than raising arguments under the First Amendment of the United States Constitution,¹⁹ most courts and theorists would find these stories have little in common. The court analyzed Henkle's case under the general doctrine of freedom of speech and retaliation,²⁰ the Top Hatter issue under symbolic speech and expressive conduct,²¹ and Williams's case under obscenity or child pornography rules.²² It is easy and comfortable to separate these stories into various doctrines. In reality, however, these three stories overlap, implicate the same interests, and pose similar questions about the relationship between sex, speech, and the First Amendment. Because of these similarities, courts should analyze all three stories as sexual speech protected by the First Amendment.²³

Sexual speech has important social value because of its relationship to gender production, but also because it provides a unique opportunity to examine the tensions between individual agency and the limiting powers of social structure. In this respect, there is little difference between saying "I'm gay," wearing clothing that says "I'm gay," and saying "I like watching lesbian sex"—or actually having sex—because all these statements and acts simultaneously involve identity (as a lesbian or one whose sexual fantasy involves lesbian sex) and the act of lesbian sex.

The First Amendment begins with the phrase "Congress shall make no law . . . abridging the freedom of speech"²⁴ Generally, the First Amendment protects a speaker's right to communicate and a

¹⁹ U.S. CONST. amend. I.

²⁰ *Henkle v. Gregory*, 150 F. Supp. 2d 1067, 1074-77 (D. Nev. 2001).

²¹ *Villegas v. City of Gilroy*, 484 F.3d 1136, 1139-42 (9th Cir. 2007); *see, e.g., Spence v. Washington*, 418 U.S. 405, 407, 409-11 (1974) (declaring unconstitutional a state statute that prohibited displaying the American flag adorned with any attachments, symbols, or marks).

²² *Williams I*, 444 F.3d at 1289-94 (11th Cir. 2006); *see, e.g., Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 240, 258 (2002) (holding certain statutory provisions prohibiting the use or sale of virtual child pornography to be unconstitutional).

²³ *See Mary C. Dunlap, Sexual Speech and the State: Putting Pornography in its Place*, 17 GOLDEN GATE U. L. REV. 359, 361 (1987). Like Mary C. Dunlap, I am defining sexual speech as "any communication in any medium about sexual matters." *Id.*

²⁴ U.S. CONST. amend. I.

listener's right to receive information.²⁵ The justification for such a facially broad protection for speech lies in various theories, including the notion that robust public debate is necessary for democracy,²⁶ that it advances knowledge,²⁷ and that it promotes and ensures individual autonomy.²⁸ The Constitution provides strong protection for speech about issues of public concern²⁹ and issues "at the core of what the First Amendment is designed to protect."³⁰ Other speech, such as commercial³¹ or indecent³² speech, receives less protection.³³

Despite the Constitution's sweeping language, protection of speech is not absolute and the Constitution may restrict or regulate a variety of speech.³⁴ For example—obscenity,³⁵ the advocacy of vio-

²⁵ *Monteiro v. Tempe Union High Sch. Dist.*, 158 F.3d 1022, 1027 n.5 (9th Cir. 1998).

²⁶ *See, e.g.*, *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964); ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 24-25 (Lawbook Exchange 2001) (1948).

²⁷ *See, e.g.*, *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring); JOHN STUART MILL, *ON LIBERTY WITH THE SUBJECTION OF WOMEN AND CHAPTERS ON SOCIALISM* 23 (Stefan Collini ed., Cambridge Univ. Press 1989) (1859).

²⁸ *See* MILL, *supra* note 27, at 15-16.

²⁹ *See Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 666 (1990) ("[T]he right to engage in political expression is fundamental to our constitutional system" (citing *Police Dep't of Chi. v. Mosley*, 408 U.S. 92 (1972))).

³⁰ *Virginia v. Black*, 538 U.S. 343, 365 (2003).

³¹ *See, e.g.*, *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 770-71 (1976) (holding the First Amendment protects commercial speech but provides less protection for most other types of speech).

³² *See, e.g.*, *FCC v. Pacifica Found.*, 438 U.S. 726, 747-48 (holding the First Amendment allows the restriction of indecent speech).

³³ Additionally, the Court has upheld, with some limitations, regulations on speech for government employees. *See, e.g.*, *Connick v. Myers*, 461 U.S. 138, 154 (1983) (holding a government employee may be discharged for private speech that interferes with government services). The Court has also upheld limitations on the speech of schoolchildren. *See, e.g.*, *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 677-78, 683 (1986) (holding a school may prohibit a student from giving a sexually explicit speech at a school assembly).

³⁴ *See Gay Lesbian Bisexual Alliance v. Pryor*, 110 F.3d 1543, 1548 (11th Cir. 1997) ("The government's power to restrict First Amendment activities depends on 'the nature of the relevant forum.'" (quoting *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 800 (1985); *Ethredge v. Hail*, 56 F.3d 1324, 1326-27 (11th Cir. 1995))).

³⁵ *See infra* Part III.

lence,³⁶ libel,³⁷ and fighting words³⁸ are, in one view, categorically exempt from First Amendment protection. Regardless of the specific category of speech, the government cannot make speech-related restrictions based on the content of the speech.³⁹ The United States Supreme Court has continually held that the First Amendment requires content neutrality to ensure there is “equality of status in the field of ideas.”⁴⁰ This neutrality “prevents the political majority from achieving a regulatory goal at the expense of the expressive interests of an unpopular or less powerful minority.”⁴¹

Speech is never really just speech for First Amendment purposes. Rather, courts classify speech. As a result of the Court’s categorization of speech, First Amendment analysis generally requires courts to label and separate one type of speech from another and then to place the speech at issue in the hierarchy of protection. This Article argues the First Amendment should protect verbally coming out, symbolically coming out, and speech about sexual fantasies under traditional categories of First Amendment analysis, and that these are all examples of sexual speech that also deserve constitutional protection as political speech. This Article also argues the Constitution should protect the act of having sex because the act is sexual speech and symbolic speech.

Part II briefly describes the Supreme Court’s political speech doctrine and why the First Amendment protects and should continue to protect the act of coming out⁴² as political speech. Part III explains the

³⁶ See, e.g., *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (explaining speech that “is directed to inciting or producing imminent lawless action and is likely to incite or produce such action” is not protected by the First Amendment).

³⁷ See, e.g., *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964).

³⁸ See, e.g., *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942) (“‘[F]ighting’ words [are] those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.” (citation omitted)).

³⁹ *Police Dep’t of Chi. v. Mosley*, 408 U.S. 92, 96 (1972).

⁴⁰ *Id.* at 96 (quoting ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE* 27 (1948)).

⁴¹ David Cole & William N. Eskridge, Jr., *From Hand-Holding to Sodomy: First Amendment Protection of Homosexual (Expressive) Conduct*, 29 *HARV. C.R.-C.L. L. REV.* 319, 336 (1994).

⁴² Clinical psychologists define coming out as recognizing one’s self as lesbian or gay, exploring sexual orientation by gaining information about the gay and lesbian community, disclosing to others, and accepting one’s sexual orientation. Mary Jane

Court's symbolic speech and expressive conduct line of cases. Part IV explores the obscenity doctrine and argues why speech about pornography deserves constitutional protection. Part V argues that coming out, identity formation, speech about sex, and sex itself are sexual speech and deserve constitutional protection. Finally, Part VI argues that all sexual speech is political speech because of the relationship between sex, identity, and agency and thus deserves the utmost First Amendment constitutional protection.

II. SPEECH AND POLITICAL SPEECH

*All speech is equal, but some speech is more equal than other speech.*⁴³

During his first few years of high school, Derek Henkle came out by appearing on a local cable-access show and by wearing buttons on his school backpack.⁴⁴ After serious threats and taunting by his peers, the principal and Henkle's school decided to transfer him to an alternative school.⁴⁵ However, before his transfer, the principal warned Henkle to "keep his sexuality to himself" at the new school.⁴⁶ Once at the alternative school, a principal again warned Henkle to keep his sexuality to himself and also to "stop acting like a fag."⁴⁷ The harassment and anti-gay violence continued against Henkle, and again, the school failed to take action to protect him.⁴⁸ After a final transfer to an adult-

Rotheram-Borus & Isabel M. Fernandez, *Sexual Orientation and Developmental Challenges Experienced by Gay and Lesbian Youths*, 25 SUICIDE & LIFE-THREATENING BEHAV. 26 (1995). Coming out is also described as a narrative constructing "an individual's experience as a linear progression, culminating in the revelation of one's lesbian or queer sexual identity." Ruthann Robson, *Beginning From (My) Experience: The Paradoxes of Lesbian/Queer Narrativities*, 48 HASTINGS L.J. 1387, 1394-95 (1997) (citation omitted) (examining the relationships between narrative, rationality, and the law). This Part is not meant to privilege coming out stories as extra special or political. I recognize the multiple political, social, and legal problems with essentializing gayness with coming out. *See id.*

⁴³ *See* GEORGE ORWELL, ANIMAL FARM 88 (Alfred A. Knopf, Inc. 1993) (1946).

⁴⁴ Henkle v. Gregory, 150 F. Supp. 2d 1067, 1069-70 (D. Nev. 2001).

⁴⁵ *Id.* at 1070.

⁴⁶ *Id.* (citation omitted).

⁴⁷ *Id.* (citation omitted).

⁴⁸ *Id.* (noting that Henkle was transferred again to a third high school which, despite reports of harassment and intimidation, did nothing to act on these reports).

education program, Henkle sued both principals and the school district for, among other things, “censoring, chilling, and deterring him from exercising his right to freedom of speech and by retaliating against him when he did exercise his rights.”⁴⁹

In denying the school’s motion to dismiss, the court easily and without much discussion found that Henkle’s complaint was sufficient to support the claim that the Constitution protected his coming out speech.⁵⁰ The court expressly rejected the school’s contention that Henkle did not have a constitutional right to discuss his homosexuality because there was no case law expressly holding that he did.⁵¹ The court reasoned that *Tinker v. Des Moines Independent Community School District* was broad enough to include “the right of a high school student to express his sexuality.”⁵²

Speech about controversial topics, including homosexuality, is political speech for purposes of the First Amendment.⁵³ At least one state court noted that identifying as, or with, gays or lesbians is a political activity.⁵⁴ These holdings recognize that declaring one’s sexual identity has significant implications, both publicly and privately.⁵⁵ Research suggests that coming out has a positive impact on social attitudes

⁴⁹ *Id.* at 1074. Henkle also brought Title IX claims against the school district in his section 1983 action. *Id.* at 1067, 1072-73.

⁵⁰ *Id.* at 1075-76.

⁵¹ *Id.* at 1076.

⁵² *Id.* *Tinker* involved a school regulation that prohibited students from wearing black armbands in protest of the Vietnam War, which the Court held to be constitutionally protected symbolic speech. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 504, 513-14 (1969).

⁵³ Gillman *ex rel.* Gillman v. Sch. Bd. for Holmes County, Fla., 567 F. Supp. 2d 1359, 1373-74 (N.D. Fla. 2008) (holding that a student’s First Amendment rights were violated by a school’s ban on clothing and buttons that advocated fair treatment of gays and lesbians); *see also* Pfeifer v. City of West Allis, 91 F. Supp. 2d 1253, 1267 (E.D. Wis. 2000).

⁵⁴ *See* Gay Law Students Ass’n v. Pac. Tel. & Tel. Co., 595 P.2d 592, 610 (Cal. 1979) (identifying the homosexual community’s fight for equal rights as a political activity).

⁵⁵ Bobbi Bernstein, Note, *Power, Prejudice, and the Right to Speak: Litigating “Outness” Under the Equal Protection Clause*, 47 STAN. L. REV. 269, 271 (1995) (discussing the inherent political implications of coming out of the closet).

towards lesbians and gays.⁵⁶ Thus, coming out can be a way of “transforming the personal into the political.”⁵⁷ The coming out process is also important in the production of social and sexual identities.

