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Same-Sex Union Announcements: Whether Newspapers Must Publish Them, and Why We Should Care

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SAME-SEX UNION ANNOUNCEMENTS: WHETHER NEWSPAPERS MUST PUBLISH THEM, AND WHY WE SHOULD CARE*

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On August 18, 2002, the *New York Times* announced that it would soon begin publishing same-sex union announcements on par with those of heterosexual weddings.[1] Bowing to "a growing and visible trend in society toward public celebrations of commitment by gay and lesbian couples," the *Times* decided to select qualified couples according to "the newsworthiness and accomplishments of the couples and their families,"[2] the same basis on which it selects heterosexual couples. "Qualified" couples are those who "[c]elebrate their commitment in a public ceremony" or "[e]nter into a legally recognized civil union (currently available only in Vermont) or register their domestic partnership (in those localities, including New York City, that offer registration)."[3] With this step, the *New York Times* became the first major metropolitan daily to offer access to social announcement pages to gay men and lesbians on the same terms as heterosexuals.[4] True to its word, the inaugural same-sex union announcement appeared in the *New York Times* on September 1, 2002.[5]

This milestone occurred after a decade of concerted effort by individuals and organizations to obtain for same-sex couples equal treatment by newspapers in their society pages. While other newspapers preceded the *Times* in publishing same-sex announcements, the *Times*, the "newspaper of record" and arguably the most influential newspaper in the country, has set an impressive precedent. Additional papers have begun

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[1] Times *Will Begin Reporting Gay Couples' Ceremonies*, N.Y. TIMES, Aug. 18, 2002, at A30.

[2] *Id.*

[3] *Id.*

[4] According to the Gay & Lesbian Alliance Against Defamation ("GLAAD"), as of December 20, 2002, 180 newspapers offer equal access to the weddings section. *See* GLAAD, *Announcing Equality Project: Newspapers that Publish Same-Sex Union Announcements*, *at* http://www.glaad.org/campaigns/announcing_equality/newspaper_list (last visited Dec. 27, 2002). This figure is out of approximately 1,600 daily newspapers. *Gay Unions to Appear in Sentinel*, ORLANDO SENTINEL, Aug. 24, 2002, at C3. It is unclear what is meant by "equal access" in this context, since several newspapers on the list—such as the *Boston Globe*—segregate same-sex union announcements into different sections from heterosexual announcements. The *New York Times* intermingles gay and heterosexual announcements on the same pages.

[5] *Daniel Gross, Steven Goldstein*, N.Y. TIMES, Sept. 1, 2002, § 9, at 12. For a behind-the-scenes account, *see* Troy Masters, *You May Now Break the Glass: The Inside Scoop on The* Times' *First Gay Wedding Announcement*, GAY CITY NEWS, Sept. 6, 2002, *available at* http://www.gaycitynews.com/GCN15/youmay.html (last visited Oct. 21, 2002). The first announcement from a lesbian couple appeared the following week. *See Leslie Miller and Alicia Salzer*, N.Y. TIMES, Sept. 8, 2002, § 9, at 12.

following suit.[6] This achievement is both remarkable and laudable.

Other newspapers, however, will undoubtedly continue in their traditional practices of exclusion. Some of these exclusionary papers will be accused in court and in the public forum of unlawful discrimination.[7] Reflexively, those newspapers will erect a defensive shield from those charges by appealing, at least in part, to the First Amendment. Since the First Amendment traditionally protects newspapers from any government interference in editorial content, this defense, at first blush, appears sound. This Article, however, questions the merits of that defense and concludes that although courts instinctively defer to the press, alternative factual and policy analyses could produce a different outcome, one which would render unlawful a newspaper's exclusionary practices.

This Article begins in Part I by sketching the history of interactions between newspapers and the gay community. A recurring touchstone of reality for this Article's analysis is a complaint of discrimination filed against the *Times-Picayune*, New Orleans's major daily newspaper. This Part recounts the background of that story, as well as newspapers' prior responses to requests to publish same-sex union

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[6] Michael Bronski, *Mergers and Acquisitions: Getting on the Times' Weddings Page*, BOSTON PHOENIX, Aug. 22, 2002, *available at* http://www.bostonphoenix.com/news_features/this_just_in/documents/0204899.htm (last visited Oct. 22, 2002) ("'The *Times* is a leader and a bellwether for other papers, [so] the effect of their decision' may be wide-ranging. Indeed, within a couple of years we may see every other paper in the country doing the same thing.") (quoting Robert Dodge, Board President for the National Lesbian and Gay Journalists' Association). For example, five days after the *New York Times* announcement, the *Orlando Sentinel* adopted a similar policy. *Gay Unions to Appear in Sentinel*, ORLANDO SENTINEL, Aug. 24, 2002, at C3. Notable additions to the list have been the *Boston Globe* and *The Oregonian*. According to GLAAD, when the *New York Times* made its announcement in August, it knew of approximately seventy newspapers with similar policies. *See* GLAAD, *GLAAD Launches Announcing Equality Project*, *at* http://www.glaad.org/org/campaigns/announcing_equality/newspaper_ust.php (Last visited Nov. 25, 2002). By the end of December, the number had more than doubled, demonstrating the power of the *Times*'s example.

[7] Only one appellate level case presents issues roughly analogous to those considered in this Article, *Cook v. Advertiser Co.*, 458 F.2d 1119 (5th Cir. 1972). In *Cook*, the plaintiff sued to have an Alabama newspaper accept for publication his wedding announcement. He sought to have the announcement included on the white-only society page and "not the black page." *Id.* at 1120 (emphasis omitted). The Fifth Circuit held that it lacked jurisdiction "over the content and arrangement of the society pages of a newspaper" and affirmed the lower court's dismissal of the complaint. *Id.* Because Cook based his complaint on a theory of contract, rather than the issues of discrimination and First Amendment protections addressed here, the case offers little insight into the current problem.

announcements on equitable terms with those offered heterosexual couples.

The Article then discusses the need for equal treatment of same-sex society announcements. Part II identifies the interests at stake in the debate over whether same-sex union announcements should appear in local newspapers. It asserts that the public recognition that accrues through such announcements is a necessary constituent of any healthy and enduring romantic relationship, and that denial of public recognition exposes gay couples to an increased risk of dissolution.

Part III examines claims of discriminatory exclusion that occur under a public accommodations law that protects sexual orientation asserted against a newspaper. The threshold issue is whether newspapers fall within the scope of a "public accommodation."[8] To date, no court has held a newspaper to be a public accommodation. Assuming this jurisprudential trend continues, claims of discriminatory exclusion presumably will be resolved in favor of the newspaper because the basis for the complaints does not reach to that institution.

However, if newspapers are indeed public accommodations, proper resolution of the discrimination dispute will focus on the kind of speech embodied in a society announcement. Part IV parses the different analytical approaches courts use to examine speech and public accommodation. Specifically, if announcements are not "news," then one kind of analysis is appropriate, but if they are "news," a different tack is required. Finally, this Article concludes in Part V that whether a newspaper can be compelled to accept and publish same-sex union announcements is a fact-intensive issue dependent upon specific local conditions, and cannot be decided universally by appeal to either the Free Press or Free Speech Clauses of the Constitution.

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[8] A public accommodation is statutorily defined in the relevant jurisdiction. As a general concept,

> [t]he appropriate object of public accommodations law . . . is an establishment in which minimal association exists between proprietor and customers, and in which the service relation is brief, casual and routine. In addition, the establishment provides a service necessary to the public, and a high degree of competition exists among establishments of the same kind. Typically, public accommodations cater to nearly all of the public, indicating that significant associational interests are nonexistent.

Pamela Griffin, *Exclusion and Access in Public Accommodations: First Amendment Limitations upon State Law*, 16 PAC. L.J. 1047, 1055 (1985) (citations omitted).

I. TRADITIONAL NEWSPAPER POLICIES

Most important policy debates fail to pay adequate attention to the historical and cultural specifics that preceded the moment of the current discussion. That failure causes many nuances to be missed, particularly the trends pertinent to the debate, which develop over time. The respective relationships between the principal actors are typically already well established, and these prior interactions color the perspective and understanding of the immediate issue. Interactions between a newspaper and the gay members of its community are no exception. Their relations often were troubled and adversarial long before anyone raised the question of same-sex union announcements.[9]

In that spirit, this discussion takes as its real-life focus the details of a complaint a lesbian couple lodged against their local newspaper. In 1994, Donna Bird and Leslie Nehring submitted material to the *Times-Picayune*, the sole daily newspaper for the New Orleans area, for publication in its wedding section.[10] The editor of the Living section forwarded this request to James Amoss, the Editor-in-Chief.[11] Although Amoss told the couple that the *Times-Picayune* "does not have guidelines for 'this type' of announcement,"[12] he nevertheless declined their request,[13] stating that "such publication was not in the *Picayune*'s best interest at this time."[14]

Believing this rejection to be discriminatory, Bird and Nehring took their complaint to the New Orleans Human Relations Commission ("NOHRC"). The NOHRC notified the *Times-Picayune* that a complaint had been filed charging the newspaper for violations of then Chapter 40C of the City Code of New Orleans.[15] The *Times-Picayune* rebutted this charge,

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[9] Edward Alwood's STRAIGHT NEWS: GAYS, LESBIANS, AND THE NEWS MEDIA (1996), provides a thorough account of this developing relationship. Much of the historical detail outlined in this section was gleaned from his engrossing work.

[10] New Orleans Human Relations Commission, Charge of Discrimination No. 1024940001 (Feb. 6, 1995) [hereinafter "NOHRC Charge"].

[11] Memorandum in Support of Motion for Temporary Restraining Order and Preliminary Injunction Ex. B, Affadavit of James Amoss, at 3, Times Picayune Publ'g Corp. v. City of New Orleans, No. Civ. A95-518N, 1995 U.S. Dist. LEXIS 4842 (La. App. 4th Cir. April 13, 1995).

[12] NOHRC Charge, *supra* note 10, at 2.

[13] Amoss Memorandum at 3.

[14] NOHRC Charge, *supra* note 10, at 1.

[15] CITY CODE OF NEW ORLEANS, art. III, § 40C-102(1) (amended and recodified as § 86-33). The analysis below will proceed under the new version of the

arguing that the complaint constituted a "frontal assault on the First Amendment freedoms generally and the freedom and independence of the press in particular."[16]

The *Times-Picayune*'s defenses are archetypical of the kinds of arguments asserted by newspapers charged with discrimination against same-sex couples. Similarly, the *Times-Picayune* example is representative of the dynamic relationship between a newspaper and the gay members of its reader community. Details from that example inform this review of the sociohistorical background of the debate over same-sex union announcements.

A. *On the Words "Gay" and "Homosexual"*

One could tell the story of the relationship between newspapers and the gay members of their local communities using any number of devices. This section selects as its theme the attitude toward the very words—"gay" and "homosexual"—themselves.

The term "homosexual" was coined in 1869 as a hybrid of Greek and Latin.[17] "Gay," by contrast, did not develop its current meaning until 1935.[18] As "homosexual" came to be viewed as a term of derision, as an archaic term or simply as an overly medical/technical term limited to sexual acts alone,[19] "gay," with its positive connotations of a fuller lifestyle beyond mere sexuality, became the preferred term within the community.[20] As the terms developed, "homosexual" described what a person *did*, while "gay" described who a person *was*: "*Gay* [has come] to represent a commitment to personal and social change, as well as a life-style—a personality and identity that marked a proud, self-determined social and political

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ordinance, which was adopted June 17, 1999, many years after the NOHRC charge.

[16] Amoss Memorandum at 2.

[17] Wayne R. Dynes & Warren Johansson, *Homosexual (Term), in* 1 ENCYCLOPEDIA OF HOMOSEXUALITY 555 (Wayne R. Dynes ed., 1990).

[18] Scott Speirs, *Gay, in* GAY HISTORIES AND CULTURES: AN ENCYCLOPEDIA 362, 363 (George E. Haggerty ed., 2000).

[19] *See, e.g.*, James M. Donovan, *Homosexual, Gay, and Lesbian: Defining the Words and Sampling the Populations*, 24(1/2) J. HOMOSEXUALITY 27, 33-40 (1992) [hereinafter *Defining the Words*] (recording the perceptions of gays that the word "homosexual" refers only to sexual acts).

[20] Speirs, *supra* note 18, at 363 ("By the time of the Stonewall riots, *gay* was the dominant term of expressing their sexual identity for a group of younger, more overtly political homosexual activists, who formed groups such as the Gay Liberation Front."); *see also* Donovan, *Defining the Words*, *supra* note 19, at 40-41.

territory. *Homosexual*, on the other hand, stood for repression and a lack of gay consciousness."[21]

The Ninth Circuit case of *One, Inc. v. Olesen*[22] reflects the early media attitude toward all things homosexual. In *Olesen*, the postmaster refused to deliver a magazine of political and social interest because it targeted gay men and lesbians. His rationale was that any material treating the topic of homosexuality was obscene per se. The publisher brought suit seeking an injunction against the postmaster's failure to deliver.[23] The district court denied the injunction, ruling that the magazine was obscene and thus non-mailable material.[24] The Ninth Circuit affirmed.[25] In 1958, the U.S. Supreme Court reversed *Olesen* without opinion.[26] This court victory was the first occasion in American history that newspapers such as the *New York Times* printed positive news about homosexuals.[27] After this reversal, simply discussing the topic of, or using the words for, homosexuality could no longer be legally proscribed as an obscene act.

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[21] RODGER STREITMATTER, UNSPEAKABLE: THE RISE OF THE GAY AND LESBIAN PRESS 83-84 (1995). The National Lesbian & Gay Journalists Association provides a "Stylebook Addenda of Gay/Lesbian Terminology" for use by newspapers, at http://www.nlgja.org/pubs/style.html. According to this document, "homosexual" is appropriate for "medical or sexual contexts." All other contexts should use "gay":

> An adjective that has largely replaced "homosexual" in referring to men who are sexually and affectionately attracted to other men . . . . For women, "lesbian" is preferred. To include both, use "gay men and lesbians." In headlines where space is an issue, gay(s) is acceptable to describe both.

NAT'L LESBIAN & GAY JOURNALISTS ASS'N, STYLEBOOK ADDENDA OF GAY/LESBIAN TERMINOLOGY, *at* http://www.nlgja.org/pubs/style.html (last visited Nov. 25, 2002).

[22] One, Inc. v. Olesen, 241 F.2d 772 (9th Cir. 1957). Historical details of the *Olesen* case are available from STREITMATTER, *supra* note 21, at 31-36.

[23] *Olesen*, 241 F.2d at 773.

[24] *Id.* at 775.

[25] *Id.* at 779.

[26] One, Inc. v. Olesen, 355 U.S. 371 (1958). The reversal was based presumptively on the reasoning of *Roth v. United States*, 354 U.S. 476 (1958), wherein obscenity was restricted to materials for the prurient interest of the consumer. Obviously, many persons would argue that homosexuality by definition fell within this construct of obscenity. The Court offered no explanation or analysis clarifying why this belief would be erroneous. The per curiam reversal of *Olesen* was one of three the Court granted after *Roth*, all without comment. The other two were *Sunshine Book Co. v. Summerfield*, 355 U.S. 372 (1958) and *Times Film Corp. v. Chicago*, 355 U.S. 35 (1957). Harry Kalven interprets this unusual action as suggesting that "the Court [felt] the pressure . . . to restrict obscenity to the worthless and hence to something akin to hard-core pornography. Thus the three decisions appear to add an important gloss to the *Roth* definition." Harry Kalven, Jr., *Metaphysics of the Law of Obscenity*, *in* COMMENTARIES ON OBSCENITY 89, 125 (Donald B. Sharpe ed., 1970).

[27] STREITMATTER, *supra* note 21, at 36.

This result, however, affected only the legal freedom to use the term in print. It did little to change the ongoing in-house custom of newspapers to refuse to print even the words "gay" or "homosexual."[28] In 1969, the *Village Voice* declined to accept an advertisement containing the word "gay," "despite the newspaper's willingness to accept apartment ads that specified No Gays."[29] Activists successfully pressured the paper to rescind the ban on both "gay" and "homosexual."[30]

The *Los Angeles Times*—which used the word "fag" as late as 1974[31]—changed a similar ban in 1969. The paper revised its policy only after being threatened with a letter writing campaign to the FCC that would have had serious economic implications for the newspaper.[32] The *New York Times* officially banned "gay" in 1975.[33] "The only exception to [the] rule would be when the word was used in direct quotes or when it was part of the official name of an organization."[34] The ban remained in effect until 1987, although even then the paper refused to use "gay" as a noun.[35] In 1978, the *Wall Street Journal* instituted a similar style rule to the effect that the paper was to use "homosexual" instead of the community-

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[28] Newspapers were not the only institution to avoid the use of these words. In 1970, the Gay Activists Alliance was refused a certificate of incorporation because "the organization could not use the term *gay* in its name." ALWOOD, *supra* note 9, at 108. The concern over words showed up in other areas as well. The Anti-Defamation League of B'nai B'rith, a Jewish watchdog group, threatened in 1985 to sue the newly formed Gay and Lesbian Anti-Defamation League for copyright infringement. *See id.* at 236. The U.S. Olympic Committee brought a similar suit over the use of the word "Olympic" by the Gay Olympics. *See* Nat Stern, *In Defense of the Imprecise Definition of Commercial Speech*, 57 MD. L. REV. 55, 99-100 (1999).

[29] ALWOOD, *supra* note 9, at 91; *see also* STREITMATTER, *supra* note 21, at 124. This hypocrisy continues today. Newspapers that have no problem accepting personal ads from gay men and lesbians "suddenly become concerned and moral when gays and lesbians want to announce to the world, as do straight people, their undying love for each other." Letter from Jay Crowell to editor of *Boston Globe* (Aug. 6, 2002), *in* BOSTON GLOBE, Aug. 6, 2002, at A14.

[30] *See* ALWOOD, *supra* note 9, at 92. Ironically, the *Village Voice* would later become the "first employer in the nation to sanction benefits for same-sex partners." *Id.* at 202.

[31] *See id.* at 6, 330 n.15 (referring to Susan Banashek & Al Martinez, *Night Shoppers—Fantasy in the Market Aisle*, L.A. TIMES, Aug. 14, 1974, at A1).

[32] *See id.* at 95.

[33] *See id.* at 162.

[34] *Id.*

[35] *See* ALWOOD, *supra* note 9, at 230-31. A more recent summary of the *New York Times*'s style policy is "to use 'gay' when referring to social and political issues and 'homosexual' when referring to clinical or psychological issues." Lawrence Ingrassia, *Fighting Words: Gay, Lesbian Groups Seek to Expunge Bias They See in Language*, WALL ST. J., May 3, 1993, at A1 (quoting Allan M. Siegal, assistant managing editor of the *New York Times*).

preferred "gay," a rule not lifted until 1984.[36] A small anecdote illustrates the tenor of the times: as late as 1978, "the U.S. Department of Commerce rejected *Gayweek*'s application to receive a trademark for its name, stating that the newspaper was 'immoral and scandalous.'"[37]

Newspapers continued to refuse to accept commercial advertisements with the words "gay" and "lesbian" as late as 1990.[38] Not unrelatedly, the AIDS epidemic "did not make the front page of an American newspaper until May 31, 1982,"[39] even though the Centers for Disease Control had identified it almost a year before[40] and even though it had been front-page news in gay community newspapers since July 1981.[41]

The historical trend can be summarized as an initial reticence by newspapers to speak about gay men and lesbians at all, or at least in anything but derogatory terms. When they did address the issue, they insisted on the use of "homosexual" instead of the community-preferred "gay." Only in the last decade have the majority of newspapers agreed to use "gay" as the ordinary term, acceding to both a community's right to self-label, and the common parlance in the broader community. On its face, this development could indicate nothing deeper than the stylistic inertia of staid institutions, which prefer to trail, rather than lead, language development.[42] Other research, however, places this historical finding of lexical patterns into broader sociological context.

An analysis of word choice through 1986 documented an increase over time of the use of "gay" in instances where writers formerly would have used "homosexual," a preference for "homosexual" by persons with a negative attitude toward gay men and lesbians and a preference for "homosexual" in formal contexts (such as academic writing) as compared with "gay" in the informal venues.[43] One implication of this study is

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[36] *See* ALWOOD, *supra* note 9, at 171-72. As of 1993, the *Wall Street Journal*'s policy discouraged use of *gay* as a noun. *See* Ingrassia, *supra* note 35.

[37] STREITMATTER, *supra* note 21, at 241.

[38] *See, e.g.*, Hatheway v. Gannett Satellite Info. Network, Inc., 459 N.W.2d 873, 875 (Wis. Ct. App. 1990).

[39] ALWOOD, *supra* note 9, at 218.

[40] *Id.* at 212.

[41] STREITMATTER, *supra* note 21, at 248. The paper was the *New York Native*.

[42] For example, the *New York Times* was slow to accept the title "Ms." *See* Susan Ager, Times *Opens Its Pages to Gay Couples*, DETROIT FREE PRESS, Aug. 20, 2002, *available at* http://www.freep.com/news/metro/ager20_20020820.htm (last visited Jan. 4, 2003).

[43] *See* Donovan, *Defining the Words*, *supra* note 19, at 33-37.

that word choice is not arbitrary, but rather systematically reflects other forces including dynamic usage changes, stylistic contrasts and, most importantly, attitudes toward the referenced population.

The historical reticence of newspapers to use the word "gay" mirrors the deliberate language choice of the opponents of gays' rights.[44] That fact alone would exacerbate tensions between newspapers and the gay community. But as Edward Alwood's history[45] more than adequately shows, the convergence of language and attitude in the case of newspapers is not accidental, but real. Newspapers tended to be adversarial toward gay men and lesbians, either through deliberate animus or through ignorance of the harm they were inflicting[46] when they refused to use the word that connoted to the community a positive, or at least non-condemnatory attitude. The good news is that newspapers have proven themselves to be educable on the issues involved, and ready to amend their practices when they learned they were inflicting needless anguish.[47] As

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[44] *See, e.g.*, William C. Duncan, *"A Lawyer Class": Views on Marriage and "Sexual Orientation" in the Legal Profession*, 15 BYU J. PUB. L. 137 (2001). In this article, Duncan, Assistant Director for Catholic University's Marriage Project, sought to show how the legal profession has become intolerant of discrimination against gay men and lesbians. In his view, this intolerance is not entirely a good thing, as it leads to "a corruption of the political process that could threaten marriage and democracy." *Id.* at 182.

Our attention goes to his use of language to convey his negative assessment of the worth of gay men and lesbians. Scare quotes are consistently used for the following terms: *openly gay*, *sexual orientation*, *same-sex marriage* and *gay rights*. Scare quotes diminish the reality of the word. Note the derogatory difference between the observation that *William is a Christian*, and the comment that *William is a "Christian."*

Directly in keeping with the present analysis, Duncan uses "homosexual" forty-five times, as located through the FOCUS function of LEXIS. "Gay" appears 118 times, in apparent contradiction to the expected language use by an opponent of civil rights for gay men and lesbians. However, after subtracting quotes by others, names of organizations or articles, and the scare quote uses, Duncan uses "gay" in a nonderogatory manner of his own volition no more than ten times.

It should be emphasized that it is not the word "homosexual" that carries negative connotations, but instead its use in inappropriate contexts, and its disproportionate use relative to the community-preferred "gay." I use the word "homosexual" in this Article; its use is not argued to be utterly *verboten*.

[45] *See generally* ALWOOD, *supra* note 9.

[46] The fact of this historical animus from newspapers against homosexuals contains more than a little irony because today "[p]ro-family organizations believe the . . . media is hopelessly biased in favor of homosexuality." Nancy J. Knauer, *"Simply so Different": The Uniquely Expressive Character of the Openly Gay Individual After* Boy Scouts of America v. Dale, 89 KY. L.J. 997, 1065 n.337 (2001).

[47] Ignorance and animus are not limited to newspapers. Indeed, gay couples have their relationships disrespected on a continual basis by, among others, corporations and the government. At no time was this more clear than after the attacks

newspapers' attitudes have become more open and accepting, their language has likewise shifted.

The language use of the *Times-Picayune* follows this general pattern. The LEXIS database for this newspaper begins in 1991. The occurrences of "gay" and "homosexual" in each year are as follows:

	1991	1992	1993	1994	1995	1996	1997	1998	1999	2000	2001
Gay	2	1	10	667	651	671	565	607	959	767	582
Homosexual	0	0	211	145	137	118	79	81	105	57	48

Two factors frustrate any reliance upon the absolute value of these numbers. First, many instances of "gay" are names of persons, and hence are not true hits. All three "gay" hits from 1991 and 1992 fall into this category. Second, it is hard to believe that 1991 and 1992 include the full contents of the paper. Otherwise, the lower figures for those years would mean that the *Times-Picayune* literally never wrote on the gay community in any way, *including* in reference to AIDS. The hits for "AIDS" for these two years, incidentally, are 0 and 1 respectively, further suggesting that the database coverage is incomplete. The number of meaningful "gay" hits, therefore, is something less than the value expressed by the table.

