

Redefining the Captive Audience Doctrine

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Introduction

When does an individual have the right not to listen to or see an offensive message? The notion that, in certain circumstances, the unwillingness of persons to receive a message outweighs another's right to speak has been a part of First Amendment analysis for over fifty years. For example, in *Kovacs v. Cooper*,¹ a majority of the United States Supreme Court upheld an ordinance prohibiting the use of sound trucks that emit loud and raucous noises, expressing concern for the plight of the unwilling listener who is "practically helpless to escape [the noises] . . . except through the protection of the municipality."² The concept that the government may regulate speech delivered to an unwilling listener is usually referred to as the "captive audience doctrine."

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1. 336 U.S. 77 (1949). One year earlier, in *Saia v. New York*, 334 U.S. 558 (1948), the Court struck down an ordinance which required the chief of police to license loudspeakers prior to their use in public places. *Id.* at 559-60. The Court held that the regulation was an unconstitutional prior restraint which gave the police chief great discretion in awarding licenses without sufficient guidelines. *Id.* The dissent favored greater control over loudspeakers, arguing that "[s]urely there is not a constitutional right to force unwilling people to listen." *Id.* at 563 (Frankfurter, J., dissenting). Several prominent scholars during this time also began to champion the cause of the captive audience. *See, e.g.*, Charles L. Black, Jr., *He Cannot Choose But Hear: The Plight of the Captive Auditor*, 53 COLUM. L. REV. 960 (1953). Justice Douglas began vehemently asserting the privacy rights of the unwilling listener, both in his writings off the bench and in his judicial opinions. *See, e.g.*, *Public Utilities Comm'n v. Pollak*, 343 U.S. 451, 468 (1952) (Douglas, J., dissenting). *See generally* Dorothy Glancy, *Getting Government Off the Backs of People: The Right of Privacy and Freedom of Expression in the Opinions of Justice William O. Douglas*, 21 SANTA CLARA L. REV. 1047 (1981). Protection for the unwilling listener in certain circumstances, even if it means silencing the speaker, is now well entrenched in First Amendment jurisprudence. *See infra* notes 2-4 and accompanying text.

2. *Kovacs*, 336 U.S. at 87.

Despite numerous Supreme Court cases invoking this doctrine,³ the most recent in 1988,⁴ the precise contours of this theory remain unclear. Rarely, if ever, is anyone truly captive; there is almost always some alternative means the unwilling listener can take to avoid the message. The unanswered question is: when should the burden be placed on listeners to turn their heads, avert their eyes, close their ears, or even psychologically tune out the message, rather than force the speaker to cease communicating? Courts and commentators have failed to describe consistently and adequately when an audience is captive.⁵ Instead, the phrase "captive audience doctrine" has become a buzzword, inserted into the analysis as though it were self-defining. It has become a slogan without substance.

Perhaps part of the problem in defining the scope of the captive audience doctrine is that the rationale for protecting persons from unwelcome speech has not been adequately explored. Courts routinely invoke the talismanic phrase "the right to be let alone," as though these words explain all.⁶ Rarely do judges explain what this right means, or why it is valued. The truth is that government often does not "leave us alone," and it is not intuitively clear when it should do so.

The failure to adequately define the philosophic and legal basis for a captive audience doctrine has real costs. Courts can mold the captive audience doctrine to curtail free speech inappropriately. As Professor Laurence Tribe cautioned, "the concept of a 'captive audience' is dangerously encompassing,"⁷ and thus it is especially important that the theory be precisely defined. Moreover, the captive audience doctrine allows courts to ignore the traditional requirement of content neutrality; courts inevitably engage in viewpoint- or content-based discrimination when ap-

3. See, e.g., *infra* notes 15-24 and 26-39 and accompanying text.

4. *Frisby v. Schultz*, 487 U.S. 474 (1988).

5. An exceptional and comprehensive discussion of the captive audience doctrine is found in Franklin S. Haiman, *Speech v. Privacy: Is There A Right Not To Be Spoken To?* 67 *Nw. U. L. REV.* 153 (1972). The article, however, does not address the concerns I raise here. Other articles that at least touch upon the captive audience doctrine include G. Michael Taylor, Comment, "I'll Defend To The Death Your Right To Say It . . . But Not To Me"—*The Captive Audience Corollary To The First Amendment*, 2 *S. ILL. U. L.J.* 211 (1983); Olivia Goodkin & Maureen Ann Phillips, *The Subconscious Taken Captive: A Social, Ethical And Legal Analysis of Subliminal Communication Technology*, 54 *S. CAL. L. REV.* 1077 (1981).

6. The roots of the captive audience doctrine can be traced to a landmark article on privacy by Louis Brandeis and Samuel Warren in 1890. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 *HARV. L. REV.* 193 (1890). The article focuses on the right to keep certain facts from the public eye. Samuel Warren was outraged at the media coverage of his wife, a Boston socialite. See William L. Prosser, *Privacy*, 48 *CAL. L. REV.* 383 (1960). Warren and Brandeis argue that individuals have the right to be let alone, and that such a right is essential to the development of an inviolate personality. Beyond this, they do not develop the idea of the right to be let alone. This cursory analysis, unfortunately, is typical in this area.

7. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 950 n.24 (2d ed. 1988).

plying the doctrine.⁸ Any theory that permits courts to silence speech based on content demands careful consideration.

Finally, the failure to define adequately a captive audience leaves no way of resolving some difficult First Amendment questions now being posed. In the last few years, regulating racist, sexist, and other kinds of hate speech increasingly has come to the forefront of First Amendment issues.⁹ For many, including myself, this issue poses an almost irreconcilable conflict between a commitment to free expression and a commitment to civil rights. Many civil libertarians have tried to resolve this dilemma by interposing the captive audience solution: racist, homophobic, or sexist speech may be spoken, but not to a captive audience.¹⁰ This, of course, helps relieve troubled consciences: we reaffirm the value of the First Amendment, but, at least symbolically, recognize the evils of hate speech by limiting its usage. Yet, it begs the question of when an audience is captive. Is an African-American captive when the racist message is delivered in a campus cafeteria? What about the Jewish man who is followed down the street by an individual shouting anti-Semitic messages? Is the woman whose boss keeps pornographic pictures in his private office captive if she never sees them, yet knows of their existence? Current conceptions of the captive audience doctrine at best merely provide the starting point for analysis.

8. See *infra* notes 76-82 and accompanying text.

9. For merely a sampling of the articles recently written on the topic of regulating racist speech, see Note, *First Amendment—Racist and Sexist Expression on Campus—Court Strikes Down University Limits on Hate Speech*, 103 HARV. L. REV. 1397 (1990); Mari J. Matsuda, *Public Response To Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320 (1989); Jon Weiner, *Reagan's Children: Racial Hatred on Campus*, 248 NATION 260 (1989); Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431. See also *infra* notes 58-68 and accompanying text.

10. See generally, Steve France, *Hate Goes to College*, 76 A.B.A. J. 44, 48 (July 1990) (some have tried to combat racist speech by expanding the concept of, among other things, the captive audience); Lawrence, *supra* note 9, at 456 (“[t]he regulation of otherwise protected speech has been permitted when the speech invades the privacy of the unwilling listener’s home or when the unwilling listener cannot avoid the speech. Racist posters, flyers, and graffiti in dorms, classrooms, bathrooms, and other common living spaces would fall within the reasoning of these cases”); Matsuda, *supra* note 9, at 2372 (supporting broader restrictions on racist speech, notes that “students [on campus] are analogous to the captive audience”). See also Marcy Strauss, *Sexist Speech in the Workplace*, 25 HARV. C.R.-C.L. L. REV. 1 (1990) (discussing the captive audience doctrine with respect to sexual harassment in the workplace and the First Amendment); J.M. Balkin, *Some Realism about Pluralism: Legal Realist Approaches to the First Amendment*, 1990 DUKE L.J. 375, 423 (author, when discussing sexual harassment in the workplace, noted that “[f]ew audiences are more captive than the average worker”); *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486, 1535 (N.D. Fla. 1991) (“female workers . . . are a captive audience in relation to the speech that comprises the hostile work environment”).

My objective, then, is to redefine the captive audience doctrine by exploring its moral and legal underpinnings, and therefore provide substance to the slogan. More specifically, Part I examines the current case law and shows how the doctrine is riddled with inconsistency and ambiguity. In Part II, the ramifications of this confusion are considered. Given the costs of the captive audience doctrine, and the need to at least reformulate—if not abolish—it, Part III analyzes the philosophical and legal purposes of the captive audience doctrine. Without an understanding of the reasons for protecting a captive audience, no accurate weighing of the right not to hear against the right to freedom of expression can occur. Without knowing precisely what rights we are protecting, and how important these rights are, it is difficult to develop a cogent theory for the captive audience “exception” to the First Amendment. Ultimately, Part III concludes that both courts and scholars have become mired in platitudes. Phrases like “the right to privacy” and the “right to be let alone,” which have intuitive appeal, are mere substitutes for rigorous analysis.

Ambiguity concerning the scope and purpose of a right to be let alone might be acceptable if one were simply developing a statement of aspirations. In the best of all worlds, it is a nice idea to have tranquility, to not be interrupted by others, to decide to whom one speaks and listens. But courts do not merely contemplate social mores; recognizing the right to be let alone means curtailing the right to freedom of expression guaranteed by the First Amendment. Thus, Part III attempts to “fine tune” the right to be let alone. Three values behind the right not to hear or see speech are considered: the right to choose what information one receives, the right to repose, and the right to be free from offense. It is these specific rights, rather than an amorphous “right to be let alone,” that must be considered, evaluated, and weighed against any First Amendment interests. Part III explores the meaning of these three specific values, and how they relate to the right not to hear or see certain messages.

Finally, Part IV suggests a model for the captive audience doctrine that is consistent with the values discussed in Part III. Here, I propose to give content to the slogan “captive audience” by suggesting the various factors a court should consider when employing that doctrine, and how the doctrine should be balanced against speech interests.

I. The Captive Audience Doctrine: Slogan, Not Substance

A. The Conceptual Confusion of the Captive Audience Doctrine

The idea of a "captive" audience inevitably causes confusion. Attempting to define captivity raises two interrelated problems. First, the concept of captivity itself is contradictory. We are always captive in some senses, and never captive in others. Unless living the existence of a hermit, we are always exposed to the sights, sounds, and smells of others in society. On the other hand, we are virtually never captive, because there is almost always something we can do to avoid exposure to whatever we find most offensive. We can shut our eyes and plug our ears; we can pull our shades in our homes. If the Court relies on the recipient's ability to shut out sights or sounds, "then almost no communication will be intrusive enough to warrant regulation."¹¹

The question is, how great a burden should be imposed on the unwilling listener to avoid the message in order to protect someone's right to speak? There is a continuum of action, from obviously minimal to more extremely burdensome conduct, that could be taken to avoid verbal and nonverbal speech: people can turn their heads, shut their eyes, turn off their radios, put their hands over their ears, walk away, cross the street, avoid the place of speech, and so on. What is a reasonable or unreasonable burden in balancing the person's right to be free from the message with the speaker's right to convey it? The captive audience doctrine turns on this issue; it is central to even defining when someone is captive. Yet nothing in the metaphor of a captive audience offers any answer.¹²

The second problem is, to what extent is avoiding the message even a solution? Are the harms of being a captive to speech alleviated if the

11. Goodkin & Phillips, *supra* note 5, at 1130 n.321. Concededly, there are times when the most arduous attempts to stay in the home and shut out noise likely would be unsuccessful. Even industrial-strength ear plugs, for example, might not shut out a boisterous sidewalk demonstration. The question then becomes whether one is obligated to do more, such as leave one's home, to avoid the speech. *See infra* notes 40-42 and accompanying text.