In addition to being an overtly political act, coming out also necessarily involves an expression of identity as lesbian or gay and an expression that the speaker is part of a lesbian or gay community.⁵⁸ “Social expression of sexual desire constitutes both identity, as well as discourses about identity and identity politics.”⁵⁹ In this way, “[c]oming out’ . . . allows gay, lesbian, bisexual, and transgender individuals to organize socially and politically and to confront heterosexual hierarchies.”⁶⁰ This process requires an audience to hear the story. “[F]or communities to hear, there must be stories which weave together their history, their identity, their politics. The one – community – feeds upon and into the other – story. There is an ongoing dynamic or dialectic of communities, politics, identities and stories”⁶¹

Even the Supreme Court recognized that “[a]n admission of sexual identity is expressive in the strictest sense of the word.”⁶² In *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, the Court found that marching in a parade was a form of coming out and a way for individuals to “celebrate [their] identity as openly gay, lesbian, and bisexual . . . [and] to show that there are such individuals in the commu-

⁵⁶ *Id.* (citing Gregory M. Herek & Eric K. Glunt, *Interpersonal Contact and Heterosexuals' Attitudes Toward Gay Men: Results from a National Survey*, 30 J. SEX RES. 239, 242-43 (1993)).

⁵⁷ Kenji Yoshino, *Covering*, 111 YALE L.J. 769, 819 (2002).

⁵⁸ See Francisco Valdes, *Acts of Power, Crimes of Knowledge: Some Observations on Desire, Law and Ideology in the Politics of Expression at the End of the Twentieth Century*, 1 J. GENDER RACE & JUST. 213, 223-28 (1997).

⁵⁹ *Id.* at 215.

⁶⁰ Darren Lenard Hutchinson, “*Closet Case*”: *Boy Scouts of America v. Dale and the Reinforcement of Gay, Lesbian, Bisexual, and Transgender Invisibility*, 76 TUL. L. REV. 81, 109 (2001).

⁶¹ KEN PLUMMER, *TELLING SEXUAL STORIES: POWER, CHANGE AND SOCIAL WORLDS* 87 (1995).

⁶² Cole & Eskridge, *supra* note 41, at 325; see Nan D. Hunter, *Identity, Speech, and Equality*, 79 VA. L. REV. 1695, 1696 (1993) (“[S]peech about sexuality [should] be treated as core political speech.”).

nity”⁶³ Self-identifying speech not only communicates one’s identity and association, but it also creates identity and association.⁶⁴ Self-identifying speech is “a major factor in constructing identity. Identity cannot exist without it.”⁶⁵ This is especially important when certain distinguishing characteristics are not immediately evident, as is true with sexual orientation.⁶⁶

III. TOP HATTERS: SYMBOLIC SPEECH AND EXPRESSIVE ASSOCIATION

“*[E]xpression is a component of the very identity itself.*”⁶⁷

Villegas v. City of Gilroy provides a valuable illustration of the interplay between clothing and the First Amendment.⁶⁸ On July 30, 2000, four men wearing vests with a logo of a skull with wings and a top hat placed between the words “Top Hatters” and “Hollister” entered the Gilroy Garlic Festival.⁶⁹ The head of security noticed the matching vests and directed another police officer to escort the men back to the entrance gate.⁷⁰ The officer explained to the Top Hatters that the festival promoters adopted an unwritten festival dress code that prohibited attendees from wearing “gang colors or other demonstrative insignia, including motorcycle club insignia.”⁷¹ The officer then asked the Top Hatters to remove their vests, a request the Top Hatters refused.⁷² The officer directed the Top Hatters to leave and the fair refunded their entrance fee.⁷³

⁶³ *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 570 (1995).

⁶⁴ *See infra* Part VI.

⁶⁵ *Hunter*, *supra* note 62, at 1718.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Villegas v. City of Gilroy*, 484 F.3d 1136, 1137 (9th Cir. 2007).

⁶⁹ *Id.* at 1138.

⁷⁰ *Id.*

⁷¹ *Id.* The festival promoters created the policy in 1996 in response to a gang fight that resulted in the stabbing of a Hell’s Angel. Audio File: Oral Argument, *Villegas v. City of Gilroy*, 484 F.3d 1136 (9th Cir. 2007) (No. 05-15725EB), http://www.ca9.uscourts.gov/media/view_subpage.php?pk_id=0000001353 (last visited June 9, 2010).

⁷² *Villegas*, 484 F.3d at 1138.

⁷³ *Id.*

Although not explicitly stated in the Constitution, the Supreme Court has recognized some conduct is inherently expressive and thus extended the First Amendment's protection of freedom of speech to include symbolic speech and expressive association.⁷⁴ Therefore, when the State punishes or silences symbolic speech or expressive association, it unconstitutionally suppresses an idea through hindering an activity.⁷⁵ The First Amendment does not provide an absolute right, as there are circumstances where the government may regulate speech.⁷⁶ Under the *United States v. O'Brien* test, when speech and nonspeech elements are both present, the State may constitutionally regulate speech if: (1) it has the power to regulate, (2) the regulation furthers an important or substantial government interest, (3) the government's interest is unrelated to the suppression of free expression, and (4) there is only incidental restriction on speech which is no greater than necessary to further the government interest.⁷⁷

A. *Symbolic Speech and Expressive Conduct*

The text of the First Amendment clearly prohibits the government from abridging one's freedom of speech.⁷⁸ Though not explicit in the First Amendment's text, the Supreme Court recognized that conduct "imbued with elements of communication" may qualify for First Amendment protection;⁷⁹ however, the Court rejected the idea that a "limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea."⁸⁰

To determine whether conduct deserves First Amendment protection, the Court developed a two-part test. Conduct is protected by the First Amendment if there is an intent to convey a particularized message and a likelihood that the message would be understood by

⁷⁴ See, e.g., *Spence v. Washington*, 418 U.S. 405, 410 (1974).

⁷⁵ See *id.* at 411.

⁷⁶ See, e.g., *United States v. O'Brien*, 391 U.S. 367, 382 (1968).

⁷⁷ See *id.* at 381-82.

⁷⁸ U.S. CONST. amend. I. The First Amendment is applied to the states through incorporation of the Fourteenth Amendment. *Griswold v. Connecticut*, 381 U.S. 479, 487-89 (1965) (Goldberg, J., concurring).

⁷⁹ *Villegas v. City of Gilroy*, 484 F.3d 1136, 1139 (9th Cir. 2007) (quoting *Spence*, 418 U.S. at 409).

⁸⁰ *O'Brien*, 391 U.S. at 376.

others. In *Spence v. Washington*, the Court reversed Spence's criminal conviction for flag desecration that resulted from Spence's display of a United States flag with a peace sign attached to it.⁸¹ Recognizing that Spence was communicating through the use of symbols, the Court concluded he was engaging in a form of protected expression because "[a]n intent to convey a particularized message was present, and in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it."⁸² Citing *Tinker*,⁸³ the *Spence* Court emphasized the context in which a symbol appears is important in deciding the likelihood that viewers would understand it, because context often provides meaning to the symbol.⁸⁴

In *Spence*, the Court found a particularized message because Spence's flag display was a *pointed expression*.⁸⁵ Along with the holding in *Spence*, the Court has recognized a wide variety of conduct as expressive, thus warranting First Amendment protection for: students wearing an arm band to protest the Vietnam War,⁸⁶ burning a cross,⁸⁷ dressing in a military uniform for performance art,⁸⁸ sleeping in the National Mall to protest homelessness,⁸⁹ marching,⁹⁰

⁸¹ *Spence*, 418 U.S. at 406.

⁸² *Id.* at 410-11.

⁸³ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 514 (1969) (finding that students wearing black armbands is constitutionally protected speech).

⁸⁴ *Spence*, 418 U.S. at 409-10.

⁸⁵ *Id.* at 410.

⁸⁶ *Tinker*, 393 U.S. at 514.

⁸⁷ *R.A.V. v. City of St. Paul*, 505 U.S. 377, 396 (1992) (holding that a statute prohibiting the burning of a cross with the intent to intimidate was unconstitutional).

⁸⁸ *Schacht v. United States*, 398 U.S. 58, 62-63 (1970) (holding a statute unconstitutional that prohibited an actor from wearing a military uniform if his dialogue was critical of the military because it infringed on the speaker's freedom of speech).

⁸⁹ *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293-95 (1984). The Court found that even though the activity was probably protected speech, under the *O'Brien* test the government had acted properly by prohibiting the overnight demonstration. *Id.* at 293, 295.

⁹⁰ *Hurley v. Irish Am. Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 559 (1995).

picketing,⁹¹ and burning the flag.⁹²

Over twenty years after *Spence*, the Court in *Hurley* rearticulated the first prong of the *Spence* test. In deciding the forced inclusion of lesbians, gays, and bisexuals in a Saint Patrick's Day parade violated the parade organizers' right to associate,⁹³ the Court noted many of its previous holdings illustrated that "a narrow, succinctly articulable message is not a condition of constitutional protection, which if confined to expressions conveying a 'particularized message,' would never reach the unquestionably shielded painting of Jackson Pollock, music of Arnold Schönberg, or Jabberwocky verse of Lewis Carroll."⁹⁴

This shift in *Hurley* led many courts to reject or modify the particularized message standard from *Spence*.⁹⁵ For example, in determining whether the First Amendment protected a student's choice to raise his fist instead of reciting the pledge of allegiance, the court in *Holloman ex rel. Holloman v. Harland* stated that post-*Hurley*, the test for determining expressive conduct is "whether the reasonable person would interpret it as *some* sort of message, not whether an observer would necessarily infer a *specific* message."⁹⁶

In addition, the court in *White v. City of Sparks* stated that a particularized message was not necessary after *Hurley*.⁹⁷ The court rejected the city's contention that an artist's work must contain specific symbols in order to qualify for First Amendment protection.⁹⁸ Finding the art merited First Amendment protection, the court noted that an artist "cannot be required to convey a particular message immediately obvious and understandable to any viewer."⁹⁹ The language in both *White*

⁹¹ *United States v. Grace*, 461 U.S. 171, 176 (1983) ("There is no doubt that as a general matter peaceful picketing and leafletting are expressive activities involving 'speech' protected by the First Amendment." (citations omitted)).

⁹² *Texas v. Johnson*, 491 U.S. 397, 399 (1989).

⁹³ *Hurley*, 515 U.S. at 578-79.

⁹⁴ *Id.* at 569 (citation omitted).

⁹⁵ *See, e.g., Mastrovincenzo v. City of N.Y.*, 435 F.3d 78, 91 n.9 (2d Cir. 2006).

⁹⁶ *Holloman ex rel. Holloman v. Harland*, 370 F.3d 1252, 1270 (11th Cir. 2004).

⁹⁷ *White v. City of Sparks*, 341 F. Supp. 2d 1129, 1140 (D. Nev. 2004), *aff'd*, 500 F.3d 953 (9th Cir. 2007).

⁹⁸ *Id.*

⁹⁹ *Id.*

and *Holloman* correctly articulates that the *Spence* standard is an evolving standard, interpreted less rigidly than previous standards.

