Fifty Years After *Brandenburg v. Ohio*

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ABA Forum on Communications Law Annual Meeting
January 31 – February 2, 2019

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Selected Free Speech Developments Fifty Years After *Brandenburg v. Ohio*

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The *Brandenburg* Decision

Clarence Brandenburg was an Ohio Ku Klux Klan ("KKK") leader who, speaking at local KKK rallies, made statements including, "if our President, our Congress, our Supreme Court, continues to suppress the white, Caucasian race, it's possible that there might have to be some revengeance taken" and "[p]ersonally, I believe the nigger should be returned to Africa, the Jew returned to Israel."[1] Brandenburg was convicted of advocating crime or violence as a means of accomplishing political reform and assembling a group formed to advocate criminal syndicalism under the Ohio Criminal Syndicalism statute.[2] At the time, twenty states had similar laws criminalizing speech that advocated crime or violence.[3] Brandenburg successfully challenged his conviction under the First and Fourteenth Amendments.[4]

As the Supreme Court noted, just over fifty years earlier, a similar California statute had been challenged on First Amendment grounds and upheld.[5] However, during the fifty intervening years, the legal landscape for speech regulation had shifted dramatically. During that time, the Court had begun to distinguish between speech regarding "the mere abstract teaching ... [of a] moral necessity for a resort to force and violence" and speech which was actually "preparing a group for violent action and steeling it to such action."[6] It had become clear that the former was

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[1] *Brandenburg v Ohio*, 395 U S 444, 446-47 (1969) (per curiam)

[2] *Id* at 445-46

[3] *Id* at 447

[4] *Id* at 445

[5] *Id* at 447 (citing *Whitney v California*, 274 U S 357 (1927))

[6] *Id* at 448 (quoting *Noto v United States*, 367 U S 290, 297-98 (1961))

protected under the First Amendment, and the latter was not. Relying on intent and likelihood of imminent violence or lawless conduct, the *Brandenburg* Court decided a line could be drawn between the two.[7] Statutes like the Ohio law that, in seeking to curb the latter, punished additional speech could not pass constitutional muster.[8]

As distilled by a leading commentator, unlawful incitement requires "(1) intent embodied in the requirement that such speech be 'directed to inciting or producing' lawless action; (2) imminence (embodied in the phrase 'imminent lawless action'); and (3) likelihood (embodied in the phrase 'and is likely to incite or produce such action')."[9] The impact of *Brandenburg* was immediate[10]: just a few years later, the Supreme Court relied on *Brandenburg* in finding that a university campus group was entitled to recognition even though the national organization had a philosophy of "violence and disruption,"[11] and in overturning a disorderly conduct conviction based on a demonstrator's statement "we'll take the fucking street [later or again]."[12] These cases made clear that *Brandenburg* had teeth, and in a five year period, wide swaths of speech that had previously been criminalized benefited from Constitutional protection.

Like the fifty years before *Brandenburg*, speech in the United States has changed dramatically in the fifty years since. The advent of the Internet, the twenty-four hour news cycle, hyper-partisanship, and terrorism have led to new wrinkles in free speech challenges. Even as the

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[7] *Id.* at 447.

[8] *Id.* at 448.

[9] Rodney A. Smolla, *Should the* Brandenburg v. Ohio *Incitement Test Apply in Media Violence Tort Cases*, 27 N. KY. L. REV. 1, 10 (2006) (quoting *Brandenburg*, 395 U.S. at 447).

[10] *Brandenburg's* impact was enhanced by the Supreme Court's issuance of another landmark free speech decision, *Tinker v. Des Moines Ind. Comm. Sch. Dist.*, earlier the same year. 393 U.S. 503 (1969). *Tinker* held that viewpoint-based speech prohibitions in schools violate the First Amendment unless the targeted speech is likely to substantially interfere with schoolwork or operations. *Id.* at 511.

[11] *Healy v. James*, 408 U.S. 169, 187 (1972).

[12] *Hess v. Indiana*, 414 U.S. 105, 107 (1973).

Court addresses speech questions that would have been unimaginable at the time *Brandenburg* was decided, *Brandenburg's* reach and impact have experienced a resurgence.

This article will discuss how *Brandenburg* has and has not influenced selected, major free speech developments in the last fifty years. In addition to examining how *Brandenburg* has influenced some free speech doctrine as applied in traditional public fora, it will examine developments in the context of schools and universities—sometimes hailed as bastions of free speech and sometimes criticized for politically correct censorship—and on the Internet, which has transformed the speed, amount, and nature of speech in ways that could not have been contemplated by many in *Brandenburg's* time.

Brandenburg's Limited Application in Traditional Public Fora

One of the first post-*Brandenburg* developments in the traditional public forum context was the Supreme Court's clarification that *Brandenburg* protects against even temporary deprivations of First Amendment rights. *National Socialist Party of America v. Village of Skokie*, decided in 1977, involved the denial of a motion to stay an injunction enjoining a Chicago neo-Nazi group from marching in uniform, wearing swastikas, and distributing or displaying "materials which incite or promote hatred against persons of Jewish faith or ancestry or hatred against persons of any faith or ancestry, race or religion."[13] The Supreme Court reversed the denial of the motion to stay, explaining that such speech restraints require "strict procedural safeguards" such as "immediate appellate review" or a stay in the interim.[14] The Court emphasized that such procedural protections were necessary because individuals would otherwise be deprived of their speech rights pending appeal, which could take "a year or more to complete."[15] In doing so, the

[13] 432 U.S. 43, 43 (1977) (per curiam).

[14] *Id.* at 44.

[15] *Id.*

Court reiterated the force of the First Amendment's protection in the face of some of the most egregious hate speech.

In addition to reiterating the force of *Brandenburg's* protections, the Supreme Court has clarified what *Brandenburg* does *not* protect. In *Virginia v. Black*, the Court has made clear that, although *Brandenburg* protects the right to express offensive ideas, it does not prevent the imposition of civil or criminal liability for harassment or intimidation.[16] The case involved three defendants challenging their convictions under Virginia's cross-burning statute.[17] In upholding the convictions, the Court noted that "[t]he First Amendment affords protection to symbolic or expressive conduct as well to actual speech."[18] As *Brandenburg* made clear, though, that protection was not absolute and did not extend to true threats.[19] Unlike statutes that criminalized offensive speech without qualification, the Virginia statute could be distinguished because it criminalized cross-burning "*with intent to intimidate*."[20] Cross-burning combined with such specific intent amounted to a punishable threat, and thus Virginia's statute was compatible with the First Amendment.

Because of *Brandenburg's* demanding test, however, it is not dispositive in many cases involving speech in public fora. More recent cases make clear that even highly provocative speech does not warrant a citation to *Brandenburg* and that the location of the speech is only one factor to be considered. For example, in *Snyder v. Phelps,* the Court upheld the Fourth Circuit's reversal of a large civil judgment that had been awarded against leaders of the Westboro Baptist Church

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[16] 538 U.S. 343 (2003).

[17] *Id.* at 348.

[18] *Id.* at 358 (citing *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992) (overturning a disorderly conduct conviction resulting from cross-burning) (additional citations omitted).

[19] *Id.* at 359-60.

[20] *Id.* at 362.

because of the Church's practice of protesting at the funerals of members of the military.[21] The Court emphasized that the speech at issue related to a public concern, thereby entitling it to the highest level of constitutional protection.[22] That the speech occurred in such a sensitive environment alone did not render it unprotected.[23]

In a similar vein, in *McCullen v. Coakley*, the Court invalidated Massachusetts's "buffer zone" law applicable to abortion clinics.[24] Although the Court had previously approved time, manner, and place regulations on speech outside abortion clinics,[25] the Massachusetts law was a blanket prohibition on all speech within 35 feet of an abortion clinic.[26] Because the statute prohibited some protected speech, the court found it facially invalid.[27]

Brandenburg On Campus

Brandenburg has seen new life recently, however, on school and university campuses which hold a special place in free speech doctrine. First Amendment protections still apply, but can be curtailed more sharply where a secondary school is acting in *loco parentis* or where there is a danger that the speech may be viewed as school-sponsored. To that end, the United States Supreme Court has allowed high schools to curtail speech that would ordinarily be protected under *Brandenburg*. Specifically, in *Bethel School District Number 203 v. Fraser*, the Court found that a high school did not violate a student's First Amendment rights in disciplining a student for

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[21] 562 U.S. 443 (2011).

[22] *Id.* at 444.

[23] *Id.*

[24] 134 S.Ct. 2518 (2014).

[25] *Hill v. Colorado*, 530 U.S. 703 (2000).

[26] *McCullen*, 134 S.Ct. at 2525.

[27] *Id.* at 2534.

offensive and lewd speech.[28] The Court reasoned that, because secondary schools necessarily stand in the shoes of parents when educating minors, they have a legitimate interest and greater latitude in protecting children from offensive speech.[29]

The Court has likewise approved high schools' censorship of students' speech which could be perceived as school-sponsored. For example, in *Hazelwood School District v. Kuhlmeier*, the Court found that the school's censorship of the student newspaper did not violate the First Amendment even though the censored material ordinarily would have enjoyed constitutional protection.[30] Because the newspaper was produced as part of the school's journalism class, relied on school resources, and was subject to direction from the school's journalism teacher, the Court found that "members of the public might reasonably perceive [the censored speech] to bear the imprimatur of the school," and it was permissible for educators to "exercise greater control" in order to further the newspaper's pedagogical purposes.[31]

The censorship decisions made by colleges and universities do not receive the same deference as those of high school administrators. In an early post-*Brandenburg* case, *Healy v. James*, the Court required a university to afford official recognition to a student group whose national organization was known for its philosophy of "violence and disruption."[32] Even in a university environment, the "mere expression" of an "abhorrent" philosophy "would not justify the denial of First Amendment rights."[33] Nor did the school's expectation that the group would be

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[28] 478 U.S. 675 (1986).

[29] *Id.* at 684.

[30] 484 U.S. 260 (1988).

[31] *Id.* at 271.

[32] 408 U.S. 169, 187 (1972).

[33] *Id.*

"a disruptive force on campus."[34] However, the school *could* deny recognition to any group that reserved the right to violate a valid campus rule.[35] Of note, the Court did not express concern that members of the public would perceive speech relating to the group's philosophy as bearing the imprimatur of the university.

Healy and similar cases have heavily influenced campus speaker dynamics today. Universities find themselves required to permit controversial speakers on campus as well as those who come to protest them. And universities simultaneously must bear the increased cost of accommodating both while maintaining a safe environment.[36] Recently, this clash has come to a head as universities find the increased security costs unsustainable, but face law suits when they do not permit such speakers on campus.[37] Further, even when universities pay such costs and

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[34] *Id.* at 191.

[35] *Id.* at 192-93.

[36] *See* Clay Calvert, *College Campuses as First Amendment Combat Zones and Free-Speech Theatres of the Absurd: The High Price of Protecting Extremist Speakers For Shouting Matches and Insults*, 16 FIRST AMEND. L. REV. 454, 455-56 (2018) (In light of deadly violence occurring in Charlottesville, Virginia, as the result of Richard Spencer's visit to the University of Virginia and outrage at the University of Florida's ("UF") decision to permit Spencer to speak, Spencer's UF visit necessitated 500-plus police officers to maintain the peace. A state of emergency was declared by the Governor, and the event cost UF more than $600,000.).

[37] *Id.* at 455 (noting that The Ohio State University, Michigan State University, and Pennsylvania State University attempted to block Spencer from speaking on campus and faced law suits). Spencer had previously successfully sued and obtained an injunction when Auburn University attempted to cancel an on-campus speech due to safety concerns. *Padgett v. Auburn University*, No. 3:17-cv-00231-WKW-WC, 2017 WL 10241386 (M.D. Ala. 2017). The Ohio State University and Pennsylvania State University cases have since been dismissed, while the Michigan State University case was resolved in mediation when the University agreed to permit Spencer to speak on campus. *See Padgett v. Bd. of Trs. of Ohio St. Univ.*, No. 2:17-CV-00919 (S.D. Ohio Mar. 6, 2018); *Padgett v. Bd. of Trs. of Penn. St. Univ.*, No. 4:17-CV-01911 (M.D. Pa. Apr. 23, 2018); *Padgett v. Bd. of Trs of Mich. St. Univ.*, No. 1:17-CV-00805 (W.D. Mich. Jan. 18, 2018); Susan Svrluga, *Michigan State agrees to let Richard Spencer give a speech on campus*, WASH. POST (Jan. 18, 2018), https://www.washingtonpost.com/news/grade-point/wp/2018/01/18/michigan-state-agrees-to-let-richard-spencer-give-a-speech-on-campus/?utm_term=.0902409ccdaf.

