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Protecting Homosexual Rights: A Contradiction in First Amendment Jurisprudence

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INTRODUCTION

Within the American judicial system, the notions of free speech and equality are cherished judicial ideals. However, in relation to homophobic hate speech regulation, these two concepts often manifest in stark opposition to one another. The First Amendment protects the freedom of speech, thereby providing some protection for offensive speech. Yet, the Fourteenth Amendment guarantees equal protection of the laws, affording protection for victims of offensive speech, which often places the First and Fourteenth Amendments at odds. Homophobic hate speech is one manifestation of the hate propaganda that permeates the lives of many Americans, causing significant harm to individuals and to groups. Lesbian, gay, bisexual, and transgender ("LGBT")
persons are one group of people who must navigate against the tide of legal protection that allows such hate speech.\footnote{5}{Id. In their analysis, the editors focus on women, people of color, and Jewish people along with gay men and lesbians.}

LGBT persons face a further hurdle in challenging the First Amendment protection of hate speech as they seek First Amendment protection of their own expressive speech.\footnote{6}{"Homosexual expressive speech" refers to the various ways that LGBT persons make this aspect of their identity known to others, ranging from public displays of affection to advocating for homosexual rights. The expression can be reserved for certain individuals, or made to the public in general.} In most cases, an LGBT-identified person must express him or herself verbally or otherwise in order to affirm his or her sexual identity. It is this speech, however, that leaves an LGBT person open to attack from bigots. This Note explores how the First Amendment is used both to protect homophobic hate speech and to more narrowly protect homosexual expressive speech. There is, however, a broader implication. In most cases, homophobic hate speech arises only in response to LGBT expressive speech.\footnote{7}{Those who wish to harm LGBT persons with homophobic hate speech may not do so directly without first having knowledge of their sexual orientation. Because LGBT persons must express themselves to reveal their identities, it follows that homophobic hate speech can only be a result of LGBT expressive speech. This is not to say that LGBT persons who have not expressed their sexual identities are not harmed, at least psychologically, by homophobic hate speech.}

Part I analyzes the current state of First Amendment hate speech protection and the arguments for and against stronger hate speech regulation. Since the current debate centers mostly on racist and sexist hate speech, rather than homophobic hate speech, it is necessary to analogize these arguments to apply to the LGBT experience. Part I concludes that there is little hope in the immediate future to push LGBT-affirmative legal reforms through regulation of homophobic hate speech. In Part II, this Note turns to LGBT expressive speech, where courts offer significantly more,
although still limited protection to LGBT persons. Part II also suggests several strategies that courts could follow that would lead to expanded protection for LGBT expressive speech. This Note concludes with the normative proposal that expanded protection of LGBT expressive speech should lead to increased restrictions of homophobic hate speech.

I. HATE SPEECH

A. How Hate Speech Harms

Support for regulation of hate speech comes most often in the context of racially-motivated hate speech. Professor Richard Delgado, a preeminent civil rights law professor at the University of Pittsburgh School of Law and critical race theorist, observed that stigmatization based on association with a particular social group is pervasively harmful.\(^8\) Individuals who suffer such stigmatization, Delgado argues, suffer from "feelings of humiliation, isolation, and self-hatred."\(^9\) The result is that these individuals "often are hypersensitive and anticipate pain at the prospect of contact with 'normals.'"\(^10\) The harm that these victims suffer affects them physically as well.\(^11\) Further, these abuses affect society as a whole\(^12\) and are similar to other harms for which our system provides legal

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9. Id. at 137.
10. Id. Racial minorities are further alienated from "normals," or members of the majority, because "[r]acial tags deny minority individuals the possibility of neutral behavior in cross-racial contacts, thereby impairing the victims' capacity to form close interracial relationships." Id.
11. Id. at 137-39.
12. Id. at 139-40. Delgado reasons that "[r]acism is a breach of the ideal of egalitarianism, that 'all men are created equal' and each person is an equal moral agent, an ideal that is a cornerstone of the American moral and legal system." Id. at 140.
Thus, Delgado argues that tort remedies should be made available to victims of hate speech.

Professor Mari Matsuda, another preeminent critical race theorist and professor, recommends criminal sanctions for hate speech. She notes that the "places where the law does not go to redress harm have tended to be the places where women, children, people of color, and poor people live." Matsuda compares American and international approaches to hate speech regulation. She argues that the international standard "recognizes that avoiding the spread of hatred is a legitimate object of the law and that some forms of racist expression are properly criminalized." Matsuda

13. Id at 150. The bases underlying this tort action are similar to those for "assault, battery, intentional infliction of emotional distress, defamation, and various statutory and constitutional causes of action. However, each of these doctrines has limitations which render it an unreliable means of redress for the victims of racial insults." Id. For example, assault theories can be inadequate because they require actual fear of injury or touching. Assault, therefore, would not cover encounters which do not rise to this level of threat, but serve only to humiliate and degrade. Id. at 150-51 (describing one such encounter from Fisher v. Carrousel Motor Hotel, Inc., 424 S.W.2d 627 (Tex. 1967)).


