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# FIRST AMENDMENT LAW—FREE SPEECH AND HIGHER EDUCATION: CAN PUBLIC COLLEGES AND UNIVERSITIES USE "SAFE SPACE" POLICIES TO RESTRICT SPEECH ON CAMPUSES?

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# FIRST AMENDMENT LAW—FREE SPEECH AND ! HIGHER EDUCATION: CAN PUBLIC COLLEGES AND UNIVERSITIES USE "SAFE SPACE" POLICIES TO RESTRICT SPEECH ON CAMPUSES? !

*John L. Magistro, IV*[*]

*The freedom to speak openly, without fear of reprisal, is one of the great defining characteristics of our country. Nowhere is this freedom more crucial than the arena of higher education. Whether seeking a degree in the arts or sciences, philosophy or physics, students who venture off to college share one thing in common—their thirst for knowledge. However, this pursuit of knowledge can, and does, cause students to confront unfamiliar, uncomfortable, and sometimes unpleasant material. In college classrooms, cafeterias, and quads across the country, students have begun seeking shelter from thoughts and ideas that might make them uncomfortable. Lately, these shelters have been taking the form of "safe spaces"—areas where students can come together and be protected from hearing viewpoints or opinions that might upset them. However, when "safe spaces" limit what can be spoken or expressed in a public arena, they have the potential to infringe upon students' First Amendment right of free speech. This Note argues that using "safe spaces" to limit, restrict, or punish what students can say on public college and university campuses violates the First Amendment.*

*"I want you to be offended every single day on campus. I want you to be deeply aggrieved and offended and upset and then learn how to speak back."*[1]

* Candidate for J.D., Western New England University School of Law, 2019. Sincere thanks to all the faculty and staff who have fostered my growth as a student and future practitioner. I would also like to express my appreciation for the friends and family who have supported me throughout this entire experience–I could not have done this without you.

1. Flemming Rose, *Safe Spaces on College Campuses Are Creating Intolerant Students*, HUFFPOST (Mar. 30, 2017, 9:54 AM) (quoting Van Jones, former advisor to former President

*Anthony Kapel "Van" Jones*

## INTRODUCTION

"Congress shall make no law . . . abridging the freedom of speech."[2] This language inarguably represents the founders' belief that having free and open discourse is critical in allowing our democracy to function.[3] Indeed, "[t]he protection given speech . . . was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people."[4] Significantly, "[t]he college classroom with its surrounding environs is peculiarly the 'marketplace of ideas,'"[5] and therefore prone to the clash of perspectives that accompanies any discussion of opposing viewpoints.[6] If speech is protected to allow open, candid discourse—and college campuses are inherently the arenas of such discourse—the logical conclusion would be that restricting speech on public college and university campuses is not only unconstitutional, but also detrimental to the prosperity and advancement of society as a whole.[7]

And yet, students at public colleges and universities around the country have been voicing criticisms about their institutions, claiming "their schools should keep them from being 'bombarded' by discomfiting or distressing viewpoints."[8] In fact, a very real trend is emerging among

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Barack Obama), https://www.huffingtonpost.com/entry/safe-spaces-college-intolerant_us_58d957a6e4b02a2eaab66ccf [https://perma.cc/79N3-RD9Y] ("Ideological and other kinds of diversity are important on college campuses and in a liberal democracy because they cultivate tolerance . . . .").

2. U.S. CONST. amend. I.

3. Thomas I. Emerson, *Colonial Intentions and Current Realities of the First Amendment*, 125 U. PA. L. REV. 737, 740 (1977) (footnote omitted). "The guarantee of the first amendment was clearly intended to reach the extent described by Blackstone, namely as a prohibition of any system of control over the process of printing, any advance censorship of publication, and the like." *Id.* at 737.

4. Roth v. United States, 354 U.S. 476, 484 (1957).

5. Healy v. James, 408 U.S. 169, 180 (1972) (quoting Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967)).

6. Natasha Josefowitz, *Contentious Opposing Views: How to Co-Exist Peacefully in Tough Times*, HUFFPOST (Feb. 27, 2017, 7:42 PM), https://www.huffingtonpost.com/entry/contentious-opposing-views-how-to-co-exist-peacefully_us_58b4c715e4b02f3f81e44ba1 [https://perma.cc/9UQH-JC5Z] ("I have caught myself trying to persuade a friend about the obvious wrongness of her ideas, and much to my dismay, instead of an intelligent discussion, it turned into a disagreeable exchange of not exactly name-calling, but dismissing the other as incomprehensibly and irremediably off.").

7. *See* Rose, *supra* note 1 ("Ideological and other kinds of diversity are important on college campuses and in a liberal democracy because they cultivate tolerance . . . .").

8. Judith Shulevitz, *In College and Hiding from Scary Ideas*, N.Y. TIMES (Mar. 21, 2015), https://www.nytimes.com/2015/03/22/opinion/sunday/judith-shulevitz-hiding-from-scary-

college students: they are developing a perception that they "need to be safe ideologically, [they] need to be safe emotionally, [and they] just need to feel good all the time."[9] Thus began the push for public colleges and universities to create "safe spaces" where students can retreat from thoughts, topics, and ideas that make them uncomfortable.

But what is a "safe space?" Where do they come from, what do they look like, and why have they become so popular? As a concept, "safe space" originated either in the 1960s and 1970s when feminism and female empowerment began to gain a strong following across the country, or during the 1990s when gay and lesbian equality was brought to the forefront of social consciousness.[10] In this context, "safe spaces [were] innocuous gatherings of like-minded people who agree[d] to refrain from ridicule[ ] [or] criticism . . . so that everyone [could] relax enough to explore the nuances of [sensitive subjects]."[11]

Others consider "safe spaces" to be "place[s] (as on a college campus) intended to be free of bias, conflict, criticism, or potentially threatening actions, ideas, or conversations."[12] Specifically, "[s]afety in this sense does not refer to physical safety. Instead, [college] safe space refers to protection from psychological or emotional harm."[13] One such "safe space," established as a refuge for students during a presentation by a sexual assault survivor, was "equipped with cookies, coloring books, bubbles, Play-Doh, calming music, pillows, blankets and a video of frolicking puppies."[14] Undoubtedly, this "safe space" was established to "help vulnerable students . . . and protect[] their health and safety from any mental tolls,"[15] while also allowing students to "take control over the information they decide to receive and how to receive it."[16]

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ideas.html; *see also* KNIGHT FOUNDATION, FREE EXPRESSION ON CAMPUS: WHAT COLLEGE STUDENTS THINK ABOUT FIRST AMENDMENT ISSUES 12–13 (2018), https://kf-site-production.s3.amazonaws.com/publications/pdfs/000/000/248/original/Knight_Foundation_Free_Expression_on_Campus_2017.pdf [https://perma.cc/2YB4-GL4X].

9. Rose, *supra* note 1.

10. Shulevitz, *supra* note 8.

11. *Id.*

12. *Safe Space*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/safe%20space [https://perma.cc/ZV28-XEG4] [hereinafter *Safe Space*].

13. Lynn C. Holley & Sue Steiner, *Safe Space: Student Perspectives on Classroom Environment*, 41 J. SOC. WORK EDUC. 49, 50 (2005).

14. Shulevitz, *supra* note 8.

15. Fuad Rafidi, *Safe Spaces and First Amendment Rights: Do Safe Spaces Belong on College Campuses?*, JURIST (Dec. 1, 2016, 9:26 AM), http://www.jurist.org/dateline/2016/12/Fuad-Rafidi-safe-college.php [https://perma.cc/G8UQ-SSZ8].

16. RaeAnn Pickett, *Trigger Warnings and Safe Spaces Are Necessary*, TIME (Aug. 31, 2016), http://time.com/4471806/trigger-warnings-safe-spaces/ [https://perma.cc/DNY4-YJEU].

Therefore, safe spaces, as outlined above, serve the purpose of filtering various thoughts, ideas, opinions, and experiences—effectively restricting exposure to anything a student may find subjectively uncomfortable, unpleasant, or even offensive. While this may seem like a worthy, laudable goal for the nation's public colleges and universities, this Note argues that the protections afforded by safe spaces are not only detrimental to students, but are unconstitutional restrictions of free speech.[17] Surely, as public colleges and universities attempt to keep students safe from uncomfortable issues and viewpoints, "[students will] be unprepared for the social and intellectual headwinds that will hit them" after graduation.[18] Furthermore, filtering the information available to students, however well-intentioned, runs afoul of the very purpose of the First Amendment.[19]

This Note argues that safe space policies are unconstitutional restrictions of free speech under the First Amendment and should not be implemented on public college and university campuses. Part I explores the history of First Amendment litigation relating specifically to free speech and focusing on the relationship between free speech jurisprudence and the academic environment. Part II examines past and current attempts at regulating speech at public colleges and universities. Finally, Part III compares safe spaces to their regulatory predecessors and explains why they are both unconstitutional restrictions of free speech and harmful to students in a broader context.

## I. A HISTORY OF FIRST AMENDMENT LITIGATION

For over one hundred years after the ratification of the Constitution, free speech and the First Amendment went unchallenged.[20] Then, in 1919, free speech faced its first true hurdle in the Supreme Court.[21] Thereafter, courts were tasked with determining whether different kinds of speech

17. *See* Rose, *supra* note 1; *cf.* Jeannie Suk Gersen, *The Trouble with Teaching Rape Law*, NEW YORKER (Dec. 15, 2014), https://www.newyorker.com/news/news-desk/trouble-teaching-rape-law [https://perma.cc/7VK8-L7M8].

18. Shulevitz, *supra* note 8.

19. *See* David L. Hudson Jr. & Lata Nott, *Hate Speech & Campus Speech Codes*, FREEDOM F. INST. (Mar. 2017), http://www.firstamendmentcenter.org/hate-speech-campus-speech-codes/ [https://perma.cc/RP2S-MQ5X] ("[T]he suppression of speech, even where the speech's content appears to have little value and great costs, amounts to governmental thought control." (quoting UWM Post, Inc. v. Bd. of Regents, 774 F. Supp. 1163, 1174 n.9 (E.D. Wis. 1991))).

20. *See* Emerson, *supra* note 3, at 739.

21. *See generally* Schenck v. United States, 249 U.S. 47, 48–51 (1919) (providing defendants' argument that free speech protections granted by the First Amendment allowed them to promote and encourage draft-dodging).

were truly protected under the First Amendment, whether the government can regulate such speech, and to what extent it may be regulated.[22] Due to the importance of these answered questions, Part I of this Note will focus on cases that have examined a governmental attempt to regulate protected speech, establish a new category of unprotected speech, or clarify an otherwise murky precedent. This Note will also remain focused on issues of free speech and speech restriction that are relevant to the discourse expected on public college and university campuses.