See also Calvert, *supra* n.36, at 462-64 (explaining that the "Supreme Court held in *Forsyth County v. Nationalist Movement* that "[s]peech cannot be financially burdened, any more than it can be punished or banned, simply because it might offend a hostile mob,'"—meaning that, under current doctrine, universities have no choice but to absorb the sometimes exorbitant security costs necessary to maintain safety when controversial speakers make campus visits) (citing 505 U.S. 123, 134-25 (1992)).

attempt to provide a viewpoint-neutral platform, the rise of the "heckler's veto," where opposition groups employ protest tactics or violence, may still silence controversial speakers.[38]

Despite the increasing frequency of such dilemmas, *Brandenburg* and its progeny make clear that prior restraints cannot be justified without satisfying the intent and likelihood of imminent violence requirements. Curtailing *Brandenburg's* protection would have far-reaching implications and would likely suppress some speech that most agree should remain protected. In any event, pressure to change free speech doctrine may be mounting as universities face increased political, public relations, and economic pressures.

Brandenburg Online

If the fifty years since *Brandenburg* have revolutionized how we contemplate free speech protections, the last twenty-five have fueled that revolution, as the Internet has provided a new forum permitting instant delivery of speech unlimited in quantity and audience. The Internet has largely been positive for speech, advancing the proliferation of non-traditional news outlets and giving individuals a platform where before they had none. But where advances are made for speech, they are made for all (or at least most) speech, including that which we would prefer not to hear. The Internet has also facilitated the proliferation of hate speech, but so far *Brandenburg* has proven versatile.

In *Elonis v. United States,* the Supreme Court overturned a conviction for making threats that was premised on a number of offensive Facebook posts.[39] In overturning the conviction, the Court emphasized the importance of intent when criminalizing conduct.[40] Because the trial court

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[38] *Id.* at 458-62 (discussing the rise of the heckler's veto and intolerance for hearing disagreeable speech on college campuses).

[39] 135 S.Ct. 2001 (2015).

[40] *Id.* at 2011-12. Of note, the Court did not premise its decision on First Amendment issues; nevertheless, *Elonis's* compatibility with *Brandenburg* is significant.

had instructed the jury to rely on how a reasonable person would have perceived the posts, rather than on the defendant's actual intent, in determining whether the posts constituted threats, the conviction could not stand.[41]

Elonis stands out as the first major test case for how free speech protections apply online. Given the speed with which the Internet is fueling online speech, it is unclear how long it will. Courts are already grappling with novel questions of when, how, and to what degree social media platforms should be held accountable for facilitating users' speech. For example, in *Fields v. Twitter*, the Ninth Circuit recently held that Twitter was not liable under the civil remedies section of the Anti-Terrorism Act ("ATA").[42] The plaintiffs in *Fields* alleged that, by providing accounts and direct-messaging services, Twitter provided material support to ISIS.[43] In finding for Twitter, though the Court acknowledged that Twitter may have "facilitated the organization's growth and ability to plan and execute terrorist acts," it nevertheless found that the plaintiffs had failed to establish that Twitter's alleged material support was the proximate cause of the plaintiffs' injuries.[44]

Fields admittedly addressed a matter of statutory interpretation, not a First Amendment challenge, but is informative for future online speech cases. The ATA's proximate causation requirement, in the context of online speech platforms, can be likened to *Brandenburg's* requirement that such speech be likely to induce imminent lawless action. Of course, even after *Elonis* and *Fields*, the question remains as to whether online communications can ever satisfy the imminence or proximate causation requirements given their inherently less direct nature. Even if

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[41] *Id.*

[42] 881 F.3d 739 (9th Cir. 2018).

[43] *Id.* at 742.

[44] *Id.* at 749-50.

courts resolve those questions, more will follow. For example, how much does it matter if speech is not protected when it is regulated not by the government, but by Twitter, Facebook, Google, and other private actors? In any event, some of these issues are likely to pose future challenges for the Court and for Congress. Whether the Court will revisit how *Brandenburg* applies online or the Congress will find that such issues are better addressed by online entities' self-governance remain to be seen.

Two Significant 2018 Cases

Two recent cases, *Nwanguma v. Trump*[45] and *Stricklin v. Stefani*[46], have both reaffirmed and questioned the limits of *Brandenburg's* protection. In *Nwanguma v. Trump*, the plaintiffs, protesters at a rally for then-candidate Trump, brought a claim against Trump for incitement to riot.[47] The plaintiffs argued that, in stating "get 'em out of here" on five occasions, Trump incited the crowd to assault, push, and shove the plaintiffs.[48] Trump moved to dismiss the claim on First Amendment grounds, but the district court denied the motion.[49] In reversing the denial, the Sixth Circuit emphasized "that 'the hostile reaction of a crowd does not transform protected speech into incitement.'"[50] Scrutinizing Trump's actual words under *Brandenburg*, the court found that they plainly fell short of incitement.[51] The court noted that the "district court did not identify 'a single word' in Trump's speech that could be perceived as encouraging violence or lawlessness"[52] and

[45] 903 F.3d 604 (6th Cir. Sept. 11, 2018).

[46] No. 3:17-CV-00397-RJC-DCK, 2018 WL 6606078 (W.D.N.C. Dec. 17, 2018).

[47] *Nwanguma*, 903 F.3d at 607.

[48] *Id.* at 606-07.

[49] *Id.* at 607.

[50] *Id.* at 610 (quoting *Bible Believers v. Wayne Cty.*, 805 F.3d 228, 246 (6th Cir. 2015)).

[51] *Id.*

[52] *Id.* at 610.

stressed that *Brandenburg* requires "*specific* advocacy of violence"—not mere "plausible" advocacy.[53] Furthermore, *Brandenburg* requires that speech be analyzed in context. In this context, the Court observed, Trump quickly followed the statements at issue with an admonition to "don't hurt em."[54] This admonition had the impact of neutralizing any "inciting tendency" of Trump's words.[55] Accordingly, the Sixth Circuit found that Trump's speech was within *Brandenburg's* protection.[56]

On the other hand, in *Stricklin v. Stefani*, the court found that the First Amendment did not shield Gwen Stefani from tort liability for telling concert patrons to "come down a little closer so [she could] see [them] a little better, just come on down, [she did not] think anyone's going to care, like just fill it in," allegedly causing the crowd to trample and injure the plaintiff.[57] Although the court agreed with Stefani's argument that the speech did not fall into an unprotected *category* (such as rising to the level of inciting a riot), the court emphasized that such "categories are not all-encompassing ... [s]tatements exist outside of these categories" that are of such "'slight social value ... that any benefit ... is clearly outweighed by the social interest in order and morality' ... [and such statements] disserve society by creating the potential for disorder and danger."[58] The court concluded that, in contrast with furthering artistic expression, Stefani's speech was both designed to and likely to induce "immediate action" that could foreseeably hurt someone, and thus was of little social value.[59] Since permitting Stefani to be held liable was not likely to have a

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[53] *Id.* at 612.

[54] *Id.*

[55] *Id.*

[56] *Id.*

[57] *Stricklin*, 2018 WL 6606078, at *2.

[58] *Id.* at *6 (quoting *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 504 (1984)).

[59] *Id.* at *7.

"chilling effect" on protected speech, the First Amendment did not preclude liability even though her speech did not overstep *Brandenburg's* boundaries.[60]

Both of these recent cases relied heavily on *Brandenburg* or its progeny and made clear that, even with some significant challenges and setbacks along the way, and with a somewhat uncertain future, fifty years later, *Brandenburg* remains relevant. From high-stakes campus clashes to anonymous online trolling to mosh pit mishaps, we look forward to fifty more years under *Brandenburg*.

[60] *Id.* at *8.

TAB 2

COLLEGE CAMPUSES AS FIRST AMENDMENT COMBAT ZONES AND FREE-SPEECH THEATRES OF THE ABSURD: THE HIGH PRICE OF PROTECTING EXTREMIST SPEAKERS FOR SHOUTING MATCHES AND INSULTS

Clay Calvert[⊗]

On October 19, 2017, the free-speech circus rolled into Gainesville, Florida.[1] The contentious crowd—Richard Spencer and a cadre of alt-right white nationalists[2]—brought their traveling spectacle[3] to a public university for the first time since deadly violence erupted in Charlottesville, Virginia—home to the University of Virginia—about two months earlier.[4]

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[1] *See* Editorial, *Open Carry + Protesters = A Recipe for Tragedy*, USA TODAY, Oct 19, 2017, at 7A ("Today, white nationalist leader Richard Spencer is to deliver a speech at the University of Florida in Gainesville, an event that led Gov Rick Scott to declare a state of emergency for the surrounding Alachua County to free up law enforcement resources ")

[2] *See* Scott Calvert & Alexa Corse, *Alt-Right Leaders Brush Off Criticism*, WALL ST J , Aug 15, 2017, at A4 (reporting that Spencer is "considered the founder of the alt-right movement," which "rejects mainstream conservatism, promotes nationalism and views immigration and multiculturalism as threats to white identity" and is "loosely organized"), Reid J Epstein & Janet Hook, *A New Political Order*, WALL ST J , Nov 10, 2016, at A1 ("Among those trying to rise in the new Republican Party are people such as Richard Spencer, the president of the National Policy Institute, an organization that advocates race based identity politics and was among Mr Trump's most enthusiastic supporters ")

[3] *See* Alan Blinder, *Roadshow of Hate Travelers From Afar Fuel White Supremacist Rallies*, N Y TIMES, Oct 29 2017, at A21 (describing the traveling "roadshow aspect" of events like Spencer's talk at the University of Florida, and asserting that "a reality of the alt-right movement" is "that it draws energy, and some of its most violent support, from out of-town sympathizers who regularly travel hundreds of miles to public events starring figures like Mr Spencer")

[4] *See generally* Joe Heim et al , *Charlottesville Protest Takes a Deadly Turn*, WASH POST, Aug 13, 2017, at A1 (reporting that "chaos and violence turned to tragedy" in Charlottesville, Virginia "as hundreds of white nationalists, neo Nazis and Ku Klux Klan members clashed with counterprotesters in the streets and a car plowed into crowds, leaving one person dead and 19 others injured," and adding that "[w]hite nationalist leader Richard Spencer" spoke at the rally, which "was meant to protest the planned removal of a statue of Confederate General Robert E Lee"), Sheryl Gay Stolberg & Brian M Rosenthal, *White Nationalist Protest Leads to Deadly Violence*, N Y TIMES, Aug 13, 2017, at A1 (reporting that "Charlottesville was engulfed by violence as white nationalists and counterprotesters clashed in one of the bloodiest fights to date over the removal of Confederate monuments across the South," and noting that Richard Spencer was scheduled to speak that day)

The University of Florida ("UF") afforded Spencer access to a campus auditorium.[5] But a trio of other public, land-grant institutions—Michigan State University,[6] Ohio State University,[7] and Pennsylvania State University[8]—did not. All three were sued for blocking Spencer and, in the process, attempting to bring his speaking tour to an inglorious finish.[9]

A major problem, however, for the schools currently battling Spencer is that his UF appearance demonstrated he can speak on campus without either inciting violence or using words directed to producing imminent lawless action. In other words, for an exceedingly exorbitant price tag,[10] the circus may continue unimpeded, with the UF visit serving as Spencer's Exhibit No. 1. It is a supreme irony. Whereas public universities once highlighted the violence in Charlottesville to justify banning him,[11] Spencer now can point to UF to illustrate why such censorship is unconstitutional.

