

## TEACHERS, LEAVE THOSE KIDS ALONE? ON FREE SPEECH AND SHOUTING FIERY EPITHETS IN A CROWDED DORMITORY<sup>†</sup>

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*Plainly . . . no mandate in our Constitution leaves States and governmental units powerless to pass laws to protect the public from the kind of boisterous and threatening conduct that disturbs the tranquility of spots selected by the people either for homes, wherein they can escape the hurly-burly of the outside business and political world, or for public and other buildings that require peace and quiet to carry out their functions, such as courts, libraries, schools, and hospitals.<sup>‡</sup>*

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<sup>†</sup> The title is drawn from the lyrics of PINK FLOYD, *Another Brick in the Wall, Part II*, on THE WALL (Columbia Records 1979) and a famous misquotation of Justice Oliver Wendell Holmes Jr. from *Schenck v. United States*, 249 U.S. 47, 52 (1919), both of which have an equally profound effect on the forthcoming analysis. Despite what some legal academicians might say about Pink Floyd, the power of their lyrics must be respected. *But see* Alex B. Long, *[Insert Song Lyrics Here]: The Uses and Misuses of Popular Music Lyrics in Legal Writing*, 64 WASH. & LEE L. REV. 531, 570 (2007) (criticizing the use of Pink Floyd’s lyrics as “likely to be lost on a sizeable portion of . . . readers”).

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<sup>‡</sup> *Gregory v. Chicago*, 394 U.S. 111, 118 (1969) (Black, J., concurring).

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INTRODUCTION

For almost twenty years,<sup>1</sup> society and the courts have struggled to harmonize the principles of the Fourteenth Amendment’s Equal Protection Clause<sup>2</sup> and the First Amendment’s Free Speech Clause.<sup>3</sup> The tension between these two clauses has preoccupied the bench, legal thinkers, and ordinary citizens alike. But rarely do these two dictates conflict more than in the context of “hate speech,” or antilocution regulation,<sup>4</sup> and universities’

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<sup>1</sup> The origin of many university speech policies can be traced back to the late 1980s. For one of the earlier examples of such a policy, see *Doe v. University of Michigan*, 721 F. Supp. 852, 866–67 (E.D. Mich. 1989) (holding that the University of Michigan’s campus speech policies were both unconstitutionally vague and overbroad, causing a “chilling effect” on valuable and innocent debate). See also John E. Matejkovic & David A. Redle, *Proceed at Your Own Risk: The Balance Between Academic Freedom and Sexual Harassment*, 2006 BYU EDUC. & L.J. 295, 296 (reviewing this “collision between the concept of a hostile work environment and other tort protections related to sexual harassment”). See generally DAVID E. BERNSTEIN, YOU CAN’T SAY THAT! THE GROWING THREAT TO CIVIL LIBERTIES FROM ANTIDISCRIMINATION LAWS 59–61 (2003) (lamenting the abridgment of speech by colleges when antidiscrimination policies conflict with free expression).

<sup>2</sup> U.S. CONST. amend. XIV, § 1, cl. 4 (“[N]or [shall any state] deny to any person within its jurisdiction the equal protection of the laws.”).

<sup>3</sup> *Id.* amend. I, cl. 3 (“Congress shall make no law . . . abridging the freedom of speech . . .”). Although its plain language applies only to the legislative branch of the federal government, the First Amendment has been recognized to apply to all forms of governmental action, and its commands apply to the states through the Fourteenth Amendment’s Due Process Clause. See, e.g., *Gitlow v. New York*, 268 U.S. 652, 666 (1925) (“[F]reedom of speech and of the press—which are protected by the First Amendment from abridgment by Congress—are among the fundamental personal rights and ‘liberties’ protected by the due process clause of the Fourteenth Amendment from impairment by the States.”).

<sup>4</sup> Although commonly used, such as in SAMUEL WALKER, HATE SPEECH: THE HISTORY OF AN AMERICAN CONTROVERSY (1994), this terminology is controversial and somewhat misleading. A better phrase might be “offensive speech,” such as is used in LAURA BETH NIELSEN, LICENSE TO HARASS: LAW, HIERARCHY, AND OFFENSIVE PUBLIC SPEECH (2006), but that phrase tends to underestimate the psychological harm that can be caused to recipients. The first psychological assessment of this concept coined the term “antilocution,” which approximates the same concept quite well, but without implying

antiharassment policies,<sup>5</sup> or—as they are more disparagingly known—“campus speech codes.”<sup>6</sup>

Defenders of these policies argue that proscribing antilocution protects everyone against threats, intimidation, and harassment.<sup>7</sup> Opposing groups argue that government should never regulate the expression of unpopular or disfavored ideas.<sup>8</sup> From cross burning<sup>9</sup> and hanging nooses,<sup>10</sup> to Nazi demonstrations<sup>11</sup> and offensive protests at military funerals,<sup>12</sup> the First Amendment assigns to American governments a difficult task: to tolerate intolerance.<sup>13</sup> Yet despite the fact that courts have almost universally re-

either too much or too little significance to the words in dispute. GORDON W. ALLPORT, *THE NATURE OF PREJUDICE* 14, 49–51 (3d ed. 1979).

<sup>5</sup> See, e.g., DIANE RAVITCH, *THE LANGUAGE POLICE* 161 (2003); ALAN CHARLES KORS & HARVEY A. SILVERGLATE, *THE SHADOW UNIVERSITY* 210–32 (1998) (giving the examples of freshman orientation, sensitivity therapy, and diversity training as evidence that universities attempt to manipulate students’ “sanctity of conscience”); see also Daniel Jacobson, *The Academic Betrayal of Free Speech*, 21 *SOC. PHIL. & POL’Y* 48 (2004) (describing and reprimanding the skepticism of free speech at many American universities).

<sup>6</sup> See, e.g., Wendy Kaminer, Editorial, *The American Liberal Liberties Union*, WALL ST. J., May 23, 2007, at A17 (praising a 2006 “federal court challenge to an unconstitutional speech code at Georgia Tech”). Indeed, the Foundation for Individual Rights in Education (FIRE), which handles a large portion of such litigation, includes on their organization’s website a “Speech Code of the Month.” See FIRE’s Speech Code of the Month, <http://www.thefire.org/index.php/scotm/> (last visited Nov. 16, 2007).

<sup>7</sup> See, e.g., Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 *DUKE L.J.* 431, 450–52 & n.83.

<sup>8</sup> Cf. *Texas v. Johnson*, 491 U.S. 397, 414 (1989) (“If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.”).

<sup>9</sup> See, e.g., *Virginia v. Black*, 538 U.S. 343 (2003); *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992).

<sup>10</sup> See, e.g., Howard Witt, *Part of ‘Jena 6’ Charges Dropped*, CHI. TRIB., Sept. 5, 2007, at C7 (describing the “violent racial unrest between blacks and whites throughout the town [of Jena, Louisiana,] that was triggered in September 2006, when three white students hung nooses from a shade tree in the high school courtyard in a warning aimed at discouraging blacks from sitting there”).

<sup>11</sup> See *Nat’l Socialist Party of Am. v. Vill. of Skokie*, 432 U.S. 43 (1977) (per curiam).

<sup>12</sup> See, e.g., Matthew Dolan, *Reversal Likely in Protest Verdict; First Amendment Applies, Experts Say*, BALTIMORE SUN, Nov. 2, 2007, at 1A (“Leading constitutional scholars say the multimillion-dollar damages awarded this week to the father of a Marine killed in Iraq [are] likely to be overturned because the church members who protested at his son’s funeral enjoy broad protection under the First Amendment.”); Erika Slife, *Veterans Decry Anti-Gay Rallies at Funerals*, CHI. TRIB., Aug. 9, 2005, at A3 (explaining that the funeral protestors, who belong to the Westboro Baptist Church of Topeka, Kansas, are expressing their church’s message that the United States is damned—“singl[ing] out military funerals because soldiers, like all Americans, have been taught to accept homosexual behavior, as well as other sinful acts”).

<sup>13</sup> Justice Oliver Wendell Holmes Jr. expressed a classic formulation of this dilemma: “[I]f there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought—not free thought for those who agree with us but freedom for the thought that we hate.” *United States v. Schwimmer*, 279 U.S. 644, 654–55 (1928) (Holmes, J., dissenting). For a more comprehensive analysis on this polemic, see LEE C. BOLLINGER, *THE TOLERANT SOCIETY: FREEDOM OF SPEECH AND EXTREMIST SPEECH IN AMERICA* 9–10 (1986), which suggests that the value of tolerating extreme speech is the equanimity and degree of self-control against antisocial behavior that it promotes in society.

jected campus speech policies for violating this command,<sup>14</sup> many universities continue to implement them.<sup>15</sup>

Regrettably, altercations and threats made from discriminatory animus continue to occur on college campuses today. For example, on October 14,

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<sup>14</sup> See *Hardy v. Jefferson Cmty. Coll.*, 260 F.3d 671, 683 (6th Cir. 2001) (finding that the firing of a university professor, if made in retaliation for his having conducted a discussion that examined the impact of such disparaging words as “nigger” and “bitch,” “was, as a matter of law, objectively unreasonable”); *Bonnell v. Lorenzo*, 241 F.3d 800, 804 (6th Cir. 2001) (“The principle of academic freedom under the First Amendment serves to protect the [offensive] utterances in question only if they are germane to course content as measured by professional teaching standards.”); *Cohen v. San Bernardino Valley Coll.*, 92 F.3d 968 (9th Cir. 1996) (holding that the college’s sexual harassment policy was too vague because it was used to punish teaching methods that one of the litigants had previously used for years); *Dambrot v. Cent. Mich. Univ.*, 55 F.3d 1177 (6th Cir. 1995) (concluding that the campus speech policy was unconstitutionally vague, but also that the coach’s speech was not a matter of public concern); *Bair v. Shippensburg Univ.*, 280 F. Supp. 2d 357 (M.D. Pa. 2003) (enjoining enforcement of various provisions of the university’s policy prohibiting acts of intolerance; finding that it was overbroad and could be interpreted as prohibiting protected speech); *Scallet v. Rosenblum*, 911 F. Supp. 999 (W.D. Va. 1996) (granting summary judgment for the defendant university, but “hold[ing] that Scallet’s remarks at faculty meetings, and his placement of articles and cartoons outside his office, are protected forms of expression under the First Amendment”), *aff’d*, 106 F.3d 391 (4th Cir. 1997); *Iota XI Chapter of Sigma Chi Fraternity v. George Mason Univ.*, 773 F. Supp. 792 (E.D. Va. 1991) (granting plaintiff fraternity’s motion for summary judgment to enjoin the defendant university from imposing any discipline on the fraternity as a result of hosting a social event that allegedly played upon racial and sexual stereotypes), *aff’d*, 993 F.2d 386 (4th Cir. 1993); *UWM Post, Inc. v. Bd. of Regents of Univ. of Wis. Sys.*, 774 F. Supp. 1163 (E.D. Wis. 1991) (rejecting defendant university’s Title VII arguments to defend its overbroad, content-based harassment policy); *Doe v. Univ. of Mich.*, 721 F. Supp. 852 (E.D. Mich. 1989) (same); *Corry v. Leland Stanford Junior Univ.*, No. 740309 (Santa Clara County, Cal. Super. Ct., Feb. 27, 1995), available at <http://www.ithaca.edu/faculty/cduncan/265/corryvstanford.htm> (striking down the private university’s policy under a state law that subjected private institutions to the same restrictions on the regulation of speech as public universities).

<sup>15</sup> For example, a survey by the American Council on Education and the National Association of Student Personnel Administrators found that around sixty percent of colleges and universities already had written policies on bigotry and verbal intimidation. See Barbara Dority, *The PC Speech Police*, HUMANIST, Mar./Apr. 1992, at 31. By 1992, more than 300 public colleges and universities regulated some forms of antilocution. See TIMOTHY C. SHIELL, *CAMPUS HATE SPEECH ON TRIAL* 3 (1998); see also JON B. GOULD, *SPEAK NO EVIL: THE TRIUMPH OF HATE SPEECH REGULATION* 189–202 (2005) (describing how many universities have retained their campus speech regulations despite contrary court precedents); SPOTLIGHT ON SPEECH CODES 2006: THE STATE OF FREE SPEECH ON OUR NATION’S CAMPUSES 3–6 (FIRE, Philadelphia, Pa. 2006), available at [http://www.thefire.org/FINAL\\_FREE\\_SPEECH\\_REPORT\\_2006.pdf](http://www.thefire.org/FINAL_FREE_SPEECH_REPORT_2006.pdf) (finding that 69% of universities employ policies that substantially restrict free speech, and that another 27% employ policies that “could be interpreted to suppress protected speech”); cf. MARTIN P. GOLDING, *FREE SPEECH ON CAMPUS* 5 (2000) (“By the beginning of 1995 more than 350 American colleges adopted or tried to adopt a speech code.”). But see Jon B. Gould, *Returning Fire*, CHRON. HIGHER EDUC., Apr. 20, 2007, at B13. While researching for his book, Professor Gould looked at how many universities employ unconstitutional speech policies:

[Forty-six] percent of four-year institutions had policies that could be used to restrict “hate speech,” meaning verbal attacks that target others on the basis of their immutable characteristics. However, only 23 percent of institutions—not FIRE’s 96 percent—had rules that were inconsistent with the First Amendment. And even that number had to be narrowed: Only public institutions (and private colleges in California) are held to the First Amendment. Considered more precisely, just 9 percent of the institutions had unconstitutional speech policies . . . .

*Id.*

2005, students held a “straight thuggin” party in a University of Chicago residence hall<sup>16</sup> that outraged minority student groups and the local community.<sup>17</sup> Such stereotype-themed parties are increasingly common in university life;<sup>18</sup> they often feature students dressed as caricatures of minorities, sometimes in blackface,<sup>19</sup> or even as Ku Klux Klan members with nooses.<sup>20</sup> In early October 2006, three students at Texas A&M University posted a video online with one student acting as a slave master and another in blackface “chomping a banana and begging mercy from his ‘master.’”<sup>21</sup> On July 15, 2007, and in early August of that year, more threatening expression was used when nooses were found by a Black<sup>22</sup> cadet and a white female officer at the Coast Guard Academy, respectively.<sup>23</sup> A parallel event occurred on

<sup>16</sup> Jodi S. Cohen, *U. of C. Gets Rap for Theme of Party*, CHI. TRIB., Nov. 2, 2005, at C1 (internal quotation marks omitted).

<sup>17</sup> *Id.*; see also Tim Michaels, ‘Ghetto’-Themed Dorm Party Offends Students, CHI. MAROON, Oct. 25, 2005, at 1.

<sup>18</sup> These events are not even limited to the undergraduate lifestyle. Two such parties within recent memory have taken place at the University of Connecticut and University of Texas Schools of Law. See Grace E. Merritt, *Off-Campus Party Theme Called Racially Insensitive*, HARTFORD COURANT, Jan. 25, 2007, at B1; Matthew Tresaugue, *New Dean Lawrence Sager Aims to Turn a Good Law School into One of Nation’s Elite*, HOUSTON CHRON., Nov. 19, 2006, at B1 (noting how the law school’s dean responded to the “recent ‘ghetto fabulous’ party hosted by some law students. . . . [by] condemn[ing it and] telling students: ‘Should the possibility of this sort of conduct present itself, please, please think twice[;] [a]nd then think twice again’”).

<sup>19</sup> See Alison Glass, *Blacks Mimicked; Race Relations Questioned*, ANDERSON INDEP. MAIL, Jan. 29, 2007, at 1A, available at <http://www.independentmail.com/news/2007/jan/29/student-dress-party-sparks-race-dialogue/>.

<sup>20</sup> See Hattie Stahl, *Controversial Party Reviewed by College Harassment Committee*, MAC WEEKLY, Feb. 2, 2007, at 1, available at <http://media.www.themacweekly.com/media/storage/paper1230/news/2007/02/02/News/Controversial.Party.Reviewed.By.College.Harassment.Committee-2944735.shtml> (describing one such party at Macalester College of St. Paul, Minnesota, on January 16, 2007, with one student who wanted to “push the lines” by using “a simulated noose, one end in the hand of the Klan-costumed member, the other end around [a] student [in] blackface’s neck”).