15. Id. at 2322.

16. Id. at 2347. Matsuda argues: "The call for a formal, legal-structural response to racist speech goes against the long-standing and healthy American distrust of government power. It goes against an American tradition of tolerance that is precious in the sense of being both valuable and fragile." Id. at 2322. The international model of hate speech regulation would require that states:

Shall declare as an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof;

Shall declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and
argues from the victim’s perspective and proposes that “actionable racist speech” should include only those messages that fulfill certain criteria, which thereby prevents the “opening of the dreaded floodgates of censorship.”

Focus on the victim’s perspective is missing from the United States Supreme Court hate speech doctrine as evidenced by its 1992 decision of *R.A.V. v. City of St. Paul.* In this case, St. Paul’s Bias-Motivated Crime Ordinance criminalized, as a misdemeanor, any disorderly conduct placing a “symbol, object, appellation, characterization or graffiti . . . which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion, or gender.” The city of St. Paul charged Robert A. Viktora under this ordinance for setting ablaze a crude cross in the yard of his African-American neighbors’ home. The Minnesota Supreme Court upheld the statute as constitutional. Citing Professor Matsuda, the court reasoned:

> Burning a cross in the yard of an African American family’s home is deplorable conduct that the City of St. Paul may without question prohibit. The burning cross is itself an

shall recognize participation in such organization or activities as an offence punishable by law; [and]

shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination.


17. *Id.* at 2357. The three criteria are: (1) the message is of racial inferiority; (2) the message is directed against a historically oppressed group; and (3) the message is persecutorial, hateful, and degrading. Though Matsuda deals with racist hate speech, the reasoning of Matsuda and others is applied here to make a case for regulation of homosexual hate speech. See discussion *infra* Part I.D.

18. *Id.* at 2358.


20. *Id.* at 380 (quoting *St. Paul, Minn., Legis. Code §292.02* (1990)).

21. *Id.*

unmistakable symbol of violence and hatred based on virulent notions of racial supremacy. It is the responsibility, even the obligation, of diverse communities to confront such notions in whatever form they appear.\textsuperscript{23}

The United States Supreme Court had a clear opportunity to follow the Minnesota Supreme Court's reasoning by adopting the victim's perspective; instead, the Court struck down the ordinance as unconstitutional. While all nine Justices joined in the result, their reasons were sharply divided. Though the five-member majority, led by Justice Scalia, adopted the Minnesota Supreme Court's narrowing of the ordinance's reach to only "fighting words," it still did not survive the Court's prohibition on content-based speech limitations.\textsuperscript{24} According to Justice Scalia, the government may not make speech regulations "based on hostility – or favoritism – towards the underlying message expressed."\textsuperscript{25}

In the four-member concurrence, Justice White disagreed with the majority, arguing that the ordinance dealt with "fighting words"\textsuperscript{26} and based on its narrow tailoring, would have survived strict scrutiny.\textsuperscript{27} Justice White reaches the same conclusion as the majority, however, because he finds the ordinance to be overbroad.\textsuperscript{28} Though it does "reach categories of speech that are unprotected," he believes, "it also criminalizes a substantial amount of expression that – however repugnant – is shielded by the First Amendment."\textsuperscript{29}

Charles Lawrence, a highly regard constitutional law scholar and critical race theorist, observed that the Court focused exclusively on "the First Amendment rights of the crossburners,"

\textsuperscript{23} Id. at 508 (citing Matsuda, \textit{supra} note 14, at 2365-66).
\textsuperscript{25} \textit{Id}. at 386.
\textsuperscript{26} \textit{Id}. at 399-403 (White, J., concurring).
\textsuperscript{27} \textit{Id}. at 403-08 (White, J., concurring).
\textsuperscript{28} \textit{Id}. at 411 (White, J., concurring).
\textsuperscript{29} \textit{Id}. at 413.
without considering "this black family's right to live where they pleased, or their right to associate with their neighbors."\(^{30}\)

Lawrence, like Matsuda, focuses on the victim's perspective, arguing that face-to-face racial insults "are undeserving of constitutional protection for two reasons."\(^{31}\) First, the "immediacy of the injurious impact" is a clear and present harm to be avoided.\(^{32}\) Second, hate speech serves to defeat a major purpose of the First Amendment - to "foster the greatest amount of speech."\(^{33}\) Hate speech silences the victim because it is "experienced as a blow, not a proffered idea, and once the blow is struck, it is unlikely that dialogue will follow."\(^{34}\)

Lawrence states that Justice Scalia's reasoning turned "the First Amendment on its head, transforming an act intended to silence through terror and intimidation into an invitation to join a public discussion."\(^{35}\) Further, Lawrence asserts that Justice Scalia "invites [the crossburner] to burn again" through legal legitimizing of the "terroristic act" as protected political speech.\(^{36}\) Despite the academic commentary and injurious effects of hate speech, it is

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30. Charles Lawrence, *Crossburning and the Sound of Silence: Antisubordination Theory and the First Amendment*, 37 Vill. L. Rev. 787, 788-89 (1992) [hereinafter "Lawrence, Crossburning"]. The violation on the family's rights comes from the total effects of the racist incidents they had suffered since moving into the white neighborhood:

They were the only black family on the block. Two weeks after they had settled into their predominantly white neighborhood, the tires on both their cars were slashed. A few weeks later, one of their cars' windows was shattered, and a group of teenagers had walked past their house and shouted "nigger" at their nine-year-old son. And now this burning cross.