### A. ! *Milestones in the Evolution of Protected Speech*

On several occasions, the Supreme Court was tasked with deciding whether the government can place restrictions upon the freedom of speech enjoyed by everyone in the country.[23] Those instances will be used as a point of comparison for the type of speech that safe space policies attempt to curtail. Therefore, it is important to understand the history of free speech litigation to better evaluate the current climate of potential speech regulations.

#### 1. 1919: *Schenck v. United States*

The Supreme Court presided over the case involving a man who was allegedly responsible for obstructing the enlistment process of the United States military.[24] The issue before the Court was whether fliers printed and distributed by Schenck were protected speech under the First Amendment despite legislation that made encouragement of insubordination illegal.[25] Although normally Schenck would have been within his rights to distribute the fliers,[26] the Court took issue with the

22. *See infra* Sections I.A–I.B.

23. *See, e.g.*, Watts v. United States, 394 U.S. 705, 708 (1969) (holding that speech arguing a political opinion will be afforded First Amendment protection, even when that speech is offensive); Roth v. United States, 354 U.S. 476, 484 (1957) (holding that speech "having even the slightest redeeming social importance" is protected by the First Amendment); Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942) (listing certain "classes" of unprotected speech, such as "fighting words"); *Schenck*, 249 U.S. at 52 (questioning whether the nature and circumstances of speech "create[s] a clear and present danger"); *see also* Porter v. Ascension Parish Sch. Bd., 393 F.3d 608, 616 (5th Cir. 2004) (holding that "true threats" are unprotected speech).

24. *See generally Schenck*, 249 U.S. at 48–50, 51 (alleging defendants violated the Espionage Act by producing and distributing pamphlets instructing men to resist the draft by "assert[ing] your opposition to the draft").

25. *Id.* at 48–49.

26. *Id.* at 52 ("We admit that in many places and in ordinary times the defendants in saying all that was said in the [flier] would have been within their constitutional rights.").

unique situation that existed at the time, noting that "the character of every act depend[s] on the circumstances in which it is done."[27]

In fact, at the outset of the opinion, the Court was very careful to acknowledge that the allegations against Schenck arose while the United States was at war with the Axis Powers, indicating that encouraging insubordination during an active war effort rose above the traditional expression of free speech.[28] In fact, the Court later opined, "[w]hen a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight."[29]

The Court also noted that "[t]he most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic."[30] This indicates that circumstances significantly inferior to war could still rise to a level where speech is no longer protected.[31] To underscore this point, the Court held that "[t]he question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about [such evils]."[32]

In establishing the "clear and present danger" standard, the Court proclaimed for the first time that the First Amendment did not protect all speech.[33] In fact, not only did the Court determine that some speech may never be protected, the Court also held that speech that might otherwise be protected by the First Amendment could lose some or all of those protections depending on the circumstances under which the speech occurred.[34] This standard, also known as the "circumstances and nature" test, is one the Court has continued to use when determining issues of protected speech.[35]

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27. *Id.*

28. *Id.* at 49, 52.

29. *Id.* at 52.

30. *Id.*

31. *See id.* ("[Free speech protection] does not even protect a man from an injunction against uttering words that may have all the effect of force.").

32. *Id.*

33. *Id.* A query of LexisNexis and Westlaw returned no Supreme Court cases that addressed the government's ability to regulate or punish speech in any regard prior to deciding *Schenck*.

34. *See id.* at 52 (holding that restrictions may be placed on speech during times of war).

35. *See, e.g.*, Snyder v. Phelps, 562 U.S. 443, 454 (2011) (emphasis added) ("In considering content, form, and context, no factor is dispositive, and it is necessary to *evaluate all the circumstances* of the speech, including what was said, where it was said, and how it was said."); Chaplinsky v. New Hampshire, 315 U.S. 568, 571 (1942) ("[I]t is well understood that the right of free speech is not absolute at all times and under all circumstances."); Herndon v.

2. 1942: *Chaplinsky v. New Hampshire*

Twenty-three years after *Schenck*, the Court took the seemingly narrow exceptions of unprotected speech outlined above and broadly expanded them.[36] In *Chaplinsky,* a Jehovah's Witness exclaimed that someone on a public street was a "damned racketeer" and a "damned Fascist."[37] The Court determined that "well-defined and narrowly limited classes of speech" could be prohibited without violating the First Amendment.[38] These classes of speech included lewd, obscene, profane, libelous, and insulting language, as well as "fighting words."[39] Specifically, "fighting words" are "those which by their very utterance inflict injury or tend to incite an immediate breach of the peace."[40]

3. 1957: *Roth v. United States*

In 1957, the Court chose to address the constitutionality of federal and state obscenity statutes, in particular, as they pertain to the aforementioned classes of lewd and obscene speech.[41] The *Roth* case actually joined two causes of action: Roth, who was convicted of violating federal law by distributing obscene material via mail, [42] and Alberts, who was convicted of violating a California statue, which prohibited the creation, distribution, or advertisement of obscene material.[43]

The Court analyzed the underlying purpose of having protected speech, stating "[a]ll ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—have the full protection of [the First Amendment]."[44] The Court then restated its language about "narrowly limited classes" of speech—citing lewd and obscene speech specifically—and opining that "such utterances are no essential part of any exposition

Lowry, 301 U.S. 242, 256 (1937) ("We recognized, however, that words may be spoken or written for various purposes and that wilful [sic] and intentional interference with the described operations of the government might be inferred from the time, place, and circumstances of the act."); Debs v. United States, 249 U.S. 211, 215 (1919) (emphasis added) ("If [obstruction] was intended and if, *in all the circumstances*, [obstruction] would be its probable effect, [the speech] would not be protected by reason of its being part of a general program and expressions of a general and conscientious belief.").

36. *See Chaplinsky*, 315 U.S. at 571–72.
37. *Id.* at 569.
38. *Id.* at 571–72.
39. *Id.* at 572.
40. *Id.*
41. Roth v. United States, 354 U.S. 476, 479 (1957).
42. *Id.* at 480.
43. *Id.* at 481.
44. *Id.* at 484.

of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."[45] To that end, the Court noted that the free speech protections of the First Amendment are primarily concerned with allowing and encouraging the discussion and exchange of "*all matters of public concern*."[46] Truly, "[t]he fundamental freedom[] of speech . . . [has] contributed greatly to the development and well-being of our free society."[47]

After applying this analysis to the claims of Roth and Alberts, the Court concluded that lewd and obscene speech falls outside the protections afforded by the First Amendment.[48] In so doing, the Court solidified that these classes of speech can be restricted through governmental means, albeit for seemingly sincere reasons.[49]

4. 1969: *Watts v. United States*

Twelve years later, in 1969, another issue of free speech was presented to the Court: the right to engage in political discourse.[50] Watts engaged in a political discussion during a public rally at the Washington Monument in Washington, D.C.[51] At this rally, and in response to a remark about education, Watts stated "[t]hey always holler at us to get an education. And now I have already received my draft classification . . . If they ever make me carry a rifle the first man I want to get in my sights is L.B.J."[52] As a result, Watts was convicted of a felony for "knowingly and willfully threatening the President."[53]

In its analysis, the Court stated that "[t]he language of the political arena . . . is often vituperative, abusive, and inexact."[54] Indeed, "debate on public issues should be uninhibited, robust, and wide-open [sic], and . . . may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."[55] Therefore, looking at Watts' statements in context, the Court concluded his speech was akin

45. *Id.* at 485 (quoting *Chaplinsky*, 315 U.S. at 572).

46. *Id.* at 488 (quoting Thornhill v. Alabama, 310 U.S. 88, 101 (1940)).

47. *Id.*

48. *See id.* at 492.

49. *See id.* at 488.

50. *See generally* Watts v. United States, 394 U.S. 705 (1969) (holding that political discourse is afforded First Amendment protection).

51. *Id.* at 706.

52. *Id.*

53. *Id.*

54. *Id.* at 708 (citation omitted).

55. *Id.* (quoting New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)).

to voicing his own political opinion.[56] By holding that—despite being crude and offensive—Watts voiced his opposition to the current political climate, the Court effectively ruled that speech voicing or conveying a political opinion is crucial enough to be afforded First Amendment protection, even though such speech can be particularly crass.[57]

5. 1989: *Ward v. Rock Against Racism*

Perhaps the largest provision for governmental regulation of speech came in 1989: content neutral restrictions. Rock Against Racism (RAR) came before the Court to address a New York City Parks Department (NYCPD) auditory control policy that affected sound amplification and modification at the Naumburg Acoustic Bandshell (the Bandshell).[58] From 1979 to 1986, RAR put on an annual performance at the Bandshell, during which time "the city received numerous complaints about excessive sound amplification at [RAR] concerts from park users and residents of areas adjacent to the park" where the Bandshell was located.[59] In response to the complaints, the NYCPD developed a set of guidelines for those wishing to use the Bandshell.[60] Ultimately, the NYCPD determined that the city could best ensure sound quality at the Bandshell without disturbing the local community by providing equipment appropriate for the venue, as well as personnel trained to operate such equipment.[61]

The Court began its analysis by noting that the Second Circuit Court of Appeals applied the correct standard in that "[c]ontent neutral time, place and manner regulations are permissible so long as they are narrowly tailored to serve a substantial government interest and do not unreasonably limit alternative avenues of expression."[62] The Court then clarified that such restrictions must be "'justified without reference to the content of the regulated speech, . . . narrowly tailored to serve a significant

56. *Id.*

57. *See id.*

58. *See* Ward v. Rock Against Racism, 491 U.S. 781, 784 (1989).

59. *Id.* at 785.

60. *Id.* at 785–87.

61. *Id.* at 787.