B. Expressive Association

In addition to protecting symbolic speech and expressive conduct, the First Amendment prohibits the government from abridging the right to peaceful assembly.¹⁰⁰ The Supreme Court has interpreted this to include the right of intimate and expressive association.¹⁰¹ Intimate association protects an individual's right to "enter into and maintain certain intimate human relationships"¹⁰² The First Amendment also protects one's "right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends."¹⁰³

In determining whether a group's expressive associational rights have been violated, the Court has not explicitly defined expressive association.¹⁰⁴ For example, in *Roberts v. United States Jaycees*, the Court found the Jaycees were an expressive association because they engaged "in a variety of civic, charitable, lobbying, fundraising, and other activities worthy of constitutional protection under the First Amendment."¹⁰⁵ Later, in *Boy Scouts of America v. Dale*, the Court required that expressive associations "must engage in some form of expression, whether it be public or private."¹⁰⁶

In finding that the Boy Scouts of America were an expressive association, the Court created an essentially circular standard. In determining whether a group is an expressive association, a court must first find that the group engages in an expressive activity.¹⁰⁷ Importantly, the Court noted that for an organization's activities to receive First

¹⁰⁰ U.S. CONST. amend. I.

¹⁰¹ See, e.g., *Roberts v. U.S. Jaycees*, 468 U.S. 609, 617-18 (1984).

¹⁰² *Id.* at 617.

¹⁰³ *Id.* at 622.

¹⁰⁴ See Jason Mazzone, *Freedom's Associations*, 77 WASH. L. REV. 639, 674-75 (2002) (noting that in applying the Court's broad and vague definition of expressive association, "it becomes difficult to see what kind of groups would not apply").

¹⁰⁵ *Roberts*, 468 U.S. at 626-27.

¹⁰⁶ *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000).

¹⁰⁷ *Id.*

Amendment protection the group does not have to agree on every issue and does not have to associate for the purpose of disseminating a certain unified message.¹⁰⁸ This echoed the Court's findings in *Hurley* where it determined that a forced formal inclusion of a gay group in Boston's Saint Patrick's Day parade violated the parade organizer's right to association.¹⁰⁹ There the Court noted, "a private speaker does not forfeit constitutional protection simply by combining multifarious voices, or by failing to edit their themes to isolate an exact message as the exclusive subject matter of the speech."¹¹⁰

Once a court determines a group is an expressive association, it then must decide if its associational rights have been violated. The *Dale* Court articulated three factors in determining this issue: (1) the group must be an expressive association, (2) forced inclusion of outsiders would significantly affect the group's expression, and (3) the government's interests do not justify such an intrusion.¹¹¹

After *Dale*, the Court again addressed expressive association in the context of gay rights in *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*¹¹² There, the Court distinguished the plaintiff law school's messages of antidiscrimination from the parade organizers in *Hurley* and concluded that the inclusion of military recruiters on law school campus did not compel speech from the schools.¹¹³ Rather, the Court concluded that it merely compelled conduct and "[u]nlike a parade organizer's choice of parade contingents, a law school's decision to allow recruiters on campus is not inherently expressive."¹¹⁴ The

¹⁰⁸ *Id.* at 655-56 ("The fact that the organization does not trumpet its views from the housetops, or that it tolerates dissent within its ranks, does not mean that its views receive no First Amendment protection.").

¹⁰⁹ See *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 559 (1995).

¹¹⁰ *Id.* at 569-70.

¹¹¹ See *Dale*, 530 U.S. at 655-59.

¹¹² *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47 (2006). For a critique of the continued homophobia that runs throughout this line of cases, see Caitlin Daniel-McCarter, Comment, *Homophobia Through the First Amendment: A Critique of FAIR v. Rumsfeld*, 10 N.Y. CITY L. REV. 199 (2006).

¹¹³ *Forum for Academic & Institutional Rights*, 547 U.S. at 63-64.

¹¹⁴ *Id.* at 64.

Court, relying on *Texas v. Johnson*,¹¹⁵ then held that for speech to warrant constitutional protection it must be *inherently expressive*.¹¹⁶ After articulating this modification, the Court concluded that the law schools did not engage in any expressive activity, and if they did, the government interest in the military would justify the forced inclusion of recruiters on campus under *O'Brien*.¹¹⁷

IV. WILLIAMS OBSCENITY

I have this really awesome picture of two semi-naked little girls. One girl has her head buried in the other girl's lap. It's really hot.

Hot outside. The picture is from a summer day in the early 1980s, and the girls—my girlfriend and her sister—are sitting on their parent's back porch draped in beach towels. One girl's head is resting on the other girl's lap.

A. Obscenity Doctrine

The First Amendment provides minimal protection for speech categorized as obscene.¹¹⁸ The Court in *Miller v. California* created the standard that material is obscene when it, “taken as a whole, appeal[s] to the prurient interest in sex, which portray[s] sexual conduct in a patently offensive way, and which, taken as a whole, do[es] not have serious literary, artistic, political, or scientific value.”¹¹⁹ In *New York v. Ferber*, the Court held that the government may constitutionally prohibit the creation or promotion of child pornography even if the situation does not satisfy the *Miller* test.¹²⁰ The Court reasoned that the Constitution does not protect child pornography because child pornography documents an underlying act of abuse, and the circulation of the images perpetuates injury to the depicted child.¹²¹ The Supreme Court

¹¹⁵ *Texas v. Johnson*, 491 U.S. 397 (1989).

¹¹⁶ *Forum for Academic & Institutional Rights*, 547 U.S. at 65-66.

¹¹⁷ *Id.* at 67, 70.

¹¹⁸ *Roth v. United States*, 354 U.S. 476, 485 (1957).

¹¹⁹ *Miller v. California*, 413 U.S. 15, 24 (1973).

¹²⁰ *New York v. Ferber*, 458 U.S. 747, 764-65 (1982).

¹²¹ *Id.* at 759. The Court also reasoned that prohibiting this activity on the distribution end is crucial in order to effectively control the initial production of this material. *Id.*

has also held that despite the constitutional right to possess obscenity in one's home,¹²² the First Amendment does not include the right to privately possess child pornography.¹²³

The text of the First Amendment clearly prohibits the government from abridging one's freedom of speech.¹²⁴ Despite the Amendment's plain language, "200 years of Supreme Court jurisprudence have narrowed, qualified, and categorized speech, making that text only a starting point for deciding what protections from governmental intrusion particular instances of speech are afforded."¹²⁵ Early on, the Court stated in dicta that "the lewd and obscene . . . are no essential part of any exposition of ideas, and are of such slight social value . . ." that obscenity has such little social value that it is categorically not protected by the First Amendment.¹²⁶ Since then, the Court has relied on this dicta in its struggle to preserve the obscenity doctrine.

The Court in *Roth v. United States* expressly stated the notion that obscenity is not constitutionally protected speech is implicit in the First Amendment's history, and therefore the Constitution does not protect obscenity.¹²⁷ The *Roth* Court defined obscenity broadly—as "material which deals with sex in a manner appealing to prurient interest."¹²⁸ A few years later in *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General*, the Court established the *Memoirs* test. This test required a showing that: "(a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or repre-

¹²² *Stanley v. Georgia*, 394 U.S. 557, 565 (1969).

¹²³ *Osborne v. Ohio*, 495 U.S. 103, 111 (1990) (holding that a state's interest in protecting victims of child pornography is compelling enough that a state may prohibit possession of child pornography without violating the Constitution).

¹²⁴ U.S. CONST. amend. I.

¹²⁵ Sienna Baskin, Comment, *Deviant Dreams: Extreme Associates and the Case for Porn*, 10 N.Y. CITY L. REV. 155, 163 (2006).

¹²⁶ *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942).

¹²⁷ *Roth v. United States*, 354 U.S. 476, 484-85 (1957) (finding "universal judgment that obscenity should be restrained [is] reflected in . . . the obscenity laws of all of the 48 states, and in the 20 obscenity laws enacted by the Congress from 1842 to 1956" (citations omitted)).

¹²⁸ *Id.* at 487.

sentation of sexual matters; and (c) the material is utterly without redeeming social value.”¹²⁹

Concerned with the burden the *Memoirs* test placed on prosecutors because of the assumption of constitutionality,¹³⁰ the Court created a more rigid test that “established a presumption against obscenity having social value.”¹³¹ The *Miller* Court created an obscenity test that employed the *Roth* Court’s definition of obscenity.¹³² The *Miller* test lessened the burden on prosecutors by making it an issue of fact analyzed under the following three-part test:

(a) whether “the average person, applying contemporary community standards” would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value.¹³³

More than thirty years later, the *Miller* test remains the constitutional test for obscenity.¹³⁴

Almost ten years after *Miller*, the Court held the Constitution does not protect child pornography, irrespective of whether or not the material is obscene under the *Miller* test.¹³⁵ The *Ferber* Court held the First Amendment entitles states to more flexibility in regulating child pornography, and therefore the *Miller* test “does not reflect the [States’]

¹²⁹ *A Book Named “John Cleland’s Memoirs of a Woman of Pleasure” v. Att’y Gen.*, 383 U.S. 413, 418 (1966).

¹³⁰ The test “called on the prosecution to prove a negative, i.e., that the material was ‘utterly without redeeming social value’ – a burden virtually impossible to discharge under our criminal standards of proof.” *Miller v. California*, 413 U.S. 15, 22 (1973).

¹³¹ Baskin, *supra* note 125, at 165.

¹³² *Miller*, 413 U.S. at 24.

¹³³ *Id.* (citations omitted).

¹³⁴ *See, e.g.*, *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 246 (2002); *United States v. Ragsdale*, 426 F.3d 765, 771 (5th Cir. 2005); *United States v. Dean*, No. 2:08cr65-MHT, 2009 WL 4023127, at *5 (M.D. Ala. Nov. 23, 2009).

¹³⁵ *New York v. Ferber*, 458 U.S. 747, 764 & n.17 (1982) (upholding a statute banning all visual representations of sexual performances of children under sixteen).

particular and more compelling interest[s] in prosecuting those who promote the sexual exploitation of children.”¹³⁶

The Court offered several reasons for its holding in *Ferber*. First, states have a compelling interest in protecting the physical and emotional well-being of children.¹³⁷ Second, the distribution of child pornography is relevant to the sexual abuse of children because pornography is a “permanent record of [a child’s] participation and the harm to the child is exacerbated by [its] circulation.”¹³⁸ The Court also found that the distribution of child pornography must be controlled in order to effectively prevent the sexual exploitation of children at the production level.¹³⁹ The Court went on to find that *Miller* was not applicable to child pornography because the *Miller* test does not address whether a child was harmed in the production of the pornography.¹⁴⁰ As a result, the Court needed to create a new test or a per se ban.

Opting for the latter, the Court found that the money earned from selling child pornography motivates the production of child pornography, which is illegal throughout the country.¹⁴¹ Drawing implicit analogies to solicitation and conspiracy, the Court compared the promotion or selling of child pornography to laws banning its production.¹⁴² The Court also found that child pornography’s value, regardless of the depictions contained therein, was “exceedingly modest, if not *de minimis*.”¹⁴³ Finally, the Court concluded that the categorical exclusion of child pornography from constitutional protection was compatible with earlier decisions.¹⁴⁴

The Court later ruled on the scope of the obscenity doctrine in *Stanley v. Georgia*, where the Court examined whether the State could constitutionally criminalize the possession of pornography in the pri-

¹³⁶ *Id.* at 756, 761.

¹³⁷ *Id.* at 756-57 (citing *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607 (1982)).

¹³⁸ *Id.* at 759.

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 761.

¹⁴¹ *Id.*

¹⁴² *See id.* at 762.

