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University Hate Speech Policies and the CaptiveAudience Doctrine

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I. INTRODUCTION

Colleges and universities, historically "Bastion[s] of Freedom,"[1] have seen an outbreak of student hatred and racially abusive speech and action over the past few decades.[2] For example, at Emory University, a black freshman was terrorized one evening when her teddy bear was slashed, her clothes were soaked with bleach, and "Nigger Hang" was written in lipstick on the wall of her dormitory room.[3] She received death threats in the mail.[4] The student eventually moved out, only to find "Die Nigger Die" written in nail polish on the floor under her rug.[5] She collapsed and was hospitalized due to the trauma.[6]

Since the late 1980s, universities have confronted a growing hate speech problem on their campuses.[7] Increasing racial, sexist, anti-Semitic, and homophobic incidents on campuses have led many universities to enact rules of conduct that regulate harassing behavior directed at members of certain minority groups.[8] Often the regulated conduct includes spoken and written

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1. Richard Delgado, *Campus Antiracism Rules: Constitutional Narratives in Collision*, 85 NW. U. L. REV. 343, 359 (1991).

2. The James McCormick Mitchell Lecture, *Language as Violence v. Freedom of Expression: Canadian and American Perspectives on Group Defamation*, 37 BUFF. L. REV. 337, 359 (1988) ("Campuses are where we think tolerance and diversity would be promoted, not the scene of increasing epithets, slogans, scrawled symbols—directed at black people, at feminists, at Jews.").

3. Nancy Gibbs, *Bigots in the Ivory Tower*, TIME, May 7, 1990, at 104.

4. *Id.*

5. *Id.*

6. *Id.*

7. WILLIAM A. KAPLIN & BARBARA A. LEE, THE LAW OF HIGHER EDUCATION: A COMPREHENSIVE GUIDE TO LEGAL IMPLICATIONS OF ADMINISTRATIVE DECISION MAKING 1017 (4th ed. 2006). Hate speech, for the purposes of this Article:

> is an imprecise catch-all term that generally includes verbal and written words and symbolic acts that convey a grossly negative assessment of particular persons or groups based on their race, gender, ethnicity, religion, sexual orientation, or disability. Hate speech thus is highly derogatory and degrading, and the language is typically coarse. The purpose of the speech is more to humiliate or wound than it is to communicate ideas or information. Common vehicles for such speech include epithets, slurs, insults, taunts, and threats.

Id. at 1018.

8. *Id.* at 1017. Researchers estimate that 90 percent of colleges and universities have some form of

words, raising difficult issues concerning the university students' free speech rights.[9] Public universities face an exceedingly difficult situation in promulgating hate speech regulations that will survive First Amendment scrutiny.[10] There is a vast amount of literature that discusses whether university hate speech policies may be permissibly drafted and whether they should exist at all.[11]

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a speech code. Hans Zeiger, *Code of Silence: Let's Return Free Speech to College Campuses*, SEATTLE TIMES, Sept. 21, 2003, at C4. For a discussion of the situation, see Michael A. Olivas, *The Political Economy of Immigration, Intellectual Property, and Racial Harassment: Case Studies of the Implementation of Legal Change on Campus*, 63 J. HIGHER EDUC. 570, 580-84 (1992).

9. KAPLIN & LEE, *supra* note 7, at 1017; *see, e.g.,* Doe v. Univ. of Michigan, 721 F.Supp. 852, 853 (E.D. Mich. 1989) (striking down a university hate speech policy that prohibited conduct that "stigmatize[d] or victimize[d]" certain minorities because some of that conduct was protected speech under the First Amendment).

10. *See infra* Part II. A.

11. For arguments in favor of hate speech policies, see Cass R. Sunstein, *Liberalism, Speech Codes, and Related Problems*, 79 ACADEME, 14 (1993) (favoring narrowly limited speech policies); Rhonda G. Hartman, *Hateful Expression and First Amendment Values: Toward a Theory of Constitutional Constraint on Hate Speech at Colleges and Universities After* R.A.V. v. St. Paul, 19 J.C. & U.L. 343, 371 (1993) (arguing that courts should defer to reasonable university determinations about hate speech); J. Peter Byrne, *Racial Insults and Free Speech Within the University*, 79 GEO. L.J. 399, 440-43 (1991) (arguing that speech limiting policies ought to be enforced with restraint); Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431 (1990); Recent Case, *First Amendment—Racist and Sexist Expression on Campus—Court Strikes Down University Limits on Hate Speech*: Doe v. Univ. of Michigan, 721 F. Supp. 852 (E.D. Mich. 1989), 103 HARV. L. REV. 1397, 1397 (1990) (suggesting a contextual analysis in analyzing the harms of hate speech to minorities and women); Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320 (1989); Richard Delgado & David Yun, *The Neoconservative Case Against Hate Speech Regulation—Lively, D'Souza, Gates, Carter, and the Toughlove Crowd*, 47 VAND. L. REV. 1807 (1994).

Opponents of restrictions on hate speech explain that such university restrictions on speech are content-based and state-imposed political orthodoxy. *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 392 (1992) ("The point of the First Amendment is that majority preferences must be expressed in some fashion other than silencing speech on the basis of its content."). For arguments against hate speech policies, see Lee Ann Rabe, Case Note, *Sticks and Stones: The First Amendment and Campus Speech Codes*, 37 J. MARSHALL L. REV. 205, 206 (2003) (concluding that "speech regulations adopted by universities are inappropriate"); *Id*. at 222 ("[F]ree speech cannot and should not be trammeled in the name of student equality."); Charles R. Calleros, *Paternalism, Counterspeech, and Campus Hate-Speech Codes: A Reply to Delgado and Yun*, 27 ARIZ. ST. L.J. 1249, 1271–72 (1995) (arguing that regulating hate speech deprives universities of helpful information about discrimination); Suzanna Sherry, *Speaking of Virtue: A Republican Approach to University Regulation of Hate Speech*, 75 MINN. L. REV. 933, 941 (1991) ("[U]niversities are attempting to coerce particular values rather than merely to create a civil environment."); *id.* at 942 ("The regulations are an attempt to dictate primarily how students (and faculty) think, and only secondarily (if at all) how they behave. As such, the regulations are a part of the larger movement in higher education toward enforcement of a 'politically correct' orthodoxy."); Rodney A. Smolla, *Academic Freedom, Hate Speech and the Idea of a University*, 53 LAW & CONTEMP. PROBS. 195, 224 (1990) ("Hate speech is an abomination, a rape of human dignity. And let there be no inhibition in punishing hate speech in any of the contexts in which speech may be punished under recognized first amendment doctrines . . . . But outside

The most fundamental rationale for freedom of speech is that it promotes finding truth.[12] The optimal way to find truth, according to this view, is robust discussion in society.[13] Therefore, almost all speech, regardless of its content, must be protected.[14] "[A] free marketplace of ideas, open to even the most odious and offensive ideas," is best, "because truth will ultimately triumph in an unrestricted marketplace."[15] "[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market[.]"[16]

Many favor no restrictions on speech whatsoever in the university environment. The university, to them, is "peculiarly the marketplace of ideas."[17] The importance of freedom in universities "is almost self-evident" to them.[18] The pursuit of knowledge is at the core of the university identity, and "impos[ing] any strait jacket" on speech would interfere with that goal.[19] "The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues,

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those narrowly defined first amendment categories, the battle against hate speech will be fought most effectively through persuasive and creative educational leadership rather than through punishment and coercion."); Bhavana Sontakay, *College and University Regulation of Racist Speech: Does Regulation Violate the First Amendment?*, 95 DICK. L. REV. 235, 255-58 (1990) (arguing that the problem hate speech policies create outweigh their positive impact); Evan G. S. Siegel, Comment, *Closing the Campus Gates to Free Expression: The Regulation of Offensive Speech at Colleges and Universities*, 39 EMORY L.J. 1351, 1375–76 (1990); Robert W. McGee, *Hate Speech, Free Speech and the University*, 24 AKRON L. REV. 363, 391 (1990) (calling for a more "absolutist view").

12. Kent Greenawalt, *Free Speech Justifications*, 89 COLUM. L. REV. 119, 130 (1989).

13. *Id.* Greenawalt finds this explanation for free speech as the most persuasive and readily applied explanation. *See generally id.* at 130-41. Other explanations include democratic self-governance, *id.* at 145-46, tolerance, *see generally* LEE C. BOLLINGER, THE TOLERANT SOCIETY: FREEDOM OF SPEECH AND EXTREMIST SPEECH IN AMERICA (1986), and promoting good characteristics in the people entrusted with the freedom, *see generally* Vincent Blasi, *Free Speech and Good Character: From Milton to Brandeis to the Present*, *in* ETERNALLY VIGILANT: FREE SPEECH IN THE MODERN ERA 60 (Lee C. Bollinger & Geoffrey R. Stone eds., 2002). For a discussion of various theories of free speech, *see generally* C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964 (1978).

14. Nadine Strossen, *Regulating Racist Speech on Campus: A Modest Proposal?*, 1990 DUKE L.J. 484, 535 (1990).

15. *Id.*; *see, e.g.*, Watts v. United States, 394 U.S. 705, 708 (1969) (per curiam) (referring to a "'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks.' The language of the political arena . . . is often vituperative, abusive, and inexact," New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)); Strossen, *supra* note 14, at 535 n.250. *See also* Red Lion Broad. Co. v. F.C.C., 395 U.S. 367, 390 (1969) ("It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market [.]").

16. Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

17. Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967) (referring to the classroom specifically).

18. Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957).

19. *Id.*

[rather] than through any kind of authoritative selection.'"[20]

Under the marketplace of ideas rationale, more speech will remedy hate speech, because the more speech in the marketplace, the more likely we will arrive at truth.[21] As one scholar put it, "the only effective method of altering a world view that is deemed pernicious is to provide a persuasive response – that is, more speech."[22] Through discussion, the "bad" ideas will give way to the "good" ones.[23] Another commentator asserted that "fighting fire with fire – or speech with more speech," is the best means to remedy hate speech.[24]

In some settings, however, "more speech" is not a sufficient remedy to "pernicious" speech.[25] Contrary to the marketplace of ideas that the First Amendment is designed to foster, hate speech in fact runs counter to that goal of more speech, denying others on campus the chance of hearing the target's ideas.[26] Hate speech is inconsistent with the marketplace of ideas because it "inflects, skews, and disables the operation of the market[.]"[27] It decreases the total amount of speech in the marketplace by its silencing effect on its target groups.[28] It systematically silences entire segments of society, through the "preemptive effect" that racist words have on further speech and through the distortion of "the marketplace of ideas by muting or devaluing the speech" of minority groups.[29] Hate speech functions as a preemptive strike against

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20. *Keyishian*, 385 U.S. at 603 (quoting Unites States v. Associated Press, 52 F. Supp. 362, 372 (S.D.N.Y. 1943)).

21. *See infra* notes 22-24 and accompanying text.

22. Kingsley R. Browne, *Title VII as Censorship: Hostile-Environment Harassment and the First Amendment,* 52 OHIO ST. L.J. 481, 550 (1991) (internal quotation marks omitted). Some also argue that driving hate speech underground will not prevent racist thoughts, but only their expression. *See* Rabe, *supra* note 11, at 226; Vince Herron, Note, *Increasing the Speech: Diversity, Campus Speech Codes, and the Pursuit of Truth*, 67 S. CAL. L. REV. 407, 422-23 (1994). Moreover, underground bigotry allows those ideas "to take on a life of their own," and since they are unknown to the rest of the university community, go unchallenged. *Id.* at 423. This results in a more dangerous situation than if the racist hate speech were out in the open, and a missed opportunity to learn from and react to the hateful expression, Calleros, *supra* note 11, at 1269.

23. *See* Browne, *supra* note 22, at 550.

24. Eloise Salholz et al., *Everything But Shouting 'Fire': Colleges grapple with the limits of free speech*, NEWSWEEK, Oct. 20, 1986, at 70.

25. *See infra* notes 27-32; *see also* ROBERT O. WYATT, FREE EXPRESSION AND THE AMERICAN PUBLIC: A SURVEY COMMEMORATING THE 200TH ANNIVERSARY OF THE FIRST AMENDMENT 63-64 (1991) (pointing out that females generally fear retribution and are reluctant to speak out and that African-Americans "are dramatically less likely to speak out than whites"). Because of their reluctance, women and blacks likely do not counter hate speech with more speech. Jessica M. Karner, Comment, *Political Speech, Sexual Harassment, and a Captive Workforce*, 83 CAL. L. REV. 637, 638 n.4 (1995).

26. *See infra* notes 27-32 and accompanying text.