12. Courts generally uphold restrictions when it is impractical for the unwilling viewer or auditor to avoid exposure, but fail to define what they mean by impractical. *See, e.g.,* *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 209 (1975). Professor Haiman has urged an "impossibility" standard: speech should only be silenced when it is impossible for the recipient to turn away. Haiman, *supra* note 5, at 182-84, 194-95. *See also* Norman W. Provizer, *Of Lines & Men: The Supreme Court, Obscenity and the Issue of the Avertable Eye*, 13 *TULSA L.J.* 52 (1977) (author says line between impossible and impracticable is important but does not explain why); *International Soc'y for Krishna Consciousness, Inc., v. McAvey*, 450 F. Supp. 1265, 1270 (S.D.N.Y. 1978) (holding that public seated in plaza area are not captive because they are free to move away from undesired communication, yet finding no need for them to do that—without explanation).

person is able to turn away after an initial exposure? Or is the initial exposure by itself an evil that justifies finding a person captive even if capable of avoiding the message?¹³ Moreover, can people be "psychic captives," that is, incapable of escaping the impact of the speech even if they never hear or see the actual message? For example, if a woman is aware that there is a pornographic cartoon about her posted in the men's bathroom, can the government justify restricting that speech based on the captive audience doctrine if she never sees it, yet can never forget that it is there and cannot put it out of her mind?¹⁴ Or, what about a Jewish resident of Skokie who knows about a planned Nazi march in Brooklyn, knows the essentials of the hate-filled message, and finds the idea of Nazi speech anywhere abhorrent and offensive? Should an avid anti-abortion activist be able to claim "psychic captivity" to the knowledge that an abortion clinic provides pro-choice information to patients?

As discussed more fully later, the Supreme Court has held that individuals may be captive even if they can subsequently turn away from the speech, because the initial exposure by itself constitutes an assault on their sensibilities. In such circumstances, courts protect individuals before any contact with the speech occurs. Once initial exposure to the speech is no longer an essential element of the captive audience doctrine, the theory loses *some* of its limitations. It is then conceivable that speech would be prohibited even before it is uttered.

Despite numerous Supreme Court decisions invoking the captive audience doctrine, the Court has failed to shed any meaningful light on the definition of captivity and on the precise burden placed on individuals to avoid the message. Perhaps the only clear conclusions one can draw is that the captive audience doctrine is more likely to be used to restrict speech when the individual is viewed as a "captive in the home" than simply on the street,¹⁵ and individuals are more likely to be viewed as captive when the speech is spoken, rather than written.¹⁶ Even within

13. See, e.g., *infra* notes 26-28 and accompanying text.

14. Of course, there may be other grounds for regulating the speech besides the captive audience doctrine. Such speech may violate Title VII of the Civil Rights Act by impermissibly interfering with the woman's employment opportunity. See Strauss, *supra* note 10, at 3.

15. See *Erznoznik*, 422 U.S. at 209 n.4 (individual privacy entitled to greater protection in home than in streets); *Public Utils. Comm'n v. Pollak*, 343 U.S. 451, 464 (1952) ("However complete his right of privacy may be at home, it is substantially limited by the rights of others when its possessor travels on a public thoroughfare or rides in a public conveyance."); *United States Postal Serv. v. Hustler Magazine*, 630 F. Supp. 867, 870 (D.D.C. 1986) (there are unique privacy interests in the home). See also Theodore H. Davis, Jr., *Frisby v. Schultz, Reconciling Public Political Expression with Residential Privacy Rights*, 6 J.L. & POL. 173, 187 (1989); and *infra* notes 34-42 and accompanying text.

16. See *FCC v. Pacifica Found.*, 438 U.S. 726, 748 (1978); *Banzhaf v. FCC*, 405 F.2d 1082, 1100-01 (D.C. Cir. 1968), *cert. denied*, 396 U.S. 842 (1969). *But see* *Rowan v. United*

those categories, the Court has not consistently defined what is meant by captive.

1. *The Captive Audience at Home*

In protecting the individual's privacy in the home, the Court has not consistently explained when it will impose on the unwilling recipient some burden, even a minimal one, to turn away from the message, rather than silence the speaker. At times, the Court has placed some obligation even on persons within the home to reject the speech. In *Bolger v. Youngs Drug Products Corp.*,¹⁷ the Court held unconstitutional a statute that prohibited the mailing of unsolicited advertisements for contraceptives to the home. The Court noted that

the First Amendment "does not permit the government to prohibit speech as intrusive unless the 'captive' audience cannot avoid objectionable speech." Recipients of objectionable mailings, however, may "effectively avoid further bombardment of their sensibilities simply by averting their eyes." Consequently, the "short, though regular, journey from mail box to trash can . . . is an acceptable burden, at least so far as the Constitution is concerned."¹⁸

Similarly, the Court in *Consolidated Edison Co. v. Public Service Commission*¹⁹ refused to find individuals at home captive to mailing inserts, lauding nuclear power, placed in the utility company's bills. Those who did not wish to read the insert could avert their eyes, or "escape exposure to objectionable material simply by transferring the bill insert from envelope to wastebasket."²⁰

The government, however, can protect the individual at home when that person has taken affirmative steps to avoid the unwanted message. For example, the Court has frequently indicated that the state may stop speech from reaching those who have assumed the burden of notifying the speaker, or the distributor of information, that they do not want to receive the message. In *Martin v. Struthers*,²¹ the Court struck down a

States Post Office Dep't, 397 U.S. 728, 736 (1970) and *infra* notes 23-24 and accompanying text. See also Haiman, *supra* note 5, at 182-83.

17. 463 U.S. 60 (1983).

18. *Id.* at 72 (citations omitted).

19. 447 U.S. 530 (1980). The New York Court of Appeals held that the New York Public Service Commission could prohibit Consolidated Edison's inserts because the utilities customers had no choice but to receive the insert and the views expressed there about nuclear power could inflame their sensibilities. See *Consolidated Edison Co. v. Public Serv. Comm'n*, 390 N.E.2d 749, 755 (N.Y. 1979).

20. *Consolidated Edison*, 447 U.S. at 542.

21. 319 U.S. 141 (1943). The decision in *Martin* was somewhat undercut in *Breard v. Alexandria*, 341 U.S. 622 (1951), where the Court upheld as constitutional an order prohibit-

complete ban on door-to-door solicitation, noting that the homeowner "could protect himself from such intrusion by an appropriate sign that he is unwilling to be disturbed."²² Likewise, in *Rowan v. United States Post Office Department*,²³ the Court rejected a constitutional challenge to a postal provision allowing individuals to specify to the Postmaster General certain mailings they do not want to receive.²⁴ In essence, the Court still requires the homeowner to turn away from the speech; but instead of personally throwing the mailings in the garbage can, the unwilling recipient designates an agent to do it for him.

Significantly, in both *Martin* and *Rowan*, only unwilling listeners were cut off from the speech. In many captive audience cases, however, there are willing audiences who would be deprived of the message if the speech was stopped.²⁵ Protecting listeners only after they indicate an unwillingness to hear or see the speech minimizes the intrusion on willing listeners; those who wish to receive the message may continue to do so with minimal interference. The burden, albeit a minimal one, is placed on the undesiring recipient to curtail the speech.

At times, however, the Court refuses to impose any requirement that the recipient turn away from or turn off the message. For example, in *FCC v. Pacifica Foundation*,²⁶ the Court rejected any suggestion that the offended listener of the radio broadcast of George Carlin's "Seven Dirty Words," simply change stations or turn off the radio. The Court concluded that even fleeting contact with the offensive message is too great a burden for the home listener: "to say that one may avoid further offense by turning off the radio when he hears indecent language is like

ing door to door commercial solicitation without the prior consent of the homeowner. *Breard* therefore, presumptively bars speech until the recipient requests it; *Martin* and *Rowan v. United States Post Office Dep't*, 397 U.S. 728 (1970), allow speech unless the individuals who desire not to hear take steps to stop it. "The latter [approach], quite obviously, is more deferential to speech than the former." Michael E. Tigar, *The Supreme Court, 1969 Term, Foreword: Waiver of Constitutional Rights: Disquiet in the Citadel*, 84 HARV. L. REV. 1, 121 n.23 (1970).

22. 319 U.S. at 148.

23. 397 U.S. 728 (1970). For a discussion of *Rowan*, see generally, Walter G. Hiltz, Case Comment, *Rowan v. United States Post Office Dep't*, 397 U.S. 728 (1970) *Constitutional Law—Right of Privacy*, 5 SUFFOLK U.L. REV. 302 (1970). See also *United States v. Treatman*, 408 F. Supp. 944, 954 (C.D. Cal. 1976) (*Rowan* permits injunction against sexually oriented mailings only if requested by mailees, not by government).

24. *Rowan*, 397 U.S. at 728. The decision in *Rowan* has been criticized as not sufficiently speech protective: the ability to throw away mail is such a "simple operation that it is difficult to understand the necessity for any further restrictions." Haiman, *supra* note 5, at 180.

25. See, e.g., *infra* note 31 and accompanying text.

26. 438 U.S. 726 (1978). *Pacifica* is one of the most controversial of the content regulation cases. See Daniel A. Farber, *Content Regulation and the First Amendment: A Revisionist View*, 68 GEO. L.J. 727, 754 & n.145 (1980).

saying that the remedy for an assault is to run away after the first blow."²⁷ The Court, in a footnote, repeated the maxim that outside the home, the burden on the listener may be greater.²⁸ This approach begs the question: why is the radio listener considered captive in the first place? The Court's position, applied more generally that any exposure is too much, would eradicate any requirement that the listener turn away. The Court provides no way to distinguish this brief exposure, which constitutes an assault, from other glimpses of unwanted speech, which presumably do not constitute assaults.²⁹

This protection for the at-home captive audience in *Pacifica* is particularly ironic because the complaining party was a father listening with his son, not at home, but in the car.³⁰ There was no evidence that anyone tuned into the station at home was offended. Additionally, unlike *Rowan*, *Pacifica* cuts off the speech not only from the unwilling listener, but from *willing* listeners as well.³¹ The Court's response—that people can still go to nightclubs to hear Carlin or buy his records³²—is disingenuous. Listening to Carlin on the radio is so different in kind from those other media, both in affordability and ease of access, as to be not comparable.³³ Individuals who desire to hear Carlin will need to go to much greater lengths to do so; many radio listeners likely will not avail themselves of these other avenues. More important, those who are unfamiliar with Carlin—and thus would not buy his records or attend his concerts but might still enjoy listening to him—will not hear his message. Without the initial radio exposure, the speaker loses the opportunity to cultivate the willing listener, and individuals miss the chance to decide if they want further exposure to the message.

The notion in *Pacifica* that recipients of information in the home have no responsibility to turn away from an unwanted message was reaf-

27. *Pacifica*, 438 U.S. at 748-49. This holding seems ironic given the Court's statement in *Rowan* that unwilling recipients of a radio or television message, unlike the recipient of mail, may easily escape the message by turning off the receiver. *Rowan*, 397 U.S. at 737.

28. *Pacifica*, 438 U.S. at 749 n.27.

29. See, e.g., *supra* note 20 and accompanying text, and *infra* notes 46, 48 and accompanying text.

30. *Pacifica*, 438 U.S. at 730.

