What Does the First Amendment Have to Say About 'Safe Spaces?'

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I. Introduction

The term 'safe-space' has garnered national media coverage for its divisive nature. Proponents of safe spaces cite the benefits of the psychological well-being for students belonging to marginalized communities, such as the LGBTQ community. However, critics argue that providing such spaces on college campuses is equivalent to coddling students, suppressing intellectual activity, and impinging on other students' right to free speech. But proponents and critics fail to consider that they may in fact be 'talking past one another.' Otherwise stated, the term safe space has no singular definition and had been used in a multitude of contexts. Thus, to engage in a productive and fruitful conversation regarding the intersection of safe spaces and First Amendment jurisprudence, it is first necessary to survey the contexts in which the term may be used.

This paper will proceed in three parts. First, I will survey the history of safe spaces. In this section I will note the evolution of the term from that of movement-building to academic theory. Second, I will survey the current First Amendment jurisprudence regarding freedom of speech in schools. In this section I will argue that the current standard has roots in the public forum doctrine and thus while the standard used has unique considerations, any attempt at regulation must also meet the requirements of the public forum doctrine. Moreover, in discussing the legal standard put forth, it is necessary to discuss the conception of hate speech and its relation to First Amendment jurisprudence. Lastly, I will put forth two conceptions of implementing safe spaces. The first I will argue is unconstitutional because it is overbroad in that it not only prohibits hate speech, but speech generally thought to cause emotional harm to LGBTQ individuals. The second conception I will argue does overcome the legal standard put

forth because while it emphasizes certain tenants of discussion, viewpoints themselves are not necessarily prohibited.

II. History of Safe Spaces

The conception of 'safe-spaces' is thought to derive from the 1970s LGBTQ movement. Originally, they were intended as spaces for members of the queer community to "be open about their respective identities with lower risk of negative societal or legal repercussions."[1] But this advocacy movement transitioned to the academy.[2] The primary motivation for the recent adoption of safe spaces on college campus is due to the "terrible rise" in homophobic rhetoric.[3] Proponents of safe spaces argue that speech codes are necessary to "protect students from these incidents."[4] However, there has been no singular unifying definition of the term. The term 'safe-space' has been used to include everything from movement-building to academic theory with each taking different forms.[5] Thus, conceptually speaking, the term 'safe space' is multi-faceted and prompts vast amounts of scholarship. While some have defined safe spaces to mean "places intended to be free of bias, conflict, criticism, or potentially threatening actions, ideas, or conversations,"[6] others use the term to mean "classrooms where students can speak freely without being afraid of their peers or their teacher."[7] But as Karin Flensner notes, there is an inherent tension in the idea of safe spaces, especially in light of First Amendment

[1] Diana Ali, *Safe Spaces and Brave Spaces: Historical Context and Recommendations for Student Affairs Professionals*, 2 RSCH. & POLICY INST. 3, 3-4 (2017).
[2] *Id*. at 4-5.
[3] Melanie A. Moore, *Free Speech on College Campuses: Protecting the First Amendment in the Marketplace of Ideas*, 96 W. VA. L. REV. 511, 514 (1993).
[4] *Id*.
[5] Ali, *supra* note 1, at 3.
[6] John L. Magistro, *First Amendment Law – Free Speech and Higher Education: Can Public Colleges and Universities Use "Safe Space" Policies to Restrict Speech on Campus?*, 41 W. NEW ENG. L. REV. 371, 373 (2019).
[7] Karin K. Flensner & Marie Von der Lippe, *Being Safe from What and Safe from Whom? A Critical Discussion of the Conceptual Metaphor of 'Safe Space'*, 30 INTERCULTURAL EDUC. 275, 276 (2019).

considerations.[8] For example, can safe spaces be open to include anti-LGBTQ discourse while at the same time be a safe place for everyone involved in the discussion? In the next section I will survey the First Amendment jurisprudence concerning freedom of speech in classrooms and conclude that: (1) freedom of speech doctrine for universities is akin to the public forum doctrine; and (2) with respect to all freedom of speech, hate speech is not included.

