CONTROLLING EXPRESSION: THE STAGNANT POLICY OF THE CENTERS FOR DISEASE CONTROL IN THE SECOND DECADE OF AIDS

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"How are you supposed to tell people not to do something without telling them what that something is?"[1]

I. INTRODUCTION

In 1985, a New York-based civic organization proposed the distribution of a "safe sex video"[2] to promote "healthy, satisfying and erotically appealing sexual alternatives"[3] to sexual practices that contribute to the spread of Acquired Immunodeficiency Syndrome ("AIDS").[4] In August 1987, the same organization distributed pamphlets that contained informal, sexually explicit materials aimed at increasing AIDS awareness within specific target communities.[5] These projects, as well as several others,[6] raised two fundamental issues for the federal government. First, should the government fund the publication and dissemination of such sexually explicit materials?[7] Second, should the government be able to restrict educational materials aimed at homosexuals which thus involve homoerotic themes?[8] These materials, and the litigation that followed, sparked a controversy over the utilization of federal funds in the fight against AIDS, and the extent to which such money can be conditioned upon content-based restrictions.[9] Years later, and well

[1] Reverend Ken South, director of AID Atlanta Support Group, *quoted in* Michael Hirsley, *AIDS Education Effort May Have Backfired*, CHI. TRIB., Nov. 10, 1985, at 1.

[2] Jack Anderson & Joseph Spear, *Officials Debate Anti-AIDS Campaign*, WASH. POST, Nov. 21, 1985, § V, at 19.

[3] *Id.*

[4] Acquired Immunodeficiency Syndrome ("AIDS"). AIDS was first recognized by the Centers for Disease Control (the "CDC") in 1981. *See* Charles D. Weiss, *AIDS: Balancing the Physician's Duty to Warn and Confidentiality Concerns*, 38 EMORY L.J. 279, 281 (1989) ("Researchers have determined that . . . [AIDS] is caused by a virus referred to as Human Immunodeficiency Virus (HIV) which has been isolated in various bodily tissues and fluids of infected individuals including blood, semen, vaginal secretions, and saliva.").

[5] *See* Gay Men's Health Crisis v. Sullivan, 733 F. Supp. 619 (S.D.N.Y. 1989) [hereinafter *GMHC I*]; *see also* 133 CONG. REC. S14,202-03 (daily ed. Oct. 14, 1987).

[6] Other projects included "two men draped in a flag and holding condoms under the caption 'Life, Liberty & the Pursuit of Happiness,' " and a depiction of an implicitly homosexual interracial couple sitting together. Gay Men's Health Crisis v. Sullivan, 792 F. Supp. 278, 294-96 nn.32, 39 (S.D.N.Y. 1992) [hereinafter *GMHC II*].

[7] Funding recipient Gay Men's Health Crisis received approximately $674,679 in federal funds for the pamphlets project, although the precise amount that went to this particular project was disputed. *See* 133 CONG. REC. S14,202-03.

[8] The materials, which included "educational sessions," were aimed at dispelling myths about homosexual practices and safe sex. One section, entitled "Guidelines for Healthy Sex," described its goal as "provid[ing] participants with a sexual enrichment program to promote healthy sexual fantasies, emotional responses and behaviors." 133 CONG. REC. at 14,203.

[9] In rejecting the projects mentioned by putting "on hold" the funds they were receiving, Dr. Michael Lane, head of the CDC preventative services, wrote in a letter to applicants:

> We are carefully considering how explicit the messages must be in order to educate risk groups. Clearly, AIDS is a problem which requires bold and unprecedented approaches. However, every aspect of AIDS activity receives intensive public scrutiny, and accountability for the appropriate use of public funds is a responsibility which must be kept in mind.

Anderson & Spear, *supra* note 2, at 19.

into the second decade of the AIDS epidemic,[10] the problems regarding the dissemination of AIDS-related materials have not been remedied. This Note addresses the legislation and policy promulgated by the Centers for Disease Control[11] (the "CDC"), a federally-created body that has provided a source of funding for various community-based AIDS prevention groups.[12] Already the subject of extensive litigation,[13] the CDC funding guidelines have withstood extensive modification[14] and have been the subject of endless Congressional debates.[15] In turn, debates over the government's allocation of funds, the funding recipients, and the manner in which such funds are utilized have initiated further litigation.[16] Such litigation has implicated the issue of subsidized

[10] *See* Richard A. Knox, *Awareness of AIDS Low, Expert Warns*, BOSTON GLOBE, Jan. 31, 1995, at 1. A CDC physician who spoke at the Second National Conference on Human Retroviruses and Related Infections "presented a new statistical snapshot of the 13 1/2 year-old AIDS epidemic" and predicted a " 'second wave' of AIDS among young gay men." *Id.* "The proportion of young gay and bisexual men who said they had engaged in unprotected anal sex in the previous six months was 29 percent in one recent survey, and 34 percent in another." *Id. See also* Michelangelo Signorile, *H.I.V.-Positive, and Careless*, N.Y. TIMES, Feb. 26, 1995, Sec. 4, at 15 ("Unsafe sex is back, and AIDS groups can share the blame. . . . Now it seems that some of what we did for those who are positive was at the expense of those who are desperately trying to remain negative.").

[11] *See* 42 U.S.C. § 300ee (1988).

[12] *See* Program Announcement and Notice of Availability of Funds for Fiscal Year 1986, Cooperative Agreements for Acquired Immunodeficiency Syndrome (AIDS), Health Education and Risk Reduction Programs, 51 Fed. Reg. 3427 (1986).

[13] *See GMHC II*; *see also infra* notes 41-56 and accompanying text; *GMHC I*, 733 F. Supp. 619.

[14] *See infra* notes 24-40 and accompanying text.

[15] Senator Jesse Helms (R-N.C.) was at the forefront of such debates:

> About 2 months ago, I received a copy of some AIDS comic books that are being distributed by the Gay Men's Health Crisis [a CDC funding recipient] . . . for so-called AIDS education and information. These comic books told the story, in graphic detail, of the sexual encounter of two homosexual men. . . . [T]he comic book promotes sodomy and the homosexual lifestyle as an acceptable alternative in American society. . . . Some Senators may believe sincerely that the AIDS epidemic has reached grave proportions that we must disseminate whatever material anybody wants to produce regardless of the content. . . . Every AIDS case can be traced back to a homosexual act . . . [s]o it seems quite elementary that until we make up our minds to start insisting on distributing educational materials which emphasize . . . abstinence from homosexual activity . . . and discourage the types of behaviors which brought on the AIDS epidemic in the first place, we will simply be adding fuel to a raging fire. . . . [This] will force this country to slam the door on the wayward, warped sexual revolution which has ravaged this Nation . . . .

133 CONG. REC. S14,202-03 (daily ed. Oct. 14, 1987); *see also* 133 CONG. REC. S17,575 (daily ed. Dec. 9, 1987); 133 CONG. REC. H12,392 (daily ed. Dec. 21, 1989); 133 CONG. REC. H12,805 (daily ed. Dec. 22, 1987); 134 CONG. REC. S5043 (daily ed. Apr. 28, 1988).

[16] Legal scholars have provided a laundry list of the litigation that has commenced with respect to subsidized speech and First Amendment implications, some of which are beyond the scope of this Note. Such cases include: Board of Trustees of Leland Stanford Junior

speech—the extent to which the federal government may censor federally funded expression or activity.[17] The controversy surrounding subsidized speech is further aggravated when the protections sought from such governmentally-imposed content restrictions extend to AIDS prevention groups.

This Note also analyzes First Amendment concerns implicated by CDC regulations, regarding the issues of obscenity and homosexual expression. The controversies surrounding the funding guidelines of the National Endowment for the Arts (the "NEA")[18] will be examined from a First Amendment perspective to determine whether those guidelines provide an adequate model for the federal funding of the CDC. This Note compares the NEA guidelines with those of the CDC, and determines whether the discussion and analysis surrounding the NEA have provided a model that other controversial federally-funded programs may follow.[19] Furthermore, this Note argues that while both NEA and CDC programs have promulgated legislation equating homosexual expression with per se obscenity, the CDC guidelines should be subjected to a higher level of scrutiny in assessing their constitutionality by maintaining a greater willingness to strike down content-based restrictions when an organization's message furthers a substantial, vital interest—in the case of the CDC, the dissemination of AIDS-related educational materials and programs.[20]

Part II of this Note examines the statutory history and case law surrounding the CDC. Part III evaluates the First Amendment jurisprudence with respect to obscenity and its relationship to depictions of homosexuality and subsidized speech. This Note argues that these guidelines have not yet adequately contemplated the target community that is purportedly central to the funding's purpose. Part IV of this Note draws comparisons to the NEA for the resolution of the constitutional issues that continue to pervade both agencies. Finally, in light of recent developments on the content of AIDS related materials,[21] Part V proposes new guidelines for the CDC which could eliminate the vagueness[22] of the current guidelines while still encouraging the distribution and dissemination[23] of non-traditional materials. Furthermore, Part V evaluates whether different grant language for the CDC would more effectively provide information for potential grantees while encouraging more provocative, creative and aggressive means by which

Univ. v. Sullivan, 773 F. Supp. 472 (D.D.C. 1991) (scientific research grants); Finley v. National Endowment for the Arts, 795 F. Supp. 1457 (C.D. Cal. 1992) (artistic funding), *see infra* notes 214-25 and accompanying text; *GMHC II*, 792 F. Supp. 278 (federally-funded AIDS programs), *see infra* notes 41-56 and accompanying text; Bullfrog Films, Inc. v. Wick, 847 F.2d 502 (9th Cir. 1988) (documentary film subsidies); Rust v. Sullivan, 500 U.S. 173 (1991) (federally-funded family planning clinics); *see generally* David Cole, *Beyond Unconstitutional Conditions: Charting Spheres of Neutrality in Government-Funded Speech*, 67 N.Y.U. L. Rev. 675 (1992).

17 The extent to which the federal government can dictate the behavior or expression of an individual who relies on its economic support has been deemed a "troubled area of [Supreme Court] jurisprudence." *Rust*, 500 U.S. at 205 (Blackmun, J., dissenting).

18 Pub. L. No. 89-209, 79 Stat. 845 (1965) (codified as amended at 20 U.S.C. §§ 951-968). The NEA has been extensively analyzed and criticized for its grant-making procedures and much-publicized controversy. This Note does not purport to address the political processes and objectives behind this controversial legislation. For that discussion see Kim M. Shipley, Note, *The Politicization of Art: The National Endowment for the Arts, The First Amendment, and Senator Helms*, 40 Emory L.J. 241 (1991); Enrique R. Carrasco, *The National Endowment for the Arts: A Search for an Equitable Grant Making Process*, 74 Geo. L.J. 1521 (1986).

19 The stated purposes of the respective programs provide additional compelling support for the arguments made in this Note. The purposes suggested for the statutory background for the NEA include the purpose of enabling "projects or productions which have substantial national or international artistic and cultural significance, giving emphasis to American creativity and cultural diversity . . . knowledge, education, understanding, and appreciation of the arts." 20 U.S.C. § 954(c)(1), (5). The CDC guidelines state "the specific purpose . . . is to assist States in building their capacity to deliver health education and risk reduction programs by providing the impetus to appraise community needs and resources related to the AIDS problem, to development [sic] effective community-based organizations to implement the program, and to begin actual implementation." Program Announcement and Notice of Availability of Funds for Fiscal Year 1986, Cooperative Agreements for Acquired Immunodeficiency Syndrome (AIDS), Health Education and Risk Reduction Programs, 51 Fed. Reg. 3427, 3428 (1986).

20 *The Politics of AIDS Prevention at the Centers for Disease Control: Hearing Before the Subcomm. on Human Resources and Intergovernmental Relations of the House Comm. on Government Operations*, 102d Cong., 2d Sess. (1992) (statement of Hon. Nancy Pelosi, Representative from California).

> I am deeply concerned about the continued high rates of HIV transmission in this country—an estimated 40,000 new HIV infections this year alone. We are now in the second decade of the AIDS epidemic and information about how AIDS is transmitted is widely available to the American public. But, we now know that information is not enough—more aggressive prevention outreach campaigns are needed. The AIDS epidemic is not going away—it is getting much worse. Now is the time to plan how our government will respond to the next ten years of the AIDS threat. Prevention must be at the top of our agenda.

Id.

21 *See* Proposed Requirements for Content of AIDS-Related Written Materials, Pictorials, Audiovisuals, Questionnaires, Survey Instruments, and Educational Sessions in Centers for Disease Control and Prevention Assistance Programs, 58 Fed. Reg. 59,726 (1993); *see also* Cooperative Agreement for National Organizations' HIV/AIDS Prevention and Health Communications Programs, Health Communications/Behavioral and Social Science Evaluation, and Technical Assistance Efforts in Support of Social Marketing and Health Communications, 59 Fed. Reg. 49,945, 49,951 (1994) (incorporating by reference the content restrictions of Content of AIDS-Related Written Materials, Pictorials, Audiovisuals, Questionnaires, Survey Instruments, and Educational Sessions in Centers for Disease Control Assistance Programs, 57 Fed. Reg. 26,742 (1992)).

22 *See infra* notes 266-68 and accompanying text.

23 *See* Cole, *supra* note 16, at 680:

> When the government funds speech . . . [F]irst [A]mendment concerns are not limited to potential coercion of the subsidized speaker, but extend also, and perhaps more importantly, to the listener. From the perspective of the audience, the danger lies not in the coercive effect of the benefit on speakers, but in the indoctrinating effect of a monopolized marketplace of ideas.

organizations could disseminate AIDS-related educational materials.

II. Background of the CDC

A. *Statutory History*

Pursuant to 42 U.S.C. § 300ee, the CDC may allocate funds "to provide for the establishment of education and information programs to prevent and reduce exposure to, and the transmission of, the etiologic agent for . . . [AIDS]."[24] Since this legislation was enacted, the CDC has become a significant source of funding for both community-based AIDS prevention programs and not-for-profit organizations that distribute AIDS-related educational materials.[25]

In January 1987, responding to criticism regarding the explicit nature of some of the AIDS-related materials being produced as a result of the funding,[26] the CDC developed guidelines to provide a standard by which the content of such educational AIDS materials would be selected for funding.[27] Faced with an ever-increasing epidemic that was then affecting predominantly homosexual males,

[24] 42 U.S.C. § 300ee (1994). The precise statutory authority for such programs of the CDC were disputed, and apparently continue to be so. *See GMHC II*, 792 F. Supp. at 290 (rejecting defendants' argument that proper statutory authority is 42 U.S.C. § 247c (Supp. 1995), a provision that "removed any mention of AIDS"). *But see* Interim Revision of Requirements for Content of AIDS-Related Written Materials, Pictorials, Audiovisuals, Questionnaires, Survey Instruments, and Educational Sessions in Centers for Disease Control Assistance Programs, 57 Fed. Reg. 26,742 (1992) ("In reality, CDC has relied upon the totally separate assistance authority contained in . . . 42 U.S.C. §§ 241 and 247(b). . . ."); *see also* Cooperative Agreement for National Organizations' HIV/AIDS Prevention and Health Communications Programs, Health Communications/Behavioral and Social Science Evaluation, and Technical Assistance Efforts in Support of Social Marketing and Health Communications, 59 Fed. Reg. 49,945, 49,946 (1994) ("This program is authorized under . . . 42 U.S.C. 241(a) and 247(b)(a), as amended."). This discrepancy aside, the current CDC guidelines are in accordance with the language set out in 42 U.S.C. § 300ee.

[25] *See GMHC I*, 733 F. Supp. 619.

[26] *See supra* note 15. Some of the proposed projects that led the CDC to put funding "on hold" included a proposal by Sloan-Kettering for "video scenarios for safe sex," for which it was to have received $185,793. Anderson & Spear, *supra* note 2, at 19. The video included a segment that "show[s] two gay men soon after meeting in a gay bar," who then "negotiate a contract of low-risk sexual behavior and leave the bar together." *Id.* Another segment of the video showed "two attractive gay models . . . in a bedroom scene that depicts certain techniques (focused on caressing and hugging) which are presented as desirable sexual behavior." *Id.* Another project was presented by the Gay Men's Health Crisis, for which it was to have received $280,638, which featured a calendar with "appealing and tastefully explicit photographs which portray images of healthy sex." *Id.*

[27] *See* Program Announcement and Notice of Availability of Funds for Fiscal Year 1986, Cooperative Agreements for Acquired Immunodeficiency Syndrome (AIDS), Health Education and Risk Reduction Programs, 51 Fed. Reg. 3427, 3431 (1986). The CDC then attempted to introduce its own standard:

> Such terms or descriptors used should be those which a reasonable person would conclude should be understood by a broad cross-section of educated adults in society, or which when used to communicate with a specific group, such as gay men, about high risk sexual practices, would be judged by a reasonable person to be unoffensive to most educated adults beyond that group.