31. Thomas G. Krattenmaker & L.A. Power, Jr., *Televised Violence: First Amendment Principles and Social Science Theory*, 64 VA. L. REV. 1123, 1233 (1978) ("surprising as it may seem to the majority [of the Court], significant numbers of people exist who are not offended by Carlin's monologue. The rights of this 'receptive, unoffended majority' are affected drastically." (citation omitted)).

32. *Pacifica*, 438 U.S. at 760.

33. Krattenmaker & Power, *supra* note 31, at 1233-34.

firmed recently in a different context. In *Frisby v. Schultz*,³⁴ the Supreme Court broadly interpreted the idea of a captive audience within the home when it upheld a city ordinance against "focused" residential picketing. The ordinance made it unlawful "for any person to engage in picketing before or about the residence or dwelling of an individual in the town of Brookfield."³⁵ This law was challenged by two individuals who, along with several others, had picketed in front of a doctor's home, protesting his performance of abortions. Justice O'Connor, writing for the Court, upheld the ordinance, finding that the words "residence" or "dwelling" narrowed the law so that it prohibited only "picketing focused on, and taking place in front of, a particular residence."³⁶ So construed, the ordinance was consistent with the First Amendment's prohibition on offensive speech when the audience is captive:

The target of the focused picketing banned by the Brookfield ordinance is just such a "captive." The resident is figuratively, and perhaps literally, trapped within the home, and because of the unique and subtle impact of such picketing is left with no ready means of avoiding the unwanted speech.³⁷

Unfortunately, *Frisby* blurred, rather than clarified, what is meant by the captive audience, and the decision creates more questions than it answers. What does it mean to be "figuratively" trapped in the house, and how is this different from literally? Did the Court mean that the individual could not leave his home or could not use his home for its traditional purposes? Although there was evidence introduced in the district court that the picketers on one occasion blocked the Victoria family's exit from the house,³⁸ the Supreme Court placed no weight on this fact when finding the ordinance constitutional. Instead, the Court held that any resident subjected to "targeted picketing" is, without any further factual showing, captive to that speech.³⁹

Moreover, the Court shrugged off, almost cavalierly, the notion that the recipient of unwanted communication should bear some responsibility for avoiding the speech. The Court asserted without further discus-

34. 487 U.S. 474 (1988). For a discussion of residential picketing, see, e.g., Edward B. Arnolds & Michael P. Seng, *Picketing and Privacy: Can I Patrol on the Street Where You Live?* 1982 S. ILL. U. L.J. 463 (1982); Daniel M. Taubman, Comment, *Picketers at the Doorstep*, 9 HARV. C.R.-C.L. L. REV. 95 (1974); Alfred Kamin, *Residential Picketing and the First Amendment*, 61 NW. U. L. REV. 177 (1967); Comment, *Picketing the Homes of Public Officials*, 34 U. CHI. L. REV. 106 (1966-1967).

35. *Frisby*, 487 U.S. at 477 (citation omitted).

36. *Id.* at 482.

37. *Id.* at 487.

38. *Schultz v. Frisby*, 619 F. Supp. 792, 795 (E.D. Wis. 1985).

39. *Cf. Frisby*, 487 U.S. at 494-96 (Brennan, J., dissenting).

sion that the homeowner had no means of avoiding the speech.⁴⁰ Indeed, one lower court case interpreted *Frisby* as not placing *any* burden on the homeowner to avoid the message.⁴¹ Yet the Brookfield ordinance prohibited picketing in circumstances where it would be easy for an unwilling recipient to ignore the message. Imagine, for example, a single, silent picketer on the street; by turning away, the resident can avoid the message.⁴² Even peaceful verbal messages may not always penetrate the exterior of the home. By refusing to consider such options, the Court broadly painted a picture of the captive audience within the home, and minimized a court's unwanted obligation to scrutinize whether an at-home recipient of unwanted information is able to avoid the speech.

2. *The Captive Audience Outside the Home*

The captive audience doctrine relating to speech outside the home is also riddled with confusion and inconsistency. Courts emphasize two principles in analyzing captive audiences outside the home. First, most courts stress "the plain, if at times disquieting truth," that individuals are inescapably captive audiences in society, forced to encounter many undesirable and offensive circumstances.⁴³ But unless the privacy interests behind the doctrine are based on expectations of what is, rather than what should be, private, the import of this observation is not clear. The descriptive statement that people are subjected to unwanted stimuli is not the same as saying that normatively they *should be* forced to endure them. In other words, the fact that people encounter daily unwanted messages does not tell us whether there are some circumstances in which the government should intervene. The second principle emphasized by the courts to some extent derives from the first: because of the inevitability of undesired speech outside the home, the burden should be placed on the viewer or recipient of information to avoid "further bombardment of his sensibilities."⁴⁴

40. *Id.* at 484-85. *But see* New York Community Action Network Inc. v. Town of Hempstead, 601 F. Supp. 1066 (D.R.I. 1978).

41. Klebanoff v. McMonagle, 552 A.2d 677, 679 (Pa. 1988). *See also* People Acting Through Community Effort v. Doorley, 338 F. Supp. 574, 579 (D.R.I. 1972) (facts described picketers as peaceful, carrying pictures of violations of building code allegedly permitted by man whose house was picketed; no evidence of any verbal protest, yet court described homeowner as trapped, helpless to respond, a "captive of those invading his privacy").

42. *See* Baldwin v. Redwood City, 540 F.2d 1360, 1367 (9th Cir. 1976) (political posters do not invade the home; they can be avoided simply by not looking).

43. Erznoznik v. City of Jacksonville, 422 U.S. 205, 210 (1975).

44. *See id.* at 211 (citation omitted); Lehman v. City of Shaker Heights, 418 U.S. 298, 320-21 (1974) (Brennan, J., dissenting); Bolger v. Youngs Drug Products Corp., 463 U.S. 60, 72 (1982).

Both principles derive from *Cohen v. California*,⁴⁵ in which the Supreme Court refused to find persons in a courthouse captive to the message "Fuck the Draft," written on a young man's jacket. Justice Harlan noted, in an oft-repeated passage:

[T]he mere presumed presence of unwitting listeners or viewers does not serve automatically to justify curtailing all speech capable of giving offense. . . . While this Court has recognized that government may properly act in many situations to prohibit intrusion into the privacy of the home of unwelcome views and ideas which cannot be totally banned from the public dialogue, . . . we have at the same time consistently stressed that "we are often captives" outside the sanctuary of the home and subject to objectionable speech. The ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is, in other words, dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner.⁴⁶

What are "substantial privacy interests," and what are "essentially intolerable invasions" of those interests? Must individuals be captive or unable to turn away from the speech, in order for their privacy interests to be invaded? Is it possible that individuals' privacy interests may be intolerably invaded even if they are able to turn away from a message, even if they never see the message?

Cohen made "captivity" a necessary condition before privacy interests are considered invaded, and linked captivity to an individual's ability to turn away. No substantial privacy interests were invaded in *Cohen* because those offended by the message "Fuck the Draft" could avert their eyes. This directly conflicts with *Pacifica*; to know to turn away, a person must either read the message in the first place, or perhaps be told about it. The Court in *Cohen*, unlike that in *Pacifica*, protected only continued exposure to the message, not the first glance. That individuals would see the message on the jacket before turning away was not enough to find them captive to the speech.

Decisions after *Cohen* have stressed the listener's responsibility to avoid the speech when outside the home. In *Erznoznik v. City of Jacksonville*,⁴⁷ for example, the Court invalidated a city ordinance prohibiting the showing of films containing nudity by drive-in theaters whose screens

45. 403 U.S. 15 (1971). See generally William Cohen, *A Look Back at Cohen v. California*, 34 UCLA L. REV. 1595 (1987); Daniel A. Farber, *Civilizing Public Discourse: An Essay on Professor Bickel, Justice Harlan, and the Enduring Significance of Cohen v. California*, 1980 DUKE L.J. 283.

46. *Cohen*, 403 U.S. at 21 (citation omitted).

47. 422 U.S. 205 (1975). The Court in *Erznoznik* also was concerned about potential overbreadth of the statute, which made it a public nuisance for a drive-in theater to exhibit any motion picture displaying "male or female bare buttocks" if the movie was visible from any

were visible from a public street. Offended viewers in public places readily can avert their eyes from the movie screen, after the initial exposure."⁴⁸ Recently, a district court recognized the burden on listeners to turn away from verbal messages, when it noted that normally "even a captive audience has the burden of 'averting their ears' from offensive speech."⁴⁹

A listener almost always has an ability to turn away from a message, at least if it is written. In *Lehman v. City of Shaker Heights*,⁵⁰ however, a plurality of the Court held that any ability of riders in the city's transit system to turn away from advertisements on its buses did not justify allowing the speech or eliminate the captive audience problem.⁵¹ Petitioner in *Lehman*, a candidate for state representative in Ohio, sought to purchase card space in the transit system to promote his candidacy. Although space was available, his request was rejected; the city accepted only commercial advertisements, and did not accept any political or public-issue advertisements on its vehicles.⁵² In upholding the city's action

public place. See generally Ralph Artigliere, Comment, *Privacy vs. Free Expression in Public Areas* *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975), 28 U. FLA. L. REV. 588 (1975).

48. *Erznoznik*, 422 U.S. at 211-12.

49. *Skyywalker Records, Inc. v. Navarro*, 739 F. Supp. 578 (S.D. Fla. 1990). See also *Weiss v. Patrick*, 453 F. Supp. 717, 722 (D.R.I. 1978) (short of evidence of coercion in attempt to speak to her, plaintiff's remedy is "simply the refusal to listen").

50. 418 U.S. 298 (1974). Thus, the Court in *Lehman* seemed to endorse Justice Douglas's dissent in *Public Utils. Comm'n v. Pollak*, 343 U.S. 451, 468 (1952). There, the majority permitted the broadcast of music in public buses, noting that "[h]owever complete [a railway passenger's] right of privacy may be at home, it is substantially limited by the rights of others when its possessor travels on a public thoroughfare . . ." *Id.* at 464. Justice Douglas dissented on the ground that "the man on the streetcar has no choice but to sit and listen, or perhaps to sit and to try *not* to listen." *Id.* at 469.

Lehman was recently distinguished in *Penthouse International, Ltd. v. Koch*, 599 F. Supp. 1338, 1347-1349 (S.D.N.Y. 1984). There, the court held that the audience was not captive to Penthouse advertisements on the subway station's walls, passways, and platforms. The distinction between the bus and the subway platform is not obvious. The same ability to turn the eyes from the offensive message exists. Individuals "need" to be on the platform for the same reasons they need to take the buses. Although there may be greater ability to move around the platform, that is not always true, as anyone who has taken the subways in New York or Chicago during peak hours can attest.

See also *Planned Parenthood Ass'n v. Chicago Transit Auth.*, 592 F. Supp. 544, 555 (N.D. Ill. 1984), which held that travelers in transit facilities are not a captive audience because it is not impossible for an unwilling audience to avoid exposure to abortion-related written advertisements displayed on transit authority buses, trains, and facilities. The district court here too, contrasted—and inverted—a Supreme Court decision. The court said that the audience is not like that in *Public Util. Comm'n v. Pollak*, 343 U.S. 451 (1952), which could not avoid exposure to the verbal messages. The Court in *Pollak*, however, had held that the verbal message could be avoided!

51. *Lehman*, 418 U.S. at 307-08.