<sup>21</sup> Laura Schreier, *Racism Subtler than Video, A&M Students Say Minorities Feel Campus Has Improved But Still Has a Lot of Work to Do*, DALLAS MORNING NEWS, Nov. 19, 2006, at 3A (highlighting how Texas A&M was quick to respond to the incident and how “A&M President Robert Gates strongly condemned the video in several campus-wide communications”).

<sup>22</sup> See Cynthia Grant Bowman, Dorothy Roberts & Leonard S. Rubowitz, *Race and Gender in the Law Review*, 100 NW. U. L. REV. 27, 29 n.7 (2006). This Comment’s use and capitalization of the term “Black” is derived from Professors Bowman, Roberts, and Rubowitz’s explanation:

“Black” is capitalized whenever it refers to Black people, in order to indicate that Blacks, or African Americans, are a specific cultural group with its own history, traditions, experience and identity—not just people of a particular color. Using the uppercase letter signifies recognition of the culture, as it does with Latinos, Asian Americans, or Native Americans.

*Id.* (citing MARTHA BIONDI, *TO STAND AND FIGHT: THE STRUGGLE FOR CIVIL RIGHTS IN POSTWAR NEW YORK CITY* (2003); Kimberlie Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1332 n.2 (1988)).

<sup>23</sup> See Chuck Potter, *Noose Incidents On Ship & Shore at CG Academy*, THE DAY, Sept. 22, 2007, at D1, available at <http://archive.theday.com/re.aspx?re=93dcd836-f431-4944-9d6a-baae456f6341> (recounting the noose-hanging incidents and finding “it difficult to perceive the[se] cowardly act[s] as hav-

September 6, 2007, when someone hung a noose in a tree close to a University of Maryland cultural center where several Black student groups were housed.<sup>24</sup> Similarly, on October 11, 2007, “a swastika and a caricature of a man wearing a yarmulke” were drawn on a bathroom stall door at Columbia University.<sup>25</sup> Such racial tension turned into violence on January 24, 2007, when three Palestinian college students were allegedly attacked and made “targets of ethnic slurs” as they attempted to leave their dormitory at Guilford College in Greensboro, North Carolina.<sup>26</sup> These events provide a stark reminder of why many university speech policies persist. Several legal groups, however, have targeted college antilocution policies, arguing that they are unconstitutional “speech codes” because they typically disfavor racist, sexist, or even religious forms of speech.<sup>27</sup>

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ing anything other than purposeful racist motivations”); *see also* Connie Schultz, Editorial, *The Ugly Truth Around a Hanging Noose*, TIMES-PICAYUNE, Oct. 1, 2007, at 5.

<sup>24</sup> *See* Liz F. Kay, *Officials Investigate Possible UM Hate Crime*, BALTIMORE SUN, Sept. 10, 2007, at 3B (describing how the cultural center “houses student groups such as the Black Explosion, an African-American student newspaper, and the Maryland Gospel Choir”). Some, however, have suggested that the recent rise in such incidents might simply be a matter of more reporting rather than more incidents. *See* Mike Pesca, *Weekend Edition Sunday: A Rise in Nooses, or a Rise in Reporting?* (NPR radio broadcast Oct. 28, 2007), available at <http://www.npr.org/templates/story/story.php?storyId=15707839>.

<sup>25</sup> *See* Elissa Gootman, *Noose Case Puts Focus on a Scholar of Race*, N.Y. TIMES, Oct. 12, 2007, at A23 (mentioning the drawing of an “anti-Semitic smear” in Lewisohn Hall).

<sup>26</sup> Adam Hochberg, *Morning Edition: Alleged Attack on Palestinians Jars N.C. College* (NPR radio broadcast Jan. 25, 2007), available at <http://www.npr.org/templates/story/story.php?storyId=7015138>; *see also* Eddie Huffman, *‘Hate Crime’ of Beatings Divides a Campus*, N.Y. TIMES, Jan. 27, 2007, at A15. A similar event occurred on September 30, 2007, at Washington, D.C.’s Model Secondary School for the Deaf (MSSD), on the Gallaudet University campus. MSSD is a federally chartered high school for the deaf and hard of hearing that houses some of its students in dormitories on campus. In one of their dormitories, a group of six white students held a Black student against his will while drawing swastikas and writing “KKK” on him. *See* Susan Kinzie, *Potential Hate Crime Probed at Gallaudet*, WASH. POST, Oct. 4, 2007, at B04 (detailing the incident from a police chief’s and administrators’ reports); *Police: Black Student Marked with ‘KKK’ at Deaf School*, CNN.COM, Oct. 4, 2007, <http://www.cnn.com/2007/US/10/03/deafschoool.racial.incident/index.html> (same); *cf.* ALLPORT, *supra* note 4, at 57 (observing that “[v]iolence is always an outgrowth of milder states of mind”).

<sup>27</sup> *See, e.g.*, Andrea Jones, *Insults Allowed at Georgia Tech*, ATLANTA J.-CONST., Aug. 16, 2006, at D1 (describing how the Alliance Defense Fund sued the Georgia Institute of Technology to alter their dormitory policies and noting how other “[n]ational Christian groups have taken up the cause of challenging ‘politically correct’ tolerance policies at several schools”). Additionally, FIRE is a perfect example of an “absolutist” group that was formed to fight speech restrictions on campus. *See supra* note 6; *see also* *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 215 (3d Cir. 2001) (accepting the arguments of FIRE, then-Judge Alito’s opinion insisted “that the mere fact that someone might take offense at the content of speech is not sufficient justification for prohibiting it”). *But see* *Morse v. Frederick*, 127 S. Ct. 2618, 2622 (2007) (reiterating that the free speech “rights of students must be applied in light of the special characteristics of the [ir] school environment” (quoting *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266 (1988))); *cf.* Gould, *supra* note 15, at B13 (“FIRE claims to protect speech rights and academic freedom on [both public and private university] campuses, and yet the group shows an amazing inconsistency in the restrictions it finds troublesome. . . . [W]here is the group’s outrage when sectarian institutions restrict speech or deny academic freedom?”).

But despite these groups' fear that such policies represent governmental attempts to control or favor certain political ideas in public debate,<sup>28</sup> most antilocution policies in the limited context of college dormitories should be considered constitutionally permissible. Unlike broader speech codes, dormitory policies should not be viewed as attempts to control students' thought or censor merely "offensive speech."<sup>29</sup> Instead, these policies encourage and allow students of all backgrounds to attend universities by attempting to create a safe, calm, and hospitable living environment that is conducive to learning.<sup>30</sup>

Public forum analysis provides the proper analytical framework for understanding why public and private universities can operate as landlords who are concerned with attracting a "critical mass" of minority student tenants.<sup>31</sup> If not properly regulated, the dormitory environment could quickly become a forbidding residence for many students.<sup>32</sup> As a student's home and last refuge, the dormitory makes students a true "captive audience" for harassment or threats. The dormitory, therefore, could easily become a hostile living environment if such opportunities for enmity were left unchecked.<sup>33</sup>

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<sup>28</sup> This relates to the democratic structure of the Republic, and how its maintenance and legitimacy could be undermined if the government establishment were allowed to "selectively instill[] in students a predetermined set of normative values and empirical assumptions." See Martin H. Redish & Kevin Finerty, *What Did You Learn in School Today? Free Speech, Values Inculcation, and the Democratic-Educational Paradox*, 88 CORNELL L. REV. 62, 67 (2002); see also Steven M. Press, *The Language of Ideology: Lingual Manipulation of Readers in German Literature of the Third Reich*, VAND. UNDERGRADUATE RES. J. (2005), <http://ejournals.library.vanderbilt.edu/vurj/include/getdoc.php?id=111&article=12&mode=pdf>, at 4–6 (showing how Nazi party leaders used rhetoric and lingual manipulation to promote fascism precisely where logical argument was lacking); cf. THE FEDERALIST NO. 84, at 517 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (stressing the significance of a citizenry "that . . . will stand ready to sound the alarm when necessary, and to point out the actors in any pernicious project").

<sup>29</sup> See *supra* note 4.

<sup>30</sup> And this is quite an important state interest for universities to carry out: "[E]ducation is perhaps the most important function of state and local governments." *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

<sup>31</sup> See *Grutter v. Bollinger*, 539 U.S. 306, 316 (2003).

<sup>32</sup> See *infra* Part II.A.

<sup>33</sup> This is the case even though courts have limited the captive audience doctrine to cover only people's own homes and workplaces, public schools, and inside and immediately around healthcare facilities. See *Hill v. Colorado*, 530 U.S. 703, 716–18 (2000) (applying the captive audience doctrine to the area immediately outside of reproductive health clinics); *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 767–68 (1994) (applying the captive audience doctrine to the inside of reproductive health clinics); *Frisby v. Schultz*, 487 U.S. 474, 484–85 (1988) (stressing the need to protect unwilling listeners in their own homes); *FCC v. Pacifica Found.*, 438 U.S. 726, 748 (1978) ("Patently offensive, indecent material presented over the airwaves confronts the citizen, not only in public, but also in the privacy of the home."); *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 210 (3d Cir. 2001) ("[S]peech may be more readily subject to restrictions when a school or workplace audience is 'captive' and cannot avoid the objectionable speech."); *Muller v. Jefferson Lighthouse Sch.*, 98 F.3d 1530, 1541 (7th Cir. 1996) ("Children in public schools are a 'captive audience' that 'school authorities acting *in loco parentis*' may

In this light, concerns that such regulatory efforts would disfavor racist or sexist ideas relate to nothing more than wholly secondary and unintentional effects.<sup>34</sup> Permitting such harassment in students' homes could undermine universities' affirmative action policies—policies that, at their core, are driven by the compelling state interest in establishing a “critical mass” of students of all backgrounds.<sup>35</sup> By protecting students from particularly virulent psychological harm in their homes, dormitory antiharassment policies resist undermining a university's creation of this critical mass.

This Comment analyzes the state of campus speech codes around the country and reviews the reasons that many have been held unconstitutional. Given that courts have found that harassing speech is not protected in less personal settings, such as workplaces,<sup>36</sup> it is improper that students who insult, harass, or intimidate others in their campus residences arguably have greater First Amendment protection than do harassing coworkers. This Comment argues that residence halls, as the personal homes of students, are places where antiharassment policies are even more necessary than they are in the workplace, and therefore even more legitimate under the First Amendment.<sup>37</sup>

Past arguments defending university speech restrictions have failed because they defended vague or overbroad policies.<sup>38</sup> Many unconstitutional

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‘protect.’” (citation omitted)); Eugene Volokh, *Freedom of Speech and Appellate Review in Workplace Harassment Cases*, 90 NW. U. L. REV. 1009, 1023 (1996) (“[I]t seems clear that workplace speech is generally protected despite the presence of an arguably captive audience.”). The sources above are collected in Howard M. Wasserman, *Fans, Free Expression, and the Wide World of Sports*, 67 U. PITT. L. REV. 525, 570 n.290 (2006). See *id.* at 270 (noting the limited nature of the “captive audience” doctrine by pointing out that “[e]ven in those places, captive status permits government to limit oral expression, but not the identical message in written form. Even captive fans can avert their eyes to avoid seeing the ‘Fuck Duke’ or ‘Yankees Suck’ shirts or posters” (citations omitted)).

<sup>34</sup> See *R.A.V. v. City of St. Paul*, 505 U.S. 377, 389–90 (1992) (suggesting that the secondary effects of policies not designed to outlaw disfavored speech would be constitutional under the First Amendment).

<sup>35</sup> See *Grutter*, 539 U.S. at 308; *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 311–12 (1978) (“[T]he attainment of a diverse student body. . . clearly is a constitutionally permissible goal for an institution of higher education.”).

<sup>36</sup> *Cf. Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993); *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 65 (1986) (clarifying employment discrimination law to prohibit the workplace from being filled by “discriminatory intimidation, ridicule, and insult[s]”). Some commentators have argued, however, that the doctrine of hostile work environment unconstitutionally restricts protected speech. See, e.g., Kingsley R. Browne, *Title VII as Censorship: Hostile Environment Harassment and the First Amendment*, 52 OHIO ST. L.J. 481 (1991) (claiming that the doctrine of hostile work environment sexual harassment law violates the First Amendment).

<sup>37</sup> *Cf. Richard Winton & Eric Malnic, Judge Refuses to Bar Suspension of Newsletter Author*, L.A. TIMES, Apr. 17, 1997, at B3 (describing a judge's upholding of a student's suspension for circulating a dormitory newsletter that was “replete with scatological language and references, most of them in connection with the purported recreational activities of students . . . such as [d]rinking, sexual activities and human excretion,” finding that civility was important in the context of residence halls).

<sup>38</sup> See, e.g., *Doe v. Univ. of Mich.*, 721 F. Supp. 852 (E.D. Mich. 1989).

speech policies were applied across entire campuses.<sup>39</sup> Many commentators claim that the goal of greater diversity in higher education, at the core of Titles VI<sup>40</sup> and VII<sup>41</sup> of the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972,<sup>42</sup> is a recognized compelling state interest that courts should consider.<sup>43</sup> However, it is disquieting that arguments for narrowly tailoring this diversity interest were not put forward to balance the interest of having a more open academic environment.<sup>44</sup> Campus speech policies could be more narrowly drawn, and therefore more likely constitutional, if limited to certain areas of campus not rationally considered public fora, such as students' living quarters.<sup>45</sup>

There is ample Supreme Court precedent suggesting that if dormitories are nonpublic fora, then even non-content-neutral policies could satisfy the First Amendment.<sup>46</sup> As long as the policies are viewpoint-neutral and "reasonable" according to the premises' purpose, courts should uphold such

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<sup>39</sup> For example, Central Michigan University's broad antidiscriminatory harassment policy at issue in *Dambrot v. Central Michigan University* applied to an athletics instructor in the course of his employment as the men's basketball coach. 55 F.3d 1177 (6th Cir. 1995).

<sup>40</sup> 42 U.S.C. §§ 2000d–2000d-4 (2006). Title VI, in relevant part, ensures that "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." *Id.* § 2000d.

<sup>41</sup> *Id.* §§ 2000e–2000e-17.

<sup>42</sup> See 20 U.S.C. §§ 1681–1688 (2006), and, their implementing regulations, 34 C.F.R. §§ 106.1, 106.3, 106.8, 106.9 (2007).

<sup>43</sup> See *Grutter v. Bollinger*, 539 U.S. 306, 329 (2003) (using Justice Powell's opinion in *Regents of University of California v. Bakke*, 438 U.S. 265 (1978), to conclude that "[w]e have long recognized that . . . universities occupy a special niche in our constitutional tradition. . . . [and that] attaining a diverse student body is at the heart of the Law School's proper institutional mission").

<sup>44</sup> See, e.g., *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738 (2007) (ruling that treating elementary, middle, and high school students in a certain manner solely because of their race is not sufficiently narrowly tailored and does not provide the requisite individualized consideration under the Equal Protection Clause or Title VI); *Gratz v. Bollinger*, 539 U.S. 244, 247 (2003) (same, but within the college context).

<sup>45</sup> *Cf. Morse v. Frederick*, 127 S. Ct. 2618, 2638 (2007) (Alito, J., concurring) ("[A]ny argument for altering the usual free speech rules . . . must . . . be based on some special characteristic of the school setting.").