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[5] Spencer's talk occurred at the "the 1,700-seat Curtis M Phillips Center for the Performing Arts," which is located "in the southwestern part of campus " Rachel Axon, *'It's Basically a Powder Keg Right Now', Florida Braces for Speech by Prominent White Nationalist*, USA TODAY, Oct 19, 2017, at 3A

[6] Plaintiff's Verified Complaint, Padgett v Bd of Trustees of Mich State Univ , No 1 17-cv-00805 (W D Mich filed Sept 3, 2017), http //dailycaller com/wp-content/uploads/2017/09/Padgett-v-Michigan-State pdf [hereinafter Michigan State Complaint]

[7] Complaint, Padgett v Bd of Trustees of the Ohio State Univ , No 2 17-cv-00919 ALM-KAJ (S D Ohio filed Oct 22, 2017), https //mgtvwcmh files wordpress com/2017/10/osu-complaint pdf [hereinafter Ohio State Complaint]

[8] Plaintiff's Complaint, Padgett v Bd of Trustees of the Pa State Univ , No 4 17-cv-01911-MWB (M D Pa filed Oct 19, 2017), http //www almcms com/contrib/content/uploads/documents/402/4903/Richard -Spencer-PSU pdf [hereinafter Penn State Complaint]

[9] *See supra* notes 6–8 (citing the complaints filed against each of the three universities) In January, 2018, Michigan State University agreed to let Spencer speak on campus, thereby bringing to a close the lawsuit filed against it David Jesse, *White Supremacist Richard Spencer Will Speaker at Michigan State After All*, DET FREE PRESS (Jan 18, 2018, 12 24 PM), https //www freep com/story/news/local/michigan/2018/01/18/richard-spencer-michigan state-university/1044354001/ Kyle Bristow, the attorney who filed the lawsuit against Michigan State on behalf of Spencer, called it both "a resounding First Amendment victory for people of the right-wing or alternative-right political persuasion" and a "stab[] at the very heart of left-wing censorship in academia " Susan Svrluga, *After Suit, Michigan State to let Spencer Speak,* WASH POST, Jan 22, 2018, at A13

[10] *See infra* note 12 and accompanying text (noting that it cost more than $600,000 in security measures to host Spencer at UF)

[11] For example, in denying Richard Spencer access to campus, Michigan State University asserted its "decision was made due to significant concerns about public safety in the wake of the tragic violence in Charlottesville " David Jesse, *Group Decries Antifa's 'Heckler's Veto,'* USA TODAY, Sept 5, 2017, at 6B Similarly, Pennsylvania State University President Eric Barron denied Spencer access to the University Park campus "[i]n light of the recent violence and tragedy in Charlottesville " Press Release, Eric J Barron, President, Penn State Univ , Richard Spencer is Not Welcome to Speak at Penn State (Aug 22, 2017),

Indeed, the UF-Spencer spectacle, thanks to more than $600,000 in taxpayer-funded security costs, the presence of 500-plus law enforcement personnel, and a state of emergency declared by Sunshine State Governor Rick Scott,[12] went off with only minor on-campus violence.[13] As the *Miami Herald* reported, "[w]hat conflict did occur—pepper spraying, punching, chasing—was largely instigated by anti-fascist protesters."[14]

Furthermore, Spencer's words were nowhere close to meeting the high threshold for unlawful incitement to violence—one of the rare categories of speech unprotected[15] by the First Amendment[16]—created by the United States Supreme Court nearly fifty years ago in *Brandenburg v. Ohio*.[17] Instead, the speech devolved into a futile shouting match between Spencer and "a boisterous audience packed with opponents"[18] who came not to praise him, but to bury Spencer with a raucous

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http //news psu edu/story/478590/2017/08/22/administration/richard-spencer-not-welcome-speak-penn-state

[12] *See* Paige Fry, *Alt Right Speech at UF Relatively Peaceful*, PALM BEACH POST (Fla), Oct 20, 2017, at 1A ("The state's flagship public university spent more than $600,000 on security on and near its campus to prepare for Richard Spencer's appearance and brought in more than 500 uniformed officers to police streets and control crowds under a state of emergency declared by Gov Rick Scott ")

[13] *See* Cindy Swirko & Daniel Smithson, *Behind-Scenes Logistics at Protest Let Officers Control Chaos*, GAINESVILLE SUN (Fla), Oct 21, 2017, at A1, A6 ("Few incidents occurred on the University of Florida campus when Spencer, who espouses white nationalist beliefs, spoke ")

A shooting later transpired off campus, approximately ninety minutes after the conclusion of Spencer's talk Susan Svriluga & Lori Rozsa, *Three Men Charged in Shooting After White Nationalist's Speech in Florida*, WASH POST, Oct 22, 2017, at A18 Three men, identified by police as white nationalists who attended the Spencer event, where charged with attempted homicide *Id*

[14] Alex Harris & Martin Vassolo, *UF Drowns out Spencer with 'Peace and Unity,'* MIAMI HERALD, Oct 20, 2017, at 1A

[15] *See* Ashcroft v Free Speech Coal , 535 U S 234, 245–46 (2002) ("The freedom of speech has its limits, it does not embrace certain categories of speech, including defamation, *incitement*, obscenity, and pornography produced with real children ") (emphasis added)

[16] The First Amendment to the U S Constitution provides, in pertinent part, that "Congress shall make no law abridging the freedom of speech, or of the press " U S CONST amend I The Free Speech and Free Press Clauses were incorporated more than ninety years ago through the Fourteenth Amendment Due Process Clause as fundamental liberties to apply to state and local government entities and officials *See* Gitlow v New York, 268 U S 652, 666 (1925)

[17] 395 U S 444 (1969) The Court in *Brandenburg* held that "that the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action " *Id* at 447

[18] Rick Neale, *Spencer's Words Wasted on Unwelcoming Ears in Fla , Protesters Outside, Hecklers Inside White Nationalist's Speech Flops at University*, USA TODAY, Oct 20, 2017, at 2A

cacophony of chants and jeers.[19] In that endeavor, they certainly succeeded and "mostly drowned out his speech."[20]

As one newspaper succinctly encapsulated it, "[s]houting and booing from the protesters in the hall—which included plenty of empty space and a small contingent of his supporters in the first few rows—left Spencer unable to make a sustained speech. Instead, he traded insults with the crowd."[21] Indeed, the protestors greeted "Spencer with mocking chants and raised fists, denying the provocateur an unchallenged platform to share his widely derided views on race in America."[22]

Bluntly put, more than half a million dollars was wasted in the name of the First Amendment on an event featuring neither a formal speech nor anything close to serious dialogue and discussion. If the massive police presence at UF prevented a so-called heckler's veto[23] and allowed Spencer to talk without being physically assaulted by a hostile mob, it also didn't forestall a tsunami of counter speech[24] that swamped Spencer. It

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[19] *See* Joe Heim et al., *Spencer Speech Met by Protests*, WASH. POST, Oct. 20, 2017, at A3 (reporting that Spencer was "drowned out . . . by a hailstorm of chants, shouting and mockery," noting that "[t]he protest and chants in the auditorium began as soon as the event began and continued until Spencer finally walked offstage 90 minutes later," and quoting Spencer as calling the audience "shrieking and grunting morons").

[20] Associated Press, *Ohio State Sued Over Refusal to Let White Nationalist Speak*, ST. LOUIS POST-DISPATCH, Oct. 23, 2017, at A8.

[21] Andrew Pantazi & Nate Monroe, *Shouting Match; Hostile Audience Drowns Out White Nationalist's Speech*, FLA. TIMES-UNION, Oct. 20, 2017, at A-1.

[22] *Id.*

[23] *See generally* DON R. PEMBER & CLAY CALVERT, MASS MEDIA LAW 42 (19th ed. 2015) (asserting that a heckler's veto transpires "when a crowd or audience's reaction to a speech or message is allowed to control and silence that speech"); Brett G. Johnson, *Heckler's Veto: Using First Amendment Theory and Jurisprudence to Understand Current Audience Reactions Against Controversial Speech*, 21 COMM. L. & POL'Y 175, 215–19 (2016) (explaining that "[i]n hostile audience cases, the referees are the police who provide protection for unpopular speakers, as well as the jurists who continue to uphold the principle that these speakers are deserving of such protection," and contending that the heckler's veto doctrine "stand[s] for the principle that state actors have a duty to protect speakers from hostile audiences who would seek to either do harm to speakers, or threaten to do harm and thereby force law enforcement to silence speakers").

[24] Justice Louis Brandeis famously explained the counter speech doctrine ninety years ago, asserting that "[i]f there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence." Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring); *see also* Robert D. Richards & Clay Calvert, *Counterspeech 2000: A New Look at the Old Remedy for "Bad" Speech*, 2000 BYU L. REV. 553, 553–54 ("Rather than censor allegedly harmful speech and thereby risk violating the First Amendment protection of expression, or file a lawsuit that threatens to punish speech perceived as harmful, the preferred remedy is to add more speech to the metaphorical marketplace of ideas.").

was all very much theatre of the absurd, with a complete breakdown of coherent communication.[25]

At least two intriguing issues arise from the UF experience. The first is the collapse of on-campus, civilized conversations when an audience is confronted by a speaker who espouses offensive, disquieting viewpoints. The second is the exploitation by extremist speakers of public universities to garner high-profile stages from which to gain the media spotlight they crave. These twin issues are addressed below.

I. THE COLLAPSE OF CAMPUS CONVERSATIONS: EITHER SHUT UP OR WE'LL SHUT YOU UP

Richard Spencer has no one to blame but himself for allowing protestors into the auditorium where he spoke at UF. After all, it was his organization—the National Policy Institute—that distributed the tickets to the event.[26] But the spectacle that ensued in the auditorium raises larger cultural questions about whether, in the era of Twitter rants and instant outrage, it is even possible for people to respectfully listen to discomfiting messages on a college campus.

Columbia University Professor Tim Wu recently lamented the deterioration of the expressive environment in the United States.[27] Although Wu focused on what he aptly called "[t]he angry, censorial online mob"[28] and "abusive online mobs,"[29] similar attention must be paid to abusive, real-world

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[25] *See* Martin Esslin, *The Theatre of the Absurd*, 4 TUL. DRAMA REV. 3, 5 (1960) (noting, in the seminal article on the topic, that theatre of the absurd is characterized, among other things, by a "futility and pointlessness of human effort" and the "impossibility of human communication" that "shows the world as an incomprehensible place").

[26] *See* Noah Feldman, *Richard Spencer Has Only Himself to Blame for Hecklers*, BLOOMBERG: VIEW (Oct. 19, 2017, 4:40 PM), https://www.bloomberg.com/view/articles/2017-10-19/richard-spencer-has-only-himself-to-blame-for-hecklers (noting that the hecklers "held tickets distributed by Spencer's own National Policy Institute"); Janae Muchmore, *National Policy Institute Takes Over Ticket Distribution For Richard Spencer*, WUFT (Oct. 17, 2017), https://www.wuft.org/news/2017/10/17/national-policy-institute-takes-over-ticket-distribution-for-richard-spencer/ (describing how the National Policy Institute took over distribution of all tickets after it "caught wind of local organizations and businesses intent to encourage locals to get tickets and not show up").

[27] Tim Wu, *Is the First Amendment Obsolete?*, *in* EMERGING THREATS 2 (David Pozen ed., 2017), https://knightcolumbia.org/sites/default/files/content/Emerging%20Threats%20Tim%20Wu%20Is%20the%20First%20Amendment%20Obsolete.pdf ("We live in a golden age of efforts by governments and other actors to control speech, discredit and harass the press, and manipulate public debate. Yet as these efforts mount, and *the expressive environment deteriorates*, the First Amendment has been confined to a narrow and frequently irrelevant role.") (emphasis added).

[28] *Id.* at 14.

[29] *Id.* at 11.

mobs that, as the University of California, Berkeley witnessed in 2017, sometimes resort to violence to squelch speech to which they object.[30]

Even when physical violence does not occur, speakers are still not permitted to talk when hostile students take over a venue. For instance, at William & Mary in October 2017, members of the college's Black Lives Matter chapter, chanting "[l]iberalism is white supremacy," rushed the stage and thwarted an attorney from the American Civil Liberties Union from making a presentation innocuously called "Students and the 1st Amendment."[31] Also in October 2017, a chanting group of students at the University of Oregon in Eugene "stormed the stage as President Michael Schill was to give his annual State of the University speech. The students, some holding signs, including one that said 'Take back our campus,' were protesting Schill's leadership, including the treatment of minority students and tuition increases."[32] The speech was cancelled and "Schill walked out of the auditorium without ever taking the podium."[33]

Lurking behind such incidents are shifting cultural views, as well as divisions along racial and political lines, about the importance of protecting free expression. The Cato Institute's 2017 survey of Americans' attitudes toward free speech and tolerance reveals the following:

> • The vast majority—76%—of those surveyed felt "that recent campus protests and cancellations of controversial speakers are part of a 'broader pattern' of how college students deal with offensive ideas."[34] Put bluntly, if an idea offends you, then shut up the speaker. Why bother listening?

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[30] *See* Thomas Fuller & Stephanie Saul, *Latest Battle at Berkeley: Free Speech Versus Safety*, N.Y. TIMES, Apr. 22, 2017, at A10.

[31] Editorial, *Let Campus Speakers Speak*, L.A. TIMES, Oct. 17, 2017, at A10; Editorial, *Free Speech Besieged*, N.Y. POST, Oct. 6, 2017, at 24; Francesca Truitt, *Black Lives Matter Protests American Civil Liberties Union*, FLAT HAT (Oct. 2, 2017), http://flathatnews.com/2017/10/02/black-lives-matter-protests-american-civil-liberties-union/.

[32] Associated Press, *Students Disrupt Speech by Oregon President*, SPOKESMAN REV. (Spokane, Wash.), Oct. 7, 2017, at C6.