Still, despite these limitations, a clear pattern emerges. Use of "gay" increased over this ten-year span, while use of "homosexual" drastically decreased. This pattern is explained, under the present analysis, by three possible circumstances: the newspaper has moved toward less formal speech, the newspaper has adopted a more pro-gay stance, or the increase merely reflects the linguistic changes inevitably occurring over time. No evidence suggests the first factor, and the documented

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of September 11, 2001. Surviving partners of the gay and lesbian victims of that fateful day have been denied the support, both financial and emotional, that employers and governmental agencies have rushed to extend to partners of the heterosexual dead. *See* Victoria Scanlan Stefanakos, *Life Goes On*, ADVOC., Jan. 22, 2002, at 48-51; Denny Lee, *Partners of Gay Victims Find the Law Calls Them Strangers*, N.Y. TIMES, Oct. 14, 2001, §14, at 4; Brooke A. Masters, *Virginia Law Denies Benefits to Domestic Partners of Sept. 11 Attack Victims*, WASH. POST, Nov. 25, 2001, at C3. So uncertain has been the possibility of aid to gay couples that a separate fund has been established for their protection. *See* Press Release, Lambda Legal Defense and Education Fund, Press Conference to Announce Establishment of "September 11 Gay & Lesbian Family Fund" (Dec. 11, 2001), *available at* http://www.lambdalegal.org/cgibin/iowa/documents/record-?record=934 (last visited Jan. 4, 2003). The Special Master of the September 11th Victim Compensation Fund, Kenneth Feinberg, did, in the end, award compensation to at least one survivor of a lesbian couple. *See* Steve Vogel, *U.S. Awards Lesbian 9/11 Benefits for Loss of Partner*, WASH. POST, Jan. 23, 2003, at B1. The refusal of newspapers to recognize gay relationships as sufficiently worthy to merit space on the society pages is but one in a long line of indignities.

changes are too significant and sudden to be accounted for solely by inevitable change. Therefore, the most reasonable hypothesis under these facts is that in the last ten years the editorial policy of the *Times-Picayune* discernibly has shifted from language that either reflected a negative editorial stance, or at least mimicked that stance, toward a more genuinely favorable representation of gay men and lesbians in its news coverage.

This brief synopsis suggests that newspapers have learned important lessons from their earlier negative treatment of gay men and lesbians, and are prepared to treat them more sensitively than they have in former decades. The typical newspaper, then, can be expected to exclude announcements of same-sex unions from its society pages not because of blatant homophobia, but rather for two reasons. First, the newspaper may not be aware of the importance of this access. Second, although the paper itself may have no principled objection to the inclusion of such announcements, a newspaper may fear reader and advertiser reaction.[48] Awareness of the likely source of newspapers' failure to include same-sex announcements could generate productive strategic responses on the part of activists, and could also inform the development of appropriate legal analyses.

B. *On Publication of Same-Sex Union Announcements*

1. Pre-*New York Times* Reactions

Examination of the *Times-Picayune* word-use table in the previous section justifies an inference that the achievement of equitable treatment of gays by newspapers has been gradual. Overt reference to gay men and lesbians increased incrementally, suggesting that official recognition was slow but steady. In fact, newspapers largely ignored gays until the AIDS epidemic,[49] and when newspapers finally paid attention for purposes of AIDS coverage, that attention did not readily extend to the wider range of issues important to the gay community. Newspapers ignored historical events in gay

[48] For an account of how earlier reader reaction changed newspaper policy toward gays, see *supra* note 32 and accompanying text.

[49] The first front page article about gays did not run in the *New York Times* until 1963, in which "the nation's newspaper of record described them as 'deviates' who were 'condemned to a life of promiscuity.'" *See* ALWOOD, *supra* note 9, at 6. For a description of the media response to AIDS, see *id.*, especially chapters 11-12.

history, such as the first demonstrations at the White House and the Pentagon.[50] Many periodicals ignored the events of Stonewall, reporting them only months afterward.[51] Newspapers regularly eliminated gay-related content from public speeches and events.[52] After newspapers more regularly began to cover political and social issues important to the gay community, a new front opened on the treatment of partners in the obituaries of those who had died from AIDS complications.[53] That front has progressed to the society pages.

A Portland, Oregon court ruling illustrates the problem generating the present discussion of same-sex union announcements.[54] Portland has an ordinance forbidding discrimination in public accommodations on the basis of sexual orientation.[55] *The Oregonian*, Portland's local paper, refused to accept a same-sex wedding announcement "based on dictionary definitions of 'wedding' and 'marriage.'"[56] Opponents of *The Oregonian*'s policy sued and the newspaper argued that the state and federal constitutions "protect its right to decide not to publish same-sex wedding announcements."[57] The state district judge denied the plaintiffs' motion for a preliminary injunction against the paper. Significantly, the court implied that the wedding announcement pages are "news space" and that "[t]here is no precedent holding news space to be a 'public accommodation.'"[58] If the public accommodations law did not encompass "news" then newspapers would have no legal obligation to treat heterosexual and gay social announcements equally. However, the court found another ground to deny the plaintiffs' motions for a preliminary injunction against the

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[50] STREITMATTER, *supra* note 21, at 68-69.

[51] *Id.* at 119. *See also infra* notes 91-99 and accompanying text (discussing Stonewall).

[52] *See* STREITMATTER, *supra* note 21, at 289.

[53] *See* ALWOOD, *supra* note 9, at 270-72. In general, obituaries both neglected to list AIDS as a cause of death and refused "to acknowledge a surviving gay spouse." *Id.* at 271. That policy began to change in 1987, when the *New York Times* introduced into its obituary narratives the term "long-time companion."

[54] Linebarier v. Oregonian Publ'g Co., No. 96-875554 (Or. Dist. Ct. Aug. 5, 1996).

[55] *See* PCC § 23.01.070, *cited in* Linebarier v. Oregonian Publ'g Co., No. 96-875554, slip op. at 2 (Or. Dist. Ct. Aug. 5, 1996). I thank the plaintiffs' attorney in this case, Renée E. Jacobs, for copies of her Memorandum and the court's opinion.

[56] *Linebarier*, No. 96-875554, slip op. at 2.

[57] *Id.* at 3.

[58] *Id.* at 3-4.

paper.[59] Because both sides' definition of "wedding" was reasonable, and therefore either choice was rational, the court ultimately refused to order the paper to publish the announcement.[60] *The Oregonian* eventually agreed to publish same-sex wedding announcements for a fee.[61]

The court's opinion is notable for its spartan discussion of the critical issues. Nowhere does it directly address (1) the relationship of the city ordinance prohibiting discrimination in public accommodations to the paper's asserted First Amendment claims or (2) why wedding announcements qualify as "news" and therefore merit the highest level of First Amendment protection available. These questions will be considered in further detail in subsequent sections of this Article.[62]

Until recently, the *New York Times* similarly refused to publish announcements of civil unions solemnized in Vermont.[63] Yet, many other papers had already decided that publishing announcements of same-sex unions was fully in keeping with their community obligations,[64] and offered this access without activist intervention. The *Brattleboro Reformer*, a paper serving the community that would later perform the first of Vermont's civil union ceremonies, began publishing same-sex announcements over ten years ago.[65] Even the

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[59] *Id.* at 4.

[60] *Id.*

[61] *See* Letter from Renée E. Jacobs to the Editor of the *Advocate*, *in* ADVOC., Oct. 29, 1996, at 8. *The Oregonian* has since joined the trend initiated by the *New York Times*, and agreed to accept same-sex union announcements. *Oregon Same-Sex Unions to Appear in Paper*, MIAMI HERALD, Oct. 28, 2002, at 18A.

[62] *See infra* Parts III and IV.

[63] *See* Frank DiGiacomo, *New York Times Nixes Gay Couple's Wedding Announcement*, N.Y. OBSERVER, July 30, 2001, at 3; Inga Sorensen, *Activists Lobby NY Times to Get with the Times*, N.Y. BLADE NEWS, Aug. 10, 2001, *at* http://www.nyblade.com/local/010810a.htm (last visited Oct. 30, 2002). The *Times* decision provoked activists from the National Organization for Women to mount a protest campaign. *See* Kimberlee Ward, *Valentine's Day of Action Draws Much Attention*, NAT'L NOW TIMES, March 1997, *available at* http://www.now.org/nnt/03-97/samesex.html (last visited Oct. 22, 2002). The campaign also targeted the *Washington Post*. *Id.* The policy of the *Washington Post* today is to "run only paid wedding and union announcements, on separate days." Christine Chinlund, *Announcing Gay Unions*, BOSTON GLOBE, July 29, 2002, at A11.

[64] *See* ALWOOD, *supra* note 9, at 303. Alwood, writing in 1996, pointed to newspapers in Brattleboro, Vermont and Salina, Kansas, as well as nine others in New Hampshire, Massachusetts, Washington and California, as examples of newspapers offering access without activist intervention.

[65] Jennifer Harper, N.Y. Times *Eyed for Bias*, WASH. TIMES, Aug. 20, 2002, at A6.

Fayetteville Observer in North Carolina,[66] a newspaper serving "a 10-county Bible Belt area that includes the U.S. Army's Fort Bragg," publishes same-sex union announcements.[67]

Most of the newspapers publishing union announcements seem to be, like the *Fayetteville Observer*, smaller organizations more responsive to the wishes of their community. For example, Edward Alwood explicitly describes as "small- to medium-sized" the eleven newspapers he identified as among the first to publish same-sex union announcements.[68] Moreover, organizations in that size range dominate the GLAAD list of 180 newspapers known to offer this service as of December 2002.[69] This pattern may exist because smaller newspapers are more directly involved in their communities and thus are more responsive to the needs of their readers.[70]

While the list of newspapers recognizing the social realities of the modern world continues to grow, thus far the decision to publish same-sex union announcements is the newspaper's own. The practice is not yet widespread, although it is becoming more common, and certainly not all newspapers equate responsible or equitable access with publication of same-sex announcements. Each decision is approached de novo. To ensure fair access to society pages for same-sex couples, and to ease the economic risks to newspapers by diminishing the novelty of publishing union announcements, courts must arm themselves with clear, uniform analytical models.

2. The Earlier "Not Legal" Excuse

At one time, newspapers reasonably rebuffed requests to publish same-sex union announcements by invoking the purported requirement that published announcements be

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[66] Charles Broadwell, *Commentary: "Civil Union" Announcement is a First*, FAYETTEVILLE OBSERVER, July 21, 2002.

[67] Patricia Callahan, *How a Gay Union Led to Paper's Soul-Search*, WALL ST. J., July 26, 2002, at B1. According to the editor of the *Fayetteville Observer*, "most of the local reaction has been negative [although] much of the national response applauds the paper's decision." Margaret Lillard, *Reaction Varies to Gay-Union Item*, SEATTLE TIMES, July 28, 2002, at A22.

[68] ALWOOD, *supra* note 9, at 303.

[69] *See* GLAAD, *supra* note 4.

[70] *See* ALWOOD, *supra* note 9, at 257 ("A good newspaper must be a community newspaper.") (quoting editor and publisher William R. Hearst III); *cf.* Lillard, *supra* note 67.

legally binding.[71] This argument, even if principled at one time, nevertheless placed some papers in an odd position. For example, the *St. Petersburg Times* received wide notice for its decision to extend domestic partner benefits to its gay employees.[72] Yet, at the same time the paper declined to publish same-sex union announcements because "marriage [is b]y definition . . . a legal as well as personal relationship, and one licensed by the state."[73] Because Florida does not sanction same-sex marriage, these unions were not suited for its announcement pages. Interestingly, the paper presented the decision as out of its control, claiming that it was powerless to treat same-sex announcements any other way until state law changed: "If that state policy [the decision not to license same-sex marriages] changes, our pages will reflect that change. Meanwhile, our employment policies fall entirely within our company's control, and so we extended these benefits as a matter of basic fairness."[74] As others have noted, however, "legal marriage is the threshold only if a newspaper chooses to make it so."[75]

The "not legal" argument's flaws are twofold. First, the papers already publish relationship announcements that lack legal significance in most jurisdictions: Engagements. Although common law originally allowed a person to be sued for breach of promise to marry, since the 1930s at least twenty-five states have enacted "heartbalm" statutes abolishing this cause of action.[76] In these jurisdictions, at least, the status of being

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[71] *See, e.g.*, Deb Taylor, Journal, Mercury *Editors Speak to FHA*, FLINT HILLS OBSERVER, Dec. 1998, *available at* http://www.debtaylor.com/fho/129802.html (last visited Oct. 25, 2002) ("the [*Manhattan*] *Mercury* will not print same-sex wedding announcements because same-sex marriages are not legal"); Dan Kennedy, *Official Notice: Gay Unions and the Wedding Pages*, BOSTON PHOENIX, May 31, 2001, *available at* http://www.bostonphoenix.com/boston/news_features/this_just_in/documents/01655-650.htm (last visited Oct. 25, 2002).

[72] *See, e.g.*, *The Advocate Report*, ADVOC., June 24, 1997, at 23.

[73] Personal communication from Paul C. Tash, Executive Editor, *St. Petersburg Times* on June 24, 1997.

[74] *Id.*

[75] Inga Sorensen, *Activists Lobby* NY Times *to Get with the Times*, N.Y. BLADE NEWS, Aug. 10, 2001, *available at* http://www.nyblade.com/local/010810a.htm (last visited Oct. 25, 2002). Newspapers invoke the "not legal" argument with sufficient frequency that plaintiffs are wise preemptively to rebut the claim. *See, e.g.*, Memorandum in Support of Plaintiffs' Motion for Preliminary Injunction at 8-9, Linebarier v. Oregonian Publishing Co., (No. 96C 875554) (Or. Dist. Ct. Aug. 5, 1996).

[76] Neil G. Williams, *What to Do When There's No "I Do": A Model for Awarding Damages under Promissory Estoppel*, 70 WASH. L. REV. 1019, 1020 (1995). Florida, the state of the *St. Petersburg Times*, is one of these states with a "heartbalm" statute. FLA. STAT. ANN. §§ 771.01-07 (West 1986).

engaged entails no legal consequences and can be broken without special liability. Consistency would require that any paper invoking the "not legal" argument to bar same-sex announcements must also refuse to publish engagement announcements, limiting their pages only to formal, legally binding marriages.

Louisiana, home state of the *Times-Picayune*, has retained the cause of action for breach of promise to marry.[77] This cause of action belies Louisiana's tradition as a jurisdiction of civil law, since no civil law country, including France, allows recovery for breach of a promise to marry.[78] Rather, Louisiana adopted this cause of action from the common law tradition of its sister states. This fact results in the ironic situation that Louisiana is preserving a common law practice after the majority of genuinely common law jurisdictions have abandoned it.

Because Louisiana recognizes engagements as having legal significance, the *Times-Picayune* is one of the few newspapers that could assert the "not legal" argument without being immediately inconsistent. Oddly, this is the one argument that the paper did *not* assert to justify its policy against the NOHRC charge.[79] Even had the paper offered this reason, however, it should have failed because of the second flaw inherent in the "not legal" rationale: same-sex unions are not always without legal significance.

Same-sex marriage equivalents exist in some foreign jurisdictions, including the Netherlands.[80] The fact that the union may have no legal significance in the locality of the paper should not be the determining factor. If the union is a binding arrangement in the place of celebration and in the domicile immediately after the marriage, the union is legally significant and should not be so easily dismissed by a newspaper.

Moreover, the varieties of "legal" same-sex relationships are not exhausted by marriage equivalents. Gay relationships

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[77] Glass v. Wiltz, 551 So. 2d 32 (La. App. 4th Cir. 1989) ("Louisiana does recognize a cause of action for damages when a party breaches a promise to marry.").

[78] Sanders v. Gore, 676 So. 2d 866, 870 (La. App. 3d Cir. 1996) (citing M. PLANIOL, TRAITE ELEMENTAIRE DE DROIT CIVIL § 781 (1959)).

[79] *See* Memorandum in Support of Motion for Temporary Restraining Order and Preliminary Injunction Ex. B, Affidavit of James Amoss, Times Picayune Publ'g Corp. v. City of New Orleans, No. Civ. A95-518N, 1995 U.S. Dist. LEXIS 4842 (La. App. 4th Cir. April 13, 1995).

[80] *See* Nancy G. Maxwell, *Opening Civil Marriage to Same-Gender Couples: A Netherlands-United States Comparison*, 18 ARIZ. J. INT'L & COMP. L. 141 (2001).

can have less legal significance than heterosexual marriages, but still retain some modicum of legal significance. These legally significant relationships can range from the full civil unions of Vermont, to the much less weighty, but still legally cognizable, domestic partnerships registered in various towns and cities.[81] Several newspapers recognized this when formulating their internal guidelines governing publication of same-sex announcements. The *New York Times*, for example, requires that couples "[c]elebrate their commitment in a public ceremony" or "[e]nter into a legally recognized civil union (currently available only in Vermont) or register their domestic partnership (in those localities, including New York City, that offer registration)."[82] The *Fayetteville Observer* "will run [union announcements] only if they involve local couples who are united in a state-sanctioned ceremony,"[83] without requiring that the ceremony be a "marriage."

The function of the "not legal" argument will probably change as more papers accept same-sex society announcements. Its utility no longer will be to keep announcements out of the paper, but to segregate them into a special section. For example, although the *Boston Globe* recently decided to run announcements, the paper will not intermingle them with those from heterosexuals.[84] The justification for this differential treatment, according to a *Globe* editor, is that it "recognizes a distinction as defined by law and as defined by most religions as well."[85] Other papers, such as the *Charlotte Observer*, adopted a similar position for similar reasons.[86] An interesting question for the future will be

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[81] A listing of states, cities and counties offering some form of domestic partnership benefits and registration can be found in WAYNE VAN DER MEIDE, LEGISLATING EQUALITY 85-86 (NGLTF Policy Institute 2000), *available at* http://www.ngltf.org/downloads/legeq99.pdf (last visited Jan. 20, 2003).

[82] Times *Will Begin Reporting Gay Couples' Ceremonies*, N.Y. TIMES, Aug. 18, 2002, at A30.

[83] Broadwell, *supra* note 66.

[84] Mark Jurkowitz, *Globe to Publish Same-Sex Unions*, BOSTON GLOBE, Sept. 29, 2002, at B3. The first announcements in the *Globe* ran on October 13, and featured three male couples on its "Special Occasions" page. Globe *Publishes First Gay Announcements*, MIAMI HERALD, Oct. 14, 2002, at 16A.

[85] Jurkowitz, *supra* note 84, at B3.

[86] *See* Debby Morse, *Coming Out In Print*, S.F. EXAMINER, Oct. 2, 2002, *available at* http://www.examiner.com/noremorse/default.jsp?story=n.morse.1002w (last visited Oct. 25, 2002).

whether segregation of union announcements will itself not fall under the rule of *Pittsburgh Press*, discussed below.[87]

II. WHAT IS AT STAKE: THE INTANGIBLES OF MARRIAGE

Why would the plaintiffs against the *Times-Picayune* be willing to assume the risks, burdens and expenses of filing a complaint, merely to get their picture in the paper? What could be motivating them? A newspaper's refusal to publish same-sex union announcements may seem to verge on the trivial.[88] Arguably, society has more important concerns generally and the gays' rights[89] movement specifically, such as attaining the right for gay men and lesbians to marry.[90] Under this view, newspaper treatment of same-sex relationships is an important but secondary issue, and certainly not the proper target for the full force of constitutional argument.

That view of the matter, however, obscures what is truly being contested in the battle over same-sex marriage: the public recognition of gay relationships. The arguments in this Part demonstrate why public recognition is important; subsequent Parts present arguments demonstrating why recognition of same-sex relationships should prevail. To clarify the ultimate prize at stake, my argument begins with a brief

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[87] See *infra* notes 221-25 and accompanying text.

[88] *See* Holly J. Morris & Vicky Hallett, *Public Displays of Affection*, U.S. NEWS & WORLD REP., Sept. 9, 2002, at 42 (quoting gay activists that the publication of same-sex union announcements is "the lighter, fluffier side of gay issues"). *See also* Michael Bronski, *Standard Deviation: Do 'Community Standards' Bar the Publishing of Gay-Wedding Announcements? Or Are Major Newspapers Simply Rubber-Stamping the Comfortable Status Quo?*, BOSTON PHOENIX, Aug. 8, 2002, *available at* http://www.bostonphoenix.com/boston/news_features/other_stories/multipage/documents/02388117.htm (last visited Oct. 25, 2002) ("On some level, the refusal to print these notices seems petty, even as the fight to get them printed comes across as frivolous.").

[89] Although "gay rights" is the more common term, it is inaccurate and misleading. It connotes a species of rights, "gay rights," which are different from other kinds of rights. This language plays into the hands of opponents who argue that "gay rights are special rights," and thus undemocratic. The term that more accurately denotes our goal is "gays' rights." "Gays' rights" refers to the rights that gay people possess, which are—or should be—the same rights that nongay people possess.

[90] According to recent polls, attaining the right to marry has become the top priority of the gays' rights movement. *See* Deb Price, *Marriage Law Becomes Gay Priority*, DETROIT NEWS, May 20, 2002, at A9 (discussing poll finding that 83% of survey respondents said marriage should be one of the movement's top three priorities; 47% said it should be number one goal). *See also* Thomas M. Keane, Jr., *Why Gays Seek to Bar the Door to Rogers*, BOSTON HERALD, Jan. 25, 2002, at 29 ("[G]ay marriage [has become] the SINE QUA NON of the gay civil rights movement.").

review of the litigation seeking to procure the right for gay men and lesbians to marry.[91]

A. *Brief History of the Movement for Gays' Rights and Same-Sex Marriage*

The initiation of the modern gays' rights movement conventionally is ascribed to the Stonewall riots of June 1969. Despite only a few years earlier having won the right to be served alcohol in public establishments,[92] homosexuals in bars remained vulnerable to recurring police harassment on morals charges. After midnight on the night of June 27, 1969, police attempted a raid on a popular gay bar, the Stonewall Inn, on Christopher Street in New York City.[93] Police had raided gay bars many times before; in fact, this was the second raid of Stonewall that week.[94] For reasons we may never know—although it may be no coincidence that this was the night of Judy Garland's funeral[95]—this time the patrons fought back. Barricaded in the bar, the police defended themselves from the "drag queens [and] butch dykes"[96] with spray from a fire hose.[97] The Tactical Patrol Force arrived to confront the crowd of over one thousand chanting gays, who stood their ground against the heavily armed officers.[98] When it was over, the police had injured "an untold number" and arrested thirteen.[99] Thousands of gays staged protests on each of the next several nights, giving voice to their newfound determination to finally claim

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[91] For a review of the same-sex marriage legal highlights, see generally WILLIAM N. ESKRIDGE, JR., EQUALITY PRACTICE: CIVIL UNIONS AND THE FUTURE OF GAY RIGHTS (2002) [hereinafter EQUALITY PRACTICE].

[92] *See, e.g.*, One Eleven Wines & Liquors, Inc., v. Div. of Alcoholic Beverage Control, 235 A.2d 12 (N.J. 1967) (holding that the mere congregation of apparent homosexuals in bars does not justify revoking liquor license); *see also* DUDLEY CLENDINEN & ADAM NAGOURNEY, OUT FOR GOOD: THE STRUGGLE TO BUILD A GAY RIGHTS MOVEMENT IN AMERICA 21 (1999).

[93] *See* TOBY MAROTTA, THE POLITICS OF HOMOSEXUALITY 71 (1981).

[94] ALWOOD, *supra* note 9, at 82.

[95] *See* LONG ROAD TO FREEDOM: THE ADVOCATE HISTORY OF THE GAY AND LESBIAN MOVEMENT 19 (Mark Thompson ed., 1994). For a subculture whose members have been euphemistically called the "friends of Dorothy," the significance of Garland's death is obvious.

[96] *Id.*

[97] MAROTTA, *supra* note 93, at 72.

[98] ALWOOD, *supra* note 9, at 83.

[99] *Id.*

their place in society, thus turning the Stonewall riots into the "Hairpin Drop Heard around the World."[100]

Almost immediately, same-sex marriage became an issue in the new gay liberation movement. In 1971, *Baker v. Nelson*[101] became the first appellate decision to hold that a same-sex couple does not have the right to marry.[102] Similar cases soon followed, all upholding state rules prohibiting same-sex marriage.[103] Despite these early cases testing the boundaries of tolerance and same-sex marriage, the gays' rights movement kept marriage far from the front-burner. In those early days, the more urgent need was for gays to stay alive and out of jails and mental hospitals. Specifically, the activists sought to remove from homosexuals the threat of blackmail, to overturn the laws criminalizing sodomy[104] and to excise homosexuality from the psychiatric manual of mental illnesses.[105]

Although always in the background, same-sex marriage did not become the showcase issue of the gays' rights movement until the 1993 case of *Baehr v. Lewin*.[106] In *Baehr*, three couples challenged Hawaii's refusal to provide marriage licenses to same-sex couples under Hawaii Revised Statutes section 572-1, which restricts marital relations to a male and a female.[107] The Hawaii Supreme Court ruled that because Hawaii's Constitution forbids discrimination on the basis of sex (an argument none of the parties had asserted or briefed), Hawaii could justify section 572-1 only by surviving a strict

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[100] MAROTTA, *supra* note 93, at 77. The selection of June as "Gay Pride Month" commemorates the Stonewall riots, acknowledging their singular significance in the initiation of the modern era of gays' rights.

[101] 191 N.W.2d 185 (Minn. 1971).

[102] WILLIAM N. ESKRIDGE, JR., THE CASE FOR SAME-SEX MARRIAGE: FROM SEXUAL LIBERTY TO CIVILIZED COMMITMENT 48 (1996) [hereinafter CASE FOR SAME-SEX MARRIAGE].