<sup>46</sup> See *Int'l Soc'y for Krishna Consciousness v. Lee*, 505 U.S. 672, 679 (1992) ("Limitations on expressive activity conducted on this last category of [government] property [(nonpublic fora)] must survive only a much more limited review. The challenged regulation need only be reasonable, as long as the regulation is not an effort to suppress the speaker's activity due to disagreement with the speaker's view.").

regulations.<sup>47</sup> And at least one circuit court has held that the residential areas of dormitories lack the traditional indicia of a public forum.<sup>48</sup>

This Comment argues that limiting speech regulation to the nonpublic fora of campus residence halls is a narrowly tailored method for universities to address antilocution, while still staying within the boundaries of the First Amendment.<sup>49</sup> Confining these policies to the nonpublic fora of the students' dormitories, where the arguments for students' safety and a peaceable atmosphere acquire a special significance in Anglo-American law,<sup>50</sup>

<sup>47</sup> See *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985) (“Control over access to a nonpublic forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral.” (citation omitted)). *Lehman v. City of Shaker Heights* provides an example of this standard. 418 U.S. 298 (1974). In that case, a plurality of the Justices held that a publicly operated bus line could ban political advertising (clearly a content-based regulation) in order to avoid any appearance of favoritism on a captive audience. *Id.* at 304. Although the ban was content-based, and might have been even more problematic given the importance of political speech to the First Amendment, the intended use of the buses—mass transit—was not pertinent to communication. And because the ban was viewpoint-neutral—in that it did not show a preference for any partisan political perspective—the content-based restriction only needed to be “reasonable” for that forum’s intended purpose in order to pass constitutional muster. *Id.*

<sup>48</sup> See *Chapman v. Thomas*, 743 F.2d 1056, 1059 (4th Cir. 1984) (“[R]esidential areas of dormitories located on the campus of a state institution of higher learning . . . ha[ve] not by tradition or designation ever constituted a public forum for communicative purposes [and] must be placed in the category of nonpublic forums.”). *But see* *Fox v. Bd. of Trs. of State Univ. of N.Y.*, 841 F.2d 1207, 1214 (2d Cir. 1988) (finding dormitories to be limited public fora for the purposes of commercial speech). For an example of the elements that courts traditionally look for in their public forum analysis, see *Perry Education Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 46 (1983), which states:

Public property which is not by tradition or designation a forum for public communication is governed by different standards. We have recognized that the ‘First Amendment does not guarantee access to property simply because it is owned or controlled by the government.’ In addition to time, place, and manner regulations, the State may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker’s view.

*Id.* (citation omitted).

<sup>49</sup> Admittedly, the more public and open areas of dormitories, such as common areas, meeting rooms, or bulletin boards, will not be as protected by this method. *But cf.* *Burson v. Freeman*, 504 U.S. 191, 211 (1992) (employing a strict scrutiny analysis to uphold a Tennessee law that prohibited distributing campaign literature within one hundred feet of a polling place; relying on the history of campaign workers intimidating voters around polling places as a sufficiently compelling state interest to justify the content-based restriction of speech within a public forum).

<sup>50</sup> See, e.g., *Gregory v. City of Chicago*, 394 U.S. 111, 125 (1969) (Black, J., concurring) (describing homes as “the sacred retreat to which families repair for their privacy and their daily way of living”); *Valenzuela v. Aquino*, 853 S.W.2d 512, 518 (Tex. 1993) (Gonzalez, J., dissenting) (recognizing that “[a] significant government interest exists in protecting the privacy of [household] residents and the right of privacy must be placed on the scales with the right of free expression in a public forum”); *City of Wauwatosa v. King*, 182 N.W.2d 530, 537 (Wis. 1971) (“Home is where . . . both husband and wife come, after the day’s work, to relax and put aside the cares of the outside world. . . . [It is] not just a house and shelter, but an opportunity to rest, relax and recharge batteries for the morrow.”). See also ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM* 24–28 (1960). Professor Meiklejohn’s analogy of the Free Speech Clause to a “town meeting” relies on this view of the right to privacy in the home:

would function to preserve a safe campus home for students of all backgrounds. The policies would not apply to the remainder of campus, most of which is a public forum, to preserve the students' interest in having an academic environment for debate and protest. This approach allows universities to balance their desires to maintain a diverse student body with their obligations under the First Amendment. Thus, a constitutional "speech code" might become more realistic than oxymoronic.<sup>51</sup>

Part I of this Comment reviews the historical context that prompted universities to create campus speech policies, as well as the current case law and other forms of antilocution regulation. Isolating the impetus behind such regulation reveals why many colleges retain their policies, in spite of adverse court rulings.<sup>52</sup>

Part II examines the manner in which both the universities' desire to prevent discriminatory effects and the students' emotional distress might alter the First Amendment calculus. Specifically, this Part compares the argument that speech policies ensure that members of all backgrounds are able to attend universities in a safe and welcoming environment with the free speech argument that emphasizes the importance of unfettered speech in the academy. This Part explores similar arguments within the context of Title VII and the concept of a "hostile work environment" as adapted to students' residence halls, appreciating the special status of the home.

Finally, Part III examines the competing interests of integration and unfettered speech in light of a public forum analysis of dormitories and their significance as many students' homes. If the courts apply the public forum doctrine to policies that regulate speech within these residences, they

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When self-governing men demand freedom of speech they are not saying that every individual has an unalienable right to speak whenever, wherever, however he chooses. . . . The common sense of any reasonable society would deny the existence of that unqualified right. . . . Anyone who would thus irresponsibly interrupt the activities of a lecture, a hospital, a concert hall, a church, a machine shop, a classroom, a football field, *or a home*, does not thereby exhibit his freedom. Rather, he shows himself to be a boor, a public nuisance, who must be abated, by force if necessary.

*Id.* at 25 (emphasis added).

<sup>51</sup> Of course, these requirements of the First Amendment as mandated by the Fourteenth Amendment only apply to state action, or public universities, rather than private. *See, e.g.,* *Rendell-Baker v. Kohn*, 457 U.S. 830, 830–31 (1982) (holding that despite accepting large amounts of government funding, the private school was more like a private contractor dependent upon government contracts and that its actions did not become acts of the government); *Blackburn v. Fisk Univ.*, 443 F.2d 121, 123 (6th Cir. 1971) (holding that a private university's abridgment of its students' speech did not constitute state action); *cf.* LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW: A STRUCTURE FOR LIBERTY* § 18-1, at 105 (1978 & Supp. 1979) (discussing the state action doctrine of the Fourteenth Amendment in the context of school segregation cases and "the still popular approach to the state action inquiry—an approach which continues to be marked by a single-minded search for the moving hand of a governmental actor in any action challenged as unconstitutional"). This Comment, although mentioning certain experiences of private universities, addresses the more constitutionally suspect actions of state-sponsored restrictions of speech by public universities.

<sup>52</sup> *See* Jon B. Gould, *The Precedent that Wasn't: College Hate Speech Codes and the Two Faces of Legal Compliance*, 35 *LAW & SOC'Y REV.* 345, 371–85 (2001) (discussing both passively and actively noncompliant universities).

will likely uphold these policies as protecting, in this limited context, the students' rights to privacy. As a consequence, university administrators will have the needed, powerful, and constitutional means to curb antilocution on their campuses.

### I. THE INTRODUCTION OF "HATE SPEECH" REGULATIONS ON CAMPUS

People often envision university campuses as places of learning, political debate, social experimentation, and personal growth. This fits with the classic conception of campuses as filled with students debating different philosophies in their quests for a more accurate vision of the truth.<sup>53</sup> Idealists hope that students will actively participate in their own campus's "marketplace of ideas" in order to increase their knowledge and range of experiences.<sup>54</sup> But when students are accosted, threatened, harassed, or humiliated by fellow students because of their minority status, the effect can be so powerful as to deter these students from remaining in, or even entering, that campus's academic "marketplace."<sup>55</sup> This concern, combined with public ridicule and pressure from local communities, led many university administrators to create speech policies.

Before the civil rights and women's movements of the 1960s,<sup>56</sup> college campuses were overwhelmingly homogeneous. Harmful interactions on the

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<sup>53</sup> This romanticized notion of the academy relates to some of the bedrock philosophies of free speech in the common law tradition. Indeed, today many understand that one of the purposes of institutions of higher learning is to serve as a place where students learn not only from their debates with their teachers, but through debates with each other as well. And once this point is connected to the original religious foundations of medieval universities as places to study religion, this romantic ideal directly relates to the central goal of free speech as propounded by John Milton's polemic *Areopagitica*. See JOHN MILTON, *Areopagitica: A Speech for the Liberty of Unlicensed Printing*, in AREOPAGITICA AND OTHER POLITICAL WRITINGS OF JOHN MILTON 45 (Liberty Fund 1999) (1644) ("[A]ll the winds of doctrine were let loose to play upon the earth, so Truth be in the field, we do injuriously by licensing and prohibiting to misdoubt her strength. Let her and Falshood grapple; who ever knew Truth put to the wors, in a free and open encounter.").

<sup>54</sup> See *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). Justice Holmes observed:

But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that *the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market*, and that truth is the only ground upon which their wishes safely can be carried out.

*Id.* (emphasis added).

<sup>55</sup> See, e.g., Mari Matsuda, *Language as Violence v. Freedom of Expression: Canadian and American Perspectives on Group Defamation*, 37 BUFF. L. REV. 337, 360–61 (1989) (describing how the choice to ignore the harm that harassing speech causes will reinforce prejudices).

<sup>56</sup> That is, the "second wave" feminists who reasserted their political and social messages beginning in the 1960s. See, e.g., BENITA ROTH, *SEPARATE ROADS TO FEMINISM: BLACK, CHICANA, AND WHITE FEMINIST MOVEMENTS IN AMERICA'S SECOND WAVE* 1–6 (2003).

basis of someone's minority status accordingly proved relatively rare.<sup>57</sup> By the 1980s, however, campuses sought to make sure that diverse students were not segregated from the larger university community.<sup>58</sup> Students finally began sharing classrooms, libraries, and residences with students of different races, religious affiliations, sexual orientations, economic classes, and of the opposite sex.<sup>59</sup> Although this situation benefited students insofar as they learned from the perspectives of others with dissimilar backgrounds and viewpoints, the greater diversity also led to increased tension and animosity on college campuses.<sup>60</sup> Students and faculty sometimes displayed their biases rather openly, and often quite boorishly.<sup>61</sup> Hence, those universities seeking to attract a diverse student body believed that they needed anti-harassment policies to do so. As incidents of harassment were reported by the media and found their way into courts, college administrators resolved to curb antilocution on their campuses swiftly in order to promote diversity and end embarrassing controversies.<sup>62</sup>

The universities' hastily drafted speech regulations usually were viewpoint-based, unconstitutionally overbroad, and impermissibly vague.<sup>63</sup> These failed attempts at regulation can be divided into three categories based on the regulations' means of defining prohibited speech: those rely-

<sup>57</sup> Increases in campus diversity were accompanied by fractious disturbances against minority students. See DANIEL A. FARBER, *THE FIRST AMENDMENT* 112 (2d ed. 2003); GOLDING, *supra* note 15, at 4–5 (2000).

<sup>58</sup> See Arthur Levine, *Diversity on Campus*, in *HIGHER LEARNING IN AMERICA, 1980–2000*, at 333, 333–34 (Arthur Levine ed., 1993) (explaining how universities began to focus on “increasing the numbers of underrepresented groups [and] achieving numbers at least comparable to minority percentages in the population” in the 1960s, but by the early 1980s “focus[ed] . . . on incorporating historically underrepresented groups, which ha[d] become segregated on campuses, into the larger campus population”).

<sup>59</sup> Sadly, because there is relatively little racial integration in preparatory schools today, there is still a problem with students of different cultures not harmoniously interacting with each other on college campuses: “In 2005, for example, according to the National Center for Education Statistics, more than half of black students but only 3 percent of white students attended public elementary and secondary schools that were 75 percent or more black.” Susan Kinzie, *Colleges See Flare in Racial Incidents*, WASH. POST, Sept. 26, 2007, at B01.

<sup>60</sup> See *id.* (“[S]chool officials and scholars say it’s natural that racial tensions sometimes flare on college campuses because colleges reflect what’s happening in the world around them; they’re not isolated from economic and social rifts. And for many students, college is the first time they’ve met so many different types of people.”).

<sup>61</sup> See Maxine Lepeles, *Conservative Alumni Act to Alter Princeton Image*, N.Y. TIMES, Mar. 3, 1974, at GN62 (describing the Concerned Alumni of Princeton organization, which, among other things, openly opposed coeducation and policies designed to increase the minority student population); see also Lawrence, *supra* note 7, at 431–34 (providing a veritable laundry list of incidents on college campuses throughout the 1980s and early 1990s). One particular incident took place on the University of Wisconsin campus, where a group of white male students trailed a Black female student while bellowing: “We’ve never tried a nigger.” Thomas C. Grey, *Civil Rights vs. Civil Liberties: The Case of Discriminatory Verbal Harassment*, 63 J. HIGHER EDUC. 485, 489 (1992).

<sup>62</sup> See GOLDING, *supra* note 15, at 3–5 (noting the emphasis on creating a “multicultural education” and the changed meaning of “academic freedom”).

<sup>63</sup> These deficiencies are further outlined below.

ing upon the discriminatory-harassment model, those relying on the emotional distress of the victim, and those relying on the “fighting words” approach.<sup>64</sup> The following Subparts address each justification for such regulation in turn.

*A. The Discriminatory-Harassment Model and Its Constitutional Problems*

The discriminatory-harassment approach centers mainly on prohibiting speech found, from an objective perspective, to be discriminatory or prejudiced.<sup>65</sup> An example of the discriminatory-harassment model was the speech policy of the University of Massachusetts, which punished any type of antilocution whatsoever. According to the Massachusetts policy, a student would be in violation when he or she “discriminatorily alters the conditions” of anyone’s participation in university activities “on the basis of race, color, national or ethnic origin, gender, sexual orientation, age, religion, marital status, veteran status or disability.”<sup>66</sup> This approach does not consider the subjective emotional effect of the speech on its recipients. Rather, the discriminatory-harassment model prohibits antilocution that would objectively offend most persons on the basis of their minority status.<sup>67</sup>

The Supreme Court precedent for the discriminatory-harassment model comes from the 1950s<sup>68</sup> and is now of questionable legitimacy. At a time when race riots began to concern local governments, some state legislatures attempted to criminalize defamatory speech against classes of persons on the basis of their race or religion.<sup>69</sup> One Illinois law criminalized the publication or exhibition of any writing or picture that portrayed the “depravity, criminality, unchastity, or lack of virtue of a class of citizens, of any race, color, creed or religion.”<sup>70</sup> In *Beauharnais v. Illinois*, the Court upheld this law criminalizing group libel by a 5-4 vote.<sup>71</sup> The Court ruled that as long as such a law is “[r]elated to the peace and well-being of the state,” it is constitutional.<sup>72</sup> Like many of the older precedents on free speech,<sup>73</sup> though,

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<sup>64</sup> GOLDING, *supra* note 15, at 2.

<sup>65</sup> *See id.* at 2.

<sup>66</sup> Anthony Lewis, *Abroad at Home; Living in a Cocoon*, N.Y. TIMES, Nov. 27, 1995, at A15.

<sup>67</sup> *See* GOLDING, *supra* note 15, at 2.

<sup>68</sup> *See* *Beauharnais v. Illinois*, 343 U.S. 250 (1952).

<sup>69</sup> *See id.* at 259–60.

<sup>70</sup> *Id.* at 251 (quoting ILL. REV. STAT. c. 38, div. 1, § 471 (1949)).

<sup>71</sup> *Id.* at 266–67. The criminal leaflet in dispute was printed in an effort to “[p]reserve and protect white neighborhoods . . . from the constant and continuous invasion, harassment and encroachment by the negroes,” and can still be seen at the University of Minnesota Law School’s First Amendment Online website, <http://1stam.umn.edu/archive/primary/Beauharnais.pdf>.

<sup>72</sup> *Beauharnais*, 343 U.S. at 258.

<sup>73</sup> *See infra* note 128 and accompanying text.

*Beauharnais* is of questionable validity,<sup>74</sup> especially after *New York Times Co. v. Sullivan* specifically held that the tort of libel was subject to the First Amendment.<sup>75</sup> Thus, *Beauharnais* provides universities with very little, if any, continuing legal grounding for the discriminatory regulation of speech.

Despite this checkered background, the University of Michigan designed an early discriminatory-harassment policy in 1988.<sup>76</sup> Several incidents at the university during the previous year—including the display of a Ku Klux Klan uniform at a demonstration on campus and the distribution of a flier that declared “open season” on minorities, referring to Black students in such derogatory terms as “saucer lips, porch monkeys, and jigaboos”<sup>77</sup>—prompted a campus antidiscrimination group to threaten a class-action lawsuit against the university “‘for not maintaining or creating a non-racist, non-violent atmosphere’ on campus.”<sup>78</sup> The university responded hastily by enacting a rather broad antilocution policy for its entire campus.<sup>79</sup>

Adopting the more objective discriminatory-harassment model, rather than one focused on the subjective harm to the speech’s recipient, the university banned any behavior that could be interpreted as “stigmatiz[ing] or victimiz[ing] an individual on the basis of race” or other immutable characteristic, as well as behavior that involved threats that could foreseeably interfere with another student’s academic achievement.<sup>80</sup> In an effort to give students adequate notice of what conduct would violate the policy, the university provided students with copies of an interpretive guide.<sup>81</sup> Unfortunately, the guide’s examples of violative behavior were often just as broad or ambiguous as the policy itself:

A flyer containing racist threats distributed in a residence hall. . . .