52. *Id.* at 299-300.

as constitutional, the Court relied in part on the fact that the riders of the system would be captive:

[The Court previously reasoned] that viewers of billboards and streetcars had no choice or volition to observe such advertising and had the message thrust upon them by all the arts and devices that skill can produce. . . . The radio can be turned off, but not so the billboard or street car placard. . . .⁵³ The streetcar audience is a captive audience. It is there as a matter of necessity, not of choice.⁵⁴

The opinion did not discuss the viewer's ability to look away from the advertisement if offended. The only point the plurality made in this regard was that riders cannot leave the streetcar.⁵⁵ Certainly many individuals in *Cohen* were also unable to leave the courthouse, yet their ability to avert their eyes was unimpaired. The Court in *Lehman* confused captivity in a *place* with being captive to *speech*. Even though individuals were not "free" to leave the bus, they still could avert their eyes from the ad and look elsewhere.⁵⁶

53. The Court's conclusion that the radio is easily turned off was ignored by the Court several years later in *Pacifica*. See *supra* notes 26-31 and accompanying text. It also subverts the traditional assumption that written messages are more easily avoided than verbal ones. See *supra* note 16 and accompanying text.

54. *Lehman*, 418 U.S. at 302. Although there were other bases for the decision, *Lehman* is now primarily regarded as a captive audience decision. See *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 556 (1975); *Mississippi Gay Alliance v. Goudelock*, 536 F.2d 1073, 1081 n.18 (5th Cir. 1976). For criticism of *Lehman*, see Sheila N. Cahill, Note, *The Public Forum: Minimum Access, Equal Access, and the First Amendment*, 28 STAN. L. REV. 117, 142-43 (1975). The Court's decision is particularly ironic given the City's decision to accept commercial advertising on its vehicles. "Once a passenger's privacy has been invaded through commercial ads, any additional invasion from political messages would seem to be of only marginal importance." Paul A. Freund, *The Supreme Court, 1973 Term—Foreword: On Presidential Privilege*, 88 HARV. L. REV. 149, 153-54 (1974). See generally, David D. Swartling, *Recent Development, Constitutional Law—The Public Forum in Nontraditional Areas* *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974), 51 WASH. L. REV. 142 (1975).

55. *Lehman*, 418 U.S. at 302. The Court in *Lehman* relied on *Packer Corp. v. Utah*, 285 U.S. 105 (1932), in which Justice Brandeis observed that ads were "constantly before the eyes of observers on the streets and in street cars to be seen without the exercise of choice or volition on their part." *Id.* at 110.

56. Justice Douglas, in his concurrence, addressed the ability of the bus riders to avoid the speech when he remarked that advertisements are constantly in front of the observers, and thus, observers have no real ability to turn away. *Lehman*, 418 U.S. at 305-08. Although there may be rare cases where the rider is so wedged into a position on a bus that it is physically impossible to move or even to turn his or her entire body, the eyes can still be averted or shut to avoid the offending message. Douglas was speaking figuratively; advertisers use psychological ploys to "compel" our viewing of their products. No scientific evidence, however, was presented to support this conclusion. Once psychological techniques to ensure viewing a picture are considered, moreover, it should be fair game on both sides. That is, psychological devices such as selective perception, that people use to tune out messages that are offensive, or conflict with their preconceived ideas, need to be considered. Only by balancing the psychological compulsion to view the ads against the well-established psychological avoidance tactics

Finally, it is important to recognize that *Lehman*, like *Pacifica* and to some extent, *Frisby*, deny speech to willing listeners. Because the Court presumed in *Lehman* that some individuals might be offended, those who would wish to view political or public issue advertisements were denied that right. In this context, therefore, the captive audience doctrine infringes not only upon a speaker's constitutional right to free expression, but also upon other people's right to receive information.

In sum, the Court's treatment of the captive audience doctrine has been inconsistent and limited. Instead of detailed analysis, the Court offers conclusory statements that do not address the real issues, such as an individual's obligation and/or ability to avoid the speech. At times, courts consider physical entrapment in the place where speech appears to be a sufficient condition for invoking the captive audience doctrine; they do not discuss the ability to avoid the speech.⁵⁷ At other times, courts recognize that even though the individual is unable or unwilling to leave the place, she can avoid the speech by throwing out the message, switching the channel, or turning her head.⁵⁸ Thus, although ostensibly captive in the place, the person is not a captive audience to the speech.

In some cases, any exposure to an offensive message is too great an intrusion on the listener's rights. In others, the initial reception of the message is protected, and the recipient has the responsibility for subsequently rejecting the communication. While some courts express concern about the rights of willing listeners to receive the message, others allow the virtual denial of speech, even to those desiring to hear.

B. Applying an Inconsistent Doctrine: Examples of Future Difficulties

By failing to sufficiently describe the parameters of the doctrine, courts provide little guidance for future applications. Specifically, the area most likely to engage the courts in the future—an area currently being explored by numerous constitutional scholars⁵⁹—is the role of the

can a court consider whether an individual is truly compelled to hear or see the speech. This the Court did not do.

57. See, e.g., *supra* notes 27, 37 and 51 and accompanying text.

58. See, e.g., *supra* notes 18, 20, 46 and 49 and accompanying text.

59. See, e.g., Matsuda, *supra* note 9, Lawrence, *supra* note 9; Nadine Strossen, *Regulating Racist Speech on Campus: A Modest Proposal?*, 1990 DUKE L.J. 484; J. Peter Byrne, *Racial Insults and Free Speech Within the University*, 79 GEO. L.J. 399 (1991); David Goldberger, *Sources of Judicial Reluctance to Use Psychic Harm as a Basis for Suppressing Racist, Sexist and Ethnically Offensive Speech*, 56 BROOK. L. REV. 1165 (1991); Bhavana Sontakay, Comment, *College and University Regulation of Racist Speech: Does Regulation Violate the First Amendment?*, 95 DICK. L. REV. 235 (1990); Deborah R. Schwartz, Note, *First Amendment Justification for Regulating Racial Speech on Campus*, 40 CASE W. RES. L. REV. 733 (1989-90).

captive audience doctrine in curtailing hate speech, particularly (although by no means exclusively) such speech on college campuses. Many civil libertarians are attempting to reconcile their desire to protect freedom of speech, yet still recognize the real harms caused by hate messages. One way to do this is to permit such speech except when delivered to a captive audience.

The question then becomes, when is an individual captive? For example, some civil libertarians argue that racist speech generally cannot be regulated consistent with the First Amendment, but that captive audiences on college campuses can be protected from exposure to such speech.⁶⁰ Professor Mari Matsuda, while supporting broad regulations on racist speech, recently argued that “students on campus are analogous to the captive audience that is afforded special [F]irst [A]mendment consideration in other contexts. Students have fewer avenues of retreat. Living on or near campus, studying in the library and interacting with fellow students are integral parts of university life.”⁶¹ Thus, the government might be able to regulate speech in college dormitories, or even elsewhere on the campus, based on the captive audience doctrine.

But statements that students on campus constitute a captive audience overgeneralize. Does this mean that the student is captive to speech anywhere on campus, including, for example, any streets or outdoor areas that are part of the university? Even in the most obvious place for assuming captivity—the college dormitory—many questions need further analysis. Is a dormitory building like a private home, or is it only the individual’s personal room that is analogous to a residence? For example, assume a student puts a poster that contains a racial epithet on the outside of the door to her room. Is another student, living in the room down the hall, captive? What if the offended student lives next door and must pass the room to use the bathroom or to leave the dormitory? Should the analysis differ if she lives a floor below and never (or rarely) has to pass the poster? What if a notice for an organizational meeting for a group devoted to “ridding the dorms of fags” is posted on the dormitory bulletin board? Is a gay student who feels horrified by the very idea of this group, captive to the message, so that he may insist on the removal of the notice? Indeed, may the school refuse to allow the notice to be posted on the assumption that gay and straight students would be offended, and for them, even an initial glance would be too great an assault?

To even begin to suggest answers to these questions based on the

60. See, e.g., Strossen, *supra* note 59, at 505-06.

61. Matsuda, *supra* note 9, at 2372. See also Lawrence, *supra* note 9, at 456-57, 481.

captive audience doctrine,⁶² we need to know why a home is a "castle"; why individuals have a right to privacy in their home that encompasses the right not to hear. Should speech anywhere in a dormitory building be considered the equivalent of speech which enters a home? As the Seventh Circuit noted:

No Supreme Court case has defined the outer limits of what is meant by the concept of "home." Is a home strictly limited to the four walls of a building serving as a private residence? Or does the concept of homes somehow encompass an area of peace and security related to, but not strictly limited by, the walls of a house?⁶³

If a dormitory is determined to be like a home, then the question is whether the courts would impose any burden on the unwilling listener to avoid the speech. If a court were to follow *Frisby* and *Pacifica*, it presumably would not matter if any student is forced to actually see the message, and no responsibility to look away or take a different route to avoid the offensive speech would be imposed on the student. After all, the *Frisby* Court did not rely on any evidence that the homeowner was in any way disturbed in his routine, or even heard the protests within the house, in finding him captive.⁶⁴ One glance, as in *Pacifica*, might constitute an assault.

Alternatively, the court could require the individual to turn away, as in *Bolger* and *Consolidated Edison*. If so, we have no way of determining what is a reasonable burden: we know that the obligation to take mail from the mailbox to the garbage can is not onerous, but beyond that, no case law exists. Should the burden of turning one's head when passing

62. There may be other ways to regulate speech on college campuses. First, the Court could simply decide to prohibit such speech by reviving the largely discredited group libel doctrine, first upheld in *Beauharnais v. Illinois*, 343 U.S. 250 (1952). *But see* *American Booksellers Ass'n v. Hudnut*, 771 F.2d 323, 331 n.3 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986) (subsequent cases "had so washed away the foundations of *Beauharnais* that it could not be considered authoritative"); Robert C. Post, *Cultural Heterogeneity and Law: Pornography, Blasphemy and the First Amendment*, 76 CAL. L. REV. 297, 330 (1988) ("*Beauharnais* is . . . damaged goods."). The fighting words doctrine could be invoked in appropriate circumstances. *See* *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942). *But see* Stephen W. Gard, *Fighting Words as Free Speech*, 58 WASH. U. L.Q. 531, 536 (1980) (the doctrine is now "nothing more than a quaint remnant of an earlier morality that has no place in a democratic society dedicated to the principle of free expression"). Or, the courts could decide that racist speech interferes with the educational opportunity guaranteed to all students under *Brown v. Board of Educ.*, 347 U.S. 483 (1954). Lawrence, *supra* note 9, at 438-40.

63. *Schultz v. Frisby*, 807 F.2d 1339, 1352 (7th Cir. 1986). *See also* Richard D. Bernstein, Note, *First Amendment Limits on Tort Liability for Words Intended to Inflict Severe Emotional Distress*, 85 COLUM. L. REV. 1749 (1985) (arguing that notion of spatial privacy could be applied to other areas where recipient found it necessary to be, such as stores, and possibly restaurants).

64. *See supra* note 39 and accompanying text.

the offensive poster outweigh the right of others, *in their home also*, to hear and speak?

Even if an analogy can be drawn between a dorm and a home, what about the rest of the college campus? The fact that the campus might constitute a "residential neighborhood" likely would not be enough to grant captivity status to the student outside the dormitory. That argument was unsuccessfully asserted in *Collin v. Smith*,⁶⁵ when Jewish residents of Skokie—many of them Holocaust survivors—argued that the Nazi march in their village deeply offended them and that they were captives to the speech. The Seventh Circuit rejected this argument, noting that residents need not be a captive audience, because they could simply avoid the Village Hall, the place of the Nazi march, for thirty minutes on a Sunday afternoon.⁶⁶ Thus, entire campuses would not be viewed as homes, and presumably some burden would be placed on students to avoid unwanted messages.