[103] *See, e.g.*, Jones v. Hallahan, 501 S.W.2d 588 (Ky. Ct. App. 1973) (upholding lower court ruling that, as a matter of definition, Kentucky's denial of marriage to same-sex couple did not violate the federal Constitution); Singer v. Hara, 522 P.2d 1187 (Wash. 1974) (rejecting the argument that the refusal to marry same-sex couples violated state equal rights amendment).

[104] According to the National Gay and Lesbian Task Force, as of July 2002, fifteen states still retain sodomy laws criminalizing homosexual activity. NGLTF, *National Gay and Lesbian Task Force: The Right to Privacy in the U.S.*, *at* http://www.ngltf.org/downloads/sodomymap.gif (last visited Dec. 2, 2002).

[105] *See generally* RONALD BAYER, HOMOSEXUALITY AND AMERICAN PSYCHIATRY: THE POLITICS OF DIAGNOSIS (1981).

[106] 852 P.2d 44 (Haw. 1993).

[107] *Id.* at 60.

scrutiny analysis.[108] To maintain its refusal to grant marriage licenses to same-sex couples, the state had to show a compelling interest in barring same-sex marriage and that this refusal was the narrowest possible means to achieve that end.[109] The court remanded the case, and Judge Kevin Chang ruled decisively in favor of the plaintiffs.[110] A state constitutional amendment passed by referendum, however, rendered the case moot.[111]

Many of the movement's political spokespersons regretted that such a volatile, losing issue had emerged to detract from what they considered the more achievable goals of employment nondiscrimination and inclusion in hate crimes laws.[112] Critics of the effort to promote same-sex marriage fell silent, however, as the cases first in Hawaii[113] and then in other states[114] raised same-sex marriage to the forefront of the consciousness of both the general public and the gay and lesbian community.

This public discussion has provoked three distinct responses from the gay and lesbian community and its supporters.[115] First, there are those who oppose same-sex

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[108] *Id.* at 67.

[109] *Id.*

[110] Baehr v. Miike, No. 91-1394, 1996 WL 694235 (Cir. Ct. Haw., Dec. 3, 1996).

[111] ESKRIDGE, EQUALITY PRACTICE, *supra* note 91, at 39-42. The amendment to the Hawaii Constitution, which passed with a 69% majority, added the sentence, "The legislature shall have the power to reserve marriage to opposite-sex couples." *Id.* at 40.

[112] *See id.* at 87 ("Marriage was not the goal of the gayocracy before the 1990s."). *See also* Andrew Sullivan, *Recognition of Same-Sex Marriage*, 16 QUINNIPIAC L. REV. 13, 18 (1996) ("I beg to differ with the Human Rights Campaign. No, the country doesn't have better things to do than this."). Sullivan elsewhere describes this situation: "In terms of Hawaii, it was the court that ruled. In fact, if the gay establishment had their way, it would never have happened. In fact, no gay group would support that legal suit. It had to be a straight guy from the ACLU." Carol Lloyd, *Marriage as a Revolutionary Act*, SALON, Nov. 30, 1998, *available at* http://archive.salon.com/books/int/1998/11/cov_30int.html (last visited Dec. 3, 2002).

[113] *Baehr*, 852 P.2d 44.

[114] *See, e.g.*, Brause v. Bureau of Vital Stat., No. 3AN-95-6562, 1998 WL 88743, at *1-6 (Alaska Super. Ct. Feb. 27, 1998); Baker v. Vermont, 744 A.2d 864 (Vt. 1998). The next battlegrounds appear to be New Jersey and Indiana. *See* Plaintiff's Amended Complaint, Lewis v. Harris, No. L-00-4233-02 (N.J. Super. Ct. Law Div., Oct. 8, 2002) (filing subsequent to original complaint filed June 26, 2002, by Lambda Legal Defense and Education Fund, Inc.) *available at* http://www.lambdalegal.org/binary-data/LAMBDA_PDF/pdf/135.pdf (last visited Jan. 10, 2003); *see also* Andrew Jacobs, *New Jersey is Likely to be Gay Marriage Battleground*, N.Y. TIMES, June 26, 2002, at B5; Matthew Tully, *Same-sex Marriage Heading to Court*, INDIANAPOLIS STAR, Aug. 22, 2002, at 1A.

[115] The gay community's opponents resist same-sex marriage because they believe it to be morally wrong and oppose validating it in any way, including publishing announcements. For a taste of the vehemence with which some quarters oppose gays

marriage. Some adopt this negative stance because they believe same-sex marriage undermines traditional marriage.[116] Others oppose same-sex marriage because they believe marriage is an intrinsically oppressive institution that no one, gay or straight, should support.[117] A second response applauds the Vermont

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and their relationships, *see Ex parte* H.H., No. 1002045, 2002 WL 227956, at *4 (Ala. Feb. 15, 2002) (Moore, C.J., concurring) ("[A] sexual relationship between two persons of the same gender [sic] creates a strong presumption of unfitness that alone is sufficient justification for denying that parent custody of his or her own children.").

[116] *See, e.g.*, Dale M. Schowengerdt, Note, *Defending Marriage: A Litigation Strategy to Oppose Same-Sex "Marriage,"* 14 REGENT U. L. REV. 487, 488 (2002) ("[T]his Note uses the term 'marriage advocates' to describe those who believe in the Judeo-Christian ethic of one man and one woman becoming one flesh. Anyone who truly views marriage this way will naturally be opposed to same-sex marriage . . . ."); George W. Dent, Jr., *The Defense of Traditional Marriage*, 15 J.L. & POL. 581, 582 (1999) ("[S]ociety has strong reasons to favor traditional marriage and to deny such treatment to the unmarried and to homosexual, endogamous and bestial relationships."); Lynn D. Wardle, *Legal Claims for Same-Sex Marriage: Efforts to Legitimate a Retreat from Marriage by Redefining Marriage*, 39 S. TEX. L. REV. 735, 768 (1998) ("The claims for same-sex marriage provide a marvelous opportunity . . . to help a new generation to see and comprehend as never before the great value of covenant heterosexual marriage.").

Predictably, persons with this view regard the decision by the *New York Times* as an unqualified error in judgment. *See, e.g.*, Harper, *supra* note 65 (noting the disagreement of the Family Research Council with the *Times*'s decision because it serves "a radical social political agenda"). *See also O'Reilly Factor* (Fox News television broadcast, Aug. 20, 2002) (statements of Genevieve Wood of the Family Research Council). Among her comments Wood drags out the canard that "if we're going to have homosexual marriages on the *New York Times* [wedding] pages, why not have polygamists on there as well?" *Id.* For a clarification of the reasons why polygamy cannot rationally be collapsed into same-sex marriage for policy purposes, and why resort to this "slippery slope" argument entails an implicit acknowledgment by conservatives that same-sex marriage cannot be argued to be an intrinsic evil, see James M. Donovan, *Rock-Salting the Slippery Slope: Why Same-Sex Marriage is Not a Commitment to Polygamous Marriage*, 29 N. KY. L. REV. 521 (2002).

[117] Examples of gay men and lesbians speaking out against battling for the right to marry include Paula Ettelbrick, *Since When is Marriage a Path to Liberation*, *in* LESBIAN AND GAY MARRIAGE: PRIVATE COMMITMENTS, PUBLIC CEREMONIES 20 (Suzanne Sherman ed., 1992); MICHAEL WARNER, THE TROUBLE WITH NORMAL vii (1999) ("marriage is unethical"); Steven K. Homer, *Against Marriage*, 29 HARV. C.R.-C.L. L. REV. 505 (1994); Laurie Essig, *Same-Sex Marriage: I Don't Care If It is Legal, I Still Think It's Wrong—And I'm a Lesbian*, SALON, July 10, 2000, *available at* http://archive.salon.com/mwt/feature/2000/07/10/marriage (last visited Dec. 3, 2002); Katha Pollitt, *Polymaritally Perverse*, NATION, Oct. 4, 1999, at 10 ("Shouldn't the real libertarian position be that marriage itself has to go?"); and JACK NICHOLS, THE GAY AGENDA: TALKING BACK TO THE FUNDAMENTALISTS 106 (1996) ("In bonding, people can best assist each other by remaining financially and emotionally self-contained. I look forward to a society structured primarily for individuals rather than for coupled or nuclear-unit survival.").

Nietzsche, the German philosopher, also concluded that marriage should be abolished. *See* FRIEDRICH NIETZSCHE, THE PORTABLE NIETZSCHE 544 (Walter Kaufmann ed., 1982). *See also* Elaine Herscher, *Most Gays Embrace Right to Marry, But Others Ask, "Why?"*, S. F. CHRON., Feb. 22, 2000, at A13 ("For other [gays], marriage is a chimera that threatens to enslave gays and bleach the color from their culture."); *Across the USA*, USA TODAY, Feb. 11, 2000, at 10A ("A proposed same-sex marriage ban on California's March 7 ballot is drawing some unexpected support from

solution of civil unions.[118] Civil unions are state-authorized relationships that have many of the economic and legal benefits associated with traditional marriage, but which are denied the use of the term "marriage" and its associated symbolism.[119] The third response refuses to accept anything less than a full marriage equivalent for same-sex couples, including use of the word "marriage."[120]

Which of these three positions one adopts is a function of how one weights the tangibles and intangibles of marriage. By *tangibles* I refer to the objective consequences of the married status, such as tax exemptions and rights to inherit. The General Accounting Office identified 1,049 federal laws in which marital status is a factor.[121] State laws add a similar number of tangible benefits to marriage, as evidenced by the long list of Vermont statutes[122] implicated in the court order that same-sex partners "may not be deprived of the statutory benefits and protections afforded persons of the opposite sex who choose to marry."[123] Although tangibles are usually positive, they can also be negative, in the form of imposed

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a small group of gay men and women."); Margaret Buist, *Days Numbered for Institution of Marriage*, LONDON FREE PRESS, Jan. 17, 2001, at A13 ("Instead of fighting to join in marriage, the gay and lesbian community should be fighting to dismantle it."). This anti-marriage attitude among some gays extends to a distaste for wedding announcements generally. *See* Timothy Noah, *Gay or Straight,* Times *Wedding Pages are a Sham*, PHILA. DAILY NEWS, Aug. 22, 2002, *available at* http://www.philly.com/mld/dailynews/news/opinion/3913829.htm (last visited Jan. 10, 2003) ("If [*Times* editor Howell] Raines is really interested in advancing equality, he shouldn't reform the *Times* wedding pages. He should abolish them.").

[118] *See* VT. STAT. ANN. tit. 15, §§ 1201-07 (Supp. 2001). Between July 1, 2000—the first day the civil union option became available—and January 4, 2002, Vermont legalized approximately 3,471 unions. *See* Laurel J. Sweet, *Commitment Phobia: A Guy Thing? Study: Most Gay Civil Unions are Women's*, BOSTON HERALD, Apr. 8, 2002, at 5. Two-thirds of these unions were for female couples. *Id.* In that time, only four dissolutions were reported in Vermont, three of which were female couples. *Id.*

[119] *See* ESKRIDGE, EQUALITY PRACTICE, *supra* note 91, at 43-82.

[120] *See* Plaintiff's Amended Complaint at 11, Lewis v. Harris, No. L-00-4233-02 (N.J. Super. Ct. Law Div., Oct. 8, 2002) (filing subsequent to original complaint filed June 26, 2002, by Lambda Legal Defense and Education Fund, Inc.) *available at* http://www.lambdalegal.org/binary-data/LAMBDA_PDF/pdf/135.pdf (last visited Jan. 10, 2003) ("Plaintiffs respectfully request that this Court . . . enjoin Defendants . . . to treat Plaintiff couples no differently than other couples regarding access to marriage."). *See also* Justice Johnson's opinion in *Baker v. Vermont*, 744 A.2d 864 (Vt. 1998). The present author can be placed in this category.

[121] General Accounting Office, DEFENSE OF MARRIAGE ACT 2 (GAO/OGC-97-16, 1997).

[122] *See* Vermont Legislative Council, *Working Draft of Statutes Potentially Affecting the Rights and Responsibilities of Married Persons* (2000), *at* http://www.buddybuddy.com/mar-vt.html (last visited Oct. 31, 2002).

[123] *Baker*, 744 A.2d at 867.

duties. For example, one spouse may be financially responsible for the debts incurred by the other.

By *intangibles*, on the other hand, I refer to the subjective benefits of marriage, including the social regard lavished on the married, the community support available to couples to help them manage the dynamics of the relationship, and the public expectation that henceforth the two people bound in marriage are presumptively an indivisible unit. The Supreme Court has itself recognized the great importance of intangible benefits: "[M]arriages . . . are expressions of emotional support and public commitment. These elements are an important and significant aspect of the marital relationship."[124] Intangibles may also be negative, such as the expectation to conform to behavior considered appropriate for couples (e.g., monogamy).

Those for whom the tangible and intangible negatives predominate will view marriage as a regressive and constraining patriarchal institution that has outlived its social usefulness.[125] Why would anyone want to participate in a rotten institution, especially gay men and lesbians whose very existence is presumably sexually and culturally transgressive? In contrast, when the positive tangibles such as inheritance rights, visitation and custody rights and spousal benefits predominate, civil unions are an acceptable compromise.

In Hawaii[126] and Vermont, society has shown itself to be more willing to allow access to these tangibles, so long as it can continue to deny gay couples the intangibles.[127] Such solutions

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[124] Turner v. Safley, 482 U.S. 78, 95-96 (1987).

[125] For an overview of the traditional patriarchal underpinnings of marriage, *see generally* E.J. GRAFF, WHAT IS MARRIAGE FOR? (1999). That gloss on marriage that feminists rightly find objectionable is preserved in the formal law of Louisiana. That state's earlier "Head and Master" system, under which, for example, only the husband had full power to alienate all property, no longer holds. Still present in the Civil Code, however, is a provision that expressly requires wives to yield to their husbands. *See* LA. CIV. CODE ANN. art. 216 (West 1993) ("In case of difference between the parents [in matters of the child], the authority of the father prevails."). The common law had a similar rule. Blackstone observed that "the father had a natural right to his children, while a mother 'was entitled to no power but only to reverence and respect.'" GRAFF, *supra* at 107.

[126] Hawaii's Reciprocal Beneficiaries Act, 1997 Haw. Sess. Laws 383, granted some sixty socioeconomic benefits to couples who cannot legally marry (i.e., excluding heterosexual couples who simply choose not to marry), and was considered a compromise measure to the referendum that constitutionally excluded homosexuals from marriage.

[127] "Hawaii has decided to afford many of the financial benefits of marriage to same-sex couples in the hope that the emotional, religious, and symbolic aspects of marriage do not also need to be extended." MARK STRASSER, THE CHALLENGE OF SAME-

are an acceptable compromise to those who minimize the importance of the intangibles. The fact that heterosexual society willingly shares the one but not the other suggests that the truly valuable consequences of marriage for heterosexual society are not the tangibles, but the intangibles.[128] As one observer noted, "[t]he fight over gay marriage has become a fight over ownership of a word. But what a potent little word it is."[129]

Although some of the tangible economic and legal benefits of marriage may be more important to members of the couple as *individuals* (e.g., the availability of insurance benefits), the intangible benefit of public recognition is arguably the most important benefit of marriage to the couple as a *unit*. For this reason, civil unions cannot be, as some have argued, a transitional phase on the way to same-sex marriage.[130] Anyone for whom marriage is the goal will not be

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SEX MARRIAGE: FEDERALIST PRINCIPLES AND CONSTITUTIONAL PROTECTIONS 65 (1999).

[128] Note the conflation of desires for the tangibles and intangibles of marriage in the stories of the twenty-one known surviving gay partners of victims of the September 11 terrorist attacks. *See* Inga Sorensen, *New York Law Backs Sept. 11 Domestic Partners*, WASH. BLADE, May 31, 2002, *available at* http://www.washblade.com/national/020531e.htm (last visited Oct. 21, 2002). The withholding of the tangible benefits hurt them most because it indicated a denial of the intangibles. *See, e.g.*, Kathleen Burge, *Sept. 11 Leaves Same-Sex Partners Adrift, Laws Bar Benefits, Even Recognition*, BOSTON GLOBE, Mar. 18, 2002, at B1 ("'That's what's so painful to me,' [said Nancy Walsh, whose partner of twelve years died on one of the planes, but who was ignored by American Airlines]. I constantly feel like I'm looking for someone to validate and approve what I know I had. It's just not right."). American Airlines also refused to recognize the relationship between Jeff Collman and Keith Bradkowski. Bradkowski is prepared to fight for his share of the federal victim compensation fund, "but his main motivation is not the money." Ray Delgado, *Grieving Man Stakes His Claim to Equality*, S.F. CHRON., Apr. 21, 2002, at A3.

These stories reveal that tangibles are frequently not ends in themselves but instead are means to the end of the intangible of public recognition.

[129] Margaret Wente, *From the Closet to the Altar*, GLOBE & MAIL (Toronto), July 20, 2002, at A15. As only one example of the power of the words associated with marriage, a Georgia state representative was pressured to stop referring to her lesbian partner as a "spouse" in the legislative directory. *See* Rhonda Cook, *Gay Lawmaker Will Stop Calling Partner "Spouse,"* ATLANTA CONST., Mar. 9, 2001, at D1. Related controversies have arisen when anti-gay parties believe that the public presentation of same-sex partners is not suitably demur. In Ohio, lower courts refused a name-change petition from two lesbians "because to do so would be to give an aura of propriety and official sanction to their cohabitation." *In re* Bicknell, 771 N.E.2d 846, 847 (Ohio 2002). The Ohio Supreme Court reversed this result, holding that the court's function in name-changes is merely to ascertain that the change is not made for fraudulent purposes. *Id.* at 848. "Any discussion, then, on the sanctity of marriage, the well-being of society, or the state's endorsement of nonmarital cohabitation is wholly inappropriate and without any basis in law or fact." *Id.* at 849. A similar battle was fought, and won, in New Jersey. *See In re* Application for a Change of Name by Bacharach, 780 A.2d 579 (N.J. Super. Ct. App. Div. 2001).

[130] For opinions to the contrary, *see* Deb Price, *Civil Unions a Step to Marital*

satisfied, even temporarily, with civil unions, because civil unions provide substantially fewer of the intangible benefits that make marriage a desirable and valued social institution. Civil unions are the mere husks of the institution, from which the heart has been wrest.

B. *The Value of Public Acknowledgement and Social Support*

What, then, are these intangible benefits of marriage? An example from a Canadian same-sex marriage battle illustrates. Joe Varnell and Kevin Bourassa commemorated their relationship in private and informal ceremonies, but they still felt a void that could be filled only by a traditional religious marriage ceremony that would be recognized by their government.[131] In Canada, as in the United States, a couple can become legally married by receiving a license from the government. But Ontario law also allows the government to issue a valid license to any couple who has had their intention to marry published by their church for three consecutive Sundays. These publications of intent are known as banns.[132] Marriage banns, once accomplished, result in a license that is presented to the civil officers only for registration; significantly, registration is not needed to render a marriage legal.[133] In

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Rights, DETROIT NEWS, July 15, 2002, at A7 ("Civil unions are a critical first step in achieving equality for gay couples."). The sense that civil unions and same-sex marriage are not aligned on an incremental continuum, but instead occupy the same space in civil liberties—making civil unions always a poor choice, since they preempt the possibility of marriage—is captured by the concern expressed by an advisor to the governor of New Jersey, in reaction to the filing of *Lewis v. Harris*: "There is concern that the lawsuit may stall domestic partnership legislation [and] may provoke a reaction . . . . I would have preferred that they didn't file the lawsuit at this time." Michael Booth, *Gay Marriage Suit May Derail Push for 'Civil Union' Status*, N.J. L.J., July 1, 2002, at 1. For a complete argument for the position that incrementalism is the appropriate approach to marriage and all gays' rights issues, see generally ESKRIDGE, EQUALITY PRACTICE, *supra* note 91. For the contrary opinion that incrementalist approaches are presumptively irrational as a deliberate strategy, however accurately they describe retrospectively how things happened, see James M. Donovan, *Baby Steps or One Fell Swoop?: The Incremental Extension of Rights is Not a Defensible Strategy*, 38 CAL. W. L. REV. 1 (2001).

[131] *See generally* KEVIN BOURASSA & JOE VARNELL, JUST MARRIED: GAY MARRIAGE AND THE EXPANSION OF HUMAN RIGHTS (2002).

[132] *See id.* at 4. *See also* R.S.O. 1990 c. M.3, s. 4 ("No marriage may be solemnized except under the authority of a license issued in accordance with this Act or the publication of banns."). R.S.O. 1990 c. M.3, s. 17 sets forth the requisites for the publication of banns.

[133] R.S.O. 1990, c. M.3, s. 28 sets forth procedures for entry into the marriage register after ceremony.

January 2001, Varnell and Bourassa had their banns published, followed by a formal wedding ceremony. Their fight for recognition of the legal validity of this ceremony then began a long trek through the Canadian courts.[134]

Relevant to our present concerns is the description of their treatment after the wedding. "After they had their wedding, their family treated them *differently*. . . . They really viewed Kevin and Joe as a real couple after they got married."[135] They had shared many years together, and already celebrated a purely religious union ceremony, but only after they participated in a ceremony of potential legal significance did their family begin to take them seriously as a couple. This "difference" constitutes the primary intangible benefit of marriage. Before the legal wedding,

> [q]uite a few . . . still introduced us as each other's "friend." They believed they were being tactful. Still others placed our portrait in a "special" place, away from the photos of other family members and their spouses, who were all grouped together on the wall. Our place was in the shadows, in words left unsaid, marginalized with the encouragement of church and state.[136]

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[134] According to the plaintiffs, the refusal of the government to register the licensed marriage does not affect its legality, it being "open to the church and the couples to simply ignore the registration requirement." *See* BOURASSA & VARNELL, *supra* note 131, at 272-73.

On July 12, 2002, a three-judge panel unanimously declared that the exclusion of same-sex couples from marriage is discriminatory and unconstitutional (in Canada). Halpern v. Canada (Attorney General), 2002 C.R.D.J. Lexis 122. The effect of this decision has been suspended for up to twenty-four months to allow a legislative response. According to the decision, a failure to respond appropriately to the concerns of the court within this time period would result in a redefinition of the common law understanding of marriage from "a man and a woman" to "two persons." The Canadian government has announced that it will appeal the Ontario decision. *See* Stephanie Rubec, *Gays Left at the Altar: Ottawa Appeals Ruling Allowing Same-Sex Unions*, TORONTO SUN, July 30, 2002, at 4.

[135] Christopher Hutsul, *Marriage Limbo*, TORONTO STAR, June 25, 2002, at E1 (emphasis added). This observation accords with that from other couples. "We don't have that demarcating event. We live together—like straight men and women live together—but they are not 'family' because they haven't had that marriage in front of everyone else. None of us have that demarcation, and maybe that's what's keeping others from looking at us as a family, because our culture has said that the family unit begins when you get married." ELIZABETH A. SAY & MARK R. KOWALEWSKI, GAYS, LESBIANS & FAMILY VALUES 85 (1998).

[136] BOURASSA & VARNELL, *supra* note 131, at 14-15. Say and Kowalewski addressed the issue of family introducing gay couples as each other's "friend": "Since the broader society has no word for a committed relationship other than heterosexual marriage, gay and lesbian relationships are often named as something less than what they are. Calling a son's or daughter's life partner a 'friend' or a 'roommate' is to diminish the significance of the relationship." SAY & KOWALEWSKI, *supra* note 135, at 66.

The primary intangible benefit of civilly recognized marriage (and, I would argue, the primary benefit of any kind from marriage) is the social approval and support extended to the married couple.[137] While many of the important tangible benefits that accrue automatically upon marriage can be mimicked by contract, nothing the couple can do will substitute for this intangible benefit of a marriage. Marriage and its corresponding public approval have a critical impact on the quality of the relationship, one that arises solely through legal recognition. Hence the irreducible need for access to legal marriage by same-sex couples, a need that is not satisfied by the creation of civil unions or domestic partnerships.

Innumerable little gestures demonstrate this social support,[138] all of which instantiate the presumption that the couple is a *couple* and that society presumes their couplehood to be permanent.[139] And, as in so many other things, thinking it so can make it so.

> [S]ociety as a whole has certain *generally shared expectations* about the kind of relationship that married couples typically have (while it lacks any such clear expectations about relationships of other sorts). Once a couple is legally married, society will come to expect that their relationship is of this kind.[140]

Critical, then, is this role of public expectation. "It is the public recognition of the status of 'married' that constitutes the most important benefit of marriage, and what is most crucially

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[137] *See* Andrew Sullivan, *State of the Union: Why "Civil Union" Isn't Marriage*, NEW REPUBLIC, May 8, 2000, at 18 (stating marriage is not merely an accumulation of benefits, but rather a fundamental mark of citizenship). *See also* David B. Cruz, *"Just Don't Call It Marriage": The First Amendment and Marriage as an Expressive Resource*, 74 S. CAL. L. REV. 925, 934 (2001) ("[E]xpressions of weddedness are importantly self-expressive and self-constitutive.").