62. *Id.* at 789 (alteration in original) (quoting Rock Against Racism v. Ward, 848 F.2d 367, 370 (2d Cir. 1988), *rev'd on other grounds*, 491 U.S. 781 (1989)). When RAR challenged the NYCPD measures, the trial court concluded those measures were constitutional, but the Second Circuit reversed the decision on appeal. *Id.* at 784.

governmental interest, and . . . leave open ample alternative channels for communication.'"[63]

The crux of RAR's argument was that the NYCPD policy could not be content neutral "because it [was] based upon the quality, and thus the content, of the speech being regulated."[64] However, the Court held that the "government 'ha[s] a substantial interest in protecting its citizens from unwelcome noise,'"[65] specifically noting that "[t]his interest is perhaps at its greatest when government seeks to protect '"the well-being, tranquility, and privacy of the home."'"[66] Finally, the Court concluded that a governmental regulation should be viewed in relation to the general concern the regulation seeks to address, rather than on a case-by-case basis.[67]

### 6. 2004: *Porter v. Ascension Parish School Board*

In 2004, the Fifth Circuit Court of Appeals determined whether speech considered to be a "true threat" is protected under the First Amendment.[68] Adam Porter, a fourteen-year-old, drew a picture of his high school, East Ascension High School (EAHS), one night while he was at home.[69] The Court described the picture as "crudely drawn, depicting the school under a state of siege by a gasoline tanker truck, missile launcher, helicopter, and various armed persons."[70] The sketch also included inappropriate words and phrases, some of which were directed at the EAHS principal.[71] However, the sketch remained tucked safely away in the privacy of his home, until a friend, Andrew Breen, came upon the sketch pad and used it for his own drawing.[72]

While transporting the sketchpad to school, Breen and another student flipped through the pages of the sketch pad and happened upon Porter's drawing.[73] Breen then showed the picture to his bus driver, who

63. *Id.* at 791 (quoting Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984)).

64. *Id.* at 792.

65. *Id.* at 796 (alteration in original) (quoting City Council of L.A. v. Taxpayers for Vincent, 466 U.S. 789, 806 (1984) (citing Kovacs v. Cooper, 336 U.S. 77, 89 (1949))).

66. *Id.* (quoting Frisby v. Schultz, 487 U.S. 474, 484 (1988)).

67. *Id.* at 801.

68. *See* Porter v. Ascension Parish Sch. Bd., 393 F.3d 608, 618 (5th Cir. 2004), *cert. denied*, 544 U.S. 1062 (2005).

69. *Id.* at 611.

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

in turn showed it to Breen's school principal.[74] After a series of inquiries, the principal expelled Porter from school after it was determined that he drew the picture.[75] Both Porter and Breen filed a cause of action, claiming their First Amendment rights were violated.[76] They argued that the artwork qualified as protected speech under the First Amendment and, therefore, punishing the students for their protected speech was an infringement on their right of free speech.[77]

The Court began with the notion that "school officials may regulate student speech when they can demonstrate that such speech would 'substantially interfere with the work of the school or impinge upon the rights of other students.'"[78] The court next cited another "class" of speech not protected by the First Amendment: true threats.[79] A "true threat" is speech that would lead a reasonable person to believe, when viewed objectively, that the speech is a "serious expression of an intent to cause a present or future harm."[80]

The court determined that a sketch drawn in the privacy of one's own home and stored for two years before being taken to a separate school by a third party cannot meet the threshold of being a "true threat" as described above.[81] As a matter of fact, "to lose the protection of the *First Amendment* and be lawfully punished, the threat must be intentionally or knowingly *communicated* to either the object of the threat or a third person."[82] This requirement of intentional or knowing communication of a threat is a crucial bar against those who would take offense when faced with discussions of general opinions or policies—as on public college and university campuses.

### 7. 2014: *McCullen v. Coakley*

Recently, the Court evaluated the issue of protected speech as it pertains to "public fora." In 2014, the Court determined the constitutionality of a Massachusetts law that restricted speech in certain

74. *Id.* at 611.

75. *Id.* at 612.

76. *Id.*

77. *See id.* at 612–13.

78. *Id.* at 615 (quoting Canady v. Bossier Parish Sch. Bd., 240 F.3d 437, 442 (5th Cir.1996)). This standard will be addressed in detail in Part II, which specifically discusses free speech that happens on school property.

79. *Id.* at 616.

80. *Id.* (quoting Doe v. Pulaski Cty. Special Sch. Dist., 306 F.3d 616, 622 (8th Cir. 2002)).

81. *Id.* at 617–18.

82. *Id.* at 616 (first emphasis added).

areas around abortion clinics.[83] The statute in question established a "buffer zone" of thirty-five feet within "any portion of an entrance, exit or driveway of a reproductive health care facility," which increased the size of the previous eighteen-foot buffer zone.[84] In essence, the statute prevented anyone who was not a patient, employee, first responder, or other person "acting within the scope of their employment" from approaching the entrances and driveways of a reproductive health clinic unless they were using the sidewalk "solely for the purpose of reaching a destination other than such facility."[85]

The Court began by noting that the statute "regulate[d] access to 'public way[s]' and 'sidewalk[s].'"[86] These areas, the Court opined, "occupy a 'special position in terms of First Amendment protection' because of their historic role as sites for discussion and debate."[87] Undeniably, "[t]hese places . . . 'have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.'"[88] Similarly, "the First Amendment's purpose [is] 'to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail.'"[89]

Furthermore, the Court noted that the actions of the petitioners—"sidewalk counseling," and, more importantly, handing out fliers—were akin to "handing out leaflets in the advocacy of a politically controversial viewpoint . . . [and] are the essence of First Amendment expression."[90] These factors—coupled with the size of the "buffer zones" and the "special position" of sidewalks in the scheme of First Amendment protections—led the Court to conclude that the Massachusetts statute was an unconstitutional restriction of free speech.[91]

As evidenced by a litany of cases, the Court carved several small exceptions from the body of First Amendment speech protections: the "circumstances and nature" test cemented in the *Schenck* decision;[92] the

83. *See* McCullen v. Coakley, 134 S. Ct. 2518, 2525 (2014).

84. *Id.* at 2526 (quoting MASS. GEN. LAWS ch. 266 § 120E½(b) (2018)). "[T]he Massachusetts Legislature amended the statute in 2007, replacing the six-foot no-approach zones . . . with a 35-foot fixed buffer zone from which individuals are categorically excluded." *Id.*

85. *Id.* (quoting § 120E½(b)(1)–(4)).

86. *Id.* at 2528 (first alteration added) (quoting § 120E½(b)).

87. *Id.* at 2529 (quoting United States v. Grace, 461 U.S. 171, 180 (1983)).

88. *Id.* (quoting Pleasant Grove City v. Summum, 555 U.S. 460, 469 (2009)).

89. *Id.* (quoting FCC v. League of Women Voters of Cal., 468 U.S. 364, 377 (1984)).

90. *Id.* at 2536 (quoting McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 347 (1995)).

91. *See id.* at 2536–41.

92. *See supra* Section I.A.1.

handful of unprotected "classes" of speech outlined in *Chaplinsky*;[93] the distinction between speech having even the most minuscule social significance from that outweighed by a "social interest in order and morality" as described in *Roth*;[94] the declaration that statements of political opposition are protected no matter how crude as determined in *Watts*;[95] the critical "[c]ontent neutral time, place and manner" exception stated in *Ward*;[96] the "true threat" standard defined in *Porter*;[97] and the "public fora" exception outlined in *McCullen*.[98] Together, these exceptions encapsulate the current distinction between protected and unprotected speech in the general sphere of public discourse, and it is upon this foundation that the Court has based its decisions regarding speech protections in public schools.

### B. ! *First Amendment Protections for Students in a School Environment*

Just as historical developments have impacted the trajectory of First Amendment jurisprudence, the issue of protected speech at public schools has also been directly impacted by cultural and social happenings in U.S. history. For example, the late 1960s were a tumultuous time and led to an increase in political activism among the younger population.[99] Particularly, involvement in the Vietnam conflict drew stark lines among the American people, and students began protesting the hostilities.[100]

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93. *See supra* Section I.A.2.

94. Roth v. United States, 354 U.S. 476, 485 (1957) (quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942)).

95. *See supra* Section I.A.4.

96. *See supra* Section I.A.5.

97. *See supra* Section I.A.6.

98. *See supra* Section I.A.7.

99. Kenneth T. Walsh, *The 1960s: A Decade of Promise and Heartbreak*, U.S. NEWS & WORLD REP. (Mar. 9, 2010, 4:00 PM), https://www.usnews.com/news/articles/2010/03/09/the-1960s-a-decade-of-promise-and-heartbreak.

> By the end of the decade, [President] Kennedy had been assassinated, along with his brother Robert and the Rev. Martin Luther King Jr. America's cities had become Powder Kegs as African-Americans, despite historic gains toward legal equality, became more impatient than ever at being second-class citizens. Women began demanding their rights in unprecedented numbers. Young people and their parents felt a widening generation gap as seen in their differing perceptions of patriotism, drug use, sexuality, and the work ethic. The now familiar culture wars between liberals and conservatives caused angry divisions over law and order, busing, racial preferences, abortion, the Vietnam War, and America's use of military force abroad.

*Id.*

100. *See id.* ("[T]he number of college students doubled between 1940 and 1960 to 3.6 million, creating a huge pool of high-minded if sometimes misguided activists with the motivation and time to devote to political and social causes.").

Born of this wave of student activism was a new question regarding the freedom of speech afforded to students of public schools.

### 1. ! 1969: *Tinker v. Des Moines Independent Community School District*

In 1969, a group of students attending public schools in Des Moines, Iowa, staged a protest against the conflict in Vietnam.[101] Specifically, the students decided to show solidarity for an end to the Vietnam conflict by wearing black armbands.[102] Once aware of the students' plan to wear the armbands at school, the principals of several Des Moines schools instituted a policy, which stated "any student wearing an armband to school would be asked to remove it, and if he refused he would be suspended until he returned without the armband."[103] The petitioners in *Tinker* violated this policy and were suspended, not returning until after the scheduled protest period had lapsed.[104]

At the outset of its discussion, the Court's position was very clear: "First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech . . . at the schoolhouse gate."[105] Furthermore, the Court noted that it is crucial "not to strangle the free mind at its source and [to] teach youth to discount important principles of our government as mere platitudes."[106]

However, the Court did not discount the need for order and civility.[107] In fact, the Court indicated that if the issue "relate[d] to [the] regulation of the length of skirts or the type of clothing, to hair style, or deportment," then the regulation of speech in this case might hold water.[108] The regulation was not directed at any speech deemed to be aggressive, disruptive, or otherwise detrimental to the learning environment at the school.[109] To the contrary, the Court made clear there was "no evidence whatever of [the] petitioners' interference, actual or nascent, with the

101. !*See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 504 (1969).

102. !*Id.*

103. !*Id.*

104. !*Id.*

105. !*Id.* at 506.

106. !*Id.* at 507 (quoting W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943)).

107. *See id.* ("[T]he Court has repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials . . . to prescribe and control conduct in the schools.").

108. !*See id.* at 507–08.