The question then becomes, what is a reasonable burden in this context? It seems grossly unfair to require a black student to take a different route to class to avoid racist slurs. The courts, which thus far have spoken generally about the ability to turn away and avert one's eyes or ears outside of the home, provide no answer to whether this is too great a burden to impose on the listener. Any analogy to *Collin v. Smith* becomes weak at this point, because the court there assumed that individuals would not be subject to any significant hardship in staying away from the Village Hall on a day it was closed.⁶⁷

Outside of the university context, difficult questions remain concerning the regulation of hate speech based on the captive audience doctrine. What about a woman at work who knows that her boss keeps a pornographic picture in his office but never has to see it?⁶⁸ Is she captive because she must be at work, like the riders in *Lehman* who had no choice

65. 578 F.2d 1197 (7th Cir. 1978), *cert. denied*, 439 U.S. 916 (1978).

66. *Id.* at 1200, 1206. *See also* Organization for a Better Austin v. Keefe, 402 U.S. 415, 420 (1971) (right of privacy does not exist beyond physical confines of home).

67. *Collin*, 578 F.2d at 1207.

68. As I argued in an earlier article, this speech can be curtailed if it discriminates against women, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000 (1981). *See* Strauss, *supra* note 10, at 46-49. Here I consider only whether the captive audience doctrine can be employed to silence the speaker. Several courts have employed the captive audience doctrine in the workplace. *See* Robinson v. Jacksonville Shipyards, Inc. 760 F. Supp. 1486, 1535 (N.D. Fla. 1991); Resident Advisory Bd. v. Rizzo, 503 F. Supp. 383, 402 (E.D. Pa. 1980) (workers at jobsite were captive to harassing messages delivered over loudspeakers; only way to avoid speech was to quit jobs). Interestingly, the court in *Rizzo* contrasted this situation with that in *Lehman* in which, the district court claimed, it would be easy to avoid the offensive advertising by averting one's eyes. Of course, this is contrary to the holding in *Lehman*, and indicates at least one lower court's dissatisfaction with that Supreme Court decision.

but to take the bus? Or is the important point that she not only can easily turn away, as in *Erznoznik*, but she in fact need not even look at it in the first place? Would it make a difference if the poster were placed near the drinking fountain so she cannot help but glance at it when she goes for a drink? This assumes that the burden on the unwilling viewer should not include forcing her to find another fountain, or even bringing her own bottled water to work. On what principled basis can a line be drawn between a reasonable and unreasonable burden? What if the woman is told about the picture by the drinking fountain, and so averts her eyes each time she goes by? Presumably, then, she is not captive to the message. Yet if she looks once (or even knows that it is there from descriptions by others), is that enough of an assault on her senses, as in *Pacifica*, to constitute captivity?

Finally, consider a Jewish man who is followed down the street by a woman shouting anti-Semitic slogans. He continues his walk, uninterrupted, proceeds at precisely the same pace, and goes to the same destination that he had intended. In fact, if questioned, he may not be able to repeat the words used by the woman; in essence he tuned her out. Was he captive to the speech? An audience has never been found captive in a public place like a street. Is his psychological rejection of the message equivalent to averting his eyes, and are others under an obligation to at least attempt to tune out the message?⁶⁹

The captive audience doctrine provides little guidance for resolving these issues. Court decisions that discuss the captive audience doctrine seem idiosyncratic; even those principles that can be generalized, like the obligation to turn away from speech, soon run into unanswered questions about their meaning. Calling an audience "captive" substitutes for an analysis of when individuals are truly unable to escape an unwanted message because the burden of turning away is too onerous. As a result, the case law forms a patchwork of decisions difficult to weave into a consistent pattern. It provides little guidance for the hard questions sure to arise.

II. The Dangers of a Slogan: The Problems with Imprecision

A. The Risk of Curtailing Speech

The captive audience doctrine's elusiveness creates the danger that it will be used to silence speech in circumstances that do not justify restrict-

69. 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, 175 (1982) (racial insults make audience captive; they cannot avert their ears).

ing the speaker's First Amendment rights. The concept of a captive audience is an elastic theory that could expand to curtail most free expression rights.⁷⁰ Indeed, courts have been willing to expand the doctrine. For example, in a recent decision concerning the obscenity of rap music lyrics, the judge noted almost casually that "a person lying on a public beach, sitting in a public park, walking down the street or sitting in his automobile for the light to change is, in a sense, a captive audience."⁷¹ The court did not make clear the "sense" in which the person is captive. Under this definition, the right to freedom of speech guaranteed by the First Amendment would soon become illusory. Once a person is deemed captive in every public setting, the audience has virtually absolute power to control the speaker's right to free speech. The fact that someone is offended, or does not like the message, is sufficient to curtail another's First Amendment rights. The audience acquires "veto power," and the captive audience doctrine could be used to "undermine the entire freedom of speech fabric,"⁷² particularly with respect to unorthodox views.

This danger is especially acute because the captive audience doctrine allows a court to curtail even political expression as in *Lehman*, speech that lies at the core of the First Amendment.⁷³ Even when employed to limit merely "offensive speech," however, the captive audience doctrine suppresses messages entitled to constitutional protection. As the Supreme Court recently noted, "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."⁷⁴ Yet, this solicitude for offensive speech ends if the court determines that a captive audience is present. Although in a few other circumstances courts have regulated offensive speech,⁷⁵ it is primarily when the offensive message is delivered to a captive audience that

70. See Krattenmaker & Power, *supra* note 31, at 1228-37.

71. *Skywalker Records, Inc. v. Navarro*, 739 F. Supp. 578, 593 (S.D. Fla. 1990).

72. As Professor Nimmer cautions, "[T]o regard . . . involuntary but merely momentary contact with the speech of others as enough to invoke a captive audience basis for suppressing the unwelcome speech would largely undermine the entire freedom of speech fabric." MELVILLE B. NIMMER, *ON FREEDOM OF SPEECH* 1-33 (1984).

73. See *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982) (citing *Carey v. Brown*, 447 U.S. 455, 467 (1980) ("This Court has recognized that expression on public issues 'has always rested on the highest rung of the hierarchy of First Amendment values.'"); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 776 (1978) (speech on matter of public concern lies at the "heart of the First Amendment's protection").

74. *Texas v. Johnson*, 491 U.S. 397, 414 (1989). See also *Boos v. Barry*, 485 U.S. 312 (1988); *Cohen v. California*, 403 U.S. 15 (1971); *Street v. New York*, 394 U.S. 576 (1969).

75. See *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976); *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986).

courts permit such speech to be regulated.⁷⁶

B. The Promotion of Content-Based Discrimination

The captive audience doctrine poses unique dangers to free expression because it permits a court to engage in viewpoint- and content-based discrimination. Traditionally, restrictions on speech must be viewpoint- and content-neutral to pass constitutional muster: "[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content. . . . There is an 'equality of status in the field of ideas,' and government must afford all points of view an . . . opportunity to be heard."⁷⁷

When protecting a captive audience from offensive speech, however, courts by definition make distinctions based on content or point of view. Inevitably, the court must look to the content of the speech to see if it is sufficiently offensive to warrant regulation.⁷⁸ For example, the court likely will not find that a stranger stopping me on the street to offer me unwanted child-rearing advice satisfies the *Cohen* standard. If that same stranger, however, stopped me to give me a picture of the latest Penthouse Pet of the Month, the result might be different. If a student at a required school assembly urged students to vote for him because of his anti-drug stance, the court would not likely find cause to restrict his speech even if some students were offended. Yet if that same student were to urge the use of drugs, the speech likely could be restricted based in part on a captive audience theory.⁷⁹

Even though some speech restrictions based on captive audience doctrine have been content-neutral, content-based discrimination has been allowed. In *Lehman*, for example, the Court sustained the city's policy distinguishing acceptable and non-acceptable advertisements based on content. Ironically, the speech prohibited was political; com-

76. *Frisby v. Schultz*, 487 U.S. 474, 487 (1988) ("The First Amendment permits the government to prohibit offensive speech as intrusive when the 'captive' audience cannot avoid the objectionable speech.").

77. *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95-96 (1972) (footnote omitted).

78. See *infra* notes 79-82 and accompanying text. See also *Upper Midwest Booksellers v. City of Minneapolis*, 602 F. Supp. 1361, 1371 (D. Minn. 1985) (while content-neutral regulation is a fundamental principle of First Amendment, court has considered content of speech to protect listener privacy in home or when captive audience cannot avoid speech).

79. See *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986). See also Brian A. Freeman, *The Supreme Court and First Amendment Rights of Students in the Public School Classroom: A Proposed Model of Analysis*, 12 HASTINGS CONST. L.Q. 1, 20-24 (1984) (drawing analogy between classroom and facts in *Lehman*).

mercial advertisements were permitted.⁸⁰ *Rowan*, too, involved a content-based restriction on speech. The homeowners could not select whatever mail they did not want to receive; only mailings that were offensive because of their "lewd and salacious character" could be barred. Thus, the statute restricted only speech related to sex; mail that was offensive because of its political or religious content was outside the scope of the regulation.⁸¹ Likewise, in *Pacifica*, the Court endorsed content-based discrimination; the FCC could distinguish between "indecent" and other language for the purposes of regulation. The Court upheld as constitutional the commission's ability to impose civil sanctions for uttering "any obscene, indecent or profane language by means of radio communication."⁸²

Given these dangers in utilizing the captive audience doctrine, and considering the inconsistent, and at times incoherent, approach of the Court, the question becomes, what now? Should the captive audience doctrine be eliminated from First Amendment jurisprudence? Or should an attempt be made to reformulate it to make it more precise and useful? Before taking either step, the policies behind the doctrine must be considered. What, if any, substance lies behind the slogan?

III. Should There Be a Captive Audience Doctrine?

Why is there a doctrine that protects an individual's right not to hear? To evaluate the balance the courts have drawn between the right to speak and the right not to be spoken to, we must consider the values behind protecting the captive and even the non-captive audience from speech. Yet here again, the courts' analyses have been woefully lacking. Courts typically invoke the phrases "the right to be let alone" or "the right to privacy" as the justifications for the captive audience doctrine.⁸³

80. The plurality did not discuss the issue of content-based regulation; Justice Douglas, who cast the fifth vote in favor of the city policy, believed that all advertising should be excluded, but because the plaintiff had not urged this position, he concurred in the exclusion of political ads. *Lehman v. City of Shaker Heights*, 418 U.S. 298, 308 (1974). See Marilyn R. Kaplan, Note, *Commercial Speech and the Right to Privacy: Constitutional Implications of Regulating Unsolicited Telephone Calls*, 15 COLUM. J.L. & SOC. PROBS. 277, 306 (1980).

81. Geoffrey R. Stone, *Restrictions of Speech Because of its Content: The Peculiar Case of Subject-Matter Restrictions*, 46 U. CHI. L. REV. 81, 84 (1978).

82. 18 U.S.C. § 1464 (1976).

83. See *supra* notes 5-6 and accompanying text. The right to privacy is important in other First Amendment areas, such as the right not to speak, *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943), the right not to take loyalty oaths, *Elfbrandt v. Russell*, 384 U.S. 11 (1966), or not to have to declare membership in organizations. See Robert B. McKay, *The Right of Privacy: Emanations and Intimations*, 64 MICH. L. REV. 259, 274 (1965).