[138] Contrarily, the lack of social awareness of the couple can result in cruel and needlessly punishing injustices. As only one recent example, a California man was prevented from being at the bedside of his partner while the partner died of AIDS. Although the man had documents naming him as his partner's agent by power of attorney, the Maryland hospital still refused admittance because he did not qualify as "family." Tom Pelton, *Man's Partner Angry at Hospital*, BALT. SUN, Feb. 28, 2002, at 1B. As proof of the themes of this Article, published descriptions of the episode minimized the relationship between the men, describing them as "housemates." Tom Pelton, *Surgeon Denies Bias in Visitation*, BALT. SUN, Mar. 1, 2002, at 1B.

[139] *See also* James M. Donovan, *An Ethical Argument to Restrict Domestic Partnerships to Same-Sex Couples*, 8 TUL. J.L. & SEXUALITY 649 (1998) [hereinafter *An Ethical Argument*]. In addition, an underrated intangible of the expectation that the couple will endure is receipt of public support and comfort should the relationship end. *See* ALWOOD, *supra* note 9, at 289.

[140] Ralph Wedgwood, *What Are We Fighting For?*, 4 HARV. GAY & LESBIAN REV. 32, 33 (1997).

abridged when the State discriminates against gay couples who want to marry."[141] When society withholds public recognition, that denial fundamentally weakens the relationship that society ignores.[142] Without legal marriage, "it is all too easy for the rest of society to ignore same-sex relationships, and to assume that they are only sexual, or involve no serious long-term commitment or sharing of finances and household responsibilities."[143]

A relationship is never truly final and settled if it lacks public acknowledgement; rather, it retains a tentative, provisionary quality.[144] Ordinarily during these provisionary stages, the members of a couple decide whether they each want to commit to the relationship. After that decision is made and formalized by marriage, they put that question behind them and commit their energies fully to the next phases of the maturing relationship. Once breaking up has been "taken off the table" as a possible response to a relationship difficulty, the couple can direct more energy toward mending any subsequent ruptures, energy that before would have been expended calculating cost/benefit values of continuing the relationship at all. Gay relationships, because they are denied marriage, are never allowed to enter completely into this second, settled phase. Therefore, they can tend to be less stable than married heterosexual relationships.[145] Lurking in the background is

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[141] *Id.*

[142] One study found that "satisfaction with social support," while highly related to relationship satisfaction for both gay male and lesbian couples, was "more strongly related to love for and liking of partner for lesbian couples than for gay couples." Lawrence A. Kurdek, *Relationship Quality of Gay and Lesbian Cohabiting Couples*, 15(3/4) J. HOMOSEXUALITY 93, 108-109 (1988). In other words, for lesbian couples strong social support seems to intensify and strengthen the emotional bond between the parties.

[143] Wedgwood, *supra* note 140, at 33.

[144] Empirical data support this claim. Lawrence Kurdek followed married heterosexual couples, gay couples and lesbian couples for a period of five years. For present purposes, the most pertinent results of this valuable study are that the homosexual cohabitating couples were at least twice as likely to breakup during the study period than were the married heterosexuals. Lawrence A. Kurdek, *Relationship Outcomes and Their Predictors: Longitudinal Evidence from Heterosexual Married, Gay Cohabiting, and Lesbian Cohabiting Couples*, 60 J. MARRIAGE & FAMILY 553, 565 (1998). Kurdek specifically links this greater tendency for gay relationships to dissolve to the "lack of formalized social and cultural supports for committed gay and lesbian relationships . . . [and as a consequence the couples] encounter few institutionalized barriers to leaving their relationships." *Id.*

[145] For example, one study found that while heterosexual marriages are stable, unmarried heterosexual "cohabitators" and gay and lesbian couples of less than two years' duration tended to dissolve with similar frequency. *See* PHILIP BLUMSTEIN & PEPPER SCHWARTZ, AMERICAN COUPLES: MONEY, WORK, SEX 307 (1983). The

always the tempting knowledge that the gay relationship can dissolve at the first whim.[146] If gays currently avoid this fate, it will be *despite* society, and not, as is the case for heterosexuals, *because of* society.[147]

Further enforcing the stability of heterosexual marriage, heterosexual couples meet societal resistance when they consider dissolving their legalized unions.[148] Friends and

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implication is that unmarried couples, both straight and gay, however committed, are vulnerable to a dissolution that does not threaten formally married couples. Heterosexuals wishing to exit this danger phase can always marry; only gay couples are permanently marooned.

An early statement of the effect of legal order on interpersonal relations can be found in the work of John Stuart Mill. *See generally* John Stuart Mill, *The Subjection of Women*, *in* ON LIBERTY AND OTHER WRITINGS 117 (Stephen Collini ed., 1989) (1869). There, Mill observed that laws requiring the submission of a woman to her husband negatively affected the relationship between them. She could not be expected to interact freely, or to express her opinions honestly, given the complete power he exerted over her. The present claim that the legal prohibition on same-sex marriage negatively affects the quality of the relationship of the gay couple can be understood to be a species of Mill's argument.

[146] *See, e.g.*, Katherine Kersten, *The Danger of Viewing Marriage as Just a Lifestyle Choice*, MINNEAPOLIS STAR TRIB., July 17, 2002, at A13 ("Cohabitation is governed by an ethic of low commitment. As a result, cohabiting couples are less likely than married couples to sacrifice for each other, or to develop vital skills of communication and conflict resolution. . . . By definition, cohabitation is more about 'me' than 'we.' Each partner is free to leave the moment he or she no longer feels happy or fulfilled."). This problem has been described as the alternatives of "fixing" and "floating." SAY & KOWALEWSKI, *supra* note 135, at 27 (summarizing the work of Zygmunt Bauman). In these terms, gays are at higher risk of becoming "floaters," that is to say, people who "'cut[ ] one's losses,' giving up when the costs of . . . investment in the relationship seem to have exceeded the return." *Id.*

[147] *See* Letitia Anne Peplau, *Lesbian and Gay Relationships*, *in* HOMOSEXUALITY: RESEARCH IMPLICATIONS FOR PUBLIC POLICY 177, 185 (John C. Gonsiorek & James D. Weinrich eds., 1991) ("We should not minimize the psychological stress that results from social rejection and stigma. What is noteworthy, however, is the extent to which contemporary lesbians and gay men seem able to overcome these obstacles and to create satisfying social networks. This is especially important because of growing evidence that emotional support, guidance, assistance, and other forms of social support contribute to mental and physical health.").

[148] Duffy and Rusbult review the argued differences between gay and straight couples:

> Some authors have argued that a variety of societal factors *might* contribute to lower satisfaction and commitment among lesbians and gay males than among heterosexual women and men. First, the greater difficulty of establishing and maintaining homosexual relationships in the face of negative societal sanctions, with no societal approbation or legitimization, *may* result in greater relationship cost and lower satisfaction. Second, it may be less likely that homosexuals have the social support of friends, family, or church for enduring relationships, a possibility that would imply lower levels of commitment in homosexual relationships; in other words, important external supports, a type of investment, may be lacking. Third, given that the legal concept of communal property does not yet apply to homosexual relationships, lesbians and gay men *may* be less likely to make some types of investments in their relationship, e.g., buying a home, having children, sharing material possessions. . . . This line of reasoning would lead us to

the state alike expect them to be a couple, and they must work long and hard to change these default expectations. The law functions as an obstacle to dissolution as well, often requiring some nontrivial time period to pass before the couple permanently divorces, allowing a window of opportunity for reconciliation.[149] Often those public messages of expected unity do compel the heterosexual couple to renew their efforts to resolve their difficulties. Gay couples, lacking that external support of the relationship, may find it easier to simply separate and begin anew with another candidate partner.[150] As Margaret Mead once observed, "[t]here is no society in the world where people have stayed married without enormous community pressure to do so."[151]

The consequences of maintaining a successful marriage ripple into all dimensions of life. Data show that married persons enjoy a higher quality of life than do those who merely cohabitate.[152] As compared to married couples,

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expect lower satisfaction, smaller investment size, better alternatives, and lower commitment in homosexual relationships.

Sally M. Duffy & Caryl E. Rusbult, *Satisfaction and Commitment in Homosexual and Heterosexual Relationships*, 12(2) J. HOMOSEXUALITY 1, 3 (1985/86). At the time these authors wrote, they believed that "empirical evidence is lacking" to support these assertions. *Id.* Later research, some of which is discussed in these notes, has constructed an empirical basis for this general claim that by ignoring or actively undermining the legitimacy of their relationships, society places gay and lesbian couples at a disadvantage in their efforts to construct deep and enduring relationships.

[149] In Louisiana, for example, divorce in most circumstances can only follow a separation of 180 days. LA. CIV. CODE. ANN. art. 102 (West 1999). Petition for divorce is extinguished if the parties reconcile during that time. LA. CIV. CODE. ANN. art. 104 (West 1999).

[150] In one study of gay couples, "[a]lmost all of the couples mentioned that the same factors keep both gay and straight couples together or break them apart." Neil R. Tuller, *Couples: The Hidden Segment of the Gay World*, 3(4) J. HOMOSEXUALITY 331, 341 (1978). *See also* BOURASSA & VARNELL, *supra* note 131, at 16 ("In the end, our own strength as a couple would determine our ability to maintain our relationship, but we had tasted, for the first time, the positive effect others can have on a relationship when it is formalized within a community.").

[151] HELEN E. FISHER, ANATOMY OF LOVE 109 (1992) (quoting Margaret Mead).

[152] *See* Jonathan Rauch, *The Marrying Kind: Why Social Conservatives Should Support Same-Sex Marriage*, ATLANTIC MONTHLY, May 2002, at 24 ("Cohabitation tends to be both less stable and less happy than marriage, and this appears to be true even after accounting for the possibility that the cohabiting type of person may often be different from the marrying kind. Research suggests that marriage itself brings something beneficial to the table."). Additional research has shown that married men live longer. *See Single Men "Die Younger,"* BBC News Online, Aug. 23, 2001, *at* http://www.newsbbc.co.uk/1/hi/health/1506209.stm (last visited Oct. 31, 2002). Married men are also less likely to recommit crimes. Press Release, Cathy Keen, University of Florida, UF Study: Marriage Can Reduce Life of Crime (Sept. 12, 2002), *at* http://www.napa.ufl.edu/2002news/recidivism.htm (last visited Oct. 31, 2002).

> cohabitating couples report lower levels of happiness, lower levels of sexual exclusivity and poorer relationships with parents. Annual rates of depression among cohabitators are more than three times higher than among married couples. By almost every measure, married couples are better off than cohabitators: On average, they live longer, have better physical and mental health, and are more productive in the labor force.[153]

This overview summarizes a report from the National Marriage Project.[154] Although the report focuses on heterosexual cohabitation, no logical impediment prevents the extension of its conclusions to same-sex cohabitating couples. The report's main conclusion is that cohabitators are disadvantaged relative to married persons, that living together is not "just like marriage" except for the lack of a piece of paper.[155] If we accept these findings, then by refusing to allow gays to marry, society condemns them to an inferior existence of unstable relationships,[156] low interpersonal commitment and other problems, including decreased mental health.[157]

Significantly, the report attributes the difference in well-being between married and cohabiting couples in part to "the better connection of married couples to the larger

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[153] Kersten, *supra* note 146.

[154] DAVID POPENOE & BARBARA DAFOE WHITEHEAD, SHOULD WE LIVE TOGETHER? WHAT YOUNG ADULTS NEED TO KNOW ABOUT COHABITATION BEFORE MARRIAGE (2002), *at* http://marriage.rutgers.edu (last visited Oct. 31, 2002).

[155] *See id.* at 14 ("It is only marriage that has the implicit long term contract, the greater sharing of economic and social resources, and the better connection to the larger community.").

[156] *See id.* at 6-7 ("[C]ohabiting is inherently much less stable than marriage . . . the break-up rate of cohabitors is far higher than for married partners. After 5 to 7 years, 39% of all cohabiting couples have broken their relationship . . . and only 21% are still cohabiting." [comparable figures for married couples are not provided]).

[157] *See id.* at 6 ("[C]ohabiting relationships tend in many ways to be less satisfactory than marriage relationships.").

Lest there be any misunderstanding, the claim here is not that gay couples *cannot* forge relationships as healthy and enduring as heterosexual couples. *See, e.g.*, *12-Year Study of Gay & Lesbian Couples*, Gottman Institute (2001), *at* http://www.gottman.com/research/projects/gaylesbian (last visited Oct. 31, 2002) ("Overall, relationship satisfaction and quality are about the same across all couple types (straight, gay, lesbian). . . .") The claim is only that it requires much more personal effort on their part to achieve the same result that the straight couple can expect to be provided by outside support. Energy not being an unlimited resource, the increased demand to achieve results heterosexuals can expect with much less investment means that fewer emotional and psychological resources are available to gay couples, on the average, to pursue other goals. Just as "coming out" can be liberating at the personal level, at the level of the interpersonal, the release from the demand to constantly defend one's primary relationship can be equally liberating, and the effects of this liberation are not merely metaphysical but practical as well.

community."[158] To achieve the desirable outcomes, couples need two interrelated elements: access to legal marriage, and public support for those marriages. Gay couples currently lack both. "The institution of marriage offers structural and cultural support to heterosexual partners; the denial of marriage to gay couples deprives them of this support."[159] Although a small gesture, publishing same-sex announcements manifests public support for whatever relationships the law currently allows gay men and lesbians to cultivate.

For many of the benefits I label intangible—that is to say, because marriage impacts so directly and fundamentally on how one lives one's life—the Supreme Court has recognized the right to marry as "one of the basic civil rights of man."[160] The Court, however, has directly addressed the fundamental right to marry in only two cases.[161] In the first, *Loving v. Virginia*, the Court struck down laws criminalizing interracial marriages, noting that "[t]he freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men."[162] A decade later, the Court reviewed its prior holdings and reaffirmed that "the right to marry is of fundamental importance"[163] and "is part of the fundamental 'right of privacy' implicit in the Fourteenth Amendment's Due Process Clause."[164] Because marriage is a fundamental right, "[w]hen a statutory classification significantly interferes with the exercise of a fundamental right, it cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests."[165]

Although some of the language discussing the right to marry may suggest that marriage refers only to a heterosexual

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[158] POPENOE & WHITEHEAD, *supra* note 154, at 7.

[159] M.D.A. Freeman, *Not Such a Queer Idea: Is There a Case for Same Sex Marriages?*, 16 J. APPLIED PHIL. 1, 13 (1999).

[160] Skinner v. Oklahoma, 316 U.S. 535, 541 (1942).

[161] *See* Zablocki v. Redhail, 434 U.S. 374 (1978); Loving v. Virginia, 388 U.S. 1 (1967).

[162] *Loving*, 388 U.S. at 12. In *Zablocki v. Redhail*, the Court struck down a Wisconsin statute that forbade remarriage by persons without custody of children from prior marriages, unless they could show that they were not delinquent in support payments, and that the child was not currently or likely to become a ward of the state. *Zablocki*, 434 U.S. at 375.

[163] *Zablocki*, 434 U.S. at 383.

[164] *Id.* at 384.

[165] *Id.* at 388.

coupling,[166] that specification is not essential to either the idea or the right of marriage.[167] Similarly narrow beliefs in an earlier age presumed that marriage necessarily precluded interracial marriage, a misunderstanding that the Court dispelled in 1967.[168] Racial similarity has been held to be a contingent, not an essential requirement of marriage; so too, eventually, will sex difference. Even the most elementary analysis invites the conclusion that "it would strain credulity to claim that lesbians and gays have the fundamental right to marry, but they simply do not have the right to marry a same-sex partner."[169]

Unlike racial similarity and sex differences, public acknowledgment of the union is incontestably an essential, not a contingent element of marriage.[170] An important expression of that public acknowledgment is announcement of the union in

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[166] Several of the cases, for example, link the ideas of marriage and procreation. The Court in *Skinner*, 316 U.S. at 541, for example, noted that "[m]arriage and procreation are fundamental to the very existence and survival of the race." But note that even here marriage is severable from procreation: it is "marriage *and* procreation," not "marriage *for* procreation." This same distinction is found in *Turner v. Safley*, 482. U.S. 78 (1987). That case maintained the right of prisoners to marry, yet acknowledged that they may be prevented from engaging in conjugal acts that might lead to reproduction. In this, the Court acknowledges that marriage and procreation are not synonymous rights, and that one might be protected but not the other. In other words, even if intimately related, marriage and procreation are not coterminous, so that one defines the other.

[167] This issue is ably handled by the Alaska Superior Court's holding in *Brause v. Bureau of Vital Statistics*, No. 95-6562, 1998 WL 88743 (Alaska Super. Ct. Feb. 27, 1998). The *Brause* court observed that the Hawaii court in *Baehr v. Lewin* concluded that same-sex marriage was not "rooted in traditions and collective conscience" such that its denial would threaten "the base of all our civil and political institutions." *Id.* at *4 (quoting Baehr v. Lewin, 852 P.2d 44, 57 (Haw. 1993)). *Baehr* went on to find support for same-sex marriage on grounds other than the right to marry, instead looking to the state constitution's equal protection clause.

The *Brause* court found that *Baehr* asked the wrong question. "The relevant question is not whether same-sex marriage is so rooted in our traditions that it is a fundamental right, but whether the freedom to choose one's own life partner is so rooted in our traditions." *Id.* at *4. Which, of course, it is. By framing the question in this way, the Alaska court could conclude that the right to marry a person of one's own choosing is a fundamental right, and is not restricted to opposite-sex couples.

[168] Loving v. Virginia, 388 U.S. 1 (1967) (invalidating Virginia's prohibition of interracial marriage as a violation of both the Equal Protection and Due Process Clauses of the U.S. Constitution).

[169] STRASSER, *supra* note 127, at 5-6. As Jonathan Rauch has pointed out, the right to marry is meaningless if it does not include the right to marry someone you love. Jonathan Rauch, *Marrying Somebody*, *in* SAME-SEX MARRIAGE: PRO AND CON 285, 286 (Andrew Sullivan ed., 1997).

[170] This fact is symbolically represented in the legal requirement that a legitimate marriage ceremony have witnesses. *See, e.g.*, LA. REV. STAT. ANN. § 9:244 (West 2000) ("The marriage ceremony shall be performed in the presence of two competent witnesses of full age.").

the newspapers in the locality of the celebrants. It is for this reason that announcements are commonly published for persons who no longer live in the community served by the newspaper.[171] Because one or both members of the couple retain significant ties to the former domicile, announcement there serves to inform family and friends in the area whom the couple will expect to treat them as a married unit.[172]

This line of reasoning leads to the conclusion that withholding marriage from gay couples raises not simply humanitarian concerns, but also constitutional ones. Granting the right to marry without also protecting the elements of marriage that have historically justified its status as a fundamental civil right would be rather pointless. Given that public recognition directly effects a critical dimension of marriage—that is, its ability to endure, and the quality of its experiential aspects[173]—then impliedly the withholding of that recognition could also implicate constitutional issues. One recognized method of public recognition in our society has been the publication of announcements in local newspapers. The discriminatory practice of newspapers denying equal access to their pages for such announcements denies gay couples the public support critical to the maintenance of their relationships, and thereby functions to "interfere[] with the exercise of [their] fundamental right" to marry.[174]

Publication of same-sex union announcements in community newspapers, therefore, involves issues central to the struggle to achieve equality for same-sex couples: "To a very large degree, we aren't just who we say we are, we are who the society pages say we are."[175] As such, how newspapers treat announcements of newly-formalized same-sex

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[171] This, for example, is one of the criteria for the *Times-Picayune*. Announcements must "evidence [a] connection between the couple and the New Orleans area . . . ." Memorandum in Support of Motion for Temporary Restraining Order and Preliminary Injunction Ex. B, Affidavit of James Amoss at 2, Times Picayune Publ'g Corp. v. City of New Orleans, No. Civ. A95-518N, 1995 U.S. Dist. LEXIS 4842 (La. App. 4th Cir. April 13, 1995).

[172] One study of gay male couples identified only two sources of conflict in the relationship recognized by over one-fifth of the study population: Financial disagreements and lack of support from family members. *See* Raymond M. Berger, *Men Together: Understanding the Gay Couple*, 19(3) J. HOMOSEXUALITY 31, 42 (1990).

[173] "[S]tate-approved marriage is good for all couples because it creates additional advantages for the relationship and a big barrier to breakups." ESKRIDGE, CASE FOR SAME-SEX MARRIAGE, *supra* note 102, at 112.

[174] Zablocki v. Redhail, 434 U.S. 374, 388 (1978).

[175] Bronski, *supra* note 88.

relationships merits the fullest examination under all applicable constitutional analyses.

III. THE THRESHOLD INQUIRY INTO PUBLIC ACCOMMODATION NONDISCRIMINATION

The *Times-Picayune* complaint, as well as the *Oregonian* case, involved public accommodations laws that prohibit discrimination on the basis of sexual orientation.[176] This Article limits its analysis to those states and municipalities with similar public accommodations laws. Although local public accommodation laws vary, many enumerate prohibited discriminatory acts, and define what constitutes a public accommodation. The Massachusetts law, for example, prohibits an "owner, lessee, proprietor, manager, superintendent, agent or employee of any public accommodation" from "actually discriminating against persons of any religious sect, creed, class, race, . . . sex, sexual orientation . . . in the full enjoyment of the accommodations . . . offered to the general public by such places of public accommodation, resort or amusement."[177] The statute then defines public accommodation as "any place, . . . which is open to and accepts or solicits the patronage of the general public."[178] The definition goes on to list ten illustrative examples of public accommodations, including: "(1) an inn, tavern, hotel . . . (6) a boardwalk or other public highway . . . (8) a place of public amusement, recreation, sport, exercise or entertainment."[179]

The threshold issue for complaints under laws like the Massachusetts statute is whether the applicable public accommodations law extends to include the local newspaper. If it does not, then the legal basis for alleging discrimination through failure to publish union announcements fails, and the complaint must be dismissed. In that vein, The *Oregonian* court observed in dismissing the complaint that "[t]here is no precedent holding news space to be a public accommodation."[180] The implication is that finding newspapers to be public

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[176] *See* PCC § 23.01.070, *cited in* Linebarier v. Oregonian Publ'g Co., No. 96-875554, slip op. at 2 (Or. Dist. Ct. Aug. 5, 1996).

[177] MASS. GEN. LAWS ch. 272, § 92A (2002).

[178] *Id.*

[179] *Id. See also infra* notes 197-200 and accompanying text, discussing the New Orleans ordinance.

[180] *Linebarier*, No. 96-875554, slip op. at 3-4.

accommodations is somehow antithetical to what should be a "public accommodation," and to the very nature of newspapers themselves. This Part demonstrates that while courts have never explicitly construed newspapers to be public accommodations, there is nothing in the nature of newspapers that prevents such a finding. In other words, nothing intrinsic to newspapers shields them from classification as public accommodations if the applicable law would permit that result.

A. *Baseline Precedent of* Hurley

A leading public accommodations case is *Hurley v. Irish-American Gay, Lesbian, & Bisexual Group of Boston, Inc.*[181] In *Hurley*, organizers of the annual St. Patrick's Day parade refused to allow a group of openly gay Irish descendants to march in the parade.[182] The gay group sued the parade organizers, arguing that the exclusion of the gay club violated the state public accommodations law and state and federal constitutions.[183] The state court agreed with the plaintiffs that the parade fell within the public accommodations law and required the organizers to include the gay group.[184] The U.S. Supreme Court reversed unanimously, holding that forcing a parade sponsor to include a contingent of gay marchers violated the free speech rights of the organizers.[185]

Unfortunately, the Court dealt ineffectively with the public accommodations aspect of the case. The Supreme Court did not quibble with the Supreme Judicial Court of Massachusetts's finding that the parade was a public accommodation under state law.[186] Rather, the Supreme Court

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[181] 515 U.S. 557 (1995).

[182] *Id.* at 561.

[183] *Id.*

[184] *Id.* at 561-62. The state courts found that the parade fit the statutory definition as either a "boardwalk, or other public highway" or as "a place of amusement, recreation, sport, exercise or entertainment." Irish-American Gay, Lesbian & Bisexual Group v. City of Boston, 418 Mass. 238, 247-48 (1994). *See also supra* notes 176-78 and accompanying text. The Supreme Judicial Court of Massachusetts affirmed the trial court's conclusions that the parade did not contain expressive elements and thus the First Amendment did not protect it, and that the parade did not involve state action. *Hurley*, 515 U.S. at 563-64.

[185] *See Hurley*, 515 U.S. at 566. *Hurley* is but the latest in a series of attempts by gays and lesbians to be included in parade events. The first may have been in 1986, when gay veterans sought unsuccessfully to be included in an American Legion parade. *See* Paul Siegel, *Lesbian and Gay Rights as a Free Speech Issue: A Review of Relevant Caselaw*, 21(1/2) J. HOMOSEXUALITY 203, 249 (1991).

[186] *Hurley*, 515 U.S. at 570-74.

objected to the application of the public accommodations law so that it "had the effect of declaring the sponsors' speech itself to be a public accommodation."[187] Finding that "one important manifestation of the principle of free speech is that one who chooses to speak may also decide 'what not to say,'"[188] the Court held that Massachusetts could not force the parade sponsor to promulgate a message it preferred to avoid. Gays could (presumably) march as members of other groups, but not under their own banner.