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 763.

vacy of one's home.¹⁴⁵ Rejecting *Roth* as dispositive of the issue, the Court started from the proposition "that the Constitution protects the right to receive information and ideas . . . regardless of their social worth."¹⁴⁶ Framing the issue to equally involve the First Amendment as well as privacy under the Fourteenth Amendment, the Court stressed the framers' intent "to protect Americans in their beliefs, their thoughts, their emotions and their sensations."¹⁴⁷ As a result, a unanimous Court held that whatever justifications the State had for regulating obscenity, the reasons did not justify the criminalization of the private possession of such material.¹⁴⁸

The Court rejected the State's contention it could criminalize private possession of obscenity simply because the material is obscene by stating that the State "cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts."¹⁴⁹ The Court also rejected the State's claim that "exposure to obscene materials may lead to deviant sexual behavior or crimes of sexual violence."¹⁵⁰ Contrary to the subsequent federal legislation about child pornography, the Court in *Stanley* firmly stated, "among free men, the deterrents ordinarily to be applied to prevent crime are education and punishment for violations of the law"¹⁵¹

After both *Ferber* and *Stanley*, the Court in *Osborne v. Ohio* decided whether *Stanley*'s protections for private possession of obscenity extended to the private possession of child pornography.¹⁵² In holding that one has no constitutional right to possess child pornography, the Court distinguished *Osborne* from *Stanley* by using *Ferber*. Relying on its findings in *Ferber*, the Court concluded that the State's "interests underlying child pornography prohibitions far exceed the interests justifying the Georgia law at issue in *Stanley*."¹⁵³ The Court classified the

¹⁴⁵ *Stanley v. Georgia*, 394 U.S. 557, 565 (1969).

¹⁴⁶ *Id.* at 563-64 (citing *Winters v. New York*, 333 U.S. 507, 510 (1948)).

¹⁴⁷ *Id.* at 564.

¹⁴⁸ *Id.* at 568.

¹⁴⁹ *Id.* at 566.

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 566-67 (quoting *Whitney v. California*, 274 U.S. 357, 378 (1927), *overruled in part by* *Brandenburg v. Ohio*, 395 U.S. 444 (1969)).

¹⁵² *Osborne v. Ohio*, 495 U.S. 103, 108 (1990).

¹⁵³ *Id.*

State's interest in *Stanley* as a paternalistic interest in regulating thoughts, while the interests in *Osborne* are protecting victims of child pornography and destroying the market for such material.¹⁵⁴ Extending *Ferber* to private possession, the *Osborne* Court transferred all of the State's justifications in the former to the latter and held that Ohio may prohibit the possession and viewing of child pornography without violating the First Amendment.¹⁵⁵

Notably, the *Ferber* Court stated that the First Amendment does not protect child pornography; however, prohibited conduct must be adequately limited and defined so the child pornography standard proscribes only visual depictions and requires "some element of scienter on the part of the defendant."¹⁵⁶ *Ferber* is about the production and distribution of child pornography and, as Justice William Brennan noted in his dissent in *Osborne*, "*Ferber* did nothing more than place child pornography on the same level of First Amendment protection as *obscene* adult pornography, meaning that its production and distribution could be proscribed."¹⁵⁷

Concerned with the loophole left by *Ferber* for computer-generated images, Congress enacted the Child Pornography Prevention Act (CPPA) in 1996.¹⁵⁸ Perceiving a threat to actual children caused by digital child pornography, legislators defined child pornography as including images that were or appeared to be "of a minor engaging in sexually explicit conduct."¹⁵⁹ The Act also criminalized the promotion of material in a manner that "conveys the impression" the material depicts a minor engaging in sexually explicit conduct.¹⁶⁰ This distinction between real and virtual images of children became a focal point in *Ashcroft v. Free Speech Coalition*.

¹⁵⁴ *Id.* at 109.

¹⁵⁵ *Id.* at 111.

¹⁵⁶ *New York v. Ferber*, 458 U.S. 747, 764-65 (1982); see BLACK'S LAW DICTIONARY 1463 (9th ed. 2009) (defining scienter as "[a] degree of knowledge that makes a person legally responsible for the consequences of his or her act or omission").

¹⁵⁷ *Osborne*, 495 U.S. at 140 (Brennan, J., dissenting).

¹⁵⁸ 18 U.S.C. §§ 2251-2260A (2006).

¹⁵⁹ 18 U.S.C. § 2256(8)(B) (Supp. II 2008).

¹⁶⁰ *Id.* § 2256(8)(D), *repealed by* PROTECT Act, Pub. L. No. 108-21, 117 Stat. 650 (2003).

In *Free Speech Coalition*, the Supreme Court held the CPPA was unconstitutional because it “proscribe[d] a significant universe of speech that is neither obscene under *Miller* nor child pornography under *Ferber*.”¹⁶¹ Specifically, the Court found the CPPA’s definition of child pornography and pandering provisions to be unconstitutionally overbroad because both included a substantial amount of protected speech.¹⁶²

The Court found this statutory definition of child pornography included protected speech because it applied to speech that had significant artistic, literary, political, or scientific value—and was “thus not obscene under *Miller*.”¹⁶³ The Court also found the Act’s inclusion of virtual child pornography was overbroad because it included material that under *Ferber* neither constituted obscenity nor involved the exploitation of children, and was thus protected by the First Amendment.¹⁶⁴ In examining the definition of child pornography, the Court rejected the government’s assertion that virtual child pornography intrinsically relates to the sexual abuse of children, thus it was necessary to ban all appearances of child pornography to deter the market for it.¹⁶⁵ The government also stated the blanket ban on all child pornography was necessary because of the difficulty in distinguishing real from virtual child pornography.¹⁶⁶ In response, the Court said the idea that “protected speech may be banned as a means to ban unprotected speech . . . turns the First Amendment upside down.”¹⁶⁷

Addressing the pandering provision in the CPPA,¹⁶⁸ the Court recognized that under *United States v. Ginzburg*, “pandering may be relevant, as an evidentiary matter, to . . . whether particular materials

¹⁶¹ *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 240 (2002).

¹⁶² *See id.* at 258.

¹⁶³ *Williams I*, 444 F.3d 1286, 1293 (2006), *rev’d*, 128 S. Ct. 1830 (2008) (discussing the holding in *Free Speech Coalition*).

¹⁶⁴ *Free Speech Coal.*, 535 U.S. at 251.

¹⁶⁵ *Id.* at 254-55.

¹⁶⁶ *Id.* at 254.

¹⁶⁷ *Id.* at 255.

¹⁶⁸ *See* 18 U.S.C. 2256(8)(D), *repealed by* PROTECT Act, Pub. L. No. 108-21, 117 Stat. 650 (2003).

are obscene.”¹⁶⁹ However, the Court found that despite *Ginzburg*, the CPPA prohibited a considerable amount of speech because it reached beyond commercial exploitation.¹⁷⁰ The Court held the pandering section was overbroad because one was guilty of violating the statute even if the material pandered did not contain any minors engaging in sexually explicit conduct or for possessing any material that was *ever* pandered as child pornography.¹⁷¹ This was held unconstitutional because a violation depended solely on “how the speech is presented [rather than] on what is depicted.”¹⁷² Additionally, the Court found the government’s evidence was insufficient to show that pandering causes actual harm to children.¹⁷³

In response to the decision in *Free Speech Coalition*, which found Congress’s previous child pornography legislation unconstitutionally overbroad, Congress enacted the PROTECT Act.¹⁷⁴ In its findings, Congress abandoned the market deterrence theory and instead focused on how the advancement of technology has made it increasingly difficult to distinguish real and virtual pornography, thus hindering prosecution of child pornographers.¹⁷⁵

The PROTECT Act redefined obscenity. The new definition, in part, incorporates the *Miller* test and prohibits “any visual depiction that is, or appears to be, of a minor engaging in certain enumerated *hard core* acts and lacks serious literary, artistic, political, or scientific value.”¹⁷⁶ This definition is important because it relates to Congress’s intent in including the pandering provision in the CPPA.¹⁷⁷ Under the PROTECT Act, one is guilty of promoting child pornography and sub-

¹⁶⁹ *Free Speech Coal.*, 535 U.S. at 257-58 (citing *Ginzburg v. United States*, 383 U.S. 463, 474 (1966)).

¹⁷⁰ *Id.* at 258.

¹⁷¹ *See id.*

¹⁷² *Id.* at 257.

¹⁷³ *Id.*

¹⁷⁴ PROTECT Act, Pub. L. No. 108-21, 117 Stat. 650 (codified as amended in scattered sections of 18, 21, 28, and 42 U.S.C.).

¹⁷⁵ S. REP. No. 108-2, at 3-5 (2003), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=108_cong_reports&docid=f:sr002.108.pdf.

¹⁷⁶ *Williams I*, 444 F.3d 1286, 1295-96 (11th Cir. 2006), *rev’d*, 128 S. Ct. 1830 (2008) (citing 18 U.S.C. § 1466A(a)-(d)).

¹⁷⁷ *Id.* at 1296.

ject to a five-year mandatory minimum prison term and a possible twenty-year term¹⁷⁸ if one knowingly

advertises, *promotes, presents*, [or] distributes . . . any material or purported material in a manner that *reflects the belief*, or that is *intended to cause another to believe*, that the material or purported material is, or contains an obscene [or nonobscene] visual depiction of a minor [or an actual minor] engaging in sexually explicit conduct.¹⁷⁹

In *Williams*, the court noted that although other sections of the Act provide for an affirmative defense based on the absence of actual minors, the defense did not apply to the pandering section.¹⁸⁰ By making pandering a stand-alone provision, Congress “remedies the problem of penalizing individuals farther down the distribution chain for possessing images that, despite how they were marketed, are not illegal child pornography.”¹⁸¹

After *Williams* appealed, the Supreme Court of the United States held that section 2252A(a)(3)(B) of the PROTECT Act should be construed to mean that one is guilty of promoting child pornography if: (1) one knowingly exhibits “speech that accompanies or seeks to induce a transfer of child pornography . . . from one person to another;”¹⁸² (2) one holds the subjective belief that the material is child pornography;¹⁸³ (3) the speech “objectively manifest[s] a belief that the material is child pornography;”¹⁸⁴ (4) the speaker “*intend[s]* that the listener believe the material to be child pornography;”¹⁸⁵ (5) the speaker “select[s] a manner of *advertising, promoting, presenting, distributing, or soliciting* the material that *he* thinks will engender that belief;”¹⁸⁶ and (6) the material is a depiction of sex between actual minors.¹⁸⁷ Instead of characterizing

¹⁷⁸ 18 U.S.C.A. § 2252A(b)(1) (West 2009).

¹⁷⁹ 18 U.S.C. § 2252A(a)(3)(B) (emphasis added).

¹⁸⁰ *Williams I*, 444 F.3d at 1295.

¹⁸¹ *Id.*

¹⁸² *United States v. Williams (Williams II)*, 128 S. Ct. 1830, 1839 (2008).

¹⁸³ *Id.* at 1840.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* (internal quotations omitted).

¹⁸⁷ *Id.* at 1841.

the speech criminalized by the PROTECT Act as obscenity, the Court instead classified it as offers to engage in illegal transactions.¹⁸⁸ This classification allowed the Court to avoid the more complicated issue of the underlying child pornography and sexuality.

The Court made clear that the statute applies only to transactional rather than advocacy speech and would not include the statement “I encourage you to obtain child pornography” but would cover a recommendation for a particular piece of child pornography with the intent of initiating a transfer.¹⁸⁹ Unlike the pandering in *Ginzburg*, all parties and courts involved with the PROTECT Act refer to section 2252A(a)(3)(b) as the pandering section. This is interesting because the Act covers noncommercial transactions and speech not related to conduct, both of which are essential to the definition of pandering.¹⁹⁰

The Court’s interpretation of the Act is overly broad. The First Amendment categorically excludes offers to participate in illegal transactions because such offers have no social value and are thus not constitutionally protected.¹⁹¹ In justifying the provision, the United States argued the statute targets only material that purports to be unprotected child pornography.¹⁹² Thus, the fatal flaw in the Court’s reasoning is that, as written, the statute criminalizes virtually any conceivable statement that is meant—in whole or in part—to convey to another that one possesses, or might possess, child pornography.¹⁹³ “A crime is committed only when the speaker believes or intends the listener to believe that the subject of the proposed transaction depicts real children.”¹⁹⁴ Under the PROTECT Act, it is irrelevant what, if any, result is intended by the

¹⁸⁸ *Id.* at 1841-42.