27. Lawrence, *supra* note 11, at 468.

28. *Id.*

29. *See id.* at 452, 470.

further speech – when it strikes, it is unlikely that dialogue will follow, as the verbal attack disables its victims and renders them speechless.[30] Moreover, the ubiquity of the messages of inferiority mutes and devalues the speech of the target groups.[31] People unconsciously and irrationally give less credence to speech from members of the target group due to racist messages of inferiority.[32] Thus, the preemptive effect that racist words have on their target's ability to speak back, combined with the unconscious devaluation of minority speech, silences speech rather than encourages it, contrary to how the marketplace of ideas is supposed to operate.[33]

Not only is more speech actually detrimental to the marketplace of ideas when it comes to hate speech, but it also causes individual and group harms.[34] Critical race theorists Mari Matsuda, Richard Delgado, and Charles Lawrence have convincingly argued for recognition of the special harms that racial hate speech causes, including the silencing effect of hate speech, discussed above, and the harms to identifiable groups, individuals, and university students.[35]

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30. *Id.* at 452-53; Richard Delgado, *Are Hate-Speech Rules Constitutional Heresy? A Reply to Steven Gey*, 146 U. PA. L. REV. 865, 872 (1998) ("Face-to-face hate speech conveys no information. It is more like a slap in the face or a performative[.]"). Discriminatory verbal attacks often render women and minorities speechless. Lawrence, *supra* note 11, at 452. The attacks also produce such responses as fear, shock, flight, and rage, which "interfere with any reasoned response." *Id.* Moreover, any response to verbal epithets are usually futile, as many of our culture's values — "feelings are minor; words only hurt if you let them; rise above it; don't be so sensitive; don't be so humorless" — limit the effectiveness of talking back. Delgado & Yun, *supra* note 11, at 1823; *but see* Calleros, *supra* note 11, at 1256-63 (describing the effectiveness and importance of counterspeech by minority targets of hate speech).

31. Lawrence, *supra* note 11, at 470.

32. *Id.* at 470-71. Racial minorities daily have their words doubted, ignored, and assumed to be without evidentiary backing. *Id.* at 471.

33. *See supra* notes 25-32 and accompanying text.

34. *See* RICHARD DELGADO & JEAN STEFANCIC, UNDERSTANDING WORDS THAT WOUND 11-18 (2004) (summarizing the harms of hate speech, including economic, social psychological, and physical harms); ALEXANDER TSESIS, DESTRUCTIVE MESSAGES: HOW HATE SPEECH PAVES THE WAY FOR HARMFUL SOCIAL MOVEMENTS (2002); *see infra* notes 35-53 and accompanying text.

35. *See generally* Delgado, *supra* note 1; Richard Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133 (1982); Delgado & Yun, *supra* note 11; Matsuda, *supra* note 11; Lawrence, *supra* note 11. For an overview of these arguments, *see* Robert C. Post, *Racist Speech, Democracy, and the First Amendment*, 32 WM. & MARY L. REV. 267, 271-78 (1991). This in no way exhausts the arguments for the harms of hate speech. Various studies and analyses in other fields contain well-developed concepts of the harms of hate speech. The psychosocial literature, *see generally* JOEL KOVEL, WHITE RACISM: A PSYCHOHISTORY (1970); Mark G. Frank & Thomas Gilovich, *The Dark Side of Self- and Social Perception: Black Uniforms and Aggression in Professional Sports*, 54 J. PERSONALITY AND SOC. PSYCH. 74 (1988); sociological literature, Laura Beth Nielsen, *Subtle, Pervasive, Harmful: Racist and Sexist Remarks in Public as Hate Speech*, 58 J. OF SOC. ISSUES 265 (2002); HARRY H. L. KITANO, RACE RELATIONS 113–14 (1974) (discussing the effects of prejudice); and the European literature, *see generally* Roger Cotterrell, *Prosecuting Incitement to Racial Hatred*, 1982 PUB. L. 378; David Kretzmer, *Freedom of Speech and Racism*, 8 CARDOZO L. REV. 445 (1987), for example, contain well-

Hate speech harms groups that are the target of the speech. Under the tradition of group libel and the Supreme Court's decision in *Beauharnais v. Illinois*,[36] speech that is likely to direct contempt or scorn on identifiable groups should be regulated to prevent injury to the status of the members of those groups.[37] A more modern understanding of hate speech derives from the understanding of racism as "the structural subordination of a group based on an idea of racial inferiority."[38] Such expression is particularly unacceptable because it locks in the oppression of already marginalized groups; it is "a mechanism of subordination, reinforcing a historical vertical relationship."[39] Hate speech reinforces stereotypes in the public mind that subsequently guide action.[40]

Beyond causing harm to the target groups, hate speech causes harms to the individual.[41] Racist speech, as one scholar asserted, is a form of "spirit-murder,"[42] with injuries to the individual including feelings of fear, humiliation, isolation, vulnerability, resentment, and self-hatred.[43] Racist expression is a "dignitary affront,"[44] particularly powerful because "[r]acial insults . . . conjure up the entire history of racial discrimination in this country."[45] Bigoted insults may almost amount to physical violence to the target.[46] Specific physiological and emotional harms to the victims include

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developed concepts of the harms of hate speech.

36. 343 U.S. 250 (1952).

37. *Id*. at 258-63. *See also* Kenneth Lasson, *Racial Defamation as Free Speech: Abusing the First Amendment*, 17 COLUM. HUM. RTS. L. REV. 11 (1985); Note, *Group Vilification Reconsidered*, 89 YALE L.J. 308 (1979).

38. Matsuda, *supra* note 11, at 2358. Anti-pornography feminists similarly argue that violent or degrading sexual depictions perpetuate a society in which women are understood as objects of male sexual desire and agency. *See* CATHARINE A. MACKINNON, ONLY WORDS 13 (1993) ("Social inequality is substantially created and enforced—that is, *done*—through words and images . . . . Elevation and denigration are all accomplished through meaningful symbols and communicative acts in which saying it is doing it.").

39. Matsuda, *supra* note 11, at 2358. *See also* Nielsen, *supra* note 35, at 266 (2002) ("If prejudice is about relative group position, then public hate speech provides a clear example of one of the ways in which such social hierarchies are constructed and reinforced on a day-to-day basis."). For this reason, there is no correlate to racist speech for the majority group, as the expression reinforces histories of subordination and inequality to the majority group. Delgado & Yun, *supra* note 11, at 1823. Terms like "honky," "cracker," and "redneck" are disrespectful, yet they also imply power. *Id.*

40. Delgado & Yun, *supra* note 11 at 1813.

41. *See infra* notes 42-47.

42. Patricia Williams, *Spirit-Murdering the Messenger: The Discourse of Fingerpointing as the Law's Response to Racism*, 42 U. MIAMI L. REV. 127, 151 (1987).

43. DANIEL A. FARBER, THE FIRST AMENDMENT 119 (2d ed. 2003); KAPLIN & LEE, *supra* note 7, at 1018; Delgado, *supra* note 35, at 137.

44. Delgado, *supra* note 35, at 143.

45. *Id.* at 157.

46. *See* Matsuda, *supra* note 11, at 2332 ("In addition to physical violence, there is the violence of

"fear in the gut, rapid pulse rate and difficulty in breathing, nightmares, post-traumatic stress disorder, hypertension, psychosis, and suicide."[47]

Exposure to hate speech interferes with the targets' access to and enjoyment of educational opportunities in the university context.[48] In addition, hate speech alienates the student from the school.[49] When hate speech goes unpunished, the victim of the speech and members of the targeted group may feel disenfranchised from the university.[50] Lack of discipline from university officials may be perceived as approval of the racist message.[51] The cumulative effect of the individual harms and the alienation of the student may result in a hostile environment to the minority groups and a denial of an equal opportunity for education.[52] Thus, hate speech not only leads to stress, but it leads to a detrimental effect on academic opportunity and performance.[53] Implicit in this Article is a belief that university hate speech policies should thus be drafted to ensure equal access to education and prevent interference with the educational process.[54]

While the Supreme Court has often held that the First Amendment extends to state university campuses,[55] it has also often held that "[a] university's mission is education" and has never interpreted the First Amendment to deny a university's "authority to impose reasonable regulations compatible with that mission upon the use of its campus and facilities."[56] Additionally, the Court has unequivocally recognized "a university's right to exclude . . . First Amendment activities that . . . substantially interfere with the opportunity of other students to obtain an education."[57] Hate speech policies

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the word. Racist hate messages, threats, slurs, epithets, and disparagement all hit the gut of those in the target group.").

47. *Id.* at 2336.

48. KAPLIN & LEE, *supra* note 7, at 1018.

49. Herron, *supra* note 22, at 412.

50. *Id*.

51. Matsuda, *supra* note 11, at 2371.

52. Herron, *supra* note 22, at 413; *accord* AnnMarie Ruegsegger Highsmith, *When He Hollers, Do We Have to Let Him Go?*, 27 BEVERLY HILLS B. ASS'N J. 27, 32 (1993); Byrne, *supra* note 11, at 407 (noting "the harm has been portrayed as the creation of a hostile environment that denies the student target equal educational opportunity."); Recent Case, *supra* note 11, at 1400 ("Hate speech hinders learning and participation in and out of class.").

53. *See generally* Darryl Brown, Note, *Racism and Race Relations in the University*, 76 VA. L. REV. 295, 325 (1990).

54. *See supra* notes 48-53 and accompanying text. However, some literature suggests that members of minority groups and women are unlikely to be intimidated by racial and sexual epithets. *See, e.g.,* Julie Seaman, *Hate Speech and Identity Politics: A Situationalist Proposal*, 36 FLA. ST. U.L. REV. 99, 99-106 (2008) (discussing various dominant theories).

55. *See* Widmar v. Vincent 454 U.S. 263, 268-69 (1981).

56. *Id.* at 268 n.5.

57. *Id.* at 277 (citing Healy v. James, 408 U.S. 169, 188-89 (1972)) (emphasis omitted).

are a means of preventing interference with minority groups' education.

It is possible to draft university hate speech policies that are consistent with First Amendment values if drafters avail themselves of the captive audience doctrine, which holds that when people's privacy interests are invaded in intolerable ways by offensive speech, such that the speech is effectively unavoidable, that speech may be restricted.[58] Some scholars suggest that the captive audience doctrine could apply to various settings in a university, such that restricting hate speech in those areas would be consistent with First Amendment jurisprudence,[59] but this idea has yet to be vigorously applied. This Article seeks to fill that gap in the literature. It applies the captive audience doctrine to three university settings: the dormitory, the classroom, and walkways to and from the classroom. University hate speech policies typically regulate hate speech regardless of the context in which the expression occurs – this broadness is their weakness.[60] The restrictions generally apply on all parts of the campus, at any time, and to all parts of university life.[61] This makes them vulnerable to a traditional First Amendment challenge; however, carefully drafted policies that are sensitive to context may provide restrictions consistent with First Amendment values.

Part II of this Article examines university hate speech policies enacted over the past twenty years and puts them in context, especially in light of the recent development in restricting speech at universities: the free speech zone. Part III then considers the captive audience doctrine. In particular, it draws out the distinction latent in the doctrine between the private and the public realm. Part IV applies the captive audience doctrine to dormitories, the classroom, and walkways to and from the classroom. Since students are "captive" in all three of these settings, this Article argues that hate speech policies should be drafted to restrict speech specifically in these settings. This way, universities may permissibly restrict harmful speech in the settings in which minority

58. *See infra* Part III.

59. *See* Marcy Strauss, *Redefining the Captive Audience Doctrine*, 19 HASTINGS CONST. L.Q. 85, 100-02, 120-21 (1992) (considering application of the captive audience theory to different settings in the university environment without any conclusion); Nadine Strossen, *Regulating Racist Speech on Campus: A Modest Proposal?*, 1990 DUKE L.J. 484, 501-06 (discussing application of the captive audience theory to university students); Lawrence, *supra* note 11, at 456-57 (considering application of the captive audience doctrine in a university context); Matsuda, *supra* note 11, at 2372 (noting this application is possible). The captive audience doctrine has been applied to public university basketball games. *See* Gregory Matthews Jacobs, Comment, *Curbing Their Enthusiasm: A Proposal to Regulate Offensive Speech at Public University Basketball Games*, 55 CATH. U. L. REV. 547, 550-51, 565-73 (2006).

60. Deborah Epstein, *Can A "Dumb Ass Woman" Achieve Equality in the Workplace? Running the Gauntlet of Hostile Environment Harassing Speech*, 84 GEO. L.J. 399, 426 (1996).

61. *See*, *e.g.*, Dambrot v. Cent. Michigan Univ., 55 F.3d 1177, 1182 (6th Cir. 1995); UWM Post, Inc. v. Bd. of Regents, 774 F. Supp. 1163, 1164-65 (E.D. Wis. 1991); *Doe*, 721 F. Supp. at 856; *see also* Epstein, *supra* note 60, at 426.

students can least avoid the harm.