Id.

the CDC implemented a Program Review Panel[28] and enunciated more specifically the content limitations to be imposed on funding recipients.[29]

Pressure and criticism over AIDS-related educational materials culminated in Congress' passage of the "Helms Amendment," which was included as part of the Labor-Health and Human Services Appropriations Act for Fiscal Year 1988.[30] The Helms Amendment provided in relevant part:

> Notwithstanding the matter under the heading "CENTERS FOR DISEASE CONTROL," none of the funds made available under this act to the Centers for Disease Control shall be used to provide AIDS education, information, or prevention materials that promote or encourage, directly, homosexual sexual activities.[31]

The Helms Amendment also required CDC-funded materials to "emphasize . . . abstinence from sexual activity outside a sexually monogamous marriage (including abstinence from homosexual sexual activities),"[32] and demanded reimbursement by "noncomplying recipients" of funds wrongfully used.[33] Moreover, the Helms Amendment narrowed the range and type of AIDS educational materials that could be produced with CDC funding by community-based gay and other organizations.[34]

When the CDC announced the available funds and related

[28] This panel was established to "review and approve all written materials, pictorials, and audiovisuals, questionnaires or survey instruments, and proposed educational group session activities" in accordance with "prevailing community standards" and the guidelines promulgated by the CDC. *Id.*

[29] "Audiovisual materials and pictorials . . . should communicate risk reduction messages by inference rather than through any display of the anogenital area of the body or overt depiction of the performance of 'safer sex' or 'unsafe sex.' " *Id.*

[30] *See* Pub. L. No. 100-202, § 514(a), 101 Stat. 1329-289 (1988).

[31] *Id.* at 289.

[32] *Id.*

[33] *See* Pub. L. No. 100-202, § 514, 101 Stat. 1329-289. Section 514(e) provides in pertinent part:

> If the Secretary of Health and Human Services finds that a recipient of funds under this Act has failed to comply with this section, the Secretary shall notify the recipient . . . of such finding and that—
>
> (1) no further funds shall be provided to the recipient;
>
> (2) no further funds shall be provided to the State with respect to noncompliance by the individual recipient;
>
> (3) further payment shall be limited to those recipients not participating in such noncompliance; and
>
> (4) the recipient shall repay to the United States, amounts found not to have been expended in accordance with this section.

Id.

[34] *See infra* notes 41-56 and accompanying text.

guidelines for fiscal year 1988, it included the Helms Amendment language which prohibited funding for materials that promoted or encouraged homosexual activity only.[35] The announcement had the effect of discouraging many organizations from applying for CDC funding for fiscal year 1988.[36] The Gay Men's Health Crisis was one of these organizations who, along with other organizations, initiated litigation claiming that the language set forth in the Helms Amendment and the CDC guidelines deterred them and other similarly situated groups from seeking funding for that fiscal year, and challenging the constitutionality of the newly adopted federal guidelines.[37] The Gay Men's Health Crisis argued that the content guidelines were unconstitutionally vague;[38] that the guidelines violated the First Amendment because they were not rationally related to a legitimate government interest;[39] and that their enactment exceeded the CDC's statutory authority.[40]

B. *Case Law*

The pertinent language of the CDC grant guidelines at the time Gay Men's Health Crisis commenced its litigation read, in relevant part, as follows:

> a. Language used in written materials . . ., audiovisual materials . . ., and pictorials . . . to describe dangerous behaviors and explain less risky practices concerning AIDS should use terms or descriptors necessary for the target audience to understand the messages.
> b. Such terms or descriptors used should be those which a reasonable person would conclude should be understood by a broad cross-section of educated adults in society, or which when used to communicate with a specific group, such as homosexual men, about high risk sexual practices, would be judged by a reasonable person to be *inoffensive* to most educated adults beyond that group.[41]

In addition to the above language, the CDC guidelines that once included the Helms Amendment[42] were replaced in fiscal year 1989 by the Kennedy-Cranston Amendment.[43] With discovery issues regarding the plaintiffs' vagueness challenge still pending, the court ordered a hearing before a magistrate before any determination would be made on constitutional grounds.[44]

In *Gay Men's Health Crisis v. Sullivan*,[45] the same parties sought a proper determination after resolution of the outstanding discovery issues from that of *GMHC I*. Once again, the plaintiffs asserted in the supplemental pleadings that the Revised Grant Terms[46] violated the First Amendment as vague, such that they offered little

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35 *See* Cooperative Agreements for Acquired Immunodeficiency Syndrome (AIDS) Prevention and Surveillance Projects Program Announcement and Notice of Availability of Funds for Fiscal Year 1988, 53 Fed. Reg. 6034-35 (1988).

> Basic Principles.
> e. Messages which are part of any materials or activities supported with CDC funds must be consistent with recently enacted Federal legislation (Pub. L. 100-102 n.1) which prohibits the use of CDC funds for " . . . AIDS education, information, or prevention materials and activities that promote or encourage, directly, homosexual sexual activities." This legislation also directs that "Education, information, and prevention activities and materials . . . shall emphasize (1) abstinence from sexual activity outside a sexually monogamous marriage (including abstinence from homosexual sexual activities) and (2) abstinence from the use of illegal intravenous drugs."

Id.

36 In addition to the Gay Men's Health Crisis, a New York-based organization that instituted the litigation, discussed *infra* notes 44-54 and accompanying text, other organizations challenged the statutory guidelines, claiming that the Helms provisions deterred them from seeking funding for fiscal year 1988: Hetrick Martin Institute, Horizons Community Services, San Antonio Tavern Guild AIDS Foundation, The Fund for Human Dignity, and the New York State Department of Health. *See GMHC I*, 733 F. Supp. at 625.

37 *See* § 514, 101 Stat. at 1329-289.

38 *GMHC II*, 792 F. Supp. at 285-86.

39 *Id.* at 286.

40 *Id.*

41 54 Fed. Reg. 10,050 (1989) (emphasis added).

42 *See supra* notes 30-34 and accompanying text.

43 The Kennedy/Cranston Amendment provided in part: "Notwithstanding any other provision of this Act, AIDS education programs funded by the [CDC] and other education curricula funded under this Act dealing with sexual activity shall not be designed to promote or encourage, directly, intravenous drug abuse or sexual activity, homosexual or heterosexual . . . ." Pub. L. No. 100-436, 102 Stat. 1692 (1988). The district court held that although the challenges to both the Helms Amendment and the Kennedy/Cranston Amendment were moot, the CDC-promulgated "offensiveness" restrictions were still applied, and therefore subject to review. *See GMHC I*, 733 F. Supp. at 631 (These claims were moot due to the fact that the litigation commenced in December 1989, and the amendments applied to the Appropriations Acts of 1988 and 1989, respectively.).

44 *Id.* at 639. The court reasoned that in order to review the plaintiffs' constitutional and statutory challenges, a determination of the CDC's "motive in adopting the regulations" was relevant. *Id.*

> [I]f plaintiff[s] can show that defendants' implementation of the restrictions was motivated by an improper purpose, such as one to suppress speech, the restrictions would be unconstitutional as applied. Similarly, if plaintiff[s] can show that the CDC restrictions were developed for improper purposes then the challenge to the face of the restriction has merit.

Id. at 639-40.

45 *GMHC II*, 792 F. Supp. 278.

46 For clarification, between the *GMHC I* litigation and *GMHC II*, the CDC published two different "Revised Grant Term" guidelines, both of which were objected to by the GMHC plaintiffs. The first set of proposed content guidelines included the following relevant language:

> b. Written materials, audiovisual materials, and pictorials should not include terms, descriptors, or displays which will be offensive to a majority of the intended audience or to a majority of persons outside the intended audience.

Draft Revision of Requirements for Content of HIV/AIDS-Related Written Materials, Pictorials, Audiovisuals, Questionnaires, Survey Instruments, and Educational Sessions, in Centers for Disease Control Assistance Programs, 55 Fed. Reg. 10,667, 10,668 (1990). The

guidance as to which types of materials would be likely to receive funding.[47] In *GMHC II,* the plaintiffs further asserted that by enacting the grant terms and its subsequent revisions, the CDC acted beyond the scope of its statutory authority as defined in 42 U.S.C. § 300ee(c) and (d), which provides:

> (c) Limitation. None of the funds appropriated to carry out this title may be used to provide education or information designed to promote or encourage, directly, homosexual or heterosexual activity or intravenous substance abuse.
> (d) Construction. Subsection (c) may not be construed to restrict the ability of an education program that includes the information required in subsection (b) to provide accurate information about various means to reduce an individual's risk of exposure to, or the transmission of [AIDS] provided that any informational materials used are not obscene.

The court, in finding that the CDC's Revised Grant Terms were indeed subject to the limitations of 42 U.S.C. § 300ee, stated that the issue is whether the grant terms were inconsistent with that provision.[48] The court held that the CDC, in promulgating the "offensiveness" criterion[49] "contravened its statutory authority which bars funding only of *obscene,* not *offensive* material."[50] Reminding the parties of the legislative history behind the entire enactment, the court emphasized language that soberly makes reference to the

second set of content guidelines that were finalized as a result of comments received by the CDC included the following relevant language:

> b. Written materials, audiovisual materials, and pictorials should not include terms, descriptors, or displays which will be offensive to a majority of the intended audience or to a majority of adults outside the intended audience unless, in the judgment of the Program Review Panel, the potential offensiveness of such materials is outweighed by the potential effectiveness in communicating an important HIV prevention message.

Revision of Requirements for Content of AIDS-Related Written Materials, Pictorials, Audiovisuals, Questionnaires, Survey Instruments, and Educational Sessions in Centers for Disease Control Assistance Programs, 57 Fed. Reg. 10,794, 10,795 (1992). It was the offensiveness language in the above finalized 1992 Revised Grant Terms that were disputed in *GMHC II,* 792 F. Supp. at 285.

47 *Id.* at 281. The CDC's proposed revision of its content guidelines for fiscal year 1990 also contained a discussion of the Kennedy/Cranston Amendment, which replaced the Helms Amendment. Pub. L. No. 100-436, 102 Stat. 1692 (1988); *see supra* note 41. Although the Helms Amendment was no longer statutorily effective, the CDC published Revised Grant Terms that continued to apply content restrictions to AIDS-related educational materials and the organizations by which they are distributed. The new 1992 grant terms contained language stating that materials that were deemed "offensive to a majority of the intended audience" would not be awarded funding. *See* Revision of Requirements for Content of AIDS-Related Written Materials, Pictorials, Audiovisuals, Questionnaires, Survey Instruments, and Educational Sessions, in Centers for Disease Control Assistance Programs, 57 Fed. Reg. 10,794 (1992).

48 *GMHC II,* 792 F. Supp. at 290.

49 *See* Revised Grant Terms, 57 Fed. Reg. 10,794 (1992).

50 *GMHC II,* 792 F. Supp. at 291 (emphasis added).

"necessity of reaching the highest risk groups by whatever means will catch their attention."[51]

In 1990, after the commencement of the *GMHC I* litigation but prior to its resolution in *GMHC II,* the CDC published a notice request for comments from interested parties relating to the litigation as well as the controversy sparked by the 1986 and 1988 grant terms.[52] Three months later, the CDC issued the codified content requirement revisions which explain in detail the comments received,[53] and the revisions adopted.[54] Nevertheless, the *GMHC II* court found that the CDC's revised grant terms had "no core meaning" and were "unconstitutionally vague."[55] Furthermore, the court held that the "offensiveness" standard failed to clarify properly to potential recipients the murky area between offensive and obscene materials.[56]

51 *Id.*; *see* 134 CONG. REC. S15,690, 15,693 (daily ed. Oct. 13, 1988) ("The federal government must not interfere with or hamstring public health efforts to educate all Americans, including gay and bisexual men, about AIDS . . . .").

52 *See* Draft Revision of Requirements for Content of HIV/AIDS-Related Written Materials, Pictorials, Audiovisuals, Questionnaires, Survey Instruments, and Educational Sessions, in Centers for Disease Control Assistance Programs, 55 Fed. Reg. 10,667 (1990).

53 The CDC noted the following comments sent to its agency by organizations with quite divergent interests with respect to the "offensiveness standard" and the reference to the "majority of persons outside the intended audience":

> [T]his standard is contradicted by the standard set out in section 1.a., that materials "should use terms, descriptors, or displays necessary for the intended audience to understand the message.";
> [R]estricting the effectiveness of public health messages and information, particularly when those messages have been targeted to individuals who may unknowingly be risking exposure to the virus, borders on the unethical and unconscionable;
> [A]n "offensiveness" standard is so vague that it provides little guidance to those designing educational materials. It may actually deter the development of materials. Offensiveness, even if it were capable of definition or application as a standard, has absolutely no relationship to how effective particular materials are in reducing risk behaviors.

See Revision of Requirements for Content of HIV/AIDS-Related Written Materials, Pictorials, Audiovisuals, Questionnaires, Survey Instruments, and Educational Sessions, in Centers for Disease Control Assistance Programs, 55 Fed. Reg. 23,414 (1990).

54 The CDC adopted the following balancing test in response to the comments received and discussed in *GMHC II*:

> Written materials, audiovisual materials, and pictorials should not include terms, descriptors, or displays which will be offensive to a majority of the intended audience or to a majority of adults outside the intended audience *unless, in the judgment of the Program Review Panel, the potential offensiveness of such materials is outweighed by the potential effectiveness in communicating an important HIV prevention message.*

Revised Guidelines, 57 Fed. Reg. 10,794, 10,795 (1992) (emphasis added).

55 *GMHC II,* 792 F. Supp. at 293.

56 *Id.* at 294. The district court discussed the problematic nature of an "offensiveness" criterion due to its inherent subjectivity. *Id.* at 294 n.31.

C. *Recent Amendments: 1992-1994*

Immediately following the *GMHC II* decision, the CDC grudgingly eliminated the language that was deemed unconstitutionally vague, and announced that an appeal of the district court's decision would be contemplated.[57] The resulting restrictions were found in new guidelines published in June 1992.[58] Such guidelines eliminated the "offensiveness" restriction, yet warned potential grantees about "sexually suggestive" practices in group sessions[59] and the encouragement of homosexual or heterosexual activity.[60] Immediately following the June 1992 guidelines, the CDC announced that it would not appeal the district court's decision in *GMHC II*.[61]

After the attention it received throughout the *GMHC* litigation, the CDC subsequently proposed new guidelines,[62] after having sought comments from interested parties and organizations.[63] The CDC's proposed guidelines focused primarily on the technical accuracy of AIDS educational materials,[64] and by stating simply that such materials "can be controversial," completely avoided the obscenity/offensiveness controversy.[65] The CDC then announced in September 1994, that the controlling content guidelines would

[57] *See* Interim Revision of Requirements for Content of AIDS-Related Written Materials, Pictorials, Audiovisuals, Questionnaires, Survey Instruments, and Educational Sessions in Centers for Disease Control Assistance Programs, 57 Fed. Reg. 26,742 (1992).

[58] *Id.*

[59] *Id.* at 26,743.

[60] *Id.*

[61] Requirements for Content of AIDS-Related Written Materials, Pictorials, Audiovisuals, Questionnaires, Survey Instruments, and Educational Sessions in Centers for Disease Control Assistance Programs, 57 Fed. Reg. 33,964 (1992).

[62] *See* Proposed Requirements for Content of AIDS-Related Written Materials, Pictorials, Audiovisuals, Questionnaires, Survey Instruments, and Educational Sessions, in Centers for Disease Control Assistance Programs, 58 Fed. Reg. 59,726 (1993).

[63] *Id.*; *see also* Interim Revision of Requirements for Content of AIDS-Related Written Materials, Pictorials, Audiovisuals, Questionnaires, Survey Instruments, and Educational Sessions in Centers for Disease Control and Prevention Assistance Programs, 57 Fed. Reg. 60,209 (1992). Under the section entitled "*Basic Principles*," the proposed language reads in relevant part:

> [Methods to reduce the risk of spreading the virus] include abstinence from the illegal use of IV drugs and from sexual intercourse except in a mutually monogamous relationship with an uninfected partner. For those individuals who do not cease risky behavior, methods of reducing their risk of acquiring or spreading the virus must also be communicated. Such messages can be controversial.

Id.

[64] "[O]rganizations . . . are required to assure in their funding applications that all new materials . . . will be responsive to the HIV prevention needs of the target audience and will be submitted, before their dissemination, to the appropriate State health/education agency to determine if the materials are technically accurate." *See* Proposed Requirements for Content of AIDS-Related Written Materials, 58 Fed. Reg. 59,726 (1993).