109. !*Id.* at 508.

schools' work or of collision with the rights of other students to be secure and to be let alone."[110]

In beginning its analysis, the Court made a powerful statement:

> [I]n our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression. Any departure from absolute regimentation may cause trouble. Any variation from the majority's opinion may inspire fear. Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk, and our history says that it is this sort of hazardous freedom—this kind of openness—that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society.[111]

The Court found no "evidence that the school authorities had reason to anticipate that the wearing of the armbands would substantially interfere with the work of the school or impinge upon the rights of other students."[112] As there was no evidence indicating a particular disturbance that the school sought to avoid, it was determined that "the action of the school authorities appear[ed] to have been based upon an urgent wish to avoid the controversy which might result from the expression . . . of opposition to this Nation's part in the conflagration in Vietnam."[113] The Court also noted that "the school authorities did not purport to prohibit the wearing of all symbols of political or controversial significance."[114]

The Court succinctly reiterated the theme of their decision: "The prohibition of expression of one particular opinion, at least without evidence that it is necessary to avoid material and substantial interference with schoolwork or discipline, is not constitutionally permissible."[115] Furthermore, "[f]reedom of expression would not truly exist if the right could be exercised only in an area that a benevolent government has provided as a safe haven for crackpots."[116]

*Tinker* was the flagship case for protected speech in public schools and has been cited, at length, in several other First Amendment cases in the years since it was decided.[117] Throughout those cases, the Court

110. *Id.*

111. *Id.* at 508–09 (citation omitted).

112. *Id.* at 509.

113. *Id.* at 510.

114. *Id.*

115. *Id.* at 511.

116. *Id.* at 513.

117. *See, e.g.*, Healy v. James, 408 U.S. 169, 180 (1972); Porter v. Ascension Parish Sch. Bd., 393 F.3d 608, 615–16 (5th Cir. 2004).

repeatedly acknowledged the importance of protected speech to the educational process—thus, the foundation for free speech in public schools was laid.

2. 1972: *Healy v. James*

In 1972, the sociopolitical climate was similar to *Tinker*—"[a] climate of unrest prevailed on many college campuses in [the] country. There had been widespread civil disobedience on some campuses, accompanied by the seizure of buildings, vandalism, and arson."[118] Only three years after *Tinker* was decided, students at Central Connecticut State College (CCSC) brought suit against school officials for failing to recognize their student organization.[119] The petitioners in this case sought to establish a chapter of Students for a Democratic Society (SDS), an organization present on campuses across the country—one which had been deemed "a catalytic force during this period."[120]

Petitioners complied with CCSC procedures for getting their organization officially recognized by the school, including filing an official request with the Student Affairs Committee (SAC).[121] The official request listed three specific reasons for the creation and existence of the new SDS chapter:

> It would provide "a forum of discussion and self-education for students developing an analysis of American society"; it would serve as "an agency for integrating thought with action so as to bring about constructive changes"; and it would endeavor to provide "a coordinating body for relating the problems of leftist students" with other interested groups on campus and in the community.[122]

Despite agreeing that the statement of SDS was "clear and unobjectionable on its face,"[123] the SAC made further inquiries into the organization's motives and associations. As a result, the SAC requested additional filing by SDS regarding affiliations with any national organization.[124] Ultimately, although SAC did recommend SDS for official recognition, the President of CCSC denied their recommendation, because "[h]e found that the organization's philosophy was antithetical to

118. *Healy*, 408 U.S. at 171.
119. *Id.* at 172–77.
120. *Id.* at 171.
121. *Id.* at 172.
122. *Id.* (quoting Healy v. James, 445 F.2d 1122, 1132–39 (2d Cir. 1971)).
123. *Id.*
124. *Id.* at 172–73.

the school's policies, and that the group's independence [from other SDS chapters] was doubtful."[125]

The Court began by reiterating not only its position that public schools are subject to the First Amendment as it pertains to free speech, but also that the need for order does not mean that protections afforded by the First Amendment should be substantially weakened on college campuses.[126] "Quite to the contrary, '[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.'"[127] The Court also noted the importance of shielding First Amendment protections from both direct attack and "more subtle governmental interference."[128]

The Court concluded that failing to officially recognize SDS as a student organization impacted the students' "ability to participate in the intellectual give and take of campus debate, and to pursue its stated purpose," and that "[s]uch impediments cannot be viewed as insubstantial."[129] The Court also noted that "'guilt by association alone, without [establishing] that an individual's association poses the threat feared by the Government,' is an impermissible basis upon which to deny First Amendment rights."[130] Ultimately, it was the Court's position that the students seeking to establish a chapter of the SDS could not have their First Amendment rights limited in this way, and that "[a]s repugnant as these views may have been, especially to one with [the President's] responsibility, the mere expression of [those views] would not justify the denial of First Amendment rights."[131]

In addition to applying First Amendment protections to speech at public colleges and universities, the Court in its holding also declared that *merely expressing an opinion*, even a "repugnant" one, is not grounds for punishment.[132] In other words, the exchange of ideas and opinions at public colleges and universities should not be subject to arbitrary censorship or punishment.

125. *Id.* at 174–75 (footnote omitted).

126. *See id.* at 180.

127. *Id.* (alteration in original) (quoting Shelton v. Tucker, 364 U.S. 479, 487 (1960)).

128. *Id.* at 183 (quoting Bates v. Little Rock, 361 U.S. 516, 523 (1960)).

129. *Id.* at 181–82.

130. *Id.* at 186 (alteration in original) (quoting United States v. Robel, 389 U.S. 258, 265 (1967)).

131. *Id.* at 187.

132. *Id.* at 187–88.

3. 2001: *Bonnell v. Lorenzo*

In 2001, nearly thirty years after *Healy*, the Sixth Circuit Court of Appeals was tasked with addressing the ability to restrict speech on college campuses.[133] Bonnell was an English teacher at Macomb Community College (MCC), a position he had held since 1967.[134] Between February 1998 and September 1999, several students filed complaints against Bonnell alleging that he had used inappropriate, distasteful language.[135] Each of these accusations resulted in verbal warnings and in-person meetings conducted by his superiors at MCC, as well as written memoranda.[136] The first warning stated:

> Unless germane to discussion of appropriate course materials and thus a constitutionally protected act of academic freedom, your utterance in the classroom of such words as 'fuck,' 'cunt[,]' and 'pussy' may serve as a reasonable basis for concluding as a matter of law that you are fostering a learning environment hostile to women, a form of sexual harassment.[137]

Bonnell was initially placed on suspension; however, the district court granted a preliminary injunction and his position was reinstated.[138] Upon returning to class, another student filed a complaint against petitioner, leading Bonnell to bring this action.[139]

The court began by outlining the existing sociopolitical atmosphere at the time.

> Currently, a debate rages concerning the degree to which speech that is sexually or racially harassing is protected. And nowhere is that debate more heated than on university campuses, historically committed to unrestricted inquiry and exploring of ideas, yet morally obligated to promoting respect . . . .[140]

The court also noted that any actions taken by the government to limit or restrict speech must be based on something other than the wish to

133. *See* Bonnell v. Lorenzo, 241 F.3d 800, 802 (6th Cir. 2001).

134. *Id.* at 802–03.

135. *Id.* at 803–05. In fact, one accusation alleged that Bonnell "displayed a lack of maturity, sensitivity, and responsibility, by taking advantage of the conversations to express his own previous sexual experiences." *Id.* at 804.

136. *Id.* at 803–06.

137. *Id.* at 803.

138. *Id.* at 808.

139. *Id.*

140. *Id.* at 810 (quoting Beverly Earle & Anita Cava, *The Collision of Rights and a Search for Limits: Free Speech in the Academy and Freedom from Sexual Harassment on Campus*, 18 BERKELEY J. EMP. & LAB. L. 282, 283 (1997)).

"avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint."[141] However, it is important to consider the nature of the speech at issue as well:

> "Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record." Speech which can be "fairly considered as relating to any matter of political, social, or other concern to the community" touches upon matters of public concern.[142]

In evaluating Bonnell's speech, the court echoed its "circumstances and nature" analysis from *Schenck* by noting that context is an important issue when judging whether speech falls under the First Amendment.[143] Furthermore,

> the protection afforded to offensive messages does not always embrace offensive speech that is so intrusive that the unwilling audience cannot avoid it. Indeed, it may not be the content of the speech, as much as the deliberate verbal or visual assault, that justifies proscription. Even in a public forum, one of the reasons we tolerate a protester's right to wear a jacket expressing his opposition to government policy in vulgar language is because offended viewers can effectively avoid further bombardment of their sensibilities simply by averting their eyes.[144]

Applying these considerations to the facts of *Bonnell*, where the petitioner was a professor and the audience is his students, it is clear that a unique relationship exists "such that [the] students are a 'captive audience' who may find themselves intimidated by the person who has the ability to pass upon them a poor grade."[145] In fact, if a teacher's language "'taken in context . . . constitute[s] a deliberate, superfluous attack on a "captive audience" with no academic purpose or justification,'" that language will not be protected.[146]

As *Bonnell* makes clear, it is not impossible to restrict speech on college or university campuses.[147] Truly,

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141. *See id.* at 811 (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 509 (1969)).

142. *Id.* at 812 (quoting Connick v. Myers, 461 U.S. 138, 147–48, 146 (1983)).

143. *See id.* at 819; *see also* Schenck v. United States, 249 U.S. 47, 52 (1919) (holding that the "circumstances and nature" of speech can determine whether it is protected under the First Amendment).

144. *Bonnell*, 241 F.3d at 819 (quoting Hill v. Colorado, 530 U.S. 703, 716 (2000)).

145. *Id.*

146. *Id.* (citing Martin v. Parrish, 805 F.2d 583, 586 (5th Cir. 1986)).

147. *Id.* at 826–27.

> just as we "hope that whenever we decide to tolerate intolerant speech, the speaker as well as the audience will understand that we do so to express our deep commitment to the value of tolerance—a value protected by every clause in the single sentence called the First Amendment[,]" we also hope that whenever we decide that intolerant speech should be restricted, it is understood that we do so with no less commitment to the value of tolerance and the First Amendment in which it is enshrined.[148]

Just as the Court defined the parameters of First Amendment speech protections in the general public sphere, complete with several tests and classifications,[149] the Court also evaluated whether those parameters applied in public classrooms across the country.[150] Whether by determining that an "undifferentiated fear" is not enough to stifle speech in a public high school where a free exchange of ideas is crucial to the development of young minds,[151] by extending that same protection to public colleges and universities by solidifying the need for constitutional freedoms in American public schools,[152] or by distinguishing uncomfortable academic speech from "'a deliberate, superfluous attack on a "captive audience,"'"[153] the courts made clear that the First Amendment applies to speech in *all* public arenas, not just a street corner or city hall. It is against this backdrop that we turn to addressing safe space policies as the most recent affront to free speech on public college and university campuses.