II. UNIVERSITY HATE SPEECH POLICIES IN CONTEXT

In response to incidents such as the one described in the Introduction,[62] one study estimates that as many as ninety percent of American public and private colleges and universities have adopted hate speech policies to curb bigoted speech.[63] These regulations prohibit potentially damaging and offensive speech.[64]

Most public and private universities continue to enact, revise, and revoke regulations against hate speech.[65] The continuing hateful incidents on campus, as well as the litigious climate and developments in the courts, make this a dynamic "hot topic."[66] Free speech advocacy organizations, such as the

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62. *See supra* notes 3-6 and accompanying text.

63. Zeiger, *supra* note 8, at C4; *see also* The FIRE, Free Speech, http://www.thefire.org/cases/freespeech (describing current hate speech policies). Public universities are bound by the first amendment under the state action doctrine. *See* Lloyd v. Tanner Corp., 407 U.S. 551, 567 (1972) ("[T]he First and Fourteenth Amendments safeguard the right[] of free speech . . . by limitations on state action, not on action by the owner of private property used non-discriminatorily for private purposes only.") (emphasis omitted); *see also* Matsuda, *supra* note 11, at 2370; Byrne, *supra* note 11, at 424 ("As to universities, a flat rule has developed: state universities are state actors, private universities are not."); *accord* Rendell-Baker v. Kohn, 457 U.S. 830, 842 (1982) (private universities are not characterized as state actors). While private universities have more freedom to regulate student behavior, many invoke the First Amendment as a matter of ethics. Matsuda, *supra* note 11, at 2370.

64. For example, the Emory University Policy Statement on Discriminatory Harassment states in part:

It is the policy of Emory University that all employees and students should be able to enjoy and work in an educational environment free from discriminatory harassment. Harassment of any person or group of persons on the basis of race, color, national origin, religion, sex, sexual orientation, age, disability, or veteran's status is a form of discrimination specifically prohibited in the Emory University community. Any employee, student, student organization, or person privileged to work or study in the Emory University community who violates this policy will be subject to disciplinary action up to and including permanent exclusion from the University. Discriminatory harassment includes conduct (oral, written, graphic, or physical) directed against any person or group of persons because of race, color, national origin, religion, sex, sexual orientation, age, disability or veteran's status and that has the purpose or reasonably foreseeable effect of creating an offensive, demeaning, intimidating, or hostile environment for that person or group of persons.

EMORY UNIV., POLICY STATEMENT ON DISCRIMINATORY HARASSMENT, *available at* https://community.bus.emory.edu/program/EveningMBA/Academics/Shared%20Documents/Discriminatory%20Harassment.pdf.

65. KAPLIN & LEE, *supra* note 7, at 1017.

66. Carol L. Zeiner, *Zoned Out! Examining Campus Speech Zones*, 66 LA. L. REV. 1, 4 (2005) (referring to the issue of university free speech zones as a "hot topic, one which will likely continue to be the subject of controversy and litigation"). An excerpt from an article in a publication of the Association of Governing Boards of Universities and Colleges, an organization whose mission is strengthening the boards of public and private universities, reflects the tumultuous situation:

Foundation for Individual Rights in Education ("FIRE")[67] and the American Civil Liberties Union ("ACLU") tend to become involved in the multitude of litigation.

To understand hate speech policies and put them in context, their history in the courts will be discussed.[68] Then, to understand the broader landscape of speech restrictions in universities, free speech zones will be described, analyzed, and distinguished from hate speech policies.[69]

A. Hate Speech Policies: Generally Impermissibly Overbroad and Vague

While universities continue to maintain and even strengthen hate speech policies,[70] they generally have not survived First Amendment attack. Policies at the University of Michigan,[71] Central Michigan University,[72] the University of Wisconsin-Madison,[73] George Mason University,[74] Shippensburg

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> September 2003 was an especially turbulent month for speech on the American college campus . For example, the University of Hawaii was successfully sued in state court by a basketball fan who, at a game several years ago, had been offended when the team's student manager uttered audible racial slurs . In Pennsylvania, a federal judge ruled that Shippensburg State University could not invoke certain student-conduct policies directed against "acts of intolerance." The court treated such provisions in the student handbook as a restrictive "speech code[]" . . . [T]he judge found that these policies (which he conceded to be "well intentioned") violated the free-speech rights of several Shippensburg students. That same month, California Polytechnic University-San Luis Obispo was taken to court under the First Amendment for targeting a white student because he had posted a flier outside the campus multicultural center that many minority students found deeply offensive . The lessons learned from these concurrent legal events are at best confusing and at worst bewildering.

Robert M. O'Neil, *Walking the Talk on Campus Speech*, TRUSTEESHIP, Mar./Apr. 2004, at 24.

67. FIRE is a nonprofit organization with a stated mission to "defend and sustain individual rights at America's colleges and universities," including the right of free speech. FIRE, About FIRE, http://www.thefire.org/ index.php/article/4851.html; *see generally* Clay Calvert & Robert D. Richards, Interview and Commentary: *Lighting a Fire on College Campuses: An Inside Perspective on Free Speech, Public Policy & Higher Education*, 3 GEO. J.L. & PUB. POL'Y 205 (2005) (examining the organization).

68. *See* Part II. A.

69. *See* Part II. B.

70. *See* JON B. GOULD, SPEAK NO EVIL: THE TRIUMPH OF HATE SPEECH REGULATION 5-6 (2005) (discussing the prevalence of hate speech policies); Jon B. Gould, *The Precedent That Wasn't: College Hate Speech Codes and the Two Faces of Legal Compliance*, 35 LAW & SOC'Y REV. 345, 345, 357-59 (2001) (finding that despite courts striking hate speech policies down as unconstitutional, both public and private universities continue to enact and maintain them).

71. *Doe*, 721 F. Supp. at 853.

72. *Dambrot*, 55 F.3d at 1185.

73. *UWM Post, Inc.*,774 F. Supp. at 1163, 1165, 1181.

74. Iota Xi Chapter of Sigma Chi Fraternity v. George Mason Univ., 993 F.2d 386 (4th Cir. 1993). This case did not involve a hate speech policy, but rather the University's suspension of a fraternity chapter

University,[75] and Stanford University[76] have been struck down as unconstitutional under the First Amendment.[77] Indeed the very term "campus speech code" connotes ideas of overbreadth, vagueness, and the chilling of permitted speech – one scholar argued that, once the court labeled the Stanford policy as a "Speech Code," the policy was doomed.[78]

The constitutional validity of a university hate speech policy was first addressed in federal court in 1989.[79] In *Doe v. University of Michigan*,[80] the court considered the University of Michigan's "Policy on Discrimination and

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for its public performance of a racist and sexist skit that created a "hostile learning environment for women and blacks, incompatible with the University's mission." *Id.* at 388.

75. Bair v. Shippensburg Univ., 280 F. Supp. 2d 357, 373 (M.D. Pa. 2003).

76. Order on Preliminary Injunction, Corry v. Stan. Univ., No. 740309, at *41 [hereinafter *Corry*] (Cal. Super. Ct. Feb. 27, 1995), *available at* http://www.ithaca.edu/faculty/cduncan/265/corryvstanford.htm. Stanford decided not to appeal the decision on March 9, 1995. *Casper: Fundamental Standard Court Case Won't Be Appealed*, STAN. CAMPUS REP., March 15, 1995, at 13. While the First and Fourteenth Amendments safeguard the right of free speech by limitations on state action, not private action, *Lloyd*, 407 U.S. at 567, and private universities are not characterized as state actors, *See Rendell-Baker*, 457 U.S. at 842, a California state statute, the Leonard Law, applied the First Amendment requirements to the disciplinary regulations of private universities and granted standing to students to challenge such regulations. *See* CAL. EDUC. CODE § 94367 (West 2009); *see also Corry*, No. 740309 at *41 (referring to California state statute as "Leonard Law"). The Leonard Law states:

> No private postsecondary educational institution shall make or enforce a rule subjecting a student to disciplinary sanctions solely on the basis of conduct that is speech or other communication that, when engaged in outside the campus or facility of a private postsecondary institution, is protected from governmental restriction by the First Amendment to the United States Constitution or Section 2 of Article 1 of the California Constitution.
>
> Any student enrolled in a private postsecondary institution at the time that the institution has made or enforced any rule in violation of subdivision (a) may commence a civil action to obtain appropriate injunctive and declaratory relief as determined by the court. Upon motion, a court may award attorney's fees to a prevailing plaintiff in a civil action pursuant to this section.

§ 94367(a)-(b) (first emphasis added). A California state court held that the Leonard Law was constitutional and that the students that challenged the Stanford policy had standing to take action against the University through the enforcement of the Leonard Law. *Corry*, No. 740309 at *42. Moreover, the court held that the Stanford policy was impermissibly overbroad and content-based. *Id.* at *42.

77. *See also* Coll. Republicans at San Francisco State Univ. v. Reed, 523 F. Supp. 2d 1005, 1024 (N.D. Cal. 2007) (granting preliminary injunction against the enforcement of university speech code provisions that allowed the university to punish students for behavior that was not "civil" or was "inconsistent" with university policies); Roberts v. Haragan, 346 F. Supp. 2d 853, 874 (N.D. Tex. 2004) (granting declaratory relief and finding interim policy unconstitutional); Pro-Life Cougars v. Univ. of Houston, 259 F. Supp. 2d 575, 585 (S.D. Tex. 2003) (holding that a policy set forth in the Student Handbook was unconstitutional).

78. Thomas C. Grey, *How to Write a Speech Code Without Really Trying: Reflections on the Stanford Experience*, 29 U.C. DAVIS L. REV. 891, 891 (1996).

79. *See Doe*, 721 F. Supp. 852.

80. *Id.*

Discriminatory Harassment of Students in the University Environment," which it had adopted in response to increased incidents of racism and racial harassment.[81] For example, individuals distributed a flier declaring "open season" on African Americans, referring to them as "'saucer lips, porch monkeys, and jigaboos.'"[82] Outraged, university students planned a demonstration.[83] In view of the demonstrators, someone placed Ku Klux Klan attire in a dormitory window.[84]

The University's hate speech policy prohibited "'[a]ny behavior, verbal or physical, that stigmatizes or victimizes an individual on the basis of race, ethnicity, religion, sex, sexual orientation, creed, national origin, ancestry, age, marital status, handicap or Vietnam-era veteran status[.]'"[85] It restricted behavior that "'[i]nvolve[d] an express or implied threat'" or created "'an intimidating, hostile, or demeaning environment'" for individual pursuits in academic, employment, or extracurricular activities.[86]

The court held that the policy was unconstitutional both on its face and under the University's interpretation and application of it.[87] It was unconstitutionally overbroad on its face because its language swept up and sought to punish substantial amounts of constitutionally protected speech.[88] For example, a graduate student who said that homosexuality was a disease that could be cured with counseling was found guilty of sexual harassment under the policy, speech protected by the First Amendment yet sanctionable under the policy.[89]

The court also held that the policy was unconstitutionally vague on its face because students could not discern what speech was prohibited and what speech was protected.[90] The vagueness created a chilling effect on speech, as the policy deterred people from saying things they otherwise would have said because of fear that their comments would violate the policy.[91] To avoid a charge of vagueness, "'men of common intelligence'" must not need to guess at a policy's meaning, and the policy must give sufficient warning of the banned conduct and set out clear standards for those who apply the policy.[92]

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81. *Id.* at 853-54.
82. *Id.* at 854.
83. *See id.*
84. *Doe*, 721 F. Supp. at 854.
85. *Id*. at 856.
86. *Id.*
87. *Id.* at 866-68.
88. *See id*. at 866.
89. *Id*. at 865.
90. *See Doe*, 721 F. Supp. at 867.
91. *See id*. at 866-67.
92. *Id.* at 866 (quoting Broadrick v. Oklahoma, 413 U.S. 601, 607 (1973)).

The policy at issue was unconstitutionally vague because its terms "stigmatize" and "victimize" were unclear and elusive.[93] The policy also did not distinguish protected from sanctionable speech, so students were forced to guess whether a comment about a controversial issue would be sanctionable under the policy.[94]

The policy at issue in *Doe* demonstrates the classic constitutional problems with university hate speech policies – they are often impermissibly overbroad and vague.[95] The hate speech policy at issue in *UWM Post, Inc. v. Board of Regents of the University of Wisconsin System* suffered from the same overbreadth problem as in *Doe*, but its terms were not vague.[96] The policy applied to "'racist or discriminatory comments, epithets, or other expressive behavior directed at an individual'" and prohibited such speech that intentionally demeaned the "'race, sex, religion, color, creed, disability, sexual orientation, national origin, ancestry or age of the individual'" and created "'an intimidating, hostile, or demeaning environment for education.'"[97] The court held that the language "'discriminatory comments, epithets, or other expressive behavior'" and "'demean'" were not vague, although other language in conjunction with that language was confusing.[98] This case demonstrates that, although the university policy was overbroad, its drafters found language that was sufficiently precise that students of common understanding need not guess at its meaning.[99]

Thus, if precise language is used in hate speech policies, it is merely the overbreadth issue that troubles the policies.[100] The overbreadth doctrine is "'strong medicine,'" and courts have generally applied it "'only as a last resort.'"[101] A policy should not be "invalidated merely because it is possible to conceive of a single impermissible application."[102] The facial overbreadth must be "'not only real but substantial in relation to the [policy's] plainly

93. *Id.* at 867.