III. First Amendment Standard

The Court made clear in *Tinker v. Des Moines* that "neither students nor teachers shed such [First Amendment] rights at the schoolhouse gate."[9] It is the case that "vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools."[10] "By limiting the power of the States to interfere with freedom of speech . . . the Fourteenth Amendment protects all persons."[11] But in light of issuing these grandiose statements, the Court has never categorized colleges or universities as it has done with other forums (i.e. parks, sidewalks, airports, etc.). However, it is *likely* that colleges and universities would be subject to the 'public forum doctrine.'[12]

The first question in deciding whether public colleges and universities and should be considered a public forum is whether *the principal purpose is promoting the exchange of ideas and/or has been used for the purpose of expressive activity?* Though the doctrine has never been explicitly applied, the 'time, place, and manner' test that accompanies the doctrine is reflected in *Tinker*. There the Court stated, conduct by a student "whether is stems from time, place or type of behavior" that materially disrupts classwork, invades rights of other students, or causes

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[8] *Id*.
[9] Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 506 (1969).
[10] Shelton v. Tucker, 364 U.S. 479, 486 (1960).
[11] *Id*. at 487.
[12] *But see* Gail P. Sorenson, *The 'Public Forum Doctrine' and its Application in Schools and College Cases*, 20 J.L. & EDUC. 445 (1991).

substantial disorder, is not subject to constitutional protection.[13] But argued explicitly, one of the central purposes of public colleges and universities is to promote the exchange of ideas. Students are often times graded not only on their participation but assigned work that requires them to share their opinion. One example of 'promoting the exchange of ideas' is found within Boston University's School of Law Intellectual Statement. It emphasizes the importance on bringing "conversations related to race, gender, sexual orientation, and wealth inequality"[14] into the campus. Moreover, the Court has held that public colleges and universities may permissibly regulate the time, place, and manner of speech.[15] Thus, one can conclude that since public colleges and universities are designed to promote the exchange of ideas and have been subjected to the reasonable time, place and manner restriction, public colleges and universities fall under the public forum doctrine. This is an important designation because it acts as a guide to the public colleges and universities concerning their respective regulation of student speech. Thus, schools

But while public colleges and universities are likely to be subject to the public forum doctrine, there is something peculiar concerning schools in comparison to sidewalks or parks, as the *Tinker* Court noted.[16] Thus, a new standard must arise by which to judge the limitations of free speech within the 'schoolhouse' while also taking into account the public forum doctrine. Essentially, though students are not "confined to the expression of those sentiments that are officially approved,"[17] as "any word spoken . . . may start an argument or cause a disturbance,"[18]

[13] *Id*. at 513.
[14] *Intellectual Life*, BOSTON UNIVERSITY SCHOOL OF LAW, https://www.bu.edu/law/about/diversity/equity-justice-engagement/.
[15] *See* Widmar v. Vincent, 454 U.S. 263 (1981); Healy v. James, 408 U.S. 169 (1972).
[16] *Tinker*, 393 U.S. at 506 (writing "applied in light of the special characteristics of the school environment).
[17] *Id*. at 511.
[18] *Id*. at 508.

there must be some limitation on freedom of speech. The Court articulated that in order for school officials prohibit particular opinions, they must be able to demonstrate that the prohibition "was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany[ies] an unpopular viewpoint." However, while this would have provided a useful rule for public colleges and universities, the Court did not expound such sentiment as a rule. Rather, such statement is merely categorized as dicta. Thus, the question remains as to the standard governing freedom of speech in public colleges and universities. Arguably, the rule would mirror that of the public forum doctrine while also incorporating the sentiment expressed in Tinker. The rule would look something like the following: *public colleges and universities may enforce reasonable time, place, and manner restrictions but only if such restrictions are (1) content-neutral; (2) narrowly tailored to serve a significant interest; (3) leave open ample alterative channels of communication; (4) and are enacted by something more than avoiding unpleasant and discomforting conversations*. But this rule then raises the question – if we are to simultaneously protect LGBTQ individuals from harms they may experience on campus, then are certain types of speech always prohibited and not unconstitutional to prohibit?