## II. HISTORICAL ATTEMPTS TO RESTRICT SPEECH IN THE ACADEMIC SETTING: SAFE SPACE PREDECESSORS !

As outlined above, the courts have largely been hesitant to uphold restrictions on free speech, whether on a public street or on a college campus.[154] That has not stopped many schools from trying to implement various methods of restricting speech. One such method can be seen in speech codes.[155] Though the general purpose of speech codes is "to prevent a rise in discriminatory harassment," the courts have been equally

148. *Id.* at 827 (alteration in original) (citation omitted).

149. *See supra* Sections I.A.1–7.

150. *See supra* Sections I.B.1–3.

151. *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 508 (1969).

152. *See* Healy v. James, 408 U.S. 169, 180 (1972).

153. *Bonnell*, 241 F.3d at 819 (quoting Martin v. Parrish, 805 F.2d 583, 586 (5th Cir. 1986)).

154. *See supra* Part I.

155. *See* Hudson & Nott, *supra* note 19.

hesitant to allow these restrictions of speech as well.[156] Therefore, to better understand how safe space policies are in violation of the First Amendment, it is important to examine the few exceptions where the courts have ultimately allowed limited restrictions of free speech on public college and university campuses.

### A. ! *Speech Codes: Overbroad, Vague, and Unconstitutional*

A perfect example of an unconstitutional speech restriction on college campuses occurred in the late 1980s. In 1989, several incidents occurred at the University of Michigan at Ann Arbor that prompted school officials to reconsider their anti-harassment policy.[157] Such incidents included the circulation of fliers containing derogatory language referring to black students and the broadcast of racist jokes by the campus radio.[158] These incidents, followed by several hearings and revisions of the original speech code, ultimately led to the implementation of the school's "policy on Discrimination and Discriminatory Harassment," which sought to regulate speech in certain locations on campus as well as targeted speech and actions.[159]

The policy itself was designed to apply "specifically to '[e]ducational and academic centers, such as classroom buildings, libraries, research laboratories, recreation and study centers.'"[160] The policies targeted

> [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, . . . [including s]exual advances, requests for sexual favors, and verbal or physical conduct that stigmatizes or victimizes an individual on the basis of sex or sexual orientation . . . .[161]

Anyone found to be in violation of the new policy could be subject to sanctions including: "(1) formal reprimand; (2) community service; (3) class attendance; (4) restitution; (5) removal from University housing; (6) suspension from specific courses and activities; (7) suspension; [or] (8) expulsion."[162]

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156. !*Id.*
157. !Doe v. Univ. of Mich., 721 F. Supp. 852, 853–55 (E.D. Mich. 1989).
158. !*Id.* at 854.
159. !*Id.* at 856–58.
160. !*Id.* at 856.
161. !*Id.*
162. !*Id.* at 857.

The court began its analysis by distinguishing protected speech from "mere conduct."[163] Indeed, there are many state and federal prohibitions on discrimination that are not in conflict with the First Amendment; the same is true for abusive or harassing conduct.[164] The court also reiterated the "fighting words" doctrine developed in *Chaplinsky*, and indicated that colleges and universities could regulate such speech so long as the prohibition was not implemented "because [the university] disagreed with [the] ideas or messages sought to be conveyed."[165] The court also noted that "[a] law regulating speech will be deemed overbroad if it sweeps within its ambit a substantial amount of protected speech along with that which it may legitimately regulate."[166]

Using this framework, the court considered each of the following incidents in turn: a student who commented on "the origins or 'curability' of homosexuality in the School of Social Work;"[167] a business student who read "an allegedly homophobic limerick" while participating in an in-class exercise;[168] and a student who merely commented that "he had heard that minorities had a difficult time in the course and that he had heard that they were not treated fairly."[169] The district court noted that in handling the complaints under the school's policy, administrators failed to consider both the subjective intent of the speakers and any First Amendment protections that might be implicated.[170] In fact, the court opined that such enforcement was "constitutionally indistinguishable from a full blown prosecution."[171]

Ultimately, the court concluded that "it was simply impossible to discern any limitation on [the policy's] scope or any conceptual distinction between protected and unprotected conduct."[172] Furthermore, the court reiterated the importance of affording speech the broadest First Amendment protection possible.[173] As such, the district court held that

163. *Id.* at 861.

164. *Id.* at 861–62.

165. *Id.* at 862–63 (citations omitted); *see supra* Section I.A.2.

166. *Doe*, 721 F. Supp. at 864 (citations omitted).

167. *Id.* at 865.

*168. Id.*

169. *Id.* at 866 (citation omitted).

170. *Id.*

171. *Id.*

172. *Id.* at 867.

173. *See id.* at 869 (second alteration in original) ("[E]ven if speech 'exceed[s] all the proper bounds of moderation, the consolation must be that the evil likely to spring from the violent discussion will probably be less . . . than if the terrors of the law were brought to bear to prevent the discussion.'" (quoting T. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS 429 (Da Capo ed. 1972))).

the policy implemented by the University of Michigan was an unconstitutional restriction of protected speech and, therefore, could not be enforced as written, with an exception granted to physical behavior or physical conduct.[174]

B. ! *Anti-Harassment Policies: Speech Codes Reborn*

The decision in *Doe* seemed to mark the beginning of the end of campus speech codes.[175] However, despite courts dismissing several speech-restricting policies for being vague and/or overbroad, many public colleges and universities have been successful in restricting speech with so-called "anti-harassment" policies.[176] In reality, "hate speech policies not only persist, but they have actually increased in number following a series of court decisions that ostensibly found many to be unconstitutional."[177]

Some "[f]eminist and anti-racist legal scholars [have] argued that the First Amendment should not safeguard language that inflict[s] emotional injury through racist or sexist stigmatization."[178] Therefore, one possible reason for the prevalence of "anti-harassment" policies is their tendency to "punish harassing speech and conduct, as opposed to offensive speech."[179] Harassment arises from "[w]ords, conduct, or action . . . that, being directed at a specific person, annoys, alarms, or causes substantial emotional distress to that person and serves no legitimate purpose."[180] Similarly, speech is harassing if it is used "to annoy persistently; . . . bother continually; pester; [or] persecute."[181] Applying these definitions, harassing speech appears very similar to the "fighting words" from *Chaplinsky* in that harassment would be likely to "inflict

174. !*Id.* at 853.

175. !David L. Hudson, Jr. & Lata Nott, *Hate Speech & Campus Speech Codes*, FREEDOM F. INST., https://www.freedomforuminstitute.org/first-amendment-center/topics/freedom-of-speech-2/free-speech-on-public-college-campuses-overview/hate-speech-campus-speech-codes/ [https://perma.cc/RP2S-MQ5X].

> In 1995, the 6th U.S. Circuit Court of Appeals struck down the University of Central Michigan's speech code in *Dambrot v. Central Michigan University*. That same year, in *Corry v. Stanford*, a California state court ruled that Stanford University's speech code violated the First Amendment. Some First Amendment advocates cheered these court decisions as the demise of campus speech codes.

*Id.*

176. !*See id.*

177. !*Id.* (quoting George Mason law professor Jon Gould).

178. !Shulevitz, *supra* note 8.

179. !Hudson & Nott, *supra* note 19.

180. !*Harassment*, BLACK'S LAW DICTIONARY (10th ed. 2014).

181. !*Harass*, MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (11th ed. 2004).

injury or tend to incite an immediate breach of the peace," and therefore be punishable as unprotected speech.[182]

However, some schools have gone one step further by implementing policies that target alleged "bias incidents."[183] According to the University of Massachusetts Amherst, bias incidents are

> [a]cts against people or property that *do not appear to constitute a crime or actionable discrimination*, but which may intimidate, mock, degrade, or threaten a member or group because of actual or perceived age, ancestry or ethnicity, color, creed, disability, gender, gender identity or expression, height, immigration or citizenship status, marital status, ex-offender status, national origin, veteran status, race, religion, religious practice, sexual orientation, socioeconomic status, weight or any combination of these factors.[184]

This language, and its implications, run directly counter to the jurisprudence surrounding First Amendment protections.

> This commitment to free expression must be unwavering, because there exist many situations where, in the short run, it appears advantageous to limit speech to solve pressing social problems, such as discriminatory harassment. If a balancing approach is applied, these pressing and tangible short run concerns are likely to outweigh the more amorphous and long run benefits of free speech. However, the suppression of speech, even where the speech's content appears to have little value and great costs, amounts to governmental thought control.[185]

This is not to say that the Court has granted complete deference to the First Amendment to the exclusion of current societal needs. Indeed, the Court has provided a solution should the need arise:

> We have previously noted the First Amendment virtues of targeted injunctions as alternatives to broad, prophylactic measures. Such an injunction "regulates the activities, and perhaps the speech, of a group," but only "because of the group's past *actions* in the context of a specific dispute between real parties."[186]

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182. *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942).

183. *See, e.g.*, *What are Acts of Bias and Hate?*, UMASSAMHERST: UMATTER AT UMASS, https://www.umass.edu/umatter/bias [https://perma.cc/744W-6PYL].

184. *Id.* (emphasis added).

185. Hudson & Nott, *supra* note 19 (quoting UWM Post, Inc. v. Bd. of Regents, 774 F. Supp. 1163, 1174 n.9 (E.D. Wis. 1991)).

186. McCullen v. Coakley, 134 S. Ct. 2518, 2538 (2014) (quoting Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 762 (1994)).

In essence, this would allow someone who has been the subject of harassing speech to obtain judicial intervention should college or university officials be unwilling, or unable, to act.[187]

Understanding the nature of free speech and its importance to discourse at public colleges and universities, as well as the remedies available to individual parties, is the first step to understanding why safe space policies are inherently unconstitutional. However, it is equally important to understand the real-world implications of safe spaces, including the arguments offered by those in favor of restricting speech. Therefore, those rationales must be tested against the bulwark of jurisprudence in favor of the free exchange of ideas that pervades institutions of higher learning.