These phrases have an almost mystical draw on our emotions;⁸⁴ they are seen as an ultimate good.⁸⁵

Yet, why is the right to be let alone really important? The phrase itself is so broad as to be virtually useless. It does not accurately depict our society. We do not have an absolute right to be let alone; we all must pay taxes, observe traffic signals, and breathe the same air. Described broadly, the right is meaningless, because virtually every government or individual act becomes a violation of another's ability to be let alone. Moreover, it does not necessarily describe the way things *should* be in society. For example, the right to be let alone justifies ignoring a drowning person's cries for help.⁸⁶ It excuses the failure to participate in the democratic process.

In an attempt to define more precisely the right to be let alone, courts often justify the captive audience doctrine based on a right to privacy. This simply begs the question: what does the right to privacy mean, particularly in the context of the right not to receive information? "Few concepts . . . are more vague or less amenable to definition . . . than privacy."⁸⁷ Although the right to privacy has long existed in common law, and more recently in constitutional theory, there is little consensus among either legal scholars or philosophers on a definition of privacy.⁸⁸ As Professor Thompson remarked, "Perhaps the most striking thing

84. One author described privacy as one of the "warmest" words in the literature. Robert B. Dixon, Jr., *The Griswold Penumbra: Constitutional Charter for an Expanded Law of Privacy?*, 64 MICH. L. REV. 197, 199 (1965).

85. See, e.g., *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting) ("The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. . . . They conferred, as against the Government, the right to be let alone . . . the most comprehensive of rights and the right most valued by civilized men."). See generally Tom Gerety, *Redefining Privacy*, 12 HARV. C.R.-C.L. L. REV. 233, 234 (1977).

Privacy, of course, is a valued concept reflected in a number of constitutional provisions including the Fourteenth Amendment, see *infra* note 94 and accompanying text; the Second Amendment, see *United States v. Cruikshank*, 92 U.S. 542, 553 (1875); the Fourth Amendment, see *United States v. Katz*, 389 U.S. 347 (1967); and the Fifth Amendment, see *Tehan v. Scott*, 382 U.S. 406 (1966). See generally Thomas I. Emerson, *Nine Justices in Search of a Doctrine*, 64 MICH. L. REV. 219 (1965).

86. See Michael A. Weinstein, *The Uses of Privacy in the Good Life*, 13 NOMOS 88, 90 (1971).

87. See Dixon, *supra* note 84, at 199.

88. See Richard B. Parker, *A Definition of Privacy*, 27 RUTGERS L. REV. 275, 275-6 (1974). As Professors Wasserstrom and Seidman recently noted, in the context of the Fourth Amendment, "moral philosophers who have thought about privacy do not speak with one voice. On the contrary, they are hopelessly divided about what privacy is; about whether it is a value in itself, or whether it is only . . . valuable because of its consequences; . . . about what claims the word privacy encompasses; and even about whether it describes a coherent concept at all." Silas J. Wasserstrom & Louis Michael Seidman, *The Fourth Amendment as Constitutional Theory*, 77 GEO. L.J. 19, 59-60 (1988).

about the right to privacy is that nobody seems to have any very clear idea what it is."⁸⁹

The problem is that courts prohibit the speaker's right to free expression, and at times, other's right to hear, based on these vague but rhetorically powerful concepts. Once an audience is found "captive," the right to be let alone or the right to privacy are invoked to outweigh, with very little analysis, any free speech interests of the speaker and even the right of others to hear. Not that these rights are without any substance; constitutional protections of privacy have ensured citizens some of their most precious rights. Although moral philosophers cannot agree on what privacy means, "in contemporary legal discourse . . . it is uncontroversial that *some* value should be attached to privacy."⁹⁰ Yet an accurate weighing of First Amendment interests cannot occur without an understanding of what the right to be let alone and the right to privacy really mean in the context of the captive audience doctrine.

The right to privacy and the right to be let alone, therefore, need to be dissected, unpacked, and more specifically defined.⁹¹ Is there any substance to the right not to hear, or is it, too, just a slogan? Three specific interests underlie the right to be let alone in the captive audience context: the right to make individual choices (autonomy); the right to repose; and the right to be free from offense. In each case, there exists some important value to society worth protecting. Because courts do not focus directly on these values, however, and instead simply assert the right to be let alone in conclusory terms, the captive audience doctrine as now developed imprecisely advances these three interests.

A. The Right to Choose

One of the rights courts traditionally accept under the umbrella of the right to privacy is freedom from intrusion in certain decision-making processes.⁹² The right to make our own choices is essential to our conception of ourselves as free thinking, independent, autonomous individuals.⁹³ The government, therefore, may not violate a right to privacy by

89. Judith Jarvis Thomson, *The Right to Privacy*, 4 PHIL. & PUB. AFF. 295, 295 (1975). See also Harry Kalven, Jr., *Privacy in Tort Law—Were Warren and Brandeis Wrong?* 31 LAW & CONTEMP. PROBS. 326 (1966).

90. Wasserstrom & Seidman, *supra* note 88, at 61.

91. Cf. Thomson, *supra* note 89, at 295-310 (right to privacy can be broken down to other more specific rights). But see Thomas Scanlon, *Thomson on Privacy*, 4 PHIL. & PUB. AFF. 315 (1975) (criticizing Thomson).

92. See *Roe v. Wade*, 410 U.S. 113 (1975).

93. See generally Roger M. Smith, *The Constitution and Autonomy*, 60 TEX. L. REV. 175 (1982); David L. Bazelon, *Probing Privacy*, 12 GONZ. L. REV. 587, 589 (1977) (privacy includes right to uphold each person's right to be different, to have opinions of his or her own

restricting someone's ability to make certain critical intimate decisions about his or her own life. In establishing the constitutional right to purchase and use contraceptives⁹⁴ and to obtain an abortion,⁹⁵ the court used the term privacy to mean an individual's right as an autonomous being to make these choices.

Forced listening by definition removes decision-making authority from the individual. Thus, for example, the statute in *Rowan* permits unwilling recipients to exercise their choice not to receive certain mail. In this way, the law fosters their autonomy; it permits them to decide for themselves what mail they wish to receive and read.⁹⁶

Understanding that the right not to hear is more specifically based on an individual's right to make choices, however, does not provide a way to determine the weight of that interest. Some choices are more important to our sense of autonomy than others. Certain decisions, for example, about medical treatment,⁹⁷ about reproduction,⁹⁸ about child-rearing⁹⁹ are typically left with the individual, free from outside interference. We view these intimate decisions as central to what it means to control our own destiny, our own bodies. While the individual's right to make decisions may have some worth in and of itself, the real weight of that value can only be assessed if there is some independent reason why

and to make choices for himself or herself); J. Harrie Wilkinson III & G. Edward White, *Constitutional Protection for Personal Lifestyles*, 62 CORNELL L. REV. 563, 589-90 (1977) (privacy means not only right to seclusion, but freedom to make decision about certain personal matters); Elizabeth L. Beardsley, *Privacy: Autonomy and Selective Disclosure*, 13 NOMOS 56, 57-58 (1971) (privacy violated if person restricts another's power to determine whether to perform an act or undergo an experience); Arnold Simmel, *Privacy is Not an Isolated Freedom*, 13 NOMOS 71, 73 (1971) (privacy lets people develop a position in opposition to social pressures; this is one of central contributions of individuality, of distinct and independent selves).

94. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

95. *Roe*, 410 U.S. at 113.

96. See Beardsley, *supra* note 93, at 58 (infliction of unwanted noise restricts freedom of choice). See also *Troyer v. Town of Babylon*, 483 F. Supp. 1135, 1138 (E.D.N.Y. 1980) ("[T]he Constitution does not allow government to create a rebuttable presumption that people do not wish to be exposed to a particular class of ideas, or mode of expression. To override strong [F]irst [A]mendment interests, the individual deserving privacy must assume the burden of indicating the choice to be left alone. *The role left to the states is to facilitate individual choice.*") (emphasis added).

97. See RUTH R. FADEN & TOM L. BEAUCHAMP, *A HISTORY AND THEORY OF INFORMED CONSENT* (1986); JAMES E. LUDLAM, *INFORMED CONSENT* (1978).

98. See *supra* notes 93-95 and accompanying text.

99. See *Moore v. East Cleveland*, 431 U.S. 494 (1977) (invalidating ordinance excluding some extended families from living in the city); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (state law dictating to parents what language their children should speak is unconstitutional); *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (Amish parents have right to determine educational upbringing of children after eighth grade).

making *this particular* choice is important.¹⁰⁰

We must decide with care which personal decisions deserve protection as part of our right to privacy, as part of what it means to be an individual. Otherwise, the right to choose will be invoked "as often as the proverbial cry of 'wolf'," and its meaning "if it was ever clear, [will] become diluted and uncertain through overgenerous applications to a wide variety of situations."¹⁰¹ Is the right to choose not to listen to or see certain messages an aspect of autonomy that should be protected? To the extent that speech is powerful, that words have the potential to alter our innermost thoughts, to convince, persuade, move, and hurt us, the ability to choose for ourselves what ideas and thoughts we want to be exposed to is worth protecting. Like the choice of whether and when to procreate, speech, in many ways, defines who we are as individuals.¹⁰²

The question remains, however, whether the captive audience doctrine is necessary to preserve our right to choose what to hear. For example, in *Rowan*, the ability to tell the Postmaster General what mail not to forward, preserved the choice not to receive and see certain offensive mail. This argument defeats itself. Even if there were no statute in *Rowan* allowing the person to reject mail, the recipient could still exercise his or her *choice* about what mail to read. The mail would be delivered and the person who chooses not to read it could simply throw it away. The value of preserving the individual's choice remains inviolate. Assuming that there is usually some way, even if onerous, to avoid the speech, the individual can still choose not to hear or see it. The right to choose is inherent in the notion of escape from the speech; the individual has the choice whether to hear the speech or leave the area. The right to choose, however, could provide a way to evaluate whether the listener should bear the burden of avoiding the speech. If the choice is not one that could be freely made, then the court could find the burden to be unreasonable and the person captive.

For example, consider an individual in a long line at the airport, waiting to purchase tickets for a flight. After waiting for twenty minutes and inching towards the front, she is confronted by a member of the Hare Krishna sect who wants to discuss his religion and who ignores her pleas to go away. The person in line has a number of choices. She can turn her head away and try not to listen. She can put her hands over her

100. See Gerety, *supra* note 85, at 275, n.153 (all compulsion cannot be invasion of privacy, need concept of intimacy of personal identity).

101. McKay, *supra* note 83, at 272.

102. See, e.g., David A.J. Richards, *Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment*, 123 U. PA. L. REV. 45 (1974); Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591 (1982).

ears. She can leave the line. The court would need to consider the reasonableness and efficacy of each alternative. If the final one—leaving the line—is the only one that realistically would avoid the message,¹⁰³ a court might find it an unreasonable burden. Although in one sense the traveler is physically fully capable of removing herself from the line, in reality the choice may be illusory; if she leaves the line she may risk missing the flight. The traveler has no choice but to listen.¹⁰⁴

The right to choose is a value worth protecting and is served by the captive audience doctrine. But by itself the right to choose is inconclusive. Courts must decide the question of what is an undue restriction on the right to choose. The value thus requires the court to analyze the possible choices available to the listener in avoiding the speech; it does not necessarily compel the conclusion that the speaker's right to free expression should be infringed.

B. The Right to Repose

In addition to the value in allowing people the choice of what to hear or see, the right to be let alone may be worthwhile to preserve tranquility and repose. Restated, then, the right is really the right not to be bothered. It is the right not to be stopped while walking to school, not to be interrupted by a phone call or a doorbell ringing, not to have to interact with another.