*Id.* at 787.

31. Charles Lawrence, *If He Hollers, Let Him Go: Regulating Racist Speech on Campus*, 1990 Duke L.J. 431, 452 (1990) [hereinafter "Lawrence, If He Hollers"].

32. *Id.*

33. *Id.*

34. *Id.* Lawrence adds that racial insults "are undeserving of first amendment protection because the perpetrator's intention is not to discover the truth or initiate dialogue but to injure the victim." *Id.*

35. Lawrence, *Crossburning*, supra note 30, at 790.

36. *Id.* at 790-91.
clear that the First Amendment offers a considerable safe harbor for those speaking freely.

B. First Amendment Opposition to Hate Speech Regulation

Opponents of restrictions to hate speech often approach the issue from a civil libertarian perspective. Calvin R. Massey, a renowned constitutional law scholar, asserts that the "soul" of American self-governance is the "individualistic paradigm, which supports the central tenet of free expression within public discourse as an indispensable means of securing autonomous self-governance." Massey embraces the slippery-slope viewpoint, arguing that the effort to suppress hate speech while "undoubtedly well-meaning, threatens slow erosion of the pillars upon which autonomous self-governance has been erected." Outlining the justifications for free expression, Massey defines two broad categories: free expression as a means to some other end or free expression as an end in itself.

Massey's survey of the goals that free expression is meant to achieve offers a comprehensive picture of the opposition to hate speech regulation. Free expression is meant to ensure six different goals: self-governance; the search for truth; the development of...

38. Id. at 197. Massey contends that "by eradicating hate speech to preserve cultural diversity, at the price of tolerating content-based curbs on public discourse, we would open the door to forms of cultural authoritarianism that might have far less benign objectives than preventing racists from spewing foul invective." Id.
39. Id. at 115.
40. Id. at 116-17. Massey believes that "[i]f the people are to govern, they must choose; to do so, they must be informed; and to be informed, governments must be disabled from restricting the dissemination of ideas." Id. at 117.
41. Id. at 122. Massey concedes that "free expression provides no guarantee of the victory of truth," but argues that "the lack of free expression is surely no improvement." Id. at 124.
moral virtue; tolerance; pressure release; and finally, to serve as a checking value against the abuse of power by public officials. In the end, the common theme through each of these rationales, and the most important purpose of free expression, is "autonomous self-governance." 

Massey asserts that the idea of free expression as an end in itself is a newer concept emerging from "the larger idea that all persons are entitled to realize their full potential." Massey points to judicial acceptance of this notion in Cohen v. California, where the Court upheld the right of an individual to wear, in public, a jacket emblazoned with the words "Fuck the Draft." By accepting that the only purpose of the expression was actually expressing the idea, the holding reflects acceptance of "free expression" as an end itself. The argument for protection of expression as valuable in itself presents a fairly strong argument against content-based speech prohibition. As Matsuda writes, "[t]he strongest argument against criminalization of racist speech is that it is content-based.

All of these rationales support the American ideal of First Amendment primacy, representing "certain values that are part of the American structure of government and the American commitment to political and civil rights." Indeed, the jurisprudence in this area also reflects this First Amendment primacy. Speech codes enacted to combat harassment are often

42. Id. at 126-27. For the development of moral virtue, Massey observes that this "rationale for free speech focuses primarily upon the moral and spiritual autonomy of each individual as a speaker." Id. at 127.

43. Id. at 129. Massey argues that by increasing tolerance, "we will ultimately treat each of our individual cohabitants with greater respect." Id. at 130.

44. Id. at 130. Massey believes that a society with such pressure release is a society where "[s]ocial peace is to be had by free speech." Id.

45. Id. at 131. ("The courts have accepted this idea most readily when engaged in grafting onto the free speech guarantee a right of press access to trials and other public judicial proceedings.").

46. Id. at 132.

47. Id.


49. Id. at 16.

50. Matsuda, supra note 14, at 2351.

51. Id. at 2353.
held to be unconstitutional in violation of the First Amendment because of their overbreadth. In *Saxe v. State College Area School District*, the district court's holding that harassment is not entitled to First Amendment protection was reversed by the Third Circuit. The Third Circuit found that the district's anti-harassment policy violated the Constitution for two reasons. First, the Third Circuit chastised the district court's conclusion that this harassment is not protected activity, suggesting that some harassment is constitutionally protected. Second, the Third Circuit found that the policy was unconstitutionally vague and overbroad. The court then euphemistically declared that when "laws against harassment attempt to regulate oral or written expression on [topics such as deeply offensive speech], however detestable the views expressed may be, we cannot turn a blind eye to the First Amendment implications." Through this style of reasoning, courts use the Massey-type First Amendment primacy to prohibit legislatures from enacting restrictions on harassment and hate speech.