¹⁸⁹ *See id.* at 1842.

¹⁹⁰ The Court fails to address however, why *promote* was included in the statute given that if it were read to have a transactional connotation, it would be indistinguishable from solicitation or advertising. The prohibition of noncommercial speech in such a broad way seems unparalleled, and the Court had no reservations in stating, “[t]o run afoul of the statute, the speech need only accompany or seek to induce the transfer of child pornography from one person to another.” *See id.* at 1840.

¹⁹¹ *Id.* at 1841.

¹⁹² Brief for the United States at 14, *Williams II*, 128 S. Ct. 1830 (No. 06-694), 2007 WL 1724329.

¹⁹³ *See* 18 U.S.C.A. § 2252A(a)-(b) (West 2009).

¹⁹⁴ *Williams II*, 128 S. Ct. at 1844.

speech. Thus, a person can be found guilty just for representing something as real child pornography even if he or she did not encourage anyone to engage in a prohibited activity.

Because guilt depends on the speaker's belief and not on the content of the underlying material, the Court admitted that one is guilty even if they are mistaken about the nature of the underlying material.¹⁹⁵ The Court concluded, "[t]here is no First Amendment exception from the general principal of criminal law that a person attempting to commit a crime need not be exonerated because he has a mistaken view of the facts."¹⁹⁶ As the dissent notes, the flaw in this logic is that possession of virtual child pornography is not a crime, and under *Free Speech Coalition*, possession of lawful material does not become unlawful simply because the possessor is mistaken about the content or origin of the child pornography.¹⁹⁷ Thus, "a transaction in what turns out to be fake pornography is better understood, not as an incomplete attempt to commit a crime, but as a completed series of intended acts that simply do not add up to a crime, owing to the privileged character of the material the parties were in fact about to deal in."¹⁹⁸

The PROTECT Act criminalizes any statement about one's sexual fantasies or reactions to viewing material (either child pornography or not) if the individual communicates the fantasy in such a way that leads the listener to believe the speaker has child pornography. The PROTECT Act also covers material that is not obscene and thus would receive First Amendment protection.

B. Pandering and the Legacy of Ginzburg

In *Ginzburg*, the Court upheld a conviction based on violation of the federal obscenity statute.¹⁹⁹ The government charged Ginzburg with violating the federal statute for mailing a hard cover magazine (*EROS*), a newsletter (*Liaison*), and a book (*The Housewife's Handbook on Se-*

¹⁹⁵ *Id.* at 1849-50.

¹⁹⁶ *Id.* at 1845.

¹⁹⁷ *See id.* at 1850-52 (Souter, J., dissenting).

¹⁹⁸ *Id.* at 1854 (Souter, J., dissenting).

¹⁹⁹ *Ginzburg v. United States*, 383 U.S. 463, 463 (1966).

lective Promiscuity).²⁰⁰ The Court found that Ginzburg was pandering, which they defined as “the *business* of purveying textual or graphic matter openly advertised to appeal to the erotic interest of their customers.”²⁰¹ At another point, the Court chided Ginzburg for being in the business of pandering to “the widespread weakness for titillation by pornography.”²⁰² The Court found Ginzburg’s pandering of the material being *sold* was significant in determining what type of material was at issue and applied the *Roth* test.²⁰³ The Court further found that Ginzburg’s exploitation of the material based solely on its prurient appeal strengthened the conclusion he was selling illicit merchandise rather than constitutionally protected material.²⁰⁴ The Court concluded by stating “[w]e perceive no threat to First Amendment guarantees in thus holding that in close cases evidence of pandering may be probative with respect to the nature of the material in question and thus satisfy the Roth test.”²⁰⁵

The dissenting opinions in *Ginzburg* stressed that the majority’s opinion was not grounded in the First Amendment because it allowed a person to be punished for his or her thoughts about constitutionally protected material. For Justice John Marshall Harlan, the holding meant that “[t]he First Amendment . . . no longer fully protects material on its face nonobscene, for such material must now also be examined in the light of the defendant’s conduct, attitude, [and] motives.”²⁰⁶ Justice Hugo Black stated, “I believe the Federal Government is without any power whatever under the Constitution to put any type of burden on speech and expression of ideas of any kind”²⁰⁷

Outside of politics, pandering generally refers to “acts of those intermediaries who engage in the exploitation of the prostitution of fe-

²⁰⁰ *Id.* at 464-66.

²⁰¹ *Id.* at 467 (emphasis added) (quoting *Roth v. United States*, 354 U.S. 476, 495-96 (1957) (Warren, C.J., concurring)).

²⁰² *Id.* at 471 (quoting Louis B. Schwartz, *Morals Offenses and the Model Penal Code*, 63 COLUM. L. REV. 669, 677 (1963)).

²⁰³ *Id.* at 471, 474.

²⁰⁴ *Id.* at 474-75.

²⁰⁵ *Id.* at 474.

²⁰⁶ *Id.* at 494 (Harlan, J., dissenting).

²⁰⁷ *Id.* at 476 (Black, J., dissenting).

males.”²⁰⁸ The pandering in *Ginzburg*, like prostitution, related to a commercial transaction—the buying, selling, or advertising of obscenity. In both contexts, the law punishes speech related to a commercial act, which can be constitutional under the commercial speech doctrine.²⁰⁹

In this way, punishing commercial pandering punishes speech related to future conduct, similar to solicitation or conspiracy. It is precisely the lack of conduct that makes the prohibitions of the PROTECT Act dangerously unconstitutional. Regulating pornography in this way is essentially regulating ideas.

C. *Child Pornography as Freedom of Thought*

The same constitutional protection given to nonconduct-related speech should extend to speech about child pornography. Speech about child pornography, regardless of the sexual fantasies or experiences of the speaker, deserves protection because of the vital link between speech and thought. Speech about sexually explicit material or sexual fantasy is important regardless of what inspired the individual speaking to do so. It is vital to protect this speech under the First Amendment as freedom of thought but also because of the political importance that comes from the act of articulating one’s thoughts rather than the subject of the speech. The Supreme Court’s decision in *Williams* is potentially harmful because the statute involved punishes based upon what the images communicate to the viewer, rather than the materials themselves.²¹⁰

Freedom of thought is protected by the First Amendment.²¹¹ The Court in *Lawrence v. Texas* reiterated the fundamental importance of freedom of thought, stating “[l]iberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct.”²¹² The Court echoed this sentiment in *Free Speech Co-*

²⁰⁸ H. Rockwell, Annotation, *Constitutionality and Construction of Pandering Acts*, 74 A.L.R. 311 (2010).

²⁰⁹ *Williams I*, 444 F.3d 1286, 1297 (11th Cir. 2006), *rev’d*, 128 S. Ct. 1830 (2008).

²¹⁰ *Williams II*, 128 S. Ct. 1830, 1840 (2008).

²¹¹ *Vaughn v. Lawrenceburg Power Sys.*, 269 F.3d 703, 717 (6th Cir. 2001).

²¹² *Lawrence v. Texas*, 539 U.S. 558, 562 (2003).

alition: “[t]he right to think is the beginning of freedom, and speech must be protected from the government because speech is the beginning of thought.”²¹³ The Court explicitly protects this right to freedom of thought in a wide variety of its holdings.²¹⁴ For example, the Court found a law requiring schoolchildren to salute the flag unconstitutional because it abridged the First Amendment right of freedom from governmental control of thought and expression.²¹⁵ In *Griswold v. Connecticut*, the Court held “[t]he right of freedom of speech . . . includes not only the right to utter or to print, but the right to distribute, the right to receive, the right to read and freedom of inquiry, freedom of thought, and freedom to teach”²¹⁶

The Court acknowledged there are important constitutional differences between thought, speech, and action. Clay Calvert argues this recognition by the Court means:

[t]he First Amendment, in turn, should protect decidedly non-intellectual and offensive thoughts, provided they do not manifest themselves in either criminal conduct (in which case the conduct, not the thoughts, is illegal) or in one of those limited categories of expression that falls outside the scope of constitutional protection, such as true threat of violence and obscenity.²¹⁷

It is precisely these thoughts that the PROTECT Act criminalizes.²¹⁸

In one sense, the Court’s construction of the PROTECT Act is extremely post-structuralist because the underlying material has no fixed meaning; it is illegal child pornography if the speaker believes it contains actual children and legal if the speaker believes it contains vir-

²¹³ *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 253 (2002).

²¹⁴ *See, e.g., United States v. Reidel*, 402 U.S. 351, 355-56 (1971) (upholding the constitutional right to freedom of thought and the privacy of one’s home); *Stanley v. Georgia*, 394 U.S. 557, 568 (1969).

²¹⁵ *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

²¹⁶ *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965).

²¹⁷ Clay Calvert, *Freedom of Thought, Offensive Fantasies and the Fundamental Human Right to Hold Deviant Ideas: Why the Seventh Circuit Got It Wrong in Doe v. City of Lafayette, Indiana*, 3 PIERCE L. REV. 125, 135 (2005).

²¹⁸ *See supra* Part IV; *infra* notes 219-20 and accompanying text.

tual children. The illegality of the image is independent from content of the image and is completely dependent upon the meaning it has for the speaker. It would be inconceivable for one person to be subject to criminal prosecution because they believe themselves to be tall and another to be immune because they feel short, though their actual heights are the same. This reasoning punishes subjective experience and thought and thus is patently unconstitutional.

The constitutionality of possession or speech about pornography should not rely on the motive of those possessing it. The underlying acts of creating child pornography are criminal, as is the completely separate issue of child abuse. Thus, by making possession or speech about child pornography criminal acts, the government is attempting to unconstitutionally regulate thoughts. As Justice Thurgood Marshall said in *Stanley*,

[i]f the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch. Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds.²¹⁹

Not only should the government not control people's thoughts, it should not criminalize articulation of those untouchable thoughts. As the court in *Lawrence* also held, the government should not criminalize the consensual sex one has at home.²²⁰

**V. SEXUAL SPEECH: "AS SEX BECOMES SPEECH,
SPEECH BECOMES SEX."²²¹**

In addition to being political speech, coming out is also sexual speech. Identifying as lesbian necessarily references lesbian sex and desire. Ultimately, one vital difference between identifying *as* a lesbian and identifying *with* lesbians is having sex with other women. For bet-

²¹⁹ *Stanley*, 394 U.S. at 565.

²²⁰ See *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

²²¹ CATHARINE A. MACKINNON, *ONLY WORDS* 26 (1993).

ter or worse, sexual acts and sexual identities have been attached for over a century.²²²

“Sexual identity does not exist apart from the active practices by which it is ascribed, asserted, avowed, and indeed, disavowed.”²²³ This nexus exists because, to borrow from Saba Mahmood, the identity is “a medium for, rather than a sign of, the self.”²²⁴ There is a vital distinction between coming out as a manifestation of the gay self and as a production of the gay self. “In this conception, one might say the [lesbian or trans] subject does not precede the performance of normative [sexuality or gender] but is enacted through the performance. [Lesbian or trans] actions may well be understood as performatives; they enact that which they name: a [lesbian or trans] self.”²²⁵

Two courts have recognized this relationship between identity and conduct.²²⁶ The Seventh Circuit held that coming out speech was an indication of probable conduct rather than identity because an admission of homosexuality “reasonably implies, at the very least, a ‘desire’ to commit homosexual acts.”²²⁷ The Supreme Court also acknowledged

²²² See MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY* 3-13 (Vintage Books 1990) (1978). “Nothing that went into his total composition was unaffected by his sexuality. It was everywhere present in him: at the root of all his actions because it was their insidious and indefinitely active principle; written immodestly on his face and body because it was a secret that always gave itself away.” *Id.* at 43; see also *Lawrence*, 539 U.S. at 568-69.