## III. SAFE SPACE POLICIES: UNCONSTITUTIONAL, HARMFUL ! RESTRICTIONS OF SPEECH !

It bears repeating that the safe spaces referred to are not to protect students, faculty, and staff from physical injury or harm, but from mental or emotional harm.[188] Each person naturally has subjective standards of what constitutes mental or emotional harm, however, which in turn severely frustrates speech regulations that "are permissible so long as they are *narrowly tailored* to serve a substantial government interest and do not *unreasonably limit* alternative avenues of expression."[189]

### A. *Safe Spaces Are Unconstitutional Restrictions of Speech*

When asked to justify the implementation of safe space policies, the most common answer is to protect students from unpleasant or uncomfortable subjects, such as sexual assault.[190] Some argue, and rightly so, that the right of students to learn about sexual assault does not negate other students' need for safety.[191]

No one is trying to suggest that students should be utterly inundated with uncomfortable or unpleasant information at all times and in all areas of campus. Nor is anyone trying to minimalize or discount the importance of victims of sexual assault or their experiences. However, administrators at public colleges and universities have a duty to keep their students safe,

187. *Id.*

188. Holley & Steiner, *supra* note 13.

189. Ward v. Rock Against Racism, 491 U.S. 781, 789 (1989) (emphasis added) (quoting Rock Against Racism v. Ward, 848 F.2d 367, 370 (2d Cir. 1998), *rev'd on other grounds*, 491 U.S. 781 (1989)).

190. Rafidi, *supra* note 15.

191. *Id.*

and this means that allowing speakers to present information relating to sexual assault awareness and prevention is crucial to that duty.[192]

With the truly pervasive nature of sexual assault and sexual violence gaining national recognition in recent years, it is impossible to say that disseminating information to public college and university students regarding sexual assault awareness and prevention lacks "even the slightest redeeming social importance."[193] Undeniably, one look at the current social climate surrounding the apparent prevalence of sexual assault and sexual violence would indicate that educating public college and university students clearly qualifies as a "matter[ ] of public concern."[194] Therefore, using safe space policies to limit speech, not only in the context of sexual assault awareness and prevention, but also other matters of equal importance and concern, clearly contradicts the purpose of First Amendment speech protections.

Rafidi also chides a decision by the University of Chicago that eliminated safe spaces from its campus.[195] He takes issue with the fact that removing safe spaces from campuses would leave students with nowhere to go during or after attending a particular presentation.[196] However, the rationale behind the University's decision is simple: if students are uncomfortable with a certain topic or presentation, they are free to leave.[197] In fact, they are free not to attend such presentations in the first place.

If this argument sounds familiar, it is because it was the court's holding in *Bonnell* when they acknowledged students in a classroom are

192. *See* Gersen, *supra* note 17 ("We are currently in the middle of a national effort to reform how sexual violence is addressed on college campuses. This effort is critical, given the apparent prevalence of sexual violence among students."); *see also Campus Sexual Violence: Statistics*, RAINN, https://www.rainn.org/statistics/campus-sexual-violence [https://perma.cc/N7Y5-SRVW].

193. Roth v. United States, 354 U.S. 476, 484 (1957) (holding that speech bearing even miniscule social importance deserves First Amendment protection).

194. *Id.* at 488 (explaining that matters of public concern may be discussed freely and publicly); *see also* Gersen, *supra* note 17.

195. Rafidi, *supra* note 15. It is important to note that the University of Chicago is a private institution, and as such, it is significantly less beholden to many aspects of the Constitution, including the First Amendment. Therefore, the decision to forego speech regulations in acknowledgement of the greater need for open discourse among students at colleges and universities should serve as a shining example to those public colleges and universities that would consider regulating speech on their campuses.

196. *See id.*

197. *Id. But see* Bonnell v. Lorenzo, 241 F.3d 800, 819 (6th Cir. 2001) (commenting that students in a classroom setting are a "captive audience" and susceptible to intimidation leveraged against them by the person in charge of grading them).

a "captive audience."[198] However, unlike *Bonnell*, students at the University of Chicago would only be subjected to uncomfortable or unpleasant content if they chose to attend a presentation.[199]

Rafidi also suggests that while "[s]afe spaces are useful . . . not all students are entitled to have safe spaces."[200] This is a troubling proposition because it could allow campus administrators to handpick which students are "entitled" to safe spaces and therefore what speech should be allowed or restricted, something that cannot be reconciled with the First Amendment.[201] This would be a direct contradiction to First Amendment jurisprudence in general, and specifically the narrow tailoring/unreasonable limitation test established in *Ward*.[202] The implementation of such a proposition would also contradict the Court's holding that "the prohibition of expression of one particular opinion, at least without evidence that it is necessary to avoid *material and substantial* interference with schoolwork or discipline, is not constitutionally permissible."[203]

Rafdi's proposition also suggests that only certain students and organizations should be allowed access to safe spaces; the corollary, of course, is that other students and organizations should be prohibited from accessing safe spaces.[204] Under Rafidi's proposition, authorities would not only have the ability to arbitrarily decide what students and organizations should be permitted to have safe spaces; they would also be permitted, if not encouraged, to police students' backgrounds in an effort to ferret out those who would seek to abuse "safe spaces."[205] Similarly, allowing administrators to determine which students and organizations are entitled to safe spaces would be the functional equivalent of allowing them to handpick what speech to permit and what to restrict, which is akin to "governmental thought control."[206]

Mirroring Rafidi's position, RaeAnn Pickett wrote a similar article praising safe spaces as necessary. Pickett chided the University of

198. *Bonnell*, 241 F.3d at 819.

199. Rafidi, *supra* note 15.

200. *Id.*

201. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 513 (1969) ("Freedom of expression would not truly exist if the right could be exercised only in an area that a benevolent government has provided as a safe haven for crackpots.").

202. *See* Ward v. Rock Against Racism, 491 U.S. 781, 789 (1989).

203. *Tinker*, 393 U.S. at 511 (emphasis added).

204. *See* Rafidi, *supra* note 15.

205. *Id.* ("Students may be taking advantage of safe spaces . . . .").

206. *See* Hudson & Nott, *supra* note 19 (quoting UWM Post, Inc. v. Bd. of Regents, 774 F. Supp. 1163, 1174 n.9 (E.D. Wis. 1991)).

Chicago for ending its policies regarding "trigger warnings" and safe spaces.[207] While Pickett concedes that the policies were ended to further promote academic freedom, she also improperly places the focus of her argument on the subjective feelings of the students.[208] To the contrary, the Court has repeatedly held that speech cannot be restricted by the government solely because it is unpleasant, uncomfortable, or even blatantly offensive to those who hear it.[209] Perhaps the Court said it best: "'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, [rather] than through any kind of authoritative selection."'"[210]

One such example of "authoritative selection" was discussed in an article by Flemming Rose:

> [I]n the aftermath of a recent visit by leading feminist intellectual and cultural critic Laura Kipnis, [six professors at Wellesley College] proposed setting up a censorship committee to vet speakers in order to make sure that 'disempowered groups' would be protected from ideas and speech they find offensive and harmful.[211]

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207. Pickett, *supra* note 16.

208. *See id.* ("[Ending] the [university's] polic[ies] puts many students in the uncomfortable position of entering spaces that may or may not be safe for them to learn, interact, and share in—and puts the onus on them to leave or to endure the situation.").

209. Watts v. United States, 394 U.S. 705, 708 (1969) (emphasis added) ("[D]ebate on public issues . . . may well include *vehement, caustic, and sometimes unpleasantly sharp attacks* on government and public officials."); Roth v. United States, 354 U.S. 476, 484 (1957) (emphasis added) ("All ideas . . . —*unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion*—have the full protection of [the First Amendment]."); *see also* Healy v. James, 408 U.S. 169, 187 (1972) ("As repugnant as these views may have been, especially to one with [the President's] responsibility, the mere expression of them would not justify the denial of First Amendment rights.").

210. Tinker v. Des Moines Indep. Cmty. Sch. Dist, 393 U.S. 503, 512 (1969) (alteration in original) (quoting Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967)).

211. Rose, *supra* note 1. Wellesley College, like the University of Chicago, is a private institution not subject to the same standard under First Amendment jurisprudence. Philip J. Faccenda and Kathleen Ross, *Constitutional and Statutory Regulation of Private Colleges and Universities*, 9 VAL. U. L. REV. 539, 540–41 (1975).

> An individual alleging that a private educational institution has deprived him of his constitutional rights must show that the institution acted on behalf of the state—as an arm of the state, which if proven, subjects the private school to the jurisdiction of federal court. . . . If state action is not shown, a private school can be sued only as an individual citizen and the reservoir of constitutional protections and procedural tools available when the private school is sued as an agent of the state are not available to the plaintiff.

*Id.*

Establishing censorship committees at public colleges and universities would certainly qualify as governmental speech regulation.[212] For example, such a committee could be tasked with predicting whether a particular speaker or event would cause subjective feelings of discomfort or uneasiness among certain students.[213] This raises the question, though, of how this committee would gauge what level of discomfort or uneasiness would merit the censorship, or outright prohibition, of a speaker or event? In all likelihood, they would *err on the side of caution* and simply disallow anything that they thought might make the student body uncomfortable to any degree, reminiscent of the "undifferentiated fear" standard that the Court denounced in *Tinker*.[214]

Now, proponents of censorship committees would argue that bringing "'guest speakers with controversial and objectionable beliefs' to campus 'impose[s] on the liberty of students, staff and faculty.'"[215] However, the Court has held that "state-operated schools may not be enclaves of totalitarianism . . . [and] students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate."[216] Furthermore,

> [a]lthough such measures have been deliberately approved by men of great genius, their ideas touching the relation between individual and State were wholly different from those upon which our institutions rest; and it hardly will be affirmed that any Legislature could impose such restrictions upon the people of a state without doing violence to both letter and spirit of the Constitution.[217]

Indeed, this bizarre dissonance between language that can be regulated in an academic setting and language that students *feel* should be regulated is underscored by an "incident" that occurred at a Smith College alumnae event in the fall of 2014.[218] This incident involved an "[argument] against the use of the euphemism 'the n-word' when teaching

212. *See Healy*, 408 U.S. at 186. "'[G]uilt by association alone, without [establishing] that an individual's association poses the threat feared by the Government,' is an impermissible basis upon which to deny *First Amendment* rights." *Id.* (first alteration in original) (emphasis added) (quoting United States v. Robel, 389 U.S. 258, 265 (1967)).

213. *Id.*

214. *See Tinker*, 393 U.S. at 509, 512 (quoting Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967)).

215. Rose, *supra* note 1.

216. *Tinker*, 393 U.S. at 511.

217. *Id.* at 511–12 (quoting Meyer v. Nebraska, 262 U.S. 390, 402 (1923)).

218. Shulevitz, *supra* note 8. Smith College is a private institution, shielded from the First Amendment in the same way as the University of Chicago and Wellesley. *See* Faccenda & Ross, *supra* note 211. This incident illustrates the inherent problem with restricting speech based on subjective standards, such as how students may "feel" about the speech in question.