52. 240 F.3d 200 (3d Cir. 2001).
53. *Id.* at 206.
54. The policy defined harassment as "verbal or physical conduct based on one's actual or perceived race, religion, color, national origin, gender, sexual orientation, disability, or other personal characteristics, and which has the purpose or effect of substantially interfering with a student's educational performance or creating an intimidating, hostile or offensive environment." *Id.* at 202.
55. *Id.* at 206.
56. *Saxe v. State College Area Sch. Dist.*, 240 F.3d 200, 214-15 (3d Cir. 2001) (holding that "any unwelcome verbal . . . conduct which offends . . . an individual because of some enumerated personal characteristic" is not sufficient justification for prohibiting the speech because someone might be offended).
57. *Id.* at 206.
C. Reconciling the First Amendment with Hate Speech Regulation: 
The Limited Tolerance of Campus Speech Codes

Advocates of increased hate speech regulation recognize the tension with traditional First Amendment jurisprudence. The freedom of speech is a fundamental constitutional right. A state may only interfere with fundamental rights if the regulation is narrowly tailored to accomplish a compelling government interest. In examining how these advocates deal with the substantial issue of First Amendment implications, it is useful to survey the scholarly, judicial, and public attention that campus speech codes receive. Campus speech codes are significant with regard to hate speech regulation for two reasons. First, speech codes affect a very limited jurisdiction, and second, speech codes are arguably necessary for universities to fulfill their missions as diverse, democratic institutions of learning.

Proponents of hate speech regulation offer various models which they argue are compatible with at least some form of First Amendment jurisprudence. J. Peter Byrne, a constitutional law scholar and professor at Georgetown Law, asserts that the Constitution tolerates university-specific speech codes, within certain limits. Though “the state should not be allowed to prohibit racial insults,” Byrne asserts that the “university’s relationship to the speech of its members is fundamentally different from the state’s.” His prohibition on state regulation emerges not because [racial insults] have any merit as speech, but because of the general concern that the state should not act as a censor of expression it concludes to be worthless or pernicious. Government does not possess

58. See supra text accompanying notes 2-3.
62. Id. at 416. Byrne includes both public and private universities in his analysis, but finds that public universities have much less power to regulate hate speech. Id. at 422.
either the ability or the principled criteria necessary to distinguish between speech that is under attack merely because it is resented by the majority and that which is objectively worthless.\textsuperscript{63}

Because of its commitment to intellectual development, the university may prohibit "[i]nfluences that interfere with this goal."\textsuperscript{64} Therefore, Byrne concludes, the university is obliged to protect its students from racial insults, which "obviously burden the ability of targets to pursue their studies."\textsuperscript{65} However, "the first amendment renders state universities powerless to punish speakers for advocating any idea in a reasoned manner," because university discourse is the best way to deal with these ideas.\textsuperscript{66}

Alan Brownstein, a constitutional law scholar and professor at University of California at Davis School of Law, argues that only those speech codes that focus on protecting the victim, rather than prohibiting the message, will pass constitutional muster.\textsuperscript{67} Brownstein compares his proposal for campus speech codes with the judicial tolerance and constitutionality of telephone harassment laws.\textsuperscript{68} He contends that the factors rendering telephone harassment impermissible even apply to a public face-to-face racial

\begin{footnotesize}
\begin{enumerate}
\item Id.
\item Id. at 420.
\item Id.
\item Id. at 422.
\item Alan E. Brownstein, \textit{Hate Speech and Harassment: The Constitutionality of Campus Codes that Prohibit Racial Insults}, 3 WM. \& MARY BILL OF RTS. J. 179, 179-80 (1994). Brownstein describes two categories of speech codes. The first "includes laws designed to prevent the insidious message of hate propaganda from directly or indirectly influencing the beliefs, attitudes, and ultimately, the actions of the speakers' audience." \textit{Id}. The second "involves regulations intended to protect individual members of victimized groups from being verbally abused by racist or sexist epithets and insults." \textit{Id}. Because laws that fall into the first category "raise particularly acute constitutional problems and violate current First Amendment doctrine," Brownstein addresses the constitutionality of only those laws that fall into the second category. \textit{Id}.
\item Id. at 192-206.
\end{enumerate}
\end{footnotesize}
insult that takes place on campus. The insult is private expression requiring the victim "as a particular individual to be the recipient of [the] hate speech." Another privacy dimension implicated is the public exposure of the victim's powerful emotional response to the harassment. Because Brownstein posits that content discrimination is necessary for identifying what constitutes verbal harassment, even R.A.V. v. City of St. Paul, "should not preclude a university per se from adopting a carefully defined prohibition against verbal harassment."

D. The Unique Problems with the Regulation of Homophobic Hate Speech

The vast majority of experiments with hate speech regulation are designed to deal with racist hate speech. While racism is an important and pervasive problem, so too is heterosexism. This Note proposes that the same arguments

69. Id. at 203. In defense of telephone harassment laws, courts have held that: (1) harassing telephone calls are conduct rather than speech; (2) there is a "substantial privacy interest" at stake; (3) the intent to harass is a required factor to render calls harassing; and (4) repetition is another requisite factor. Id. at 194-202.