Thus defined, why is this right important? To some extent, the right to repose is based on notions of autonomy; it protects the ability of people to choose to be left alone. Independently, the right to repose serves

103. For example, the volume of the speech may make turning the head impossible. This may also impede the efficacy of putting hands over the ears; or perhaps that option is not feasible because the traveler, although unwilling to listen to the Hare Krishna, may need to listen to others as she stands in line.

104. In *International Soc'y for Krishna Consciousness, Inc. v. Lee*, 721 F. Supp. 572 (S.D.N.Y. 1989), the district court held unconstitutional the Port Authority of New York's policy prohibiting the distribution of literature to, and the solicitation of contributions from, persons in the passenger terminal at various airports. The court held that the airport was a public forum, and rejected any captive audience problem:

Defendant further argues that the presence of captive audiences distinguishes the airports from the traditional public fora of streets and parks. . . . With this contention, we do not agree. Captive audience group[s] [form] outside city concert halls, movie theaters, and outdoor concession stands to the same extent as they form at airport ticket counters, baggage conveyer belts, and security checkpoints. . . . Such concerns, however, are the appropriate subject of reasonable time, place and manner restrictions, not blanket prohibitions on expressive activity.

Id. at 578.

The court also rejected any analogy to *Lehman* as farfetched, but added that "[d]efendant's reliance on *Lehman* might be more persuasive were plaintiffs seeking access to the aircraft, themselves." *Id.* at 578 n.8.

other values: when we are let alone and not subject to interruption or disturbance, we can use that time to engage in private behavior, to develop intimate relationships, reflect on ideas, or vent our emotions.¹⁰⁵

This right to repose, to engage in private behavior, to enjoy tranquility and peace, has been most clearly protected with respect to the home. There should be some place to go for peace, to get away from it all, to be by ourselves. Although the familiar saying "a man's home is his castle" has not been more eloquently transposed by the Supreme Court into a broad-based protection of privacy in the home,¹⁰⁶ the Court has consistently viewed "protecting the well-being, tranquility, and privacy of the home . . . [as a state interest] of the highest order in a free and civilized society."¹⁰⁷

Although the right to tranquility and peace are values worth protecting, these rights do not necessarily justify the way courts define the right not to hear, either within or without the home. Within the home, individuals are deemed captive without any showing that their right to repose has been violated in an unacceptable way. In *Frisby*, for example, the Supreme Court did not indicate whether the target of the picketing was in any way affected by the acts of the protesters.¹⁰⁸ At a minimum, a court should require some showing that interests worth protecting are being infringed, rather than rely on conclusory statements that a person's privacy interests are being invaded. Even within their homes, people are frequently and inevitably confronted with unwanted messages, the couple next door fighting, the man on the street chastising his children, the dog a few houses down barking, or the book with the unanticipated offensive passage. Concededly, the fact that some unwanted stimuli penetrate the home does not mean that all should be able to get in.¹⁰⁹ But it does

105. See Bazelon, *supra* note 93, at 590 (privacy assures space to reflect on one's choices, determine the direction of one's life, and permit emotional release); CHARLES FRIED, AN ANATOMY OF VALUES 142 (1970) (privacy promotes human relationships); Edward J. Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U. L. REV. 962, 974 (1964) ("He who may intrude upon another at will is the master of the other and, in fact, intrusion is a primary weapon of the tyrant.").

106. See *Bowers v. Hardwick*, 478 U.S. 186 (1986); *Osborne v. Ohio*, 495 U.S. 103 (1990).

107. *Carey v. Brown*, 447 U.S. 455, 471 (1980). See also *Gregory v. City of Chicago*, 394 U.S. 111, 125-26 (1969) (Black, J., concurring) ("I believe that the homes of men, sometimes the last citadel of the tired, the weary, and the sick, can be protected by government from noisy, marching, tramping, threatening picketers and demonstrators . . ."). See generally ZECHARIAH CHAFEE, JR., *FREE SPEECH IN THE UNITED STATES* 407 (1948) ("Freedom of the home is as important as freedom of speech.").

108. *Frisby v. Schultz*, 487 U.S. 474, 487 (1988).

109. Unlike picketing, moreover, none of these examples include speech *targeted* against the homeowner.

demonstrate the need to prove that the infringement on the right to repose is sufficiently serious to warrant governmental restriction on speech.

The burden of showing an infringement of the right to repose in the home is not onerous. An example of where such a finding likely could be made is in *Klebanoff v. McMonagle*.¹¹⁰ The Klebanoffs sought, and the court granted, an injunction to prevent picketing or demonstrations in the street directly in front of their home. The Klebanoff home had been picketed many Sundays for almost a year by twenty to thirty picketers who were members of an anti-abortion organization. The picketers carried signs and shouted comments to Dr. Klebanoff, and once attempted to taunt him into a physical confrontation. The family felt compelled to keep their son in the house in order to avoid the picketers. Mrs. Klebanoff left her house for the sake of her son and for her own emotional stability when no one else was home during the demonstrations. The family's reaction seemed reasonable under the circumstances because evidence was introduced that the picketers might become violent.¹¹¹ Thus, the Klebanoff family could not enjoy the tranquility of their home; they could not use their home any longer for private endeavors during the times that the picketing took place. These facts should have been sufficient to permit the court to weigh the parties' right not to hear in order to protect their right to repose and tranquility in the home, against the free speech rights of the picketers and against the rights of any willing listeners to hear.

Similarly, a time, place, and manner restriction¹¹² that prohibits loudspeakers in residential areas above a certain decibel level—or even prohibits such noise entirely during certain hours—may be justified based on the value of repose; an individual's right to repose presumably includes the ability to keep out, at least at certain times, unduly loud noises. A city ordinance like that in *Frisby* condemning all picketing, however, would be unconstitutionally overbroad under the standard I propose. Certain kinds of picketing, such as silent picketing or even peaceful picketing by a small group, should not be assumed, without proof, to significantly infringe on a homeowner's right to repose.¹¹³

110. 552 A.2d 677 (Pa. 1988). See *supra* note 41 and accompanying text.

111. *Klebanoff*, 552 A.2d at 679.

112. Time, place, and manner restrictions are content-neutral regulations of speech within the public forum. See *United States v. Grace*, 461 U.S. 171 (1983) (“[t]he government may enforce reasonable time, place, and manner restrictions [only if] the restrictions ‘are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.’”). *Id.* at 177.

113. See, e.g., *Brown v. Louisiana*, 383 U.S. 131 (1966) (silent picketing did not disturb function of library).

Beyond the confines of the home, the captive audience doctrine is not tailored to protecting repose. Return for a minute to the hypothetical of the Jewish man being followed by the person spewing anti-Semitic slurs. As noted, a court would probably not find him to be captive.¹¹⁴ Yet clearly his right to tranquility and peace is being violated. Assume that the Jewish man walks by a person standing on the street corner shouting anti-Semitic slogans through a bull horn. He hears what the person says and walks away, still hearing it for a short time. There is little doubt that the court would not silence the hate speech on the basis of either the captive audience doctrine or the listener's right to privacy. Yet certainly his sense of peace and tranquility has been greatly disturbed.

In sum, although the captive audience doctrine can be justified by the important goal of protecting repose, the principles of the doctrine are overprotective of repose within the home, and not sufficiently protective of repose outside the home. The answer may be that the doctrine needs an alternative justification, at least when employed outside of private residences. The previous hypothetical, concerning the anti-Semitic slurs, reveals the final value that may be worth protecting in the right to be let alone: a right to be free of certain speech that is offensive.

C. The Right to Be Free from Offensive Speech

Perhaps the meaning of the right to be let alone is that we should not have to listen to speech that offends. But why is this so? The arguments here sound circular: captive audiences should be protected from offensive speech because people should not be forced to hear such speech. When does the offensive nature of the speech justify its regulation?

In fact, offensive speech is by itself valuable. It is often an integral part of the message; to exclude offensiveness "would exclude from public consideration many of the ideas of the strident critics who have often made the most significant contributions to the public debate."¹¹⁵ Moreover, one person's offensive message is another's masterpiece; it is not for the government to determine what messages are "worthy" enough to be part of the marketplace of ideas.¹¹⁶ In other words, the notion that speech is offensive should not be enough to regulate it, even when it is delivered to a captive audience. Any interest in protecting people from

114. It is conceivable that a court would find that his privacy was being invaded in an intolerable manner; however, because courts seem to require captivity as a necessary condition before finding an invasion of privacy, such a holding is unlikely.

115. Frederick Schauer, *Response: Pornography and the First Amendment*, 40 U. PITT. L. REV. 605, 615 (1979).

116. See Farber, *supra* note 45, at 302.

such speech likely collapses into the previous two interests: the right to choose not to hear offensive messages and the right to repose. Positing a right to be free from offensiveness does not really advance the analysis.

Offensive speech, however, should not be viewed as a monolith. Probing deeper, there may be a certain value in protecting people from speech that may fall loosely within a category called "offensive speech." Offensive speech may cause some degree of emotional distress that justifies regulation. This distress is most clearly associated with hate speech: research has consistently demonstrated that insults and epithets based on group characteristics hurt the person to whom they are directed.¹¹⁷ Professor Mari Matsuda eloquently described the "spirit murder"¹¹⁸ caused by racist speech: "[T]he negative effects of hate messages are real and immediate for the victims. Victims of vicious hate propaganda have experienced physiological symptoms and emotional distress ranging from fear in the gut, [to] rapid pulse rate and difficulty in breathing, nightmares, post-traumatic stress disorder, hypertension, psychosis, and suicide."¹¹⁹

But is the captive audience doctrine suited to protecting this interest? Currently, the doctrine is not aligned with protecting individuals from emotional distress. Emotional distress is neither a necessary nor a sufficient condition for invoking the captive audience doctrine. First, there certainly is no requirement that such distress be proven before an audience is deemed captive. Moreover, even if there is emotional distress from exposure to speech, the court will not necessarily conclude that the listener is captive. For example, in *Collin v. Smith*,¹²⁰ the court conceded that many Holocaust survivors and other Jewish residents of Skokie would suffer real and significant emotional disturbance from the presence of Nazis in their community. The unwilling listeners, however, were still able to *physically* avoid the speech by not coming near the town hall, and

117. See Matsuda, *supra* note 9, at 2335-41 (detailing severe physical and psychological harm resulting from hate speech); Lawrence, *supra* note 9, at 462 (same); Christine A. Littleton, *Feminist Jurisprudence: The Difference Method Makes*, 41 STAN. L. REV. 751, 751-75 (1989) (describing effects of sexual harassment). Offensive speech that is directed at an individual and likely to provoke a violent response may be punished consistent with the First Amendment under the "fighting words doctrine." *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942). The fighting words doctrine has been narrowly construed by the courts, and the Supreme Court has not upheld a conviction under the doctrine in over 40 years. See Stephen W. Gard, *Fighting Words as Free Speech*, 58 WASH. U. L.Q. 531, 538 (1980). See also Kent Greenawalt, *Insults and Epithets: Are They Protected Speech?* 42 RUTGERS L. REV. 287, 291-98 (1990).

118. Patricia Williams, *Spirit-Murdering the Messenger: The Discourse of Fingerpointing as the Law's Response to Racism*, 42 U. MIAMI L. REV. 127, 129 (1987).

119. Matsuda, *supra* note 9, at 2336.

120. 578 F.2d 1197, 1200 (7th Cir. 1978), *cert. denied*, 439 U.S. 916 (1978).

thus they were not captive.¹²¹ If the value behind the right not to hear was truly freedom from emotional distress, the captive audience doctrine has not been interpreted to maximize that goal.