94. *Id.*

95. *See*, *e.g.*, *Bair*, 280 F. Supp. 2d at 372 (finding the harassment policy to be overbroad, the court did not rule on the vagueness claim); Vega v. Miller, 273 F.3d 460, 477 (2d Cir. 2001) (Cabranes, J., dissenting) (arguing sexual harassment policy was unconstitutionally overbroad and vague); *Dambrot*, 55 F.3d at 1184 (policy was unconstitutionally vague).

96. *UWM Post, Inc*., 774 F. Supp. at 1179-80 (finding that key terms had "clear and definite" meanings).

97. *Id.* at 1165.

98. *Id.* at 1179-80.

99. *See id.* at 1180-81.

100. *See id.*

101. Sypniewski v. Warren Hills Reg'l Bd. of Educ., 307 F.3d 243, 258-59 (3d Cir. 2002) (quoting Los Angeles Police Dep't. v. United Reporting Publ'g. Corp., 528 U.S. 32, 38 (1999) (citations omitted)).

102. Flaherty v. Keystone Oaks Sch. Dist., 247 F. Supp. 2d 698, 702-03 (W.D. Pa. 2003).

legitimate sweep'" in order to render the policy unconstitutional.[103] If hate speech policies are drafted more precisely, with a sensitivity to context, they will not be rejected as overbroad, as will be demonstrated in Part IV.

B. Free Speech Zones Distinguished From Hate Speech Policies

Hate speech policies are distinguished from free speech zones.[104] Free speech zones are part of a movement in which universities are looking for a way to regulate speech without falling into the trap of the "campus hate speech code," which tends to "doom" policies in both the public relations arena and in court.[105] Free speech zones limit student expression to defined areas of campus.[106] Often the zones are remote parts of campus, to limit disruption of the main parts.[107] Many such policies permit rallies, demonstrations, speeches, or pamphleteering in the designated areas only.[108]

Free speech zones theoretically may be defended as permissible restrictions on speech because they may constitute "constitutionally permissible, content-neutral time, place, and manner [restrictions] . . . in the public fora" of the campus.[109] Under public forum doctrine, as long as the restrictions are "justified without reference to the content of the regulated speech, . . . narrowly tailored to serve a significant governmental interest, and . . . leave open ample alternative channels for communication of the information" they will be permissible.[110] A regulation is narrowly tailored if it promotes a significant government interest that would be accomplished less effectively without the regulation.[111]

Under the first requirement, a free speech zone is seemingly content-neutral since all speakers are affected "regardless of the content of their speech [.]"[112] However, several cases involving free speech zones held that the zones

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103. Saxe v. State College Area Sch. Dist., 240 F.3d 200, 214 (3d Cir. 2001) (quoting *Broadrick*, 413 U.S. at 615).

104. FIRE, Speech Code Issues, http://www.thefire.org/index.php/article/5675.html#zones (last visited Oct. 8, 2009) (discussing various forms of speech code policies and issues that may arise with each).

105. Grey, *supra* note 78, at 891-92 (reflecting on how the Stanford hate speech policy was in trouble as soon as it was called a "Campus Speech Code").

106. FIRE, *supra* note 104.

107. *Id.*

108. *Id.*

109. Zeiner, *supra* note 66, at 17. *See also* Am. Future Sys., Inc. v. Pennsylvania State Univ., 688 F.2d 907, 915 (3d Cir. 1982) ("It is undisputed that even speech entitled to the highest First Amendment protection may be subject to reasonable time, place, and manner regulations.").

110. Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984) (citing City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 808, 812, 821-23 (1984)).

111. Ward v. Rock Against Racism, 491 U.S. 781, 799 (1989) (citing United States v. Albertini, 472 U.S. 675, 689 (1985)).

112. Thomas J. Davis, Note, *Assessing Constitutional Challenges to University Free Speech Zones*

were unconstitutional because university officials had too much discretion in what activities were permitted in the designated areas.[113] For example, in *Pro-Life Cougars v. Lee*, university officials subjected "potentially disruptive" activities to different time, place, or manner restrictions than activities they considered to be nondisruptive.[114]

Under the second requirement, free speech zones may restrict more speech than is necessary. The interest in preventing disorder on campus is significant;[115] however, a ban on certain types of expressive activity in large portions of the campus could fail the narrowly tailored requirement.[116] In *Service Employee International Union, Local 660 v. Los Angeles*,[117] to secure the area around the 2000 Democratic National Convention, the Government banned expressive activity in a secured zone of 185 acres around the building where the convention was held.[118] Protesters sought a preliminary injunction against enforcement of the zone.[119] The court held that although the interest in security was significant, the size of the secured zone was so large that it prevented anyone "with any message, positive or negative, from getting within several hundred feet" of their intended audience as the delegates entered and exited the convention center.[120] The court granted the motion for the preliminary injunction because the secured zone covered more area than necessary to secure the building.[121] Free speech zones may similarly not meet the narrowly tailored requirement if, on a large campus, they limit expressive activity to a small, remote area (as most free speech zones do).[122] The university could restrict less speech and still avoid the disruptions that unrestricted speech would cause in university operations.[123]

Lastly, free speech zones may not meet the adequate alternatives requirement. In *Students Against Apartheid Coalition v. O'Neil*,[124] the University of Virginia banned structures from the Lawn, a centrally located

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Under Public Forum Doctrine, 79 IND. L.J. 267, 269 (2004).

113. *See, e.g.*, *Pro-Life Cougars*, 259 F. Supp. 2d at 583-84; Khademi v. S. Orange County Cmty. Coll. Dist., 194 F. Supp. 2d 1011, 1023 (C.D. Cal. 2002); Burbridge v. Sampson, 74 F. Supp. 2d 940, 952-53 (C.D. Cal. 1999). *See also* Davis, *supra* note 112, at 278-81 (discussing content-neutrality and free speech zones).

114. *Pro-Life Cougars*, 259 F. Supp. 2d 577-78.

115. Davis, *supra* note 112, at 284.

116. *See infra* notes 117-23 and accompanying text.

117. 114 F. Supp. 2d 966 (C.D. Cal. 2000).

118. *Id.* at 968.

119. *Id.*

120. *Id.* at 971.

121. *Id.* at 975.

122. Davis, *supra* note 112, at 285.

123. *See id*.

124. 660 F. Supp. 333 (W.D. Va. 1987).

area of the campus, in reaction to a group of protesters placing politically symbolic structures there.[125] The University suggested alternative sites where the structures could be built,[126] but the court held that the alternative building sites were inadequate because they were in low-traffic areas and the politically-motivated speech was unlikely to reach the intended audience.[127] Thus, if a university's free speech zone limits speech to remote, low traffic areas of campus, the zone may be unconstitutional under the adequate alternatives requirement.[128]

Hate speech policies, unlike free speech zones, do not limit speech to specified areas, but traditionally restrict certain offensive speech altogether.[129] Depending on how a hate speech policy is drafted, the rallies, protests, and pamphleteering that are limited to certain areas with free speech zones may not be limited at all, as long as the speech does not fall under the restricted hate speech categories of the policy. Unlike free speech zones, hate speech policies are not analyzed under public forum doctrine, because hate speech policies do not only regulate those parts of the campus that are traditional public fora – the policies regulate speech in all university areas. Hate speech policies are generally not content-neutral, whereas free speech zones, at least ostensibly, are.

III. THE CAPTIVE AUDIENCE DOCTRINE

The First Amendment, which protects "freedom of speech,"[130] suggests that the speaker's interest is the central focus of the guarantee.[131] However, an individual does not have an absolute right to offensive expression:[132] in certain circumstances, the unwillingness of others to listen to the expression can outweigh the speaker's right to say it.[133] While First Amendment interests are

125. *Id.* at 335-37.

126. *Id.* at 337.

127. *Id.* at 339-40.

128. *See* Davis, *supra* note 112, at 288-89.

129. This Article's proposal changes this. *See supra* notes 60-61 and accompanying text (stating that those restrictions that apply on all parts of the campus, at any time, to all parts of university life are vulnerable to First Amendment challenge and should be drafted with sensitivity to context that would restrict hate speech consistent with First Amendment values).

130. U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech").

131. Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 593 (1982) ("[T]he constitutional guarantee of free speech ultimately serves only one true value[:] . . . 'individual self-realization.'").

132. Offensive expression is not the only type of speech that may be restricted. *See* Rowan v. U.S. Post Office Dep't, 397 U.S. 728, 738 (1970) (establishing that in some contexts, "no one has a right to press even 'good' ideas on an unwilling recipient").

133. *See, e.g.*, Kovacs v. Cooper, 336 U.S. 77, 86-87 (1949) (contrasting an unwilling listener from "the passer-by who may be offered a pamphlet in the street but cannot be made to take it"); Cohen v.

substantial, so too are the privacy interests of unwilling listeners.[134] Both interests are "'rooted in the traditions and significant concerns of our society.'"[135] Therefore, even though the freedom to communicate is substantial, "the right of every person 'to be let alone' must be placed in the scales with the right of others to communicate."[136] When a listener's "substantial privacy interests are being invaded in an essentially intolerable manner"[137] and the listener is either unable to avoid the unwanted speech or avoidance is significantly difficult,[138] the Government may "shut off discourse solely to protect others from hearing it."[139] When unwanted speech is so intrusive that it is effectively unavoidable, the audience is considered to be "captive" to the speech.[140] The captive audience doctrine renders Government regulation of speech constitutionally permissible.[141]

Identifying the precise circumstances in which the Government may regulate speech pursuant to the captive audience doctrine is difficult: rarely is anyone truly "captive" to a speaker's message[142] because the Supreme Court has suggested a variety of ways for the unwilling listener to avoid an offensive message.[143] It is unclear, however, under what circumstances "the burden [should] be placed on listeners to turn their heads, avert their eyes, close their ears, or even psychologically tune out the message, rather than force the

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California, 403 U.S. 15, 21 (1971) ("[T]his Court has recognized that government may properly act in many situations to prohibit intrusion into the privacy of the home of unwelcome views and ideas which cannot be totally banned from the public dialogue.").

134. *See* Erznoznik v. Jacksonville, 422 U.S. 205, 208-09 (1975) (describing the antinomy between the right to privacy and the right to free speech).

135. *Id.* at 208-09 (citing Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 491 (1975)).

136. *Rowan*, 397 U.S. at 736.

137. *Cohen*, 403 U.S. at 21.

138. Hill v. Colorado, 530 U.S. 703, 716 (2000) ("[T]he protection afforded to offensive messages does not always embrace offensive speech that is so intrusive that the unwilling audience cannot avoid it.").

139. *Cohen*, 403 U.S. at 21.

140. Justice Douglas coined the term "captive audience" in his dissent in Public Utilities Commission v. Pollak, 343 U.S. 451, 468 (1952) (Douglas, J., dissenting) (establishing a captive audience as one who must endure the speech "as a matter of necessity, not of choice").

141. *See Cohen*, 403 U.S. at 21("[T]his Court has recognized that government may properly act in many situations to prohibit intrusion into the privacy of the home of unwelcome views and ideas which cannot be totally banned from the public dialogue[.]"); *see also* Strauss, *supra* note 59, at 85 ("The concept that the government may regulate speech delivered to an unwilling listener is usually referred to as the 'captive audience doctrine.'").

142. *See Erznoznik*, 422 U.S. at 210 (quoting *Rowan,* 397 U.S. at 736) ("[I]n our pluralistic society . . . 'we are inescapably captive audiences for many purposes.'").

143. *See, e.g., id.* at 210-11 (suggesting averting eyes from the unwanted message); Consolidated Edison Co. v. Public Service Commission, 447 U.S. 530, 542 (1980) (suggesting throwing the unwanted material away); *but see* J.M. Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 1990 DUKE L.J. 375, 418-21 (arguing that these means may not be sufficient in certain contexts).

speaker to cease [speaking.]"[144]

Under Supreme Court doctrine, the speaker's location is important to determining when the captive audience doctrine can be applied.[145] While a speaker has a broad right to speak on his own property[146] and on publicly owned property that either traditionally or by Government designation has been held open for expression,[147] he has less right to speak on public property without that designation,[148] and little or no right to speak on others' privately owned property.[149] These distinctions represent a balancing between the speaker's right to expression "and the competing rights of others."[150]

The value of the speech is also important in the balancing of whether the unwilling recipient's privacy interest will outweigh the speaker's right to expression. The Supreme Court has not found vulgar or offensive speech to be undeserving of protection.[151] It has, however, used similar language, explaining that "[b]ecause content of [vulgar, offensive, and shocking speech] is not entitled to absolute constitutional protection under all circumstances, [the Court] must consider [the speech's] context in order to determine whether [a restriction on speech] was constitutionally permissible."[152] While any regulation of low-value speech will receive strict scrutiny,[153] the First Amendment thus allows low-value speech to be regulated in certain contexts.[154]

Scholars have criticized or cautioned use of the captive audience doctrine

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144. Strauss, *supra* note 59, at 86.