First, it is imperative to draw a distinction between speech that carries with it unpopular sentiments and hate speech.[19] Arguably, hate speech, as distinct from speech that may carry unpopular sentiments, has the following characteristics: (1) it targets a group or individual as a member of a group; (2) it has content in the message that expresses hatred; (3) the speaker

[19] This can be demonstrated using the phrase "marriage is between a man and a woman." This phrase used in a classroom discussion might make homosexuals feel uncomfortable, however, it was not directed at a particular individual. Nor does the message itself necessarily target any group or member of a group. Instead, it expresses a belief. This is different than if an individual were to call someone a fag in the middle of a classroom discussion. Furthermore, the distinction is necessary because while the prior may warrant constitutional protection, the latter does not.

intended harm; and (4) the speech has no redeeming purpose for discussion.[20] Furthermore, it is critical the context play a role in defining hate speech. Two examples prove illustrative of this point.

1. Students of a religion and sexuality class had to read material on marriage. The teacher walks into the classroom as writes "God hates fags" on the board. The teacher then asks the students, "do you think the Westboro are right in saying God meant this in Leviticus 18:22 and 20:13?"
2. Students of a religion and sexuality class had to read material on marriage. The teacher walks into the classroom as writes "God hates fags" on the board. The teacher then points at the transgender student and states "Do you see this? Underline it."

At first glance there seems to be a difference between the two scenarios. Although the word 'fag' has a negative connotation and is often used as an insult, such is not always the case. In the first scenario while the word 'fag' does target a group of individuals and the content of the message on the board does express some degree of hate, arguably the teacher did not intend to harm her students. Furthermore, she is using the statement to facilitate a discussion surrounding the intersection of extremist interpretation and modern sentiments. However, in the second scenario it becomes unclear if the teacher meant harm by singling out the transgendered student to underline the expression for their notes. Thus, not only should the factors listed above be taken into consideration when determining hate speech but also the context in which the statement was uttered.

The reason for the examples was to demonstrate two points. The first is that not only should the factors listed play a role in determining hate speech, but context also plays a vital role. This is important because as the Court has held, hate speech is not a constitutionally protected class of speech. Thus, public colleges and universities face no problem overcoming the First

[20] Andrew F. Sellars, *Defining Hate Speech* 25-30 (Berkman Klein Center for Internet & Society at Harvard University, Working Paper No. 2016-20, 2016), https://cyber.harvard.edu/publications/2016/DefiningHateSpeech.

Amendment test set forth in outright prohibiting such statements. The second reason for the example was to demonstrate that while public colleges and universities may theoretically outright prohibit hate speech, in practice this would be hard to accomplish without the prohibition being overbroad and potentially vague. As Melanie Moore notes, "courts have held many university speech codes unconstitutional as overbroad."[21] Inevitably, if public colleges and universities enact a code which prohibit certain types of speech categorically, there is bound to be a "chilling effect on speech"[22] that cannot stand in light of First Amendment concerns. Thus, safe spaces face a particular challenge of protecting LGBTQ students.

IV. Safe Spaces

Understanding the first amendment limitations and permissions, I will now turn to safe spaces. As noted previously, safe spaces have been defined in a myriad of ways. However, while some do not pass constitutional muster, others are constitutionally adequate. In this section I will provide two examples. The first conception I will explore is a space, either defined within a school or the entire school, that prohibits discussion of 'problematic' opinions. This I conclude does not pass constitutional muster. The second conception I will explore defines safe spaces as classrooms adhering to certain principals in facilitating class discussion. This conception I will argue does in fact stand in light of First Amendment challenges.

A. Safe Space as Prohibition

Some universities have implemented safe spaces as designated areas in which marginalized individuals are free from "biases, discrimination, and criticism from the outside world."[23] The main drive for these segregated spaces to ensure that LGBTQ individuals those

[21] Moore, *supra* note 3, at 525.
[22] *Id*. at 536.
[23] *What Is a Safe Space in College*, THE BEST SCHOOLS, https://thebestschools.org/resources/safe-space-college/ (last visited Dec. 20, 2022).

have a space of refuge.[24] But this segregated space from which LGBTQ individuals are free from biases, discrimination, and criticism is not only a violation of first amendment jurisprudence but is also practically impossible or contradictory.