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<sup>74</sup> See *Collin v. Smith*, 578 F.2d 1197 (7th Cir. 1978) (ignoring *Beauharnais* as binding precedent and striking down the village’s decision to deny the Nazi party a permit to hold a demonstration in front of the village hall); *id.* at 1205 (“The Eighth Circuit . . . [has] expressed doubt, which we share, that *Beauharnais* remains good law at all.”).

<sup>75</sup> Compare *Beauharnais*, 343 U.S. at 266 (“Libelous utterances not being within the area of constitutionally protected speech, it is unnecessary . . . to consider the issue[] . . .”), with *New York Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964) (striking down Alabama’s libel law because the First Amendment protects the publication of all statements, even false ones, about the conduct of public officials—unless statements are made with “actual malice,” that is, with knowledge that they are false or in reckless disregard of their falsity). This sub silentio repudiation of *Beauharnais* stems from the application of First Amendment protection to defamation law, which was central to Justice Frankfurter’s opinion.

<sup>76</sup> See *Doe v. Univ. of Mich.*, 721 F. Supp. 852, 854 (E.D. Mich. 1989).

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 856.

<sup>80</sup> *Id.* (“Any behavior, verbal or physical, that stigmatizes or victimizes an individual on the basis of race, ethnicity, religion, sex, sexual orientation, [or] creed . . . and that . . . [c]reates an intimidating, hostile, or demeaning environment for educational pursuits, employment or participation in University sponsored extra-curricular activities.”).

<sup>81</sup> *Id.* at 857–58.

A male student makes remarks in class like “Women just aren’t as good in this field as men,” thus creating a hostile learning atmosphere for female classmates.

Students in a residence hall have a floor party and invite everyone on their floor except one person because they think she might be a lesbian.<sup>82</sup>

The interpretive guides also included a segment labeled “You are a harasser when . . . ,” giving the examples:

You exclude someone from a study group because that person is of a different race, sex, or ethnic origin than you are.

You tell jokes about gay men and lesbians. . . .

You display a confederate flag on the door of your room in your residence hall . . .

You make obscene telephone calls or send racist notes or computer messages.

You comment in a derogatory way about a particular person or group’s physical appearance or sexual orientation, or their cultural origins, or religious beliefs.<sup>83</sup>

Students began filing complaints as soon as the university enacted the policy. One student filed a complaint against another who argued that Jews have employed the Holocaust as a justification for Israeli policies regarding Palestinians.<sup>84</sup> Another student complained about a dental student’s comment that “he had heard that minorities had a difficult time in the course and that he had heard they were not treated fairly.”<sup>85</sup>

In 1989, a psychology graduate student challenged the university’s policy.<sup>86</sup> He feared that if he discussed controversial theories in his field of biopsychology,<sup>87</sup> his comments could be interpreted as demeaning certain students of a different race or sex and thus violate the policy.<sup>88</sup> The student,

<sup>82</sup> *Id.* at 858.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* at 866 n.14.

<sup>85</sup> *Id.* at 866.

<sup>86</sup> *Id.* at 858.

<sup>87</sup> *Id.* This phenomenon is a good example of a regulation creating a “chilling effect” on the free speech rights of confused citizens. See *Lamont v. Postmaster Gen.*, 381 U.S. 301, 307 (1965) (declaring the Postal Service and Federal Employees Salary Act of 1962, 39 U.S.C. § 4008(a) (1964), unconstitutional for creating a deterrent effect on the addressee’s freedom of speech). For the original use of this terminology, see Paul A. Freund, *The Supreme Court and Civil Liberties*, 4 VAND. L. REV. 533, 539 (1951), which describes the chilling effect that might possibly result from a temporary injunction or a restraining order.

<sup>88</sup> *Doe*, 721 F. Supp. at 858. This is a common quandary with antilocution. Defining what constitutes prohibited speech can present an extremely difficult task. See Jeffrey M. Shaman, *The Theory of Low-Value Speech*, 48 SMU L. REV. 297, 325–26 (1995) (describing how classic and award-winning novels, such as Mark Twain’s *Huckleberry Finn* and Bernard Malamud’s *The Fixer*, can be seen as either works containing bigoted antilocution or great works of art).

who was represented by the American Civil Liberties Union, argued that the university's objective discriminatory-harassment policy was facially overbroad and was so vague that enforcing it would violate the Due Process Clause.<sup>89</sup>

Finding for the plaintiff, the district court held that that the policy was overbroad because it “punish[ed] speech or conduct solely on the grounds that they are unseemly or offensive.”<sup>90</sup> The court believed that this was especially true in an academic environment, believing that there should be heightened protection for free expression in such a context. After the court examined all of the students' complaints filed under the policy,<sup>91</sup> it concluded that “[t]he University could not seriously argue that the policy was never interpreted to reach protected conduct.”<sup>92</sup>

With respect to the plaintiff's vagueness claims, the court agreed that it was too difficult to determine what language was impermissible.<sup>93</sup> Noting that it was “simply impossible to discern any limitation” on the policy's scope or reach, the court concluded that free speech was too important to be sacrificed by a poorly constructed regulation.<sup>94</sup> Thus, one of the first efforts at curbing antilocution on college campuses failed due to university administrators' lack of precision. This outcome highlights one of the central problems with the discriminatory-harassment approach: its emphasis on the objective examination of statements pulls divisive words out of context, which is especially troubling in the context of academic debate. But this failure of the discriminatory-harassment model did not stop other universities from attempting to enact antilocution regulations that concerned victims' emotional distress.

#### *B. The Emotional Distress Model and Its Constitutional Deficiencies*

Some university policies aim to limit the emotional distress students experience by prohibiting intimidating speech. A University of Texas speech policy illustrates this emotional distress approach.<sup>95</sup> The policy makes any form of discriminatory harassment punishable by suspension or expulsion, and defines offenses as any “extreme or outrageous acts of communication that are *intended* to harass, intimidate, or humiliate a student or students on account of race, color, or national origin and that *cause*

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<sup>89</sup> *Doe*, 721 F. Supp. at 853–54.

<sup>90</sup> *Id.* at 864.

<sup>91</sup> *Id.* at 865–66.

<sup>92</sup> *Id.* at 866.

<sup>93</sup> *Id.* at 867 (“Looking at the plain language of the Policy, it was simply impossible to discern any limitation on its scope or any conceptual distinction between protected and unprotected conduct.”).

<sup>94</sup> *Id.* at 867.

<sup>95</sup> See GOLDING, *supra* note 15, at 2.

them to suffer severe emotional distress.”<sup>96</sup> Regulations based on the emotional distress model emphasize the speaker’s subjective intent to cause the recipient distress, as well as the recipient’s own subjective psychological harm.<sup>97</sup>

Within Supreme Court case law, the emotional distress model lies somewhere between the discriminatory-harassment approach and the fighting words doctrine. All of the Court’s cases concerning fighting words have addressed only that category of words which provoke immediate violence.<sup>98</sup> However, the other part of the fighting words doctrine concerns the recipient’s psychological injury.<sup>99</sup> It is this concern with the recipient’s psychological injuries that has been echoed in workplace harassment law. Hence, where a pervasive environment of ridicule might visit psychological injury upon a recipient, that ridicule can be regulated against without violating the First Amendment.<sup>100</sup>

The University of Wisconsin promulgated a campus-wide speech policy based on this emotional distress model.<sup>101</sup> The university felt this policy

<sup>96</sup> *Id.* (emphasis added) (quoting the language used in the policy, which is similar to The University of Texas of the Permian Basin’s current student guide, available at [http://www.utpb.edu/utpb\\_student/students/studentguide/sg3\\_index\\_frame.htm](http://www.utpb.edu/utpb_student/students/studentguide/sg3_index_frame.htm) (last visited Oct. 25, 2007)).

<sup>97</sup> See Thomas C. Grey, *How to Write a Speech Code Without Really Trying: Reflections on the Stanford Experience*, 29 U.C. DAVIS L. REV. 891, 916–17 n.77 (1996) (“The University of Texas discriminatory abuse policy, drafted by Mark Yudof, required an actual showing of severe emotional distress before speech could be punished.”). This type of policy, however, could produce interesting outcomes when the speaker has no intent to harass other students, but causes great unrest among the students nonetheless. See, e.g., Susan Kinzie, *Anti-Muslim Fliers Cause Uproar*, WASH. POST, Oct. 9, 2007, at B03 (describing posters at George Washington University with the headline: “HATE MUSLIMS? SO DO WE!!!,” which caused considerable consternation among students, but were intended to satirize the Young America’s Foundation’s hosting of an upcoming “Islamofascism Awareness Week”); Elise Kigner, *A Portrait of the Poster’s Creators*, GW HATCHET, Oct. 12, 2007, at A1, A3, available at <http://media.www.gwhatchet.com/media/storage/paper332/news/2007/10/11/News/A.Portrait.Of.The.Posters.Creators-3026922.shtml> (“The seven students who admitted to hanging the posters . . . insist they were meant to convey a satirical message, even if the message at face value seems anti-Muslim.”); cf. Shaman, *supra* note 88.

<sup>98</sup> See *infra* notes 118–31 and accompanying text.

<sup>99</sup> See *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942) (characterizing “those [words] which by their very utterance inflict injury” as being “of such slight social value” that they are not protected from regulation by the First Amendment); Mark C. Rutzick, *Offensive Language and the Evolution of First Amendment Protection*, 9 HARV. C.R.-C.L. L. REV. 1, 6 (1974) (“The first interest . . . concerns the prevention of injury other than physical, primarily emotional upset and injury to the ‘sensibilities’ of addressees or auditors.”).

<sup>100</sup> Although this has not been explicitly ruled on by the Court, there are numerous sexual harassment cases that imply the constitutionality of such legislation. See, e.g., *Harris v. Forklift Sys., Inc.* 510 U.S. 17, 22 (1993) (noting how even though psychological well-being is not a touchstone of Title VII, the statute nevertheless “comes into play before the harassing conduct leads to a nervous breakdown” and how deleteriously affecting “employees’ psychological well-being[] can and often will detract from [their] . . . performance, discourage employees from remaining . . . or keep them from advancing in their careers”).

<sup>101</sup> See *UWM Post, Inc. v. Bd. of Regents of Univ. of Wis. Sys.*, 774 F. Supp. 1163, 1164–67 (E.D. Wis. 1991).

was necessary to respond to several incidents on its campus, among them a fraternity's mounting of a picture of a Black Fijian for one of its parties (presumably to make the figure an object of humor or ridicule), another fraternity's "slave auction" featuring pledges in blackface, and a racially charged fight between members of separate fraternities.<sup>102</sup> In 1989, the university adopted a "Design for Diversity" plan that included antilocution regulation.<sup>103</sup> The university's policy forbade addressing any specific individual with "racist or discriminatory comments" that would:

[d]emean the race, sex, religion, color, creed, disability, sexual orientation, national origin, ancestry or age of the individual or individuals; and [c]reate an intimidating, hostile or demeaning environment for education, university-related work, or other university-authorized activity.<sup>104</sup>

Unlike the University of Michigan's policy, Wisconsin's policy did not prohibit expression of derogatory opinions about a specific minority *group* in a classroom discussion. Instead, the policy only applied to speech directed at a specific *individual*. Thus, the policy aimed to reduce an individual recipient's subjective emotional distress.

Despite this nuance, one of the university's student newspapers and numerous students challenged the policy's constitutionality.<sup>105</sup> Like the court in *Doe* just a few years before it, the Wisconsin federal district court agreed with the plaintiffs and struck down the policy because it was not content-neutral.<sup>106</sup> Outside of its application to the narrow context of fighting words,<sup>107</sup> the court struck down the policy as overbroad because it might "chill" protected speech.

To buttress its main contention that the policy prevented only harmful "fighting words," the university argued that its policy was designed to comply with Title VII.<sup>108</sup> To this end, the university analogized Title VII's hostile workplace environment case law to the campus setting, arguing that universities, too, were compelled to regulate against the creation of a hostile academic environment.<sup>109</sup> Nevertheless, the university's use of employment law as a justification for speech regulation of students on a college campus failed to persuade the court.

The court distinguished Title VII on three grounds. First, the court held that the differences between the employment and educational settings

<sup>102</sup> *See id.* at 1165.

<sup>103</sup> *See id.* at 1164.

<sup>104</sup> *Id.* at 1165.

<sup>105</sup> *Id.* at 1164.

<sup>106</sup> *Id.* at 1172–74.

<sup>107</sup> Fighting words are those threats or provocative statements that are unprotected because of the likelihood that they will provoke an immediately violent and lawless response by the recipient. *See infra* note 120 and accompanying text.

<sup>108</sup> *See UWM*, 774 F. Supp. at 1177.

<sup>109</sup> *Id.*

made the applicability of Title VII dubious at best.<sup>110</sup> Second, although employers can usually be found liable for their employees' conduct, the court maintained that a university could not likewise be held liable for the conduct of its students.<sup>111</sup> Third, the court reminded the university that Title VII is only a statute. No matter how laudable its goals, it could not supersede the constitutional dictates of free speech.<sup>112</sup>

Finally, the court rebuffed the university's purported rationale that its speech policy was necessary to curb discriminatory harassment on campus; the court noted that the policy itself impeded the diversity of ideas available on campus:

[C]ommitment 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.<sup>113</sup>

The court expressed concern about the content-based restrictions of the policy and did not want to allow any governmental prohibitions of disfavored opinions.<sup>114</sup> This concern highlights the fundamental flaw of the emotional distress model: what is subjectively harmful to one person's psyche might be a strong political belief to another.<sup>115</sup> On the one hand, allowing the government to regulate the content of speech out of concern for the harm to the receiving party would be akin to giving the receiving party a "heckler's veto,"<sup>116</sup> creating an impermissible likelihood that the government would

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<sup>110</sup> *Id.* Though the court did not explicitly state its reasoning, this is presumably because a workplace environment is oftentimes more confining than an entire university campus.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* at 1181 ("The problems of bigotry and discrimination sought to be addressed here are real and truly corrosive of the educational environment. But freedom of speech is almost absolute in our land and the only restriction the fighting words doctrine can abide is that based on the fear of violent reaction.").

<sup>113</sup> *Id.* at 1174 n.9.

<sup>114</sup> *Id.* at 1181 ("Content-based prohibitions such as that in the UW Rule, however well intended, simply cannot survive the screening which our Constitution demands.").

<sup>115</sup> This point is analogous to Justice Harlan's famous maxim from *Cohen v. California*: "[I]t is . . . often true that one man's vulgarity is another's lyric." 403 U.S. 15, 25 (1971).

<sup>116</sup> A common phrase in First Amendment jurisprudence, a "heckler's veto" is when a government abridges the *speaker's* right to free speech in order to avoid the *listener's* disorderly behavior. See HARRY KALVEN JR., *THE NEGRO AND THE FIRST AMENDMENT* 140-45 (1965). Nevertheless, the "heckler's veto" has come to represent two distinct situations relating to free speech. Professor Kalven uses the term to describe when the state suppresses the speech of unpopular persons because their messages cause others to do them harm. In common usage, though, the term is loosely used to describe any situation where a speaker is simply "heckled down" by an unruly audience. The best example of the former is when counterdemonstrators cause a demonstrator's speech to be cut short by the police to prevent a

privilege certain political beliefs over others. On the other hand, when there is some other primary concern that motivates the regulation, such as preventing immediate violence, governmental entities can regulate where before they were prohibited.<sup>117</sup> This dichotomy provides the legal basis for the current application of the fighting words doctrine.