145. Frisby v. Schultz, 487 U.S. 474, 479 (1988) ("[t]o ascertain what limits, if any, may be placed on protected speech, [the Court has] often focused on the 'place' of that speech"); *see also Cohen*, 403 U.S. at 21-22 (discussing the varying privacy interest in avoiding unwanted communication in different settings).

146. City of Ladue v. Gilleo, 512 U.S. 43, 55 (1994).

147. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45-46 (1983).

148. *Id.* at 49.

149. *See* Adderley v. Florida, 385 U.S. 39, 48 (1966).

150. Lesie Gielow Jacobs, *Is There an Obligation to Listen?*, 32 U. Mich. J. L. REF. 498, 496-97 (1999).

151. *See, e.g., Cohen*, 403 U.S. at 16, 26 (holding that a man wearing a jacket that displayed the phrase "Fuck the Draft" in a courthouse was protected by the First Amendment from criminal prosecution).

152. F.C.C. v. Pacifica Found., 438 U.S. 726, 747-48 (1978).

153. *See* Hess v. Indiana, 414 U.S. 105, 108-09 (1973) (explaining that the defendant's conviction could only be upheld if his offensive language passed the strict scrutiny test adopted in Brandenburg v. Ohio, 395 U.S. 444, 447 (1969)). Some scholars assert that the Court has not been consistent in requiring all content-based restrictions of protected speech to be narrowly tailored to serve a compelling state interest. *See, e.g.*, Eugene Volokh, *Freedom of Speech, Permissible Tailoring and Transcending Strict Scrutiny*, 144 U. PA. L. REV. 2417, 2417 (1996). After reviewing the Court's history of applying strict scrutiny, Volokh concluded that "some content-based speech restrictions are unconstitutional even though they are narrowly tailored to a compelling state interest." *Id.* at 2460.

154. *See Pacifica*, 438 U.S. at 747-48; *see also* Jacobs, *supra* note 59, at 553-54.

to restrict speech.[155] One argues that, since the precise parameters of the doctrine are unclear, including exactly when audiences are considered captive, "[i]t has become a slogan without substance."[156] Furthermore, courts have not sufficiently explored the privacy interests at play.[157] The failure to precisely delineate the doctrine has troubling implications. The captive audience doctrine can be troubling because a broad understanding of it "would effectively empower a majority to silence dissidents simply as a matter of personal predilections."[158] Until we define the precise limits of the doctrine, courts may be able to use it flexibly to curtail speech inappropriately.[159] As Professor Laurence Tribe warned, "the concept of a 'captive audience' is dangerously encompassing,"[160] allowing courts to discount the traditional requirement of content-neutrality.[161] Such a malleable theory that allows courts to restrict speech based on content should be applied with caution.[162] This Article will lay out the captive audience doctrine as it has been applied in the private and public realms, and will note the underlying principles behind the decisions that guide when the doctrine is appropriately applied.

A. The Captive Audience in the Private Realm

While it is difficult to ascertain exactly when individuals are considered captive for purposes of the doctrine, the Supreme Court has most clearly categorized individuals as captive in the home.[163] The home comprises a special domain wherein the unwilling listener's interest in being left alone achieves the status of a right.[164] Unwilling listeners are under less of an obligation to avoid offensive speech in the home than elsewhere simply because "the home is different."[165] Residential privacy and well-being is an

155. *See infra* notes 156-62 and accompanying text.

156. Strauss, *supra* note 59, at 86.

157. *Id.*

158. *Cohen*, 403 U.S. at 21.

159. Strauss, *supra* note 59, at 86. "One could regulate offensive speech based on rather vague notions of captivity." J.M. Balkin, *Free Speech and Hostile Environments*, 99 COLUM. L. REV. 2295, 2311 (1999).

160. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 949-50 n. 24 (2d ed. 1988).

161. Strauss, *supra* note 59, at 86. Professor Volokh argues that the captive audience doctrine should not apply to content-based restrictions at all. *See* Eugene Volokh, Comment, *Freedom of Speech and Workplace Harassment,* 39 UCLA L. REV. 1791, 1841-43 (1992).

162. Volokh, *supra* note 161, at 1841-43.

163. *See, e.g., Frisby*, 487 U.S. at 486-88 (an ordinance that banned focused picketing was constitutional because the banned speech was focused at the "captive" resident, "figuratively, and perhaps literally, trapped within the home, . . . with no ready means of avoiding the unwanted speech").

164. Anne D. Lederman, Comment, *Free Choice and the First Amendment or Would You Read This If I Held It In Your Face and Refused to Leave?*, 45 CASE W. RES. L. REV. 1287, 1292 (1995).

165. *Frisby*, 487 U.S. at 484.

interest "of the highest order,"[166] so the unwilling listener ought to be protected "within [his] own walls."[167] Therefore, the individual's privacy rights "plainly outweigh[] the First Amendment rights" of the speaker.[168] There is "no right to force speech into the home of an unwilling listener."[169]

The Supreme Court has articulated various reasons for treating the home differently from other settings.[170] First, the Government has a significant "'interest in protecting the well-being, tranquility, and privacy of the home[.]'"[171] The home is unique in that it provides a "retreat" for individuals to "repair [and] escape from the tribulations of their daily pursuits[.]"[172] Therefore, while individuals sometimes cannot avoid offensive speech outside the home, they enjoy "a special benefit" of privacy within their walls.[173] Second, individuals are physically captive in their homes, as opposed to the relative "ease of avoiding unwanted speech in other circumstances."[174] Individuals are "figuratively, and perhaps literally, trapped within the home . . . with no ready means of avoiding the unwanted speech."[175] Because the home is the ultimate refuge for individuals, wherein there is no escape from offensive speech, the Court has recognized a broad privacy interest in the home.[176]

For example, because of the special status of the individual as captive in the home, the Court has held that postal provisions that allow individuals to restrict the type of mail they receive are constitutional.[177] The speaker's asserted First Amendment right to send unwanted material "stops at the outer boundary of each [individual's] domain."[178] Others do not have "a right to press even 'good' ideas on an unwilling recipient" in the home.[179]

An individual's private, protected domain also extends beyond the home and into other private realms. In *F.C.C. v. Pacifica Foundation*,[180] for example, the audience was a man and his son in their car, captive to an

166. Carey v. Brown, 447 U.S. 455, 471 (1980).
167. *Frisby*, 487 U.S. at 484.
168. *Pacifica*, 438 U.S. at 748.
169. *Frisby*, 487 U.S. at 485.
170. *See infra* notes 171-75 and accompanying text.
171. *Frisby*, 487 U.S. at 484 (quoting *Carey*, 447 U.S. at 471).
172. *Carey*, 447 U.S. at 471.
173. *Frisby*, 487 U.S. at 484.
174. *Id.* at 487; *see also* Jacobs, *supra* note59, at 526.
175. *Frisby*, 487 U.S. at 487.
176. *See supra* notes 171-75.
177. *Rowan*, 397 U.S. at 738.
178. *Id.*
179. *Id.*
180. 438 U.S. 726 (1978).

allegedly obscene radio broadcast.[181] Just as the Court stressed a privacy interest in the home,[182] it recognized a substantial privacy interest even in an individual's car.[183] The Court reasoned that, just as the unwilling listener does not have ready means of avoiding offensive speech in the home, he is also peculiarly captive to the speech while in his car.[184]

Even residential streets may be deserving of a privacy interest to the individuals who live on them, despite the Court's established view that "public streets [are] the archetype of a traditional public forum."[185] Accordingly, the Court upheld an ordinance that banned targeted picketing in *Frisby v. Schultz*.[186] Even though the picketing stopped outside the home,[187] the Court recognized that individuals were captive inside the home to the offensive speech.[188] Recognizing the substantial privacy interest of the home,[189] the ordinance met the "stringent" scrutiny required,[190] since the ordinance was narrowly tailored to prohibit only that offensive speech that was focused at homes, consistent with the captive audience doctrine.[191]

While the Supreme Court imposes some minimal requirements on recipients to avoid speech when they may easily do so,[192] the trend has been

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181. *Id.* at 730.

182. *Id.* at 748-49.

183. *See id.* at 730, 748-49; *see also* Patrick J. Flynn, *Street Preachers Versus Merchants: Will the First Amendment Be Held Captive in the Balance?*, 14 ST. LOUIS U. PUB. L. REV. 613, 651-53 (1995) (noting that the Court's language suggests that the balance is in favor of the asserted captive audience interest, rather than in favor of the speech interest).

184. *Cf. Frisby*, 487 U.S. at 487 (The court noted that an individual may be literally trapped within his home. A similar logic can apply to the individual in his car.); *Cohen*, 403 U.S. at 21-22 (noting the ease of avoiding unwanted speech in public places, versus the difficulty of avoiding it in the home).

185. *Frisby*, 487 U.S. at 480. A traditional public forum consists only of places such as "streets and parks which have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Perry Educ. Ass'n,* 460 U.S. at 45 (internal quotation marks omitted) (quoting Hague v. Comm. for Indus. Org., 307 U.S. 496, 515 (1939)).

186. 487 U.S. 474, 488. The prohibition of focused picketing was constitutional despite that picketing is generally considered to be core political speech. *See Carey*, 477 U.S. at 460.

187. Flynn, *supra* note 183, at 638.

188. *Frisby*, 487 U.S. at 487 (noting that the individuals in the targeted homes are "figuratively, and perhaps literally, trapped within the home . . . with no ready means of avoiding the unwanted speech").

189. *Id.* at 484 (the government has a significant "interest in protecting the well-being, tranquility, and privacy of the home").

190. *Id.* at 481 (the ordinance was judged against the "stringent" traditional public fora standards).

191. *Id.* at 488.

192. The Court tends to impose some minimal burden on the unwilling recipient of mailings within the home, rather than silence the speaker entirely. This burden can be the affirmative step of notifying the Post Office, as in *Rowan*, 397 U.S. at 738, "'averting [the recipient's] eyes,'" Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 72 (1983) (quoting *Cohen*, 403 U.S. at 21), or throwing the objectionable material away, *Consolidated Edison Co*., 447 U.S. at 542.

for the Court to refuse to impose burdens on privacy interests when the audience is captive in the private realm.[193] For example, in *Pacifica*, the Court refused to impose the seemingly minimal requirement of turning off the radio when a program was offensive:[194] "To say that one may avoid further offense by turning off the radio when he hears indecent language is like saying that the remedy for an assault is to run away after the first blow. One may hang up on an indecent phone call, but that option does not give the caller a constitutional immunity or avoid a harm that has already taken place."[195] In other words, the harm would already be done if the offensive speech were permitted at all.[196] Thus, when the individual is captive in the private realm, he is under no obligation to avoid the speech unless it may be avoided with almost no effort at all; therefore, the offensive speech may be prohibited entirely.[197]

B. The Captive Audience in the Public Realm

Individuals may be "captive" even when in public.[198] The Supreme Court has recognized that there is a spectrum of privacy interests in different settings.[199] The privacy interest in avoiding unwanted speech is less important in public parks[200] than in one's own home or when the unwilling listener is necessarily unable to avoid the speech.[201] When the degree of captivity is enough that the unwilling listener cannot practically avoid exposure, the Government may regulate speech.[202]

In *Lehman v. City of Shaker Heights*,[203] for example, the Court held that a city could permissibly prohibit political advertising on public buses, upholding a content-based restriction on political speech.[204] The Court reasoned that individuals riding the bus could not readily avoid unpleasant speech.[205] The

193. Flynn, *supra* note 183, at 636 (discussing the shift in the Court's treatment of the captive audience doctrine).

194. *Id.* at 637 (noting that the Court "did not even discuss the ease of avoiding the offensive speech except to suggest it was an inadequate remedy for listeners").

195. *Pacifica*, 438 U.S. at 748-49.

196. *See id.*

197. *See supra* notes 192-96 and accompanying text.

198. *See* Lehman v. City of Shaker Heights, 418 U.S. 298, 302 (1974) (individuals in a public streetcar were considered to be a captive audience) (citing Public Utilities Comm'n v. Pollak, 343 U.S. 451, 468 (1952) (Douglas, J., dissenting)).

199. *Cohen*, 403 U.S. at 21-22.