In response, Brownstein argues that: (1) it is the content that renders the call harassing; (2) residential privacy alone does not shield an individual from receiving other types of disturbing communications, and the laws apply to calls to non-private locations as well; (3) there are many types of intentionally annoying calls that are protected by the First Amendment; and (4) "[n]othing in the First Amendment suggests . . . that a person's freedom of speech is intrinsically limited to saying something only once," and this is really a manifestation of a person's autonomy interest in not receiving a communication. Id.

70. Id. at 203.
71. Id.
73. Brownstein, supra note 67, at 206-07.
74. "Heterosexism" describes:

[A]n ideological system that denies, denigrates, and stigmatizes any nonheterosexual form of behavior, identity, relationship, or community. Using the term heterosexism highlights the parallels between antigay
supporting increased regulation of racist hate speech can also be used to support increased regulation of homophobic hate speech.

Serious, daunting obstacles face proponents of hate speech regulation. In other areas where minorities seek racial equality, they have made significant progress, gaining noteworthy federal legislative protections. Therefore, where racial minorities seek hate speech protection, they have a vast background of progress and momentum to utilize in their pursuit and a similar sentiment and other forms of prejudice, such as racism, antisemitism, and sexism.

Like institutional racism and sexism, heterosexism pervades societal customs and institutions. It operates through a dual process of invisibility and attack. Homosexuality usually remains culturally invisible; when people who engage in homosexual behavior or who are identified as homosexual become visible, they are subject to attack by society.

Examples of heterosexism in the United States include the continuing ban against lesbian and gay military personnel; widespread lack of legal protection from antigay discrimination in employment, housing, and services; hostility to lesbian and gay committed relationships, recently dramatized by passage of federal and state laws against same-gender marriage; and the existence of sodomy laws in more than one-third of the states.


75. For instance, in 1964, Congress passed the Civil Rights Act, 42 U.S.C. §§ 2000a–2000h-6 (2005), which was meant to guarantee equal opportunities in various settings. This is "the most important civil rights legislation ever," and "the first legislation to proscribe racial discrimination in employment." ROY L. BROOKS ET AL., *CIVIL RIGHTS LITIGATION: CASES AND PERSPECTIVES*, 399 (2000). Its protected classes include race, color, religion, sex, and national origin, and it primarily encompasses voting, public accommodations, education, and employment. See generally 42 U.S.C. §§ 2000a–2000h-6.
extrapolation can be made for women seeking protection against sexist speech.\textsuperscript{76}

While the Civil Rights Act includes many protected classes,\textsuperscript{77} a classification for sexual orientation is not mentioned. At the time when racial minorities and women were organizing mass demonstrations and accomplishing significant policy change, LGBT-identified Americans still faced "extreme stigma."\textsuperscript{78} Indeed, it is widely accepted that the gay and lesbian rights movement did not even begin until 1969, the year of the Stonewall rebellion.\textsuperscript{79} Although there has been recent emphasis on federal protection of the rights of racial minorities and women, many LGBT rights still lack federal protection.\textsuperscript{80}

Further, it is generally accepted that racial minorities and women have been subjugated by the dominant white, male classes

\textsuperscript{76} The 1964 Civil Rights Act includes sex as a protected class. 42 U.S.C. §§ 2000a–2000h-6. Previous justice movements for racial minorities and women have obviously not been completely successful. Employment discrimination, in particular, has simply changed forms. "It has become more subtle and less overt. No longer does one encounter signs in store windows that read 'Latinos need not apply' or company rules that outright bar African American employees from being promoted." BROOKS ET AL., supra note 75, at 397.

\textsuperscript{77} See supra note 75.


\textsuperscript{79} Id. at 1702 n.33. Hunter describes the event as follows:

The event occurred at the Stonewall Inn in Greenwich Village, when the bar's patrons spontaneously resisted what the police no doubt considered a routine raid. The resistance was all the more dramatic because most of the patrons were drag queens in full dress, although one observer credits a lesbian among the crowd with being the first to call on her compadres to fight back. The ensuing struggle became a pitched battle between gays and police that continued for hours in the streets of the Village.


\textsuperscript{80} A notable exception is an executive order that protects federal employees from employment discrimination based on sexual orientation. Exec. Order No. 13152, 65 Fed. Reg. 26115 (May 2, 2000).
for centuries.\textsuperscript{81} While heterosexism may seem relatively new in comparison, its recent emergence is related to the fact that LGBT community members have started to "come out"\textsuperscript{82} only recently.\textsuperscript{83} Therefore, while it may seem that LGBT-identified persons have experienced a shorter history of oppression, they have been widely persecuted since they became more public about their sexual orientations.\textsuperscript{84}

Though the LGBT community lacks longstanding historical oppression, its members deserve the same protection as other oppressed groups. Members of the LGBT community suffer the same intimidation, threats, and violence that hate speech promulgates against other minorities.\textsuperscript{85} Accordingly, proposals for

\begin{quote}
81. Brooks illustrates "the American race problem, society's longest running social and moral dilemma" with a short story:

\textit{Two groups—one white, one black—are playing a game of poker. They have been playing the same game for some 300 years, during which time the white group has cheated on numerous occasions. The white group now announces that "from this day forward, we will stop cheating." "That's fine," the black group responds, "but what are you going to do about all those poker chips that have stacked up on your side of the table all these years." "We're going to give them to current and future members of our group," the white group replies. "So, whites will continue to benefit from past cheating; that's not fair," the black group insists.}

BROOKS ET AL., supra note 75, at 3.