### C. *The Fighting Words Paradox and the Doctrine's Gradual Demise*

The University of California's administration was the first to develop an antilocution policy that explicitly adopted the fighting words approach.<sup>118</sup> Recognizing the continued validity of the violence portion of the fighting words doctrine, the university attempted to use the Court's language from *Cohen v. California*<sup>119</sup> to define impermissible fighting words as "those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction."<sup>120</sup> Because this doctrine has been limited by more contemporary case law, however, it is of negligible use to universities attempting to design speech policies.<sup>121</sup>

Indeed, it is important to note that the Supreme Court has not upheld a conviction under this doctrine since *Chaplinsky v. New Hampshire* in 1942.<sup>122</sup> In many of the instances involving fighting words, modern courts

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breach of the peace. For a good example of this phenomenon in the university setting, see *Healy v. James*, 408 U.S. 169 (1972), which held that a state college could not ban a specific student group's existence out of a fear that its members might disrupt classes.

<sup>117</sup> See, e.g., *Feiner v. New York*, 340 U.S. 315 (1951) (describing the "hostile audience" doctrine—holding that the arrest of an acting party for incitement while making a political speech did not violate the First Amendment because it came after police thought a riot might occur). Much like *Beauharnais* and the fighting words doctrine, *Feiner* has never been overruled but is of dubious legitimacy because no case since has used the hostile audience doctrine to uphold a conviction.

<sup>118</sup> The Regents of the University of California apparently still employ this approach. The police of the University of California at Irvine continue to release pamphlets containing an explicit university rule against fighting words based on a person's particular background. UCI POLICE DEP'T, UNIV. OF CAL. IRVINE, FREEDOM OF EXPRESSION: "A RIGHT WITH RESPONSIBILITIES," available at <http://www.police.uci.edu/safety/publications/speech.pdf> (last visited Oct. 25, 2007).

<sup>119</sup> 403 U.S. 15, 20 (1971); see UCI POLICE DEP'T, *supra* note 118.

<sup>120</sup> *Cohen*, 403 U.S. at 20 (holding that Cohen's arrest for wearing a jacket that said "Fuck the Draft" could not constitute fighting words because, among other things, it did not contain any "personally abusive epithets"). But see ALEXANDER M. BICKEL, *THE MORALITY OF CONSENT* 72 (1975) (arguing that offensive speech, such as the phrase on Cohen's jacket, is a form of verbal "assault" that, if left unchecked, "create[s] a climate, an environment in which conduct and actions that were not possible before become possible"); cf. Catharine A. MacKinnon, *Not A Moral Issue*, 2 YALE L. & POL'Y REV. 321, 324 (1984) (arguing that pornography "causes attitudes and behaviors of violence and discrimination"). Justice Harlan's opinion in *Cohen* was later condemned by Robert Bork as a form of "moral relativism." Michael Cromartie, *Give Me Liberty, but Don't Give Me Filth: Robert Bork Makes a Case for Censorship*, CHRISTIANITY TODAY, May 19, 1997, at 28.

<sup>121</sup> See *infra* notes 122–31 and accompanying text.

<sup>122</sup> 315 U.S. 568 (1942). The case is infamous for its memorable facts. The defendant, Walter Chaplinsky, was a Jehovah's Witness attempting to distribute religious leaflets. After getting some complaints, a town marshal told Chaplinsky that a riot might ensue if he did not stop distributing the ma-

simply strike down the ordinances as unconstitutionally vague or overbroad.<sup>123</sup> But in the past, certain classes of speech were seen as wholly outside of First Amendment protection.<sup>124</sup> Fighting words were such a category; that is, the government prohibited “certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have *never* been thought to raise any Constitutional problem. . . . [including] the insulting or ‘fighting’ words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.”<sup>125</sup> As mentioned above,<sup>126</sup> the first part of the fighting words analysis evaluates recipients’ psychological injuries, whereas the second part concerns the need to prevent the likely physical retaliation that might grow into an even greater breach of the peace.<sup>127</sup> Despite the Court’s broad language, this doctrine’s current validity is questionable,<sup>128</sup> with problems comparable to *Beauharnais*.<sup>129</sup> Because the Court has not upheld a conviction for fighting words since *Chaplinsky*, “it is unclear whether the doctrine has any independent vitality, except perhaps . . . where the incitement is to a brawl with the speaker rather than to an attack on a third-party.”<sup>130</sup> Opponents of speech restrictions have limited any expansion of the fighting words doctrine.<sup>131</sup>

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terial. *Chaplinsky* then called the town marshal “a God damned racketeer” and “a damned Fascist.” *Id.* at 569. In keeping with this description, the town marshal immediately arrested him for violating Chapter 378, Section 2, of the Public Laws of New Hampshire, which required that:

No person shall address any offensive, derisive or annoying word to any other person who is lawfully in any street or other public place, nor call him by any offensive or derisive name, nor make any noise or exclamation in his presence and hearing with intent to deride, offend or annoy him, or to prevent him from pursuing his lawful business or occupation.

*Id.*

<sup>123</sup> *E.g.*, *Gooding v. Wilson*, 405 U.S. 518, 524 (1972).

<sup>124</sup> Another class of unprotected speech was that of defamation. *See supra* note 75 and accompanying text; *see also* *Roth v. United States*, 354 U.S. 476, 481–86 (1957) (relying on *Beauharnais* in its reasoning); *Beauharnais v. Illinois*, 343 U.S. 250, 266 (1952) (“Libelous utterances not being within the area of constitutionally protected speech, it is unnecessary . . . to consider the issue[ . . . ]”).

<sup>125</sup> *See Chaplinsky*, 315 U.S. at 571–72 (emphasis added).

<sup>126</sup> *See supra* text accompanying notes 98–100.

<sup>127</sup> *See Rutzick, supra* note 99, at 6–8.

<sup>128</sup> Indeed, the few instances where this doctrine has been consistently upheld have been where police officers are the targets of such “fighting words.” *See* Stephen W. Gard, *Fighting Words as Free Speech*, 58 WASH. U. L.Q. 531, 534–35 (1980) (“[S]ince *Chaplinsky* was decided, the Court has not upheld a single conviction for the use of fighting words. . . . [T]he Court, despite its protestations to the contrary, is merely paying lip service to *Chaplinsky*’ and . . . in fact, the fighting words doctrine is moribund.” (quoting *Gooding*, 405 U.S. at 537 (Blackmun, J., dissenting))).

<sup>129</sup> *See supra* notes 74–75 and accompanying text.

<sup>130</sup> FARBER, *supra* note 57, at 105.

<sup>131</sup> Although the Court has continued to uphold the fighting words doctrine, the Justices have gradually narrowed the grounds on which the doctrine is applicable. For instance, in *Street v. New York*, the Court overturned a statute that relied on the fighting words doctrine to prohibit burning or verbally abusing the American flag. 394 U.S. 576 (1969). The Court held that words that are merely offensive cannot qualify as proscribable fighting words. *See id.* at 592.

For example, in *R.A.V. v. City of St. Paul*, the Court addressed whether states could regulate cross burning under the fighting words doctrine.<sup>132</sup> In *R.A.V.*, the Court struck down a local ordinance that specifically targeted discriminatory speech by making it a misdemeanor to “place[] on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender.”<sup>133</sup> After a juvenile burned a makeshift cross on a Black family’s yard, the town of St. Paul, Minnesota charged him with violating this ordinance.<sup>134</sup>

Although the ordinance had overbreadth and vagueness deficiencies, the Minnesota Supreme Court attempted to evade these issues by using the longstanding canon of construction of narrowly interpreting the statute to avoid constitutional problems.<sup>135</sup> The court held that the ordinance’s prohibition was strictly limited to the unprotected category of “fighting words”<sup>136</sup> or the incitement to “imminent lawless action.”<sup>137</sup> Under this narrow construction, the only remaining issue was the constitutionality of the ordinance’s content-based distinction between different forms of antilocution.

In Justice Scalia’s majority opinion, the Supreme Court struck down the ordinance for its impermissible content-based distinctions.<sup>138</sup> By prohibiting only certain types of fighting words (in this case, discriminatory speech) based on their viewpoint, the ordinance created an uneven playing field for social and political debate: “St. Paul has no such authority to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry Rules.”<sup>139</sup> A true innovation in this opinion

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<sup>132</sup> 505 U.S. 377 (1992).

<sup>133</sup> *Id.* at 380.

<sup>134</sup> *Id.* at 379–80.

<sup>135</sup> *Id.* at 377; *see, e.g.*, *McConnell v. Fed. Election Comm’n*, 540 U.S. 93, 126 (2003); *Boos v. Barry*, 485 U.S. 312, 331 (1988); *New York v. Ferber*, 458 U.S. 747, 769 n.24 (1982) (“When a . . . court is dealing with a . . . statute challenged as overbroad, it should, of course, construe the statute to avoid constitutional problems, if the statute is subject to such a limiting construction.”); *Crowell v. Benson*, 285 U.S. 22, 62 (1932).

<sup>136</sup> *See In re Welfare of R.A.V.*, 464 N.W.2d 507, 509–10 (Minn. 1991); *see also Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

<sup>137</sup> *See In re R.A.V.*, 464 N.W.2d at 510 (quoting from *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam), which held that the government cannot punish incitement of unlawful conduct unless it is directed to, and likely to create, imminent lawless action); *see also FARBER, supra* note 57, at 105 (noting that the only proper understanding of the fighting words doctrine today is “as a kind of adjunct to *Brandenburg*”).

<sup>138</sup> *See R.A.V.*, 505 U.S. at 383–84 (“[T]hese areas of speech can, consistently with the First Amendment, be regulated *because of their constitutionally proscribable content* (obscenity, defamation, etc.)—not that they are categories of speech entirely invisible to the Constitution, so that they may be made the vehicles for content discrimination unrelated to their distinctively proscribable content.”).

<sup>139</sup> *Id.* at 392.

was Justice Scalia's revision of the two-tiered conception of speech,<sup>140</sup> which was explicitly relied on in *Chaplinsky*,<sup>141</sup> and continues to be the basis for modern-day obscenity regulation.<sup>142</sup> Since 1942, the Court had assumed that certain classes of speech were of such slight social importance that they were not within the ambit of the First Amendment's protection.<sup>143</sup> Many of the concurring Justices in *R.A.V.* pointed out Justice Scalia's sleight of hand, and noted how the Court had frequently held that certain forms of expression were not actually "speech" for purposes of First Amendment analysis.<sup>144</sup>

Justice Scalia's approach forces governments to reconcile this seeming paradox of regulating antilocution without suppressing such ideas. Despite announcing a generic presumption of invalidity for content-based regulations, his opinion lists numerous exceptions.<sup>145</sup> Thus, *R.A.V.* does not clearly identify when content-based regulation of fighting words is allowable. Regulations against antilocution cannot fall within these exceptions, however, if their purposes relate to silencing unpopular ideas.<sup>146</sup> Under normal circumstances "content discrimination among various instances of a class of proscribable speech . . . does not pose [the] threat [of viewpoint

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<sup>140</sup> See *id.* at 383–84. The concurring Justices spurned the majority's reconception of prior precedent. See *id.* at 399 (White, J., concurring in the judgment) ("This Court's decisions have plainly stated that expression falling within certain limited categories so lacks the values the First Amendment was designed to protect that the Constitution affords no protection to that expression.").

<sup>141</sup> See *Chaplinsky*, 315 U.S. at 571–72.

<sup>142</sup> See, e.g., *Roth v. United States*, 354 U.S. 476, 484–85 (1954) ("[I]mplicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance. . . . This is the same judgment expressed by this Court in *Chaplinsky v. New Hampshire*. . . . [O]bscenity is not within the area of constitutionally protected speech."). But see *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 112–13 (1973) (Brennan, J., dissenting) (arguing that the definition of obscenity was unconstitutionally vague).

<sup>143</sup> For a good example of this two-tiered conception in more modern case law, see *Ashcroft v. ACLU*, 542 U.S. 656, 676 (2004) (Scalia, J., dissenting). Justice Scalia employed an *ad maiore ad minus* form of the *a fortiori* argument to claim that because commercial pornography is wholly unprotected, regulations on child pornography should be constitutionally allowed: "Since this business could, consistent with the First Amendment, be banned entirely, [the Child Online Protection Act]'s lesser restrictions raise no constitutional concern." *Id.*

<sup>144</sup> Indeed, the four concurring Justices would have struck down the statute because the law was overinclusive, rather than concluding, as the majority did, that the law was unconstitutionally underinclusive. See *R.A.V.*, 505 U.S. at 413–14 (White, J., concurring in the judgment) ("Although the ordinance reaches conduct that is unprotected, it also makes criminal expressive conduct that causes only hurt feelings, offense, or resentment, and is protected by the First Amendment. The ordinance is therefore fatally overbroad and invalid on its face." (citations omitted)).

<sup>145</sup> See *id.* at 387–90 (majority opinion) (explaining that, among other things, threats against the President are proscribable "since the reasons why threats of violence are outside the First Amendment (protecting individuals from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur)" apply equally, but "have special force when applied to the person of the President").

<sup>146</sup> See *id.*

discrimination],” but for antilocution, it is almost inseparable.<sup>147</sup> The chief focus for Justice Scalia was whether “the nature of the content discrimination is such that there is no realistic possibility that official suppression of ideas is afoot.”<sup>148</sup>

After *R.A.V.*, constitutionally permissible antilocution regulation is quite difficult to establish under the fighting words doctrine. On the one hand, if the government attempts to single out certain categories of antilocution, then the law will likely be invalidated on charges of impermissible content-based discrimination.<sup>149</sup> On the other hand, if the governmental regulation is too expansive, then the law will likely be struck down as vague, overbroad, or both.<sup>150</sup>

More than a decade later, the Court returned to the criminalization of racist speech in the form of cross burning in *Virginia v. Black*.<sup>151</sup> *Black* concerned a Virginia statute making it a felony “for any person . . . with the intent of intimidating any person or group . . . to burn . . . a cross on the property of another, a highway or other public place.”<sup>152</sup> The law further specified that “[a]ny such burning . . . shall be prima facie evidence of an intent to intimidate a person or group.”<sup>153</sup> At trial, one of the defendants objected on free speech grounds to the jury instruction that burning a cross was itself enough evidence from which an “intent to intimidate” could be presumed. The Virginia Supreme Court agreed with him and struck down the law as facially invalid under *R.A.V. v. City of St. Paul*.<sup>154</sup>

In the plurality opinion, Justice O’Connor explained that “[i]ntimidation . . . is a type of true threat, where a speaker directs a threat to a person or a group of persons with the intent of placing the victim in fear of bodily harm or death.”<sup>155</sup> A majority of the Court held that a state may ban cross burning committed with an intent to intimidate,<sup>156</sup> but the plurality held that the provision in the statute that treated *any* cross burning as prima facie evidence of such an intent made the current version of the statute unconstitutional.<sup>157</sup>

Some commentators have interpreted *Black* as an example of the Court “permitting a narrowly drawn statute that targets not all fighting words but that singles out particular ones, what might be thought of as ‘hard-core hate

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<sup>147</sup> *Id.* at 388.

<sup>148</sup> *Id.* at 390.

<sup>149</sup> This was precisely the flaw that the majority opinion in *R.A.V.* found. *See id.* at 391.

<sup>150</sup> *See, e.g.,* *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 215–17 (3d Cir. 2001).

<sup>151</sup> 538 U.S. 343 (2003).

<sup>152</sup> *Id.* at 348.

<sup>153</sup> *Id.*

<sup>154</sup> *See id.* at 360.

<sup>155</sup> *Id.*

<sup>156</sup> *Id.* at 362–63.

<sup>157</sup> *Id.* at 364.

speech’—hate speech that expresses not only venom but would normally be read by the ‘average addressee’ as a true threat.”<sup>158</sup> In this sense, the doctrine of fighting words has come almost full circle, and can be viewed as almost completely hollow except in regard to “true threat[s]”<sup>159</sup> and remarks made against the police.<sup>160</sup>

Therefore, institutions attempting to regulate antilocution on the basis of fighting words will continue to face difficulty in establishing a constitutionally permissible policy. This was true for the University of California,<sup>161</sup> and even for the private institution of Stanford, which instituted its own speech policies based on the fighting words doctrine.<sup>162</sup> There is thus no reasonable way for universities to attempt to regulate discriminatory speech campus-wide while still maintaining that their purpose is not to quell particular ideas or messages. This dilemma renders the constitutional regulation of speech on university campuses practically impossible.