²²³ Kendall Thomas, *The Eclipse of Reason: A Rhetorical Reading of Bowers v. Hardwick*, 79 VA. L. REV. 1805, 1807 (1993).

²²⁴ SABA MAHMOOD, *POLITICS OF PIETY: THE ISLAMIC REVIVAL AND THE FEMINIST SUBJECT* 166 (2005). Mahmood analyzes the performance of piety in Egypt’s Mosque Movement to critique Judith Butler’s formulation of the relationship between performance and agency. See *id.* at 17-20, 155-67. Mahmood argues that performativity is not to take as necessary the disjuncture between what is socially performed and biologically given, but rather that performance is aimed at overcoming that disjuncture. See *id.* at 157.

²²⁵ *Id.* at 163.

²²⁶ For a detailed examination of the legal history of the division between status and conduct, see Teresa M. Bruce, Note, *Doing the Nasty: An Argument for Bringing Same-Sex Erotic Conduct Back into the Courtroom*, 81 CORNELL L. REV. 1135, 1172 (1996).

²²⁷ *Ben-Shalom v. Marsh*, 881 F.2d 454, 460-62 (7th Cir. 1989) (holding that a United States Army Reserve sergeant’s denial for re-enlistment after coming out was

that coming out fundamentally relates to same-sex behavior.²²⁸ In evaluating a claim of unconstitutional discrimination based on sexual orientation, Justice William Brennan noted that the petitioner's speech regarding her homosexual preference "is better evaluated as no more than a natural consequence of her sexual orientation," and thus "it is realistically impossible to separate her spoken statements [about her bisexuality] from her status [as a bisexual]."²²⁹

The nexus between speech and status also exists in the military's "don't ask, don't tell" policy. The federal law prohibits anyone who "demonstrate[s] a propensity or intent to engage in homosexual acts" from serving in the military.²³⁰ The policy includes in its definition of homosexual conduct any *statements* by a service member that declare the speaker a homosexual²³¹ and "any bodily contact which a reasonable person would understand to demonstrate a propensity or intent to engage in" homosexual contact for sexual pleasure.²³²

Because coming out as lesbian or gay necessarily requires some speech about sexual matters, the First Amendment should protect it as sexual speech. Just as proclaiming one's identity as a lesbian relates to having lesbian sex, so too does speech related to lesbian sex.

A. *Identity is Sexual Speech*

The tests²³³ used by the Court to determine whether conduct is protected by the First Amendment provides a unique opportunity to protect queer and transsexual identities and behaviors while not requiring a static legally recognizable transsexual identity. In this regard, the use-

constitutional because the regulation does not prohibit speech per se, only the act of identification).

²²⁸ Rowland v. Mad River Local Sch. Dist., 470 U.S. 1009, 1016 n.11 (1985) (Brennan, J., dissenting) (denying review to a case where a school employee was fired because she revealed her sexual preference for women to co-workers).

²²⁹ *Id.*

²³⁰ 10 U.S.C. § 654(a)(15) (2006).

²³¹ U.S. DEP'T OF DEFENSE, DIRECTIVE NO. 1332.14, ENLISTED ADMINISTRATIVE SEPARATIONS E.3.8(a)(2)(b) (Aug. 28, 2008), available at <http://www.dtic.mil/whs/directives/corres/pdf/133214p.pdf>.

²³² 10 U.S.C. § 654(f)(3).

²³³ See *supra* Part III.A.

fulness of the *Spence* test is that it focuses on the intent—rather than the identity—of the speaker. It is precisely because of the particularized message requirement that the *Spence* test is important to transsexual people and why the misapplication of it, as in *Villegas*, is so dangerous. As illustrated below, a conflict exists among courts about what the Supreme Court requires for expressive conduct or symbolic speech to warrant constitutional protection. Courts tend to require an agreed upon message, a political message, or that the message conveyed be the specific message understood.²³⁴ However, none of these requirements appear in *Spence* or *Hurley*.

Under the proper application of the *Spence* test, the First Amendment should protect a transsexual person's gender-specific dress as symbolic speech because it conveys a particularized message that those who view it are likely to understand.²³⁵ A message of group membership satisfies the particularized message requirement even when the group itself does not necessarily agree upon what membership means.²³⁶ The speaker must only intend to convey *a* message, not *an agreed upon* message; various circuits' decisions regarding student and employee dress codes illustrate this idea.

Though students do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate[,]”²³⁷ the Supreme Court has consistently held that student's rights “must be applied in light of the special characteristics of the school environment.”²³⁸ School dress code cases provide a useful reference for the limits of the symbolic speech doctrine because before a court decides whether a particular code or regulation violates the First Amendment, it must first decide if the student's clothing or appearance is speech.²³⁹ When courts address the constitutionality of school dress codes, they evaluate, in

²³⁴ For a further discussion of lower courts' struggles with applying *Spence*, see James M. McGoldrick, Jr., *United States v. O'Brien Revisited: Of Burning Things, Waving Things, and G-Strings*, 36 U. MEM. L. REV. 903, 915-26 (2006).

²³⁵ See *Spence v. Washington*, 418 U.S. 405, 410-11 (1974).

²³⁶ See *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 655 (2000).

²³⁷ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969).

²³⁸ *Morse v. Frederick*, 551 U.S. 393, 397 (2007) (quoting *Tinker*, 393 U.S. at 506); see also *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266 (1988); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682 (1986).

²³⁹ See *Tinker*, 393 U.S. at 507-08.

part, whether the student's dress is pure speech or an expression of identity.²⁴⁰

A Texas district court found the First Amendment protects student expression that violates the school dress code when the student is likely to convey a message simply by wearing it, such as an outward expression of their religious beliefs.²⁴¹ As a result, the court found that the Constitution treats wearing a rosary to communicate one's Catholicism as protected speech—even if viewers did not associate the rosary with Catholicism.²⁴² The court found the rosary is familiar and not so abnormal that those viewing would understand it as a symbol of Christianity generally.²⁴³ Another district court in Texas also held a school dress code that prohibited men from wearing long hair violated both the free speech and free exercise rights of Native American students.²⁴⁴ There, the court accepted the students' arguments that the First Amendment protects wearing long hair because it has spiritual significance in tribal culture and the students were expressing their religious beliefs in wearing their hair long.²⁴⁵ In so finding, the court recognized that "long hair in Native American culture and tradition is rife with symbolic meaning[,]"²⁴⁶ and that all members of the tribe need not hold the symbolism.²⁴⁷

²⁴⁰ In judging whether school children's claims are protected, many courts cite *Tinker* for the proposition that the ruling was limited to political speech and did not relate to "the length of skirts or the type of clothing, . . . hair style, or deportment." *Id.* For example, *Tinker* has been cited for this proposition by *Miller v. Penn Manor School District*, 588 F. Supp. 2d 606, 620 (E.D. Pa. 2008) and *Carter v. Hodges*, 317 F. Supp. 89, 95 (W.D. Ark. 1970).

²⁴¹ *Chalifoux v. New Caney Indep. Sch. Dist.*, 976 F. Supp. 659, 666, 670 (S.D. Tex. 1997).

²⁴² *Id.* at 665.

²⁴³ *Id.*

²⁴⁴ *Ala. & Coushatta Tribes of Tex. v. Trs. of the Big Sandy Indep. Sch. Dist.*, 817 F. Supp. 1319, 1333-34 (E.D. Tex. 1993).

²⁴⁵ *See id.* at 1325-26.

²⁴⁶ *Id.* at 1333.

²⁴⁷ *See id.* at 1325-26, 1329. Part of the students' claim was that the prohibition of long hair infringed on their free exercise rights, which prompted the court to discuss at length the history of the tribe's religious beliefs, conversions, and the political resurgence of long hair as a symbol of Native Americanism through the American Indian Movement. *See id.* at 1324-26.

Important in these cases is that the courts found protected symbolic speech even while recognizing that the particularized message and the message likely received were different, though related. The students' claims were not dismissed simply because others would not understand the precise message they were communicating. Instead, these courts implicitly recognized there is often a disjuncture between what one communicates and what others understand.

These decisions are also significant because in both cases the court accepted the idea that when a symbol shows group membership, it may be symbolic speech protected by the First Amendment. In these cases, the particularized message was not one of specific religious or cultural doctrine or tradition, but rather a general message about the speaker's membership in a group. In contrast to *Villegas*, the courts in these cases did not find the message nonexistent because not all Catholics or Christians agree on what the cross symbolizes or because all Native Americans did not agree on the spiritual significance of long hair.²⁴⁸ Instead, the court simply accepted the students intended to convey a message of group membership.²⁴⁹

Conversely, when the court determines that a student does not wear clothing or maintain a certain appearance for individual self-expression, school district regulations are constitutional.²⁵⁰ Even where courts find that a dress code is constitutional, courts tend to determine whether they can regulate student speech based on whether the speech "materially and substantially interfere[s] with the requirements of appropriate discipline in the operation of the school" rather than because the student's dress is not speech.²⁵¹ Relying on this purported need for discipline in school, a school constitutionally prevented white students from wearing clothing with a Confederate flag.²⁵²

²⁴⁸ *Id.*

²⁴⁹ See *Braxton v. Bd. of Pub. Instruction*, 303 F. Supp. 958, 959 (M.D. Fla. 1969) (holding that the firing of an African American teacher for wearing a goatee to express his cultural heritage and racial pride violated the Fourteenth Amendment).

²⁵⁰ See *Hines v. Caston Sch. Corp.*, 651 N.E.2d 330, 335-36 (Ind. Ct. App. 1995) (holding a school's earring ban to be constitutional because the district had a legitimate government objective).

²⁵¹ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509 (1969).

²⁵² *Phillips v. Anderson County Sch. Dist. Five*, 987 F. Supp. 488, 493 (D.S.C. 1997) (holding the clothing ban was constitutional because allowing the student to wear a

This racialization of symbols can be seen in the Supreme Court's jurisprudence as well. The Ninth Circuit also held that when clothing is meant to demonstrate group or political affiliation, the First Amendment may provide protection.²⁵³ In *Virginia v. Black*, Justice Sandra Day O'Connor, in finding a cross-burning statute unconstitutional, took great pains to list the ways that burning a cross is more than just hate speech.²⁵⁴ Significantly, she noted that burning a cross could be an expression of solidarity.²⁵⁵ Despite its implications for hate speech, the Court's decision in *Black* is important because it granted constitutional protection for speech that communicates affiliation. This recognition is important because clothing, as discussed above, communicates affiliation.

Courts have found the First Amendment does not protect symbolic student speech that is not religious and intends only to express cultural identity, especially when students of color bring the claim. A school no-hats policy was found constitutional even though the rule prevented an African American woman from wearing a head wrap in celebration of her cultural heritage.²⁵⁶ Additionally, a school was able to prevent a student from wearing sagging pants despite the fact that he did so as "a statement of his identity as a black youth and as a way for him to express his link with black culture and the styles of black urban youth."²⁵⁷ What cannot be overlooked in these cases is that both school dress codes related to the curtailing of gang activity and both plaintiffs were African American. It is not a coincidence that courts tend to grant protection to religious symbols and those that white people commonly

Confederate flag jacket would likely result in substantial disruption though acknowledging that the students were engaged in speech).

²⁵³ See *Sammartano v. First Jud. Dist. Ct.*, 303 F.3d 959, 974-75 (9th Cir. 2002) (granting injunction for plaintiffs who were denied entrance to a courthouse because they were wearing motorcycle organization symbols based on First Amendment right to expression).