As far as it goes, *Hurley* seems correctly decided. The decision, however, lacks an explanation as to why its reasoning would not apply to all, or at least some, other public accommodations. The confusion arises from the two variables interacting in *Hurley*, the type of discrimination, and the form of public accommodation. The path from the facts to the result is less than obvious. Imagine two forms of public accommodation, a parade and a hotel.[189] Imagine also two types of discrimination, by race and by sexual orientation. Although *Hurley* instructs us as to the outcome of the parade-sexual orientation combination, its reasoning does not directly illuminate the outcome required by the other combinations.

Would *Hurley* have been decided differently if the excluded group had been African-Americans or women, demographic categories that both receive heightened scrutiny from the courts?[190] Perhaps, but present concerns force a critique of *Hurley* from the other direction. Controlling for the type of discrimination, does *Hurley* stand for the proposition that other forms of public accommodations can now also exclude gay men and lesbians, at least when they are in self-identified groups? It does not suffice to point out that *Hurley* found decisive the expressive nature of parades. Hotel establishments can also express a point of view.[191] The relevant

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[187] *Id.* at 573.

[188] *Id.*

[189] A hotel is an explicit category of a public accommodation under many laws, including the Americans with Disabilities Act. *See* 42 U.S.C. § 12181(7)(A) (2002). For a related example of a restaurant being prohibited from restricting use of semi-private booths to heterosexual romantic couples, see *Rolan v. Kulwitzky*, 200 Cal. Rptr. 217 (1984).

[190] Race receives "the most rigid scrutiny." Loving v. Virginia, 388 U.S. 1, 11 (1967); the Court extended intermediate scrutiny to sex in *Craig v. Boren*, 429 U.S. 190 (1976).

[191] The Sandals resorts, for example, strictly enforce a heterosexual couples only policy. *See Straight-only Resort Can't Advertise on British Television*, ADVOCATE.COM, July 6, 2001, *at* http://www.advocate.com/new_news.asp?id=1638&sd-

differences distinguishing hotels from parades are clearly quantitative, and not qualitative, as indicated by the Court's attempt to characterize parades as being *primarily* expressive conduct or symbolic speech.[192] Hotels, by contrast, would be reasonably construed to be expressive in only some secondary, derivative sense that is less strictly protected. Hotels are, in other words, primarily commercial, and it is this expressive-commercial dichotomy and the primacy of expression in a parade that seemingly determined the outcome of *Hurley*.

This dichotomy, taken from Justice O'Connor's concurrence in *Roberts v. United States Jaycees*, looks to the principal goal of the enterprise.[193] The purpose of a hotel is to generate commercial profits, while the purpose of a parade is to express an idea. Although hotels can be expressive, or parades profitable, these characteristics are only incidental to their primary purposes. A commercial establishment is accorded less flexibility in its discriminatory practices than an expressive establishment, as an extension of the idea that commercial speech may be regulated to a greater extent than expressive speech.[194] Therefore, a hotel's practices of exclusion will be censurable while a parade's exclusions will be protected. Under this analysis, censure of discriminatory practices is determined by the relation of the prohibited discrimination to the organization's primary purpose, commercial or expressive.

The *Hurley* Court, unfortunately, never identified this dichotomy as the critical issue controlling its decision. Even if it had, however, all problems would not be resolved. Both conditions of "commercial" and "expressive" admit of degrees, and the *Hurley* opinion does not suggest how hybrid situations are to be handled. While the parade will be protected as expressive, what is the status of the official parade vendors on the side? How "expressive" must a public accommodation be

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=07/06/01 (last visited Jan. 20, 2003); C. Barillas, *Microsoft Ends Affiliation with Anti-Gay Resort*, DATA LOUNGE, Feb. 3, 1999, *at* http://www.datalounge.com/datalounge/news/record.html?record=3889 (last visited Jan. 20, 2003).

[192] *See Hurley*, 515 U.S. at 568.

[193] *See* Roberts v. United States Jaycees, 468 U.S. 609, 638 (1984) (O'Connor, J., concurring in part and concurring in the judgment) ("Minnesota's attempt to regulate the membership of the Jaycees chapters operating in that State presents a relatively easy case for application of the expressive-commercial dichotomy."). *See also infra* notes 275-85 and accompanying text, discussing the *Roberts* decision.

[194] *Roberts*, 468 U.S. at 634 ("[T]here is only minimal constitutional protection of the freedom of commercial association.").

before it merits constitutional protection from local nondiscrimination ordinances?[195]

Despite these shortcomings, *Hurley* presumptively would support a newspaper's argument that even if the newspaper were found to be a public accommodation, government pressure to convey a message that it does not support (e.g., one that can be construed as support of same-sex unions) would violate its First Amendment rights. Further analysis, however, shows why this confidence may be misplaced. First, I identify the contexts in which a newspaper can be found to be a public accommodation.

B. *Public Accommodation Analysis*

Based on *Hurley*, a newspaper would seem to have firm warrant for its position that the government cannot force it to communicate a message (in this case, an acceptance of same-sex relationships) that it chooses not to convey, even if it is a public accommodation.[196] If a newspaper is *not* a public accommodation, the issue would not even arise.

Most union announcement plaintiffs seek to frame "public accommodation" to include newspapers, although the statute or ordinance involved does not explicitly include newspapers. As discussed above, the *Hurley* decision was likely based upon the Court's understanding of the primarily expressive nature of parades, but the Court offered no analysis of the relationship between a parade's expressivity and the status of a parade as a public accommodation. This lacuna will be telling if courts find newspapers, or at least the society pages therein (as opposed to the news and editorial pages), to be public accommodations. The reasoning of *Hurley* cannot sensibly apply to all public accommodations without effectively negating all nondiscrimination laws. The Court, however, gave little guidance as to when a public accommodation is primarily expressive (other than parades) or when these laws interfere with the accommodations' First Amendment rights.

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[195] *See* discussion *infra* Part IV.D.1.

[196] This reliance would be strengthened by the fact that the *Hurley* Court itself found similarities between parades and newspapers. *See Hurley*, 515 U.S. at 575.

1. Are Newspapers "Public Accommodations"?

Before broaching the problem of applying *Hurley* to the present scenario, I consider whether a newspaper is a public accommodation at all. Since local antidiscrimination laws vary, for present purposes I focus on the New Orleans ordinance controlling the *Times-Picayune*.

"Public accommodation" is currently defined in the New Orleans City Code as:

> [a]ny place, store, or other establishment or means of transportation, either licensed or unlicensed, which supplies goods or services to the general public or which solicits or accepts the patronage or trade of the general public, or which is supported directly or indirectly by government funds.[197]

Although the statutory definition of "public accommodation" lists several exemptions,[198] none extend to newspapers. A newspaper could arguably fall within the scope of the definition as an "establishment . . . that solicits or accepts the patronage . . . of the general public."[199]

Public accommodations are forbidden, on the basis of sexual orientation, from

> (1) [discriminating] . . . by refusing, withholding or denying to such person any of the goods, services, accommodations, advantages, facilities or privileges offered by the public accommodation, . . . by:
>
> > a. Placing or attempting to place any person in a separate class of customers, patrons, . . . in a separate section or area of the . . . facilities of the public accommodation . . . .

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[197] City Code of New Orleans, § 86-1.5, at CD86:5. *See also supra* notes 177-79 and accompanying text, discussing the Massachusetts statute.

[198] The exceptions include "bona fide private clubs" of many types. City Code of New Orleans, § 86-1.5, at CD86:5.

[199] Use of the word "establishment" might introduce confusion into the present analysis if that term is taken to require a physical "bricks and mortar" entity to qualify as a public accommodation. Courts have debated that issue, and at least some have decided in the negative. For example, when construing the ADA public accommodations sections, the First Circuit overturned a ruling by the district court that placed a strict interpretation on the term "place of public accommodation." *See* Carparts Distrib. Ctr. v. Automotive Wholesaler Ass'n, 37 F.3d 12, 18 (1st Cir. 1994).

> The plain meaning of the terms do not require "public accommodations" to have physical structures for persons to enter. Even if the meaning of "public accommodation" is not plain, it is, at worst, ambiguous. This ambiguity, considered together with agency regulations and public policy concerns, persuades us that the phrase is not limited to actual physical structures.

Id. at 21-22. Construing "establishment" to include newspapers (and it is necessary that the term include the product or service, and not merely the corporation) is in keeping with that line of broad interpretation.

> (2) [publishing or] circulat[ing] . . . any . . . communication, notice or advertisement to the effect that any of the services, accommodations, advantages, facilities or privileges of any public accommodation . . . will be refused, withheld, or denied to any person.[200]

If a newspaper is a public accommodation, then its refusal to grant access to the society pages to gay men and lesbians for the purpose of announcing their unions, likely would violate the nondiscrimination ordinance in two ways.[201] First, withholding that service violates section (1) because that act would deny privileges available from the newspaper, such as appearance in the society pages, based on the prohibited criterion of sexual orientation. Second, if the newspaper publishes or circulates any advance notice of its intent to withhold that service, it then violates section (2) because such notice publicizes the newspaper's prior intent to restrict access to its services based upon the prohibited criterion of sexual orientation.

No court has found a newspaper to be a public accommodation. However, neither has a court ever held that newspapers are inherently immune from being categorized as public accommodations. Despite frequent suits that seek to treat newspapers as public accommodations, they have thus far avoided such categorization only because of the specific language of the local ordinance or statute defining public accommodation status.

For example, in *Treanor v. Washington Post Co.*,[202] a disabled author who wrote a book chronicling disabled civil rights history sued the newspaper for refusing to publish a review of the book. He claimed that such a refusal violated the Americans with Disabilities Act ("ADA"). The court found that the newspaper was not a public accommodation as that term is defined in the ADA.[203] The ADA identifies public accommodations largely through an extensive list of examples.[204] This list does not include newspapers, and the

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[200] City Code of New Orleans, § 86-33, at CD86:24.

[201] This argument does not require that the newspaper also be expected to announce couplings of unmarried heterosexuals, because unmarried heterosexuals are not similarly situated as unmarriageable same-sex couples. *See* Donovan, *An Ethical Argument*, *supra* note 139, at 655-69.

[202] 826 F. Supp. 568 (D.D.C. 1993).

[203] *Id.* at 569.

[204] *See* 42 U.S.C. § 12181 (1994). The public accommodations covered by the ADA are defined by twelve extensive categories. *See id.* § 12181(7). These include:

court could not analogize newspapers to anything on the list.[205] The court further found that such a plain meaning reading of the statute circumvented potential First Amendment conflicts.[206]

The same search for analogies precluded a Wisconsin court from deeming a local newspaper a public accommodation under state law.[207] In *Hatheway v. Gannett Satellite Information Network, Inc.*, the newspaper refused an advertisement from a gay and lesbian organization.[208] The court stated that "the newspaper's classified advertising section [was] so dissimilar from the businesses listed in the statute that it [did] not come within the purview of the public accommodations act."[209] Significantly, the court rendered its decision in favor of the newspaper solely on the basis of statutory construction; the court refused to address "the constitutionality of any act, rule or order requiring a newspaper to publish any specific item."[210]

Another Wisconsin case, however, left open the possibility that a newspaper could be a public accommodation. In *Painters Union Local 802 v. Madison Newspapers, Inc.*, a newspaper sued to enjoin the state Equal Opportunities Commission from pursuing a complaint from a labor union after the newspaper refused to accept its ad. The newspaper claimed it was free to refuse the ad because it was not a "public

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(A) an inn, hotel, motel, or other place of lodging . . .; (B) a restaurant, bar, or other establishment serving food or drink; (C) a motion picture house, theater, concert hall, stadium, or other place of public exhibition or entertainment; (D) an auditorium, convention center, lecture hall, or other place of public gathering; (E) a bakery, grocery store, clothing store . . . or other sales or rental establishment; (F) a laundromat, dry-cleaner, bank, barber shop, beauty shop . . . or other service establishment; (G) a terminal, depot, or other station used for specified public transportation; (H) a museum, library, gallery, or other place of display or collection; [as are places] of (I) . . . recreation; (J) . . . education; (K) . . . social service[s] . . . ; and (L) . . . exercise . . . .

Id.

[205] *See Treanor*, 826 F. Supp. at 569. *See also* Brown v. Tenet Paraamerica Bicycle Challenge, 959 F. Supp. 496 (N.D. Ill. 1997) (holding that in ADA cases defendant must be analogous to one of the law's explicitly identified examples of public accommodations). For a discussion of the problems with using lists as definitions, see Donovan, *Baby Steps or One Fell Swoop?*, *supra* note 130, at 25-30.

[206] *Treanor*, 826 F. Supp. at 569.

[207] *See* Hatheway v. Gannett Satellite Info. Network, Inc., 459 N.W.2d 873, 876 (Wis. Ct. App. 1990).

[208] *Id.*

[209] *Id.*

[210] *Id.* at 877.

place of accommodation."[211] The court granted the Commission's motion to dismiss, implying the EOC might have a colorable argument that not accepting the advertisement was discriminatory under the public accommodation law.[212] Because the matter settled, the court did not definitively rule on whether the newspaper indeed fell within the ambit of the relevant definition of "public accommodation." One commentator noted that the joint implication of these two Wisconsin cases is that "[a]pparently, newspaper advertising is not a public accommodation for gays, but is a public accommodation for labor unions."[213]

While a court has yet to hold a newspaper to be a public accommodation under a statutory list scheme, a newspaper could be so categorized under state and municipal public accommodation laws using alternative statutory schemes.[214] Laws have typically defined public accommodations through a list of examples, leaving the court to decide if a newspaper is analogous to any of them. Almost always it is not. But because the New Orleans ordinance does not include a list of exemplars, that use of analogical reasoning would not apply. Since a plaintiff could establish that a newspaper is a public accommodation, at least under a noninclusive list scheme, the next question focuses on whether such a categorization is inconsistent with the First Amendment.

2. Are Newspapers Exempted from Public Accommodations Laws Because of Their Expressivity?

If a newspaper is found to be a public accommodation, reason dictates that it will be subject to the same regulation as all other public accommodations. It is here that the explanatory lacuna of *Hurley* creates an interpretative difficulty.[215] In

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[211] Painters Union Local 802 v. Madison Newspapers, Inc., No. 3165 (Equal Opportunity Comm'n, Madison Wis. file closed Dec. 24, 1987). *See* Martha M. Ertman, *Contractual Purgatory for Sexual Marginorities: Not Heaven, but Not Hell Either*, 73 DENV. U. L. REV. 1107, 1147 n.163 (1996). *See also* P. CAMERON DEVORE & ROBERT D. SACK, ADVERTISING AND COMMERCIAL SPEECH: A FIRST AMENDMENT GUIDE 371, 545 (2001).

[212] *See* Ertman, *supra* note 211, at 1147 n.163.

[213] *Id.*

[214] *See supra* notes 177-79 and accompanying text discussing the Massachusetts law, and notes 197-200 and accompanying text discussing the New Orleans ordinance.

[215] *See supra* Part III.A.

Hurley, the parade was a public accommodation, but the Court exempted it from the requirement that it not discriminate in expressive activities.[216] Either *Hurley* is a jurisprudential aberration, limited only to parades (thus offering no solace to other public accommodations, including newspapers), or something about *this kind* of public accommodation demanded the exemption from a nondiscrimination law.

Assuming the latter, the task is to discern the special character of parades that commanded this result. Once the special character is discerned, one can apply it to other examples of public accommodations, including newspapers, to see if the same outcome is required. As discussed above, it does not suffice to point to the expressivity of the parade; any public accommodation can be expressive. The controlling inquiry will be whether expression is the primary purpose of the establishment, as opposed to an incidental by-product. Establishments whose expression is central to the mission of the organization will receive greater deference than those whose expression is epiphenomenal.

An initial assumption would be that newspapers are primarily expressive, and as such fall within the holding of *Hurley* even if newspapers are, like parades, public accommodations. This assumption, however, is flawed. The expressivity of the parade forces the *Hurley* result because in that case the critical expressivity is coterminous with the parade as a totality. The message of the parade organizers comprises the parade as a whole with no remainder, without any discernible and severable parts of the parade to which this expressive quality might not extend. This reading also squares *Hurley* with previous Supreme Court precedent, especially *Roberts v. United States Jaycees*.[217]

In contrast, newspapers are not exclusively expressive. Prior decisions have found newspapers to be less homogeneous than the parades in *Hurley*. Two cases demonstrate this point that the expressivity of the newspaper does not extend to all sections; what a newspaper can say on the editorial pages it

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[216] *Hurley v. Irish-American Gay, Lesbian & Bisexual Group*, 515 U.S. 557, 573 (1995) ("[T]he state courts' application of the statute had the [impermissible] effect of declaring the sponsors' speech itself to be the public accommodation.").

[217] 468 U.S. 609, 638 (1984) (O'Connor, J., concurring in part and concurring in the judgment) ("Minnesota's attempt to regulate the membership of the Jaycees chapters operating in that State presents a relatively easy case for application of the expressive-commercial dichotomy.") *See also infra* notes 275-86 and accompanying text, discussing *Roberts*.

cannot say in other sections, such as the classified advertisements. In the first case, *Ragin v. New York Times Co.*,[218] the plaintiffs accused the newspaper of violating the Fair Housing Act because the models appearing in housing advertisement illustrations where mostly white, and, when black models appeared, they were associated with less desirable real estate locations.[219] Against the *Times*'s objection that ordering it to conform its ads to the requirements of the Fair Housing Act would "compromise the unique position of the free press,"[220] the Second Circuit held that "real estate advertisements that indicate a racial preference 'further an illegal commercial activity' . . . [and as such] are constitutionally unprotected."[221] While a newspaper should be free to use its editorial space to advocate that housing should be racially segregated, even against a congressional law to the contrary, noneditorial sections of the paper may not advance that same opinion.

Ragin based its holding in part on the second case, *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*.[222] In *Pittsburgh Press*, the Supreme Court found that segregation of employment advertisements into male- or female-preferred columns violated a local human relations ordinance, and that the First Amendment did not protect this activity.[223] The Court was "unpersuaded" by the newspaper's argument that the placement of the advertisements in the newspaper layout removed those "actions from the category of commercial speech," and were therefore unregulable.[224] It is important for present purposes to note that the Court did *not* hold that these placement decisions were themselves commercial speech. The Court held only that requiring the newspaper to comply with the ordinance did not violate its First Amendment rights.

Pittsburgh Press provides a clear precedent for the requirement that in some circumstances the press must conform noneditorial (albeit expressive) content to other laws, including public accommodations ordinances. The present

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[218] 923 F.2d 995 (2d Cir. 1991).
[219] *See id.* at 998.
[220] *Id.* at 1003.
[221] *Id.* at 1002.
[222] 413 U.S. 376 (1973).
[223] *Id.* at 391.
[224] *Id.* at 388.

argument for publication of same-sex union announcements, therefore, does not break entirely new ground, but only seeks to extend established rules to new facts. One might try to distinguish same-sex union announcements by noting that *Ragin* and *Pittsburgh Press* involved "illegal commercial activity"[225] whose regulation was not prohibited by the First Amendment.[226] Newspapers would rebut that union announcements are not commercial speech, and therefore these decisions are not applicable. However, union announcements may be deemed commercial speech under the proper analysis, thereby placing them firmly within the *Pittsburgh Press* holding.

I propose that announcements are more closely analogous to commercial than to editorial speech.[227] If *Pittsburgh Press* requires categorizing the material as one or the other—and that certainly is the lesson of O'Connor's *Roberts* concurrence—the more appropriate choice is commercial speech. The logical progression toward this conclusion is clarified below.

While the *Ragin* and *Pittsburgh Press* decisions speak in terms of commercial speech, the facts of the cases complicate such simple analysis. In both cases, the issue was not the direct commercial speech of the advertisers, but the treatment of that commercial speech by the newspapers—in the case of *Ragin*, attaching racially discriminatory illustrations, and in *Pittsburgh Press*, arranging the employment ads into sexually exclusive columns. The appropriateness of the ads themselves, when that has become an issue, may be severable from the elements of the complaints directed toward the newspaper.[228] From this perspective, the fundamental issue was not that the speech involved was commercial, but that it did not rise to the

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[225] *Id.*

[226] *See id.* at 391.

[227] *See infra* Part IV.C.

[228] *See Pittsburgh Press*, 413 U.S. at 384 ("[S]peech is not rendered commercial by the mere fact that it relates to an advertisement."). As a technical matter, the complaint against *Pittsburgh Press* was that it *aided* the advertisers; aid is a far cry from "commercial speech" as ordinarily understood, as "speech proposing a commercial transaction." *See* Cent. Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 562 (1980). Although the Court expressed skepticism about how the newspaper's placement of the ad interacted with the commercial speech of the advertisers, *Pittsburgh Press*, 413 U.S. at 387 ("[W]e are not persuaded that . . . the actual placement there lifts the newspaper's actions from the category of commercial speech"), the Court held only that enforcement of the antidiscrimination ordinance did not infringe upon the newspaper's First Amendment rights. *Id.* at 391.

standard of protected editorial speech. Assuming speech must fit into either the commercial or expressive category, the newspapers' speech was clearly, albeit uneasily, commercial. Because union announcements are non-editorial speech,[229] the lessons of *Ragin* and *Pittsburgh Press* are immediately applicable.

The logical conclusion is thus clear. Newspapers may be categorized as public accommodations, although this outcome depends upon the specific details of the applicable law. If the statutory definition includes an exemplary list of representative public accommodations, and if that list includes neither newspapers explicitly nor some other example to which newspapers can be analogized, then categorizing newspapers as public accommodations will be difficult. In situations, however, where the law does not include an illustrative list, that outcome is more easily obtained. While no court has found a newspaper to be a public accommodation, neither has one reasoned that this result is precluded due to the unique status that newspapers enjoy under the Constitution. If a court finds a newspaper to be a public accommodation, *Hurley*[230] will protect only its expressive sections—either directly or in conjunction with other cases such as *Pittsburgh Press*[231] and *Roberts*.[232] *Pittsburgh Press* would be especially instructive, because it found advertising sections to fall outside the umbrella of protected editorial expression.[233] The logical result is that society pages are more closely analogous to unprotected classifieds than to protected editorials.

IV. THE NEWS STATUS OF UNION ANNOUNCEMENTS

If a party satisfies the threshold criterion of the public accommodation status of the newspaper, inquiry shifts to what kind of speech the rejected announcement represents. The critical distinction is whether a social announcement qualifies as "news" or editorial speech, or whether the announcement is commercial speech.[234] While a claimant may prevail in both

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[229] *See infra* Part IV.A.

[230] 515 U.S. 557 (1995).

[231] 413 U.S. 376 (1973).

[232] 468 U.S. 609 (1984).

[233] 413 U.S. at 391.

[234] As I conceive it, "news" and "editorial speech" relate to two intersecting (not always neatly) areas. On the one hand, I think of "editorial speech" as a superordinate category, of which "news" is a subset. Not everything in the paper is

situations, the grounds for attaining each outcome are distinct. Section A considers situations where announcements are not "news" or editorial speech, and as such are not protected by either the Free Press or Free Speech Clauses of the First Amendment. Section B considers what arguments might apply in situations where society announcements are protected forms of speech. Even in these situations, however, newspapers might still be compelled to allow access on a nondiscriminatory basis given their arguable status as quasi-public corporations.

This discussion concludes that the status of announcements is not an abstract determination, but is fact intensive. The announcements in one newspaper may not qualify as protected "news," while announcements in another paper might, according to the degree to which editorial judgment underlies the finished product. That the issue is one of fact and not law is important because these discrimination complaints rarely receive a full hearing on the facts. If such cases did receive factual inquiries, courts could thoughtfully consider the issues this Article raises and both clarify and advance the law.

A. Tornillo *and the Standard of Editorial Judgment*

The obvious refuge for any newspaper fleeing from governmental attempts to dictate its contents is the Constitution.[235] While the Constitution contains both a Free Press and a Free Speech Clause, the protections extended to the press are largely reducible to the protections given any speaker.[236] A few exceptions, however, do exist.

"news," most notably the editorial opinions. I think of both as forms of editorial speech, although only articles would qualify as "news." On the other hand, the terms mark a distinction as to the source of constitutional protection. "News" is protected by the Free Press clause, while editorial speech is protected by the Free Speech clause. Because of the restricted sense in which I use the term, "news" will always appear in quotes.

[235] "Congress shall make no law . . . abridging the freedom of speech or of the press . . . ." U.S. CONST. amend. I.

[236] *See* David A. Anderson, *Freedom of the Press*, 80 TEX. L. REV. 429, 430 (2002). ("Most of the freedoms the press receives from the First Amendment are no different from the freedoms everyone enjoys under the Speech Clause."). According to David Anderson, the Free Press Clause received greatest attention from the Supreme Court in the early part of this century. *Id.* at 448. The 1931 case of *Near v. Minnesota*, 283 U.S. 697, "was the first case to hold that a law violated the guarantees of freedom of the press." LUCAS A. POWE, JR., THE FOURTH ESTATE AND THE CONSTITUTION: FREEDOM OF THE PRESS IN AMERICA 142 (1991). Beginning in the 1970s, however, the Court "seemed to lose its enthusiasm for the Press Clause." Anderson, *supra* at 449. Thereafter, the Court's preferred analysis was to treat "media cases as free-speech cases rather than free-press cases." *Id.*

The press holds two unique rights: taxation and editorial autonomy.[237] The Free Press Clause of the Constitution protects a newspaper against demands that it comply with nondiscrimination ordinances and thereby publish same-sex union announcements when such compliance undermines the editorial autonomy of the newspaper. When compliance does not implicate editorial autonomy, the newspaper must follow the law.