## II. FOCUSING ON THE CONSEQUENCES OF EMOTIONAL DISTRESS AND THE SPECIAL STATUS OF THE HOME COULD SAVE THE FAILED APPROACHES

Dormitories, unlike the rest of a campus, operate as a surrogate home for students. As such, dormitories should be viewed as a student’s last refuge from rancorous debate, rather than as an open forum for anyone to protest or harass freely. Without this refuge, students might have nowhere else to live safely and peaceably while they study or attend classes on campus. But antilocution and harassment render this refuge unavailable to many students. Such a result undermines the compelling interest of diversity that lies at the core of Titles VI and IX. University speech policies that prohibit student-on-student harassment aim to prevent this compelling interest from being undermined.

Although all the universities’ above-noted arguments have failed in the face of First Amendment challenges,<sup>163</sup> it is plausible that these regulations would be constitutional in the context of students living in dormitories. Narrowly tailored regulations of more private environments might be found to be constitutionally permissible because the resulting emotional distress might “dictate that the constitutional balance swing more toward the privacy of the student and less toward the free speech rights of the speaker.”<sup>164</sup>

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<sup>158</sup> Leslie Friedman Goldstein, *Virginia v. Black: Hard-Core Hate Speech, Hard-Core Porn and the First Amendment*, GOOD SOC’Y, No. 1–2, 2005, at 44, 48.

<sup>159</sup> *Black*, 538 U.S. at 360.

<sup>160</sup> See *supra* note 128 and accompanying text.

<sup>161</sup> See *supra* notes 118–21 and accompanying text.

<sup>162</sup> For a complete analysis of the Stanford speech policy, see generally Grey, *supra* note 97.

<sup>163</sup> See *UWM Post, Inc. v. Bd. of Regents of Univ. of Wis. Sys.*, 774 F. Supp. 1163 (E.D. Wis. 1991); *Doe v. Univ. of Mich.*, 721 F. Supp. 852 (E.D. Mich. 1989).

<sup>164</sup> RODNEY A. SMOLLA, *SMOLLA & NIMMER ON FREEDOM OF SPEECH* § 17:27, at 17–38 (2006).

It is necessary to examine these arguments with greater precision to understand how their strengths and weakness might operate in different fora.

*A. Focusing on the Consequences of Antilocution Could Alleviate Most First Amendment Problems*

Among the most oft-repeated arguments for antilocution regulations are that harassment causes a particularly hurtful kind of psychological harm to minorities,<sup>165</sup> and that regulation against this harm in some way facilitates a more equal society.<sup>166</sup> However, beyond simply asking for a change in presently existing law, proponents of the emotional distress model ask judges to accept the responsibility for changing society at large. Although members of contemporary society may, in fact, hold ingrained biases that work to favor those already in power,<sup>167</sup> legitimating the reversal of these biases by governmental actors would openly violate the notion that the government should never attempt to censor certain sides of a debate in the free exchange of ideas.

In this way, the emotional distress model resembles government endorsement of certain ideas,<sup>168</sup> violating the idea of content neutrality used by Justice Scalia in *R.A.V. v. City of St. Paul*.<sup>169</sup> Although it is possible to see such regulation as being neutral in the sense that everyone is prohibited from making racially derogatory expressions, Justice Scalia's opinion

<sup>165</sup> It is worth noting that the Supreme Court does not always dismiss arguments relying on particularized kinds of psychological harm based on prejudices. See, e.g., *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 & n.11 (1954).

<sup>166</sup> See generally Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320 (1989) (advocating for the imposition of sanctions against anyone who uses racist speech in public given the assault-like consequences such speech can have on its victims). Normally, universities have justified their speech regulations on the ground that antilocution harms its victims. Cf. MARSHALL S. SHAPO, *TORT LAW & CULTURE* 150 (2003) ("[E]ven a medium that lives by a process of communication cannot escape responsibility for physical injuries that are directly and foreseeably attributable to its message."). Indeed, there are many who claim that derogatory epithets can cause severe emotional, psychological, and physiological damage in such forms as difficulty with breathing, rapid heart rate, psychosis, hypertension, nightmares, post-traumatic stress disorder, and even suicide. See Richard Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133 (1982); see also Donald A. Downs, *Skokie Revisited: Hate Group Speech and the First Amendment*, 60 NOTRE DAME L. REV. 629, 640–41 n.50 (1985) (explaining the degree of despondency amongst residents of Skokie, Illinois, when confronted with the possibility of having a Nazi demonstration along their village's streets).

<sup>167</sup> See Lawrence, *supra* note 7, at 467–68 ("The American marketplace of ideas was founded with the idea of the racial inferiority of non-whites as one of its chief commodities, and ever since the market opened, racism has remained its most active item in trade.").

<sup>168</sup> This is especially true since almost any form of speech with a controversial message can cause some degree of emotional distress, but should still be entitled to First Amendment protection. See, e.g., *Hustler Magazine v. Falwell*, 485 U.S. 46, 53 (1988) ("[T]he law does not regard the intent to inflict emotional distress . . . [with] much solicitude . . . . But in the world of debate about public affairs, many things done with motives that are less than admirable are protected by the First Amendment.").

<sup>169</sup> See 505 U.S. 377 (1992).

framed the issue as racists being regulated differently from non-racists.<sup>170</sup> Arguably, if the emotional distress theory legitimated broad speech regulation, it would result in the fundamental alteration of content neutrality.<sup>171</sup> Consequently, such arguments for broad speech regulation are unlikely to withstand judicial scrutiny.

Yet the arguments for antilocution regulation based on emotional distress have some merit. Minority students can be deterred by the prospect of harassment from actively engaging, or participating at all, in a hostile academic environment.<sup>172</sup> This is similar to the experience of harassed employees in a hostile work environment.<sup>173</sup> Just as it is too severe under Title VII to force an employee to choose between leaving his job and escaping harassment, it is too severe to force a student to choose between pursuing an education and escaping from a home permeated with intimidation and enmity. The key to understanding this aspect of the emotional distress argument is the connection between the prohibition of the severe consequences of being exiled, which has already been accepted as intolerable in the employment context, and the confining realm of higher education. This point was argued in *UWM*, but it failed because the university relied solely on Title VII (which only applies to workplaces),<sup>174</sup> rather than basing its defense on either Title VI or Title IX—both of which tie obligations of equal access and participation to the conditional acceptance of federal funds.<sup>175</sup>

Thus, an argument connecting speech regulation to a university's obligation of equal treatment, especially in light of *Grutter v. Bollinger*,<sup>176</sup> will have a much greater likelihood of success. Although speech policies based on the emotional distress model arguably reflect a sufficiently compelling state interest,<sup>177</sup> they must also be narrowly tailored to be constitutionally

<sup>170</sup> See *id.* at 391–92.

<sup>171</sup> It should be noted, though, that this suggestion has been made seriously before. See Steven J. Heyman, *Spheres of Autonomy: Reforming the Content Neutrality Doctrine in First Amendment Jurisprudence*, 10 WM. & MARY BILL RTS. J. 647 (2002).

<sup>172</sup> See Matsuda, *supra* note 166, at 2338 (“However irrational racist speech may be, it hits right at the emotional place where we feel the most pain. The aloneness comes not only from the hate message itself, but also from the government response of tolerance.”).

<sup>173</sup> See *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993).

<sup>174</sup> See *UWM Post, Inc. v. Bd. of Regents of Univ. of Wis. Sys.*, 774 F. Supp. 1163, 1177 (E.D. Wis. 1991).

<sup>175</sup> See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 284–87 (1978).

<sup>176</sup> See 539 U.S. 306, 334 (2003) (holding that that the University of Michigan Law School had a compelling interest in obtaining a diverse student body, and that the admissions process tailored to that interest did not violate the Equal Protection Clause). A similar argument has been made before in an attempt to harmonize the compelling state interests in affirmative action with campus antilocution policies. See Alice K. Ma, Comment, *Campus Hate Speech Codes: Affirmative Action in the Allocation of Speech Rights*, 83 CAL. L. REV. 693 (1995).

<sup>177</sup> This argument necessarily assumes that *Grutter* will not be overturned. But given the Court's relatively recent changes in personnel, that assumption could easily be proven false. See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2753–54 (2007) (noting that the principle of *Grutter* involved “considerations unique to institutions of higher education”).

sufficient.<sup>178</sup> This is especially true because, in the university setting, there is a strong countervailing interest in allowing for rigorous and open debate.<sup>179</sup> Therefore, judges will likely view as especially troublesome suggestions that the speech of the entire campus—including, for example, the classrooms—should be regulated.<sup>180</sup> Even if the university's commitment to equal treatment is considered a compelling state interest, the broader the speech regulation's span, the greater the likelihood that protected speech will be unconstitutionally chilled.<sup>181</sup>

When considering the entire campus, the court's analysis in *UWM* seems sound in its conclusion that the campus environment is distinctly different from that of the workplace.<sup>182</sup> While it might be difficult to leave one's job and thereby escape harassment in the workplace, it is not as difficult to walk away from harassment on a large university campus.<sup>183</sup> Accordingly, emotional distress arguments for speech regulations that are limited to locations on campus where the students must remain for a certain period of time, such as their dormitories, are far more appropriate than those for any campus-wide speech policy. This is especially true when one examines the limited places of retreat that students have upon reaching their campus homes. For some students, there might be nowhere else on campus to live. Given that students need a place to live in order to have access to an education, a narrowly tailored policy protecting students' campus homes from antilocution would seem justified in light of the similarities of Title VII to the other civil rights statutes, including Titles VI and IX. Articulating this as the basis for dormitory harassment policies would increase the likelihood of a court finding these regulations to be constitutional, overcoming the narrower reasoning taken by the court in *UWM*.<sup>184</sup>

Titles VI and IX oblige universities to create an open and inviting environment for students of all backgrounds. Indeed, universities could be held liable to students for neglecting to address these concerns or for being deliberately indifferent to student harassment. For instance, Title VI has been interpreted to prohibit a university's intentional indifference to student-on-

<sup>178</sup> For an early example of the strict scrutiny test, see *Braunfeld v. Brown*, 366 U.S. 599 (1961).

<sup>179</sup> See *supra* notes 53–54 and accompanying text.

<sup>180</sup> Perhaps this is why the courts have not been persuaded by arguments analogizing the concept of a hostile academic environment to Title VII's concept of a hostile work environment. See *UWM Post, Inc. v. Bd. of Regents of Univ. of Wis. Sys.*, 774 F. Supp. 1163, 1177 (E.D. Wis. 1991).

<sup>181</sup> This was essentially the argument made by the plaintiff in *Doe v. University of Michigan*. See 721 F. Supp. 852, 864 (E.D. Mich. 1989); *supra* notes 87–89 and accompanying text.

<sup>182</sup> See *UWM*, 774 F. Supp. at 1177.

<sup>183</sup> Although it is true that students can be followed by other students from one campus location to another, see *Grey*, *supra* note 61, at 489, the possibility of escape is much greater in a large area than in the close confines of one's dormitory residence.

<sup>184</sup> See *UWM*, 774 F. Supp. at 1177. Although it will certainly be argued that students do not have to live on campus, that is often the only option that students of limited means can afford, especially if they are out-of-state students.

student racial harassment.<sup>185</sup> In *Bryant v. Independent School District*, students who were suspended from their high school following a fight claimed, among other things, that the school district created a racially hostile educational environment when it failed to prevent other students' racially offensive slurs and display of offensive symbols.<sup>186</sup> School administrators had been aware that students at the high school made racial slurs, inscribed graffiti in school furniture, placed offensive notes in students' lockers, and wore T-shirts that featured swastikas, Ku Klux Klan symbols, and hangman nooses.<sup>187</sup> Because this type of environment might deter equal participation in a federally funded program, the Tenth Circuit held that school administrators could be liable to the students under Title VI for failing to provide a nondiscriminatory educational environment for their students.<sup>188</sup>

Similarly, Title IX prohibits school administrators' deliberate indifference to student-on-student sex discrimination.<sup>189</sup> The recent case of *Williams v. Board of Regents of the University System of Georgia* involved the gang rape of a female student by male student athletes in her dormitory and the subsequent harassment of the assaulted student by one of her assailants over the phone.<sup>190</sup> Applying a prior Supreme Court precedent concerning sexual harassment in a grammar school,<sup>191</sup> the Eleventh Circuit held that a cause of action exists under Title IX when school officials are deliberately indifferent to the potential for student-on-student sexual harassment that would effectively bar the student equal access to an educational opportunity or benefit.<sup>192</sup> Thus, that discriminatory acts might bar access to educational opportunities because they are so traumatic that students withdraw has already been recognized as a very real threat.<sup>193</sup>

Likewise, some circuits have even been willing to extend the Equal Protection Clause to prohibit a school's willful indifference to student sexual harassment based on sexual orientation.<sup>194</sup> After a school district failed

<sup>185</sup> See *Bryant v. Indep. Sch. Dist. No. I-38 of Garvin County, Okla.*, 334 F.3d 928 (10th Cir. 2003).

<sup>186</sup> *Id.* at 929.

<sup>187</sup> *Id.* at 932.

<sup>188</sup> *Id.* at 932–34.

<sup>189</sup> See, e.g., *Williams v. Bd. of Regents of Univ. Sys. of Ga.*, 477 F.3d 1282 (11th Cir. 2007); see also Courtney G. Joslin, *Recognizing a Cause of Action Under Title IX for Student-Student Sexual Harassment*, 34 HARV. C.R.-C.L. L. REV. 201, 236–43 (1999) (concluding that there should be a cause of action under Title IX for student-on-student sexual harassment).

<sup>190</sup> 477 F.3d at 1288–89.

<sup>191</sup> See *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629 (1999).

<sup>192</sup> See *Williams*, 477 F.3d at 1293–99.

<sup>193</sup> See *id.* at 1298–99 (“Although [the university] neither formally forced Williams to leave nor banned her from returning, the discrimination . . . they allowed to occur on campus caused Williams to withdraw and not return. . . . Considering these circumstances, we conclude that Williams has alleged sufficient facts at this stage to show that the alleged discrimination ‘effectively bar[red] [her] access to an educational opportunity or benefit,’ namely pursuing an education at [the university].”).

<sup>194</sup> See *Nabozny v. Podlesny*, 92 F.3d 446 (7th Cir. 1996); see also *Flores v. Morgan Hill Unified Sch. Dist.*, 324 F.3d 1130 (9th Cir. 2003).

to take adequate disciplinary action when students made anti-gay remarks to a homosexual student, a court found that indifference to such harassment by the school district could violate the requirements of equal protection.<sup>195</sup> Indeed, the harassment was so injurious to the student in question that he repeatedly attempted suicide and eventually withdrew from the county's public high school.<sup>196</sup> The court consequently held that the school officials' indifference to the plaintiff's abuse was so severe that his rights to equal protection had effectively been violated.<sup>197</sup>

These interpretations are analogous to the interpretations of Title VII in the context of a hostile work environment.<sup>198</sup> In a confined domain, harassment could easily become so severe that part of a university's campus could be viewed as a "hostile academic environment" for certain students. Due to the indifference of school officials in *Bryant*, *Williams*, and *Nabozny*, the victimized students were faced with a choice between repeated harassment and departure from school. This dilemma is even more pressing in the cabined setting of a dormitory.<sup>199</sup> Because living together constitutes a more intimate setting than simply working together, the need for antiharassment policies in the dormitory is vital, or at least as justifiable as in the workplace.<sup>200</sup> From this perspective, it is easy to see why many colleges have at least retained their dormitory antilocution policies.<sup>201</sup>

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<sup>195</sup> See *Nabozny*, 92 F.3d at 460.

<sup>196</sup> *Id.* at 452. Such extreme repercussions seem to call out for the school to take some action. Cf. ANDREW KOPPELMAN, *ANTIDISCRIMINATION LAW & SOCIAL EQUALITY* 254 (1996) ("A school that tolerates such effects is not providing [an] equal educational opportunity . . .").

<sup>197</sup> *Nabozny*, 92 F.3d at 454–56. For a broader analysis of the case, see Alycia N. Broz, Note, *Nabozny v. Podlesny: A Teenager's Struggle to End Anti-Gay Violence in Public Schools*, 92 NW. U. L. REV. 750 (1998).

<sup>198</sup> See *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993).

<sup>199</sup> One experience described by Justice Thomas illustrates the harsh consequences that can occur when a minority student is faced with this Hobson's choice:

The nail in the coffin of my vocation was in the spring of 1968 when Dr. King was assassinated. I was going back into the dorm, to my dormitory and someone said in front of me when we heard that Dr. King had been assassinated. He said, "Well, that's good. That's, I hope the SOB dies." And that was it. That was the end of seminary. That was the end . . . .