[33] Therese Bottomly, *Student Protesters Disrupt University of Oregon's Announcement of $50 Million Gift*, OREGONIAN (Oct. 6, 2017), http://www.oregonlive.com/education/index.ssf/2017/10/protesters_disrupt_announcemen.html.

[34] Emily Ekins, *The State of Free Speech and Tolerance in America: Attitudes About Free Speech, Campus Speech, Religious Liberty and Tolerance of Political Expression*, CATO INST. 1, 3 (2017), https://object.cato.org/sites/cato.org/files/survey-reports/pdf/the-state-of-free-speech-and-tolerance.pdf.

> • Demonstrating support for a heckler's veto,[35] 58% of those surveyed by Cato think that "colleges should cancel controversial speakers if administrators believe the students will stage a violent protest otherwise,"[36] with the figure rising to a whopping 74% among Democrats surveyed.[37] In stark contrast, 54% of Republicans surveyed said that colleges should not cancel the speaker if students threaten violence.[38]
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> • Reflecting both racial and political divisions, the survey found that "[s]trong liberals (52%), African Americans (54%), and Latinos (54%) stand out with slim majorities who believe it's more important for colleges to prohibit offensive and biased speech on campus. Conversely, majorities of regular liberals (66%), conservatives (73%), and white Americans (73%) think colleges need to expose students to a wide variety of perspectives even if they are offensive or prejudiced."[39]

A 2017 survey of college students conducted by YouGov on behalf of the Foundation for Individual Rights in Education revealed divisions along the lines of political affiliation when it comes to disinviting controversial speakers. "Democratic students are 19 percentage points more likely than their Republican peers to agree that there are times a speaker should be disinvited," the report notes.[40] Specifically, "[a]lmost half of Republicans (47%) and two-thirds of Democrats (66%) support disinvitations in some instances."[41]

A 2016 survey conducted by Gallup for the Knight Foundation and the Newseum Institute reflected differences in beliefs among college students based on race. Specifically, 41% of black students surveyed believed that colleges should be able to restrict the expression of "political views that are upsetting or

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[35] *See supra* note 23 and accompanying text (discussing the concept of a heckler's veto).
[36] Ekins, *supra* note 34, at 4.
[37] *Id.*
[38] *Id.*
[39] *Id.* at 41.
[40] Kelsey Ann Naughton, *Speaking Freely: What Students Think About Expression at American Colleges*, FOUND. FOR INDIVIDUAL RIGHTS IN EDUC. 1, 15 (Oct. 2017), https://d28htnjz2elwuj.cloudfront.net/wp-content/uploads/2017/10/11091747/survey-2017-speaking-freely.pdf.
[41] *Id.*

offensive to certain groups."[42] In contrast, only 24% of white students felt colleges should restrict such political views.[43]

Perhaps the growing intolerance in college for hearing disagreeable speech is simply generational. As Erwin Chemerinsky and Howard Gillman recently wrote, the current crop of college students "is the first generation of students educated, from a young age, not to bully. For as long as they can remember, their schools have organized 'tolerance weeks.'"[44] Ironically, of course, the only thing that some of them seem unable to do is tolerate the intolerant speech of others.

Ultimately, and regardless of why it occurred, what transpired at UF when Richard Spencer attempted to speak there was disappointing. As a columnist for one Florida newspaper put it, "As much as I hate what Spencer has to say, he should have been able to say it. The danger in not allowing free speech is the tide during these contentious times can turn quickly and take aim at different beliefs tomorrow."[45]

Lata Nott, executive director of the First Amendment Center of the Newseum Institute, stresses another problem with shouting down speakers. "It demonstrates a visceral fear of ideas, as if it's not enough to disagree with someone's opinion, or even vehemently oppose it—instead, *they must not be allowed to express it in the first place*," she writes.[46] She adds that:

> Shouting down a speaker like Richard Spencer makes students feel like they've defeated a neo-Nazi—but it's uncertain what kind of impact this has on the white supremacist movement as a whole. Sometimes we forget that freedom of speech doesn't just refer to the right to talk; it also encompasses the right to hear others speak. The rising antagonism toward speech we disagree with doesn't necessarily violate the First Amendment, but this attitude can be corrosive to its spirit.[47]

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[42] GALLUP, INC , FREE EXPRESSION ON CAMPUS A SURVEY OF U S COLLEGE STUDENTS AND ADULTS 13 (2016),
https //www knightfoundation org/media/uploads/publication_pdfs/FreeSpeech_campus pdf

[43] *Id*

[44] ERWIN CHEMERINSKY & HOWARD GILLMAN, FREE SPEECH ON CAMPUS 10 (2017)

[45] Ron Littlepage, *Richard Spencer's Supremacist Views are Terrible, but He Should be Allowed to Speak*, FLA TIMES-UNION, Oct 25, 2017, at A-7

[46] Lata Nott, *Shouting Down Free Speech*, NEWSEUM INST (Oct 27, 2017)
http //www newseuminstitute org/2017/10/26/shouting-down-free-speech/

[47] *Id*

Thus, it is readily evident that free speech advocates and, in particular, free speech educators now face a daunting task of promoting ideals of civil discourse and discussion when speakers with disagreeable viewpoints come to campus. It is not mere hyperbole to believe that the very notion of a public university as a marketplace of ideas—something embraced by the U.S. Supreme Court[48]—lies in the balance.

II. EXPLOITING PUBLIC UNIVERSITIES: THE BILL FOR COVERING COSTS OF EXTREMIST CIRCUSES

Beyond the collapse of conversation, Richard Spencer's UF visit highlights another issue. Specifically, a critical problem today, as UF President Kent Fuchs opined in the pages of the *Wall Street Journal* shortly after Richard Spencer's UF visit, is that public universities "may become hostage to Nazis or other extremists—forced to stand by as these groups capitalize on their university's visibility and prestige to amplify their vile messages." [49] In brief, Richard Spencer is causing the militarization—recall the more than 500 law enforcement personnel to keep the peace at UF[50]—and weaponization of government property. A *Tampa Bay Times* article crisply captured Spencer's exploitation and hijacking of the First Amendment this way:

> Spencer and other fringe-right provocateurs have seized on prestigious public universities as launching pads for their viral stunts. Beyond a built-in audience of students and press, these speakers get to stand upon the First Amendment, which makes it difficult for public institutions to push away speakers with even the vilest of beliefs, and with even the most hostile of potential audiences.[51]

It's an issue now spilling over from the halls of academia to the chambers of the U.S. Capitol. As Senator Lamar Alexander, R-Tenn., chairman of the Senate Committee on

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[48] *See* Healy v. James, 408 U.S. 169, 180 (1972) (opining that "[t]he college classroom with its surrounding environs is peculiarly the 'marketplace of ideas'" (quoting Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967))).

[49] Kent Fuchs & Glenn C. Altschuler, *How White Supremacists Exploit Higher Education*, WALL ST. J., Oct. 23, 2017, at A17.

[50] *Supra* note 12 and accompanying text.

[51] Claire McNeill & Kathryn Varn, *Richard Spencer Speaks, and Gainesville Emerges Weary but at Peace*, TAMPA BAY TIMES, Oct. 20, 2017, at 1.

Health, Education, Labor & Pensions, asserted during an October 2017 hearing:

> there is the question of deliberately inflammatory speakers, and the protests and riots in response that push the freedom of speech to a limit that creates chaos. Sometimes these demonstrations turn into tragedy as we saw recently in Charlottesville. And just last week at the University of Florida, when the white supremacist Richard Spencer was speaking, his supporters and protestors caused the university to spend $600,000 on security, bring in over 1000 law enforcement officers and cause the governor to declare a state of emergency. It is a familiar problem in a country that prizes freedom. If you're a university president, what do you do about this?[52]

The answer to Senator Alexander's question, of course, varies. As noted above, some university presidents have denied Spencer access and now face lawsuits.[53] But for those like UF President Kent Fuchs that grant him access, the price tag is high, and their campuses are turned into militarized zones. UF had to cover the cost of the security, rather than shifting it to Spencer, because the U.S. Supreme Court held in *Forsyth County v. Nationalist Movement*[54] that "[s]peech cannot be financially burdened, any more than it can be punished or banned, simply because it might offend a hostile mob."[55] But as UF spokeswoman Janine Sikes explained, "[p]ublic institutions cannot continue to pay this kind of money."[56]

In his *Wall Street Journal* column, Fuchs suggested that a "partial solution could entail a new Federal Extremist Speakers Fund to help universities with their exorbitant security costs. That would shift the financial burden of following the First Amendment to the government that requires universities to do

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[52] *Exploring Free Speech on College Campuses: Hearing Before the S. Comm. on Health, Educ., Labor & Pensions*, 115th Cong. (2017) (opening statement of Sen. Lamar Alexander, Chairman, S. Comm. on Health, Educ., Labor & Pensions), https://www.alexander.senate.gov/public/index.cfm?p=SpeechesFloorStatements&id=43BEFB1D-1CBF-4460-8CEA-DB9C2D09BA69.

[53] *See supra* notes 6–8 (citing the complaints filed on behalf of Spencer against Michigan State University, Ohio State University, and Pennsylvania State University).

[54] 505 U.S. 123 (1992).

[55] *Id.* at 134–35.

[56] Douglas Belkin, *U.S. News: Colleges Face High Security Expenses*, WALL ST. J., Oct. 23, 2017, at A3.

so."[57] Such a proposal, however, merely moves the burden from one governmental entity (a public university) to another (the federal government), with taxpayers ultimately paying in the end.

The fact, of course, is that Richard Spencer could just as easily rent space in a ballroom at a Hilton or Hyatt hotel and, in turn, have total control over the audience. Such venues, however, would not allow Spencer to invoke the First Amendment and play the role of victim when he is denied access to a public university campus. They also would not provide him with the large, angry crowds that generate massive news media coverage for his message. For now, then, public universities are being exploited for events that carry little educational value.

III. CONCLUSION

One of the more interesting tidbits of data gleaned by the Cato Institute survey cited earlier is that "51% of strong liberals say it's 'morally acceptable' to punch Nazis."[58] Outside the auditorium where Richard Spencer spoke at UF, white nationalist Randy Furniss—wearing a shirt festooned with swastikas—was punched in the face by an unknown assailant.[59] Furniss, who wasn't speaking and was merely walking through the crowd when he was punched, told the *Gainesville Sun* that people "were hitting me on the back of the head and sitting on me . . . . It wasn't black people, it was white people, they were getting everybody riled up."[60]

Indeed, the presence of extremist speakers on college campuses certainly has many riled up. As this Essay suggested, a larger issue raised by Spencer's UF appearance is whether the riling up and agitation he provokes also reflects a societal change in how people respond to messages with which they vehemently disagree. The collapse of conversations on public university campuses and the rise of attitudes in favor of stifling speakers are profoundly troubling developments for the future of the First Amendment freedom of speech. Yet at the same

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[57] Fuchs & Altschuler, *supra* note 49, at A17.

[58] Ekins, *supra* note 34, at 1.

[59] Mary Hui, *A Black Protester Hugged a White Nationalist Outside Richard Spencer's Talk. 'Why Do You Hate Me?' He Asked*, WASH. POST (Oct. 20, 2017) https://www.washingtonpost.com/news/inspired-life/wp/2017/10/20/a-black-protester-hugged-a-white-nationalist-outside-richard-spencers-talk-why-do-you-hate-me-he-asked/?utm_term=.bebddb4d5820.

[60] Sara Marino, *After Punch at Richard Spencer Protest, an Unlikely Friendship*, GAINESVILLE SUN (Oct. 21, 2017, 1:31 PM), http://www.gainesville.com/news/20171021/after-punch-at-richard-spencer-protest-unlikely-friendship.

time, as this Essay pointed out, it is equally worrisome that educational institutions are being exploited and held financially hostage in the name of the First Amendment by extremist speakers. There are no easy solutions to either problem, but starting to examine them now, as the Richard Spencer circus raucously rolls on, is critical.

TAB 3

Northwestern University Law Review

Vol 112

RECONSIDERING INCITEMENT, *TINKER* AND THE HECKLER'S VETO ON COLLEGE CAMPUSES: RICHARD SPENCER AND THE CHARLOTTESVILLE FACTOR

Clay Calvert

ABSTRACT—This Essay analyzes key First Amendment issues surrounding Richard Spencer and Milo Yiannopoulos speaking on public university campuses. Some institutions (Ohio State University, Michigan State University and Pennsylvania State University) have flatly banned Spencer, citing fears of incitement to violence but also sparking federal lawsuits. Other schools have permitted Spencer to speak, but at massive security costs, in an attempt to prevent a so-called heckler's veto. This Essay examines the tension between providing a public platform for controversial speakers and the costs associated with doing so, including the relevance of the Supreme Court's aging incitement test created in *Brandenburg v. Ohio*. It also questions the Court's 1992 ruling in *Forsyth County v. Nationalist Movement* restricting governmental entities' ability to shift escalating security fees to speakers based on fears of violence.