The primary authority for the position that the Free Press Clause confers a privileged status upon editorial judgment is *Miami Herald Publishing Co. v. Tornillo*.[238] In *Tornillo*, a Florida political candidate invoked a state statute granting candidates for office a right to reply to a negative editorial. The U.S. Supreme Court deemed the statute unconstitutional for three reasons. First, reply rights impose opportunity costs on newspapers. Printing a reply requires the paper to forego printing other news or advertisements and requires it to incur additional printing expenses. Second, reply rights may chill speech. If an editor knows that he may bear the expense of printing replies, he might decide to forego the critical editorial entirely.[239]

Those two rationales do not apply, however, to the problem of union announcements. As discussed in greater detail below, many papers accept all submitted wedding announcements that conform to the published submission criteria. They expect, in other words, to publish all material that they receive, only rejecting those that are defective. Unlike a "right of reply" statute, then, compliance with an order to publish same-sex union announcements will not impose opportunity costs on a newspaper, as it will not noticeably increase the paper's publishing costs.[240] Since the fear of

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[237] Anderson, *supra* note 236, at 493-95. Taxation is beyond the scope of this Article.

[238] 418 U.S. 241 (1974).

[239] *See id.* at 256-57.

[240] The Vermont civil union experience provides some initial insight as to what the potential demand for same-sex union announcements might be. In the first year that civil unions were available, 2,258 unions were recorded. David Mace, *A Year with Civil Unions*, TIMES ARGUS, July 1, 2001, *at* http://timesargus.nybor.com/Story/-29127.html (last visited Oct. 27, 2002). Only 20% of this number (or 463) involved at least one Vermonter, *id.*, and thus this would be the number of announcements that all Vermont newspapers would, in theory, be expected to publish. As that number may include a "backlog" of couples waiting to formalize their relationships, the annual number could be expected to fall in subsequent years. More recent statistics on Vermont civil unions are available from *Vermont's Civil Unions*, PROVIDENCE J., Oct.

increased costs cannot act as a prior restraint—preventing the newspaper, presumably, from publishing any announcements at all—this reasoning of *Tornillo* does not apply to the present study.

More relevant is the third *Tornillo* rationale, that mandatory speech, like a right of reply, intrudes on editorial autonomy.[241] Although the Court left this principle largely unexplained, it seemed to rely on two constitutional interpretations. First, the First Amendment proscribes state action rather than compelling the press to act. In other words, it does not require the press to be responsible. Second, the First Amendment, supported by the Fifth Amendment,[242] prohibits the state from compelling speech. The *Hurley* Court relied on this principle for its holding that the parade organizers had the right to control their message.[243] According to *Tornillo*:

> Even if a newspaper would face no additional costs to comply with a compulsory access law and would not be forced to forgo publication of news or opinion by the inclusion of a reply, the Florida statute fails

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13, 2002, *at* http://www.projo.com/yourlife/content/projo_2021013_gaysidex.a7954.html (last visited Dec. 3, 2002).

[241] *Tornillo*, 418 U.S. at 258.

[242] "No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V.

[243] Hurley v. Irish-American Gay, Lesbian & Bisexual Group, 515 U.S. 557, 575 (1995). "A newspaper is . . . 'more than a passive receptacle or conduit for news, comment, and advertising,' and we have held that 'the choice of material . . . and other decisions made as to other limitations on the size and content . . . and treatment of public issues . . . –whether fair or unfair—constitute the exercise of editorial judgment' upon which the state cannot intrude." *Id.* (citing *Tornillo*, 418 U.S. at 258).

This passage might seem to present a problem for the present argument. It says that the "choice of material," including advertisements, is beyond the intrusion of the State. As I have at times analogized social announcements to classified advertisements, this dicta in *Hurley* might undermine the thesis I defend. But as a general rule, this statement from the Court is inaccurate, since it ignores its earlier case of *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376 (1973), which did allow governmental interference with newspaper advertising practices. The statement, therefore, must be read in the limited context in which it is offered. In the context of the issue in *Tornillo*, the statement does not claim that the named parts of the newspaper are beyond governmental interference, but only that those parts of the paper upon which the newspaper exercises *choice* are protected. The proper inquiry is not into the type of material the government seeks to regulate, but whether the regulation interferes with editorial choice. Typology is only useful to the extent that it informs about that choice. Some genera of material, such as editorials, by their very natures entail significant elements of choice. Other types, such as advertisements and announcements, provide no intrinsic insight about the amount of choice involved in their publication. This problem of choice, or "retail level judgment," is addressed in detail *infra* Part IV.C.1.

> to clear the barriers of the First Amendment because of its intrusion into the function of editors.[244]

Editorial judgment requires that something be added to the information beyond that available from those "who merely compile and distribute information."[245] Without this "something extra," the "press" is indistinguishable from all the other innumerable information providers in today's market. Thus, for *Tornillo* to apply and shield a newspaper from antidiscrimination laws, the newspaper must demonstrate that union announcements are the product of editorial judgment.

In trying to define the "press" protected by the Free Press Clause, one usually draws attention to this value-added editorial function. In a word, the Free Press Clause protects "news" where it may not protect mere entertainment, fiction or other forms of expressive works.[246] The question then boils down to whether wedding announcements constitute "news" in the sense required by the Free Press Clause as construed by *Tornillo*. Determining what qualifies as "news" can be problematic, but analysis should focus on the purpose of the Free Press Clause: to protect "activity that reflects independent choice of information and opinion of current value, directed to public need, and borne of non-self-interested purposes."[247] By this definition, wedding announcements are not "news."

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[244] *Tornillo*, 418 U.S. at 258.

[245] Anderson, *supra* note 236, at 445.

[246] *See* Randall P. Bezanson, *The Developing Law of Editorial Judgment*, 78 NEB. L. REV. 754, 855 (1999) (arguing that works of fiction, history, poetry, entertainment and art are protected as speech but not as "press" publications). *See also Tornillo*, 418 U.S. at 259 ("[T]he First Amendment erects a virtually insurmountable barrier between government and the print media so far as government tampering, in advance of publication, where *news and editorial content* is concerned.") (White, J., concurring) (emphasis added).

[247] Bezanson, *supra* note 246, at 856. The meaning of the Free Press Clause is especially fluid when compared to other constitutional phrases, because "it is simply impossible to turn to discussions by the framers . . . for definitive answers on the scope of the freedom of the press." POWE, *supra* note 236, at 23. The logic for this special protection of the press is as follows: "Americans maintained . . . that sovereignty derived from the people's continuous assent. Continuous assent meant continuous scrutiny. The sovereign people needed information and the ability to discuss freely how their government was performing." *Id.* at 27. This view that "[t]he primary purpose of the First Amendment is, then, that all the citizens shall, so far as possible, understand the issues which bear upon our common life" is derived from the works of Alexander Meiklejohn. *Id.* at 171 (quoting Meiklejohn).

Powe identifies three theories to justify the constitutional protections of the freedom of the press (and of speech): (1) the checking theory; (2) the marketplace of ideas theory; and (3) the self-government theory. The *checking theory* is grounded "in distrust," and serves to counterbalance the government's tendency to suppress contrary opinion. This theory is the basis of the "Fourth Estate" analogy of the press advanced

B. *Bezanson's Criteria to Find Editorial Judgment*

Professor Randall Bezanson distills the relevant case law to isolate three criteria to ascertain whether material is protected "news":[248]

> [T]o qualify as editorial judgment by the *press*, the choice of material (i) must concern information and opinion of current value to the public, or to an undifferentiated audience of interested consumers of non-fictional current information; (ii) must be made independently, oriented to the audience's needs as well as preferences; and (iii) must be grounded on a judgment about the specific content being published. These three criteria aptly describe the paradigmatic qualities of editorial judgments concerning "news" . . . .[249]

Announcements in at least some contexts fail to satisfy all three standards and, consequently will not be "news." I consider those cases first. The announcements in other newspapers will, however, satisfy Bezanson's criteria. In Section D, I consider whether an announcement's status as "news" dispositively settles the matter in the paper's favor, or whether, even in that setting, arguments could still be marshaled to pressure a newspaper to accept and publish the same-sex union announcement.

C. *When Society Announcements are Not "News"*

Bezanson isolated three criteria that must be satisfied if material is to be categorized as "news" and therefore protected under the Free Press Clause: (1) the material must be private and not public; (2) the purpose behind the newspaper's decision to publish such announcements must be non-self-interested; and (3) the selection of that material requires "retail-level judgments." I address these criteria in reverse order.

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so strongly by Justice Stewart. Potter Stewart, *"Or of the Press,"* 26 HASTINGS L.J. 631 (1975). The *marketplace* theory "rests on a belief in objective truth and in the predominance of rational thought, and an almost religious faith that truth will prevail . . . ." POWE, *supra* note 236, at 239. The *self-government* theory articulated by Meiklejohn was described above. *Id.* at 238-39. Meiklejohn's theory is especially relevant to the present discussion, because it "carries the potential to exclude from protection anything that does not provide information about issues on which citizens may be called on to vote." *Id.* at 239; *cf.* discussion *infra* Part IV.D.2. Because union announcements are not a topic open to citizen vote, the First Amendment would not extend to this kind of material under a self-government theory analysis.

[248] Professor Randall Bezanson is recognized as "[t]he scholar who has written most extensively about the legal meaning of the press." Anderson, *supra* note 236, at 451.

[249] Bezanson, *supra* note 246, at 830.

1. Retail-Level Judgments

By "retail-level judgments" Bezanson means that publishers must choose to publish each piece, thereby transforming what may have been originally another's work "into the publisher's own expression."[250] Where a newspaper obviates selection by deciding to publish wholesale "the messages of several advertisers, political and/or commercial, convey[ing] a diffuse array of messages and therefore fail[ing] to meet the paradigmatic quality of an editorial judgment,"[251] such wholesale adoption of others' speech devoid of retail-level judgment "is entitled to lesser or . . . no First Amendment protection under the free press guarantee."[252]

Some newspapers fail to exercise editorial judgments about society announcements at the retail-level, thereby, according to Bezanson's analysis, forfeiting free press protections for these materials. It is not uncommon for papers to mechanically accept announcement materials that are properly and timely submitted. Papers formulaically recompose these submissions, which perhaps requires artistry but not subjective editorial judgment.[253] In other words, "choice" is not an element of the decision either to publish or not, or of the content of the announcement.

The Editor-in-Chief of the *Times-Picayune* described the limited nature of union announcement composition:

> After the form is filled out and submitted, a *Times-Picayune* editorial assistant writes an article announcing the wedding or engagement using the information contained in the form. After the article is drafted, an Assistant Editor of the Living Section checks the article against the form to ensure the accuracy of the article and compliance with format requirements. . . .

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[250] *Id.* at 808.

[251] *Id.* at 810 (discussing United Mine Workers v. Parsons, 305 S.E.2d 343 (W. Va. 1983)).

[252] *Id.*

[253] Recall that, according to Bezanson's analysis, art and fiction are not protected under the Free Press Clause—at the very least that is an accurate summary of the current jurisprudence, and it also will quite likely prove an influential assessment about where the boundary of the Clause will continue to be drawn in the future. In contrast to the formulaic process of the *Times-Picayune* is the more article-oriented approach of the *New York Times*, which actually uses reporters to interview selected couples, for some announcements rather than relying on submitted forms. *See* Margery Eagan, *New Week's Times: Mr. Rich Weds Mr. Famous*, BOSTON HERALD, Aug. 25, 2002, at 13.

> The *Times-Picayune* determines the order in which information provided on the form will be presented in the article. In addition, information submitted which is considered inappropriate or which is not called for by the form is not published in the article. Articles about engagements submitted too late to be published prior to the wedding date are not published; articles about weddings submitted too late after the wedding are not published. Articles which make inaccurate statements about the parentage of the engaged or wedded couple . . . are not published. Articles which evidence no connection between the couple and the New Orleans area are not published. Until approximately three years ago, only articles announcing first marriages were published. Finally, only a wedding article or an engagement article, not both, is published for each couple.
>
> Occasionally, persons wishing to have articles published in a manner inconsistent with the policies described above have offered to pay for publication of the articles in the manner they desire. The *Times-Picayune* has refused to deviate from its policies . . . desired announcements which do not conform to the *Times-Picayune*'s policies for wedding or engagement articles can be published only as paid advertisements.[254]

Noticeably absent in this long description of the creation of published wedding announcements are the very criteria necessary to qualify those announcements as news. First, no mention is made of any choice about whether to publish.[255] That decision is based on mechanical application of established guidelines. Second, wedding announcements do not deviate from form, even if the party is willing to pay for the added expense, further proving the absence of editorial discretion. All announcements, according to the *Times-Picayune* Editor, conform to this cookie-cutter production process. Whatever the virtues of this process, it demonstrably lacks the requisite editorial judgment to satisfy the retail judgment criterion, and thus fails to qualify the end product as "news." Therefore, the Free Press Clause does not protect these announcements.

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[254] Memorandum in Support of Motion for Temporary Restraining Order and Preliminary Injunction Ex. B, Affidavit of James Amoss, at 2-3, Times Picayune Publ'g Corp. v. City of New Orleans, No. Civ. A95-518N, 1995 U.S. Dist. LEXIS 4842 (La. App. 4th Cir. April 13, 1995).

[255] This is not to suggest that where choice is exercised, that fact is dispositive of the claims being asserted. For example, although university admissions involve "choice," they are not entitled to discriminate. But the fact of choice being exercised would render the analysis more complex.

2. Non-Self Interest

Protected material must, according to Bezanson's second criterion, be "made independently and with a public, not a private orientation."[256] The Free Speech Clause may still protect self-interested expression, but that speech would not garner additional Free Press Clause protection, "which is governed by the ethic of disseminating material deemed important for a public readership and selected by a process of reason and audience-oriented (and thus not strictly personal) judgment."[257] Union announcements fail this criterion because the paper's motivation to publish them is not non-self-interested. Why, one might reasonably ask, do newspapers assume the trouble and burden—and in many instances, the costs—of publishing this material? What, in other words, is their "motive"?

Bezanson's criterion of non-self interest mirrors the civil law question of an obligation's "cause." Louisiana, a civil law jurisdiction lacks the common law doctrine of consideration[258] and instead, applies a theory of cause.

According to its Civil Code, "[a]n obligation cannot exist without a lawful cause."[259] "Cause" is subsequently defined as "the reason why a party obligates himself."[260] Denying what the common law doctrine of consideration explicitly requires, the comment to the Louisiana statute notes: "Under this Article, 'cause' is not 'consideration.' The reason why a party binds himself need not be to obtain something in return or to secure an advantage for himself."[261] This effectively voids the bargain theory of consideration in Louisiana. The next sentence is especially important for present purposes: "*An obligor may bind himself by a gratuitous contract, that is, he may obligate himself for the benefit of the other party without obtaining any advantage in return.*"[262] In other words, the fact that the *Times-Picayune* does not receive "pecuniary consideration" for publication of wedding announcements, even if non-self

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[256] Bezanson, *supra* note 246, at 808.

[257] *Id.* at 757.

[258] James D. Gordon III, *A Dialogue about the Doctrine of Consideration*, 75 CORNELL L. REV. 987, 1002 (1990).

[259] LA. CIV. CODE ANN. art. 1966 (West 1987).

[260] *Id.* art. 1967, para. 1.

[261] *Id.* art. 1967, cmt. c.

[262] *Id.*

interested and thus fatal in a common law jurisdiction, is not especially relevant under the civil law.

The civil law's emphasis on cause compels us to examine the motive in undertaking the obligation, an issue that can get lost in the common law's focus on consideration. At the very least, the newspaper extends the offer to publish social announcements to cultivate the goodwill of the community. If newspapers run this material, people will buy the paper out of a sense of loyalty, and they will read these items of social and community interest even if they are uninterested in the editorial content. That consumer pattern raises the readership above the level of those whose interest in the paper is largely informative—that is, above those who are attracted to the paper because of the specific functions the Constitution protects—and thereby makes the paper more attractive to advertisers. By soliciting these materials, the newspaper can fill more pages and earn greater advertising revenue, especially from businesses connected to the topics of the announcements—diamond companies, houseware retailers, real estate agencies, and other providers of goods and services a newly bonded couple could be expected to need.[263]

This goodwill is technically gratuitous, but is not therefore also altruistic. Although it is an intangible, community goodwill serves the self-interest of the newspaper. The offer to publish is not a gift, but a smart business decision, given the customer base most community newspapers wish to cultivate. Publication of the announcement serves the commercial self-interest of the paper, and not an editorial, public good function.

If the motivation for a newspaper to publish social announcements is primarily economic in nature, then the newspaper's claim to Free Press protection is dubious at best. The economic benefit need not, of course, be as indirect or hidden as with community goodwill. Many papers charge fees for announcements, creating a direct economic benefit to the publisher.[264] It may even be that the majority of newspapers

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[263] One estimate places the cost of the average wedding at $15,500, making the announcements section of great interest to advertisers. Williams, *supra* note 76, at 1037.

[264] *See, e.g.*, Kathleen Parker, *Gay Union Announcements: Nice Problem for Lucky People*, ORLANDO SENTINEL, Sept. 4, 2002, at A17 ("In many newspapers, including the *Sentinel*, these announcements won't be reportorial products of the newspaper's staff, but paid advertisements.").

charge to publish announcements, just as they do to run classified ads.[265] Surely these newspapers run announcements to advance their own self-interest. That motivation is not inappropriate, but it does remove the announcements from material protected by the Free Press Clause.

The court in *Oregonian*, however, found announcements to be "news space."[266] Fee-based announcements are more properly analogized to commercial speech than editorial speech. Thus, *Pittsburgh Press*[267] directly applies, not *Tornillo*.[268] Recall that *Pittsburgh Press* held that enforcement of an antidiscrimination ordinance against a newspaper that published employment ads in sex-exclusive columns did not infringe on the paper's First Amendment rights.[269] In contrast to the reasonably specific criteria that can be articulated to identify "news," commercial speech is an imprecisely structured category,[270] encompassing material beyond the prototypical propositions to engage in economic activity.[271] For one counterintuitive example, the Seventh Circuit held that responses to a questionnaire about company relations with Israel, in contravention of U.S. Department of Commerce regulations, were commercial speech because "the proposed answers to the boycott questions . . . were intended only to advance the purpose of continuing commercial dealings with the Arab world."[272] Given the imprecise and elastic universe of commercial speech, no special justification is required to assert that it may, at times, extend to include union announcements. If announcements are analogous to commercial speech and are not "news" because they fail the non-self interest test, then regulations governing their appearance cannot be argued to

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[265] *See* David Zeeck, *Same-Sex Announcements Not Yet Common in Newspapers*, NEWS TRIB. (Tacoma, WA), Sept. 22, 2002, at A2 ("More than 100 newspapers, including *The News Tribune*, accept notices of same-sex commitment ceremonies. Most of them, including the *TNT*, run the notices as advertisements.").

[266] Linebarier v. Oregonian Publ'g Co., No. 96-875554 (Or. Dist. Ct. Aug. 5, 1996). The court's rationale for this conclusion rests merely on an observation that no precedent exists to the contrary. *Id.* at 3-4.

[267] Pittsburgh Press Co., v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376 (1973).

[268] Miami Herald Pub. Co. v. Tornillo, 418 U.S. 241 (1974).

[269] *Pittsburgh Press*, 413 U.S. at 391.

[270] *See* Stern, *supra* note 28, at 79.

[271] Robert C. Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. REV. 1, 5 (2000) ("[S]ometimes expression that would not ordinarily be regarded as advertising is included within the category of commercial speech.").

[272] Stern, *supra* note 28, at 131 (discussing Briggs & Stratton Corp. v. Baldrige, 728 F.2d 915 (7th Cir. 1984)).

interfere with the interests that the Free Press Clause was intended to protect,[273] and which *Tornillo* was penned to preserve.

3. Public Good

As detailed in Part II, the direct value of union announcements is private, not public, as required by Bezanson's third criterion. That is to say, announcements do not inform generally on any public matter of import that requires informing the electorate. Rather, the benefit accrues to the couple whose announcement is published and whose union is thereby celebrated and supported. Society as a whole benefits indirectly through this process by gaining stable family units necessary to build secure political bodies, but that is not the immediate intent or function of union announcements. For this reason, union announcements must be classed as private goods, not public. Thus, they do not qualify as "news" under the Bezanson test.

In order to be protected by the Free Press Clause, published material must satisfy the three criteria isolated by Bezanson: retail-level judgment, selection not based on the self-interest of the newspaper and material of public, not private value. Although lack of any one criterion would be fatal, union announcements typically fail on all three. Announcements are not the type of material that the Free Press Clause was intended to protect, and as such, government regulation of that material cannot be prohibited under this constitutional provision.

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[273] The newspaper, to rebut the above argument, might look to the concurring opinion of *Cook*: "Mechanical layout is not a reliable indicator that the paper is not exercising some form of editorial discretion in deciding what to print." Cook v. Advertiser Co., 458 F.2d 1119, 1124 (5th Cir. 1972) (Wisdom, J., concurring). *See supra* note 7. Judge Wisdom goes on to say that "I see nothing to be gained by requiring a trial which might enable Cook to prove that the editorial techniques which lead to publication of wedding announcements in the *Advertiser* are mechanical. Those stories are still news stories and they are not commercial advertising." *Id.* The problem with Judge Wisdom's analysis is that he conflates the terms of analysis of the Press and Speech Clauses. Having decided in *Cook* that announcements are not commercial speech, he implies that they are, by default, news. But these terms relate to distinguishable levels of analysis.

4. Newspapers as "Quasi-Expressive" Associations

The salience of the conclusion that society announcements are not typically protected "news" is bolstered by the Supreme Court's commercial speech jurisprudence. Recall that in *Hurley*, the Supreme Court refused, with uneven justification, to require a public accommodation to comply with laws prohibiting nondiscrimination based on sexual orientation.[274] However, *Roberts v. United States Jaycees*[275] indicated a different result. This well-known case required the Jaycees, a civic organization, to admit women into full membership.[276] Although the organization argued that such a requirement violated its rights of free speech and expressive association,[277] the Court found that such rights are not absolute but must yield to compelling state interests. Eliminating sex discrimination was such an interest.[278]

Supporters of the gay group in *Hurley* assumed that the state interest in eliminating sexual orientation discrimination was as compelling as eliminating sex discrimination. Arguably, the First Amendment rights of the offending parade organizers were no greater than the Jaycees'. Observers expected the Court to follow its own lead. Its failure to do so might suggest a disregard for the problems of discrimination the gay community faces. That explanation, however, renders even more puzzling the outcome of *Romer v. Evans*,[279] which held a Colorado statute unconstitutional because it singled out homosexuals for adverse treatment under the law.[280] One obvious difference between *Hurley* and *Roberts*, of course, is that while sex is a quasi-suspect category, subject to higher scrutiny, sexual orientation discrimination is subjected to only rational basis scrutiny. This line of argument, however, is noticeably absent from *Hurley*.

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[274] Hurley v. Irish-American Gay, Lesbian & Bisexual Group, 515 U.S. 557, 572-73 (1995).

[275] 468 U.S. 609 (1984).

[276] *Id.* at 628.

[277] *Id.* at 615.

[278] *Id.* at 623.

[279] 517 U.S. 620 (1996). It should be noted that the Court's opinions on laws specific to homosexuals are confused and unsettled. As Justice Scalia points out, the decision in *Romer* contradicts the holding of *Bowers v. Hardwick*, 478 U.S. 186 (1984), although *Romer* does not mention *Bowers*, much less explicitly overturn it. *Romer*, 517 U.S. at 636 (Scalia, J., dissenting).

[280] *See* Nan D. Hunter, *Proportional Equality*, 89 KY. L.J. 885 (2001).

Dale Carpenter reconciles these cases by examining Justice O'Connor's concurrence in *Roberts*.[281] O'Connor disapproved of the majority's test—that "the Jaycees' right of association depends on the organization's making a 'substantial' showing that the admission of unwelcome members 'will change the message communicated by the group's speech'"[282]—deeming it "both overprotective of activities undeserving of constitutional shelter and underprotective of important First Amendment concerns."[283] Instead of the inquiry "into the connection between membership and message,"[284] she favored a typological rule. An association "engaged exclusively in protected expression" enjoys a "right to define its membership . . .," while a commercial association merits "only minimal constitutional protection."[285] *Roberts* "present[ed] a relatively easy case for application of the expressive-commercial dichotomy" because the Jaycees fell comfortably into the latter category.[286]

Carpenter suggests that in subsequent opinions the Court adopted O'Connor's rationale from *Roberts*, albeit without explicitly invoking it.[287] For O'Connor's rationale to apply to more than the simple cases, however, Carpenter argues for the addition of a third category to the dichotomy: "quasi-expressive associations."[288] In ambiguous or analytically difficult cases, judicial inquiry

> should focus on the nature of the activity or internal operation sought to be brought into compliance with anti-discrimination law. If the activity or internal operation at issue is primarily expressive, the activity or internal operation should generally be exempt from compliance. If it is primarily commercial, it should not enjoy such an exemption.[289]

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[281] Dale Carpenter, *Expressive Association and Anti-Discrimination Law after* Dale*: A Tripartite Approach*, 85 MINN. L. REV. 1515, 1564-66 (2001).

[282] *Roberts*, 468 U.S. at 632 (O'Connor, J., concurring in part and concurring in the judgment).