200. *But see Ward*, 491 U.S. at 784, 792 (preserving tranquility in part of Central Park was justification for restraining offensive musical expression).

201. *Cohen*, 403 U.S. at 21-22.

202. *See Lehman*, 418 U.S. at 304.

203. 418 U.S. 298.

204. *Id.* at 304.

205. *Id.* at 307 (Douglas, J., concurring); *but see* Strauss, *supra* note 59, at 98 (noting that though the

riders must remain on the bus, as they are riding it out of necessity.[206] Because they were physically confined on the bus without ready means to avoid speech, the Government had a legitimate interest in minimizing potentially offensive speech on the captive audience.[207]

It is important to note that the Court could have held that inherent in choosing to ride public transportation is acquiescence to listening to any speech offered in the public forum.[208] That an individual can be captive, even in public, is an important innovation that underlies the holding in *Lehman*.

Some scholars have suggested that some of the captive audience cases are no longer good law.[209] In particular, some scholars are bothered by cases that place no burden on the unwilling listener to avoid the offensive message.[210] For example, in *Pacifica,* the Court pointed out that "prior warnings cannot completely protect the listener or viewer from unexpected program content" and that "[t]o say that one may avoid further offense by turning off the radio when he hears indecent language is like saying that the remedy for an assault is to run away after the first blow."[211] This language has led some to conclude that *Pacifica* was decided incorrectly.[212] The Court, however, has not overruled the opinion.[213] On the contrary, it has recently upheld ordinances that restrict speech in the public domain, placing no burden on the listener to take any steps to avoid the unwanted speech.[214] Therefore, while the Court has not drawn clear lines to identify when listeners will bear some responsibility for avoiding the unwanted speech and when they will not, this law is still good.[215]

IV. APPLYING THE CAPTIVE AUDIENCE DOCTRINE TO UNIVERSITIES

University hate speech policies have typically regulated hate speech

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riders were not free to leave the bus, they could avert their eyes from the potentially offensive political advertisements).

206. *Lehman*, 418 U.S. at 306-07 (Douglas, J., concurring).

207. *Id.* at 305-08.

208. James J. Zych, Note, Hill v. Colorado *and the Evolving Rights of the Unwilling Listener*, 45 ST. LOUIS U. L.J. 1281, 1290 (2001).

209. *See, e.g.,* Strauss, *supra* note 59, at 94.

210. *See id.*

211. *Pacifica*, 438 U.S. at 748-49.

212. Jacobs, *supra* note 59, 581 n.168.

213. *Id.*

214. *See generally Hill*, 530 U.S. 703. For a discussion of *Hill*, see *infra* notes 255-68 and accompanying text.

215. Professor Flynn discusses a shift in the Court's treatment of the captive audience doctrine, imposing less responsibility on the listener to avoid unwanted speech than it used to. Flynn, *supra* note 183, at 636-37.

regardless of the context in which the expression occurs.[216] Their restrictions apply throughout the campus, at any time, and to all parts of university life.[217] This application has led to their being found unconstitutional. The policies are generally overbroad, restricting protected speech.[218] Hate speech policies that designate the settings in which hate speech is prohibited would more appropriately reconcile the conflicting privacy and free speech values. Context is often determinative under the captive audience doctrine: the Government may restrict speech that is normally protected, depending on the context.[219] Thus, hate speech policies should be drafted more narrowly, targeting only those settings in the university wherein the students are unable to avoid offensive speech and have a privacy interest. Student dormitories, walkways to and from the classroom, and the classroom itself are those settings in which hate speech may be permissibly regulated.[220]

A. Students Are Captive in Their Dormitories

University students are captive to offensive hate speech in their dormitory rooms. At The Citadel, for example, an African American freshman was asleep in his room when five white cadets, wearing white sheets and cone-shaped masks, shouted offensive language at him and left behind a burnt cross made of newspaper.[221] This type of incident creates the special harms discussed earlier, including silencing and harming the individual target and the target group, and interfering with the target's access to and enjoyment of educational opportunities in the university context.[222] The university, therefore, has an interest in limiting this type of hateful expression. To that end, university hate speech policies should be drafted to specifically prohibit hate speech in dormitories, thereby limiting interference with the educational process. Such a prohibition is consistent with the captive audience doctrine and would not suffer from the impermissible overbreadth of traditional hate speech policies.[223]

The reasons for treating the home differently from other contexts also apply to a student in his dormitory. A student's dormitory actually is his home

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216. Epstein, *supra* note 60, at 426.

217. S*ee, e.g., Dambrot*, 55 F.3d at 1182; *UWM Post*, 774 F. Supp. 1163; *Doe*, 721 F. Supp. 852; *see also* Epstein, *supra* note 60, at 426.

218. *See supra* Part II. A.

219. *Pacifica*, 438 U.S. at 747-48.

220. *See infra* Part IV. A., B., and C.

221. Dudley Clendinen, *Citadel's Cadets Feeling Effects of a Klan-Like Act*, N.Y. TIMES, Nov. 23, 1986, at A26.

222. *See supra* notes 27-33 and accompanying text.

223. *See supra* Part II. A.

while he is a student – it is where he sleeps, gets dressed, and brushes his teeth. Additionally, just as the home provides a "retreat" for individuals to "repair [and] escape from the tribulations of their daily pursuits,"[224] a dormitory also provides a retreat to the student, so he might get away from other university matters and relax. The student thus deserves the benefit of privacy within his walls.[225] Moreover, the idea that individuals are literally captive, in the physical sense, in their homes, as opposed to the relative "ease of avoiding unwanted speech in other circumstances,"[226] is important in determining captivity. Students are also, literally, physically captive in their dormitory rooms, and they cannot avoid unwanted speech as easily as they could in situations where they may simply walk away. Because the dormitory is a student's home, his ultimate refuge, wherein there is no escape from unwanted speech, the captive audience doctrine should extend to recognize a privacy interest for students in their dormitory rooms.[227]

While some scholars are wary of extending captivity beyond the home,[228] an extension into the dormitory context is consistent with the current doctrine. The Court has already recognized a substantial privacy interest in an individual's car.[229] If the Court was willing to extend the captive audience doctrine to a car, extending it to dormitories seems even more reasonable. While listeners are physically captive in their cars, cars are not traditional sources of retreat as are homes and dormitories.[230] Therefore, principled application of the captive audience doctrine in the dormitory setting would not extend the doctrine in dangerous ways; rather, it would apply the doctrine in a setting more similar to the home than other settings to which the doctrine has already been applied.

Furthermore, hate speech could conceivably be constitutionally restricted beyond the mere walls of the dormitory room and into common areas of the dormitory. Residential streets were construed as deserving of a privacy interest to the individuals who live on those streets in *Frisby*, despite the Court's established view that "public streets [are] the archetype of a traditional public forum[.]"[231] As such, dormitory common areas should afford a similar privacy interest to students who live in the rooms because dormitories are not

224. *Carey*, 477 U.S. at 471.

225. *See Frisby*, 487 U.S. at 484.

226. *Id.* at 487 (citing *Cohen*, 403 U.S. at 21-22); *see also* Jacobs, *supra* note59, at 526 (citing *Cohen*, 403 U.S. at 21-22).

227. *See supra* notes 224-26 and accompanying text.

228. Volokh, *supra* note 161, at 1838-44 (arguing the captive audience doctrine should not extend to settings beyond the home).

229. *Pacifica*, 438 U.S. at 726.

230. *See supra* notes 165-79, 224-26 and accompanying text.

231. *Frisby*, 487 U.S. at 480.

likely to be considered public fora.[232] While focused picketing could have stopped outside the home,[233] the Court nevertheless upheld the prohibition of the speech;[234] similarly, even though hate speech may occur only outside of a student's room, the restriction of offensive speech in dormitory common areas near the room is consistent with *Frisby.*

Professor Volokh argues that speech that is directed at an individual is more readily restricted than speech that is not.[235] The captive doctrine audience was extended to targeted picketing in *Frisby* because the picketing was focused – "focused picketing . . . is fundamentally different from more generally directed means of communication . . . the picketing [was] narrowly directed at the household, not the public."[236] The Court drew a distinction between seeking to disseminate a message to the general public and intruding upon the targeted resident – the former would be protected, whereas the latter could be restricted.[237] The Court found the picketing to be "especially offensive" and to have a "devastating effect [.]"[238] "'To those inside[,] . . . the home becomes something less than a home when and while the picketing . . . continue[s.] [The] tensions and pressures may be psychological, not physical, but they are not, for that reason, less inimical to family privacy and truly domestic tranquility.'"[239] Because the picketing was intended to intrude upon the privacy of the home, it could be regulated even though the actual picketing stopped outside the walls of the home.[240]

Hate speech in the common areas of a dormitory includes the same sort of targeted communication as the picketing in *Frisby.*[241] When hate speech is directed at another individual, it is meant narrowly and not meant to make a statement to the public. The "devastating effect" present in *Frisby* is also present with hate speech in common areas of dormitories: to those target group members that live there, their college home becomes something less.[242] Hate speech creates psychological tensions and intrudes upon the educational process.

A special problem with dormitory common areas is that it is a common

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232. *See* Bd. of Trustees of the State Univ. of New York v. Fox, 492 U.S. 469, 474 n.2 (1989) (refusing to determine whether dormitories of a public university constitute public fora).

233. Flynn, *supra* note 183, at 638.

234. *Frisby*, 487 U.S. at 488.

235. *See* Volokh, *supra* note 161, at 1843-71.

236. *Frisby*, 487 U.S. at 486.

237. *See id.*

238. *Id.*

239. *Id.* (quoting Carey, 447 U.S. at 478).

240. *See id.* at 494.

241. *Cf. Frisby*, 487 U.S. at 486.

242. *Cf. id.*

home for many. By protecting an individual's rights in his "home," another individual's rights may be impeded. Because of the special harms of hate speech, the balance should shift toward protecting the target. If drafted precisely, hate speech policies will allow students to know what is sanctionable, such that their speech will not be chilled. As a result, students' rights will be restricted somewhat in their homes, but not more than is necessary to prevent harms to the target group member.

Universities may draft hate speech policies consistent with the First Amendment when the policy is applied inside dormitory rooms and common areas. A dormitory room has most of the marks of the home, wherein the Government has the most latitude to regulate offensive speech. Additionally, hate speech in dormitory common areas shares an aspect of being focused at individuals in the same way that picketing was focused in *Frisby.*[243] Because the offensive speech is directed narrowly at the individual and intrudes on the privacy of the student's home, common areas may be regulated consistent with *Frisby.*

B. Students Are Captive in College Walkways to Get to and From the Classroom

University students are also captive audiences when using the walkways to get to and from the classroom. For example, consider if campus sidewalks leading to classrooms are chalked with racist remarks and symbols, and epithets are hurled at students on their way into a building in which they have class.[244] Such hate speech may lead to stress and a detrimental effect on academic opportunity and performance.[245] Universities have an interest in limiting this, so hate speech policies should be drafted such that hate speech in this context is prohibited. A privacy interest may override the First Amendment right of speakers in a quintessentially public forum.[246] The Court has long recognized a privacy interest in the broad "right to be let alone,"[247] an aspect of which is the interest in protecting unwilling listeners from offensive speech and a right to be free from "following and dogging" in public fora.[248] The "right to be let alone" was characterized by Justice Brandeis as "the most

243. *See supra* notes 241-42 and accompanying text.

244. This situation is based loosely on incidents at the University of Colorado in 2003. *See* Rebecca Jones, *CU Takes on Rise in Bigotry University President Rebukes "Tolerance for Intolerance,"* DENVER ROCKY MOUNTAIN NEWS, Jan. 22, 2003, at 24A.

245. *See supra* notes 48-54 and accompanying text.

246. *Hill*, 530 U.S. 703.

247. Olmstead v. U.S., 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

248. American Steel Foundries v. Tri-City Central Trades Council, 257 U.S. 184, 204 (1921).

comprehensive of rights and the right most valued by civilized men."[249] These "rights" are better characterized as "interests" that States can decide to protect in certain situations.[250] The interest in being left alone and free from following applies to going to and from particular settings, including one's workplace.[251] As the Court stated in *American Steel Foundries v. Tri-City Central Trades Council*:

> How far may men go in persuasion and communication and still not violate the right of those whom they would influence? In going to and from work, men have a right to as free a passage without obstruction as the streets afford, consistent with the right of others to enjoy the same privilege. We are a social people and the accosting by one of another in an inoffensive way and an offer by one to communicate and discuss information with a view to influencing the other's action are not regarded as aggression or a violation of that other's rights. If, however, the offer is declined, as it may rightfully be, then persistence, importunity, following and dogging become unjustifiable annoyance and obstruction which is likely soon to savor of intimidation. From all of this the person sought to be influenced has a right to be free and his employer has a right to have him free.[252]

Because the interest in protecting unwilling listeners from unwanted speech is an aspect of the broader "right to be let alone," an unwilling listener's interest in avoiding unwanted speech applies with force when going to and from work.[253] Until recently, the unwilling listener generally had a right to be left alone only after he refused a communication from the speaker, leaving the listener to "absorb the first blow' of offensive speech."[254]

In 2000, the Supreme Court allowed a novel construction of the unwilling listener's privacy interest in *Hill v. Colorado*, recognizing that the State has a significant interest in protecting people's "right to be left alone" on public sidewalks, so much so that the unwilling listener does not need to bear the burden of refusing the communication of the speaker under certain circumstances.[255] This privacy interest in certain situations protects people

249. *Olmstead*, 277 U.S. at 478 (Brandeis, J., dissenting).