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INTRODUCTION

Here's a foolproof formula for generating legal woes at public universities:

Start with a healthy dose of the First Amendment.[1] It protects offensive ideas,[2] including on campus.[3] Then sprinkle in ignorance among many students regarding the types of expression—most significantly, hate speech[4]—that the First Amendment safeguards.[5]

Stir into this mixture a "safe spaces"[6] mentality at some institutions where, purportedly, "professors live in fear of accidentally offending their

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[1] The First Amendment to the U S Constitution provides, in pertinent part, that "Congress shall make no law abridging the freedom of speech, or of the press " U S CONST amend I The Free Speech and Free Press Clauses were incorporated more than ninety years ago through the Fourteenth Amendment Due Process Clause as fundamental liberties to apply to state and local government entities and officials *See* Gitlow v New York, 268 U S 652, 666 (1925) ("[F]reedom of speech and of the press are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States ")

[2] *See* Matal v Tam, 137 S Ct 1744, 1751 (2017) (calling it "a bedrock First Amendment principle" that "[s]peech may not be banned on the ground that it expresses ideas that offend")

[3] *See* Papish v Bd of Curators Univ of Mo , 410 U S 667, 670 (1973) (asserting that "the mere dissemination of ideas—no matter how offensive to good taste—on a state university campus may not be shut off in the name alone of 'conventions of decency'"), *see also* Texas v Johnson, 491 U S 397, 414 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable ")

[4] Justice Samuel Alito recently explained for the Supreme Court that hate speech is protected by the First Amendment, writing that "[s]peech that demeans on the basis of race, ethnicity, gender, religion, age, disability, or any other similar ground is hateful, but the proudest boast of our free speech jurisprudence is that we protect the freedom to express 'the thought that we hate '" *Matal*, 137 S Ct at 1764 (quoting United States v Schwimmer, 279 U S 644, 655 (1929) (Holmes, J , dissenting))

[5] A nationwide survey of 1,500 undergraduates conducted in August 2017 found that 44% mistakenly believe the First Amendment does not protect hate speech and 16% did not know if the First Amendment protects hate speech John Villasenor, *Views Among College Students Regarding the First Amendment Results from a New Survey*, BROOKINGS INST (Sept 18, 2017), https //www brookings edu/blog/fixgov/2017/09/18/views-among-college-students-regarding-the-first-amendment-results-from-a-new-survey/ [https //perma cc/RH5X-WRGV], *see also* Catherine Rampell, *Students Need a Lesson on Free Speech*, WASH POST, Sept 19, 2017, at A17 (noting that the same survey revealed "significant differences by gender Women are more likely than men to believe hate speech is not constitutionally protected (49 percent vs 38 percent, respectively)")

[6] The definition of safe space is contested Stanford University Education Professor Eamonn Callan notes, for example, that while the meaning of safe space "is ambiguous," the term "sometimes means an

own students."[7] This seemingly contravenes the United States Supreme Court's pronouncement more than four decades ago that universities are robust marketplaces of ideas.[8] Indeed, as Professor Mary-Rose Papandrea recently wrote, "Public colleges and universities are struggling more than ever to balance their obligations under the First Amendment and their desire to create inclusive communities."[9]

Next, toss into this already volatile mélange several divisive, pot-stirring provocateur speakers. Most prominent among them are former *Breitbart News* editor Milo Yiannopoulos[10] and self-identified white

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institution that has been rid of all speech that offend any oppressed group, or perhaps anyone at all." Eamonn Callan, *Re The Thought Police*, STANFORD MAG., Sept. 2017, at 34, 34. Other definitions exist. *See generally* Sophie Downes, *A Misleading Attack on Trigger Warnings*, N.Y. TIMES, Sept. 11, 2016, at Sunday Review 4 ("A safe space is an area on campus where students—especially but not limited to those who have endured trauma or feel marginalized—can feel comfortable talking about their experiences. This might be the Office of Multicultural Student Affairs or it could be Hillel House, but in essence, it's a place for support and community."), Stephanie Saul, *Campus 101: Learning How Not to Offend*, N.Y. TIMES, Sept. 7, 2016, at A1 (defining safe spaces as locations "where students from marginalized groups can gather to discuss their experiences"), Margaret Sullivan, *Talk of Free Speech Mired by Sessions's Hypocrisy*, WASH. POST, Sept. 27, 2017, at C2 (discussing safe spaces as areas "provided by universities to protect students from ideas that upset them").

[7] Bret Stephens, *Our Best University President*, N.Y. TIMES, Oct. 21, 2017, at A21.

[8] *See* Healy v. James, 408 U.S. 169, 180 (1972) (opining that "[t]he college classroom with its surrounding environs is peculiarly the 'marketplace of ideas'") (quoting Keyishian v. Bd. of Regents State Univ. of N.Y., 385 U.S. 589, 603 (1967)). The marketplace of ideas is "one of the most powerful images of free speech, both for legal thinkers and for laypersons." MATTHEW D. BUNKER, CRITIQUING FREE SPEECH: FIRST AMENDMENT THEORY AND THE CHALLENGE OF INTERDISCIPLINARITY 2 (2001). The theory hinges on the assumption that free speech "contributes to the promotion of truth." Daniel J. Solove, *The Virtues of Knowing Less: Justifying Privacy Protections Against Disclosure*, 53 DUKE L.J. 967, 998 (2003).

[9] Mary-Rose Papandrea, *The Free Speech Rights of University Students*, 101 MINN. L. REV. 1801, 1804 (2017). *See also* ERWIN CHEMERINSKY & HOWARD GILLMAN, FREE SPEECH ON CAMPUS 1 (2017) ("Where should we draw the line between protecting free speech on college campuses and protecting an inclusive learning environment? Hardly a week goes by without new tensions around this question.").

[10] *See* Joseph Bernstein, *Here's How Breitbart and Milo Smuggled Nazi and White Nationalist Ideas into the Mainstream*, BUZZFEED NEWS (Oct. 5, 2017), https://www.buzzfeed.com/josephbernstein/heres-how-breitbart-and-milo-smuggled-white-nationalism?utm_term=.atKe0Ngak#.aimrEVo8B [https://perma.cc/9AR5-W3CE] ("The Breitbart employee closest to the alt-right was Milo Yiannopoulos, the site's former tech editor known best for his outrageous public provocations, such as last year's Dangerous Faggot speaking tour and September's canceled Free Speech Week in Berkeley."), William Cummings, *Video Leads Milo Yiannopoulos to Resign from Breitbart News*, USA TODAY, Feb. 22, 2017, at 3A ("Milo Yiannopoulos resigned from *Breitbart News*, the far-right website where he was a top editor, after video surfaced in which the controversial figure appeared to condone sex with boys as young as 13."), Jacey Fortin & Emily Cochrane, *Citing Free Speech, A.C.L.U. Sues Washington Metro Over Rejected Ads*, N.Y. TIMES (Aug. 9, 2017), https://www.nytimes.com/2017/08/09/us/politics/aclu-ads-banned-metro.html [https://perma.cc/AF83-A6HE] (labeling Yiannopoulus a "right-wing provocateur"), Thomas Fuller, *Berkeley Cancelation Won't Deter Some Right-Wing Speakers*, N.Y. TIMES, Sept. 24, 2017, at A16 (describing Yiannopoulus as a "writer and professional provocateur of liberal campuses"

nationalist Richard Spencer.[11] Their incendiary presence is being felt precisely when many students feel their institutions "should be allowed to establish policies that restrict slurs and other language that is intentionally offensive to certain groups."[12] For example, a 2017 survey of 1,250 undergraduates conducted by YouGov revealed that "[a] majority of very liberal students (63%) and almost half of very conservative students (45%) agree that it is important to be part of a campus community where they are *not* exposed to intolerant or offensive ideas."[13]

Then throw in two violent incidents. The first, ironically, erupted at the University of California, Berkeley—cradle of the Free Speech Movement.[14] It stifled a February 2017 talk by Yiannopoulos.[15] That mayhem, in turn, led the institution to cancel "a planned event with conservative author Ann Coulter."[16] The Young America's Foundation and Berkeley College

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whose February 2017 appearance at the University of California, Berkeley "was canceled when protesters attacked the building where he was scheduled to speak")

[11] Spencer is "a prominent white nationalist." Sheryl Gay Stolberg & Brian M. Rosenthal, *White Nationalist Protest Leads to Deadly Violence*, N.Y. TIMES, Aug. 13, 2017, at A1. He "is credited with coining the term 'alt-right'" Kevin Roose, *Digital Home for Alt-Right Pulls Away Welcome Mat*, N.Y. TIMES, Aug. 16, 2017, at B1. Spencer, who heads the "white-nationalist group National Policy Institute," also has been characterized as a "neo-Nazi." Margaret Sullivan, *To Fight Bigotry and Hate Speech, Don't Muzzle It*, WASH. POST, Aug. 21, 2017, at C1. The Southern Poverty Law Center calls Spencer "one of the country's most successful young white nationalist leaders—suit-and-tie version of the white supremacists of old, a kind of professional racist in khakis." *Richard Bertrand Spencer*, S. POVERTY LAW CTR., https://www.splcenter.org/fighting-hate/extremist-files/individual/richard-bertrand-spencer-0 [https://perma.cc/3QRN-FN5R] (last visited Nov. 27, 2017). *See also* Ashley May, *Man at Center of UF Frenzy Is Out to Change the World*, USA TODAY, Oct. 20, 2017, at 2A (reporting that "Spencer was born in Boston and grew up in an affluent neighborhood of Dallas," and noting that "[h]e graduated from the University of Virginia in 2001 and got a master's degree in humanities at the University of Chicago").

[12] KNIGHT FOUND. ET AL., FREE EXPRESSION ON CAMPUS: A SURVEY OF U.S. COLLEGE STUDENTS AND U.S. ADULTS 12 (2016), https://www.knightfoundation.org/media/uploads/publication_pdfs/FreeSpeech_campus.pdf [https://perma.cc/AE8J-BWF7].

[13] FOUND. FOR INDIVIDUAL RIGHTS IN EDUC., SPEAKING FREELY: WHAT STUDENTS THINK ABOUT EXPRESSION AT AMERICAN COLLEGES 3 (2017), https://d28htnjz2elwuj.cloudfront.net/wp-content/uploads/2017/10/11091747/survey-2017-speaking-freely.pdf [https://perma.cc/9LMX-YDPN] (emphasis added).

[14] The Free Speech Movement (FSM) began in late 1964 when students at the University of California, Berkeley sought to garner attention for the civil rights movement. They met resistance from university officials who, "citing a formerly unenforced school regulation which prohibited campus political advocacy, told students they could not raise money or distribute literature on campus for the civil rights movement or any other off-campus political cause." Robby Cohen, *Berkeley Free Speech Movement: Paving the Way for Campus Activism*, 1 ORG. AM. HISTORIANS MAG. HIST. 16, 16 (1985). Ultimately, the "FSM's success demonstrated to students across the nation that effective protest movements could be built on campus, and that engaging in such dissident activity was not 'un-American' but was, in fact, their moral and political right." *Id.* at 18. *See generally* THE FREE SPEECH MOVEMENT: REFLECTIONS ON BERKELEY IN THE 1960S (Robert Cohen & Reginald E. Zelnik eds., 2002) (featuring chapters by multiple authors, including Mario Savio, a leader of the movement).

[15] Thomas Fuller, *A Free Speech Battle at the Birthplace of a Movement*, N.Y. TIMES, Feb. 3, 2017, at A9; Susan Svrluga, *Berkeley Cancels Speech by Breitbart Writer Milo Amid Intense Protests*, WASH. POST, Feb. 2, 2017, at A2.

[16] Benjamin Oreskes & Paige St. John, *Free Speech at What Cost?*, L.A. TIMES, Aug. 30, 2017, at B1.