²⁵⁴ See *Virginia v. Black*, 538 U.S. 343, 365-66 (2003).

²⁵⁵ *Id.*

²⁵⁶ *Isaacs ex rel. Isaacs v. Bd. of Educ.*, 40 F. Supp. 2d 335, 338 (D. Md. 1999) (noting there were other ways for the student to express pride in her heritage).

²⁵⁷ *Bivens v. Albuquerque Pub. Schs.*, 899 F. Supp. 556, 558 (D.N.M. 1995) (finding the plaintiff failed to provide sufficient evidence to show a genuine issue of fact on this issue).

consider protected while courts consider those used by minorities as mere individualized expressions of identity.

Outside of the school context, there are considerably fewer cases that use the First Amendment to challenge dress codes. Most workplace dress code challenges are based on Title VII, which prohibits discrimination because of sex.²⁵⁸ In evaluating whether an employer violated a terminated employee's rights, a court in the Sixth Circuit found that, according to the *Spence* test, the Constitution protected the act of wearing a cross necklace as expressive conduct.²⁵⁹ There, the court found that the plaintiff's display of her cross pendant to "give witness to [her] religious faith . . . would be understood by viewers as carrying her intended message."²⁶⁰ Though the plaintiff stated in her deposition that she wore the cross to remind herself of Jesus, the court noted this did not contradict her testimony about giving witness to her religious faith because she never stated that she "wore the cross for no other reason or that she did not intend to communicate any other message."²⁶¹ The Fifth Circuit also held that wearing a rosary was protected symbolic speech as it is a recognized symbol that viewers would understand.²⁶² The Second Circuit also recognized that the First Amendment entitles items of clothing to constitutional protection when they have significant expressive intent and are more than purely utilitarian items.²⁶³

The distinction these courts make is between items the courts judge as political or religious and those that are merely disruptive displays of individuality. Just as the Top Hatters were simultaneously punished for communication of membership in a group and for the court's finding that their activity was not communicative, so too are students who are told they are being disruptive to hegemonic norms and that

²⁵⁸ 42 U.S.C. § 2000e-2(a) (2000), *declared unconstitutional by Rweyemamu v. Cote*, 520 F.3d 198 (2d Cir. 2008). For a discussion of transgender claims under Title VII, see Ilona M. Turner, *Sex Stereotyping Per Se: Transgender Employees and Title VII*, 95 CAL. L. REV. 561 (2007).

²⁵⁹ *Draper v. Logan County Pub. Library*, 403 F. Supp. 2d 608, 613 (W.D. Ky. 2005).

²⁶⁰ *Id.*

²⁶¹ *Id.* at 613 n.5.

²⁶² *Chalifoux v. New Caney Indep. Sch. Dist.*, 976 F. Supp. 659, 666, 670 (S.D. Tex. 1997).

²⁶³ *Mastrovincenzo v. City of N.Y.*, 435 F.3d 78, 96-97 (2d Cir. 2006) (holding a street vendor's clothing that contained text, logos, and designs was protected).

their claims are “so unimportant that their messages do not rise to the level of political speech.”²⁶⁴ In addition to the constitutionally ungrounded requirements these courts impose, they implicitly ignore or dismiss the fact that clothing, or members in a group identified by clothing, is inherently multifarious and “pregnant with expressive content”²⁶⁵

The *Spence* test’s focus on the message rather than the speaker has the potential to provide a unique opportunity for transsexual people to avoid many of the inherent political drawbacks of other rights litigation while gaining some measure of constitutional protection. Currently, the two primary types of suits seeking rights for transsexual people are equal protection²⁶⁶ and sex discrimination.²⁶⁷ Both of these strategies require there be a legally recognizable transsexual subject.²⁶⁸ As discussed above, the First Amendment merely requires legally recognizable conduct which people already engage in.

As the court in *Zalewska v. County of Sullivan* noted:

For many, clothing communicates an array of ideas and information about the wearer. It can indicate cultural background and values, religious or moral disposition, creativity or its lack, awareness of current style or adherence to earlier styles, flamboyancy, gender identity, and social status. From the nun’s habit to the judge’s robes,

²⁶⁴ Paisley Currah, *Gender Pluralisms under the Transgender Umbrella*, in *TRANSGENDER RIGHTS* 3, 20 (Paisley Currah et al. eds., 2006).

²⁶⁵ *Texas v. Johnson*, 491 U.S. 397, 405 (1989).

²⁶⁶ See generally Diana Elkind, Comment, *The Constitutional Implications of Bathroom Access Based on Gender Identity: An Examination of Recent Developments Paving the Way for the Next Frontier of Equal Protection*, 9 U. PA. J. CONST. L. 895 (2007); Janine M. Demanda, *Our Transgressions: The Legal System’s Struggle With Providing Equal Protection to Transgender and Transsexual People*, 71 *UMKC L. REV.* 507 (2002).

²⁶⁷ See generally Turner, *supra* note 258; James G. O’Keefe, Note, *Pyrrhic Victory: Smith v. City of Salem and the Title VII Rights of Transsexuals*, 56 *DEPAUL L. REV.* 1101 (2007).

²⁶⁸ Richard M. Juang, *Transgendering the Politics of Recognition*, in *TRANSGENDER RIGHTS*, *supra* note 264, at 242, 242-45.

clothing may often tell something about the person so garbed.²⁶⁹

This is an important recognition because often, as illustrated by *Villegas*, courts fail to recognize dress as communicating gender group membership because “it has been so effectively naturalized out of sight.”²⁷⁰

In this way, clothing used to express one’s membership in a gender group is functionally equivalent to a flag or religious symbol. In both contexts, “[t]he use of an emblem or flag to symbolize some system, idea, institution, or personality, is a short cut from mind to mind.”²⁷¹ In addition to the utilitarian functions the flag or clothing may serve—demarcating United States territory for the flag or protecting one from the elements—the purpose of these items is also to serve as a symbol, and these items are, as Justice Brennan noted in *Texas v. Johnson*, a “primitive but effective way of communicating ideas.”²⁷² If there is a fundamental recognition that clothing generally—gendered clothing specifically—communicates membership in a group, then the *Spence* test is easily satisfied because there is a particularized message of gender group membership that is likely to be understood.

B. Child Pornography is Sexual Speech

Sexual speech occurs in relation to both child and nonchild pornography through viewing and talking about pornography, including statements of ownership of particular genres of pornography. Pornography is “not simply a question of how one reads the messages but what one does with them”²⁷³ Just as sex is sexual speech because of the relationships between pleasure, identity, and expression, so too is pornography because of the interplay between fantasies, identities, and bodies.

²⁶⁹ *Zalewska v. County of Sullivan*, 316 F.3d 314, 319 (2d Cir. 2003).

²⁷⁰ Currah, *supra* note 264, at 20.

²⁷¹ *Texas v. Johnson*, 491 U.S. 397, 405 (1989).

²⁷² *Id.*

²⁷³ Susan Etta Keller, *Viewing and Doing: Complicating Pornography’s Meaning*, 81 GEO. L.J. 2195, 2216 (1993).

Similar to Jacob Hale's experiences of identity formation through sadism and masochism (S/M),²⁷⁴ the act of watching pornography has similar implications for the viewer. The sexual speech found in pornography is not just in the content of the images but in the relationship between the viewer and the image. "While the goal of fantasy is to create a feeling of reality, the concurrent unreality will always be part of the turn on."²⁷⁵ Thus, part of sexual gratification of viewing pornography can be found in the fact that the viewer does not participate.²⁷⁶

Because watching pornography is fundamentally tied to fantasy, the articulation of either the fantasy involved or a mere statement of ownership is also sexual speech. Just as coming out is sexual speech because of the identification with a group and sex acts, so too is speech about pornography. In this way, there is little difference among saying "I'm gay," communicating one's sexual preference by saying "I have gay pornography," or by directly communicating one's sexual fantasy.

Speech about sex or one's sexual fantasies is important because it relates to pleasure and desire, which are important tools for looking at agency and identity. For Judith Butler, "[f]antasy is part of the articulation of the possible; it moves us beyond what is merely actual and present into a realm of possibility, the not yet actualized or the not actualizable."²⁷⁷ This interplay between the actual and the possible relates to the protection of all obscenity because in order for one to conceptualize what one wants to be, one must also be able to fantasize about what one can be. Social science literature illustrates that sex is a site of gender production precisely because it involves, at least for some, both the conceptualization of and the acting out of what is possible. The link between one's subjective beliefs about the nature of an image of child pornography cannot be separated from the fantasy one has about the image. It seems unlikely that one who sexualizes child pornography would find equal satisfaction in an image, believing it con-

²⁷⁴ See *infra* Part V.C.

²⁷⁵ Keller, *supra* note 273, at 2220.

²⁷⁶ *Id.* at 2221. "Successful pornography, like successful fantasy, will strive to create a feeling of realness for the consumer. But that realness is not the same thing, at all, as reality, although the two are related. It may be the combination of feeling real and not being real that makes the pornographic representation 'work'" *Id.* at 2223.

²⁷⁷ JUDITH BUTLER, UNDOING GENDER 28 (2004).

tained actual children and young-looking adults because “[d]esire and identification are often mapped onto each other.”²⁷⁸

C. *Sex is Sexual Speech*

In arguing that states and courts should not define the meaning of personal, intimate relationships, the Court in *Lawrence v. Texas* plainly found that sex was expressive.²⁷⁹ Thus, the act of having sex is both sexual speech and expressive conduct.²⁸⁰ Having sex is sexual speech because it involves a conversation with one’s partner or partners about pleasure and desire²⁸¹ and also because it fundamentally connects to identity. In speaking about S/M, Michel Foucault’s exploration of the desexualization of pleasure is important because it disrupts the essentialist notion that bodily pleasure should always come from sexual pleasure. Additionally, it addresses not only the possibility of the proliferation of pleasures but when, how, and under what conditions sex and pleasure become sites of resistance in terms of discourse creation.²⁸² This pleasure production is a result of an “acting out of power structures by a strategic game that is able to give sexual or bodily pleasure.”²⁸³

S/M can provide a space where the pleasure received is precisely through the acting out of power. Hale explores the ways that acting out his fantasies in an S/M relationship require him to perform as, and be treated as, a boy while identifying himself as a woman. For Hale, this acting was vital to his coming out or discovering of his transgendered-

²⁷⁸ HENRY RUBIN, *SELF-MADE MEN: IDENTITY AND EMBODIMENT AMONG TRANSSEXUAL MEN* 118 (2003).

²⁷⁹ *Lawrence v. Texas*, 539 U.S. 558, 567 (2003) (“When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice.”).

²⁸⁰ See generally James Allon Garland, *Sex as a Form of Gender and Expression After Lawrence v. Texas*, 15 COLUM. J. GENDER & L. 297 (2006).

²⁸¹ See James Allon Garland, *Breaking the Enigma Code: Why the Law Has Failed to Recognize Sex as Expressive Conduct Under the First Amendment, and Why Sex Between Men Proves That It Should*, 12 LAW & SEXUALITY 159, 235 (2003).

²⁸² See Bob Gallagher & Alexander Wilson, *Michel Foucault, An Interview: Sex, Power and the Politics of Identity*, ADVOCATE, Aug. 1984, at 26, 28-29.

²⁸³ *Id.* at 30.

ness because it showed him the potential of the interplay between the actual and the possible.²⁸⁴ Thus, the erotic appeal of S/M came from, in part, the identification by each partner with both sets of roles.²⁸⁵ This reconfiguring made it conceptually possible to be male during sex despite the presence of female body parts. This remapping illustrates that identity and pleasure are a result of the negotiations between partners and meanings of bodies and identities. Fundamental to this process is the communication of fantasy. Had Hale not been able to articulate his position as a boy, his boyish performance would have been ignored. This process applies not only to S/M or transsexual people; most sexual encounters involve some negotiation—though often it is nonverbal—of bodies, pleasure, and identity.