In addition to protecting individuals from messages that emotionally hurt, we may want to protect people from offensive messages that harass or intimidate. Harassing phone calls or other threatening or coercive messages may be prohibited because of the harm they cause to the unwilling recipient of the speech. Mere offensiveness is not enough to warrant protection for an individual under the captive audience doctrine. Some specific and definable harm attributable to the offensiveness must be demonstrated.

IV. Rethinking the Captive Audience Doctrine: A Proposed Solution

The captive audience doctrine is in disarray. It is a doctrine without clear definition, and thus renders future applications problematic. The courts apply an amorphous concept—the right to be let alone—without any real analysis of what that right means. The doctrine is not consistently applied, and when applied, it often entails content- and viewpoint-based distinctions. It is necessary to replace the slogan with a detailed, substantive analysis.

The captive audience doctrine is worth preserving to the extent that it can protect the important values identified in Part III. The doctrine should be retained only if courts engage in careful balancing that expressly identifies and weighs the competing interests. The values in favor of the right not to hear are only half of the balance. In using the captive audience test, the courts must also carefully identify and weigh the effects on freedom of speech.

Accordingly, in employing the captive audience doctrine, the courts should expressly weigh three factors. First, how great is the justification for protecting an unwilling audience? Second, how difficult is it for the listener to avoid the speech, and would avoiding the speech achieve the goals of the captive audience doctrine? Finally, how significant is the infringement on the First Amendment right to freedom of expression?

A. How Great Is the Justification?

First, how compelling is the justification for protecting the unwilling audience? As described in Part III, a court must carefully consider the precise value(s) furthered by the captive audience doctrine in a particular

121. *Id.* at 1207.

case. Does the government's regulation protect someone's freedom of choice with regard to receiving information? This would be true only if the regulation is like that in *Rowan*,¹²² where the government implements the express choice of the individual, or if the unwilling recipient seeks an injunction, requesting that the court protect his or her right not to hear or see a particular message. The right to choose would not be protected by an ordinance like that sustained in *Frisby*; there the government decided for its citizens what speech they should want to hear.¹²³

The right to repose might be posed separately or in conjunction with the right to choose. For example, in *Rowan*, both values are implicated;¹²⁴ in *Frisby*, only the former.¹²⁵ As indicated earlier, the court should not merely assume that any speech that "touches" the home infringes on the right to repose in objectionable ways; unwilling listeners should more specifically detail how their rights to peace and tranquility in the home (or elsewhere) are jeopardized. Evidence could be introduced that the noise from the picketing was so intrusive that people could not communicate, peacefully read, or even think thoughts. Or, evidence might show that the family was forced to leave the house because the picketing was so intrusive. In some cases, there might not be any evidence that the speech interferes with repose.

Finally, the court could consider whether, and to what extent, the unwilling listener is harmed psychologically by the speech. Claims of mere offensiveness should not be enough to outweigh free speech concerns; if the offensive speech is likely to cause serious emotional distress, the balance of interests may tilt against the right to freedom of expression.

B. How Much of a Burden?

The second factor the courts should evaluate explicitly is the burden on the listener in avoiding the speech. Initially, the court should consider the range of avoidance techniques, and analyze which one(s) effectively insulate the unwilling listener from the message. Next, the court should assess whether these ways of avoiding the message impinge on the very values protected under the captive audience doctrine: choice, repose, and avoiding emotional distress. For example, people almost always can put their hands over their ears to escape a verbal message delivered into the home. But this will infringe too greatly on repose: keeping

122. *Rowan v. United States Post Office Dep't*, 397 U.S. 728, 730 (1970).

123. *Frisby v. Schultz*, 487 U.S. 474, 476-77 (1988).

124. *Rowan*, 397 U.S. at 732.

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

one's hands over one's ears eliminates any ability to do many things that the peacefulness and tranquility of the home are supposed to permit. Earplugs may be a more viable option, but they too infringe on the ability to communicate with others within the home and thus develop or preserve intimate relations. These options, moreover, may infringe on choice: by closing off one's ears, one cannot listen to those sounds one wishes to hear.

Similarly, even turning one's head from speech, while protecting choice and perhaps repose, may not preserve the right to be free from emotional distress. It is only with emotional distress, not with some undefined notion of assault, that the court might find that any exposure to the speech is too great a burden for the unwilling listener. The court, moreover, must be careful not to use its own view of offensiveness or the government's assumption of what is offensive speech. There should be specific and persuasive evidence that any exposure to the speech is likely to cause, or did cause, significant emotional distress before the burden on the listener to avoid the speech is possibly obviated.

Moreover, as discussed earlier, the burden may be unacceptable because it does not represent a real choice to the listener. For example, deciding not to apply for welfare because of offensive messages in the government office is not a viable option for an impoverished individual. Forfeiting one's place in line at the airport terminal to turn away from a message is not an onerous physical burden, but the consequences of such an action make it an unrealistic choice. Crossing the street, however, to avoid listening to a religious sermon, or closing your eyes on the bus (or reading a book) to avoid looking at offensive advertisements, typically should not be considered unreasonable or onerous.

C. What Is the Impact on Expression?

The third factor the court should weigh is the impact on the First Amendment right to freedom of expression if the speech were prohibited or regulated. Here, the court needs to examine several specific questions. First, what is the effect of the proposed regulation on willing listeners? The captive audience doctrine may curtail the autonomy interests of others who desire to see or hear the message. When the government prohibits the posting of political ads in buses, it infringes the rights of other persons who would choose to receive such speech. As indicated earlier, courts on numerous occasions have protected the right not to hear at the expense of other willing listeners.¹²⁶ In so doing, courts in-

126. See, e.g., *supra* notes 31-33, 35, and 51 and accompanying text.

fringe the very interest they seek to preserve through the captive audience doctrine. The Seventh Circuit recognized this problem when rejecting the constitutionality of the Brookfield ordinance in *Schultz v. Frisby*:¹²⁷

It is also unclear how one is to separate conceptually, or actually, willing from unwilling listeners. One person's heresy is another's orthodoxy; the tamest discourse may be heard as a thunderous philippic. Maybe all of Dr. Victoria's neighbors disapproved of the plaintiff's picketing, but maybe somewhere in the community the picketer's chants fell on sympathetic ears. What seems relatively clear is that a municipality may not decide for its citizens what messages they may receive. Privacy, by definition, is a right that adheres to the person, and not to the community. The Town of Brookfield has usurped its citizens' right to decide for themselves what they shall, or shall not, hear and see.¹²⁸

Thus, the court will need to determine whether employing the captive audience doctrine infringes other listeners' rights to choose what speech to hear or see. To some extent, this issue turns on the existence of alternative, comparative forms of communication. The court should carefully tailor its order, if possible, to protect both the willing and unwilling listener. For example, an injunction prohibiting protests—proven to be sufficiently disturbing to the homeowner—within 10 yards of the target's home, yet permitting such picketing elsewhere in the neighborhood, may withstand constitutional challenge. This alternative forum may be comparable to picketing in front of the house, because the picketers can still reach the target as well as other potential listeners, without infringing too greatly on the right of the target to be free from unwanted messages in his or her home. As discussed, the Court's analysis in *Pacifica* is inadequate on this issue; it fails to consider the noncomparability of the other avenues for speech in exposing people to the message.¹²⁹

Finally, the court will need to consider other interests infringed by restricting freedom of speech. For example, there is a societal interest, and perhaps an individual interest, in exposing people to different ideas. The theory behind the First Amendment assumes that society benefits in a marketplace of ideas, in which arguments are met with counter-arguments, and there is a free flow of ideas, including the unorthodox and the unpopular.¹³⁰ If we all rejected ideas that ran counter to our intuition

127. 807 F.2d 1339 (7th Cir. 1986).

128. *Id.* at 1352.

129. *FCC v. Pacifica Found.*, 438 U.S. 726, 726 (1978).

130. *See Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting); *Dennis v. United States*, 341 U.S. 494, 546-53 (1951) (Frankfurter, J., concurring); *Whitney v.*

without any exposure to them, our growth as individuals would suffer. Thus, the court would need to assess the overall impact on the speaker's ability to communicate the message to society—that is, to convey the thought in the marketplace of ideas.

D. The Balance

In evaluating and weighing these three factors, the greatest justification for regulation of expression based on the captive audience doctrine exists when the speech is highly intrusive upon the values discussed in Part III, where the burden in avoiding speech would be very great, and the effect on expression quite minimal. Under this test, *Pacifica* was decided incorrectly. George Carlin's monologue played by the radio station does not violate repose in any meaningful way, especially if a person tuned in at the beginning of the broadcast, and individuals could protect themselves (and thus achieve the autonomy values) by turning off the radio or changing channels. The offensiveness of the speech does not rise to the level of emotional distress. The impact on First Amendment rights, however, is great because many willing listeners are completely denied access to speech. Moreover, no alternative forum would substitute for the radio.

On the other hand, racist speech in a dormitory might be an example where the captive audience doctrine is appropriately applied to restrict speech. Consider again the hypothetical of a racist poster placed on a dormitory door near the room of an African-American student. All three values underlying the right to be let alone are potentially implicated here. The African-American student's right to be free from offense may be infringed. The student may demonstrate that her right to repose in the home is infringed by evidence that she felt compelled to leave the dormitory or no longer felt capable of using her dorm room for what it was intended. Whether her right to choose what speech to see or hear was violated would turn on the possible alternative ways to avoid the message. Although the individual could turn her head, that may not protect her from emotional distress. While moving from the dormitory may accomplish that result,¹³¹ the doctrine should not require such extraordinary efforts: that would by itself infringe on the right to repose

California, 274 U.S. 357, 375-78 (1927) (Brandeis, J., concurring). See also Lawrence Byard Solum, *Freedom of Communicative Action: A Theory of the First Amendment Freedom of Speech*, 83 NW. U. L. REV. 54 (1989).

131. This may not be true; the mere exposure may seem too great a burden to place on the student.

and should not be considered a free choice.¹³² Less extreme alternatives, like taking a different route out of the dorm, also might be addressed. The court would need to assess what the student gives up if required to exercise this option: is the student forced to take a less desirable route (i.e., the stairs instead of the elevator)? Would the student be compelled to forego certain opportunities that other students have, such as being able to visit the dorm rooms of certain other students near the poster? Finally, the court would need to consider the First Amendment rights of those who live in the dorm and wish to express themselves in such a way, and the First Amendment interests of willing viewers who might be denied access to this message.

Conclusion

The captive audience doctrine is an undercurrent in First Amendment jurisprudence. Rarely subjected to careful analysis, it surfaces from time to time as the basis for restricting speech. The doctrine advances important values, and it should not be discarded. But these values currently are served only imprecisely and indirectly because application of the captive audience doctrine does not focus on them. Nor does analysis under a captive audience doctrine adequately consider the effects of the doctrine on free speech.

If the captive audience doctrine is to remain—and I believe it should—courts using it must engage in explicit and detailed analysis of the specific interests involved. The captive audience doctrine should become a method of analysis, not just a catchy slogan. The solution I propose does not provide a simple formula or a determinate single rule. But by identifying the specific factors that should be considered in the application of the captive audience doctrine, the doctrine should prove more workable. This analysis should allow the courts to protect more consistently and effectively the rights of both the speaker and all listeners, willing and unwilling. Thus can the substance replace the slogan.

132. See Lawrence, *supra* note 9, at 456 (“Minority students should not be required to remain in their rooms to avoid racial assault. Minimally, they should find a safe haven in their dorms and other common rooms that are a part of their daily routine.”).