American history or 'The Adventures of Huckleberry Finn.'"[219] To be clear, it appears that the euphemism, "the n-word," is what was actually used in lieu of any derogatory slang; moreover, the euphemism did not appear directed at anyone.[220] In relation to this incident, Kaminer made the following remark: "It's amazing to me that [students] can't distinguish between racist speech and speech *about* racist speech, [and] between racism and *discussions* [about] racism."[221] This statement perfectly encapsulates the inherent danger, repeatedly noted by the Court, that arises when speech is regulated based on subjective feelings of discomfort, unpleasantness, or inappropriateness.[222]

In a similar incident, Zineb El Rhazoui, a *Charlie Hebdo* journalist, was chided by the University of Chicago student newspaper for allegedly using her "relative position of power . . . [as a] free pass to make condescending attacks on a member of the university."[223] Evidently, one of the students who disagreed with *Charlie Hebdo*'s "apparent disrespect for Muslims" was even less pleased when Ms. El Rhazoui stated, "'Being Charlie Hebdo means to die because of a drawing,' and not everyone has the guts to do that."[224] This interaction, and the subsequent backlash, illustrates yet another problem with restricting speech based on subjective feelings of comfort: "[T]he student[s] and [their] defender[s] had burrowed so deep inside their cocoons, [and] were so overcome by their own fragility, that they couldn't see that it was Ms. El Rhazoui who was in need of a safer space."[225]

Furthermore, a Pierce College student was subjected to an arguably unconstitutional restriction of his free speech rights in fall of the 2016 school year.[226] This student, Kevin Shaw, was stopped from distributing copies of the *U.S. Constitution* on the grounds of Pierce College for

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219. *Id.*

220. *Id.*; *see Challenging the Ideological Echo Chamber: Free Speech, Civil Discourse, and Liberal Arts*, SOUNDCLOUD (Sept. 22, 2014, 25:30), https://soundcloud.com/sydney-sadur/challenging-the-ideological-echo-chamber-free-speech-civil-discourse-and-the-liberal-arts.

221. *Id.* (emphasis added).

222. Roth v. United States, 354 U.S. 476, 484 (1957) (emphasis added) ("All ideas having even the slightest redeeming social importance—*unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion*—have the full protection of the [First Amendment].").

223. Shulevitz, *supra* note 8 ("[Zineb] El Rhazoui is an immigrant, a woman, Arab, a human-rights activist who has known exile, and a journalist living in very real fear of death.").

224. *Id.*

225. *Id.*

226. *See generally* Complaint for Injunctive and Declaratory Relief and Damages, Shaw v. Burke et al., No. CV-17-2386 (C.D. Cal. Mar. 28, 2017), 2017 WL 1173731 [hereinafter Complaint] (challenging the constitutionality of the "free speech area" policy at Pierce College).

allegedly violating the campus speech policy.[227] This policy "restricts the distribution of literature, including 'petitions, circulars, leaflets, newspapers, miscellaneous printed matter and other materials,' to 'the geographical limits of the Free Speech Area' on each campus."[228] In fact, the policy goes so far as to state:

> Individuals planning to distribute material on campus are required to go to the Vice President of Student Services Office located on the third floor of the Student Services Building between the hours of 9:00am and 4:00pm to: 1. Report his/her presence on campus; 2. Identify the organization and give the name(s) of the distributor(s) and address of the organization; [and] 3. Indicate how many people will be distributing along with the date(s) and time(s) of distribution.[229]

This policy is similar to the censorship committee suggested by Wellesley College, except for a crucial difference: Pierce College is a public college campus.[230] Moreover, "'handing out leaflets in the advocacy of a politically controversial viewpoint . . . *is the essence of First Amendment expression*'; '*[n]o form of speech is entitled to greater constitutional protection.*'"[231] By implementing this policy, the Los Angeles Community College District (of which Pierce College is a member) is able to quite literally police who is speaking on their campus as well as what they are speaking about.[232] Simply put, enforcing this policy is fundamentally antithetical to both the spirit and letter of the First Amendment.[233]

Additionally, using this speech policy to restrict free speech in such a way—particularly by defining a particular area in which free speech may be practiced—effectively makes the rest of the campus a *de facto* safe

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227. *Id.* at ¶ 8 (emphasis added).

228. *Id.* at ¶ 9 (citations omitted).

229. *Id.* at ¶ 11.

230. *See* Rose, *supra* note 1.

231. McCullen v. Coakley, 134 S. Ct. 2518, 2536 (2014) (emphasis added) (quoting McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 347 (1995)).

232. *See* Complaint, *supra* note 226, at ¶ 11 (outlining the steps required to obtain a permit to use the designated free speech area, including disclosure of the content of the speech engaged in by those applying to use the space).

233. *See, e.g.*, Watts v. United States, 394 U.S. 705, 708 (1969) ("[D]ebate on public issues should be uninhibited, robust, and wide-open . . . ."); Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 508–09 (1969) ("[I]t is this sort of hazardous freedom [of speech] . . . that is the basis of our national strength and of the independence and vigor of [all] Americans . . . ."); Roth v. United States, 354 U.S. 476, 484 (1957) ("All ideas having even the slightest redeeming social importance . . . have the full protection of the [First Amendment] . . . .").

space.[234] Therefore, this policy is arguably beyond the scope intended by the court's holding in *Bonnell*, with regard to the principle of captive audience versus the ability to leave or avoid at will.[235] In fact, such restriction on the ability to exercise free speech sounds much more akin to the Court's concern in *Tinker* that "[f]reedom of expression would not truly exist if the right could be exercised only in an area that a benevolent government has provided as a safe haven for crackpots."[236]

Whether it is a presentation on sexual assault awareness and prevention,[237] an academic discussion about the merits of white-washing historical pedagogy with euphemisms,[238] a presentation by a journalist whose life and freedom of speech is under constant threat,[239] or a student attempting to distribute copies of the Constitution at Pierce College,[240] one thing is clear: these are not instances of targeted, repetitive, verbal harassment—the latter form of speech is impermissible under First Amendment jurisprudence.[241] However, the above-mentioned instances are examples of academic and scholarly discussion, the likes of which have been deemed constitutionally protected exercises of free speech by the Court numerous times.[242]

### B. ! *Safe Spaces Harm Students by Limiting Exposure to Concepts and Ideas That Force Students to Think Critically*

Rape law is one subject of the safe space debate that should be of particular concern to law students, lawyers, judges, and everyone involved in the legal community.[243] In recent years, students have started being advised that they "should not feel pressured to attend or participate in class sessions that focus on the law of sexual violence."[244] In fact, "[i]ndividual

234. *See Safe Space*, *supra* note 12. Safe spaces are "intended to be free of bias, conflict, criticism, or potentially threatening actions, ideas, or conversations." *Id.* Therefore, it would make sense that restricting any such conflicts or conversations to a very small, designated area, effectively frees the rest of the campus from such issues and thereby transforms the campus into a massive safe space.

235. !*See* Bonnell v. Lorenzo, 241 F.3d 800, 819 (6th Cir. 2001); Rafidi, *supra* note 15.

236. !*Tinker*, 393 U.S. at 513.

237. !*See, e.g.*, Rafidi, *supra* note 15.

238. *See, e.g.*, Shulevitz, *supra* note 8 (discussing the use of the euphemism "the n-word" when teaching American History or the Adventures of Huckleberry Finn).

239. !*Id.* (discussing the struggle of Ms. El Rhazoui).

240. !Complaint, *supra* note 226, at ¶ 13.

241. !*See* Chaplinsky v. New Hampshire, 315 U.S. 568, 573 (1942); *supra* Section II.B.

242. *See, e.g.*, Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 511–12 (1969) ("[S]tudents may not be regarded as closed-circuit recipients of only that which the State chooses to communicate.").

243. !*See* Gersen, *supra* note 17.

244. !*Id.*

students often ask teachers not to include the law of rape on exams for fear that the material would cause them to preform less well."[245] More troubling still is the notion that teachers should stop teaching rape law altogether.[246]

There can be little doubt that sexual assault and violence are very serious issues that colleges and universities are striving to address—with many campuses bringing victim-survivors to speak to students about their experiences and even offer advice.[247] Therefore, to suggest that rape law should not be taught is perplexing, especially when one considers the sad state of rape law even thirty years ago.

> Until the mid-nineteen-eighties, rape law was not taught in law schools, because it wasn't considered important or suited to the rational pedagogy of law-school classrooms. The victims of rape, most often women, were seen as emotionally involved witnesses, making it difficult to ascertain what really happened in a private encounter. This skepticism toward the victim was reflected in the traditional law of rape, which required a woman to "resist to the utmost" the physical force used to make her have intercourse. Trials often included inquiries into a woman's sexual history, because of the notion that a woman who wasn't [a virgin] must have been complicit in any sex [act] that occurred. Hard-fought feminist reforms attacked the sexism in rape law, and eventually the topic became a major part of most law schools' mandatory criminal-law course.[248]

It cannot be denied that the topic of rape, and subsequently rape law, is an intensely uncomfortable subject for most people, particularly those who have been the victim of sexual violence, sexual assault, and rape.[249] This is especially true when professors teach cases "that test the limits of the rules, and that fall near the rapidly shifting line separating criminal conduct from legal sex."[250] However, for law students, these cases are

245. *Id.*

246. *Id.* ("[S]ome students have even suggested that rape law should not be taught because of its potential to cause distress.").

247. *See, e.g.*, Shulevitz, *supra* note 8.

248. Gersen, *supra* note 17.

249. *Id.*; *see also* Skylar Washington, *Let's Get Comfortable with Being Uncomfortable: A Discussion About Rape and Sexual Assault*, MEDIUM (Mar. 27, 2018), https://medium.com/gendered-violence/lets-get-comfortable-with-being-uncomfortable-a-discussion-about-rape-and-sexual-assault-937f8fc15dac [https://perma.cc/DNK3-QMS3] ("Whether it's someone who has been violated or someone who hasn't, the word 'rape' sets an unpleasant, very devastating tone that creates a blanket of silence.").