First, it is imperative to recognize that bias is a concept that includes discrimination, in fact, logically "bias begets discrimination."[25] Thus, it is necessary to address bias and discrimination together when discussing safe spaces. In other words, bias can be understood as having a preference, whether explicitly or implicitly, for certain 'type' of persons. However, discrimination, in this context, can be defined as *acting* on one's bias towards an individual based on their membership status in a particular group.[26] However, if we take these definitions as correct or representative of the various definitions of the terms, then a problem emerges with respect to both. If safe spaces are meant to be spaces where LGBTQ individuals are free from bias, the safe space does not accomplish its goal. Quite simply, all humans are bias whether it take the form of explicit or implicit bias. Or in other words, as Howard Ross stated, "if you are human, you are bias."[27] Thus, safe spaces fail to provide a bias free environment. But elimination of all bias is not likely the goal of LGBTQ safe spaces. Rather, the goal can be better stated as cultivating an environment free from anti-LGBTQ bias. However, if cultivating a specific environment free from anti-LGBTQ bias is taken to be the goal of safe spaces, then such does not pass First Amendment scrutiny. Again, as Moore states, "it is well settled that universities cannot regulate student speech based upon its content."[28] Court cases "clearly

[24] Emily Crockett, *Safe Spaces Explained*, VOX, https://www.vox.com/2016/7/5/11949258/safe-spaces-explained.
[25] Rebecca Puhl & Kelly D. Brownell, *Bias, Discrimination, and Obesity*, 9 OBESITY Research 788, 800 (2001).
[26] Andrew Altman, *Discrimination*, STANFORD ENCYCLOPEDIA OF PHIL., https://plato.stanford.edu/entries/discrimination/#ConDis.
[27] HOWARD J. ROSS, EVERYDAY BIAS: IDENTIFYING AND NAVIGATING UNCONSCIOUS JUDGMENTS IN OUR DAILY Lives 1 (2014).
[28] Moore, *supra* note 3, at 527.

indicate that colleges can only restrict student speech in the most extraordinary instances."[29] Thus, it is highly unlikely the a court would find physical safe spaces permissible if the stated goal of said spaces was to prevent bias and discrimination, especially in light of other protective measure on campus.

When specifically applied to the prior articulated standard, designated LGBTQ safe spaces fail in that they are premised on content restriction, namely an environment that does not tolerate anti-LGBTQ bias. Thus, the space cannot be held to be content neutral. Furthermore, while it is arguable the safety, whether mental or physical, is a significant interest to public colleges and universities, it does not necessarily follow that designating physical spaces where only particular opinions can be shared is the most narrowly tailored measure as it prevents all other views that may run contrary to the cultivated opinion. Additionally, as discussed earlier, public colleges and universities cannot prohibit speech merely because it is unpleasant or discomforting. Furthermore, as was discussed, hate speech is not constitutionally protected and thus LGBTQ individuals who experienced hate speech on campus would have grounds for asking the administration to deal with the perpetrator. This then presents a dilemma for this conception of a safe space, namely if hate speech is not constitutionally protected and thereby actionable then the only other claim would be concerned with speech that does not rise to the level of hate speech and therefore may be constitutionally protected.

B. Safe Spaces as Tenants

Safe spaces can also be conceptualized to mean that classrooms adhere to certain conversation guiding tenants. For example, Diana Ali puts forth the following tenants to be implemented in classrooms: (1) controversy with civility; (2) owning intentions and impacts; (3)

[29] *Id*.

challenge by choice; (4) respect; and (5) no attacks.[30] These tenants, contrary to a separate physical space, can be implemented in classrooms throughout the entirety of college campus. However, how do they fair against the First Amendment standard put forth by the Court?