250. *Hill*, 530 U.S. at 707 n. 24 (citing Katz v. United States, 389 U.S. 347, 350-51 (1967).

251. *American Steel Foundries*, 257 U.S. at 204.

252. *Id.*

253. *See Hill*, 530 U.S. at 717 (recognizing this right of free passage in going to and from work and medical facilities); *American Steel Foundries*, 257 U.S. at 204 (recognizing the "right to be left alone" in going to a from work after an offer to communicate has been declined).

254. William E. Lee, *The Unwilling Listener:* Hill v. Colorado's *Chilling Effect on Unorthodox Speech*, 35 U.C. DAVIS L. REV. 387, 405 (2002).

255. *Hill,* 530 U.S. at 716-19.

from receiving even the "first blow" of unwanted speech.[256] Some read this opinion as considerably broadening the Government's ability to assert this interest.[257]

In *Hill*, anti-abortion protesters, known as "sidewalk counselors," approached women outside abortion clinics to give them various printed materials, photographs, and plastic replicas of babies to "educate" and "persuade" them about abortions.[258] Although counselors were sometimes aggressive and used offensive language in these encounters, there was no evidence they were ever abusive or confrontational.[259] A Colorado statute was enacted to balance the right of a person "to obtain medical counseling and treatment in an unobstructed manner" against the right of others "to protest or counsel against certain medical procedures . . . ."[260] The statute prohibited people from approaching others within eight feet for the purpose of distributing material, orally protesting, or counseling in a public area or sidewalk that was within one hundred feet from a health care facility.[261] The Court considered whether the First Amendment rights of the sidewalk counselors were violated by the statute's protection of the unwilling listeners.[262]

In balancing the competing interests at stake, which the Court characterized as the privacy interests of the unwilling listeners and the First Amendment rights of the speakers,[263] it noted that the analysis must take into account that the statute dealt only with speech directed at an unwilling audience.[264] The Court recognized a privacy interest where "'the degree of captivity makes it impractical for the unwilling viewer or auditor to avoid exposure.'"[265] Restrictions on the First Amendment rights of speakers could be appropriate when the speech was so intrusive as to be unavoidable: the protection that offensive speech is normally afforded in public fora will not always apply when unwilling listeners constitute a captive audience.[266] The behavior of the sidewalk counselors was "so intrusive that the unwilling

256. Lee, *supra* note 254, at 409.

257. Robert D. Nauman, *The Captive Audience Doctrine and Floating Buffer Zones: An Analysis of* Hill v. Colorado, 30 CAP. U. L. REV. 769, 770 (2002).

258. *Hill*, 530 U.S. at 708-10; Lee, *supra* note 254, at 391-93.

259. *Hill*, 530 U.S. at 710.

260. COLO. REV. STAT. § 18-9-122(1) (2009).

261. *Id.* § 18-9-122(3) .

262. *Hill*, 530 U.S. at 708.

263. *Id.*

264. *Id.* at 715-16.

265. *Id.* at 718 (quoting *Erznoznik*, 422 U.S. at 209).

266. *Id.* at 715-16.

audience [could not] avoid it."[267] Thus, the Court could properly consider the privacy interest in being left alone outside of the Colorado abortion clinics.[268]

The privacy interest the Court recognized in *Hill* is similar to that of a college student walking to and from class. Students and universities have an interest in students getting to class on time and unscathed.[269] Hate speech, such as the chalkings and epithets described above,[270] interfere with that interest. Furthermore, it is impractical for students to avoid speech that is on their way to class.[271] Racist symbols or epithets, particularly those directed at an individual, are unavoidable, like the counseling at issue in *Hill.*[272]

One scholar described the captive audience language in *Hill* as "a statement about the importance of patient privacy and the unimportance of speech at close proximity."[273] The Court was concerned with the protection of patients from the potential physical and emotional harm that the protesters could cause.[274] That concern, coupled with the fact that the protesters need not be very close to patients as they walk into the healthcare facility to convey their message, explains the holding.[275]

The First Amendment protects the right of speakers to "reach the minds of willing listeners and to do so there must be opportunity to win their attention."[276] Thus, any regulation must allow for the ability to access the ears of willing listeners.[277] In *Hill*, the Court stressed that the ordinance did not squelch the protester's speech entirely.[278] It allowed the protester to communicate at a normal distance, and those interested in the protester's message could approach the protester.[279]

By analogy to protests directed at patients, a university has an interest in protecting students from potential physical and emotional harm that campus hate speech may cause.[280] Additionally, the speakers of hate speech need not be close to other students to convey their message.[281] If hate speech is

267. *Hill*, 530 U.S. at 716.
268. *Id.* at 718.
269. *See supra* notes 55-57and accompanying text.
270. *See supra* note 244 and accompanying text.
271. *Cf. Hill*, 530 U.S. at 716.
272. *Cf. id.*
273. Lee, *supra* note 254, at 409.
274. *See Hill*, 530 U.S. at 708 n.25.
275. *See id.* at 726-27.
276. Kovacs v. Cooper, 336 U.S. 77, 87 (1949).
277. *See Hill*, 530 U.S. at 728-29 (discussing a statute requiring a speaker to remain at least eight feet from his audience permitted willing listeners to access that speech).
278. *Id.*
279. *Id.* at 727.
280. *See supra* notes 36-57 and accompanying text.
281. *Cf. Hill*, 530 U.S. at 726-27.

regulated only in walkways to and from class, speakers may still communicate and those that wish to listen may approach the speakers.[282] The speakers may "reach the minds of willing listeners" and would have the "opportunity to win their attention."[283] They simply would not be able to interfere with students getting to and from class.

C. Students are Captive in the Classroom

University students are also a captive audience in the classroom. For example, at the University of Wisconsin–Madison, a professor was administering an exam in an African storytelling course when six men disrupted the proceedings, and stayed in the room for ten minutes during which time they threw obscenities and left an exam book filled with pornography.[284] Two hours later, in an African languages course, six men harassed the class by setting off a stink bomb in the classroom.[285] This type of classroom expression should be prohibited, in particular because such hate speech can interfere with the targets' access to and enjoyment of educational opportunities.[286] Prohibiting such speech under a hate speech policy is constitutional because of the captive audience doctrine.

Prohibition of harassment in the workplace has also been criticized on First Amendment grounds, analogously to university hate speech codes.[287] Title VII of the Civil Rights Act of 1964 makes it "an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his . . . employment, because of such individual's race, color, religion, sex, or national origin . . . ."[288] Courts have interpreted this provision to prohibit workplace harassment by speech or nonspeech conduct, as long as the harassment "has created a hostile or abusive work environment" that is "sufficiently severe or pervasive to alter the conditions of [the victim's]

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282. *Cf. id.* at 727.

283. *See Kovacs*, 336 U.S. at 87.

284. Delgado, *supra* note 1, at 356-57 n.104.

285. *Id.* at 356-57.

286. *See supra* notes 48-54 and accompanying text.

287. *See generally* Volokh, *supra* note 161; BARBARA LIDEMANN & DAVID B. KADUE, SEXUAL HARASSMENT IN EMPLOYMENT LAW 592-601 (1992) (discussing possible First Amendment difficulties); Browne, *supra* note 22, at 501-31 (arguing that harassment law is usually unconstitutional when applied to speech); Jules B. Gerard, Symposium, *The First Amendment in a Hostile Environment: A Primer on Free Speech and Sexual Harassment,* 68 NOTRE DAME L. REV. 1003, 1009-35 (1993) (arguing that harassment law runs afoul of the First Amendment); *see also generally* Marcy Strauss, *Sexist Speech in the Workplace,* 25 HARV. C.R.–C.L. L. REV. 1 (1990) (finding some of sexual harassment law constitutional and some unconstitutional).

288. 42 U.S.C. § 2000 e-2(a)(1) (2000).

employment and create an abusive working environment."[289] A hostile work environment is determined by the "totality of the circumstances."[290] While isolated and mild insults do not create an abusive working environment,[291] the abuse need not be so severe or pervasive as to compel the employee to leave the job.[292]

Title VII holds employers, not the harassing employees themselves, liable for the offensive conduct of their employees.[293] It obligates employers to provide a workplace free of harassment for their employees.[294] To avoid liability, employers frequently implement anti-harassment policies that prohibit certain speech and conduct and provide for disciplinary measures if breached.[295]

When harassment consists of speech – such as sexually explicit comments, bigoted epithets, and pornography positioned in the workplace – some scholars argue that the prohibition of harassment is problematic under the First Amendment.[296] Although few courts have addressed the issue,[297] these scholars argue that the "sufficiently severe or pervasive" hostile work environment standard is so vague that it has a substantial chilling effect, because employers must restrict speech that might not meet the legal standard to be safe from legal liability under Title VII.[298] Moreover, harassment violates Title VII only in the totality of the circumstances – infrequent offensive statements on their own may not meet Title VII standards – but because an employer cannot explicitly allow single offensive statements that would not meet Title VII standards, it must instead ban all instances of offensive speech.[299]

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289. Meritor Savings Bank v. Vinson, 477 U.S. 57, 66-67 (1986) (internal quotations marks omitted); *see also* Volokh, *supra* note 161, at 1799.

290. *Meritor Savings Bank*, 477 U.S. at 69.

291. Faragher v. City of Boca Raton, 524 U.S. 775, 788 (1998) (protection does not include ordinary workplace problems, such as the periodic use of obnoxious language, gender-related jokes, and teasing); Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 81 (1998) (reminding lower courts not to mistake ordinary workplace socializing for harassment); *Meritor Savings Bank*, 477 U.S. at 67.

292. *Meritor Savings Bank*, 477 U.S. at 67.

293. *See, e.g.,* Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486, 1541 (M.D. Fla 1991) (injunction entered against employer and top managers).

294. *Meritor Savings Bank*, 477 U.S. at 72-73.

295. *See Robinson*, 760 F. Supp. at 1541 (court ordered an employer to implement a sexual harassment policy after finding that certain sexually explicit remarks and materials posted throughout the workplace created a hostile work environment).

296. *See* Volokh, *supra* note 161, at 1800-02.

297. Cynthia L. Estlund, *Propter Honoris Respectum: The Architecture of the First Amendment and the Case of Workplace Harassment*, 72 NOTRE DAME L. REV. 1361, 1363 (1997).

298. *See* Volokh, *supra* note 161, at 1811-12.

299. *See id.* at 1812.

Scholars[300] and courts[301] have argued that employees cannot easily avoid offensive speech in the workplace. They rely on the captive audience doctrine to support their argument that Title VII's explicit prohibition of hostile environment sexual harassment does not violate the First Amendment.[302]

The Supreme Court has applied the captive audience doctrine only when unwanted speech invades "substantial privacy interests . . . in an essentially intolerable manner."[303] Setting is important in determining the privacy interest at stake, with the classic distinction drawn between the home and a public park.[304] The workplace, scholars argue, is somewhere in between these two settings, but it falls much closer to the home.[305] First, people spend a large amount of time at the workplace,[306] as they do at home, so it makes sense to recognize the "'right to be let alone'" there.[307] Second, there is often a sense of identification with one's workplace.[308] Similar to the ease people feel at home, people may feel at ease at the workplace.[309] Recognizing a privacy interest in the workplace can encourage these feelings about the workplace.[310] Third, while some scholars have been wary of extending the captive audience

300. Balkin, *supra* note 143, at 423; Strauss, *supra* note 287, at 36; Karner, *supra* note 25, at 678-88; Balkin, *supra* note 159, at 2310-15; Epstein, *supra* note 60, at 421-29; Andrea Meryl Kirshenbaum, *Hostile Environment Sexual Harassment Law and the First Amendment: Can the Two Peacefully Coexist?*, 12 TEX. J. WOMEN & L. 67, 87-95 (2002); Suzanne Sangree, *Title VII Prohibitions Against Hostile Environment Sexual Harassment and the First Amendment: No Collision in Sight*, 47 RUTGERS L. REV. 461, 515-19 (1995); *but see* Volokh, *supra* note 161, at 1832-43 (arguing that the captive audience doctrine is only salient in the home and ought not apply to employees in the workplace); Nadine Strossen, *The Tensions Between Regulating Workplace Harassment and the First Amendment: No Trump*, 71 CHI.–KENT L. REV. 701, 709-10 (1995) (noting that the captive audience doctrine would not justify prohibition of speech based on its viewpoint); Browne, *supra* note 22, at 516-20 (arguing that the captive audience doctrine does not support the regulation of workplace offensive speech because the captive audience doctrine does not support the prohibition of speech when the speaker has an equal right to be present to the listener); Gerard, *supra* note 287, at 1030-32 (arguing that it is unlikely after *R.A.V.* that the Court will permit captive audience doctrine in hostile environment cases).