250. *See* Gersen, *supra* note 17.

arguably more instructive precisely because they help teach not only the rules but how to apply academic concepts to real-world problems.[251]

While it may be incredibly uncomfortable to learn about and discuss the law governing sexual assault, sexual violence, and rape, the fact remains that knowing how to apply the law to real-world facts to achieve justice for victims is inarguably a "matter[ ] of public concern," similar to the concerns voiced in *Roth*.[252] Furthermore, unlike the speech at issue in *Bonnell*, discussion of sexual assault, sexual violence, and rape in a class where the anticipated educational outcome is a fundamental understanding of the law governing these issues inarguably meets the "public concern" standard raised in *Bonnell*.[253]

This relates back to the concern that Rafidi expressed about the possible traumatization of students who are exposed to sexual assault survivors who come to campuses for the purpose of educating both men and women about the dangers of sexual violence.[254] In fact, there are those who would seek to keep sexual assault awareness and prevention speakers from coming to campuses altogether, because "[b]ringing in a speaker like that could serve to invalidate people's experiences."[255] However, "[n]ow more than ever, it is critical that law students develop the ability to engage productively and analytically in conversations about sexual assault."[256] In fact, "[i]f the topic of sexual assault were to leave the law-school classroom, it would be a tremendous loss—above all to victims of sexual assault."[257] This further serves to underscore the fact that such discussions are crucial matters of public concern.[258]

In a similar article, Flemming Rose challenges the idea that students should be free of conflict and negativity on college and university

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251. *Id.* *See generally* Jonathan Zimmerman & Emily Robertson, *The Case for Contentious Curricula*, ATLANTIC (Apr. 26, 2017), https://www.theatlantic.com/education/archive/2017/04/the-case-for-contentious-classrooms/524268/ [https://perma.cc/8X3S-7DK6] (arguing that schools should engage students in contentious subjects so they can "engage in reasoned, informed debates across society's myriad differences").

252. Roth v. United States, 354 U.S. 476, 488 (1957) (quoting Thornhill v. Alabama, 310 U.S. 88, 101–02 (1940)).

253. Bonnell v. Lorenzo, 241 F.3d 800, 812 (6th Cir. 2001) ("Speech which can be 'fairly considered as relating to any matter of political, social, or other concern to the community' touches upon matters of public concern." (quoting Connick v. Myers, 461 U.S. 138, 146 (1983))).

254. *See* Rafidi, *supra* note 15; *see also supra* Section III.A.

255. Shulevitz, *supra* note 8.

256. Gersen, *supra* note 17.

257. *Id.*

258. *See* Roth v. United States, 354 U.S. 476, 488 (1957); *Bonnell*, 241 F.3d. at 812.

campuses.[259] He recounts an interview with activist and former advisor to President Obama, Van Jones (a.k.a. Anthony Kapel Jones), who made a powerful statement about the kind of comfort and safety safe spaces seek to promote. Jones stated:

> I think [safe spaces are] a terrible idea for the following reason: I don't want you to be safe ideologically. I don't want you to be safe emotionally. I want you to be strong. That's different. I'm not going to pave the jungle for you. Put on some boots, and learn how to deal with adversity. I'm not going to take the weights out of the gym. That's the whole point of the gym.
> You can't live on a campus where people say stuff you don't like? […] You are creating a kind [o]f liberalism that the minute it crosses the street into the real world is not just useless but obnoxious and dangerous. I want you to be offended every single day on this campus. I want you to be deeply aggrieved and offended and upset and then learn how to speak back.[260]

This explains the danger of shielding students from uncomfortable topics and discussions as well as the reasoning behind why they should feel uncomfortable in the first place. It also serves as a perfect modern encapsulation of the Court's view that "unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion" are worthy of the protections of the First Amendment.[261]

Rose also mentions a speech made by then-President Barack Obama at a high school in Des Moines, Iowa (home of the famous *Tinker* decision), where the president spoke about the importance of experiencing different perspectives, ideals, and beliefs.[262] "[T]he purpose of college is not just . . . to transmit skills. It's also . . . to make you a better citizen; to help you to evaluate information; [and] to help you make your way through the world."[263] This would be difficult, if not impossible, for someone who had nothing but their own thoughts, beliefs, and perspectives on life, society, and everything else.[264] Removing challenge

259. Rose, *supra* note 1.

260. *Id.* (second alteration in original).

261. *Roth*, 354 U.S. at 484.

262. Rose, *supra* note 1.

263. *Id.* (quoting President Barak Obama).

264. *Id.* (emphasis added) ("[I]t was because there was this space where you could interact with people who didn't agree with you and had different backgrounds that I then started testing my own assumptions. *And sometimes I changed my mind.*"); *see also* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 508–09 (1969) ("But our Constitution says we must take this risk . . . that is the basis of our national strength and of the independence and vigor of Americans . . . .").

and discomfort from the learning environment can be problematic, even detrimental, to students.

> It's one thing to say that students should not be laughed at for posing a question or for offering a wrong answer. It's another to say that students must never be conscious of their ignorance. It's one thing to say that students should not be belittled for a personal preference or harassed because of an unpopular opinion. It's another to say that students must never be asked why their preference and opinions are different from those of others. It's one thing to say that students should be capable of self-revelation. It's another to say that they must always like what they see revealed.[265]

Indeed, it cannot be denied that "[t]he path to self-discovery can be difficult and stressful."[266] The very real concern raised by many opponents of safe spaces is that "safe classrooms might result in a nonacademic environment that stifles student learning."[267] Similarly, a question is raised when one considers the potential for "one student's speaking up in a safe space . . . to seriously harm another student."[268] Moreover, "[a] comment that is perceived as an appropriate critique by one student might be felt as judgmental or as an attack by another."[269] These subjective feelings, while not invalidated, fail to withstand the Court's many denouncements.[270]

Therefore, students venturing into the academic arena should accept, first and foremost, that "learning necessarily involves not merely risk, but the pain of giving up a former condition in favor of a new way of seeing

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265. Holley & Steiner, *supra* note 13, at 51 (quoting Robert Boostrom, "Unsafe Spaces": Reflections on a Specimen of Educational Jargon, paper presented at the Annual Meeting of the American Educational Research Association (Mar. 24, 1997), made available at https://files.eric.ed.gov/fulltext/ED407686.pdf [https://perma.cc/CV8J-J2WD]).

266. *Id.*

267. *Id.*

268. *Id.* at 52. "[O]ne must question whether students feel safe only in an environment where their beliefs go unquestioned and ideas unchallenged. If this is the case, what feels safe for students might be antithetical to the discomfort that is sometimes necessary for true growth and learning to occur." *Id.* at 60.

269. *Id.* at 61.

270. *See, e.g.*, Healy v. James, 408 U.S. 169, 187 (1972) (holding the "mere expression" of repugnant views is not sufficient to deny someone their free speech right); Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 508 (1969) ("[I]n our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression."); Doe v. Univ. of Mich., 721 F. Supp. 852, 869 (E.D. Mich. 1989) (discussing the balance between speech which "exceeds all the proper bounds of moderation" and the "terrors of the law were [it] brought to bear to prevent the discussion" (quoting COOLEY, *supra* note 173, at 429)).

things."[271] Indeed, "[i]t might also be important to discuss the connection between personal and intellectual growth and periodic discomfort or challenge."[272] President Obama summarized this line of thinking thus:

> [W]hen I went to college, suddenly there were some folks who didn't think at all like me. And if I had an opinion about something, they'd look at me and say, well that's stupid. And then they'd describe how they saw the world. And they might have had a different sense of politics, or they might have a different view about poverty, or they might have a different perspective on race, and sometimes their views would be infuriating to me. . . . Sometimes I realized, you know what, maybe I've been too narrow-minded. Maybe I didn't take this into account. Maybe I should see this person's perspective.[273]

Students are supposed to go to a college or university to broaden not only their academic education, but their social education as well.[274] Many students who go away to college are leaving their homes, sometimes their states, and in some cases even their countries, for the first time. The very act of being on a college campus and attending classes exposes each student to variety of backgrounds, experiences, and perspectives.[275] It is important to foster acceptance and understanding, not by shutting down or silencing discourse because it may be uncomfortable, but by encouraging people to share their experiences without fear of reprisal from fellow students, faculty, or staff, merely because they speak about a topic that caused them to think critically about something.[276]

## CONCLUSION

Federal courts have ruled time and again that speech cannot be restricted, prohibited, or punished based solely on its content.[277] To do so would start the country down a slippery slope towards tyranny, the very likes of which the Constitution was designed to prevent.[278] Indeed, the

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271. Robert Boostrom, *"Safe Spaces": Reflections on an Educational Metaphor*, 30 J. CURRICULUM STUD. 397, 399 (1998).

272. Holley & Steiner, *supra* note 13, at 61 (alteration in original).

273. Rose, *supra* note 1.

274. *See generally* Glenn Geher, *Why Go to College?*, PSYCHOL. TODAY (Jan. 10, 2018), https://www.psychologytoday.com/us/blog/darwins-subterranean-world/201801/why-go-college [https://perma.cc/BN9R-QK9R] (discussing fourteen reasons why students should go to college, including exposure to diverse ideas and people).

275. *Id.*

276. *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 512 (1969).

277. *See supra* Section I.A.

278. Emerson, *supra* note 3, at 742 ("When men govern themselves, it is they—and no one else—who must pass judgment upon unwisdom and unfairness and danger." (quoting A. MEIKLEJOHN, POLITICAL FREEDOM 27 (1960))).

courts have also acknowledged that the freedom to speak and discuss openly all things important to the current times is most crucial in the arena of education.[279] After all, an informed citizenry cannot be adequately informed if discussion and debate is restricted.

And yet, that is what safe spaces seek to do. They seek to allow only speech deemed "acceptable"—that is, speech that does not upset the delicate sensibilities of the arbitrary few who control, among other things, campus advertisements and guest speakers.[280] To allow this manner of speech regulation would be to permit—even support—some viewpoints more strongly than others, to say the college fully supports and accepts X platform, viewpoint, or opinion, but denounces Y platform, viewpoint, or opinion. This is the very evil the First Amendment was designed to prohibit.

Furthermore, to conduct such blatantly arbitrary control over free speech on campuses would be not only detrimental, but antithetical to the very reason students go to colleges and universities in the first place. One could hardly agree that students could successfully broaden their minds if their minds are only exposed to that which the administration approves by way of "authoritative selection."[281] The mere act of attending college *will* expose students to uncomfortable—even offensive—thoughts, beliefs, perspectives, and opinions. And that is a good thing, because being exposed to something different, something they do not agree with, forces students to move past "I disagree" and explain *why*. If they cannot explain *why* they disagree with someone, students cannot convince others that their thoughts, beliefs, perspectives, or opinions are incorrect. In the words of Justice Black: "I do not believe that it can be too often repeated that the freedom[ ] of speech . . . guaranteed by the First Amendment must be accorded to the ideas we hate or sooner or later they will be denied to the ideas we cherish."[282]

279. *See supra* Section I.B.

280. *See* Complaint, *supra* note 226, at ¶ 11.

281. *Id.*

282. Communist Party v. Subversive Activities Control Bd., 367 U.S. 1, 137 (1961) (Black, J., dissenting).