[65] *See id.*

be those found in the previously published guidelines of June 15, 1992.[66] Their constitutionality having already been established, their effectiveness is now brought into question.[67]

III. First Amendment Implications

The First Amendment[68] issues implicated by the *GMHC* litigation were twofold. First, the government allocates federal money to recipient projects while dictating the content of such funded projects. Second, due to the fact that the educational materials deal with content of a sexual nature—complicated further by homosexual overtones—such materials raise issues concerning the blurry line that marks where sexual explicitness ends and obscenity begins. First Amendment jurisprudence necessitates a labeling, or categorization, of the expression at issue in order to determine the protection afforded by the level of scrutiny through which the regulation will be examined. This categorization of varying levels of expression or speech has been described as taking two possible forms: Devaluing speech because of its mode of expression[69] or devaluing speech because of its content.[70]

The CDC guidelines trigger a two-tier inquiry for the following reasons. First, a First Amendment evaluation of the CDC guidelines implicates the issue of government-funded speech, and raises the question of what level of scrutiny should be used to examine the CDC guidelines. The "unconstitutional condition" doctrine[71]

[66] *See* Cooperative Agreement for National Organizations' HIV/AIDS Prevention and Health Communications Programs, Health Communications/Behavioral and Social Science Evaluation, and Technical Assistance Efforts in Support of Social Marketing and Health Communications, 59 Fed. Reg. 49,945, 49,951 (1994) (incorporating by reference content restrictions of June 1992 guidelines, 57 Fed. Reg. 26,742).

[67] In the meantime, other federal agencies serving functions similar to that of the CDC, such as the Health Resources and Services Administration ("HRSA") continue to promulgate further similar requirements that have been criticized with respect to the CDC. These include suggesting that such programs not directly promote homosexual activity and neglecting to include homosexuals within the groups of people that are at risk for HIV infection for certain government funded programs. *See* Availability of Funds for Grants to Provide Outpatient Early Intervention Services With Respect to HIV Disease, 58 Fed. Reg. 52,315-16 (1993). Perhaps a distinguishing factor between the two federally-created bodies—the CDC and the HRSA—is that the funding promulgated by the CDC is aimed at preventative materials via distribution and promotion. Conversely, the HRSA distributes funds for early outpatient intervention services, which does not invoke similar First Amendment implications. *Id.*

[68] The First Amendment reads in relevant part: "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." U.S. Const. amend. I.

[69] *See* Brent Hunter Allen, Note, *The First Amendment and Homosexual Expression: The Need for an Expanded Interpretation*, 47 Vand. L. Rev. 1073, 1095 (1994).

[70] *Id.* at 1092.

[71] *See* Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 Harv. L. Rev. 1415 (1989); Cole, *supra* note 16, at 679 n.17. "Unconstitutional conditions doctrine seeks to identify those conditions on funding that have a coercive effect on the recipient's freedom to exer-

has been developed as a means of determining the constitutionality of a particular federally-funded program, thus lowering the level of scrutiny based on the mode of expression of such materials. The following section analyzes the CDC guidelines, given the implications of subsidized speech, and its accompanying level of judicial scrutiny. Second, due to the fact that the CDC's restrictions were content-based, a First Amendment analysis requires consideration of the content of such expression. Thus, it must be determined where depictions of homosexuality or homoeroticism fall within the rhetoric of obscenity and offensiveness.

A. *Subsidized Speech*

Subsidized speech raises the issue of whether the government can dictate certain speech or policies and exclude others, when the speech at issue has been subsidized by the federal government.[72] As one commentator characterized the recent Supreme Court decision in *Rust v. Sullivan*,[73] "while family planning counselors may have a constitutional right to talk about abortion, they have no constitutional right to do so while being funded by the government."[74] *Rust* involved a federally-funded family planning clinic which was prohibited by the terms of its funding from disseminating information concerning the availability of abortions.[75] The decision marked the culmination of a long struggle over the standards by which a court is to determine First Amendment implications where the government is subsidizing controversial speech.[76]

The family planning clinics in *Rust* received federal funding under Title X of the Public Health and Service Act.[77] Under Title X, the Secretary of the Department of Health and Human Services is authorized to "make grants to and enter into contracts with pub-

cise her constitutional rights on her own time and with her own resources." Cole, *supra* note 16, at 680.

72 One author noted that government-funded speech presents a paradox: "Government-funded speech is at once a necessary and valuable part of the marketplace of ideas and an ever-present threat to an autonomous citizenry and free public debate." Cole, *supra* note 16, at 747.

73 500 U.S. 173 (1991).

74 Cole, *supra* note 16, at 676.

75 *Rust*, 500 U.S. at 178-80.

76 Note, however, that the scope of the *Rust v. Sullivan* decision is not quite defined. President Bill Clinton, after less than a week in office, signed an executive order that reversed the Supreme Court's decision upholding the "gag rule"—regulations that prohibit Title X recipients from providing their patients with information, counseling, or referrals concerning abortions. *See* 58 Fed. Reg. 7455 (1993) (executive order directing the Secretary of Health and Human Services to "suspend the Gag Rule pending the promulgation of new regulations in accordance with the 'notice and comment' procedures of the Administrative Procedure Act.").

77 42 U.S.C. § 300 *et seq.* (1991).

lic or nonprofit private entities to assist in the establishment and operation of voluntary family planning projects which shall offer a broad range of acceptable and effective family planning methods and services."[78] In 1988, Dr. Louis Sullivan, then Secretary of Health and Human Services, established regulations that prohibited recipients of Title X funds from engaging in abortion counseling or from making referrals for abortions.[79] In upholding the statute and program, the Supreme Court held that such "conditions" to receiving federal funding are constitutionally sound where the government is dictating aspects of the program for which it is subsidizing.[80] Conversely, an "unconstitutional condition" would involve "situations in which the government has placed a condition on the *recipient* of the subsidy rather that [sic] on a particular program or service, thus effectively prohibiting the recipient from engaging in the protected conduct outside the scope of the federally funded program."[81]

A common defense to a First Amendment attack of a federally-subsidized program is that denial of a grant application is merely denial of the subsidy, rather than a bar to the exercise of the expression.[82] This was precisely the defense used by the NEA in *Finley v. National Endowment for the Arts*.[83] However, the district court in *Finley* rejected this argument and held that the reason for the denial of a grant is significant for demonstrating that there are certain reasons for denial upon which the government may not rely.[84] Citing to the Supreme Court decision in *Perry v. Sindermann*,[85] the *Finley* court re-emphasized that:

78 42 U.S.C. § 300(a).

79 *See* 42 U.S.C. § 300a-6.

80 For a discussion arguing that the *Rust* holding also gave "greater flexibility to administrative agencies in interpreting legislative acts" at the expense of narrowing First Amendment freedoms, see Robert R. Graves, Jr., Note, *Administrative Agencies Get Their Way Over Constitutional Rights in* Rust v. Sullivan, 28 WILLAMETTE L. REV. 173, 174 (1991).

81 *Rust*, 500 U.S. at 197 (emphasis in original); *cf.* Cole, *supra* note 16, at 680. Cole criticizes the unconstitutional conditions doctrine by arguing that it is limited to the First Amendment concerns of the speaker while it ignores audience-based First Amendment concerns. As an example, Cole raises a hypothetical public university that is directed by the government to only teach ideas that support government policies. The unconstitutional conditions doctrine, Cole argues, would not properly address the First Amendment concerns if one were to assume that the entire faculty consisted of those who were academically committed to such a viewpoint. Therefore, in such an example, Cole argues that the unconstitutional conditions doctrine is an inadequate standard for reviewing subsidized speech where audience concerns exist. *Id.*

82 *See Finley*, 795 F. Supp. at 1463; *see also* Dorothy E. Roberts, Rust v. Sullivan *and the Control of Knowledge*, 61 GEO. WASH. L. REV. 587, 612-13 (1993).

83 795 F. Supp. 1457; *see also infra* notes 214-54 and accompanying text.

84 795 F. Supp. at 1463.

85 408 U.S. 593, 597 (1972) (termination of a nontenured college professor at state university after professor criticized the university's regents constitutes an unconstitutional condition).

> [The government] may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interests in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited . . . . Such interference with constitutional rights is impermissible.[86]

Citing *Rust,* the *Finley* court declared that while the government may constitutionally place a subsidy condition on a particular program or service,[87] placing a condition on the *recipient* of the subsidy unacceptably "prohibit[s] the recipient from engaging in the protected conduct outside the scope of the federally-funded program."[88]

Scholars have struggled over whether the standard for judicial review of statutes or regulations implementing "subsidized speech" is or should be different from that for other limitations of forms of expression.[89] In *GMHC II,*[90] the court stated that a " 'mixed level' of scrutiny" is to be applied "as it takes into account that 'relatively more stringent scrutiny' is required because of the free speech dimension, . . . while recognizing that courts should be 'more tolerant of possible vagueness in laws that impose civil rather than criminal penalties' " due to the reality that government-funded programs are limited in scope.[91] Moreover, the *GMHC II* court stated that in controversies concerning speech that is subsidized through statutory implementation, " '[the] tolerance [for vagueness and potential constitutional problems] should be even greater . . . where the consequence of noncompliance with the enactment is not a civil penalty, but merely a reduction of a government subsidy.' "[92]

86 *Finley,* 795 F. Supp. at 1463.

87 *Id.*

88 *Id.* (quoting *Rust,* 500 U.S. at 197).

89 The debate over level of scrutiny stems from an inherent ideology regarding the purpose and effect of government funding in the first place. For example, it has been argued that subsidized speech must recognize the crucial role constitutional rights play in "maintaining the distribution of power between government and individuals." Cole, *supra* note 16, at 698. Another argument suggests viewing the role of government subsidies as having the effect or purpose of pressuring or coercing recipients to alter a particular preferred choice in a direction favored by the government. For these reasons, it has been argued, courts should utilize a strict level of scrutiny when reviewing government-funded programs. *Id.* Conversely, another argument would view subsidized programs no differently than any other "benefit" found in the market economy—all benefits or conditions in the market affect people and alter choices—that is how the market works, therefore, a strict level of scrutiny is unnecessary. *Id.* at 699.

90 *GMHC II,* 792 F. Supp. 278; *see supra* notes 45-56 and accompanying text.

91 *GMHC II,* 792 F. Supp. at 293 (citation omitted).

92 *Id.*

In *GMHC I* and *II,* the courts grappled with the recipient/program dichotomy and rejected the notion that a recipient's First Amendment rights are not fully realized unless a program is actually (or successfully) subsidized.[93] Citing to a line of cases, concerning Title X provisions (as in *Rust),* the district court determined that the imposition of governmental conditions turns on the issue of the legitimate governmental objective.[94] Therefore, the question becomes (i) whether the guidelines of the CDC further the government's respective interests, and (ii) whether these restrictions are rationally related to those purported objectives.[95]

Since 1986, the CDC guidelines have included subsections entitled "Basic Principles" and "Requirements," enumerating basic policy and content restrictions, and have outlined the procedural implementation of a "Program Review Panel."[96] The "Basic Principles" and "Purpose" of the CDC guidelines have evolved from "providing an impetus" to assist state and local organizations facing the spread of AIDS[97] to facilitating organizations to engage in a collaborative effort to promote "individual behaviors that eliminate or

93 In *GMHC I,* each party advanced a line of argument that suggested utilizing different levels of scrutiny when a federal statute implementing government subsidies is at issue:

> [The CDC] reason[s] that selective government subsidies of speech by their nature are not considered viewpoint-based regulations and therefore are subject only to rational basis review. . . . Plaintiffs reply that because the purpose or effect of the regulations is to suppress certain ideas, the strict scrutiny standard of review applies.

GMHC I, 733 F. Supp. at 636.

94 *Id.* "These cases compel the conclusion that conditional government subsidies designed to further a legitimate governmental interest are permissible so long as rationally related to a legitimate governmental objective." *Id.*; *cf.* Cole, *supra* note 16, at 748 (In arguing the importance of "neutrality and independence" in government-funded institutions, Cole suggests "two interrelated substantive inquiries, one into the role that specific institutions play in public debate and value-formation, and one into the role that free expression plays within the particular institution under consideration.").

95 For a discussion on the varying levels of scrutiny and the significance of a "rational relation test" in the First Amendment context, see RODNEY A. SMOLLA, SMOLLA AND NIMMER ON FREEDOM OF SPEECH: A TREATISE ON THE FIRST AMENDMENT (1994).

96 *See* Program Announcement and Notice of Availability of Funds for Fiscal Year 1986, Cooperative Agreements for Acquired Immunodeficiency Syndrome (AIDS), Health Education and Risk Reduction Programs, 51 Fed. Reg. 3427 (1986); Cooperative Agreements for Acquired Immunodeficiency Syndrome (AIDS) Prevention and Surveillance Projects Program Announcement and Notice of Availability of Funds for Fiscal Year 1988; Amendment, 53 Fed. Reg. 6034 (1988); Interim Revision of Requirements for Content of AIDS-Related Written Materials, Pictorials, Audiovisuals, Questionnaires, Survey Instruments, and Educational Sessions in Centers for Disease Control and Prevention Assistance Programs, 57 Fed. Reg. 60,209 (1992); Proposed Requirements for Content of AIDS-Related Written Materials, Pictorials, Audiovisuals, Questionnaires, Survey Instruments, and Educational Sessions in Centers for Disease Control and Prevention Assistance Programs, 58 Fed. Reg. 59,726 (1993).

97 *See* Program Announcement and Notice of Availability of Funds for Fiscal Year 1986, Cooperative Agreements for Acquired Immunodeficiency Syndrome (AIDS), Health Education and Risk Reduction Programs, 51 Fed. Reg. 3427 (1986).

reduce the risk of acquiring and spreading the virus."[98] Thus, from 1986 to the present, the purpose behind the CDC guidelines has remained relatively constant. As discussed in Part II, however, the means by which these purported objectives are reached have withstood numerous modifications.[99] The controversy surrounding the CDC with respect to programs proscribed by 42 U.S.C. § 300ee is evidenced by the numerous grant terms and their related revisions and amendments in the past seven years.[100] The CDC has gone through a complicated series of grant term proposals and revisions due to political pressure and judicial scrutiny.[101] Although the debate culminated with the passage of the Helms Amendment, CDC policies are clearly influenced by the political climate.[102]

It can be argued in this context that, unlike the NEA[103] or other federally-funded agencies, the governmental objective here—*increasing* dissemination of information for the purpose of *decreasing* the number of people that will be diagnosed each year—is not only "legitimate,"[104] it is absolutely necessary. Neither *GMHC I* or *GMHC II* emphasized this point in the context of applying a level of scrutiny, and instead, the *GMHC II* court sustained a

[98] *See* Proposed Requirements for Content of AIDS-Related Written Materials, Pictorials, Audiovisuals, Questionnaires, Survey Instruments, and Educational Sessions in Centers for Disease Control and Prevention Assistance Programs, 58 Fed. Reg. 59,726-27 (1993); *see also* Interim Revision of Requirements for Content of AIDS-Related Written Materials, Pictorials, Audiovisuals, Questionnaires, Survey Instruments, and Educational Sessions in Centers for Disease Control and Prevention Assistance Programs, 57 Fed. Reg. 26,742-43 (1992) (incorporated by reference in Cooperative Agreement for National Organizations' HIV/AIDS Prevention and Health Communications Programs, 59 Fed. Reg. 49,945, 49,951 (1994)).

[99] *See supra* notes 24-66 and accompanying text.

[100] *See supra* notes 24-40 and accompanying text.

[101] This is illustrated by the changes made to the "Basic Principles" section of the CDC guidelines. *See supra* note 35 and accompanying text.

[102] *See supra* notes 30-33; *see also* 141 CONG. REC. S173-01 (daily ed. Jan. 4, 1995). At the opening of the 104th Congress, on January 4, 1995, Jesse Helms stated that:

> Federal employees are told to reduce their HIV contraction risk by practicing "safer sex" by using barriers like condoms, dental dams, plastic wrap, and latex gloves. . . . The training materials are based on government "evidence" and the materials espouse confidence in latex which is not supported by research. For example, the U.S. Centers for Disease Control and Prevention misrepresent a wealth of conflicting scientific evidence. The CDC does a disservice to the American public when it promotes condoms as a responsible prevention strategy. CDC places its hope on the correct and consistent use of condoms, an unreached and unreachable goal.

[103] *See infra* part IV.