The speech aspect of sex is not tied to the identities of the participant and her partner or partners, but instead to meanings given to sex acts and bodies. “It’s not the act or the partner, it’s the identity” that is important during sex.²⁸⁶ The importance of identity during sex can also be seen in the naming of body parts. What in one context could be a clit on someone who identifies as a woman could easily be called a penis on a female-to-male transsexual. In either case, the body is named to conform with the identity of the person to which the genital is attached. This process, instead of requiring an actual clit or penis, only requires at least one of the participants to believe the genital identification to be subjectively true and the others, regardless of their belief of reality, engage with the fantasy being created.

For instance, sex involving a penis penetrating a vagina is not determinate of orientation. If it’s a straight man and woman and that’s how they identify, it’s

²⁸⁴ See C. Jacob Hale, *Leatherdyke Boys and Their Daddies: How to Have Sex Without Women or Men*, SOC. TEXT, Autumn-Winter 1997, at 223, 231 (“Leatherdyke practice may help [both trans people and academics] discern those aspects of our embodied subjectivities that are susceptible to our own agency, and those parts of our bodies that we must change if we are to live in our own skins.”); see also *id.* at 223-36.

²⁸⁵ Jessica Benjamin, *Master and Slave: The Fantasy of Erotic Domination*, in POWERS OF DESIRE: THE POLITICS OF SEXUALITY 280, 291-92 (Ann Snitow et al. eds., 1983).

²⁸⁶ JASON CROMWELL, TRANSMEN AND FTMS: IDENTITIES, BODIES, GENDERS & SEXUALITIES 136 (1999) (citation omitted).

het[erosexual] sex. If the penis happens to be a dildo and the parties happen to be dykes, it's lesbian sex. If it's a gay man and a transfag, it's gay sex.²⁸⁷

The act of having sex is also expressive conduct because “sexual expression possesses deep communicative significance.”²⁸⁸ The Supreme Court recognized this in holding that nude dancing in public is *expressive conduct*.²⁸⁹ Though not joining the plurality on this issue, even Justice Antonin Scalia conceded the definition of *inherently expressive conduct* involves activity “that is normally engaged in for the purpose of communicating an idea, or perhaps an emotion, to someone else.”²⁹⁰ The idea that the First Amendment protects the emotive function of speech is not new. In 1971 the Court noted that the emotive function of expression “may often be the more important element of the overall message sought to be communicated.”²⁹¹

Just as particular words are chosen for their emotive force, so too is sexual conduct. Certain sexual conduct communicates “certain messages that cannot be equally communicated through mere words.”²⁹² All forms of sexual conduct are expressive in this way, regardless of why the participants engaged in a given act because “sex is intrinsically communicative and may express a wide range of emotions—love, desire, power, dependency, even rage or hatred.”²⁹³ Though saying one is gay, articulating a gay fantasy, and having gay sex all communicate different desires and identities, all three are a “profound expression of what one feels and thinks.”²⁹⁴ This recognition that protecting speech necessarily involves the protection of emotive expression means that sexual expression must be protected because prohibiting particular words or emotive expressions runs the risk of stifling protected ideas in the process.

²⁸⁷ *Id.*

²⁸⁸ Cole & Eskridge, *supra* note 41, at 326.

²⁸⁹ Barnes v. Glen Theatre, Inc., 501 U.S. 560, 565-66 (1991) (plurality opinion).

²⁹⁰ *Id.* at 578 n.4 (Scalia, J., concurring).

²⁹¹ Cohen v. California, 403 U.S. 15, 26 (1971).

²⁹² Cole & Eskridge, *supra* note 41, at 326 n.32.

²⁹³ *Id.* at 326. See generally FOUCAULT, *supra* note 222.

²⁹⁴ Cole & Eskridge, *supra* note 41, at 326.

VI. SEXUAL SPEECH IS POLITICAL SPEECH

I keep thinking about power. The intuitive flash of power that “coming-out” can give I think “coming-out”—that first permission we give ourselves to name our love for women as love, to say, I am a lesbian, but also the successive “comings-out” to the world . . . is connected with power, connects us with power, and until we believe that we have the right not merely to our love but to our power, we will continue to do harm among ourselves, fearing that power in each other and in ourselves.²⁹⁵

Identity is conceptually important in explaining social and cultural changes as well as social structures. As Steven Epstein points out, “[e]ach society seems to have a limited range of potential storylines for its sexual scripts It may be that we’re all acting out scripts – but most of us seem to be typecast.”²⁹⁶ Individuals then make their own identity, “but they do not make them just as they please.”²⁹⁷ Identities can be understood as historical constructions and reflections of political locations without undermining the relevance that such identities have for individuals who use them. Identities have historical weight.²⁹⁸ They carry meanings from the past. But as our understanding of identities changes, the historical meanings remain the same.²⁹⁹ Understanding that identities do not have a fixed relationship to actual *facts* about a person expands our understanding of identities—bodies can inhabit many identities. Identity categories can thus become strategic tools, rather than essential facts about someone, and can illustrate how people

²⁹⁵ Adrienne Rich, *Foreword* to *THE COMING OUT STORIES*, at xii-xiii (Julia Penelope Stanley & Susan J. Wolfe eds., 1980).

²⁹⁶ Steven Epstein, *Gay Politics, Ethnic Identity: The Limits of Social Constructionism*, 17 *SOCIALIST REV.* 9, 24 (1987), available at http://www.williamapercy.com/wiki/images/Gay_Politics,Ethnic_Identity.pdf (pdf pagination).

²⁹⁷ *Id.* at 30.

²⁹⁸ See “*They Wonder to Which Sex I Belong*”: *The Historical Roots of the Modern Lesbian Identity*, in *THE LESBIAN AND GAY STUDIES READER* 432, 432-52 (Henry Abelove et al. eds., 1993).

²⁹⁹ See RUBIN, *supra* note 278, at 279-80 (describing how female-to-male transsexuals are required to distinguish themselves from the historically established description of a lesbian in order to qualify for receiving hormones and surgeries).

interpret and use identities in the context of conceptual frameworks rather than their literal meaning.

[Identity categories] make us not only question what is real, and what ‘must’ be, but they also show us how the norms that govern contemporary notions of reality can be questioned and how new modes of reality can become instituted. . . . [N]ew modes of reality take place in part through the scene of embodiment, where the body is not understood as a static and accomplished fact, but as an aging process, a mode of becoming that, in becoming otherwise, exceeds the norm, reworks the norm, and makes us see how realities to which we thought we were confined are not written in stone.³⁰⁰

Finding room for resistance and understanding how power limits individuals is pivotal to understanding the social world and to creating and maintaining political identities.

What is significant about this body of literature is that one’s freedom to think of oneself as one wishes does not simply occur during the act of having sex; it also occurs in the mental processes and articulation of those thoughts that accompany it. “[I]f we think of ‘agency’ not simply a synonym for resistance to social norms but as a modality of action, then this conversation raises some interesting questions about the kind of relationship established between the subject and the norm, between performative behavior and inward disposition.”³⁰¹ To use the words of Robert Reid-Pharr, little within the law addresses the “question of how we inhabit our various bodies, especially how we fuck or, rather, what we think when we fuck.”³⁰² Important for *Williams* and the PROTECT Act, this process also occurs in the consumption and speech of pornography and pedophilic fantasies.

³⁰⁰ BUTLER, *supra* note 277, at 29.

³⁰¹ MAHMOOD, *supra* note 224, at 157.

³⁰² ROBERT F. REID-PHARR, *BLACK GAY MAN: ESSAYS* 86 (2001) (“In the face of wildly impressive work on gay and lesbian history and historiography, gender roles and politics, queer literature and culture, we have been willing to let stand the most tired and hackneyed notions of what our sex actually means.”).

Butler argues, “to the extent that desire is implicated in social norms, it is bound up with the question of power and with the problem of who qualifies as the recognizably human and who does not.”³⁰³

We need, therefore, a conceptual vocabulary that tracks the performative act of identification. Heterosexual identity is “performative,” in the sense that the content of heterosexual identity has to be produced, fabricated, made up, and acted out. Recall, in this connection, the etymological roots of the word “orientation”: heterosexual identity has to be “oriented” or raised up alongside, and against, its identificatory alternatives. Like all sexualities, heterosexuality has no ontological status apart from the various acts of identification whose performance constitutes its “reality.”³⁰⁴

Asking the question “what about sex is pleasurable?” leads to examinations of bodies, desires, and power. Sex becomes “not a fatality [but] a possibility for creative life[]”³⁰⁵ and a ripe site to discuss and discover the multiple relationships and possibilities between body, identity, and power. Thus gender expression becomes intertwined with issues of sex and sexuality.³⁰⁶

VII. CONCLUSION

After posting nude pictures of herself on her own Myspace page, a fourteen-year-old New Jersey teen was arrested and charged with possession and distribution of child pornography.³⁰⁷ Undeterred by the fact that the girl posted the pictures of herself for her partner, prosecutors were only concerned with the fact the young woman knowingly posted

³⁰³ BUTLER, *supra* note 277, at 2.

³⁰⁴ Thomas, *supra* note 223, at 1807.

³⁰⁵ Gallagher & Wilson, *supra* note 282, at 27.

³⁰⁶ See HOLLY DEVOR, FTM: FEMALE-TO-MALE TRANSSEXUALS IN SOCIETY 342-43 (1997).

³⁰⁷ Beth Defalco, *Porn Charges for Girl Who Posted Nude Pics of Self*, ORLANDO SENTINEL, Mar. 27, 2009, at A8, available at 2009 WLNR 5790974.

the pictures.³⁰⁸ Though the case was dismissed, the PROTECT Act expressly permits prosecution in such a scenario, regardless of mitigating factors.

In 2000 John Doe, a convicted sex offender, went to a park in Lafayette, Indiana looking for children.³⁰⁹ While at the park, Doe saw some children, started having sexual fantasies, and then left the park.³¹⁰ After leaving the park without approaching, contacting, or touching the children, Doe called his psychologist who suggested he tell this story to his sex addicts support group.³¹¹ The next night Doe told the sex addicts anonymous group about his trip to the park and subsequent thoughts.³¹² After sharing his sexual fantasies, someone in the group reported Doe to city officials who then banned Doe from all of the town's parks and school grounds.³¹³ The Seventh Circuit later upheld this ban against a constitutional challenge.³¹⁴

Because courts have allowed fear of crime to dictate First Amendment jurisprudence, it is important to protect speech and thought that arises through the act of sex, sexual fantasy, and all forms of pornography.

The underlying identity does not exist inertly beneath the speech that describes it, but is partially fashioned by that speech. For both reasons, so long as there is a “right to be” a particular kind of person, I believe it follows that there is a “right to say what one is.”³¹⁵

As illustrated by Henkle, the Top Hatters, and Michael Williams, the right to define oneself comes in many forms.

³⁰⁸ See *id.*; see also Gil Kaufman, *Federal Judge Blocks Child-Pornography Charges In Sexting Case*, MTV NETWORKS, Mar. 31, 2009, <http://mtv.com/news/articles/1608142/20090331/story.jhtml>.

³⁰⁹ Doe v. City of Lafayette, 377 F.3d 757, 759 (7th Cir. 2004).

³¹⁰ *Id.* at 760.

³¹¹ *Id.* at 775 (Williams, J., dissenting).

³¹² *Id.*

³¹³ *Id.*

³¹⁴ *Id.* at 774.

³¹⁵ Yoshino, *supra* note 57, at 833-34 (citation omitted).