At first glance none of the tenants proposed violates the First Amendment standard put forth above. Starting our inquiry, it has been stated that public colleges and universities can enact manner restrictions. Otherwise stated, the way in which speech is spoken. These seems to address the central purpose of tenant's conception of safe space. As is evident by the tenants – there is no outright prohibition on certain topics or subject matter. Rather, the tenants encourage such discussion as evidenced by the first tenant, controversy with civility. Furthermore, the tenants are narrowly tailored in that they only provide the framework in which sensitive discussions may take place. Unlike designated safe spaces that prohibit or seek to keep out bias, this conception of safe spaces allows for bias so long as said bias is communicated in a civil and respectful way. Lastly, while this conception of safe spaces does prohibit direct attacks, it is arguable that direct attacks are relatively similar to hate speech, which is not constitutionally protected. With this similarity in mind, it is likely that the court would not invalidate a policy with the principal of prohibition of direct attacks because they are "of such slight social value."[31] In fact, if personal attacks are understood as meaning epithets or personal abuse, then such speech "is not in any proper sense communication of information or opinion safeguarded by the

[30] Diana Ali, *Safe Spaces and Brave Spaces: Historical Context and Recommendations for Student Affairs Professionals*, 2 Research & Policy Institute 3, 3-4 (2017).
Controversy with civility means that "varying opinions are accepted. Owning intentions and impacts are when "students acknowledge and discuss instances where a dialogue has affected the emotional well-being of another person." Challenge by choice gives students the option "to step in and out of conversations." Students must also show respect for another person's basic personhood and not intentionally inflict harm on other students.
[31] Beauharnais v. Illinois, 343 U.S. 250, 257 (1952).

Constitution."[32] Thus, in prohibiting personal attacks, the limitation does not run afoul of the First Amendment.

Some critics of the proposed model of safe spaces are likely to cite the faults of implementing an objective versus a subjective standard. For example, Magistro argues that safe spaces effectively restrict "exposure to anything a student may find subjectively uncomfortable, unpleasant, or even offensive."[33] However, while it is imperative that there is discussion regarding what constitutes harm or intent in these situations, Magistro conveniently overlooks the fact that we have preexisting legal mechanisms in place by which to determine intent and harm. One only need to look to criminal law to realize that while it is impossible to prove with absolute certainty another's intent, such can be done through evidence. Additionally, harm can be demonstrated much the same way. So, while it may be the case that one cannot with absolute certainty read the minds and feelings of others, our legal system has constructed various ways in which to demonstrate both intent and harm.[34] Thus, the subjectivity argument does not carry the weight critics of safe spaces believes it does. Moreover, while the principals' approach to safe spaces may be considered broad or vague, it is unlikely to fail the First Amendment test. This is because the central concern of broad speech codes is that they may have a chilling effect.[35] However, as evidenced by the tenants of the safe space, there is no prohibition of speech other than direct attacks. Rather, individuals must only present their opinion in a respectful manner. With respect to vagueness, "campus codes must include explicit standards for those applying them and must give adequate warning of prohibited activities." This model does both. The

[32] Cantwell v. Connecticut, 310 U.S. 296, 309 (1952).
[33] Magistro, *supra* note 5, at 374.
[34] *See* Erica Beecher-Monas & Edgar Garcia-Rill, *The Law and the Brain: Judging Scientific Evidence of Intent*, 1 J. App. Prac. & Process (1999); Womack v. Eldridge, 210 S.E.2d 145 (1974).
[35] Broadrick v. Oklahoma, 413 U.S. 601, 611 (1973).

standards set forth are explicit in that they give students the necessary framework to engage in speech and it provides students with the requisite notice that direct attacks on fellow students is prohibited. Thus, the second model discussed is likely to withstand constitutional challenge.

V. Conclusion

While safe spaces have become a 'hot button' subject, many of the criticism levied against them are either misplaced or against a 'strawman' conception. While some conceptions of safe spaces would fail under current First Amendment jurisprudence, the second model as explored would likely survive. Thus, our attention need not be focused on how to segregate the LGBTQ community in order to foster opinions but rather on constructing an environment where all individuals can engage in a healthy and productive conversation regarding important matters. In this paper, I aimed to demonstrate that while the LGBTQ community has and is currently subject to harmful rhetoric, not all discomfort is harm. Furthermore, the First Amendment has been continuously and fiercely protected in our constitutional jurisprudence. Thus, to cabin speech merely because some find it to be unpleasant or uncomfortable is alone not sufficient. But there is a way to foster an environment where regardless of viewpoint, individuals can discuss openly important matters while also being respected for the individuals they are.