[104] *See GMHC I*, 733 F. Supp. at 637. It is also important to note that despite the language akin to a low, rational-relation test scrutiny analysis, the court emphasized that a "mixed level of scrutiny" is to be applied, "as it takes into account that 'relatively more stringent scrutiny' is required because of the free speech dimension, while recognizing that courts should be 'more tolerant of possible vagueness in laws that impose civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe.' " *GMHC II*, 792 F. Supp. at 293 (quoting *GMHC I*, 733 F. Supp. at 638).

facial attack on the CDC's revised grant terms.[105] Nevertheless, the debate continues over the level of scrutiny to be applied in the context of constitutional challenges to subsidized programs.[106] Given the facts that AIDS and the related statutory framework are matters of first impression to the courts, a more strict level of scrutiny should be applied to ensure greater dissemination of educational materials. This argument is further supported by the fact that education of the public is currently the only means of preventing the further spread of the disease.[107] However, despite the *GMHC II* court's holding that the guidelines were facially unconstitutional,[108] the argument against the restrictive guidelines would likely prevail against low-level scrutiny analysis. Since the governmental objectives ostensibly are to disseminate vital educational materials "by whatever means will catch their attention,"[109] any attempts to thwart this goal—here, to limit graphic materials that are not obscene—could be argued as not being rationally related to such objective.[110]

Alternatively, the GMHC plaintiffs asserted that the funding guidelines, by nature of their content restrictions, have caused self-censorship due to the blurred line between homoeroticism and offensiveness evidenced in the CDC guidelines.[111] Where the statute

[105] *GMHC II*, 792 F. Supp. at 293; *see also Finley*, 795 F. Supp. at 1472 ("On [a facial] challenge, it is inappropriate to consider the manner in which the agency has interpreted and applied the statute.").

[106] For different subsidized speech problems and the level of scrutiny the Court will utilize to determine constitutionality, see FCC v. League of Women Voters of Cal., 468 U.S. 364 (1984) (using middle level scrutiny to strike down a congressional prohibition on editorializing by public broadcasters who are federal funding recipients); Regan v. Taxation With Representation of Wash., 461 U.S. 540 (1983) (where the government chooses to subsidize one protected right, it does not have to subsidize analogous counterpart rights); Perry v. Sindermann, 408 U.S. 593 (1972) (not allowing an unconditional condition to determine tenure of public university professor).

[107] *See* 57 Fed. Reg. 26,742-43 ("Controlling the spread of HIV infection and AIDS requires the promotion of individual behaviors that eliminate or reduce the risk of acquiring and spreading the virus.").

[108] *GMHC II*, 792 F. Supp. at 293.

[109] 134 CONG. REC. S15,690 (daily ed. Oct. 13, 1988); *see also GMHC II*, 792 F. Supp. at 291.

[110] *See GMHC II*, 792 F. Supp. at 291. However, even if a low-level scrutiny analysis left the guidelines unscathed, an alternate argument is that the vagueness of the grant terms create a chilling effect, which was also found persuasive. *See id.* at 303-04; *see also GMHC I*, 733 F. Supp. at 637 (holding old grant terms unconstitutional despite low-level scrutiny where a finding is satisfied that "offensiveness" standard is not rationally related to governmental objectives).

[111] The court in *GMHC II* held that a showing of self-censorship provides adequate evidence of vagueness in the grant restrictions. "Because the grant terms are subjective and imprecise, AIDS educators cannot predict with any certainty what materials will be approved. Thus, they are forced to censor themselves and concentrate on proposals that will pass the 'offensiveness' test with room to spare." *GMHC II*, 792 F. Supp. at 303. Plaintiffs introduced evidence showing that programs to distribute "explicit, attention-grabbing brochures for a gay male audience" were abandoned out of fear of denial for funding, in

or grant terms imply restrictions on protected expression, self-censorship will most likely result. This may be caused by artists' modifying portions of their work[112] or an organization's dissemination of educational materials. Moreover, where the statute or grant terms provide little guidance as to what will be deemed worthy of funding, a chilling effect results, as a provision's vagueness will lead recipients to curb such expression or discourage them from applying for funding altogether.[113] This results in fewer materials being distributed and fewer people being reached.

Identifying the issue of subsidized speech and the level of scrutiny demanded in the context of the CDC comprises half of the requisite analysis. Just how closely the court should scrutinize such guidelines also requires an understanding of the type of materials or expression that the government agency attempts to suppress.[114] Therefore, once the level of scrutiny for subsidized speech is determined, as the *GMHC* court did, the next issue is the extent to which depictions of homosexuality—which are central to the CDC "offensiveness" and "controversial" standards—should be protected.

The second aspect of the First Amendment analysis requires finding the appropriate label or category for the speech and determining the protection afforded. This analysis involves an examination of the actual content of the materials. The controversies surrounding the NEA and virtually all of the litigation regarding the CDC has centered around expression with homosexual depictions or connotations. The following section will address whether homosexual expression is protected by the First Amendment. Moreover, if it is protected, the category within which homosexual expression lies must be examined to determine the limitations of First Amendment protection and the consequences of governmental regulation. Furthermore, an analysis of the protection afforded homosexual expression, in light of subsidized speech scrutiny, will assist in determining whether the CDC guidelines have been, are, and will be constitutionally tolerable.

addition to not having the adequate resources to create diverse programs in a "trial-and-error" forum. *Id.* (citation omitted).

112 *See infra* part IV.

113 As the court suggested in *GMHC II*, the necessity of reaching people through AIDS educational materials or prevention information is too vital to be even remotely chilled by administrative guidelines. *See supra* note 55 and accompanying text.

114 In other words, consideration must be given to the jurisprudence that outlines the different categories of speech and the protection extended as a matter of law. For an argument analogizing the suppression of homosexual expression to subversive advocacy and therefore warranting heightened protection, see Allen, *supra* note 69, at 1073.

> Homosexuality is today essentially a form of political, social, and moral dissent on par with the best American traditions of dissent and even subversive advocacy. . . . Those that support criminalization find today in homosexuality what they found before in the family planning of Sanger, the atheism of Darwin, the socialism of Debs, or the Marxist advocacy of the American Communist Party.

Id. at 1074 (quoting David A.J. Richards, *Constitutional Privacy and Homosexual Love*, 14 N.Y.U. REV. L. & SOC. CHANGE 895, 905 (1986)).

B. *Homosexual Expression and the First Amendment: The Supreme Court's Handling of Homosexuality and Homosexual Expression Under the First Amendment*

1. Determining the Benchmark or Categorization for Homoerotic Expression: Straight Sex, Gay Sex, and Obscenity

The categorization of homosexual expression is necessary in the First Amendment context because it establishes a benchmark to determine whether regulations are constitutionally justifiable. Different forms of homosexual expression have been labeled as obscenity,[115] fighting words,[116] indecent speech,[117] or low-value speech.[118] Moreover, the issue of homosexuality can trigger various constitutional implications including: privacy,[119] association,[120] and homosexual speech, all of which could be argued as being in-

115 *See* Allen, *supra* note 69, at 1092. Because art is a means by which public expression is channeled into the marketplace, it serves as an important medium for minorities or "outsiders" to express such views. Therefore, homosexually-oriented artistic images in art and literature provide a forum for the expression of the homosexual experience usually in a message that a mass audience will more easily understand—with a portrayal of same-sex love or with the suggestion of homoerotic acts. *Id.* at 1093.

116 *See* Allen, *supra* note 69, at 1093. *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942) (Jehovah's witness's conviction under a New Hampshire statute was upheld where he had attracted a restless crowd by denouncing all religion, and yelled insults at the Marshall who had arrested him). The holding in *Chaplinsky* has since been noted by the oft-quoted sentiment:

> There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.

Id. at 571-72. The fighting words doctrine, it has been argued, could be used to deny First Amendment protection to expression of one's homosexual status when it is met with—or if it is threatened by—a violent response. Allen, *supra* note 69, at 1093; *see also* John Christensen, Note, *Sticks and Stones: Homosexual Solicitations and the Fighting Words Doctrine*, 41 OHIO ST. L.J. 553, 573 (1980) (arguing that the Ohio Supreme Court in State v. Phipps, 389 N.E.2d 1128 (Ohio 1979), applied the fighting words doctrine to homosexual solicitations, and in the process, assumed that it met the requirement that such speech has the tendency to cause an average person to react violently).

117 *See In re* Pacifica Found., Inc., 2 F.C.C.R. 2698 (1987) (homosexual sex scene found indecent under 18 U.S.C. § 1469).

118 *See* Allen, *supra* note 69, at 1094; *see also* FCC v. Pacifica Found., Inc., 438 U.S. 726, 732 (1978) (indecent language described as "patently offensive as measured by contemporary community standards for the broadcast medium"); *see also In re* Pacifica Found., Inc., 2 F.C.C.R. 2698 (holding homosexual-sexually-explicit dialogue indecent under *FCC v. Pacifica*).

119 *See* Allen, *supra* note 69, at 1092; *see also* Bowers v. Hardwick, 478 U.S. 186 (1986)

tertwined with the expression of a minority/political viewpoint.[121] A distinction has been made between a "privacy right to pure association"[122] and the "speech right to expressive association."[123] Furthermore, because a growing number of legal scholars have equated homosexual identity with one's ability to engage in expressive sexual conduct, it is helpful to look at the effect of the constitutional criminalization of consensual sodomy[124] not only upon

(denying a constitutional right to engage in consensual homosexual sodomy); *see infra* note 124.

120 *See* NAACP v. Alabama, 357 U.S. 449 (1958) (compelling interest requirement not satisfied for Alabama state government to obtain NAACP membership list); *see also* Irish-American Gay, Lesbian and Bisexual Group of Boston v. City of Boston, 418 Mass. 238, 636 N.E.2d 1293 (Mass. 1994), *cert. granted sub nom.*, Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, 115 S. Ct. 714 (1995) (First Amendment rights of parade organizers not violated when injunctive relief was issued in favor of homosexual group that was refused by organizers).

121 *See* Allen, *supra* note 69.

122 *See also* Roberts v. United States Jaycees, 468 U.S. 609, 617-18 (1984) (distinguishing freedom of association as "the choice to enter into and maintain certain intimate human relationships" as a "fundamental element of personal liberty").

123 *Id.* This was described by the Supreme Court as a right "to associate for the purpose of engaging in those activities protected by the First Amendment—speech, assembly, petition for the redress of grievances, and the exercise of religion." *Id.* at 618.

124 *See* Bowers v. Hardwick, 478 U.S. 186 (1986) (denying constitutional protection to engage in consensual homosexual sodomy). The issue of the effect of the criminalization of sodomy is beyond the scope of this Note. It is relevant, however, to the extent that it has been argued that such constitutionally permitted restrictions effect homosexual expression. *See* David Cole, *From Hand-Holding to Sodomy: First Amendment Protection of Homosexual (Expressive) Conduct*, 29 HARV. C.R.-C.L. L. REV. 319, 322 (1994) (also arguing that the United States Military's policy regarding homosexuality—the "don't ask, don't tell" policy—relates to the suppression of expression and should therefore be subject to strict judicial scrutiny). Also, the issue is relevant here with respect to the identity/sexuality-conduct dichotomy. *See* Allen, *supra* note 69, at 1093 n.108 (arguing that "[b]ecause homosexuality is the 'invisible minority' . . . it is defined by the majority of the population in terms of sex"). Therefore, the criminalization of the sexual act with which society defines such community surely affects the toleration of the expression of such acts. This would most likely manifest itself in the rejection of such expression as tolerable within certain community standards. This is best illustrated by the impact of *Bowers*, and certain expressive cases that followed.

In *Bowers*, a homosexual challenged the constitutionality of a Georgia statute criminalizing sodomy under which he had been previously convicted. The conviction was based on acts of consensual homosexual sodomy which took place with another man in the privacy of his own home. *Id.* at 188. The Court held that the Constitution does not confer upon homosexuals a fundamental right to engage in sodomy. *Id.* at 190. In arguing that such a holding is tantamount to the denial of one's identity, Justice Stevens in his dissent noted that during oral argument, the Georgia Attorney General conceded that Georgia's sodomy statute would be unconstitutional as applied to a married couple engaging in the same sexual act, due to the Court's holding in Griswold v. Connecticut, 381 U.S. 479 (striking down a Connecticut law forbidding the use of contraceptives). *Id.* at 218 n.10. Moreover, Justice Brennan's dissent noted that "[t]he fact that individuals define themselves in a significant way through their intimate sexual relationships with others suggests . . . that there may be many 'right' ways of conducting those relationships . . . ." *Id.* at 205.

Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991), a post-*Bowers*, First Amendment case, appeared to interpret its holding as standing for the proposition that it is constitutionally acceptable for a state to proscribe laws that prohibit certain expressive behavior on the basis of a state's interest in morality. *Id.* at 569 (upholding an Indiana indecency statute flatly prohibiting any form of public nudity). What has been created, it is argued, is a

homosexual expression itself, but also on its effect upon the subjective "community standard" element of *Miller v. California.*[125]

The educational materials at issue in the CDC-context are sexually explicit by their very nature. Thus, obscenity appears to be an appropriate area of First Amendment jurisprudence to determine the limitations of the CDC's regulations in addition to the extent to which homoerotic depictions are protected and are not deemed to be obscene. Perhaps it is both inappropriate and unhelpful in furthering purported governmental objectives to subject homosexual expressions to obscenity standards when the homosexual expression reaches target groups for HIV prevention. However, by determining the limitations of First Amendment protection under obscenity law, distinctions could be drawn between that expression which the CDC finds problematic and that which is constitutionally unprotected.

The CDC, through its regulatory actions, has blurred the line between obscenity and depictions of homosexuality.[126] By utilizing standards like "offensiveness,"[127] and "promoting homosexual activity,"[128] to deny funding, the CDC has expressed the government's and various legislators' views on homosexuality.[129] Moreover, the use of terms like "offensiveness" which was once in the CDC guidelines left groups like Gay Men's Health Crisis unsure as to what would warrant such a description:

> Can educational material be offensive simply because it men-

gap between the regulation of expressive sexual conduct and the regulation of sexual identity. *See* Cole, *supra*, at 324. *Glen Theatre* could be read to support the proposition that moral justifications are acceptable to suppress homosexual depictions or homoerotic expression under similar First Amendment scrutiny. *See* Melanie Ann Martin, Note, *Constitutional Law—Non-Traditional Forms of Expression Get No Protection: An Analysis of Nude Dancing Under* Barnes v. Glen Theatre, Inc., 27 WAKE FOREST L. REV. 1061, 1103 (1992); *see also* Carmen J. DiMaria, Note, *Constitutional Law—First Amendment—State's Prohibition Against Nude Dancing is Constitutional Because its Interest in Preserving Societal Order and Morals is Both Sufficiently Substantial and Content Neutral*—Barnes v. Glen Theatre, Inc., 22 SETON HALL L. REV. 943 (1992). This undoubtedly effects the subjectivity already inherent in an obscenity analysis, moreover, the fictitious "community standards" prong of *Miller*. *See infra* notes 151-82.

125 413 U.S. 15 (1973); *see infra* part III.B.3.

126 *See supra* notes 49-51 and accompanying text.

127 *See* Program Announcement and Notice of Availability of Funds for Fiscal Year 1986, Cooperative Agreements for Acquired Immunodeficiency Syndrome (AIDS), Health Education and Risk Reduction Programs, 51 Fed. Reg. 3427 (1986).

128 *See* 42 U.S.C. § 300ee(c); *see also supra* note 43 and accompanying text.

129 *See* 133 CONG. REC. 14,202-04 (daily ed. Oct. 14, 1987). With respect to commenting on homosexuality, Senator Helms has stated: "We have got to establish some priorities. Yes, I am old-fashioned enough to say moral priorities. We have got to call a spade a spade and a perverted human being a perverted human being, not in anger, but in realism."; *see also infra* notes 216-33 and accompanying text. The NEA, through section 304, *infra* note 216 and accompanying text, equated homoeroticism with obscenity, sadomasochism and the exploitation of children. *See also* 141 CONG. REC. S173-01 (daily ed. Jan. 4, 1995).

> tions homosexuality? Because it depicts an interracial couple? Can a proposed AIDS education project be offensive because it traps a captive audience, such as subway riders, and forces them to look at a condom? Does offensive apply to all descriptions of sexual behavior, graphic depictions of sexual behavior, or descriptions of unusual sexual behavior?[130]

The test for obscenity established in *Miller*[131] set out three factors a trier of fact must consider to determine whether a particular work should be deemed obscene. These factors are:

> (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest . . . ; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.[132]

Applicability of the *Miller* standard is further complicated with the issue of homosexual expression in the CDC context, particularly with respect to the first and third factors of the *Miller* test.[133] This section will first analyze the *Miller* test to determine its applicability to homosexual depictions and the relation, if any, to obscenity. Second, the "community standards" element of the test will be evaluated to determine whether it should be modified when applied to a "minority" group. Third, the final prong of the *Miller* test—whether the material lacks serious literary, artistic, political, or scientific value—will be applied to the CDC context. Finally, lower court decisions which followed the Supreme Court's tenuous lead on the issue of homoerotic expression will be examined.