Republicans in April 2017 sued multiple University of California officials over such censorship.[17]

The second occurrence was a deadly altercation in the hometown of the University of Virginia: Charlottesville. It arose between neo-Nazis and counterprotestors, including anti-fascists (colloquially, antifa) sometimes accused of violence,[18] in August 2017.[19] Richard Spencer was present and scheduled to speak in Charlottesville the day chaos broke out over the removal of a statue of Confederate General Robert E. Lee[20] and the presence of "a rally of white nationalists."[21]

The "Unite the Right" gathering attracted about 500 to 600 participants from more than thirty states.[22] Spencer, however, holds "his followers blameless in the Charlottesville melee."[23] He asserts that "[t]he idea that I could be held responsible is absurd."[24]

Finally, bake this combustible, cacophonous concoction in an oven: 1) overheated by a politically polarized climate;[25] 2) stoked by a U.S. Attorney

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[17] Verified Complaint for Injunctive, Declaratory, and Monetary Relief, Young America's Found v Napolitano, No 3 17-cv-02255 (N D Cal Apr 24, 2017)

[18] *See* Michael E Miller, *Antifa Fascism Fighters or Lawless Thrill-Seekers?*, WASH POST, Sept 15, 2017, at A17 (reporting that antifa activists "are all open to using violence, some embrace it—even glorify it," and adding that "[i]n Washington, a masked antifa sucker-punched Richard Spencer")

[19] *See generally* Joe Heim, Ellie Silverman, T Rees Shapiro & Emma Brown, *Charlottesville Protest Takes a Deadly Turn*, WASH POST, Aug 13, 2017, at A1 ("Chaos and violence turned to tragedy Saturday as hundreds of white nationalists, neo-Nazis and Ku Klux Klan members clashed with counterprotesters in the streets and a car plowed into crowds, leaving one person dead and 19 others injured "), Matt Pearce, David S Cloud & Robert Armengol, *Chaos in Charlottesville*, L A TIMES (Aug 13, 2017), http //www latimes com/nation/nationnow/la-na-charlottesville-white-nationalists-rally-20170812-story html [https //perma cc/M2Y3-FBXB] (reporting on "a violence-filled Saturday in Charlottesville, Va , where white nationalists had gathered for one of their largest rallies in at least a decade, only to see their event end in chaos and national controversy," and adding that "[b]loody street brawls broke out between dozens of anti-racism activists and far-right attendees, many of whom carried shields, weapons and Nazi and Confederate battle flags ")

[20] Stolberg & Rosenthal, *supra* note 11, at A1

[21] Sheryl Gay Stolberg, *Hurt and Angry, Charlottesville Tries to Regroup*, N Y TIMES, Aug 14, 2017, at A1

[22] Spencer S Hsu, *Study Rally in Charlottesville Drew from Far and Wide*, WASH POST, (Oct 9, 2017), https //www denverpost com/2017/10/08/charlottesville-white-supremacist-rally-attendees-35-states/ [https //perma cc/UP82-6PKW]

[23] Arelis R Hernández, Jack Gillum, Michael E Miller & Steve Hendrix, *No Bail for Suspect, Portrait Emerges of a Violent Teen*, WASH POST, Aug 15, 2017, at A4

[24] Leonard Greene, *Racist Alt-Right Feeds off President Trump's Rhetoric*, N Y DAILY NEWS (Aug 13, 2017), http //www nydailynews com/news/national/racist-alt-right-feeds-president-trump-rhetoric-article-1 3408936 [https //perma cc/836G-DQ7B]

[25] *See generally* Rick Hampson, *Few Swearings-In Stir Tension, But Jackson Lincoln FDR, Nixon Faced Hostility in Taking Office*, DAYTON DAILY NEWS, Jan 21, 2017, at Z3 (describing President Donald J Trump's inauguration as "possibly the most politically polarized Inauguration Day since the Civil War"), Jesse Wegman, *After 58 Years, a 'Stranger' Says Goodbye to the Supreme Court*, N Y TIMES, July 3, 2017, at A16 (noting that the United States today is "a politically polarized society")

General who asserts that "[f]reedom of thought and speech on the American campus are under attack;"[26] and 3) punctuated by verbal gusts of searing air from President Donald J. Trump. Trump, who is prone to spout off on Twitter in blunt, button-pushing fashion about nearly everything,[27] "occasionally trafficked in retweets of racist social media posts during his campaign."[28] He responded to the Charlottesville violence, however, "in what critics in both parties saw as muted, equivocal terms."[29] Indeed, Trump insisted there were "very fine people, on both sides"[30] of the Virginia fracas.

What's the end result of this convergence of factors and forces? At least four federal lawsuits,[31] as well as multiple threatened ones,[32] targeting public universities and their ability—or lack thereof—to deny Richard Spencer

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[26] Sari Horwitz, Debbie Truong & Sarah Larimer, *Sessions Criticizes Free-Speech Policies*, WASH POST, Sept 27, 2017, at B1 (quoting the remarks of U S Attorney General Jeff Sessions during a speech at Georgetown University Law Center)

[27] *See generally* Brian Fung, *Twitter Defends Its Stance on Trump*, WASH POST, Sept 27, 2017, at A18 (addressing "a controversial tweet by President Trump that targeted North Korea," and noting "repeated calls from some users that the president's account be banned"), Katie Rogers & Maggie Haberman, *Like Father Like Son, Using Twitter as a Foil to Skewer Political Foes*, N Y TIMES, July 1, 2017, at A14 (describing President Trump's "affection for Twitter as a weapon against political foes," and adding that "President Trump tends to fire a digital bazooka when met with a perceived slight, often hitting below the belt and leaving himself open to bipartisan criticism")

[28] Jonathan Lemire, *Trump Names Hate Groups, Denouncing Charlottesville Violence*, ST LOUIS POST-DISPATCH, Aug 15, 2017, at A1

[29] Glenn Thrush & Maggie Haberman, *Critics Slam Trump's Tepid Condemnation of Violence on 'Many Sides' in Virginia*, N Y TIMES, Aug 13, 2017, at 14 *See* Amy B Wang, *One Group Loved Trump's Remarks About Charlottesville White Supremacists*, WASH POST (Aug 13, 2017), https //www washingtonpost com/news/post-nation/wp/2017/08/13/one-group-loved-trumps-remarks-about-charlottesville-white-supremacists/ [https //perma cc/457R-5LEE] ("President Donald Trump's public remarks on the violence in Charlottesville, Va , have been criticized by many, including members of his own political party, for being insufficient and vague ")

[30] Denis Slattery & Christopher Brennan, *Be Nice to Nazis*, N Y DAILY NEWS, Aug 16, 2017, at News 4

[31] *See* Complaint, Padgett v Auburn Univ , No 3 17-cv-00231-WKW-WC (M D Ala Apr 18, 2017), Plaintiff's Verified Complaint, Padgett v Bd of Trustees Mich State Univ , No 1 17-cv-00805 (W D Mich Sept 3, 2017) [hereinafter Michigan State Complaint], Plaintiff Cameron Padgett's Verified Complaint, Padgett v Bd of Trustees Ohio State Univ , No 2 17-cv-00919-ALM-KAJ (S D Ohio Oct 22, 2017) [hereinafter Ohio State Complaint], Plaintiff's Complaint, Padgett v Bd of Trustees Pa State Univ , No 4 17-cv-01911-MWB (M D Pa Oct 19, 2017) [hereinafter Penn State Complaint]

[32] *See* ASSOCIATED PRESS, *White Nationalist Threatens to Sue Two Ohio Universities if Speech Rejected*, DAYTON DAILY NEWS, Oct 1, 2017, at B5 (involving threats by attorney Kyle Bristow to sue the University of Cincinnati and Ohio State University if those institutions deny Richard Spencer access to speak on campus), Claire McNeill, *White Nationalist's Lawyer Puts UF on Notice*, TAMPA BAY TIMES, Sept 1, 2017, at 1 (describing First Amendment attorney Gary Edinger's battle against the University of Florida to allow Richard Spencer to speak on the Gainesville campus, and reporting that "Edinger sent university officials a formal notice giving them one more chance to let Spencer speak—or UF will be taken to federal court")

access to speak on campus.[33] All of the cases are filed by Cameron Padgett, "who is helping to organize Spencer's college tour."[34]

As one newspaper article tidily encapsulated the underpinnings of this litigious situation:

> The rally in Charlottesville left universities across the U.S. bracing for more clashes between extremists and the protesters who oppose them. It also left schools in an increasingly tight bind as they try to ensure campus safety in the face of recruiting efforts by white nationalist and neo-Nazi groups that have escalated beyond campus fliers and online messages, and to balance that with freedom of speech.[35]

For example, in announcing Pennsylvania State University's denial of access to Spencer to talk at the University Park campus, Penn State President Eric Barron explained that a potential Spencer visit "presents a major security risk to students, faculty, staff and visitors to campus."[36] Barron elaborated that "[i]t is the likelihood of disruption and violence, not the content, however odious, that drives our decision."[37] Cameron Padgett ultimately sued Penn State in October 2017.[38] The complaint alleges Penn State and Barron "wantonly violated Plaintiff's right to free speech as guaranteed by the First and Fourteenth Amendments to the United States Constitution by prohibiting Plaintiff from hosting Richard Spencer . . . of the National Policy Institute . . . as a speaker on the campus of Pennsylvania State University."[39]

Barron's sentiment mirrors University of Florida President Kent Fuchs's explanation in August 2017 for why his institution initially denied Spencer access. "The likelihood of violence and potential injury—not the words or ideas—has caused us to take this action," Fuchs asserted.[40] A University of Florida spokesperson cited the violence in Charlottesville as

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[33] *See infra* Part I (addressing whether the test from *Brandenburg v Ohio*, 395 U.S. 444 (1969), provides public universities with power to preemptively ban Spencer from stepping foot on campus to speak)

[34] Susan Svrluga, *Richard Spencer's Upcoming Speech at U-Fla Sparks Worries About Safety*, WASH POST, Oct 10, 2017, at A03

[35] Collin Binkley & Michael Kunzelman, *Charlottesville Exposes New Threat for College Campuses*, ST LOUIS POST-DISPATCH, Aug 21, 2017, at A11

[36] Ramsey Touchberry, *Penn State is 5th University to Deny White Nationalist Richard Spencer*, DAYTON DAILY NEWS, Aug 27, 2017, at B8

[37] *Id*

[38] Bill Schackner, *Penn State Faces Suit for Snubbing 'Alt-Right' Speaker, Richard Spencer a Security Risk, University Said*, PITT POST-GAZETTE, Oct 21, 2017, at A1

[39] Penn State Complaint, *supra* note 31, at 2

[40] Claire McNeill, *UF Denies Stage for Hate Speech*, TAMPA BAY TIMES, Aug 17, 2017, at 1

justifying this decision,[41] although the university later allowed Spencer on campus on October 19, 2017.[42] Similarly, when Michigan State University rebuffed Spencer, it released a statement contending the "decision was made due to significant concerns about public safety in the wake of the tragic violence in Charlottesville."[43]

In brief, Charlottesville proved a game-changing force for universities across the nation in justifying decisions to deny access to Richard Spencer.[44] As University of California, Berkeley Chancellor Carol Christ cogently put it, "What happened in Charlottesville—I'm very concerned that could happen again. The political situation has shifted in ways that some extremist groups of the right and the left feel authorized to [use that] kind of extraordinary violence."[45]

The theory that past violence in Charlottesville justifies censoring future speech on other campuses raises a crucial constitutional issue. Specifically, is the Supreme Court's test for determining when speech constitutes unlawful incitement unprotected by the First Amendment adequate for addressing this situation? In other words, does the standard from *Brandenburg v. Ohio*[46]—today's version of the clear-and-present-danger test[47]—permit what amount to preemptive strikes banning speakers based on the past bad acts associated with them? This Essay argues it does not.

A second related question is whether college administrators should be allowed to invoke the test from *Tinker v. Des Moines Independent*

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[41] *Id*

[42] Susan Svrluga, *Richard Spencer Gets OK to Speak at the University of Florida, His First Campus Event Since U-Va*, WASH POST (Oct 5, 2017), https //www washingtonpost com/news/grade-point/wp/2017/10/05/richard-spencer-gets-ok-to-speak-at-the-university-of-florida-his-first-campus-event-since-u-va/?utm_term= df78afaf52f9 [https //perma cc/DT5M-MEGW]

[43] David Jesse, *Group Decries Antifa's 'Heckler's Veto,'* USA TODAY, Sept 5, 2017, at 6B

[44] *See* Joseph Goldstein, *'Agonizing' at A C L U Over the Rise of Violence in Political Protests*, N.Y TIMES, Oct 5, 2017, at A19 ("Since Charlottesville, public universities in at least six states have rebuffed attempts to bring the alt-right ideologue, Richard Spencer, to campus, citing the risk of violence ").