82. When members of the LGBT community make their sexual orientation known to their friends, family, co-workers, or members of the public, it is generally referred to as "coming out."

83. Secrecy was the key in the early movement. "Because the focus of the early cases and legislation was on sexual conduct, privacy became the primary intellectual bulwark of rights advocates." Hunter, supra note 78, at 1696-97.

84. In the early 1990s, data compiled by the National Gay and Lesbian Task Force "show[ed] that homophobic violence and victimization continue to be a widespread and critical problem." Martin Kazu Hiraga, \textit{Anti-Gay and Lesbian Violence, Victimization, and Defamation: Trends, Victimization Studies, and Incident Descriptions, in The Price We Pay: The Case Against Racist Speech, Hate Propaganda, and Pornography} 109, 112 (Laura Lederer & Richard Delgado eds., 1995).

85. Professor Lawrence relates an incident suffered by one of his gay male students:
\end{quote}
regulation of hate speech can and should cover homophobic hate speech. Because it is already recognized as a problem, a solution can help prevent the need for a long struggle against oppression.

Regardless of the strength of the academic theories and proposals for hate speech regulation of any type, the legal and political reality in the United States has prevented the regulations from taking hold. There are well-reasoned and principled arguments for the constitutionality of prohibitions of racist hate speech, and these are equally applicable to homophobic hate speech. The Supreme Court, however, has repeatedly held that the First Amendment prohibits the government from restricting even the most abhorrent hate speech. Although the United States might accept hate speech regulation in the near future, that is a tenuous avenue for establishing further LGBT rights.

In response to my request that students describe how they experienced the injury of racist speech, Michael told a story of being called “faggot” by a man on a subway. His description included all of the speech inhibiting elements I noted previously. He found himself in a state of semi-shock, nauseous, dizzy, unable to muster the witty, sarcastic, articulate rejoinder he was accustomed to making. He suddenly was aware of the recent spate of gay-bashing in San Francisco, and how many of these had escalated from verbal encounters. Even hours later when the shock resided and his facility with words returned, he realized that any response was inadequate to counter the hundreds of years of societal defamation that one word – “faggot” – carried with it. Like the word “nigger” and unlike the word “liar,” it is not sufficient to deny the truth of the word’s application, to say, “I am not a faggot.” One must deny the truth of the word’s meaning, a meaning shouted from the rooftops by the rest of the world a million times a day.

Lawrence, If He Hollers, supra note 31, at 455.

86. See supra Parts I.A., I.C.

II. LGBT EXPRESSIVE SPEECH

A. The Significance of LGBT Expressive Speech

Unlike members of other minority groups in the United States, lesbian, gay, bisexual, or transgender persons must first express their identity before society becomes aware of his or her sexual orientation. This type of expression commonly takes the form of "coming out," where an LGBT-identified person makes this identity known to selected people or the general public. Nan D. Hunter, a public health law scholar and professor, clarifies that:

Self-identifying speech does not merely reflect or communicate one's identity; it is a major factor in constructing identity. Identity cannot exist without it. That is even more true when the distinguishing group characteristics are not visible, as is typically true of sexual orientation. Therefore, in the field of lesbian and gay civil rights, much more so than for most other equality claims, expression is a component of the very identity itself. 88

A corollary to the idea that LGBT identity is formed at least partially by expression, is the claim that without expression, LGBT identity would not fully be realized. Thus, it follows that barriers to LGBT expressive speech are barriers to LGBT identity. Accordingly, the stakes for protecting LGBT expression seem to be much higher because without that protection, LGBT identity itself is threatened.

88. Hunter, supra note 78, at 1718.
B. Current Jurisprudence Involving LGBT Expressive Speech

1. Protecting LGBT Expressive Speech in the University Setting

Generally, courts most often protect expression of sexual orientation in the context of student organizations in the university setting. For example, in *Gay Alliance of Students v. Matthews*, the Fourth Circuit required Virginia Commonwealth University to recognize a student group as "a 'pro-homosexual' political organization advocating a liberalization of legal restrictions against the practice of homosexuality and one seeking, by the educational and informational process, to generate understanding and acceptance of individuals whose sexual orientation is wholly or partly homosexual." The Fourth Circuit specifically rejected the school's assertions that recognition would "increase the opportunity for homosexual contacts." Quoting *Healy v. James*, the court noted, "[t]he critical line for First Amendment purposes must be drawn between advocacy, which is entitled to full protection, and action, which is not." In *Healy*, the Supreme Court outlined the associational right of students and held that there "can be no doubt that denial of official recognition, without justification, to college organizations burdens or abridges that associational right." Thus, the Fourth Circuit protected LGBT expressive speech, in the form of student organizations, as part of the First Amendment associational rights of students.