. . . . I had to go back home. That's the hard part. And tell [my grandfather]. You know, I had made my promise I wouldn't quit. So, I told him. And he immediately kicked me out of the house.

60 Minutes: *The Private Clarence Thomas* (CBS television broadcast Sept. 30, 2007), transcript available at [http://www.cbsnews.com/stories/2007/09/27/60minutes/main3305443\\_page4.shtml](http://www.cbsnews.com/stories/2007/09/27/60minutes/main3305443_page4.shtml).

<sup>200</sup> See Jon Gould, *Title IX in the Classroom: Academic Freedom and the Power to Harass*, 6 DUKE J. GENDER L. & POL'Y 61, 78 (1999) ("If we move out of the classroom and into the dormitories, civility constraints are even more important. A student's dorm room is her home on campus, and the added privacy she deserves there includes protection against uninvited and offensive harassment.").

<sup>201</sup> *Id.*; cf. Gould, *supra* note 52, at 367 ("At . . . [an] other institution, administrators proposed a new speech policy designating zones about campus in which different standards for speech applied. For example, free speech would reign in the student commons, but greater restrictions would be allowed in residence halls.").

After reviewing the breadth of the speech policies that have been struck down by courts, it becomes understandable that courts have held unconstitutional policies based on the nondiscrimination, emotional distress, and fighting words approaches. The courts are more troubled by the breadth of the specific regulations than by the concept of antilocution regulation on campus per se. University officials should note that the narrower the application of the speech policy, and the greater the chance that discriminatory speech could be taken as a form of intimidation,<sup>202</sup> the greater the probability there is for success in court.<sup>203</sup> If a speech regulation applied only in the most sensitive campus environments, and was narrowly tailored to protect students rather than to take sides in a debate involving protected speech, it would likely comply with the requirements of the First Amendment.<sup>204</sup> The residence halls of students—as the primary place for privacy and reflection—should be considered enough of a last refuge of personal significance for students that university harassment policies specifically protecting them are constitutionally permissible.

### B. *Understanding the Special Nature of the Home*

Viewed through this lens, dormitories, as the primary domiciles of students during the academic year, can be analogized to student apartments.<sup>205</sup> This view of dormitories as homes would emphasize the students' signifi-

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<sup>202</sup> See *Virginia v. Black*, 538 U.S. 343, 359–60 (2003) (holding that a state may ban threats intended to intimidate); see also *id.* at 367 (plurality opinion).

<sup>203</sup> Assuming, of course, that universities are serious about maintaining and enforcing such policies. There is some suggestion that administrators retain speech regulations for students only as a means of “keeping up” with the rest of the academy. See Gould, *supra* note 52, at 372.

<sup>204</sup> For a good example of a regulation designed to protect particularly sensitive persons, see *Hill v. Colorado*, 530 U.S. 703, 716 (2000). Justice Stevens’s opinion for the Court explicitly relied on this reasoning:

The right to free speech, of course, includes the right to attempt to persuade others to change their views, and may not be curtailed simply because the speaker’s message may be offensive to his audience. But the protection afforded to offensive messages does not always embrace offensive speech that is so intrusive that the unwilling audience cannot avoid it. Indeed, “[i]t may not be the content of the speech, as much as the deliberate ‘verbal or visual assault,’ that justifies proscription.”

*Id.* (alteration in original) (citations omitted) (quoting *Erznoznik v. Jacksonville*, 422 U.S. 205, 210–11 n.6 (1975)) (citing *Frisby v. Schultz*, 487 U.S. 474, 487 (1988)).

<sup>205</sup> See, e.g., Arthur L. Coleman & Jonathan R. Alger, *Beyond Speech Codes: Harmonizing Rights of Free Speech and Freedom from Discrimination on University Campuses*, 23 J.C. & U.L. 91, 121 (1996). In providing examples where colleges’ antilocution regulation would be useful and necessary, Coleman and Alger explain how

college dormitories are essentially the temporary private residences of individuals within the microcosm of a society that is a higher education institution. Thus, the educational benefits in this context must by necessity include the benefits typically associated with living in one’s own home, including privacy, personal security and safety. Conduct within this realm of interaction must be regulated to the extent necessary to protect these interests.

*Id.*

cant rights of privacy therein.<sup>206</sup> First Amendment scholar Zechariah Chafee described this significance when he wrote that “home is one place where a man ought to be able to shut himself up in his own ideas if he desires. There he should be free not only from unreasonable searches and seizures but also from hearing uninvited strangers expound distasteful doctrines.”<sup>207</sup> With the ample case law that supports this principle,<sup>208</sup> the regulations against antilocution in student dormitories represent more of an effort to protect the school’s tenants than an official suppression of unpopular viewpoints. From this perspective, the privacy rights of the tenants—the students—should outweigh the free speech rights of others to harass students from their doorsteps.<sup>209</sup>

The Court in *Carey v. Brown* addressed this type of dilemma after a civil rights group was arrested for peacefully protesting in front of the mayor’s home.<sup>210</sup> The group argued that the statute, which prohibited residential picketing for everything except employment matters, was discriminatory. The law, they argued, discriminated against lawful and unlawful conduct based on nothing more than the content of the demonstrator’s message.<sup>211</sup> In fact, however, “the statute did no such thing.”<sup>212</sup> Nevertheless,

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<sup>206</sup> Indeed, the proverbial expression that a “man’s home is his castle” turns out to be moderately true in Anglo-American law. It is certainly true for purposes of the Fourth Amendment’s protection against unreasonable searches and seizures. *See, e.g.,* *Kyllo v. United States*, 533 U.S. 27 (2001) (holding that the use of thermal imaging devices from a public vantage point to monitor the interior of the home is a “search” under the Fourth Amendment). This principle has also been included within the substantive right of privacy. *See* *FCC v. Pacifica Found.*, 438 U.S. 726, 748 (1978) (“[I]n the privacy of the home . . . the individual’s right to be left alone plainly outweighs the First Amendment rights of an intruder.”); *Rowan v. U.S. Post Office Dep’t*, 397 U.S. 728, 738 (1970) (ruling that a householder could require a mailer to remove his name from mailing lists and stop future mailings to him); *Kovacs v. Cooper*, 336 U.S. 77, 86–87 (1949) (regarding sound trucks near homes, the Court insisted that it “never intimated that the visitor could insert a foot in the door and insist on a hearing”); *see also* Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 220 (1890) (“The common law has always recognized a man’s house as his castle, impregnable, often even to its own officers engaged in the execution of its commands.”).

<sup>207</sup> ZECHARIAH CHAFEE, *FREE SPEECH IN THE UNITED STATES* 406 (1954).

<sup>208</sup> This principle is even mentioned in decisions that have invalidated complete bans on expressive activity in residential areas. *See, e.g.,* *Martin v. City of Struthers*, 319 U.S. 141, 151 (1943) (Murphy, J., concurring) (striking down a door-to-door solicitation ban, Justice Murphy pointed to the predicament of “protect[ing] the privacy and safety of the home and yet preserv[ing] the substance of religious freedom”); *Schneider v. State*, 308 U.S. 147, 162–63 (1939) (speaking of a right to dispense handbills only “to one willing to receive it”); *City of Wauwatosa v. King*, 182 N.W.2d 530, 537 (Wis. 1971) (“Home is where . . . both husband and wife come, after the day’s work, to relax and put aside the cares of the outside world. . . . [It is] not just a house and shelter, but an opportunity to rest, relax and recharge batteries for the morrow.”); *Boffard v. Barnes*, 248 N.J. Super. 501, 591 A.2d 699 (Ch. Div. 1991) (issuing an injunction prohibiting anti-abortion protestors from picketing within 200 feet from a physician’s residential cul-de-sac); *Klebanoff v. McMonagle*, 552 A.2d 677, 681–82 (Pa. Super. Ct. 1989) (same).

<sup>209</sup> *See* SMOLLA, *supra* note 164, at § 17:27.

<sup>210</sup> 447 U.S. 455 (1980).

<sup>211</sup> *Id.* at 458.

the Court held that the law was not content-neutral, and that government may not grant the use of a forum to people whose views it finds acceptable but deny the use of that forum to those wishing to express less favorable messages.<sup>213</sup>

By 1988, the Court distanced itself somewhat from *Carey* with its opinion in *Frisby v. Schultz*.<sup>214</sup> Like *Carey*, the case involved picketers on a public street. Unlike *Carey*, however, *Frisby* involved protestors outside the residence of a doctor who performed abortions.<sup>215</sup> When the town board enacted an antipicketing ordinance that made it illegal to picket “before or about” any individual’s residence, the defendants quickly filed suit for injunctive relief.<sup>216</sup> Although the Court recognized that streets and sidewalks were considered public fora, it found a legitimate state interest in protecting the unwilling home listener from picketing on the sidewalk.<sup>217</sup> Citing then-Justice Rehnquist’s dissent in *Carey*, the Court emphasized the central premise behind the argument for antilocution regulation in dormitories: “The First Amendment permits the . . . prohibit[ion of] offensive speech as intrusive when the ‘captive’ audience cannot avoid the objectionable speech. The target of the focused picketing banned by the . . . ordinance is just such a ‘captive.’ The resident is figuratively, and perhaps literally, trapped within the home.”<sup>218</sup>

The different outcomes in these two cases present the fundamental dilemma for speech regulation in dormitories. On the one hand lies the concern for free speech rights. On the other hand lies the concern for the privacy rights of the home. *Frisby* indicates, however, that narrow legislation designed to curb intrusive speech upon the unwilling listener will not receive the same degree of First Amendment protection that *Carey* provided. Simply put, *Frisby* stands for the proposition that even in a public forum, targeted harassment of residents in their homes can be prohibited.<sup>219</sup> Were this principle adapted to the nonpublic fora of student residence halls,

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<sup>212</sup> LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-3, at 802 (2d ed. 1988). Professor Tribe’s characterization relies on the fact that the legislature intended that “the statute not be used to muzzle labor unions” and that the regulation was “aimed not at content, but rather at the character of the residence sought to be picketed.” *Id.* at 803 (citations omitted). In his opinion, “[a]ll picketing, both labor and nonlabor, was allowed at [the exempted categories of] residences used as places of business or of public assembly. The majority’s [reasoning] . . . was thus inexact at best.” *Id.*

<sup>213</sup> See *Carey*, 447 U.S. at 461–63 (citing *Police Dep’t of Chi. v. Mosley*, 408 U.S. 92, 95–96 (1972)).

<sup>214</sup> See *Frisby v. Schultz*, 487 U.S. 474, 487 (1988). It should be noted that the ban in *Frisby* was characterized as content-neutral by the majority. *Id.* at 488.

<sup>215</sup> *Id.* at 476.

<sup>216</sup> *Id.* at 476–77.

<sup>217</sup> *Id.* at 486–88.

<sup>218</sup> *Id.* at 487 (citations omitted).

<sup>219</sup> *Id.*

concerns for the privacy rights of student tenants could make dormitory anti-harassment policies permissible.<sup>220</sup>

### III. HOW PUBLIC FORUM DOCTRINE COULD ALLOW UNIVERSITIES TO HAVE HARASSMENT POLICIES IN THEIR RESIDENCE HALLS

Because of the importance of content neutrality in speech regulations implicating public fora,<sup>221</sup> it is important to establish whether a dormitory is a nonpublic forum at all. This distinction is significant because speech regulations for nonpublic fora do not have to be content neutral as they did in *Carey*, so specific types of content can be regulated. But even the regulation of speech in nonpublic fora must be viewpoint neutral; policymakers may not favor one side of a debate over others.<sup>222</sup>

#### A. *Why University Dormitories Should Be Considered Nonpublic Fora*

Generally speaking, when public property is neither traditionally considered a public forum for expressive activities, nor designated or used as such, that property will be classified as a nonpublic forum.<sup>223</sup> For example,

<sup>220</sup> While it certainly can be argued that dormitory residents are more akin to urban apartment dwellers living in close proximity to their fellow residents or to the town hall, targeted harassment is the greater concern for most university administrators in designing residence hall antilocution policies. It is undeniable that a great deal of debate and protest occur on college campuses every day, but targeted harassment is something much more threatening and disturbing. See *supra* notes 23–26 and accompanying text.

<sup>221</sup> See *Carey v. Brown*, 447 U.S. 455, 463 (1980).

<sup>222</sup> Some commentators, however, have gone so far as to suggest that content discrimination itself is a form of viewpoint discrimination. For example, if there is a general prohibition on religious speech, that regulation will inevitably favor the secular viewpoint over the religious. See, e.g., Martin H. Redish, *The Content Distinction in First Amendment Analysis*, 34 STAN. L. REV. 113 (1981). Professor Redish concludes that “[w]hile governmental attempts to regulate the content of expression undoubtedly deserve strict judicial review, it does not logically follow that equally serious threats to [F]irst [A]mendment freedoms cannot derive from restrictions imposed to regulate expression in a manner unrelated to content.” *Id.* at 150. Consequently, Professor Redish argues that “[w]hatever rationale one adopts for the constitutional protection of speech, the goals behind that rationale are undermined by any limitation on expression, content-based or not.” *Id.* at 128.

<sup>223</sup> See *Int’l Soc’y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 680 (1992). But see *Gilles v. Blanchard*, 477 F.3d 466, 473–74 (7th Cir. 2007), *cert. denied*, 128 S. Ct. 127 (2007) (eschewing public forum analysis for a university’s barring of an uninvited evangelist from using the college’s lawn as his personal soapbox, yet concluding that uninvited speakers do not have a free speech right to use university property in this manner). Assessing the plaintiff’s argument, Judge Posner nevertheless emphasized the context of the university’s facilities:

He wants to turn the lawn into an American version of Speakers’ Corner in London’s Hyde Park, where anyone can speak on any subject other than the Royal family or the overthrow of the British government. The limits that Vincennes University has placed on the use of the library lawn are consistent with limiting university facilities to activities that further the interests of the university community. The limits are constitutional.

*Id.* at 473. Interestingly, the plaintiff in *Gilles*, an evangelist known as Brother Jim, has made quite a habit of challenging speech regulations at “dozens of college campuses.” Elizabeth F. Farrell, *University Did Not Place Undue Burden on Evangelist, Court Says in Preliminary Ruling*, CHRON. HIGHER

in a relatively recent public forum case, the Supreme Court determined that walkways in a public airport terminal were nonpublic fora because they had neither been traditionally used as places for public expression, nor intentionally opened for such communicative purposes.<sup>224</sup>

The overarching concept behind the public forum doctrine is that for certain publicly owned properties—those never intended to be used for general communication or expression—there should be no governmental requirement to allow members of the public to use them for their own individual communicative purposes.<sup>225</sup> The doctrine allows the government to use this kind of property to accomplish its designated purpose, rather than to permit completely open speech—which could disrupt the property’s primary function. This idea makes sense when one considers that where (and implicitly how) speech occurs can determine whether that speech is protected.<sup>226</sup>

Because of the romanticized view of universities as places of learning, political debate, and personal growth,<sup>227</sup> however, some have argued that the costs of restricting speech on campuses are too great not to consider the entire university campus a public forum.<sup>228</sup> Practical realities of college campuses nevertheless seem to support the conclusion that different areas or buildings on college campuses have different statuses—public fora, limited public fora, or nonpublic fora—and therefore the university will have different degrees of control over speech depending on the status of that fora.<sup>229</sup> The Supreme Court recently applied a similar principle in *Morse v. Frederick* to restrict pro-drug speech by public school students where such a mes-

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EDUC., July 20, 2007, at A25; see also Rhiannon Weber, *Evangelist Expresses Religious Views*, TECH TALK, Dec. 11, 2003, at 8, available at [http://www.latech.edu/techtalk/archives/12\\_11\\_03/current/evangelist.php](http://www.latech.edu/techtalk/archives/12_11_03/current/evangelist.php) (“Gilles has been arrested more than forty times in the last seventeen years . . . Gilles claim[s] he used to be a sinner but ha[s] been saved and was sent to pass judgment on others. His ‘judgment’ include[s] condemning Jews, Catholics, Muslims and rock ‘n’ roll fans . . .”).