2. The Road to *Miller*: Early Obscenity Cases Involving Homosexual Expression and Homosexually-Oriented Materials

The Court in *Roth v. United States*[134] categorically eliminated obscenity from the realm of protected material under the First Amendment. Subsequently, the courts have struggled with respect

130 Pls.' Mem., *GMHC II*, 792 F. Supp. at 294.

131 413 U.S. 15; *see infra* part III.B.3.

132 413 U.S. at 24 (citation omitted).

133 The second prong of the *Miller* test—the specificity of the patently offensive conduct proscribed by state law—is inapplicable in the context of funding guidelines of the CDC as a federally-created agency.

134 354 U.S. 476, 489 (1957) (The test in *Roth* was "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest.").

to the means by which such obscenity is to be identified. In *Memoirs v. Massachusetts*,[135] the Court attempted for the first time to create a definitive three-prong test.[136] Similarly, in early obscenity cases involving the distribution of pictorials of male nudity to homosexual markets, the Court seemed reluctant to analyze the "community standards" element of judicially-created doctrines such as that in *Memoirs*, and instead focused on whether such depictions were facially offensive and appealing to a prurient interest in sex.[137]

One of the earliest cases presenting the issue of whether certain homosexual depictions are obscene was *One, Inc. v. Olesen*.[138] The plaintiff published a magazine entitled *One—The Homosexual Magazine*, which the defendant, Postmaster of the City of Los Angeles, claimed was "obscene, lewd, lascivious and filthy," and thus non-mailable under federal law.[139] The plaintiff sought to enjoin the Postmaster from "failing or refusing to dispatch in the regular course of mail" the plaintiff's magazine.[140] The Ninth Circuit stated that an article or photograph may be vulgar or offensive even if deemed acceptable by "a particular group . . . constituting a small segment of the population because their own social or moral standards are far below those of the general community."[141]

The Ninth Circuit's holding, that the Postmaster's discretion to withhold distribution of the magazine was appropriate, was unanimously reversed without an opinion by the Supreme Court.[142] The Court cited *Roth* and abstained from any further

135 383 U.S. 413 (1966).

136 The *Memoirs* test provided that federal or state governments could regulate the distribution of material where

> three elements must coalesce: it must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value.

Id.

137 Manual Enters., Inc. v. Day, 370 U.S. 478 (1962). In *Manual Enterprises*, the Court did attempt to analyze the "community" in which the standard of decency shall be established for such a determination, however, rested that holding on the basis of *Roth*, that the photographs involved although deemed "dismally unpleasant, uncouth, and tawdry" were not obscene. *Id.* at 481.

138 355 U.S. 371 (1958), *rev'g without an opinion* 241 F.2d 772 (9th Cir. 1957).

139 18 U.S.C. § 1461 provided in pertinent part:

> Every obscene, lewd, lascivious, or filthy book, pamphlet, picture, paper, letter, writing, print, or other publication of an indecent character . . . is declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier.

140 *One, Inc.*, 241 F.2d 772, 773 (9th Cir. 1957), *rev'd*, 355 U.S. 371 (1958).

141 *Id.* at 777. Moreover, the Ninth Circuit continued to utilize morality to describe its concept of obscenity and analogized homosexuals to "society's dregs." *Id.*

142 *One, Inc.*, 355 U.S. 371.

analysis.[143] The facts set out in *One, Inc. v. Olesen* presented an opportunity for the Court to address First Amendment protection for homosexual depictions, yet the Court was silent. Furthermore, it is impossible to determine whether the Court unanimously reversed the Ninth Circuit because the Postmaster's actions constituted an unacceptable prior restraint, or because the material itself was not "obscene" within the meaning of *Roth*.

In *Hamling v. United States*,[144] the Court had to decide whether the *Miller* or the *Memoirs* test[145] should govern. This determination was needed to assess whether the defendants should be convicted for postal violations because they used the mails to carry an obscene brochure containing homoerotic depictions.[146] In *Hamling*, the criminalized behavior occurred prior to the *Miller* decision, but was appealed after *Miller* was handed down.[147] In further defining the *Miller* standard, the Court rejected a uniform national standard for determining obscenity, and reasserted the standard enunciated in *Paris Adult Theater I v. Slaton*.[148] The *Paris* standard dictated that jurors may draw on their own knowledge of the views of a particular community in order to determine community standards and therefore eliminated the need for expert testimony.[149]

The *Miller* court eliminated the notion of socially redeeming value from the *Memoirs* test in adopting the test for obscenity which remains the current standard.[150] The following sections will analyze homoerotic depictions in the CDC context under the first and third prong of *Miller*—as the first prong provides the most suitable framework for an analysis of the CDC guidelines; while the third prong provides the strongest argument for reducing the CDC guideline restrictions.

143 *Id.*

144 418 U.S. 87, *reh'g denied*, 419 U.S. 885 (1974).

145 *See supra* note 132.

146 *Hamling*, 418 U.S. at 98.

147 *Id.* at 103.

148 413 U.S. 49, 56 (1973) (holding that it was acceptable for state court "to fail to require 'expert' affirmative evidence" of a film's obscenity, where the film itself was placed in evidence). However, the Court's holding did not extend to "extreme cases" where "contested materials are directed at such a bizarre deviant group that the experience of the trier of fact would be plainly inadequate to judge whether the material appeals to the prurient interest." *Id.* at 56 n.6; *see, e.g.*, United States v. Klaw, 350 F.2d 155 (2d Cir. 1965) (reversing trial court's finding of defendant's distribution of obscure materials because of failure to offer proof of prurient appeal to a particular deviate group).

149 *Hamling*, 418 U.S. at 103-04.

150 *See Miller*, 413 U.S. at 24-25 ("We do not adopt as a constitutional standard the 'utterly without redeeming social value' test of [Memoirs]. . . . If a state law that regulates obscene material is thus limited, as written or construed, the First Amendment values . . . are adequately protected by the ultimate power of appellate courts to conduct an independent review of constitutional claims when necessary.").

The *Miller* test, although a "three-prong" formula, has been discussed as embodying seven requirements: (i) depiction must be sexual; (ii) depiction must be judged by community standards to determine prurient interest component; (iii) the offensive conduct must be specifically defined by the applicable law; (iv) obscenity law at issue must proscribe sexual acts with specificity; (v) depictions must be patently offensive; (vi) patent offensiveness is defined by community standards and must be distinguished from "normal" sexual depictions; (vii) redeeming value must be "serious" and determined by a reasonable person standard. *See* SMOLLA, *supra* note 95, § 7.02[2], at 7-18.

3. Whose Community Standards?—The Development of a Legal Fiction

Part of the formulation of the obscenity doctrine now embodied in *Miller* was dependent upon the determination of the "community standards" element of the test. The debate over the type of controlling community standards has included being defined by national standards,[151] local standards,[152] and defining prurient appeal in terms of a "deviant sexual group."[153] Moreover, this paradox existed in *Miller* itself, which rejected a national uniform standard, from the notion that "[u]nder a National Constitution, fundamental First Amendment limitations on the powers of the states do not vary from community to community."[154] In *Mishkin v. New York*,[155] a pre-*Miller* case, the defendant was convicted under New York law for publishing, preparing, and selling obscene books to different "sexually deviant" groups.[156] The issue presented was whether the fact that the materials appealed to a specific group, i.e., homosexuals, required a different analysis under the "appeals to prurient interest" prong of the *Roth* test.[157] The Court noted the defendant's statements identifying the precise audience to which he sought the materials to appeal.[158] The defendant argued that the materials did not satisfy the prurient appeal requirement because homosexual depictions do not appeal to the prurient interest of an "average" (heterosexual) person, but instead, have the effect

151 *See* Jacobellis v. Ohio, 378 U.S. 184, 192-95 (1964) (applying a national standard to determine the obscenity of the French film "Les Amants" (The Lovers)).

152 *Id.* at 200-01 (Warren, C.J., joined by Clark, J., dissenting).

153 *See* Mishkin v. New York, 383 U.S. 502, 508 (1966) (upholding conviction under a criminal obscenity statute for the sale and production of materials with both heterosexual and homosexual themes, and applying the "prurient appeal" requirement to "a clearly defined deviant sexual group").

154 *Miller*, 413 U.S. at 30; *see also* SMOLLA, *supra* note 95, § 7.02[2], at 7-18.

155 383 U.S. 502 (1966).

156 *Id.* at 509. The defendant was convicted under New York Penal Law § 1141 which provided in relevant part:

> A person who . . . has in his possession with intent to sell, lend, distribute . . . any obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic, or disgusting book . . . or who . . . prints, utters, publishes, or in any manner manufactures, or prepares any such book . . . is guilty of a misdemeanor.

Id.

157 *Id.* at 508.

158 *Id.* at 505.

of being "disgust[ing] or sicken[ing]."[159] The Court rejected this argument and asserted that so long as the dominant theme of the material appeals to a prurient sexual interest of a clearly defined sexual deviant group, such material will be deemed obscene.[160]

Justice Douglas filed a dissenting opinion in both *Mishkin* and *Ginzburg v. United States*,[161] suggesting that the majority in both decisions had created a "judge-made exception concerning obscenity."[162] This exception includes leaving unprotected the use of sexually stimulating symbols, both heterosexual and homosexual, to appeal to potential purchasers.[163] Justice Douglas noted that the Court's analysis had shifted from the Court's holding in *One, Inc.*[164]

The Court in *Hamling*,[165] also focused on the "appeal to a prurient interest in sex" element by distinguishing its relevance to the "average" person from a member of a "deviant sexual group." The Court stated, "in measuring the prurient appeal of allegedly obscene materials, i.e., whether the 'dominant theme of the material taken as a whole appeals to a prurient interest in sex,' consideration may be given to the prurient appeal of the material to clearly

159 *Id.* at 508. A more forceful argument would claim that what appeals to an average heterosexual's "prurient interest" may be quite different from what would appeal to that of a homosexual. Rather than placing the focus on the effect of homosexual depictions upon heterosexuals, the reception of such depictions by the homosexual community should be considered.

160 *Id.* at 509-10.

> Where the material is designed for and primarily disseminated to a clearly defined deviant sexual group, rather than the public at large, the prurient-appeal requirement of the *Roth* test is satisfied if the dominant theme of the material taken as a whole appeals to a prurient interest in sex of the members of that group.

Id. at 508. The dissents of Justices Stewart and Black not only rejected the role the Court had taken as assuming inappropriate "censorship responsibilities," but also could not share in the majority's conclusion that the materials themselves constituted hard-core pornography or obscene material. *Id.* at 518 (Stewart, J., dissenting).

161 383 U.S. 463 (1966).

162 *Id.* at 482.

163 In discussing the majority's handling of materials containing certain depictions exclusively appealing to homosexuals, Douglas stated:

> But why is freedom of the press and expression denied them? Are they to be barred from communicating in symbolisms important to them? When the Court today speaks of "social value" does it mean a "value" to the majority? Why is not a minority "value" cognizable? The masochistic group is one; the [homosexual] group is another. Is it not important that members of those groups communicate with each other? . . . [I]f the communication is of value to [homosexuals] . . . how can it be said to be "utterly without redeeming social importance"? "Redeeming" to whom? "Importance" to whom?

Id. at 489-90 (Douglas, J. dissenting).

164 *Id.* at 490. Justice Douglas explained that the Court's reversal of the Ninth Circuit's opinion in *One, Inc.* suggested the Court's acceptance of different materials appealing to people with different tastes: "Each of us is a very temporary transient with likes and dislikes that cover the spectrum. However plebian my tastes may be, who am I to say that others' tastes must be so limited and that other tastes have no 'social importance'?" *Id.* at 491.

165 418 U.S. at 87, 89 (1974).

defined deviant sexual groups."[166]

The distinction between graphic heterosexual themes and graphic homosexual themes remains unclear, despite the debate over the precise "community"[167] which are to be subjected to such materials.[168] Although the Supreme Court has utilized a uniform reasonable person standard in determining whether a work lacked "literary, artistic, political or scientific value,"[169] it can be argued that the "community standards" envisioned are not those of a national level,[170] but those of a local community.[171] Unfortunately, however, this argument does not address the question of how the standards of a particular community are determined. As one commentator noted, "[a]ll that was known after *Miller*—and to this day—is that community standards do not necessarily equate with national standards. By ruling in the negative ("A does not equal B"), the Court did not tell us what the community *does* equal."[172]

State courts have defined the relevant community from the entire state itself,[173] to the standards of specified local communities or municipalities.[174] Moreover, among the states that have permit-

166 *Id.* at 128 (quoting Mishkin v. New York, 383 U.S. 502 (1966)); *see also supra* note 155 and accompanying text.

167 *See* United States v. Pryba, 678 F. Supp. 1225, 1235 (E.D. Va. 1988) (defining relevant community as the "adult community within the jurisdiction of the Alexandria division of the Eastern District of Virginia"); *see also* Darlene Sordillo, Note, *Emasculating the Defense in Obscenity Cases: The Exclusion of Expert Testimony and Survey Evidence on Community Standards*, 10 LOYOLA ENT. L.J. 619 (1990).

168 This seemed to be the crux of Douglas' dissent in *Ginzburg v. United States*—simply, that non-obscene depictions of heterosexual nudity should be subjected to the same standard as non-obscene depictions of homosexual nudity. *Ginzburg*, 383 U.S. at 489 (Douglas, J., dissenting).

169 *See* Pope v. Illinois, 481 U.S. 497 (1987) (holding that the proper inquiry in determining such artistic value is whether a "reasonable person would find such value in the [work at issue]").

170 *See* Smith v. United States, 431 U.S. 291, 313-15 (1977) (Stevens, J., dissenting) (jury is not bound by state legislature's determination of what community standards are applicable). *But see* United States v. Schein, 31 F.3d 135 (3d Cir. 1994) (rejecting view of consenting homosexual as forming the basis for community standards to determine whether homoerotic materials sent through the mails were obscene for conviction under 18 U.S.C § 1461).

171 *See* Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115 (1989) (upholding conviction under federal statute prohibiting obscene telephone messages while recognizing varying degrees of criminal liability in different states).

172 Sordillo, Note, *supra* note 167, at 626 (emphasis in original).

173 Sordillo, Note, *supra* note 167, at 631; *see, e.g.*, Commonwealth v. United Books, 453 N.E.2d 406, 409 n.2 (Mass. 1983) (applying state statute st. 1982, c. 603, § 7 which statutorily applies "the contemporary standards of the county where the offense was committed" to a coin-operated film); Pierce v. State, 296 So.2d 218, 223 (Ala. 1974) ("community standards should be statewide"); State v. Cimino, 366 A.2d 1168 (Conn. 1976) (holding that the community standards of the state of Connecticut are applicable despite defendant's contention that community standards of the city of Danbury should apply).

174 *See* Sordillo, Note, *supra* note 167, at 631; *see, e.g.*, United States v. Marks, 520 F.2d 913, 918 (6th Cir. 1975), *rev'd on other grounds*, 430 U.S. 188 (1977) (applying community standards of the Eastern District of Kentucky, the area encompassing the district in which

ted expert testimony regarding the standards of a particular community under a *Miller* analysis, a debate exists as to who is qualified to be such an expert.[175] Some courts have not permitted as expert the testimony of sex therapists[176] and homosexuals[177] but have allowed the testimony of sociologists, art professors, and psychiatrists.[178] Other states have relied on public opinion polls as accurate indicators of a particular community's standard.[179]

Legal experts and social scientists have argued that because obscenity is a subjective determination, an accurate standard from a sample community is essential in formulating an accurate determination of obscenity. In support of the notion that "[the First Amendment does not require] that people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas, or New York City,"[180] scholars have argued that when an opinion survey is taken to determine a community's standards, it ought to gather more specific information:

> [T]here is another possible interpretation [of the community standards element of *Miller*] that asks not whether the materials offend the community or the average person, but whether the community or the average person is offended by the materials being available to those who wish to see them. In other words, are the community standards tolerant, even though most members of the community might themselves be offended by the materials. If so, it can be argued that the materials are not offensive to the community because they are restricted only to those who choose to see them. . . . [T]hus, the survey may ask respondents whether *they* are offended by the material, or whether they are offended by its availability in the community to those who want it.[181]

the court sat); *Cimino*, 366 A.2d at 1170 (finding the community standards of the State of Connecticut adequate where no "suggestion in the evidence . . . of any difference between [a smaller city area] and the rest of the state as to the degree of sexually provocative material that would be tolerated by the community").

175 *See* Sordillo, Note, *supra* note 167, at 638.