However, there was an underlying wrinkle in homosexual student organization cases of the 1970s since homosexual sex acts were largely proscribed by law during this time period. So, "[c]ourts and litigators generally treated advocacy of homosexuality

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89. *Id.*
90. 544 F.2d 162 (4th Cir. 1976).
91. *Id.* at 164.
92. *Id.* at 166.
94. *Id.* at 192.
95. *Id.* at 181.
as advocacy of conduct." Therefore, courts in the student organization cases "quickly and comfortably drew on the preexisting framework for the analysis of the advocacy of unlawful conduct, making these easy cases." That framework involved application of the Brandenburg test, which required intentional incitement to immediate action in order to hold the advocacy itself to be unlawful. Because the student organizations did not intentionally incite immediate action, the Fourth Circuit properly held that their activities passed the Brandenburg test, thereby protecting their associational rights.

Later, the focus would turn to homosexual expression in itself, rather than advocacy of conduct, and this simple framework would be replaced by a much more complicated analysis. In other words, where homosexual expression advocates ideas and not conduct, the courts abandoned this simple test, providing a more difficult path to protecting expressive rights.

2. Protecting LGBT Expressive Speech in the Public Employment Setting

When politicians began framing LGBT speech in terms of advocacy of ideas rather than advocacy of conduct, the debate shifted to the public employee's right to homosexual expression. Hunter considers the 1978 Briggs Initiative, the "first political debate about homosexuality outside urban centers or limited enclaves like universities," to be the first time that "expression rather than conduct formed the core of the issue." Stealthily designed to allow the state to "fire gay teachers and thus purge that group from the schools and from contact with children," the

96. Hunter, supra note 78, at 1702.
97. Id.
99. Id. at 447-48.
100. Hunter, supra note 78, at 1702.
101. Id.
103. Id. at 1703 (emphasis added).
Initiative sanctioned the firing of a school employee for any promotion of homosexuality that might come to the attention of students or other employees. The Initiative was defeated, but the concept that homosexual expressive speech could be considered political speech or "the advocacy of ideas" was established.

Conceptions of LGBT speech had now shifted from advocacy of conduct to advocacy of ideas. The way courts deal with expressive rights of LGBT public employees exemplifies the new jurisprudence that emerged to deal with this shift. For current disputes involving public employee expression rights, courts turn to the First Amendment balancing test found in *Pickering v. Board of Education.* First, this balancing test involves determining whether the speech was a matter of public concern. If not, the speech is not protected. If the speech was a matter of public concern, the court then decides whether it was true or false. If true, the court moves on to weigh the government's interest in the efficient provision of public service against the individual's free speech interest. If false, the speech may still be protected, under a *N.Y. Times v. Sullivan* analysis, where negligent or innocent statements may be protected, and intentional or reckless statements are not protected.

As applied to LGBT expressive speech, the key inquiry is whether or not the speech is classified as a matter of public concern. This is often a difficult determination. For example, a Utah federal court found that a female teacher's revelation to a student that she was a lesbian involved a matter of public concern and was protected.

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105. *Id.* at 1705. Hunter notes that the Briggs Initiative represented that the "moment when American politics began to treat homosexuality as something more than a deviance, conduct, or lifestyle; it marked the emergence of homosexuality as an openly political claim and as a viewpoint. That, in turn, laid the foundation for the emergence of a new analysis of speech about homosexuality." *Id.* at 1704.
107. *Id.*
108. *Id.*
110. *Id.* at 279-80.
by the First Amendment. The court explained that either the fact that homosexual identity "is inherently a matter of public concern," or that her employer's censorship actions converted the matter into one of public concern. However, the Sixth Circuit held that a guidance counselor who declared her bisexuality was not engaging in matters of public concern and thus could be fired for her comments. Due to the important role that homosexual expressive speech plays in supporting the rights of LGBT persons as a subordinated group, this Note contends that homosexual expressive speech should be considered a matter of public concern. However it remains unclear whether such speech will be found to meet the first part of the Pickering test.

3. Protecting LGBT Expressive Speech in the Local Political Setting

The United States Supreme Court addressed another aspect of LGBT expression in Romer v. Evans. Here, the state of Colorado, through a statewide ballot initiative, had effectively repealed any municipal or state antidiscrimination laws, within the state, that protected individuals with a "homosexual, bisexual, or lesbian orientation." The Colorado state courts discussed the initiative as including a hybrid First Amendment and Equal Protection Clause issue: its effect on the right of LGBT persons "to

112. Id.
113. Rowland v. Mad River Local Sch. Dist., 730 F.2d 444, 449 (6th Cir. 1984). It is curious how the unprotected expression here involved a disclosure of bisexuality, which is even less mainstream than homosexuality. Also, the decision came fourteen years prior to the Utah court's ruling. Perhaps increased acceptance of the homosexual lifestyle and the fact that lesbianism, rather than bisexuality was disclosed, helps explain the seemingly conflicting holdings.
115. COLO. CONST. art. II, § 30b (enforcement permanently enjoined 1996).
participate equally in the political process." However, the Supreme Court ignored the First Amendment claim and decided the case based on its violation of the Equal Protection Clause alone. The freedom of speech is integral to political participation, but whether or not First Amendment protection of homosexual expressive speech has any relationship to LBGT rights to participate in the political process is still an open question.