<sup>224</sup> See *Krishna Consciousness*, 505 U.S. at 680.

<sup>225</sup> See Harry Kalven Jr., *The Concept of the Public Forum: Cox v. Louisiana*, 1965 SUP. CT. REV. 1 (suggesting that the degree of allowable individual freedom to speak can reasonably be modified to fit the context of the forum).

<sup>226</sup> For example, the plurality in *Virginia v. Black* struck down the law in question because of its provision mandating that cross burning of any kind could be used as prima facie evidence of intent. See 538 U.S. 343, 367 (2003) (plurality opinion). This was probably out of a concern for drawing such an important conclusion without even looking at the intended message or addressees beforehand. Indeed, without looking at the surrounding context of the expression, speech could lose much, if not all, of its intended meaning. Take, for instance, the burning of the American Flag out of respect compared to its usage in political protest. See *Texas v. Johnson*, 491 U.S. 397 (1989).

<sup>227</sup> See *supra* notes 53–54 and accompanying text.

<sup>228</sup> See, e.g., Juliane N. McDonald, Note, *Brister v. Faulkner and the Clash of Free Speech and Good Order on the College Campus*, 28 J.C. & U.L. 467, 491–93 (2002).

<sup>229</sup> See, e.g., *Ala. Student Party v. Student Gov’t Ass’n*, 867 F.2d 1344, 1354 n.6 (11th Cir. 1989) (Tjoflat, J., dissenting) (“Some places on campus, such as the administration building or the president’s office, are not opened as fora, for use by the student body, and may be best described as nonpublic fora.”).

sage was in direct conflict with the government building's purposes.<sup>230</sup> Under similar reasoning, a university can restrict antilocution in certain spaces on campus where such behavior is in direct conflict with that building's purpose. Given the special nature and purpose of dormitories, they should be understood as distinct from the open spaces on campus for purposes of protest and debate.<sup>231</sup>

Factual distinctions between residence halls and the rest of the campus offer further indication that residence halls differ from other campus buildings. For instance, most college dormitories are not open to the public at large, but rather are secured by the use of resident students' keys. This, combined with the imposed quiet hours for studying, makes such residence halls seem more like government-run apartments with strict landlords than anything else; these distinctions would lead courts to conclude that the non-public fora label is appropriate. Indeed, in *Chapman v. Thomas* the Fourth Circuit combined these facts with the nature of college dormitories as places to live and work, rather than places to express or campaign; the court thus concluded that college dormitories have not traditionally been used as places for public expression and should be considered nonpublic fora accordingly.<sup>232</sup>

In *Chapman*, North Carolina State University amended its door-to-door ban on dormitory solicitation to allow student government candidates to campaign for a two-week period.<sup>233</sup> A student who was denied the right to solicit for religious purposes challenged the selectivity of the newly created policy as violating his First Amendment rights. The Fourth Circuit concluded that given the nature and purpose of college dormitories, they should be considered nonpublic fora: "The public property at issue here, residential areas of dormitories located on the campus of a state institution of higher learning, which has not by tradition or designation ever constituted a public forum for communicative purposes[,] must be placed in the category of nonpublic forums."<sup>234</sup>

Furthermore, because courts "will not find that a public forum has been created in the face of clear evidence of a contrary intent, nor . . . infer that

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<sup>230</sup> See 127 S. Ct. 2618, 2629 (2007) ("The 'special characteristics of the school environment' . . . allow schools to restrict student expression that they reasonably regard as promoting illegal drug use." (emphasis added) (citation omitted)); *id.* at 2631 n.2 (Thomas, J., concurring) (highlighting that "[e]ven at the college level, strict obedience was required of students: 'The English model fostered absolute institutional control of students by faculty both inside and outside the classroom'" (quoting Brian Jackson, Note, *The Lingering Legacy of In Loco Parentis: An Historical Survey and Proposal for Reform*, 44 VAND. L. REV. 1135, 1140 (1991))).

<sup>231</sup> See Rodney A. Smolla, *Academic Freedom, Hate Speech, and the Idea of a University*, LAW & CONTEMP. PROBS., Summer 1990, at 195, 218 (1990) ("The soundest view is to treat the campus . . . as subdivided into multiple forums to which differing free speech standards apply.").

<sup>232</sup> See *Chapman v. Thomas*, 743 F.2d 1056, 1059 (4th Cir. 1984).

<sup>233</sup> *Id.* at 1057.

<sup>234</sup> *Id.* at 1059.

the government intended to create a public forum when the nature of the property is inconsistent with expressive activity,<sup>235</sup> most college dormitories should be considered nonpublic fora. The court upheld the selectivity of the policy at issue in *Chapman* because student government was a significant aspect of the university environment, and the court held that the narrow exception for student campaigns was designed to promote a significant interest without intending to suppress religious views.<sup>236</sup> Thus, much like the narrow exception for student campaigns on campus, as long as there is a significant interest in campus diversity,<sup>237</sup> antilocution policies directly promoting that interest should be allowable in such a nonpublic forum.

*Chapman*'s framework for the public forum analysis of dormitories explains why at least some dormitory speech regulation should be constitutional. But the court did not address the argument that dormitories are students' homes and are therefore entitled to some special protections. In students' homes, there is a heightened concern for the students' right to be left alone from much of the debate and protests that occur on the rest of campus. Had the Fourth Circuit included such an analysis in its opinion, the rationale for classifying dormitories as nonpublic fora would be even stronger.

*B. The Debate Over Speech Policies' Viewpoint Neutrality, and How to Get Around It*

Antilocution regulations arguably are not viewpoint neutral under *R.A.V. v. City of St. Paul*.<sup>238</sup> This is because universities could be viewed as favoring one side of the debate about diversity over others. In accordance with this reasoning,<sup>239</sup> the Supreme Court declared that its main concern was preventing the government from punishing expression due to its disapproval

<sup>235</sup> *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 803 (1985) (citations omitted).

<sup>236</sup> *See Chapman*, 743 F.2d at 1059. Indeed, the university's administrators might not have wanted the students to believe that any type of speech would be acceptable in dormitories, but felt that strictly political speech would not send this message. *Cf.* Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 *IND. L.J.* 1, 27–28 (1971) (“If the dialectical progression is not to become an analogical stampede, the protection of the [F]irst [A]mendment . . . must be cut off when it reaches the outer limits of political speech.”).

<sup>237</sup> *See Grutter v. Bollinger*, 539 U.S. 306, 343 (2003) (mentioning that this interest in diversity will gradually diminish in social value).

<sup>238</sup> 505 U.S. 377, 391 (1992).

<sup>239</sup> *See id.* at 391–92 (noting that, broadly interpreted, antilocution regulation might in all cases be unconstitutional if one always interprets such regulations as an attempt to quash disfavored social ideas). Writing for the Court, Justice Scalia observed:

One could hold up a sign saying, for example, that all ‘anti-Catholic bigots’ are misbegotten; but not that all ‘papists’ are, for that would insult and provoke violence ‘on the basis of religion.’ *St. Paul* has no such authority to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules.

*Id.*

of the sentiments expressed.<sup>240</sup> *R.A.V.*'s own language provides some leeway for the states to deal with the harmful "secondary effects" of prejudiced harassment:

[F]or example, sexually derogatory "fighting words," among other words, may produce a violation of Title VII's general prohibition against sexual discrimination in employment practices . . . . *Where the government does not target conduct on the basis of its expressive content, acts are not shielded from regulation merely because they express a discriminatory idea or philosophy.*<sup>241</sup>

Thus, although strong arguments can be made that dormitory speech policies are not viewpoint neutral (prohibiting only certain types of unprotected harassment) and therefore violative of the First Amendment under *R.A.V.* as well as the constitutional dictates for nonpublic fora,<sup>242</sup> the university's legitimate concern with maintaining a hospitable living environment for all of its students ensures that there is no "official suppression of ideas . . . afoot."<sup>243</sup>

Functionally, dormitory speech policies are minimal rules that are probably necessary to accomplish a university's affirmative action policies<sup>244</sup> or to comply with Titles VI<sup>245</sup> and IX.<sup>246</sup> Compliance with these goals and statutory mandates is independently valuable. And any university that seeks to increase its degree of diversity might reasonably fear that if such a hostile environment existed in students' living quarters, it might not be able to retain or attract minority students in the future. Having regulations to implement these goals also parallels Justice Scalia's own example from *R.A.V.* concerning workplace discrimination.<sup>247</sup> Therefore, because universities are more concerned with dealing with the potentially harmful "secondary effects"<sup>248</sup> of antilocution rather than with suppressing its actual content, the policies could be viewed as sufficiently viewpoint neutral.

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<sup>240</sup> *Id.* at 390 ("[T]o validate such selectivity . . . it may not even be necessary to identify any particular 'neutral' basis, so long as the nature of the content discrimination is such that there is no realistic possibility that official suppression of ideas is afoot.").

<sup>241</sup> *Id.* at 389–90 (emphasis added) (citations omitted).

<sup>242</sup> See *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985).

<sup>243</sup> *R.A.V.*, 505 U.S. at 390.

<sup>244</sup> See *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

<sup>245</sup> See *Bryant v. Indep. Sch. Dist. No. I-38 of Garvin County, Okla.*, 334 F.3d 928 (10th Cir. 2003).

<sup>246</sup> See *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629 (1999).

<sup>247</sup> See *R.A.V.*, 505 U.S. at 389–90.

<sup>248</sup> See GOULD, *supra* note 15, at 89 (writing that university administrators employ such regulations to minimize racial agitation on campus and send a "symbolic" message to retain and attract students from traditionally marginalized groups).

*C. Harassment Policies Are Reasonably Related to the Purposes of  
Residence Halls*

Furthermore, given the close proximity within which students must live inside residence halls, it is entirely reasonable for universities to place narrowly tailored restrictions on speech in the nonpublic fora of dormitories. The government is allowed to restrict speech within nonpublic fora as long as the restrictions are reasonably related to the purpose of the forum and are not an effort to suppress expression because of official opposition to that speaker's viewpoint.<sup>249</sup> Preventing harassment and a hostile academic environment in the dormitories is reasonably related to their general purpose—to provide a safe, comfortable, and conducive environment for students to live and study.

If residents of the dormitories do not feel safe or comfortable in their homes, they might not desire to live there any longer. Furthermore, recalling the concerns of North Carolina State University when it banned certain door-to-door solicitations, universities might want their students to have a peaceful and quiet dormitory, rather than one where a prejudiced hostile environment might be created.<sup>250</sup> In a dormitory, students must live very close to one another and often do not have a choice of which neighbors or even roommates they will have. Therefore, rules for dormitory life need to reflect the particularly valid concern that there must exist a certain degree of civility amongst neighbors for the dormitory to be a comfortable home for all its resident students.

And even though there is no requirement that a nonpublic forum must be in close proximity to a public forum, most areas of universities' campuses are dedicated to free debate and an open atmosphere for ideas. Presumably, these areas are therefore public fora,<sup>251</sup> and are also geographically large enough (and less intimate) to handle the espousal of potentially discriminatory or prejudiced viewpoints. But forcing isolated students to deal with such harassment in their own homes creates a psychologically intolerable situation. Consequently, rules designed to make this living situation as painless as possible are plainly "reasonable" for the purposes of the nonpublic dormitory forum.<sup>252</sup>

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<sup>249</sup> See *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 677–78 (1998) ("The government can restrict access to a nonpublic forum 'as long as the restrictions are reasonable and [are] not an effort to suppress expression merely because public officials oppose the speaker's view.'" (quoting *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 800 (1985))).

<sup>250</sup> See *Chapman v. Thomas*, 743 F.2d 1056, 1059 (4th Cir. 1984).

<sup>251</sup> See Derek P. Langhauser, *Free and Regulated Speech on Campus: Using Forum Analysis for Assessing Facility Use, Speech Zones, and Related Expressive Activity*, 31 J.C. & U.L. 481 (2005) (explaining the public forum analysis as it relates to university campuses and the recent rise of "free speech zones"); see also Thomas J. Davis, Note, *Assessing Constitutional Challenges to University Free Speech Zones Under Public Forum Doctrine*, 79 IND. L.J. 267 (2004) (evaluating the constitutionality of campus "free speech zones" under public forum analysis).

<sup>252</sup> See *Cornelius*, 473 U.S. at 803.

*D. How This Frame Solves the Deficiencies of Previous "Speech Codes"*

The true advantage of universities' abiding by public forum doctrine and limiting their regulations to dormitories is that it allows administrators as much legal flexibility as possible in their attempts to prevent harassment, while simultaneously confining that flexibility to the place where it can do the most good: the students' homes. In the context of student residences, it is unlikely that the objectivity problems of the discriminatory-harassment model will recur. An example of a constitutional policy construction that relies on this reasoning would be as follows:

Dormitory harassment that refers to another resident's race, ethnicity, national origin, religion, sex, sexual orientation, gender identity, marital status, veteran status, disability, age, or any other highly sensitive personal-identity characteristic known to threaten or intimidate, violates university policy. "Dormitory" is defined as a student's on-campus residence, but does not include the common areas, meeting rooms, or bulletin boards within each residence hall. "Harassment" is defined as behavior, including derogatory expression, that is intended to materially and substantially interfere with another student's physical or psychological welfare, educational advancement, or academic opportunities; is either threatening or intimidating; or is sufficiently severe or pervasive so as to create a hostile academic environment for its recipient.

Limiting this type of antilocution regulation to dormitories makes it more difficult for statements to be taken out of context, and consequently it is less likely that the policy will be vague or overbroad. While heated debates will certainly occur in the classroom, it is unlikely that the effects of such a debate in the dormitory could be easily misinterpreted if it is intended to harm another student's well-being.

This approach also addresses the serious consequences of emotional distress from antilocution by ensuring that students will have some island of tranquility for retreat. Although it will still be the case that these regulations will not cover most of the campus, this approach can at least provide some respite for students. Additionally, maintaining a safe place on campus for students will serve to insulate universities from much of their student-on-student liability under the Equal Protection Clause, Title VI, and Title IX.<sup>253</sup> This type of policy can likewise show, both to current and prospective students, that universities actually care about the degree of diversity and psychological well-being of their student bodies.

The final, most important aspect of this framework is that it can actually fit within modern constitutional doctrines. After *R.A.V.*, the fighting words approach is of little utility to college administrators who desire to enact antilocution policies. In view of the dilemma of either abandoning the effort to protect students' psyches, or continuing with an unconstitutional policy, this approach provides a useful alternative that is likely the best

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<sup>253</sup> See Joslin, *supra* note 189, at 243–44.

method for administrators to prevent many instances of campus harassment while remaining vigilant against violating the First Amendment.

#### CONCLUSION

Upon review of the relevant case law and background, there remain strong arguments for the constitutionality of a well-designed, dormitory-based antiharassment policy.<sup>254</sup> Indeed, it seems that the arguments previously rejected by courts can be strengthened the closer they come to affecting a student's living quarters. Simply put, if students are forced to live in an environment where they do not feel safe, or where they feel humiliated by regular harassment, the function of that site as a "home" is reduced to a nullity. Public forum analysis allows for speech policy defenders to refocus the debate on an area of campus where their chances of success are substantially increased.

The legal debate that began with *Doe* continues on,<sup>255</sup> with many trying to remove harassment policies from entire campuses.<sup>256</sup> But despite losses in court, the reality is that speech codes are not fading away. Once one acknowledges that harassing or intimidating speech can have a significant adverse impact on students, it becomes understandable that many universities try to have some policies in place for its deterrence. The public forum approach to designing a harassment policy gives administrators the amount of legal flexibility they need to maintain a policy that deters student-on-student discriminatory harassment. Simultaneously, the policy's limited application to the campus residence halls renders it narrowly tailored enough to be seen as a policy designed to protect students' personal integrity and privacy in their campus homes, rather than as an unconstitutional abridgement of the First Amendment. Courts will be more sympathetic to this approach than to any of the previous models for speech codes.

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<sup>254</sup> See SMOLLA, *supra* note 164, at § 17:27.

<sup>255</sup> See *Doe v. Univ. of Mich.*, 721 F. Supp. 852 (E.D. Mich 1989).

<sup>256</sup> See, e.g., *DeJohn v. Temple Univ.*, No. 06-778, 2006 WL 2623274, at \*8 (E.D. Pa. Sept. 11, 2006).