[45] Susan Svrluga & Sarah Larimer, *'We Don't Pretend This Is Over' After Charlottesville, Colleges Expect Trouble*, WASH POST (Aug 29, 2017), https //www washingtonpost com/local/education/we-dont-pretend-this-is-over-after-charlottesville-colleges-expect-trouble/2017/08/29/2d07de3e-8847-11e7-a50f-e0d4e6ec070a_story html?utm_term= 6deb1052f5d5 [https //perma cc/EL5D-88R2]

[46] 395 U S 444 (1969) The Court in *Brandenburg* held that "the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action " *Id* at 447

[47] The clear-and-present danger test was created in *Schenck v United States*, 249 U S 47 (1919) In *Schenck*, Justice Oliver Wendell Holmes famously wrote

> The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent It is a question of proximity and degree

Id at 52 *See also* Susan M Gilles, Brandenburg v State of Ohio *An "Accidental," 'Too Easy," and "Incomplete" Landmark Case*, 38 CAP U L REV 517, 520 (2010) (noting that "*Brandenburg* is famous for abandoning the 'clear and present danger' test"), Steven M Morrison, *The System of Modern Criminal Conspiracy*, 63 CATH U L REV 371, 389 (2014) ("The 'clear and present danger' test gradually evolved into the *Brandenburg* test, which the Court set forth in the 1969 case of the same name ")

Community School District[48] to thwart the likes of Spencer from stepping foot on campus. The *Tinker* standard permits public schools, from high school to elementary,[49] to stop student speech if officials have actual facts to reasonably forecast that the speech will cause a substantial and material disruption of schoolwork or discipline.[50] This Essay contends that while the *Tinker* test is much better suited than *Brandenburg* to block speakers based on past bad actions, its deployment in colleges is misguided and could dangerously lead to public universities treating students like high school pupils.

Third and finally, the Essay reconsiders the heckler's veto principle and, specifically, the extremely high security costs that institutions such as the University of Florida—more than $500,000 in its case with Spencer[51]—must bear when inflammatory individuals come on campus. The cost for police security at the University of California, Berkeley when Yiannopoulos spoke there in September 2017 was a whopping $800,000.[52]

The fact that public universities have picked up such exorbitant security tabs is especially relevant because the Supreme Court twenty-five years ago in *Forsyth County v Nationalist Movement*[53] struck down a local ordinance that allowed "a government administrator to vary the fee for assembling or

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[48] 393 U S 503, 509 (1969)

[49] *See* K A v Pocono Mountain Sch Dist , 710 F 3d 99, 110 (3d Cir 2013) (concluding that *Tinker* "provides the requisite analytic framework for even an elementary school student's speech or expression")

[50] The *Tinker* majority opined that "the prohibition of expression of one particular opinion, at least without evidence that it is necessary to avoid material and substantial interference with schoolwork or discipline, is not constitutionally permissible " 393 U S at 511 It added that conduct that "materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech " *Id* at 513 The majority noted that an "undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression " *Id* at 508 It emphasized that "a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint" is not sufficient grounds for squelching student speech *Id* at 509

[51] In a press release, parts of which were published by a local newspaper, the University of Florida stated

> Since safety of students, faculty, staff and visitors to campus is the University's top priority, UF will end up paying at least $500,000 to enhance security on campus and in the city of Gainesville This includes costs from the University of Florida Police Department, Gainesville Police Department, Alachua County Sheriff's Office, Florida Department of Law Enforcement, Florida Highway Patrol and other agencies who are providing first responders

Andrew Caplan, *Richard Spencer's Contract to Speak at UF Complete*, GAINESVILLE SUN (Oct 5, 2017, 8 58 PM), http //www gainesville com/news/20171005/richard-spencers-contract-to-speak-at-uf-complete [https //perma cc/YE9E-28HZ]

[52] Benjamin Oreskes & Javier Panzar, *How the 'Coachella of Conservatism' Fizzled into an Expensive Photo Opp' at Berkeley*, L A TIMES (Sept 25, 2017), http //www latimes com/local/lanow/la-me-milo-berkeley-antifa-20170925-htmlstory html [https //perma cc/4HLL-H7JE]

[53] 505 U S 123 (1992)

parading to reflect the estimated cost of maintaining public order."[54] Writing for a five-justice majority, Justice Harry Blackmun reasoned that "[s]peech cannot be financially burdened, any more than it can be punished or banned, simply because it might offend a hostile mob."[55] This Essay asks whether shifting a reasonable portion of security costs to an antagonistic speaker with a track record of violence is equivalent to a constitutionally impermissible heckler's veto. The Essay resolves that ratcheting up fees on a speaker is unfair when, in fact, it is the audience that resorts to violence when confronted by First Amendment-protected expression.

Finally, this Essay concludes by calling on public university leaders to find the courage—and the money—to protect the speech rights of extremists rather than to roll back the First Amendment freedom of speech.[56] To sacrifice the First Amendment in the face of Richard Spencer is to accord him far more power and influence than he and his viewpoints are due.

I. *BRANDENBURG* MISSES THE MARK: PREEMPTIVE STRIKES, PRIOR RESTRAINTS AND PREDICTING VIOLENCE

Incitement to violence is one of the very few categories of speech not protected by the First Amendment.[57] An unlawful incitement occurs under *Brandenburg v. Ohio*[58] when three elements are satisfied: "(1) intent (embodied in the requirement that such speech be 'directed to inciting or producing' lawless action); (2) imminence (embodied in the phrase 'imminent lawless action'); and (3) likelihood (embodied in the phrase 'and is likely to incite or produce such action')."[59]

The *Brandenburg* Court also stressed the key difference between protected abstract advocacy of violence and unprotected speech involving "'preparing a group for violent action and steeling it to such action.'"[60] It added that "[s]tatutes affecting the right of assembly, like those touching on freedom of speech, must observe the established distinctions between mere advocacy and incitement to imminent lawless action."[61]

The *Brandenburg* test is highly relevant when attempting to prevent Richard Spencer from speaking on campus. Consider, for example, how

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[54] *Id* at 124

[55] *Id* at 134–35

[56] *Infra* notes 139–55 and accompanying text

[57] *See* United States v Alvarez, 567 U S 709, 717 (2012) (noting that "advocacy intended, and likely, to incite imminent lawless action" is among the few categories of "content-based restrictions on speech [that] have been permitted"), Ashcroft v Free Speech Coal , 535 U S 234, 245–46 (2002) ("The freedom of speech has its limits, it does not embrace certain categories of speech, including defamation, *incitement*, obscenity, and pornography produced with real children ") (emphasis added)

[58] *See supra* note 46 and accompanying text (discussing the *Brandenburg* test)

[59] Rodney A Smolla, *Should the* Brandenburg v Ohio *Incitement Test Apply in Media Violence Tort Cases?*, 27 N KY L REV 1, 10 (2000) (quoting Brandenburg v Ohio, 395 U S 444, 447 (1969))

[60] Brandenburg, 395 U S at 448 (1969) (quoting Noto v United States, 367 U S 290, 298 (1961))

[61] *Id* at 449 n 4

closely snippets from an August 22, 2017, statement by Pennsylvania State University President Eric Barron track key elements of the *Brandenburg* standard:

- "[T]he First Amendment does not require our University to risk *imminent* violence."[62]
- "It is the *likelihood* of disruption and violence . . . that drives our decision."[63]

Indeed, in issuing a preliminary injunction in favor of Spencer's right to speak at Auburn University in April 2017—several months before the violence at Charlottesville—U.S. District Judge W. Keith Watkins applied the *Brandenburg* test.[64] Watkins concluded that "Auburn did not produce evidence that Mr. Spencer's speech is likely to incite or produce imminent lawless action."[65] In fact, the judge suggested Auburn had engaged in a heckler's veto, opining that Auburn "cancelled the speech based on its belief that listeners and protest groups opposed to Mr. Spencer's ideology would react to the content of his speech by engaging in protests that could cause violence or property damage."[66]

That ruling, as noted above, occurred before the Charlottesville incident. Does the subsequent violence there necessarily change this *Brandenburg* calculus today when Spencer applies to speak on a public university campus? Interestingly, the *Brandenburg* Court did not apply its own test to the facts of the case; instead, it merely struck down an Ohio statute, under which Clarence Brandenburg was prosecuted and convicted.[67] Yet, the facts themselves suggest the test was intended to apply to this type of situation.

Specifically, *Brandenburg* pivoted on a speech at an Ohio farm by Ku Klux Klan leader Clarence Brandenburg that accompanied a cross burning attended by about a dozen hooded Klan members, "some of whom carried firearms."[68] Other than one television journalist who filmed the event, no one else was present.[69] Brandenburg hurled aspersions at both African Americans

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[62] Press Release, Pennsylvania State University, Richard Spencer is Not Welcome to Speak at Penn State (Aug 22, 2017), http //news psu edu/story/478590/2017/08/22/administration/richard-spencer-not-welcome-speak-penn-state [https //perma cc/JD3P-DNLC] (emphasis added)

[63] *Id* (emphasis added)

[64] Preliminary Injunction at 2, Padgett v Auburn Univ , No 3 17-cv-231-WKW (M D Ala Apr 18, 2017)

[65] *Id*

[66] *Id* at 2–3

[67] Brandenburg v Ohio, 395 U S 444, 448 (1969) ("Measured by this test, Ohio's Criminal Syndicalism Act cannot be sustained ")

[68] *Id* at 445

[69] *Id* at 445–46

and Jews.[70] He also told his comrades, "We're not a revengent [sic] organization, but if our President, our Congress, our Supreme Court, continues to suppress the white, Caucasian race, it's possible that there might have to be some revengeance [sic] taken."[71]

Because no one else was nearby to hear such vitriol—just a dozen Klansmen and a reporter—it seems clear these words were not likely to produce the type of imminent lawless action that the *Brandenburg* test demands. Furthermore, Clarence Brandenburg couched his language in conditional terms rather than stating an immediate directive. Specifically, any "revengeance" was only "possible" and simply "might" be needed "if" government officials continued to suppress whites.[72] The Supreme Court in *Hess v. Indiana*, in applying *Brandenburg*, clarified that "advocacy of illegal action at some indefinite future time"[73] does not render it outside the bounds of First Amendment protection.

Does the *Brandenburg* test allow courts to take into account prior violence associated with a speaker in order to preemptively ban him from speaking on campus? More specifically, would it permit a judge, in the process of evaluating a public university's decision to deny Richard Spencer access to campus, to consider the violence in Charlottesville, assuming for the sake of argument that such violence was directly caused[74] by Spencer?[75] The answer, arguably, is no.

That's because the *Brandenburg* test is built for stopping speech *in progress*, not for banning *future expression*. That is a crucial dichotomy. *Brandenburg* is triggered only when an individual actually starts to speak. In other words, a necessary condition to apply the standard is speech by the individual in question. Without words, there simply is no advocacy to proscribe. There is simply a person and a guess about what he might say.

In brief, a preemptive strike against Richard Spencer—banning him from campus *before* he has a chance to start spewing his disquieting beliefs—is impermissible under *Brandenburg* and amounts to a prior restraint on speech.[76] Prior restraints on speech, the Supreme Court has

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[70] Among other messages, Brandenburg stated things such as "bury the niggers," "nigger will have to fight for every inch he gets from now on," and "send the Jews back to Israel." *Id.* at 446 n.1.

[71] *Id.* at 446.

[72] *Id.*

[73] 414 U.S. 105, 108 (1973).

[74] The Supreme Court recently has stressed that in order to permissibly regulate speech based upon the nature of its content, "[t]here must be a direct causal link between the restriction imposed and the injury to be prevented." United States v. Alvarez, 567 U.S. 709, 725 (2012). *See* Brown v. Entm't Merchs. Ass'n, 564 U.S. 786, 799 (2011) (holding unconstitutional a California statute restricting minors' access to violent video games, and noting that California "cannot show a direct causal link between violent video games and harm to minors").

[75] As noted earlier, Spencer asserts he did not cause the violence in Charlottesville. *Supra* notes 23–24 and accompanying text.

[76] Prior restraints on speech are presumptively unconstitutional and the government carries a heavy burden in justifying such restrictions on speech. *See* N.Y. Times Co. v. United States, 403 U.S. 713, 714 (1971).

observed, "are the most serious and the least tolerable infringement on First Amendment rights."[77]

To trigger *Brandenburg*, an individual must begin to talk. At that point, an examination of the words uttered, in light of the entire context in which they are used—including whether those same words spawned violence in the past—should be undertaken to determine if they could be squelched. Unfortunately, as Dean Erwin Chemerinsky laments, *Brandenburg* fails to "answer . . . how imminence and likelihood are to be appraised."[78] This ambiguity, in turn, is problematic when it comes to judges using past bad actions that are causally attributable to a potential on-campus speaker to forecast whether the speaker's words are likely to spark imminent violence.

In summary, *Brandenburg* does not seem to allow a public university to preemptively ban a controversial speaker from coming to campus. Such a ban is tantamount to a prior restraint on expression. Instead, the speaker must be afforded the opportunity to begin to speak and then, only at that point, is a *Brandenburg* analysis undertaken.