[283] *Id.*

[284] *Id.* at 633.

[285] *Id.* at 633-34.

[286] *Id.* at 638. "Notwithstanding its protected expressive activities, the Jaycees—otherwise known as the Junior Chamber of Commerce—is, first and foremost, an organization that, at both the national and local levels, promotes and practices the art of solicitation and management." *Id.* at 639.

[287] Carpenter, *supra* note 281, at 1570.

[288] *Id.* at 1576.

[289] *Id.* at 1576-77.

For Carpenter "a large, general circulation newspaper is likely a quasi-expressive association, mixing significant elements of expression and commerce."[290] In such cases, the commercial aspects of the operation should yield to nondiscrimination laws (consistent with *Roberts*), while the expressive dimensions should not (hence the result of *Hurley*).

Since society announcements are often noneditorial—because they usually lack editorial judgment and are motivated primarily by commercial interests—they are commercial, not expressive (especially if they are overtly fee-generating). Consequently, consistent with Carpenter's approach, the commercial activity of publishing union announcements should be subject to nondiscrimination laws. Furthermore, when a newspaper has expressed an editorial position favoring nondiscrimination of homosexuals, the *failure* to include same-sex union announcements in its society pages could not be an editorial message meriting First Amendment protection.[291] In this case, Carpenter's tripartite model results in the conclusion that the commercial and noneditorial aspects of the paper, here including the society pages, should receive only minimal First

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[290] *Id.* at 1578.

[291] This conclusion is extracted from the reasoning of *Boy Scouts v. Dale*, 530 U.S. 640 (2000). A recurring argument in *Dale* concerns not only whether Dale was in fact expressing the message attributed to him, but also whether the Boy Scouts were indeed expressing the alleged contrary message, i.e., that scouting was incompatible with being unembarrassed about being gay. Significantly, the Scouts had propounded no such message as official policy before the issue began to be litigated. Lacking an explicit declaration, the Scouts argued that that message of homosexual exclusion was embedded in the general principles that a scout is to be "clean" and "morally straight." *Id.* at 650. The Court dismissed this issue, stating that "it is not the role of the courts to reject a group's expressed values . . . ." *Id.* at 651. The proper inquiry is only into the "question of the sincerity of the professed beliefs." *Id.*

In *Dale*, the Court deferred to the organization's own statement "regarding the nature of its expression . . . ." *Id.* at 652. The dissent's view was that, because the Scouts are "silent on homosexuality" as far as official policy goes, they had no message on the subject that Dale's presence would contradict. *Id.* at 684 (Stevens, J., dissenting). The lesson seems to be that ambiguity should be resolved in favor of the message claimed by the organization. Where there is no such ambiguity, however, it remains an open question whether the organization is entitled to this deference.

A newspaper could hardly claim that its omission of homosexuals from the society pages constituted a "message" in the way that the exclusion of homosexuals from the Scouts was construed to be expressive, if that same newspaper's editorial pages are decrying the need for fair and equitable treatment of gay men and lesbians. Certainly the explicit stance of the editorial pages should trump the silence of the society pages, whenever a court needs to look to see what message the paper intends to send. Whenever the messages are inconsistent, the explicit message should prevail. In any situation, then, where a paper has expressed an editorial position favoring the equitable treatment of gay men and lesbians, their omission from the society pages is not a "message" in the sense protected by *Hurley* and *Dale*.

Amendment protections from the speech and press clauses, neither of which would suffice in these circumstances to trump a local law prohibiting nondiscrimination.

5. Summary

No more editorial judgment goes into society announcements in newspapers such as the *Times-Picayune* than into their classified advertising—ascertaining that the form is properly filled out, and reading it to make sure that it contains appropriate and nonlibelous subject matter. As cases such as *Pittsburgh Press* hold, classified ads can indeed be subject to governmental regulation such as public accommodations laws.[292] Explicitly analogizing social announcements to commercial speech like classified advertisements bolsters the government's power to require their equitable publication.

Applying Bezanson's three criteria,[293] at least some newspapers will fail and thereby fall outside the category of "news" that the Free Press Clause was intended to protect. Some papers fail to exercise the requisite retail-level judgment because they are indiscriminate in the choice of announcements to publish. Most announcements, however, are non-news because the couple pays for publication, meaning that publication involves the self-interest of the newspaper rather than the necessary public good. A further, general argument may also be made that no union announcements are "news" because the benefit of publication always devolves on private individuals instead of the public, and therefore even when published for free and on a selective basis, every announcement would still fail Bezanson's test.

Other tests may also apply. One standard could look to what department of the newspaper handles announcements. If union announcements come from the editorial department (the "newsroom"), then they may be presumptively "news." If, however, the advertising or classified department produces them, then they likely are not "news."[294] This standard has the

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[292] Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376 (1973).

[293] *See supra* Part IV.B.

[294] Newspapers themselves seem to recognize the distinction. "Unlike the [*New York*] *Times*, engagements and wedding announcements are paid advertisements at the [*Dallas*] *Morning News*, whereas the *Times* treats them as news items. . . . Stuart Wilk, managing editor of the *Morning News*, explained that until this year

advantage of respecting the classification established by the newspaper itself. Of course, this standard would also allow newspapers to adjust their practices to ensure First Amendment protections.

Justice Stevens's dissent in *New York Times Co., Inc. v. Tasini* suggests another possible standard.[295] *Tasini* concerned the relationship between a printed periodical and posting of freelance articles to Electronic Databases.[296] Justice Stevens noted that "[t]he record indicates that what is sent from the *New York Times* to the Electronic Databases . . . is simply a collection of ASCII text files representing the *editorial content* of the *New York Times* for a particular day."[297] If true and generally valid, this fact would allow unequivocal assessment of whether the newspaper regards announcements as editorial content or something less. If editorial content, union announcements would be included in the uploads of the print version to the online databases such as Lexis and Westlaw (as is the case with announcements published in the *New York Times*). If announcements are not editorial content—i.e., they are categorized with advertising content—then they will not be uploaded. Although the *Times-Picayune* fails the test of retail-level judgment, it does pass this "upload" test (i.e., at least some of its wedding announcements can be retrieved through Lexis), as well as the departmental test: according to its website, union announcements are the responsibility of its editorial department. Because all tests will not yield the same result, the outcome in any specific adjudication would depend on which test a court chose to apply.

In summary, plaintiffs can argue on numerous grounds that announcements that run in most newspapers are not strictly "news" of the sort the Free Press Clause was intended to protect; therefore, announcements are susceptible to

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engagement and wedding announcements were news items in the *Morning News*. However, since they now run as ads, the news department is not involved in deciding whether to follow the *Times*' lead in publishing same-sex commitment announcements." Don Maines, *Dallas Morning News Reviewing Same-Sex Union Policy*, DALLAS VOICE, Aug. 30, 2002, *available at* http://www.dallasvoice.com (last visited Oct. 31, 2002). Another paper that, like the *Morning News*, has moved announcements out of the newsroom and into the advertising department is the *Charlotte Observer*. Cristina Breen & Ken Garfield, The Observer *to Accept Same-Sex Union Announcements*, CHARLOTTE OBSERVER, Sept. 19, 2002, *available at* http://www.charlotte.com/mld/charlotte/4109385.htm (last visited Oct. 31, 2002).

[295] 533 U.S. 483 (2001).

[296] *Id.* at 487.

[297] *Id.* at 512 (Stevens, J., dissenting) (emphasis added).

discrimination claims. Indeed, newspaper organizations may treat this type of material increasingly less like "news" and more overtly like classified advertising, meaning that even if announcements once enjoyed protected status as "news" products, that outcome cannot be assumed today. The newspaper should be required to present the necessary facts to support any determination that union announcements are protected "news." In all these scenarios, failure of the announcements to rise to the standard of protected "news" means that they are open to regulation by governmental nondiscrimination ordinances under *Pittsburgh Press*.[298]

D. *When Society Announcements are "News"*

Although the above analysis, finding announcements to be unprotectable for not being "news," arguably applies to most social announcements, it does not describe all announcements. Some newspapers, such as the *New York Times*, treat some society announcements as true news articles; thus, the argument in the preceding section does not resolve the problem in this context. This Section considers whether government regulation or civil action can compel newspapers to publish same-sex union announcements, even when those announcements qualify as news.

1. Announcements as Expressive Speech

Generally, society announcements do not rise to the standard of "news" because of the mechanical and formulaic method by which they are generated, and their lack of editorial judgment and discretion. Other newspapers, however, treat their society announcements the same as any other article.[299] The *New York Times* reports as a news article at least one wedding per week.[300] To the extent that that process of

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[298] Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 391 (1973).

[299] One example is the *San Francisco Examiner*.

> If *The Examiner* ran wedding announcements for straight couples, I would of course expect us also to run them for gay couples. But officially we don't run wedding announcements at all, not of the humdrum variety.
>
> *The Examiner*'s society writer, Anne Lawrence, occasionally writes up unions; she makes the judgment call of whether they're interesting enough to include in her See and Be Scene column.

Morse, *supra* note 86.

[300] One writer describes the *Times* notices this way:

reporting, editing and publishing determines the classification of the product, then at least some society announcements will qualify as "news."

Some commentators reach a related conclusion that although ordinary heterosexual announcements may or may not qualify as "news," same-sex announcements necessarily belong to that category. These writers argue that anything openly gay is intrinsically a "message," even when there is no intent, as in *Hurley*, to communicate anything other than existence.[301] In *Hurley*, recall, the Court recognized a parade as a uniquely expressive event,[302] and as such entitled its organizers to control the message that the event communicated to bystanders.[303]

The Court took its *Hurley* analysis a further step in *Boy Scouts of America v. Dale*.[304] In *Dale*, the Boy Scouts sought an exemption from a New Jersey public accommodations law that prohibited discrimination on the basis of sexual orientation.[305] The state interpreted that nondiscrimination law to compel the Boy Scouts to reinstate a scoutmaster whose membership it revoked after learning that he was homosexual.[306] The Boy Scouts argued that *Hurley* granted the right to exclude homosexuals, because admitting them would send a message of acceptance, which the Boy Scouts did not wish to convey.[307] The Court sided with the Boy Scouts. Dale's mere presence, according to the Court, was sufficiently communicative to send a message equal to that sent by the *Hurley* sign-carrying gay paraders.[308] As in *Hurley*, on the principle that speakers should

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> the [*Times*'s] popular "Vows" column, which has, each week since 1992, taken a particularly felicitous coupling and turned it into a soft-news story, these wedding announcements were courtship narratives in miniature, each, like a Jane Austen novel, ending at the moment when married life begins.

Rebecca Mead, *Gay Old Times*, NEW YORKER, Sept. 2, 2002, at 31.

[301] Authors discussed in this Article who fall in this category are Todd Brower, Nancy Knauer and Paul Siegel. *See infra* notes 308-18 and accompanying text.

[302] *Hurley*, 515 U.S. at 568.

[303] *Id.* at 558.

[304] 530 U.S. 640 (2000).

[305] *Id.* at 644.

[306] *Id.* at 645-46.

[307] *Id.* at 647.

[308] Todd Brower discusses in detail the relationship of *Hurley* to *Dale*, and notes that for the Court, "the case turned on Dale's gay status, and not on his conduct, advocacy, or beliefs." Todd Brower, *Of Courts and Closets: A Doctrinal and Empirical Analysis of Lesbian and Gay Identity in the Courts*, 38 SAN DIEGO L. REV. 565, 577 (2001). While in *Hurley* the immediate issue was whether a gay group could march in a parade under its own banner, in *Dale* the problem was with who Dale was, not what he

be allowed to control the message they send, the Court permitted the Boy Scouts to exclude Dale.[309]

Nancy Knauer agrees with the outcome of *Dale* and articulates "the uniquely expressive character of the openly gay individual"[310] presumed by the Court. Both sides of the culture war, she argues,

> strongly agree on the expressive and distinctly political value of openly gay role models—an openly gay individual sends a message of gay pride, encourages others to embrace homosexuality, and puts an ordinary face on homosexuality for the non-gay majority. Not surprisingly, a central tenet of the pro-family anti-gay plank is to silence positive articulations of gay identity, whereas pro-gay organizations stress the importance of gay and lesbian visibility and foster and encourage coming out as a personal and public good.[311]

Knauer argued that because society has an embedded assumption of "heteronormativity," defined as "the largely unstated assumption that heterosexuality is the essential and elemental ordering . . . [principle] of society,"[312] the majority in *Dale* rightly concluded that the unapologetic presence of an "openly gay" individual indeed communicates a message.

Paul Siegel similarly argued that "[g]ay rights are, in contemporary American society, a First Amendment issue."[313] He reasoned that "[e]xpressions of heterosexual personhood . . . are 'favored socially and legally by tacitly being seen neither as

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did. Given the emphasis put on language use in an earlier section, Part I.A, *supra*, the following insight is enlightening:

> Rehnquist's language . . . reinforces the dominance of identity over viewpoint in *Dale*. He described Dale as "an avowed homosexual and gay rights activist in an assistant scoutmaster's uniform." Dale's identity was gay first, activist second, and scout third, if at all. Dale was not an assistant scoutmaster—he simply wore the uniform of one as if he were a gay man in Boy Scout drag.
>
> Now, contrast that description with the "heterosexual assistant scoutmaster who is on record as disagreeing with Boy Scouts policy." The noun in that clause is "scoutmaster"; he is a scout first, one who merely holds an opinion. The Court's rhetoric illustrates the asymmetry in its comparison and dictates its result.

Id. at 594.

[309] *Dale*, 530 U.S. at 654 ("[T]he presence of Dale as an assistant scoutmaster would just as surely interfere with the Boy Scout's choice not to propound a point of view contrary to its beliefs.").

[310] Knauer, *supra* note 46, at 997.

[311] *Id.* at 1051-52. *See also* Bobbi Bernstein, Note, *Power, Prejudice, and the Right to Speak: Litigating "Outness" under the Equal Protection Clause*, 47 STAN. L. REV. 269, 271-76 (1995) (discussing the importance of coming out).

[312] Knauer, *supra* note 46, at 1020.

[313] Siegel, *supra* note 185, at 251.

sexual *nor as speech*' by virtue of their 'unremarkableness.'"[314] He continued, "[w]hen one looks at a cavalcade of engagement and wedding photos, it never even crosses one's mind to think 'gosh, what a slew of heterosexuals.'"[315] Public assertion "of *gay* personhood, then, derives its free speech qualities precisely from the unacceptability of same-sex conduct."[316] If gay expression today implicates free speech issues, says Siegel, that may not be the case in the future when homosexuality is as unremarkable as heterosexuality.[317] Even if the free speech dimension of gay expressivity is time-dependent, the fact remains that today gay expression implicates free speech issues in a way that heterosexual expression does not.[318]

From this perspective, the facts of *Dale* present a peculiar paradox. As Todd Brower pointed out,

> New Jersey law gives all persons the right to employment and public accommodations without discrimination because of sexual orientation. However, there can be no discrimination *because of* sexual orientation unless the person or organization knows of the victim's orientation. Nevertheless, once the organization knows of this identity, it may properly exclude that individual without contravening antidiscrimination laws. Consequently, the sexual orientation protections afforded under the law are effectively nullified.[319]

That is to say, because sexual orientation is invisible, one can escape the assumption of heteronormativity only by speaking about one's identity. Yet, under *Dale*, speaking out removes the speaker from the protections of the antidiscrimination laws when the speech implicates another's expression. Consequently, antidiscrimination laws fail to protect homosexuals because they only apply to situations where the discrimination is not present because the individuals are not known to be homosexuals. The effect of *Dale* is to "enshrine

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[314] *Id.*

[315] *Id.* at 250-51 (quoting Richard Mohr, *Mr. Justice Douglas at Sodom*, 18 COLUM. HUM. RTS. L. REV. 43, 97 (1987)).

[316] *Id.* at 251.

[317] *See id.*

[318] *See also* Jennifer Minear, Note, *Performance and Politics: An Argument for Expanded First Amendment Protection of Homosexual Expression*, 10 CORNELL J.L. & PUB. POL'Y 601, 603 (2001) ("[S]elf-identification as a homosexual may be constitutionally protected political expression.").

[319] Brower, *supra* note 308, at 582.

[the] pressure [to remain closeted] into First Amendment doctrine."[320]

According to Knauer and Siegel, the announcement of same-sex unions communicates a message beyond the surface content, one that is not included in most heterosexual announcements (although a similar message might be attributed to announcements from interracial couples for largely these same reasons), and even one that may not be intended by the submitter.[321] By their analysis same-sex union announcements qualify as "news" because they contain an expressive message that ordinarily, under the holdings of *Hurley* and *Dale*, a newspaper could not be compelled to carry. Below, I consider whether policy grounds exist to carve out an exception to these holdings in the case of newspapers, an exception requiring compliance with governmental antidiscrimination ordinances even when society announcements fall into the category of "news."

2. Regulatory Precedents in Other Media

The government already exerts over broadcast media the kind of regulatory control required to make social announcements comply with antidiscrimination laws. Examining social announcements in this light means that using antidiscrimination laws to assure equitable access to society pages is a matter of degree, and not of kind, and thus hardly constitutes the "frontal assault on the First Amendment freedoms generally and the freedom and independence of the press in particular" that the *Times-Picayune* claimed.[322]

In *Red Lion Broadcasting Co. v. FCC*,[323] the Supreme Court upheld a "fairness doctrine," similar to the right of reply rejected in *Tornillo*,[324] against arguments that the doctrine infringed on broadcasters' First Amendment rights. The element of the fairness doctrine at issue required radio licensees to inform individuals or groups who were attacked on

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[320] *Id.* at 590.

[321] *See supra* notes 308-18 and accompanying text.

[322] Memorandum in Support of Motion for Temporary Restraining Order and Preliminary Injunction Ex. B, Affadavit of James Amoss, at 2, Times Picayune Publ'g Corp. v. City of New Orleans, No. Civ. A95-518N, 1995 U.S. Dist. LEXIS 4842 (La. App. 4th Cir. April 13, 1995).

[323] 395 U.S. 367 (1969).

[324] Miami Herald Pub. Co. v. Tornillo, 418 U.S. 241 (1974); *see supra* notes 238-47 and accompanying discussion.

air and to provide the attacked individual or group a reasonable opportunity to respond,[325] at the broadcaster's expense if necessary.[326] The Court justified the governmental interference in broadcast programming content by relying on the scarcity of broadcast frequencies.[327] Broadcast frequencies in the 1960s, the time of the case, were limited. Only one user could broadcast on a frequency at a time, necessitating government regulation to establish order and prevent signal interference.[328] Since the government licenses the frequencies, they remain in a public trust rather than becoming the private property of the licensee.[329] Because broadcast frequencies are a limited public resource, this "difference[] in the characteristics of new media justif[ied] differences in the First Amendment standards applied to them."[330] In other words, broadcast media can be regulated in a way that newspapers cannot, because physical limits exist to the number of speakers who can access the airwaves.

Motivating the scarcity conclusion was the "public debate" interpretation of the First Amendment. The public debate interpretation presumes that a vital democracy requires an informed citizenry, and that the government must assure that citizens have access to the information and viewpoints necessary for the formation of intelligent political choices.[331] *Red Lion* adopted this public debate understanding of the First Amendment when it pronounced that "the right of the viewers and listeners, not the right of the broadcasters, . . . is

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[325] *Red Lion*, 395 U.S. at 373-74. The fairness doctrine was repealed in 1987. *See* Syracuse Peace Council v. FCC, 867 F.2d 654, 657 (D.C. Cir. 1989) ("[T]he fairness doctrine contravenes the First Amendment and thereby disserves the public interest.") (citing 2 FCC Rec. 5043, 5057 (1989)).

[326] *Red Lion*, 395 U.S. at 377.

[327] *Id.* at 383.

[328] By the late 1980s the FCC concluded that spectrum scarcity was no longer a problem, repealed the fairness doctrine and advocated returning spectrum to the free market. For a thorough discussion of spectrum scarcity, see Fred H. Cate, *The First Amendment and the National Information Infrastructure*, 30 WAKE FOREST L. REV. 1, 27-34 (1995).

[329] *Red Lion*, 395 U.S. at 383.

[330] *Id.* at 386.

[331] *See* Charles W. Logan, Jr., *Getting Beyond Scarcity: A New Paradigm for Assessing the Constitutionality of Broadcast Regulation*, 85 CAL. L. REV. 1687, 1718-19 (1997) (describing the public debate model of the First Amendment); *see also* Post, *Constitutional Status*, *supra* note 271, at 13 (reviewing the Meiklejohnian thesis that "'the final aim' of the First Amendment freedom is to ensure the circulation of opinion and information necessary for 'the voting of wise decisions.'"). *See also supra* note 247.

paramount."[332] "Speech" in this context "is more than self-expression; it is the essence of self-government."[333]

In a series of *Turner Broadcasting System, Inc. v. FCC* decisions,[334] the Court upheld "set aside" and "must-carry" provisions for cable television, again over protestations from media representatives that these regulations interfered with their editorial programming choices in contravention of their First Amendment rights.[335] Unlike in *Red Lion*, scarcity was not an issue in these cases because there is no practical limit on the number of stations a cable operator may provide. Instead, the rationale for upholding these regulations derived from the threat cable posed to the viability of broadcast stations in markets where the cable network chose not to carry the local over-air programming.[336] The Court deemed the burden of regulatory compliance on cable programming minimal when compared to the interest in "preserv[ing] a multiplicity of broadcast stations for the 40 percent of American households without cable."[337] The Court showed its preference for the public debate interpretation of the First Amendment: "At the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression . . . Our political system and cultural life rest upon this ideal."[338] Significantly, the Court applied a heightened scrutiny standard to consider the issue, placing cable in the same category as print media rather than broadcast media.[339] The Court conceded that the

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[332] *Red Lion*, 395 U.S. at 390. Admittedly, *Red Lion* also contains language associated with the alternative First Amendment interpretation, the "absolutist" model that adopts a laissez-faire policy toward the "marketplace of ideas." *See* Logan, *supra* note 331, at 1716-18. Under this model the "truth will ultimately prevail" without any governmental interference at all. *Red Lion*, 395 U.S. at 390. Despite this apparent confusion of rationales, the holding of *Red Lion* is consistent only with the public debate model.

[333] *Red Lion*, 395 U.S. at 390 (quoting Garrison v. Louisiana, 379 U.S. 64, 74-75 (1964)).

[334] (Turner I) 512 U.S. 622 (1994); (Turner II) 520 U.S. 180 (1997).

[335] *Turner II*, 520 U.S. at 188-89. The set aside provisions required cable operators to provide a certain number of channels for public, educational and governmental use, and to lease such channels at regular rates on a nondiscriminatory basis. The must-carry provisions required cable operators to provide a portion of their channels to local broadcast stations. *Id.* at 188.

[336] *Id.* at 199.

[337] *Id.* at 216.

[338] *Turner I*, 512 U.S. at 641.

[339] *Id.* at 637-38.

regulatory provisions constrained speech, but that not every interference was impermissible.[340]

The public debate interpretation warrants allowing access not to all persons, but to all views. In *FCC v. Pacifica Foundation*,[341] the Court justified government regulation of "indecent" programming not on grounds that broadcast frequencies are scarce, but because broadcast programming is "uniquely pervasive."[342] The criterion of "uniquely pervasive" indicates yet another means by which government can regulate content in media.

These cases demonstrate that First Amendment debate no longer turns on whether the government can interfere with publishers' decisions, but only when and to what extent that interference is appropriate. Against the background of these precedents, the question becomes whether the rationale for the regulation of nonprint media could encompass the print media as well.

The scarcity principle remains "the primary basis for upholding the constitutionality of broadcast regulation,"[343] despite attacks by academic commentators[344] and the availability of alternative bases for the Court. Yet this scarcity rationale for subjecting broadcast, but not print media, to governmental regulations is today a fiction:[345] almost any locality has far more broadcast outlets than it does newspapers, typically three public broadcast channels to only one daily newspaper.[346] If scarcity is truly the justification for the differential regulation, then today's print media should be regulated more heavily than broadcast so as to assure that access to that limited resource is available to the widest

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[340] *Id.* at 636, 648.

[341] 438 U.S. 726 (1978).

[342] *Id.* at 748.

[343] Logan, *supra* note 331, at 1697.

[344] *Id.* at 1700-01 (citing Thomas W. Hazlett, *The Rationality of U.S. Regulation of the Broadcast Spectrum*, 33 J.L. & ECON. 133, 138 n.15 (1990)) ("[I]t is fair to say that the [scarcity] rationale 'has lost credibility in the contemporary legal literature.'").

[345] New research continues to demonstrate that the broadcast frequency spectrum is no longer a scarce public resource requiring regulation to assure equitable access. In fact, today "a broadcaster has more space than is needed to transmit a program," suggesting that continued reliance upon a regulatory scheme devised in 1927 will waste, not conserve the resource. Wendy M. Grossman, *Radio Space: A Renegade Plan to Show that Spectrum Isn't Scarce*, 287(3) SCI. AM. 29 (2002).