301. *See* Baty v. Willamette Indus., Inc., 172 F.3d 1232, 1246 (10th Cir. 1999) (rejecting employer's First Amendment challenge to Title VII in part because "workers are a captive audience") (overruled on other grounds by Nat'l R.R. Passenger Corp. v. Morgan*,* 536 U.S. 101 (2002)); *Robinson*, 760 F. Supp. at 1535-36 (dismissing employer's First Amendment challenge to Title VII because women employees at the employer's workplace were a captive audience to the offensive speech that made up the hostile work environment).

302. *Robinson*, 760 F. Supp. at 1535-36.

303. *Cohen*, 403 U.S. at 21.

304. *See id.* at 21-22.

305. Karner, *supra* note 25, at 682-83.

306. *Aguilar*, 980 P.2d at 868-69 (Cal. 1999) (Werdegar, J., concurring).

307. Karner, *supra* note 25, at 682.

308. *Id.*

309. *Id.*

310. *Id.*

doctrine beyond the home because of the fear of a slippery slope,[311] no slippery slope applies in extending the captive audience doctrine to the workplace.[312] There may be a principled application of the captive audience doctrine in the workplace without extending it any further.[313]

Employees should also be considered captive at the workplace because they often cannot avoid offensive messages after initial exposure to them. While an audience is not captive if it can avoid the message after initial exposure to it,[314] it would be difficult to avoid exposure in various contexts of the workplace, particularly if the unwanted speech is directed at the employee[315] or is pervasive.[316] Employees often cannot avoid working with those who engage in the offensive speech or in the areas of the workplace where offensive speech or images are posted.[317]

Further, the captive audience doctrine should be understood to mean that "a person must listen to speech because he . . . is *practically* unable to leave" rather than the common understanding that he is utterly unable to do so.[318] The captive audience doctrine is not only for circumstances in which listeners are physically unable to leave,[319] such as the passengers on the bus in *Lehman*.[320] Economic coercion leaves employees unable to avoid unwanted speech in the practical sense: they must remain at work, even under offensive conditions, due to the costs of leaving.[321] Employees rely on their jobs for economic survival[322] so, if they cannot afford to be unemployed, they cannot avoid offensive speech in the workplace.[323] Employees should not have to

311. *See, e.g.,* Balkin, *supra* note 159, at 2311 ("One could regulate offensive speech based on rather vague notions of captivity.").

312. Karner, *supra* note 25, at 682-83.

313. *Id.*

314. *See Erznoznik*, 422 U.S. at 206-07, 210-11 (ordinance banning nudity from a drive-in movie theater that was visible from the street could not be upheld because passers-by could avert their eyes after initial exposure to the image).

315. Strauss, *supra* note 287, at 36-37.

316. Sangree, *supra* note 300, at 518.

317. *Id.*

318. Balkin, *supra* note 159, at 2311-12 (emphasis added); *Aguilar*, 980 P.2d at 872 (Werdegar, J., concurring) ("The relative captivity of plaintiffs here supports the restriction on [the] defendant['s] . . . . Plaintiffs were not present at their job because they wished to hear [the speaker's] particular views on their Latino heritage, but neither were they reasonably free to walk away when confronted with his racial slurs.); *see* Strauss, *supra* note 287, at 13.

319. *Aguilar*, 980 P.2d at 872 (Werdegar, J., concurring).

320. *Lehman*, 418 U.S. at 306-07 (Douglas, J., concurring) (the passengers had to remain on the bus because they were riding it out of necessity; they were physically confined on the bus without ready means to avoid the speech).

321. Balkin, *supra* note 159, at 2311-12; Sangree, *supra* note 300, at 518.

322. *Aguilar*, 980 P.2d at 872 (Werdegar, J., concurring); Sangree, *supra* note 300, at 518.

323. Epstein, *supra* note 60, at 425.

sacrifice their employment to avoid a hostile working environment anymore than the resident in *Frisby* was required to move to avoid the picketing,[324] or the passengers in *Lehman* were required to find other means of transportation.[325] Therefore, scholars argue, employees at their workplace are more captive than people merely sitting at home because there is no penalty for leaving one's home.[326]

These arguments, supporting the application of the captive audience doctrine in the workplace, also apply to the restriction of hate speech in university classrooms. Students are captive while in the university classroom, just as employees are captive in the workplace. Thus, restricting offensive speech should be permissible under the First Amendment.

Just as the workplace falls somewhere between the home and a public park, so does the classroom. In both settings, there are compelling reasons to recognize privacy interests. The sense of identification that scholars have recognized for employees in the workplace[327] also exists for students in the classroom. They spend some of their most important hours of the day there.[328]

Conflicting with regulating speech in the classroom is the notion that the classroom is "peculiarly the marketplace of ideas."[329] "[I]mpos[ing] any straight jacket"[330] on speech could disrupt the pursuit of knowledge, the core goal of the university. There is a need for the free flow of ideas in the classroom, a "robust exchange of ideas which discovers truth 'out of a multitude of tongues.'"[331] Surely the free flow of ideas is important in the classroom. On the other hand, however, recognizing a privacy interest in the classroom will encourage feelings of ease in the classroom and students will be more comfortable to engage in the exchange of ideas. Regulations that require "civility and respect in academic discourse" are necessary to promote the fullest exchange of academic debate.[332] Without restricting hate speech, the free flow of ideas may be hindered on the part of the targeted students. Hate speech silences and devalues the target's speech such that the target's ideas will not be as likely to be heard. In effect, this devaluation could silence an entire side of the debate. Balancing the importance of a free flow of ideas

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324. *See Frisby*, 487 U.S. at 487-88.

325. *See Lehman*, 418 U.S. at 303-04, *Aguilar*, 980 P.2d at 872 (Werdegar, J., concurring).

326. *See* Balkin, *supra* note 159, at 2312; Karner, *supra* note 25, at 683.

327. Karner, *supra* note 25, at 682.

328. *See* EMORY UNIVERSITY, IMPORTANCE OF TIME MANAGEMENT, *available at* http://www.college.emory.edu/current/support/learning_programs/pdf/time_mgt.pdf.

329. *Keyishian*, 385 U.S. at 603 (referring to the classroom specifically).

330. *Sweezy*, 354 U.S. at 250.

331. *Keyishian*, 385 U.S. at 603 (quoting *Associated Press*, 52 F. Supp. at 372).

332. Lawrence, *supra* note 11, at 438.

with the importance of including all sides of the discourse is difficult. Speech regulations must be drawn narrowly and precisely to keep out only the offensive hate speech and not chill any speech.[333]

Moreover, no slippery slope arises in extending the captive audience doctrine into the university setting.[334] Extending the captive audience doctrine into the university classroom is less of a leap from the current doctrine than extending it to the workplace. The Supreme Court has already recognized that minor students are captive in public schools and that student speech may be restricted in the classroom and school assemblies when it interferes with the rights of other students.[335] Extending the captive audience doctrine into university classrooms would, thus, be consistent with current doctrine and would not create any slippery slope problems.[336]

University students are also captive in the classroom because they likely cannot avoid offensive messages after initial exposure to them. In *Erznoznik v. Jacksonville*, the audience on the street was not captive with respect to nudity projected in a drive-in movie theater because it could avoid the offensive image after initial exposure, simply by averting their eyes.[337] However, the classroom is a different case. A student cannot simply plug his ears to avoid offensive speech in the classroom, particularly if it is directed at him or if it is pervasive in the discussion.[338] This difference is especially salient when the offensive speech comes from a professor. The student will be tested on the material and needs to listen attentively throughout class – selective hearing simply does not work in the classroom.[339]

A student in the classroom is practically unable to leave in order to avoid

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333. Various elective courses are offered at universities that deal with sensitive racial issues and by their nature could violate hate speech policies. These courses are valuable and should not be restricted. Hate speech policies should be drawn narrowly to allow open discussion in these courses. If students elect to take the courses, perhaps the hate speech policy should not apply, or there should be a different set of rules.

334. *Cf.* Karner, *supra* note 25, at 682-83 (there is no slippery slope problem with extending the captive audience doctrine to the workplace).

335. *See, e.g.,* Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 683–85 (1986) (students were captive to offensive speech in their secondary school). *See also* Hazelwood School Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988) (a public school may regulate school-sponsored speech).

336. *See Hazelwood*, 484 U.S. at 266 (the current doctrine with regard to schools has only been extended to minors thus far but since captive audience doctrine is applied to people of any age, this does not inhibit extending the doctrine to the university classroom.).

337. *Erznoznik*, 422 U.S. at 210-11.

338. *Cf.* Strauss, *supra* note 287, at 36-37 (in various contexts of the workplace it is difficult to avoid exposure, particularly if the unwanted speech is directed at the employee); Sangree, *supra* note 300, at 518 (noting the difficulty of avoiding offensive expression in the workplace when it is pervasive).

339. *Cf.* Sangree, *supra* note 300, at 518 (noting that employees often cannot avoid working with those that engage in the offensive speech or the areas of the workplace where offensive speech or images are posted).

offending speech, rather than physically or necessarily unable to avoid it.[340] While economic coercion leaves employees unable to avoid unwanted speech in the practical sense, because they must remain at work even under offensive conditions due to the costs of leaving,[341] students are similarly coerced into remaining in the classroom even under offensive conditions. They must remain in the classroom and intently listen to succeed in their education and make the most of their tuition. Higher education has become increasingly important to getting jobs, so there is indirect economic coercion to remain in the classroom as well.[342] Students should not have to sacrifice their education to avoid offensive speech in the classroom any more than employees should have to sacrifice their employment to avoid a hostile working environment, or the resident in *Frisby* should have to move to avoid the picketing,[343] or the passengers in *Lehman* should have to find other means of transportation.[344] Indeed, students may be more captive than people in their homes because there is no penalty for leaving one's home;[345] however, the penalty for leaving the classroom is significant.

Therefore, the privacy interests of students in these three specific areas of the public university – dormitory rooms, the walkways to get to and from the classroom, and the classroom – are substantial, and these interests should override the First Amendment rights of the speakers. In these three discrete settings, the offensive speech is unavoidable, to varying degrees. Extending the captive audience doctrine to cover students in these settings would be consistent with the doctrine as it stands. It would not extend the doctrine too far. University hate speech policies should be drafted in light of this.

V. CONCLUSION

Hate speech has a number of special harms, including a silencing effect of its target and the target group, individual harms, group harms, and particular harms in the university context.[346] The university has an interest in limiting hate speech so that it does not interfere with the opportunity of the targets of the speech to obtain an education.[347]

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340. *See Aguilar*, 980 P.2d at 872 (Werdegar, J., concurring).

341. Balkin, *supra* note 159, at 2311-12; Sangree, *supra* note 300, at 518.

342. IRA SHOR, CRITICAL TEACHING AND EVERYDAY LIFE 8 (1987) (college "has become almost obligatory[.]").

343. *See generally Frisby*, 487 U.S. at 474.

344. *See generally Lehman*, 418 U.S. 298, *Aguilar*, 980 P.2d at 872 (Werdegar, J., concurring).

345. *Cf.* Balkin, *supra* note 159, at 2312 (noting that employees in the workplace may be more captive there than people are in their homes).

346. *See supra* notes 27-54 and accompanying text.

347. *See supra* notes 55-57 and accompanying text.

University hate speech policies historically have not fared well in the courts.[348] They have generally been impermissibly overbroad and vague.[349] University hate speech policies typically regulate hate speech regardless of the context in which the expression occurs – this broadness is their weakness.[350] By drafting the policies more narrowly, the overbreadth issue can be overcome: policies drafted with a sensitivity to context would restrict hate speech consistent with First Amendment values.[351] It is possible to draft permissible university hate speech policies if drafters avail themselves of the captive audience doctrine, which applies to various university contexts.[352]

Students are either practically or necessarily "captive" to offensive hate speech in their dormitories, on the walkways to and from the classroom, and in the classroom.[353] Since hate speech is effectually unavoidable in these three settings, hate speech policies should be drafted to restrict speech specifically in these settings. This way universities may permissibly restrict harmful speech in the settings in which minority students can least avoid the harm.

348. *See supra* Part II. A.
349. *Id.*
350. *See supra* notes 60-61 and accompanying text.
351. *See supra* Part IV.
352. *Id.*
353. *Id.*