176 *See* Sordillo, Note, *supra* note 167, at 638; *see, e.g.*, Albright v. State, 501 N.E.2d 488, 493-94 (Ind. 1986) (sex therapist's testimony not permitted where it fails to show "how [therapist's specialty with] sexual dysfunction is related to tolerance of sexually explicit material or how attitudes of persons with sexual dysfunction towards sexually explicit materials are related to the general community's attitudes toward sexually explicit material."); Sedelbauer v. State, 455 N.E.2d 1159, 1164-65 (Ind. 1983) (expert testimony of therapist allowable "in order to guide a jury in determining the prurient appeal of material on a specific deviant group," but not allowable for purposes of testifying on community standards in Allen County, Indiana); *see also* Pinkus v. United States, 436 U.S. 293 (1978) ("In applying [Miller], the question involved is not how the picture now impresses the individual juror, but rather, considering the intended and probable recipients, how the picture would have impressed the average person or member of a deviant sexual group at the time they received the picture.").

177 *See* Sordillo, Note, *supra* note 167, at 638; *see, e.g., Sedelbauer*, 455 N.E.2d at 1164-65 (testimony of homosexual not allowable for purposes of establishing community standards in Allen County, Indiana).

178 *See* Sordillo, Note, *supra* note 167, at 638.

179 *See* Sordillo, Note, *supra* note 167, at 640-42.

180 Miller v. California, 413 U.S. at 32.

Therefore, a further inquiry into what one regards as tolerable rather than personally offensive, along with a proper determination of community standards by expert opinion testimony, would not only reflect a more reliable and accurate community standard, but also preserve such issues on appeal.[182] These procedures would provide a more accurate framework in which to determine the community standards regarding homosexual depictions, particularly in the context of the CDC's guidelines, where a particular group is specifically targeted.

4. "Value" Determined

The third prong of the *Miller* test asks whether a particular work, "taken as a whole, lacks serious literary, artistic, political, or scientific value."[183] As one commentator noted, "[t]he value must be more than a mere cosmetic sham, added to the otherwise hardcore obscenity to create a patina of literary merit."[184] The Supreme Court in *Pope v. Illinois*,[185] while re-affirming the contemporary community standard of the first and second prongs of *Miller*, held that with respect to the requirements of redeeming literary, artistic, political, or scientific value of the third prong, a national "reasonable person" standard will govern:

> The proper inquiry is not whether an ordinary member of any given community would find serious literary, artistic, political, or scientific value in allegedly obscene material, but whether a reasonable person would find such value in the material, taken as a whole.[186]

It may be argued that the broadening of the CDC guidelines which will in turn result in homoerotic and sexually suggestive edu-

181 JOHN MONAHAN AND LAURENS WALKER, SOCIAL SCIENCE IN LAW: CASES AND MATERIALS 129 (1994) (quoting FREDRICK SCHAUER, THE LAW OF OBSCENITY 1 (1976)); *cf. United Books, Inc.*, 453 N.E.2d at 410 ("[T]he fact that public tolerance shifts over time does not in itself show that there are no statewide standards, so long as public tolerance shifts uniformly.").

182 *See* Sordillo, Note, *supra* note 167, at 652.

183 *Miller*, 413 U.S. at 24.

184 *See* SMOLLA, *supra* note 95, at 7-23; *see also* Kois v. Wisconsin, 408 U.S. 229, 231 (1972) (pictures containing nudity that are rationally related to an accompanying article are protected).

185 481 U.S. 497, 499 (1987) (holding that it is improper for lower court to instruct jury to determine value of material "as it would be viewed by ordinary adults in the whole State of Illinois").

186 *Id.* at 500-01.

cational materials—in order to properly reach the target audience—would certainly fit into a national reasonable person's standard of embodying the social or political value of reducing the spread of AIDS. Moreover, it is arguable that art is not even relevant in the CDC context, as it is to convey imperative messages regarding the primary focus: preventing the spread of AIDS. The art or style of such messages acts merely as a vehicle to allow as broad dissemination as possible. Although the new uniform reasonable person standard has been criticized,[187] its applicability to works involving homosexual depictions may be two-fold. Although homosexuals are indeed considered a "minority group"[188] warranting a community standard tailored accordingly, AIDS presents a health crisis of national proportions; therefore, aggressive education and information are imperative. Equally important is the adoption of the view that the "community standards" element should consider the alternative interpretation of the tolerance viewpoint[189] and should embrace broader CDC guidelines that can promote sexually suggestive and publicly appealing materials while remaining constitutionally tolerable.

5. Lower Court Interpretations of the Analysis Provided by the Supreme Court

From the limited case law that has surfaced, it appears that the lower federal courts have extended heightened First Amendment protection to materials with homosexual depictions or expression.[190] Moreover, much of the recent case law has involved restric-

187 *See* Shafer, Bradley J., *Sex, Lies, and Videotape: In Critique of the* Miller *Test of Obscenity*, 70 MICH. B.J. 1038, 1042 (1991) (arguing from a social science perspective that different psychological realities such as " 'pluralistic ignorance' (the belief in empirically false propositions about others), 'egocentric bias' (the overestimation of support for an individual's own values among others in society), 'prosecution-induced intolerance' (the skewing of the perception of community tolerance for certain conduct by the simple fact of either numerous or well-publicized prosecutions), and the 'spiral of silence' (the general unwillingness of a silent majority to publicly state its position because it perceives itself to hold a minority opinion)" have an affect on determining the average person standard in the obscenity context where it does not play a role in determining the average person for tort or other types of cases).

188 *See* Allen, *supra* note 69, at 1093 n.108.

189 *See* MONAHAN & WALKER, *supra* note 181.

190 *See* Kristie v. City of Okla. City, 572 F. Supp. 88 (W.D. Okla. 1983). In *Kristie*, a corporation investing in the production of a national contest for female impersonators, sought a preliminary injunction against the City, which had denied a permit for the production on the grounds that the denial constituted a prior restraint. The City argued that the event was "to be an open expression of homosexuality which . . . violated prevailing community standards." *Id.* at 90. Citing the Supreme Court decision in Southeastern Promotions v. Conrad, 420 U.S. 546 (1975), the court discussed the heavy presumption against prior restraints. In response to other arguments challenging the artistic value of the production, the court criticized the subjectivity of the City's approach and went on to hold that "the

tions on homosexually-oriented businesses with the intention that such prohibitions would curb the purported secondary effects—the spread of AIDS.[191]

The Supreme Court's continual difficulties with respect to its obscenity analysis has provided a problematic forum for the additional issue of homosexual depictions and the precise protection that is to be afforded. Admittedly, the Court has been straightforward in its rejection of vague or overreaching statutes that affect protected materials.[192] Moreover, the Supreme Court has expressly recognized the distinction between sexually explicit materials and obscene materials.[193] Also, where the distribution of clearly non-obscene materials is at issue, the Court has unequivocally held that First Amendment protection is unwavering.[194] However, the inherent problem in such an analysis lies in the fact that homosexual sexually explicit depictions are not perceived as analogous to

First Amendment is not an art critic." *Id.* at 91; *see also* Southeastern Promotions v. Conrad, 420 U.S. 546, 554 (denial of a permit to a production of the musical "Hair" was an unconstitutional prior restraint, without reaching obscenity issue). Furthermore, citing the Oklahoma Supreme Court case, The Gay Activists Alliance v. The Board of Regents of the Univ. of Okla., 638 P.2d 1116 (Okla. 1981), the district court asserted that although homosexual expression was not a controlling issue, it is otherwise protected. *Kristie*, 572 F. Supp. at 91. In *Gay Activists Alliance*, a gay student organization sought a preliminary injunction to compel the board of the university to be recognized as an official on-campus organization. The court stated the issue to be "whether constitutional guarantees found in the First Amendment are violated when student organizations . . . are denied recognition due to the content of the message espoused by the organization." *Gay Activists Alliance*, 638 P.2d at 1119. The court answered this affirmatively. Also, it should be noted that some states have declined to follow *Bowers*, *see supra* note 124. *See, e.g.*, Commonwealth of Ky. v. Wasson, 842 S.W.2d 487, 493 (Ky. 1992), *reh'g denied*, Jan. 21, 1993 (rejecting *Bowers* and striking down a homosexual sodomy statute) ("Deviate sexual intercourse conducted in private by consenting adults is not beyond the protections of the guarantees of individual liberty in our Kentucky Constitution simply because 'proscriptions against that conduct have ancient roots.' ").

191 *See* Ellwest Stereo Theater v. Boner, 718 F. Supp. 1553 (M.D. Tenn. 1989) (ordinance that required certain disclosures of stockholders or interested parties of adult-oriented businesses were not rationally related to objective to regulate such businesses to control the spread of AIDS); *see also*, Bamon Corp. v. City of Dayton, 730 F. Supp. 80 (S.D. Ohio 1990) (ordinance targeting sexual activity "between adult males" in "closed peep show booths in adult bookstores" to reduce spread of AIDS was valid as furthering a substantial governmental interest); Citizens for Responsible Behavior v. Riverside City Council, 2 Cal. Rptr.2d 648 (App. 4 Dist. 1991) (invalidating city ordinance that prohibits against the future enactment of any ordinance which " 'promotes, encourages, endorses, legitimizes or justifies homosexuality' "); *cf.* 42 U.S.C. § 300ee(c) ("None of the funds appropriated . . . may be used to provide education or information designed to promote or encourage, directly, homosexual or heterosexual activity . . . .").

192 *See* SMOLLA, *supra* note 95, § 3.06, at 3-11.

193 *See Roth*, 354 U.S. at 487 ("[S]ex and obscenity are not synonymous. Obscene material is material that deals with sex in a manner appealing to prurient interest. The portrayal of sex, e.g., in art, literature and scientific works, is not itself sufficient reason to deny material the constitutional protection of freedom of speech and press." (footnotes omitted)).

194 *Manual Enters., Inc.*, 370 U.S. 478 (1962); *see supra* note 137.

heterosexual sexually explicit materials.[195] This is aggravated by (i) public perception that homosexuality is intimately connected with one's identity;[196] (ii) the denial of certain privacy rights to homosexuals;[197] and (iii) judicial acceptance of restrictions on intimate behavior, premised upon moral justifications.[198] As with any obscenity analysis, all of these factors affect subjectivity,[199] particularly with respect to the "community standards" prong of the test enunciated in *Miller*.

The Court's unanimous reversal in *One, Inc.*[200] acknowledged the protection afforded to homosexual expression under the First Amendment, specifically, that a homoerotic depiction is not per se obscene.[201] However, there was no analysis regarding the extent of sexually explicit homoerotic depictions. Moreover, because *One, Inc.* was a pre-*Miller* case, no factual determinations such as "community standards" or "redeeming value" were made.[202] Thus, the lower courts are left to speculate as to the Court's position on homosexual expression within the context of determining obscenity under the First Amendment. Furthermore, with an accurate application of the community standards prong of the *Miller* test, sexually explicit homoerotic depictions will likely be protected to the same extent as heterosexual depictions.

The problems inherent in an obscenity analysis are alleviated in the context of the CDC guidelines, as the homoerotic messages/depictions are not for artistic expression purposes. Rather, they are merely an effective vehicle for the distribution and communication of information necessary to properly combat a national health crisis. Thus, while the obscenity analysis is inapplicable for the CDC guidelines, it is necessary to argue that in order to target the homosexual community with information regarding the prevention of the spread of AIDS, the CDC guidelines necessitates homoerotic material that is constitutionally protected within the boundaries of obscenity. In other words, what public policy necessitates—*sexually explicit homoerotic materials for effective dissemination*—and what the courts prohibit—*obscene materials*—are wholly reconcilable.

195 *See* Allen, *supra* note 69, at 1093.
196 Allen, *supra* note 69, at 1093 n.108.
197 *See* Bowers v. Hardwick, 478 U.S. 186 (1986).
198 *Id.* at 196; *see also Glen Theatre*, 501 U.S. at 569 (upholding state public indecency law and following *Bowers* in accepting a moral justification).
199 *See* Shafer, *supra* note 187, at 1042.
200 355 U.S. 371 (1958), *rev'g without an opinion* 241 F.2d 772 (9th Cir. 1957).
201 *Id.*
202 *Id.*

IV. The NEA—An Adequate Model?

The National Endowment for the Arts (the "NEA") was established by Congress "to help create and sustain not only a climate encouraging freedom of thought, imagination and inquiry but also the material conditions facilitating the release of . . . creative talent."[203] The Chairperson of the NEA "is authorized to establish and carry out a program of contracts with, or grants-in-aid or loans to, groups or . . . individuals of exceptional talent engaged in or concerned with the arts."[204] The NEA is comprised of a twenty-six person council and a chairperson, all of whom are appointed by the President and subject to the approval of the Senate.[205]

Both federally funded programs, the NEA and the CDC, raise similar problems inherent in their respective functions. First, both dictate policies that have tremendous First Amendment implications.[206] Second, since both the CDC and the NEA are created through the statutory authority of Congress which funds expressive activity with government money, both raise the issues of subsidized speech and the level of scrutiny with which courts must analyze the respective First Amendment implications. Restrictions imposed on federally subsidized speech forces potential recipients to speculate and to curb future programs and materials for fear of either (i) indiscernible grant standards, as with the CDC revised grant terms;[207] or (ii) the possibility of being denied funding, as with the many recipients of NEA funding and the litigation it has initiated.[208] Third, both the CDC and the NEA suggest, or have suggested,[209] policy that could be interpreted as construing homosexual expression as per se obscene. Lastly, both agencies are profoundly influenced by the political climate.[210] Like most governmental organizations, both the NEA and the CDC "set the

203 20 U.S.C. § 952(7) (1988).
204 20 U.S.C. § 954(c).
205 *See* 20 U.S.C. §§ 954(b)(1), 955(b)(1).
206 The First Amendment implications stem from the notion of governmental neutrality in the context of the public subsidization of art, public funding of the press, and university activities. Where the government places subjective content-restrictions upon funding recipients, that purported neutrality is jeopardized; thus, First Amendment principles are triggered. *See* Finley v. National Endowment for the Arts, 795 F. Supp. 1457, 1472-73 (C.D. Cal. 1992).
207 *See supra notes* 55-67 *and accompanying text.*
208 *See Finley*, 795 F. Supp. 1457; Bella Lewitzky Dance Found. v. Frohnmayer, Nat'l Endowment for the Arts, 754 F. Supp. 774 (C.D. Cal. 1992).
209 *See infra* notes 214-233 and accompanying text.
210 *See* Pamela Weinstock, Note, *The National Endowment for the Arts Funding Controversy and the* Miller *Test: A Plea for the Reunification of Art and Society*, 72 B.U. L. Rev. 803, 816 (1992); *see also* 141 Cong. Rec. H163, 169 (daily ed. Jan. 9, 1995).

stage" and influence the alternate private funding opportunities[211] available to those that seek funds in the first place.[212] Conversely, courts have stated that both organizations have the potential to create a "chilling effect" that leads to self-censorship, out of fear that funding will otherwise not be granted.[213] Thus, an examination of the NEA's funding policies, related controversies, and resulting amendments will provide valuable insight which can be used to properly structure the CDC funding regulations. Also, such a comparison will not only highlight the differences between the purported objectives of the respective agencies, but will also necessitate disparate judicial scrutiny upon such programs.

A. *First Amendment Implications*

In the spring of 1989, debate over screening and funding processes in the Senate was sparked by two projects that received NEA funding.[214] Both projects were criticized as being either sacrilegious or obscene.[215] These debates lead to Congress' adoption of portions of the Department of the Interior and Related Agencies Appropriations Act of 1990, which provided:

> None of the funds authorized to be appropriated for the National Endowment for the Arts . . . may be used to promote, disseminate, or produce materials which in the judgment of the National Endowment for the Arts . . . may be considered obscene, including but not limited to, depictions of sadomasochism, homoeroticism, the sexual exploitation of children, or individuals engaged in sex acts and which, when taken as a whole, do not have serious literary, artistic, political, or scientific value.[216]

Several artists[217] sought declaratory judgments on the grounds that the language set out in section 304, above, violates the First Amendment.[218] The plaintiffs challenged the constitutionality of section 304 and the procedure implemented thereby which required certification, or a sworn statement, from the potential funding recipient.[219] Furthermore, the plaintiffs claimed that section 304 was implemented without the procedural safeguards set out in a relevant Supreme Court case.[220] Although the administration of section 304(a) was struck down by the courts;[221] the language itself declared unconstitutional;[222] and the so-called "decency provision,"[223] incorporated in the statutory authority that created the NEA, was also struck down,[224] Congress has expressly dealt with

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211 *See* 20 U.S.C. § 954(e) which reads:

> The total amount of any grant to any group pursuant to subsection (c) of this section shall not exceed 50 per centum of the total cost of such project or production, except that not more than 20 per centum of the funds allotted by the [NEA] for the purposes of subsection (c) of this section for any fiscal year may be available for grants and contracts in that fiscal year without regard to such limitation.