4. Protecting LGBT Expressive Speech in the Military

Compared to the high level of protection that student organizations receive, the United States military affords little protection for LGBT expression. The Fourth Circuit, twenty years after *Gay Alliance of Students v. Matthews*, addressed the military's "Don't Ask/Don't Tell" policy in *Thomasson v. Perry.* The plaintiff, an honorably discharged lieutenant, claimed that the policy violated the Equal Protection Clause, the First Amendment, and the Due Process Clause. The court found that the classification involved was not suspect, so it only implicated rational basis review. Under rational basis review, the court found a rational relation between "Don't Ask/Don't Tell" and the legislative goals of promoting unit cohesion and an environment free from sexual pressure. As for the First Amendment claim, the court found it rational for a declaration of homosexuality to create a rebuttable presumption that one has a propensity to engage in

118. 544 F.2d 162 (4th Cir. 1976); see discussion supra Part II.B.1.
119. 10 U.S.C. § 564(b) (2005). Service members, under this policy, may be investigated and administratively discharged if they: make a statement that they are lesbian, gay, or bisexual; engage in physical contact with someone of the same sex for the purposes of sexual gratification; or marry, or attempt to marry, someone of the same sex. *Id.*
120. 80 F.3d 915 (4th Cir. 1996) (en banc).
121. *Id.* at 919.
122. *Id.* at 928.
123. *Id.* at 928-31.
homosexual activity. Accordingly, the court found, it is permissible for the policy to require the soldier to overcome the presumption that he or she engages in homosexual activity in order to keep his or her job.

The Fourth Circuit's reasoning mirrors the opinions held by other courts on the matter. This line of cases upholds the balancing test utilized in the jurisprudence of public employee expression: that governmental interest can and sometimes does outweigh individual expressive rights. That is, a government interest such as military unit cohesion easily outweighs a person's right to express his or her sexual identity. Because it applies only to the expressive rights of LGBT persons, the government subordinates LGBT speech to a level that is below that of heterosexual speech.

To avoid this devastating result, the law should protect LGBT speech to the same extent that it protects heterosexual speech. In the public employment as well as the military settings, individual expression of heterosexual identity is not a legitimate reason to terminate the speaker's employment. The government's interest in either forum, to promote efficient government functioning, should be as compatible with homosexual expression as it is with heterosexual expression. In rejecting protection for homosexual expression, the government symbolically stamps its approval of homophobia and bigotry.

C. Expansion of Protection of Homosexual Expressive Speech

To fight for expanded protection of homosexual expressive speech, advocates should closely examine the different fora where the issue has played out and develop a strategy based on this differential treatment. Homosexual expressive speech tends to garner the most protection in the university setting, where for

124. Id. at 932-33.
125. Id.
126. See Able v. United States, 155 F.3d 628 (2d Cir. 1998); Holmes v. Cal. Army Nat'l Guard, 124 F.3d 1126 (9th Cir. 1997); Richenberg v. Perry, 73 F.3d 172 (8th Cir. 1995).
127. See discussion supra Part II.B.2.
decades students have had the power to assemble and advocate for their rights as homosexuals.\textsuperscript{128}

However, establishing progressive change in the public employment setting is probably more useful because that is where courts balance competing governmental and individual interests. The \textit{Pickering} test, central to this evaluation, mandates that the speech be of public concern in order to guarantee First Amendment protection.\textsuperscript{129} The burden then falls on advocates of homosexual expressive speech to frame the issue as one of public concern. To accomplish this, the rhetoric must shift to frame LGBT issues as a matter of nationwide importance and concern. This change in perception could filter its way into the courts, rendering moot the question of whether homosexual expressive speech is a matter of public concern. Organizers of the LGBT rights movement and public commentators would be a significant factor in bringing about this change.

Within the political speech setting, lawmakers as well as public commentators may play a role in expanding protection of LGBT expressive rights. Though the Court in \textit{Romer} was unwilling to extend First Amendment protection to LGBT rights,\textsuperscript{130} the decision nonetheless grants local lawmakers stronger footholds. Here, advocates of LGBT expressive speech could introduce legislation affirming these rights, thus further enhancing the web of protection for LGBT expression.

The government's control over LGBT speech is the strongest within the military setting. While advocates do and should push for increased expressive rights for LGBT persons in the military, campaigns to expand LGBT expressive speech protection are more likely to succeed in the university, public employment, and political speech arenas.

\textsuperscript{128} See discussion \textit{supra} Part II.B.1.


\textsuperscript{130} Romer v. Evans, 517 U.S. 620, 632 (1996).
CONCLUSION

From the student organization cases to the "Don’t Ask/Don’t Tell" cases, there is a relatively small window of protection for LGBT expressive speech. Advocates of LGBT rights can, however, work to open this window further. For LGBT persons, expressive speech is inseparably intertwined with identity, and American culture purports to value unique identity. This value, however, is lost on those who cannot express their identities for fear of retaliation and prejudice. We allow those who would persecute LGBT persons to cause harm with their speech, but we offer little speech protection to LGBT persons in affirming their own identity. It is a perverse reality that the LGBT expressive speech that renders an LGBT person vulnerable to attack is often unprotected, when the speech attacking them is fully protected.