[346] *Turner II*, 520 U.S. at 207.

possible audience.[347] Beyond this bluntly empirical contradiction between the perception and the fact of scarcity, however, is the more philosophical realization that even in the abstract, "scarcity is a universal fact, [one that] can hardly explain regulation in one context and not another. The attempt to use a universal fact as a distinguishing principle necessarily leads to analytical confusion."[348] Under this analysis, if broadcast frequencies are scarce, so too are "the newsprint, ink, delivery trucks, computers, and other resources that go into the production and dissemination of print journalism."[349]

Finally, all signs point to an increased tendency to regulate broadcast media, including the Internet.[350] This forces the conclusion that if regulatory schemes were to merge because of the lack of any reasoned basis to sustain the distinction, print would come under the regulatory umbrella currently shouldered by broadcast media,[351] and not vice-versa.

One can, in fact, see some signs that government already mandates some content in print media, suggesting that this Rubicon has already been crossed. The regulation of society pages considered here is different from the regulation that already exists, but again only in degree and not in kind. Courts and legislatures both behave at times as though local newspapers are resources at their disposal. A recent example occurred in Ohio: "A couple who had sex on a popular lakeside beach . . . were ordered by a judge to apologize to shocked beachgoers *in newspaper advertisements*, or go to jail."[352] There, the court ordered a newspaper to carry content, but the paper was reimbursed for the costs by the content provider (i.e., the

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[347] The economics of establishing a competing newspaper are today prohibitive. *See id.* at 211 ("Until these economic facts change, competing newspapers are not going to spring up, whatever the theoretical possibility that they might do so."). To the extent that the freedom of the press from regulation was originally based upon the presumed ease of entering the media marketplace with a competing message, that rationale is no longer valid. In this context, see *CBS, Inc. v. Democratic National Committee*, 412 U.S. 94, 159 (1973) (Douglas, J., concurring) ("[I]n practical terms the newspapers and magazines, like TV and radio, are also available only to a select few.").

[348] Telecomms. Research & Action Ctr. v. FCC, 801 F.2d 501, 508 (D.C. Cir. 1986).

[349] *Id.*

[350] *See, e.g.*, Children's Internet Protection Act of 2000, 47 U.S.C. § 254 (2000).

[351] This merging of media regulation could not occur without some significant overhauls of existing rules. "*Tornillo* embraced a Fourth Estate checking model and rejected the right-to-know model for the print media. It thus stands as a bar to imposing broadcast-like obligations on the press." POWE, *supra* note 236, at 248.

[352] *Pair Must Run Ads as Apology for Beach Sex*, SAN DIEGO UNION TRIB., June 29, 2002, at A10 (emphasis added).

in flagrante beachgoers). Is the newspaper free to reject the ad on free speech grounds, even though that rejection means jail time for the couple? The court seemed to think not, and the paper registered no objection on principle to the compelled speech.

Legislatures take similar liberties. Many versions of state Megan's laws require community notification through publication by convicted sex offenders of the offenders' pictures and addresses in local newspapers.[353] Again, the First Amendment issue is whether papers are free to reject these statutorily mandated notices, particularly if a paper feels that the notices convey a message not suitable for their audiences.

Municipal or state ordinances prohibiting discrimination in society pages will have the effect of inserting government into decisions made by newspapers. But similar regulation already pervades other media, and the barrier purportedly distinguishing these other media from the sacrosanct print media is today irrelevant. At best, all media face scarcity, and if a discrepancy exists, it favors regulation of print rather than deregulation of broadcast media. Moreover, at least minor precedent already exists for just such governmental mandate of newspaper content. The only remaining issue, then, is whether the government can take the final step and prohibit discrimination in the publication of union announcements, and on what basis.

3. Newspapers as Public Fora

Charles Logan recognized the tenuous place of the scarcity rationale in First Amendment analysis,[354] prompting him to seek a replacement justification for the regulation of broadcast media. This justification he found in the public forum doctrine,[355] which holds that public property must, under reasonable conditions and within well-established bounds, be open for people to gather and exchange ideas. If he is correct,

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[353] *See, e.g.*, LA. REV. STAT. ANN. § 15:542(B)(2)(a) (West Supp. 2002) (The offender shall give notice "published on two separate days within the applicable period provided for herein, without cost to the state, in the official journal of the governing authority of the parish where the defendant plans to reside and, if ordered by the sheriff or police department, in a newspaper which meets the requirements of R.S. 43:140(3). . . .").

[354] *See* Logan, *supra* note 331.

[355] *Id.* at 1714 ("The public forum doctrine thus provides an independent basis for upholding broadcast regulation under the First Amendment.").

and the public forum analysis can support the current practice of regulating broadcast media, then to the extent that newspapers—or more specifically, parts of newspapers—act as a public forum, they could be subject to limited governmental regulation over certain aspects of their content. This Section plumbs the possible merits of this argument.[356]

a. Public Forum Analysis

The suggestion that the public forum doctrine could help to illuminate this discussion seemingly crashes on the simple fact that the public forum doctrine applies only to *public* fora, and newspapers, being privately owned businesses, are clearly outside this category. While this assumption certainly captures the conventional understanding of the doctrine as articulated by the Supreme Court,[357] the public forum doctrine is sufficiently complex and problematic that such a simple assertion may belie the implicit unifying intuition binding the disparate instantiations of the doctrine. The present Section presents an alternative to the conventional, property-oriented understanding of the public forum doctrine.

In *Perry Education Ass'n v. Perry Local Educators' Ass'n*,[358] the Supreme Court reviewed the public forum doctrine under a free speech analysis. The Court identified three kinds of fora, and the level of judicial scrutiny appropriate to each. First are the traditional fora: "places which by long tradition or by government fiat have been devoted to assembly and debate, [wherein] the rights of the State to limit expressive activity are sharply circumscribed."[359] Speech in these fora may be limited only by "regulations of the time, place and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication."[360]

At the other extreme is the nonpublic forum, which "the state may reserve . . . for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable

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[356] In fairness to Logan, he probably would not support this extended application of his thesis. *See id.* at 1714-15.

[357] The public forum doctrine is articulated by the Supreme Court in *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983).

[358] *Id.*

[359] *Id.* at 45.

[360] *Id.*

and not an effort to suppress expression merely because public officials oppose the speaker's view."[361] Finally, between the traditional and nonpublic fora are the "limited public fora." These properties are not traditional public fora, but the state may open them to serve that function. This decision is discretionary, but as long as the forum exists the state "is bound by the same standards as apply in a traditional public forum."[362]

Robert Post has characterized the problematic nature of the public forum doctrine as arising largely from its development "in a manner heedless of its constitutional foundations."[363] Illustrating the removal of public forum analysis from the constitutional framework is a post-*Perry* case, *Cornelius v. NAACP Legal Defense & Educational Fund, Inc.*[364] The *Cornelius* Court explained that

> [t]he government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse. Accordingly, the Court has looked to the policy and practice of the government to ascertain whether it intended to designate a place not traditionally open to assembly and debate as a public forum.[365]

This statement, Post acknowledges, has

> the virtue of candor, for it tactfully withdrew the concept of the limited public forum as a meaningful category of constitutional analysis. If a limited public forum is neither more nor less than what the government intends it to be, than a first amendment [sic] right of access to the forum is nothing more than the claim that the government should be required to do what it already intends to do in any event.[366]

This example is instructive because, according to Logan, broadcast media should be analyzed as limited public fora,[367] a category that Post concludes is empty for purposes of constitutional analysis. More generally, the example illustrates

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[361] *Id.* at 46.

[362] *Perry*, 460 U.S. at 46.

[363] *See* Robert C. Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L. REV. 1713, 1715 (1987). Other scholars have similarly critiqued the public forum doctrine. *See also* Steven G. Gey, *Reopening the Public Forum: From Sidewalks to Cyberspace*, 58 OHIO ST. L.J. 1535 (1998).

[364] 473 U.S. 788 (1985).

[365] *Id.* at 802.

[366] Post, *supra* note 363, at 1756-57.

[367] *See supra* notes 353-56 and accompanying text.

the nuances one finds in any attempt to understand the public forum doctrine in the abstract, much less when one attempts to apply the doctrine to a novel situation.

The problem with contemporary public forum doctrine, Post suggests, is its reliance on a distinction that lacks any articulated relationship to the First Amendment principles at issue.[368] Instead of a misplaced emphasis on the "substantive power" of government ownership,[369] the more meaningful vector of analysis in public forum cases has been

> to decide whether a resource is subject to a kind of authority "like" that characterized by the government's relationship to a newspaper editorial, which is to say like that involved in the *governance* of the general public, or whether it is subject to a kind of authority "like" that characterized by the government's control over the internal management of its own institutions, which is say to the authority of *management*.[370]

Critical for present purposes is Post's conclusion that "[p]ublic forum doctrine is conventionally, although inaccurately, understood to be pertinent only when the public seeks to use government property for expressive purposes."[371] If the government's relationship to the forum is "managerial," then the rational basis level of scrutiny for nonpublic fora is appropriate. If, however, "the government exercises the authority of governance over a resource which a member of the general public wishes to use for communicative purposes, the resource is a public forum."[372]

Taken together, Logan's and Post's arguments offer the following result: Communication media can be governmentally regulated to the extent they are subject to the public forum doctrine. "Public" refers not to governmental ownership, but rather to the degree of control the government exercises over the resource. The state may have a governing relationship over newspapers, as decisions such as *Ragin* and *Pittsburgh Press* suggest: those cases allowed the government to impose negative restrictions on what newspapers can publish in sections not containing protected expressive speech.[373] In other

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[368] Post, *supra* note 363, at 1777.

[369] *Id.*

[370] *Id.* at 1782 (emphasis added).

[371] *Id.* at 1797.

[372] *Id.* at 1717.

[373] Pittsburgh Press Co., v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 391 (1973) (holding that an order prohibiting sex-designated employment

words, while the government cannot tell them what they must do, it can tell them what they cannot do, i.e., violate antidiscrimination laws. Therefore, the government could regulate newspapers under the public forum doctrine in a way that will assure nondiscriminatory access to the society pages. If a newspaper chooses to publish announcements, it cannot restrict those announcements on the basis of the kind of announcement that it is (e.g., interracial, same-sex). This result furthers the broad *Red Lion* principle that "[t]here is no sanctuary in the First Amendment for unlimited private censorship operating in a medium not open to all. 'Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests.'"[374]

b. Newspapers as "Quasi-Public"

Newspapers may fall under the public forum doctrine if, as Post argues, "public" is understood in his nonconventional sense of a contrast between managerial and governance relationships. The same result, however, can be achieved by bringing newspapers within the more ordinary expectation of what kinds of things fall into the category of "public."[375] Two lines of court decisions have extended the category of "public" to include some kinds of private property.[376]

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advertising columns does not infringe the First Amendment rights of newspapers); Ragin v. N.Y. Times Co., 923 F.2d 995, 1003-05 (2d Cir. 1991) (holding that application of the Fair Housing Act to newspapers did not violate the First Amendment).

[374] Red Lion Broad. Co. v. FCC, 395 U.S. 367, 392 (1969) (quoting Associated Press v. United States, 326 U.S. 1, 20 (1945)). For a forceful argument that private ownership should not obstruct a right of access to press outlets, *see* Jerome A. Barron, *Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641 (1967).

[375] Other means may exist to extend public forum analysis in a way that would be useful to this analysis. For example, some cases have invoked a "public thoroughfare" analogy to extend the category of the public forum beyond the traditional arenas of streets and sidewalks. *See, e.g.*, Toward a Gayer Bicentennial Comm. v. Rhode Island Bicentennial Found., 417 F. Supp. 632, 638 (D.R.I. 1976). One could construct a plausible argument to characterize newspapers as metaphysical "public thoroughfares."

[376] *Hurley* is not as helpful in extending the category of "public" as it could have been, but this time it is the plaintiff's and not the Court's fault. In the original complaint, the plaintiff argued that the parade organizer was a de facto governmental actor, and in this sense it, too, was "public" despite being technically private. *See* Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc., 515 U.S. 557, 566 (1995). If that characterization were granted, then the plaintiff could have asserted its own First Amendment claims against the exclusionary state action if it could have argued that the state had created a limited public forum from which the plaintiff was being excluded based on its viewpoint. This cause of action is not available against

i. *From* Marsh *to* PruneYard

The first line of case law that construes some private property, in some contexts, as "public" builds upon the holding of *Marsh v. Alabama*.[377] In *Marsh*, a Jehovah's Witness was prevented from distributing religious literature on the grounds of the company town of Chickasaw. Had Chickasaw been a municipal corporation, the prohibition would have been clearly unconstitutional.[378] The issue, therefore, was whether the fact that a private company had legal title to the town required a different result.

The Court said no and expressed its decision in sweeping, principled language. "Ownership," it said, "does not always mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it."[379] Moreover, the Court's reasoning drew on the public debate understanding of the First Amendment: "To act as good citizens they must be informed. In order to enable them to be

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purely private conduct. *See id.*

The record certainly provides ample reason to accept this characterization of the parade organizer as a de facto government actor: Although the city originally sponsored the parade, in 1947 it authorized a specific private organization to serve this function. *Id.* at 560. Along with that authority came financial support, public printing services and rights to use the city's official seal. *Id.* at 561. This entanglement ceased only after 1992, which was the same time that the gay and lesbian marchers first sued to be included in the event. *Id.* The trial court rejected the characterization of the parade as state action, and the plaintiffs, even when questioned on this matter at oral argument before the Supreme Court, chose "not [to] press that issue [t]here." *Id.* at 566.

I, at least, believe that had the plaintiffs accepted this invitation to reintroduce this issue, the outcome of the case may well have been different. I also believe that a similar oversight marred the argument in *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000). While the decision treated the Boy Scouts as fundamentally a private organization, the crux of the argument was that, given the amount of public assistance the Boy Scouts receive, it is not a private organization, but a public one. The Boy Scouts argued successfully that their organization should have the benefits of public financial and other support while retaining private status, including the right to discriminate.

Notably, the *Hurley* Court did *not* hold that the entwined interests of the city and the parade organizers, such as they were, failed to make the parade a public event; the Court merely deferred to the plaintiff's decision not to argue that point, and instead based its decision on public accommodations law. The way is thus open to argue that some links between public and private, perhaps even less substantial than were present in *Hurley*, could still serve to render the society pages of a newspaper a "public forum" for present purposes.

[377] 326 U.S. 501 (1946).

[378] *Id.* at 504.

[379] *Id.* at 506.

properly informed their information must be uncensored."[380] For these reasons the town of Chickasaw, despite being private property, was subject to the same restrictions on limiting liberties as burden a public town.[381]

On its own, *Marsh* might have supported an argument that a newspaper, because it is essential to the formation of an informed citizenry, and because it has opened itself up for use by the public in the form of advertising and announcements, is therefore compelled to respect the free speech right of access to this public forum. But the later cases that most directly invoked *Marsh* moved in another direction. *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*[382] applied the *Marsh* arguments to require a shopping center to allow picketing on its private property.[383] The Court, in *Lloyd Corp v. Tanner*,[384] later limited the *Logan* holding, distinguishing between the activities involved in the two cases. Whereas the picketing in *Logan* was directed toward the shopping center itself, the impermissible activity in *Lloyd* was general leafleting on private property.[385] In *Hudgens v. NLRB*,[386] the Court then interpreted *Lloyd* as not merely distinguishable from *Logan*, but as overruling it, because "the *Lloyd* opinion incorporate[d] lengthy excerpts from two of the dissenting opinions in *Logan Valley*," and thus amounts to a "total rejection" of its holding.[387]

The Supreme Court finally settled, in *PruneYard Shopping Center v. Robins*,[388] on a rule that the *federal* Constitution provides no basis for requiring private property owners to allow unapproved exercise of individual speech rights, even when that property is opened to public use.[389] However, the federal Constitution does not prevent *state* law

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[380] *Id.* at 508.

[381] *Id.* at 509.

[382] 391 U.S. 308 (1968).

[383] *Id.* at 319 ("We see no reason why access to a business district in a company town for the purpose of exercising First Amendment rights should be constitutionally required, while access for the same purpose to property functioning as a business district should be limited simply because the property surrounding the 'business district' is not under the same ownership.").

[384] 407 U.S. 551 (1972).

[385] *Id.* at 564.

[386] 424 U.S. 507 (1976).

[387] *Id.* at 518.

[388] 447 U.S. 74 (1980).

[389] *Id.* at 79.

from requiring that same access,[390] at least for some kinds of property.

ii. Quasi-Public Entities

A more promising argument that some kinds of private property can be subject to burdens normally associated with public properties concerns the category of the *quasi-public*. A "quasi-public" corporation is defined as a "for-profit corporation providing an essential public service."[391] Examples of typical quasi-public entities include banks,[392] hospitals[393] and utilities such as telephones, electricity and water.[394] Classification of an entity as quasi-public subjects the corporation, despite being privately owned, to greater governmental regulation, as would be expected given the function of the entity to provide "an essential public service."

If one accepts the public debate interpretation of the First Amendment a newspaper clearly provides just such an essential public service. The healthy maintenance of our participatory democracy requires an informed citizenry. The role of the newspaper within the community is to foster debate and to provide vital information about the community, nation and world that will allow the reader to form intelligent opinions about topics of public interest. If that description of the newspaper's role is valid, then the paper provides a service essential to the public good and consequently qualifies as a quasi-public entity.[395] Under this theory, as a consequence of this quasi-public status, the government can regulate newspapers to assure access to this forum on a nondiscriminatory basis, even as to the society pages.

Several courts have noted that newspapers have precisely the quasi-public status proposed here. In *Herald Co. v. Seawell*,[396] the Tenth Circuit, when considering a derivative suit over the treatment of stock, had this to say:

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[390] *Id.* at 88.

[391] BLACK'S LAW DICTIONARY 344 (7th ed. 1999).

[392] *Id.* at 139.

[393] Valley Hosp. Ass'n v. Mat-Su Coalition for Choice, 948 P.2d 963, 969 (Alaska 1997).

[394] BLACK'S LAW DICTIONARY 344, 1544 (7th ed. 1999).

[395] But note Justice Stewart's skepticism on this point when he mused whether "[t]he press should be relegated to the status of a public utility." Stewart, *supra* note 247, at 636.

[396] 472 F.2d 1081 (10th Cir. 1972).

> A corporation publishing a newspaper such as the *Denver Post* certainly has other obligations besides the making of profit. It has an obligation to the public, that is, the thousands of people who buy the paper, read it, and rely upon its contents. Such a newspaper is endowed with an important public interest. It must adhere to the ethics of the great profession of journalism. The readers are entitled to a high quality of accurate news coverage of local, state, national, and international events. The newspaper management has an obligation to assume leadership, when needed for the betterment of the area served by the newspaper. Because of these relations with the public, a corporation publishing a great newspaper such as the *Denver Post* is, in effect, a quasi-public institution.[397]

More than fifty years earlier, an Ohio court in the case of *Uhlman v. Sherman*[398] delved even deeper into the issue. *Uhlman* concerned a complaint by a businessman that the community newspaper had refused to accept his advertisement. Bearing in mind the Supreme Court's observation that "[p]roperty does become clothed with a public interest, when used in a manner to make it of public consequence and affect the community at large,"[399] the *Uhlman* court addressed the claim that the newspaper was "so 'affected with public interest' that it is a *quasi* public corporation."[400] Among the factors considered were the implications of statutes requiring publication of notices in community newspapers. Noting that the statutes allowed for alternatives by permitting a particular qualifying newspaper to refuse the required notices, the court concluded that the statutes did not contemplate that "all newspapers [meeting the statutory requirements] should refuse to publish such 'ads.'"[401] Holding that a newspaper that has opened its pages to advertising had no right to discriminate against a submission that complied with its published criteria, the court noted

> that the growth and extent of the newspaper business, the public favors and general patronage received by the publishers from the public, and the general dependence, interest and concern of the public in their home papers, has clothed this particular business with a public interest and rendered them amenable to reasonable regulations and demands of the public.[402]

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[397] *Id.* at 1094-95.
[398] 1919 WL 1009 (Ohio C.P. 1919).
[399] *Id.* at *4 (quoting Munn v. Illinois, 94 U.S. 113 (1877)).
[400] *Id.* at *2.
[401] *Id.* at *5.
[402] *Id.* at *6.

Seawell, *Uhlman* and other decisions[403] demonstrate the reasonableness of the treatment of newspapers as quasi-public corporations.[404] As a quasi-public entity, a newspaper cannot discriminate against persons who comply with its submission criteria, especially where local laws and ordinances expressly forbid that kind of discrimination.[405] Even more generally, recognizing newspapers as quasi-public entities counters the argument that they are privately owned and are therefore not "public," thereby removing the largest obstacle to the application of public forum doctrine to newspapers.

CONCLUSION

The battle for same-sex marriage has been long and hard-fought, and much opposition yet remains. When the Vermont Supreme Court held that under the state's constitution same-sex couples cannot be denied "the statutory benefits and protections afforded persons of the opposite sex who choose to marry,"[406] Gary Bauer, then a conservative GOP presidential hopeful, unfavorably compared the decision with an act of terrorism.[407] That statement, read now in a post-September 11 world, blatantly displays the depth of the resistance.

Same-sex union announcements have a central role to play in these debates. On one level, they show to the world a side of gay relationships it often does not see, that they can be committed, stable and frankly quite ordinary. On another, they help to elicit the social responses that contribute to the healthful maintenance of those relationships during the peaks and valleys endured by all romantic couples. Newspapers

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[403] *See, e.g.*, Los Angeles Daily News, 19 Lab. Arb. 39 (1952) (upholding firing of suspected Communist Party members on the ground that a newspaper has "a quasi-public responsibility in that the newspaper, in discharging its obligations to the public, must print the news and without bias . . . ."); United Press Ass'n, 22 Lab. Arb. 679 (1954).

[404] *Accord* Barron, *supra* note 374, at 1669 ("[I]f parks in private hands cannot escape the stigma of abiding 'public character,' it would seem that a newspaper, which is the common journal of printed communication in a community, could not escape the constitutional restrictions which quasi-public status invites. If monopoly newspapers are indeed quasi-public, their refusal of space to particular viewpoints is state action abridging expression in violation of even the romantic view of the first amendment.").

[405] The *Times-Picayune*, even today, does not specify in its submission criteria that the couple must be heterosexual.

[406] Baker v. Vermont, 744 A.2d 864, 867 (Vt. 1999). *See also supra* note 118.

[407] Elaine Herscher, *Candidates Out of the Closet on Gay Issues*, S.F. CHRON., Jan. 25, 2000, at A1.

increasingly appear willing to allow gay couples to attain these social intangibles through access to their society pages. But of the estimated 1,600 metropolitan newspapers, only about 180 are known to have opened their announcements sections to gay men and lesbians. More, certainly, will follow the example set by the *New York Times*. But others, like the New Orleans *Times-Picayune*, have remained adamant in their refusal, and these newspapers can expect legal action by the aggrieved parties. Because the intangible of public recognition is so very important, it is worth fighting for, and, when necessary, merits the energy and resources to persuade newspapers to publish announcements on a nondiscriminatory basis.

Whether this outcome can be realized depends on the unique factual setting in which each refusal to publish occurs. The threshold consideration is whether there exists a public accommodations law that prohibits discrimination on the basis of sexual orientation, and whether that law can be applied to newspapers. If that criterion is met, the next step is to ask how announcements in that newspaper are to be categorized, either as editorial "news" or as noneditorial speech analogous to commercial advertising.

The Free Press Clause protects editorial judgment embodied in "news." Bezanson presented three criteria to be satisfied before granting material these free press protections. If little editorial judgment is exercised over the announcement's creation, then it should be excluded from the class of editorial speech that the Free Press Clause and *Tornillo*[408] are intended to protect. Further, the mixture of commercial and expressive content of newspapers can render them vulnerable to the bifurcated analysis articulated by Justice O'Connor in *Roberts*,[409] and which Dale Carpenter has expanded into three categories. All told, when a court deems society announcements noneditorial speech, they should be subject to antidiscrimination regulation by public accommodations laws. Under most criteria discussed in this Article, the *Times-Picayune* satisfies the conditions for mandated publication of union announcements.

In other environments, however, society announcements will qualify as "news" because they do evidence editorial judgment in their creation. Moreover, some writers argue that

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[408] Miami Herald Pub. Co. v. Tornillo, 418 U.S. 241 (1974).

[409] Roberts v. United States Jaycees, 468 U.S. 609 (1984).

same-sex declarations of this type are intrinsically expressive and political speech. By either standard, a different analysis is required in these contexts, one that centers on the Free Speech Clause and its protection of the newspaper's expressive content. That barrier falls, however, when newspapers are construed to be quasi-public corporations, and therefore subject to scrutiny as public fora. Here again, the First Amendment should not shield newspapers from reasonable regulation of generally applicable antidiscrimination regulations.

As a result, most of the arguments that newspapers traditionally employ to shield them from the requirement to publish are not as impenetrable as they might hope. Some newspapers will be especially vulnerable to governmental oversight because of the locally variable conditions that define public accommodations to include newspapers. Others will be vulnerable because their internal procedures minimize the editorial judgment involved in publication decisions. Specifically, they publish all that they receive, and compose the announcements according to routine formula, or even take the announcements directly from the submitters.

Other newspapers, concededly, will be more protected on these considerations. Those newspapers exist in jurisdictions whose public accommodation laws cannot be extended to include newspapers, they publish announcements only on a genuinely selective basis, and the announcements they do publish reflect substantial editorial judgment. The *New York Times* inhabits this end of the spectrum, adding to the irony that it should be this paper that has lead the way. Of all newspapers, the *Times* was particularly free to rebuff the request to publish union announcements, but it chose to publish, perhaps recognizing that the time has come for equality in public recognition of all committed relationships.