20 U.S.C. § 954(e) (Supp. IV 1994).

212 Arguments have been made suggesting that the NEA, as a result of its responsibilities, has an obligation to fund, particularly where funding is being denied to potential "troublemakers." *See* Anne L. Rody, Note, *Federal Arts Funding At What Cost? The Impact of Funding Guidelines on the First Amendment and the Future of Art in America*, 1 FORDHAM ENT. MEDIA & INTELL. PROP. L. F. 175, 182 (1991) ("Screening based on content for funding purposes may not render the creation of certain artwork illegal, i.e., it may not constitute censorship per se, but for the NEA to 'merely deny' grant money to 'troublemakers' is de facto censorship—it ultimately results in censorship.").

213 *See GMHC II*, 792 F. Supp. at 303.

214 One project was an exhibit of Robert Mapplethorpe's photography which included homoerotic images; the other was a widely publicized exhibit entitled "Piss Christ," a work by Andres Serrano.

215 *See* 135 CONG. REC. S5594 (daily ed. May 18, 1989); 135 CONG. REC. S5805 (daily ed. May 31, 1989).

216 Pub. L. No. 101-121, § 304(a), 103 Stat. 701, 741. The original language in this amendment, as introduced by Senator Helms, read as follows:

> None of the funds authorized to be appropriated pursuant to this Act may be used to promote, disseminate, or produce: (1) obscene or indecent materials, including but not limited to depictions of sadomasochism, homoeroticism, the exploitation of children, or individuals engaged in sex acts; or (2) material which denigrates the objects or beliefs of the adherents of a particular religion or non-religion; or (3) material which denigrates, debases, or reviles a person, group, or class of citizens on the basis of race, creed, sex, handicap, age, or national origin.

135 CONG. REC. 8807 (1989); *see also* Jesse Helms, *Is it Art or Tax-Paid Obscenity? The NEA Controversy*, 2 J.L. & POL'Y 99, 102 (1994).

217 The "NEA Four" included artists Karen Finley, John Fleck, Holly Hughes, and Tim Miller. *See Finley*, 795 F. Supp. at 1462.

218 *Id.*

219 *Id.* at 1461.

220 *Id.* at 1464 (citing *Southeastern Promotions, Ltd.*, 420 U.S. 546), *see supra* note 190, (holding that where the government acts to impose a prior restraint, an additional procedural requirement will be imposed, that includes setting forth in a detailed written statement the reasons for the denial). The plaintiffs unsuccessfully further argued that the implementation of § 304 lacked the procedural safeguards demanded in *Southeastern Promotions*. *Id.*

221 *See Bella Lewitzky Dance Found.*, 754 F. Supp. at 774.

222 *See Finley*, 795 F. Supp. at 1475.

223 20 U.S.C. § 954(d)(1) (1988 & Supp. 1993) states in relevant part:

> (d) No payment shall be made under this section except upon application therefor which is submitted to the [NEA] in accordance with regulations issued and procedures established by the Chairperson. In establishing such regulations and procedures, the Chairperson shall ensure that—
>
> (1) artistic excellence and artistic merit are the criteria by which applications are judged, taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public. . . .

224 *See Finley*, 795 F. Supp. at 1474, *appeal filed*, Finley v. National Endowment for the Arts, No. 92-56028 (9th Cir. filed Mar. 30, 1993). The claims that the government violated the artists' privacy by disclosing details of their grant proposals to the press were settled out of court. Finley v. National Endowment for the Arts, CD CA, No. CV90-5235-AWT (June 4, 1993). *See National Endowment for the Arts Settles Lawsuit Brought by Performance Artists*, ENT. L. REP., Vol. 15, No. 3, at 28 (Aug. 1993). The settlement did not contemplate the issue of the constitutionality of the decency provision. *Id.*

the obscenity issue by statutorily proscribing the standards set out in *Miller v. California*.[225]

Another recent controversy involved a performance with AIDS-related and homosexual themes at the Walker Art Center,[226] a Minnesota organization that receives funding from the NEA.[227] That performance precipitated yet another proposed amendment presented by Senator Helms (the "1994 Helms Amendment"). The 1994 Helms Amendment read in relevant part as follows:

> Notwithstanding any other provision of law, none of the funds made available under this Act to the [NEA] may be used by the Endowment, or by any other recipient of such funds, to support, reward, or award financial assistance to any activity or work involving:

[225] 413 U.S. 15. 20 U.S.C. § 952(l) reads as follows:

> The term "obscene" means with respect to a project, production, workshop, or program that —
>
> (1) the average person, applying contemporary community standards, would find that such project, production, workshop, or program, when taken as a whole, appeals to the prurient interest;
>
> (2) such project, production, workshop, or program depicts or describes sexual conduct in a patently offensive way; and
>
> (3) such project, production, workshop, or program, when taken as a whole, lacks serious literary, artistic, political, or scientific value.

As distinguished from a generally accepted (although inconsistently applied) obscenity standard, the decency provision, it has been argued, raises three distinct constitutional problems:

> First, it may create a prior restraint . . . because the determination of what is decent is administratively applied. Second, the terms "decency" and "respect" may be unconstitutionally vague. At the very least, these terms require the artist or arts organization to guess at the chairperson's version as to what comports with general standards of decency and respect. Finally, this language is far broader than the term "obscene," for what may be indecent may not be obscene. Nevertheless, the chairperson is now authorized to refuse to fund art that while not obscene, is beyond general standards of decency—art that should be protected by the First Amendment.

Elizabeth DeGrazia, *In Search of Artistic Excellence: Structural Reform of the National Endowment for the Arts*, 12 CARDOZO ARTS & ENT. L.J. 133, 161 (1994) (footnotes omitted).

[226] *See* 140 CONG. REC. S9606, 9610 (daily ed. July 25, 1994).

[227] The Walker Art Center received approximately $104,500 from the NEA in 1994, $150 of which went to this rather controversial performance. This performance has been described in two very different ways: *See* Letter to Senator Paul Eight from Kathy Ate, Lawrence Perlman, and Tom Crosby, Jr., Director of Walker Art Center, Chairman of the Board of Directors, and President of the Board of Directors, respectively, read into the record, 140 CONG. REC. S9606, 9611 (1994) ("The performance, which . . . has been seen in other communities such as Los Angeles and Chicago, dealt with the difficult issues surrounding AIDS. . . . This performance drew on centuries-old traditions from around the world and included a ceremony related to the African tradition of sacrafication which involved the drawing of a small amount of blood. Because of the nature of this performance, the Walker Center took all appropriate precautions as developed by the [CDC]"); 140 CONG. REC. at 9609 (statement of Sen. Helms) ("[The performance artist] informed his audience that he has the AIDS virus. Then he begins his bloody performance, but he tells them nothing about the HIV status of the other performers whom he later slashes and slices on the stage. He keeps that a secret.").

> (a) human mutilation or invasive bodily procedures on human beings dead or alive; or
>
> (b) the drawing or letting of blood.[228]

After lengthy debate,[229] the 1994 Helms Amendment was narrowly defeated.[230]

The controversy surrounding the NEA has its limitations as a basis for comparison with the CDC due to the inherent nature of such a federal agency. One limitation is that a determination of whether to fund the arts at all rests solely with Congress.[231] Another is that funding determinations for art rests with the NEA.[232] However, the difficulties arise here, as with other forms of subsidized speech, where the guidelines set forth by such governmental agencies test constitutional limitations.[233]

B. *Subsidized Speech and Level of Scrutiny*

Karen Finley and other "controversial" artists, after being denied funding on the basis of what they deemed to be "impermissible political grounds," challenged the NEA by claiming that it did not adhere to the procedural safeguards mandated by the First Amendment.[234] In addition, the artists, joined by the National Association of Artists' Organization, made a facial constitutional challenge based on the First and Fifth Amendments to the so-called "decency clause,"[235] and its legislative counterparts. The plaintiffs claimed that the NEA violated their First Amendment interests by "denying their applications because of the content of their past ar-

[228] 140 CONG. REC. 9607.

[229] *Id.* at 9609-9626.

[230] *Id.* at 9626; *see also* Jacqueline Trescott, *NEA Budget Sliced Over Bloodletting: Senate Reacts to Performance Artist's Act*, WASH. POST, July 26, 1994, at E1.

[231] 20 U.S.C. § 954(a) (1994) ("There is established within the Foundation a National Endowment for the Arts.").

[232] 20 U.S.C. § 952(d)(1) ("No payment shall be made under this section except upon application therefor which is submitted to the [NEA] in accordance with regulations issued and procedures established by the Chairperson. In establishing such regulations and procedures, the Chairperson shall ensure that artistic excellence and artistic merit are the criteria by which applications are judged, taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public.").

[233] In a similar challenge to § 304, Floyd Abrams, counsel for The New School for Social Research argued that:

> [O]ne [limitation] is that government may not require, as a precondition for any public benefit, that documents be signed and promises extracted which, by their nature, are so vague that those who do act at their peril. Another [limitation] is that the price tag for a publicly funded benefit may not be the forced surrender of First Amendment rights.

Mem. of Law in Support of Pl.'s Motion for a Prelim. Inj., New School for Social Research v. Frohnmayer, Nat'l Endowment for the Arts, No. 90 Civ. 3510 (S.D.N.Y. May 23, 1990).

[234] *Finley*, 795 F. Supp. at 1462; *see also supra* note 219 and accompanying text.

[235] 20 U.S.C. § 954(d); *see also supra* note 223.

tistic expression and by failing to provide a written statement of the reasons for the denial."[236]

In discussing *Rust v. Sullivan*[237] and its applicability with respect to creating an "unconstitutional condition," the district court restated the legislative history surrounding the creation of the NEA, and the notion that "[a]rtistic expression, no less than academic speech or journalism, is the core of a democratic society's cultural and political vitality."[238] The court stressed the close relationship between academia and artistic expression and concluded that:

> [P]rofessional evaluations of artistic merit are permissible, but decisions based on wholly subjective criterion of 'decency' are not. Thus, the fact that the exercise of professional judgment is inescapable in arts funding does not mean that the government has free rein to impose whatever content restrictions it chooses, just as the fact that academic judgment is inescapable in the university does not free public universities of First Amendment scrutiny. The right of artists to challenge conventional wisdom and values is a cornerstone of artistic and academic freedom, no less than the rights of scientists funded by the National Institutes of Health.[239]

The Court went on to conclude that the First Amendment requires the "breathing space" that the decency clause seeks to suppress and thus "clearly reaches a substantial amount of protected speech."[240]

In *Bella Lewitzky Dance Foundation v. Frohnmayer, National Endowment for the Arts*,[241] plaintiffs brought a constitutional challenge in the same court as *Finley*, and contended that the certification requirement in section 304 of the Appropriations Act[242] was unconstitutionally vague and that the guidelines violated the First Amendment.[243] Plaintiffs challenged the NEA's requirement that in order for grant funds to be released, a certification was to be signed in compliance with the terms set out in section 304.

236 *Finley*, 795 F. Supp. at 1463. In support of this contention, the individual plaintiffs claimed that John Frohnmayer, then Chairman of the NEA, requested the re-evaluation of certain artists' applications after "two of his close friends had attended a Karen Finley show and had reported to him that it was not obscene." *Id.* at 1464. This, the plaintiffs contended, confirmed that certain applications were being denied based on past performances, which constituted, in effect, a penalty for past speech. *Id.*

237 500 U.S. 173 (1991); *see also supra* notes 73-114 and accompanying text.

238 *Finley*, 795 F. Supp. at 1473.

239 *Id.* at 1475 (citations omitted).

240 *Id.* at 1476.

241 *Bella Lewitzky Dance Found.*, 754 F. Supp. at 774.

242 *See supra* note 216.

243 *Bella Lewitzky Dance Found.*, 754 F. Supp. at 783.

Although not expressly concluding that section 304 was facially unconstitutional, the Court struck down the certification requirement and concluded that once the plaintiffs had received the approval for funding from the NEA, the certification requirement forced the recipients to attest to criteria that were indiscernible.[244]

In *Bella Lewitzky*, the district court did not expressly identify a specific level of scrutiny that was applied, but rather it cited *Perry v. Sindermann*[245] and held that the certification requirement of section 304, in effect, infringes upon the artists' First Amendment rights.[246] In *Finley*, the district court applied a different analysis to two primary claims: (i) the chairperson of the NEA violated procedural requirements by taking a "poll of individual [c]ouncil members for their respective recommendations"[247] regarding the allocation of grants, and that (ii) the decency clause is unconstitutionally overbroad and vague.[248]

To the first claim, the *Finley* court applied the test outlined by the Supreme Court in *Chevron U.S.A. v. Natural Resources Defense Council*,[249] and held that the congressional intent was clear in the

244 "[T]he government may not place restrictions on disbursement of those grants that require grantees to certify to obscenity provisions that are vague in violation of the Fifth Amendment, and which correspondingly cause a chilling effect in violation of the First Amendment." *Id.* at 785. It is crucial to note, however, that the *Bella Lewitzky* decision only attacks the certification requirement; it does not conclude that section 304, on its face, is unconstitutional, as the plaintiffs did not choose to further that argument. *See* Pl.'s Mem. Supp. Prelim. Inj.; Pl.'s Repl. Mem. Supp. Prelim. Inj. & Summ. J., New School for Social Research v. Frohnmayer and the National Endowment for the Arts, Case No. 90 Civ. 3510 (1990) (presenting another challenge to the application of the certification requirement in addition to a facial constitutional challenge to § 304 of the Appropriations Act.) ("It is simply not permissible for government to extract a promise from recipients of its benefits not to take certain actions (let alone constitutionally protected ones) in the absence of clear guidelines as to what is and what is not proscribed. This is especially so where the right to freedom of expression is the cost."). Pl.'s Mem. Supp. Prelim. Inj., *New School*, 90 Civ. 3510.

245 408 U.S. 593; *see supra* note 85.

246 *See Bella Lewitzky*, 754 F. Supp. at 785. Despite the NEA's argument that the certification requirement "is nothing more than a governmental decision not to subsidize the exercise of particular protected expression," the court reasoned that because the NEA's central financial role in the art world initiates private investors to back certain artistic programs, "an artist cannot, as [the NEA] claim[s], ignore the vague certification requirement and be no worse off than if the NEA had not entered the funding business at all." *Id.* at 784-85.

247 *Finley*, 795 F. Supp. at 1465. The plaintiffs argued that the denial of their grants was not arrived at in the proper manner proscribed by the statute. *See* 20 U.S.C. § 955(d) & (f).

248 *Finley*, 795 F. Supp. at 1475.

249 467 U.S. 837 (1984) (holding that the proper test for a court to apply in reviewing the judgments of a statutorily-created agency is to first determine "whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific

implementation of the procedures to which the NEA chairperson must adhere.[250] Thus, any transgression from such procedure constituted adequate grounds for the district court to set aside such action taken by the NEA.[251] To the second claim, the district court held that the decency clause was unconstitutionally overbroad on its face as it "sweeps within its ambit speech and artistic expression which otherwise is protected by the First Amendment."[252] Therefore, in the NEA litigation, the courts have not so much relied on varying levels of judicial scrutiny as much as they have (i) examined congressional intent behind the federal agency;[253] and (ii) contemplated the overriding First Amendment principles regarding the NEA's central role in artistic expression.[254] Such standards of scrutiny and governmental interests become even more forceful in the CDC context, where disseminating information is vital.

C. *Congressional Ambivalence and Homosexual Expression*

Like that of the CDC, the content restrictions promulgated by the NEA have blurred the line between homosexual depictions and obscenity. Not only has this been established by case law surrounding the NEA,[255] it has also been established expressly by members of Congress.[256] The "homoerotic" controversy surrounding the

issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute."). *Id.* at 842-43. The *Finley* court, in finding unquestionable Congressional intent, held that it was unnecessary to reach the second prong of the *Chevron* test. *See Finley*, 795 F. Supp. at 1466. Because *Chevron* involved the judicial reviewability of federal agencies' statutory construction and subsequent quasi-adjudicative judgments, that case and the test created are beyond the scope of this Note, as only the CDC's legislation and federal regulations are at issue since no judgments have been issued.

250 *Finley*, 795 F. Supp. at 1466.

251 *Id.*

252 *Id.*

253 *Id.*

254 *See Bella Lewitzky*, 754 F. Supp. at 785; *see also* Alvaro Ignacio Anillo, Note, *The National Endowment for the Humanities: Control of Funding Versus Academic Freedom*, 45 VAND. L. REV. 455 (1992) (arguing for the application of strict scrutiny in reviewing conditions attached to grants set forth by the National Endowment for the Humanities).

255 *See Finley*, 795 F. Supp. at 1461 (discussing the photography exhibit by Robert Mapplethorpe, which included homoerotic images, the court recognized that much of the recent controversy has stemmed from artists' depictions that "express women's anger over male dominance in the realm of sexuality or which endorse equal legitimacy for homosexual and heterosexual practices").

256 Some sentiments stated in Congress over the NEA controversy in Congress include: "[T]he [NEA] has been giving untold thousands upon thousands of dollars to people who mutilate corpses in the name of art; or who hand out $10 bills to illegal immigrants at the Mexican border, *$10 bills that they got from the [NEA]; or individuals who promote vulgar*, rotten, homosexual film festivals, or commit acts calculated to outrage the sensibilities of decent Americans who are required to put up the money to reward such garbage." 139 CONG. REC. S11,705-04 (daily ed. Sept. 15, 1993) (statement of Sen. Packwood); "[A]s a taxpayer, and maybe as a person who has some responsibility over taxpayers' funds, I find it very offensive to think that we as taxpayers would be subsidizing homoerotic art." 137 CONG. REC. S16,195-01 (daily ed. Nov. 7, 1991) (statement of Sen. Nickles); "Reporter after

Robert Mapplethorpe exhibit sheds some light upon the broader issues at stake: the significance of homoerotic images in the art world at the onset of the AIDS epidemic;[257] the role that art has with respect to matters of public and cultural significance;[258] and the apparent disparity inherent in the differentiation between homosexual and heterosexual depictions.[259] The Helms Amendment, by restricting homoerotic images, successfully frustrated the efforts of gay rights and AIDS activists from acquiring the funds that would have provided a forum to display such works.[260] Moreover, such projects clearly sought to address pressing matters of social concern and the ignorance that inevitably accompanies it. With the Helms Amendment no longer enforced, only time will indicate the residual effects of its content-based restrictions upon potential projects and future recipients. Furthermore, despite the well-established obscenity guidelines now embodied in the legislation,[261] and the appointment of Jane Alexander as the new NEA Chairperson,[262] the fate of the federal agency that was initially created for the purposes of fostering young talent, and encouraging cultural and artistic diversity hangs in the balance with the newly-elected 104th Congress.[263]

reporter, show after show, cries of censorship even though they know that is false. They have hidden from the public what the issue really is—that is Government support for indecency, rottenness, homosexuality, sodomy, bestiality." 137 CONG. REC. S15,643-01 (daily ed. Oct. 31, 1991) (statement of Sen. Helms).

257 *See* Shipley, Note, *supra* note 18, at 241. Referring to one person's impression of the Mapplethorpe exhibit, a journalist stated:

> There were no giggles, scarcely any whispers. It was as if everyone felt the moral weight of the issues. And one felt almost palpable resistance to face the thoughts that the show generated, which each visitor had to overcome. It is not an easy experience, but it is a crucial one. Art is more than just art.

Id. at 264.

258 *See id.* at 262 n.120-29 (discussing the effect of art upon "cultural enlightenment").

259 Shipley, Note, *supra* note 18. ("Despite the homophobic cries of certain legislators, the fact that the erotica portrayed by Mapplethorpe is homosexual rather than heterosexual is not principled ground to deny constitutional protection.").

260 Shipley, Note, *supra* note 18, at 294.

261 *See* 20 U.S.C. § 952(l) (1994).

262 See Letter from President Bill Clinton to Senator Edward M. Kennedy, Chairman, Committee on Labor and Human Resources (nominating Jane Alexander to head the NEA) (Aug. 6, 1993) ("Over thirty years ago, President John F. Kennedy said, 'I see little of more importance to the future of our country and our civilization than full recognition of the place of the artist.' With those words as her challenge, I am confident Jane Alexander, when confirmed by the Senate, will work tirelessly and courageously to make the arts a full and productive partner in our nation's future."). *For a post-confirmation commentary, see* Frank Rich, N.Y. TIMES MAG., Oct. 10, 1993, at 66 ("[P]ublic relations can take Alexander only so far. After years of neglect and demonization, the arts needs a courageous advocate in Washington, not merely a decorous diplomat who will preserve the poorly financed status quo so that Congressmen can stop worrying that a tiny agency will thrust them into embarrassing, no-win ideological battles.").

263 *See, e.g.*, Robert Pear, *A Hostile House Trains Its Sights on Funds for Arts*, N.Y. TIMES, Jan. 9, 1995, at A1 ("The National Endowment for the Arts is preparing to fight for survival as

The controversy appears to be moving away from debates over obscenity and focusing on a more precise definition of artistic merit that warrants funding. Furthermore, other state-funded controversies have diverted attention away from that of the NEA.[264] Nonetheless, despite the elimination of its content-based restrictions, the NEA is now focusing on the process of reorganizing to establish broader appeal, both artistically and politically.[265]

Although the goals of the respective federal agencies—the CDC and the NEA—are different with respect to the actual governmental interests being furthered, the policies and debates surrounding both have been quite similar. It must be noted that art is indeed art—and although the images and messages evoked can be thought-provoking, perhaps even devastating, they do not necessarily seek to remedy a national health crisis. However, the CDC does, and for that reason alone, the guidelines should be as lenient as possible. The NEA, by eliminating content restrictions and continuing to maintain efforts to fund provocative materials/performances with alternate viewpoints, has started down that path, now the CDC must follow.

V. Proposed Legislation

This section provides a model for proposed legislation for the CDC that would more adequately distinguish materials that do not further the governmental objective of widely disseminating AIDS-related educational materials while still fostering other experimental and non-traditional materials by which such messages may be effectively communicated. First, the obscenity standard enunciated in *Miller v. California*[266] should be applied rather than the once indiscernible "offensiveness" or the currently uncertain "controversial" standard. Furthermore, the obscenity issue is not remedied by skirting the issue entirely with statements that "such messages may be controversial," as the CDC has suggested in its most recent guideline proposal.[267] Allowing for controversial messages and materials is an empty gesture without understandable limitations. The only "limitations" that have been constitutionally acceptable up to this point have been incorporated in *Miller*, therefore, it is this standard that should be expressly adopted.[268]

Second, by emphasizing a local community-based standard, the CDC could foster unorthodox means of disseminating information while recognizing that standards—not to mention target groups—differ among communities. Thus, there ought to be an essential emphasis on fostering non-traditional, innovative and effective means in relation to the community and the target group where the organization is situated.

A. Model Guidelines that Collaborate with Government Objectives to Foster Provocative Materials

A model of the Content Guidelines might read as follows:

Basic Principles

Prevention and education are the only currently existing methods of curbing the number of individuals who will be infected with Human Immunodeficiency Virus (HIV), the virus that precipitates Acquired Immunodeficiency Syndrome (AIDS), this year. Therefore, messages and educational materials must be communicated to target communities effectively and accurately. Messages must inform the public of the methods by which they can protect themselves and others from acquiring the virus. Moreover, accurate information about the health risks relating to people

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House Republican leaders take aim at its budget and challenge its very existence."); Ralph Blumenthal, *Cultural Groups Mobilize to Take on the New Congress*, N.Y. Times, Jan. 10, 1995, at C11.

264 The recent decision in Marietta, Georgia, Cobb County, to cut off all state funding to the arts for 1994 after a production of "Lips Together, Teeth Apart," among other productions, was deemed contrary to "family values and morals" illustrates the fine lines between the government's role in the arts and First Amendment protections, more specifically, what happens when these interests conflict—especially with respect to homosexuality and the arts. *See* N.Y. Times, Aug. 29, 1993, at B12 ("There are not many counties in America more conservative than [Cobb County] . . . so it was not entirely out of character when the Cobb County Board of Commissioners this month passed a resolution condemning homosexuality, and then decided to cut off all arts financing rather than have to decide what art offended community values.").

265 Upon the arrival of Jane Alexander, in addition to the Clinton Administration's efforts, the New York Times stated:

> [s]o far, the President's main accomplishment in the arts has not been in tangible areas of policy or money but in intangibles: in creating an aura of support, a sense that after the culturally bleak Reagan and Bush years, the arts are viewed with sympathy by the White House. . . . Ms. Alexander brought to the job the independent stature of a well-known figure in the arts, and more than a little of her luster has rubbed off on the endowment, an agency whose standing with the public was badly bruised by the obscenity debates."

N.Y. Times, Mar. 23, 1994, at C13; *see also supra* note 262 and accompanying text.

266 413 U.S. 15; *see supra* note 125 and accompanying text.

267 *See* Proposed Requirements for Content of AIDS-Related Written Materials, Pictorials, Audiovisuals, Questionnaires, Survey Instruments, and Educational Sessions in Centers for Disease Control Assistance Programs, 58 Fed. Reg. 59,726 (1993).

268 It should be noted that although the CDC is attempting to be least restrictive by stating what the materials "*may*" include, the CDC should be consistent with well-established judicial doctrines in specifying precisely what they *cannot* include—otherwise, the CDC will be working backwards and a potential recipient may be left with a denied grant—and these groups do not have the money or the resources to conduct a trial-and-error process which is a likely result of indiscernible guidelines. In other words, permitting "*controversial*" materials still presents the same vagueness problems as the previous standards that have been struck down by the *GMHC* court, leading to further vagueness problems.

who are HIV positive or have AIDS should be provided so as to eliminate, to the greatest extent possible, misconceptions or false information. Moreover, the technical accuracy of AIDS-related messages is essential. Messages provided to the public should include, but need not be limited to, abstinence from illegal intravenous drug use; the promotion of monogamous relationships with an uninfected partner; and the practice of "safe sex." For members of the respective intended audiences who do not cease such behavior that is most susceptible to risk, more non-traditional, provocative messages should be provided to effectuate communication.

The Program Review Panel must review such messages and materials in light of relative statistics and community-based factors such as the target groups at which such materials are aimed. Due to the fact that the AIDS epidemic is in its thirteenth year, and in spite of a societal awareness which supposedly has been heightened since 1986 when the CDC first implemented its informational program, new methods must be employed. These materials must be more provocative, taking into consideration that certain target groups have not been responsive to previous conventional messages; such individuals comprise the high risk target groups to which such materials should be tailored.

Content Requirements

Written materials (e.g., pamphlets, brochures, fliers), audiovisual materials (e.g., motion pictures and video tapes), and pictorials (e.g., posters and similar educational materials using photographs, slides, drawings, or paintings) should utilize terms, descriptions, depictions, or displays necessary to communicate to the target audience such messages which would provide a greater understanding of safe sex practices; the risks of intravenous drug use; and other types of information relating to HIV transmission and prevention. Such messages may be sexually explicit, non-traditional, and controversial within the confines of the obscenity doctrine enunciated in Miller v. California. *In conformity with the* Miller *standard, the following factors should be considered to determine whether such educational materials are obscene: (i) whether the average person applying local community standards would find that the work, taken as a whole, appeals to the prurient interest; and (ii) whether the material, taken as a whole, lacks serious literary, artistic, political, or scientific value so as not to be reasonably related to the purposes behind AIDS-educational material distribution. Sexually explicit messages include but are not limited to non-obscene depictions of safe homosexual and heterosexual sexual activity; encouragement of safe sex practices—both homosexual and heterosexual—in so far as such depictions meet the obscenity standard enunciated above. The community standards to which such messages will be subjected will be that of the target group or intended audience of the funding recipient.*

B. A Different Emphasis

There are four elements that should be emphasized in the above proposed legislation to amend the current CDC guidelines. First, the CDC would be recognizing that funding recipients must now reach previously unreached target groups that may have been ignored due to limitations of past guidelines. Second, the obscenity standard ought to be explicitly stated and should not include an unconstitutional "offensiveness" standard or ambiguous "controversial" standard. Third, allowing the use of sexually explicit materials—which encourage safe homosexual and heterosexual activity[269]—will provide a means for reaching problematic target groups within the clear confines of *Miller*. Finally, a standard that emphasizes the target community will allow for diverse and innovative messages that will be tailored to meet the needs of local communities.[270]

VI. Conclusion

After nearly ten years of CDC-sponsored programs, AIDS continues to ravage society as it enters its second decade. With no foreseeable cure, prevention of HIV transmission is the only existing method of curbing the rate of the contraction of AIDS. Providing education that might reach target risk groups must be a primary focus in these efforts. The controversial nature of subsidized speech or expression is evidenced not only by the CDC's prevailing case law, but also by the varying range of enactments and their subsequent amendments. The courts have provided some guidance as to the level of scrutiny by which such legislation will be analyzed in the constitutional context.[271] The problem arises, however, when such enactments of the CDC have stretched constitu-

269 It should be noted that the elimination of the clause that rejects materials that "encourag[e] homosexual or heterosexual sexual activity" will be significantly less restrictive. *Cf. supra notes* 57-60 and accompanying text. Although the initial version of this clause only prohibited the encouragement of *homosexual* sexual activity, it was then amended to include both homosexual and heterosexual activity, thus making it seemingly less restrictive. However, although Congress sought to provide content guidelines with neutral terms, it created a broader restriction. Therefore, since safe sex has been an integral part of the prevention efforts, this content restriction should be eliminated. *See supra* notes 30-40 and accompanying text.

270 *See* Allen, *supra* note 69, at 1103 (suggesting the importance of applying a subjective analysis for First Amendment protection to homosexual expression due to the fact that it is the anti-majoritarian view).

271 *See supra* notes 72-114 and accompanying text.

tional limitations in an effort to "flush out" materials that are purportedly not worthy of funding.[272] With such influence—both economic and political—in addition to a government objective that is essential, providing a neutral forum that encourages experimental and non-traditional materials is imperative. Specifically, materials that can provide education and reach target groups that have been neglected by the over-restrictive guidelines since 1986 and the subsequent amendments must now flourish.

The government may constitutionally subsidize a certain program or service, and in the process, place a condition on that particular program or service.[273] Moreover, courts will often apply a standard that entails a "mixed level of scrutiny"[274] in reviewing the constitutionality of such programs. Yet, courts have repeatedly struck down as unconstitutional the programs that restrict a recipient of funding rather than the program itself. Case law surrounding the CDC's enactments has determined that past guidelines have been violative of both the First and Fifth Amendments.[275] Furthermore, where the guidelines have been either indiscernible and vague or over-restrictive, potential recipients who would have applied for funding, have either not done so or have done so differently, so as to conform in the hope of being speculatively funded.[276] This type of self-censorship within the realm of an overwhelmingly urgent health issue is self-destructive and most damaging to the purported government interests being furthered.

While the Supreme Court has held that homosexuality is not a fundamental "right" that is protected under the Constitution,[277] homoerotic speech or expression remains protected so long as any restriction is content-neutral and exceptions such as obscenity do not apply.[278] Thus, the CDC guidelines that have restricted expression—particularly that of homosexual expression—must be

272 Furthermore, the extent of this influence becomes increasingly troublesome when confronted with the argument that many plaintiffs have set forth—that subsidized programs such as the CDC and the NEA allow certain voices to be heard, influence other private investors, and in essence, shape the pool of perspective recipients and the materials it seeks to fund.

273 Rust v. Sullivan, 500 U.S. 173 (1991); *see also supra* notes 73-81 and accompanying text.

274 *See Finley*, 795 F. Supp. at 1475; *GMHC II*, 792 F. Supp. at 292. Apparently, a high level of scrutiny is maintained due to the free speech issue that is evoked, while recognizing that unlike civil or criminal penalties that may result from other types of litigation, the consequence of non-compliance with the legislation merely results in a reduction or loss of a government subsidy.

275 *See GMHC I*, 733 F. Supp. 619; *GMHC II*, 792 F. Supp. 278; *see also supra* notes 48-56 and accompanying text.

276 *See GMHC II*, 792 F. Supp. at 303.

277 *See* Bowers v. Hardwick, 478 U.S. 186 (1986).

278 *See* Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991); *see supra* note 124.

amended to allow for innovative and provocative materials that are subject only to the obscenity standards enunciated in *Miller v. California*.[279] In the CDC context, particularly with respect to reaching target groups, the freedom to openly depict homosexuality is vital to curbing transmission. Congressional debates over the CDC have promulgated legislation that has initiated litigation and raised First Amendment issues while leaving potential recipients without guidance as to what types of educational materials warrant federal funding.[280] Furthermore, although recent Grant Term Revisions promulgated by the CDC have eliminated language that was once severely criticized, new language eliminating the restrictions on sexually provocative materials should be enacted. In addition, a less ambiguous "controversial" standard to better effectuate the dissemination of AIDS educational materials should be instituted. This issue is different from the NEA controversy because of the magnitude of the public health considerations at stake. Thus, restrictions that may be upheld in the NEA context are inappropriate here. Accordingly, unlike the controversies surrounding NEA programs, the restrictive nature of the CDC guidelines should be far less restrictive[281] so as to promote the distribution of non-traditional and provocative AIDS educational materials that ensure accurate and effective communication to diverse communities. Not only will such guidelines promote the tailoring of such materials to fit the needs of each particular community, but they will also foster the necessary philosophy to continually encourage innovative messages until they are no longer necessary.

279 413 U.S. 15 (1973); *see supra* note 125 and accompanying text.

280 *See supra* part II.A-B.

281 *See supra* part V.