It thus is time for the Supreme Court to revisit and revise *Brandenburg*. Specifically, the Court should make clear precisely how much, if at all, any prior acts of violence causally linked to an individual's words during other speaking appearances should be factored into the *Brandenburg* calculus. Law enforcement officers who provide security at public university events like a Richard Spencer speech have an extremely difficult job. Not only must they provide physical security, but they need to know the weight they permissibly can give to prior incidents of violence when deciding, under *Brandenburg*, if speech is likely to incite imminent violence. It is the police on the sidewalks, not judges in their chambers, who need to make snap, but sophisticated, judgments affecting First Amendment rights. Without clarity from the nation's high court, the difficulty for law enforcement officers in making those judgments is compounded.

II. SHOULD *TINKER* APPLY WHEN DIVISIVE SPEAKERS VISIT CAMPUS? ELEVATING A HIGH SCHOOL STANDARD TO THE COLLEGIATE LEVEL

If *Brandenburg* cannot be deployed to prevent a prospective speaker from talking on campus, is there an alternative legal mechanism a university might assert to ban such an individual? One possibility is the Supreme

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[77] Neb. Press Ass'n v. Stuart, 427 U.S. 539, 559 (1976).

[78] ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 1049 (5th ed. 2015).

Court's substantial-and-material disruption test developed in *Tinker v. Des Moines Independent Community School District*[79] nearly fifty years ago.[80]

The *Tinker* test permits schools to censor speech—and, by extension, speakers—based on past misconduct. For example, the U.S. Court of Appeals for the Ninth Circuit in 2014 applied *Tinker* to uphold a school district's ban on the wearing of American-flag emblazoned and embossed clothing on Cinco de Mayo, due partly to prior racial trouble on campus.[81] Similarly, prior racial unrest permits school officials, under *Tinker*, to ban the wearing of Confederate battle flag clothing.[82]

Tinker, however, involved two high school students and one junior high school student, not censorship on a university campus.[83] As Professor James Hefferan wrote in 2016, "It must always be remembered that *Tinker* arose in a primary and secondary educational context. The Supreme Court has never expressly extended *Tinker* to speech occurring on college campuses."[84]

The problem, of course, is that if public universities are successfully able to assert *Tinker* to stop the speech of outside speakers such as Richard Spencer, then it opens the door for public universities to apply *Tinker* to censor the expression of their own students. In fact, as Frank LoMonte writes, "lower courts at times rely on *Tinker* . . . as the starting point for analyzing content-based restrictions on speech at public universities."[85] Writing elsewhere, LoMonte points out that although "some courts maintain that *Tinker* is insufficiently protective at the college level,"[86] "most circuits

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[79] 393 U S 503 (1969)

[80] *See supra* notes 50–52 and accompanying text (setting forth the *Tinker* test)

[81] *See* Dariano v Morgan Hill Unified Sch Dist , 767 F 3d 764, 777 (9th Cir 2014), *cert denied*, 135 S Ct 1700 (2015) (noting that the censorship of the clothing in 2010 "took place in the shadow of similar disruptions a year earlier")

[82] *See, e g* , Defoe v Spiva, 625 F 3d 324, 334–35 (6th Cir 2010) (finding that "uncontested evidence of racial violence, threats, and tensions" at two schools provided sufficient evidence, under *Tinker*, such "school officials in this case reasonably forecast that permitting displays of the Confederate flag would substantially disrupt or materially interfere with the school environment"), D B v Lafon, 217 Fed Appx 518, 523–25 (6th Cir 2007) (holding that a school's "recent history of racial tensions as recited in the record" allows it to prohibit, under *Tinker*, the wearing of Confederate battle flag apparel, and noting that "[d]uring the prior academic year, Blount High School had been the scene of racial tension, intimidation and violence to such an extent that law enforcement officials were brought in to maintain order, and the school was defending against lawsuits depicting it as a racially hostile educational environment"), West v Derby Unified Sch Dist No 260, 206 F 3d 1358, 1366 (10th Cir 2000) (opining "that based upon recent *past events*, Derby School District officials had reason to believe that a student's display of the Confederate flag might cause disruption and interfere with the rights of other students to be secure and let alone") (emphasis added)

[83] *See Tinker*, 393 U S at 504 (noting that the three petitioners were Des Moines, Iowa, high school students John Tinker and Christopher Eckhardt, as well as junior high school student Mary Beth Tinker)

[84] James Hefferan, *Picking Up the Flag? The University of Missouri Football Team and Whether Intercollegiate Student-Athletes May Be Penalized for Exercising Their First Amendment Rights*, 12 DEPAUL J SPORTS L & CONTEMP PROBS 44, 55 (2016)

[85] Frank D LoMonte, *Fouling the First Amendment Why Colleges Can t, and Shouldn't, Control Student Athletes' Speech on Social Media*, 9 J BUS & TECH L 1, 10 (2014)

[86] Frank D LoMonte, *"The Key Word is Student"* Hazelwood *Censorship Crashes the Ivy-Covered Gates*, 11 FIRST AMEND L REV 305, 311 (2013)

have adopted *Tinker* as the starting point for analyzing censorship of college students' expression."[87] Indeed, Professors Vikram David Amar and Alan E. Brownstein concur that "the analyses drawn from high school cases are often used as starting points for courts confronting disputes in the university setting."[88]

This, unfortunately from a free-speech perspective, means reducing the First Amendment rights of university students—"young adults,"[89] as the Supreme Court dubs them—to those of high school pupils by vesting university officials with a test devised for high schools—*Tinker*—to suffocate free expression. Therefore, *Tinker* should not be used by universities as a tool to squelch speech, be it of either outside speakers or students.

III. THE HECKLER'S VETO AND SHIFTING SECURITY COSTS: PAYING A HIGH COST FOR LOW-VALUE SPEECH

A heckler's veto occurs "when a crowd or audience's reaction to a speech or message is allowed to control and silence that speech."[90] This result is anathema to the First Amendment freedom of expression because "the censored ideas die aborning, and the marketplace of ideas is impoverished accordingly."[91]

Professor Brett Johnson recently explained:

> After some time brewing in the 1940s, 1950s and 1960s . . . the heckler's veto came to stand for the principle that state actors have a duty to protect speakers from hostile audiences who would seek to either do harm to speakers, or threaten to do harm and thereby force law enforcement to silence speakers.[92]

Although it is far from easy for the government to step up to the First Amendment plate to defend speakers in such situations, doing so is vital. As Johnson cogently wrote:

> Hostile audience cases . . . become the supreme test of tolerance by state actors toward extreme speech. Faced with the potential for popular disapproval of a

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[87] *Id.*

[88] Vikram David Amar & Alan E. Brownstein, *A Close-Up, Modern Look at First Amendment Academic Freedom Rights of Public College Students and Faculty,* 101 MINN. L. REV. 1943, 1944 (2017).

[89] Widmar v. Vincent, 454 U.S. 263, 274 n.14 (1981).

[90] DON R. PEMBER & CLAY CALVERT, MASS MEDIA LAW 42 (19th ed. 2015).

[91] Richard F. Duncan, *Just Another Brick in the Wall: The Establishment Clause as a Heckler's Veto,* 18 TEX. REV. L. & POL. 255, 265 (2014).

[92] Brett G. Johnson, *The Heckler's Veto: Using First Amendment Theory and Jurisprudence to Understand Current Audience Reactions Against Controversial Speech,* 21 COMM. L. & POL'Y 175, 219 (2016).

> message to turn violent, state actors must refrain from acquiescing to the popular will and protect the rights of speakers to share their unpopular message rather than punish them for angering the audience. This principle reflects a deep respect for the value of unpopular messages within American democracy.[93]

The burden, in short, is on the government to protect the speaker from a heckler's veto.[94] As the Supreme Court wrote more than a half-century ago, "Participants in an orderly demonstration in a public place are *not chargeable* with the danger, unprovoked except by the fact of the constitutionally protected demonstration itself, that their critics might react with disorder or violence."[95]

Robert Shibley, executive director of the Foundation for Individual Rights in Education, observed in September 2017 that "it's been a banner year for hecklers,"[96] as "colleges have allowed the heckler's veto to flourish."[97] But preventing a heckler's veto on campus can come at an immensely steep price today.

For instance, Richard Spencer's October 2017 visit cost the University of Florida and Sunshine State taxpayers more than $500,000 in security costs.[98] That sum covered costs not only for the university's own police force, "but also for the Gainesville Police Department, Alachua County Sheriff's Office, Florida Department of Law Enforcement, Florida Highway Patrol and other agencies providing first responders."[99] By comparison, Spencer paid a mere $3,870 for security within the Phillips Center—a theater with

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[93] *Id* at 210–11

[94] *See* Cheryl A Leanza, *Heckler's Veto Case Law as a Resource for Democratic Discourse*, 35 HOFSTRA L REV 1305, 1306 (2007) (observing that "the First Amendment grants a positive right to the speaker the local government must take action to protect the speaker against a hostile crowd The courts do not allow local law enforcement to accede to a heckler's veto")

[95] Brown v Louisiana, 383 U S 131, 133 n 1 (1966) (emphasis added)

[96] Robert Shibley, *Keep Students Safe from the Heckler's Veto*, WALL ST J, at A15 (Sept 28, 2017)

[97] *Id*

[98] Claire McNeill, *Holding Nose, UF Set for Visit*, TAMPA BAY TIMES (Oct 12, 2017), http //www tampabay com/news/education/college/uf-security-costs-top-500000-for-richard-spencers-talk-on-white-separation/2340689 [http //perma cc/JG96-JUUX] ("Yet the university, bound by the First Amendment, has found itself playing host to his contentious talk with an estimated security price tag for UF, and taxpayers, of more than $500,000 ")

[99] Paige Fry, *Speaker to Cost UF $500K for Security*, PALM BEACH POST (Oct 17, 2017), http //www palmbeachpost com/news/state--regional-govt--politics/new-state-emergency-declared-ahead-white-nationalist-speech/A6AaSLfqyv1YasB613GxEL/ [https //perma cc/FWT9-5ME8]

more than 1,700 seats[100]—at which he spoke.[101] It was Spencer's first visit to a public university campus since the violence in Charlottesville.[102]

Why must universities foot the security bills rather than shift costs to extremist speakers? Because forcing an individual to pay more in order to speak safely is tantamount to a heckler's veto: escalating costs make it financially unfeasible to speak if foisted on the individual. In *Forsyth County v. Nationalist Movement*,[103] the Supreme Court reasoned that imposing security costs based on the "[l]isteners' reaction to speech is *not* a content-neutral basis for regulation."[104] That's a key point because content-neutral regulations of speech typically are reviewed under a deferential, intermediate scrutiny standard.[105] In contrast, content-based restrictions are generally subject to rigorous review under the strict scrutiny test.[106] One might

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[100] *See University of Florida Performing Arts Venues*, UNIV OF FLA PERFORMING ARTS, http //performingarts ufl edu/venues/ [https //perma cc/B39R-A7VV] (last visited November 29, 2017) (describing the Phillips Center as featuring "a 1700+ seat theater flanked by two reception foyers")

[101] McNeill, *supra* note 98 Spencer only had to pay for security costs inside the auditorium because that is the only space he rented He did not rent space outside the auditorium Security fees inside the facility, per UF's standard rental agreement for the facility, cost $16 50 per worker-hour *Curtis M Phillips, M D Center for the Performing Arts Rental Information as of July 1, 2015*, UNIV OF FLA PERFORMING ARTS, http //performingarts ufl edu/wp-content/uploads/2010/05/PCPA-Rental-Policy-Summary-1-Page pdf [https //perma cc/WNY3-8MJ6] (last visited November 29, 2017) The University of Florida explained why it had to pick up the tab for security outside the facility, posting the following message on its website

> The application and assessment of security fees in the First Amendment context was litigated and decided by the U S Supreme Court in 1992 The Court clarified that the government cannot assess a security fee on the speaker based upon the costs of controlling the reaction of potential hostile onlookers or protestors, under a legal doctrine called the "heckler's veto " As Justice Harry Blackmun wrote for the Court in that case (*Forsyth County v Nationalist Movement*), "[s]peech cannot be financially burdened, any more than it can be punished or banned, simply because it might offend a hostile mob " For UF, this means that Richard Spencer and his organization may not be made responsible for paying the costs of potential protestors, onlookers, or members of the public outside of the speaking venue

Q & A for Richard Spencer 10/19 Event, UNIV OF FLA , https //freespeech ufl edu/qa-for-1019-event/ [https //perma cc/29MZ-JGJY] (last visited November 29, 2017)

[102] McNeill, *supra* note 98

[103] 505 U S 123 (1992)

[104] *Id* at 134 (emphasis added)

[105] *See* Dan V Kozlowski, *Content and Viewpoint Discrimination Malleable Terms Beget Malleable Doctrine*, 13 COMM L & POL'Y 131, 131–32 (2008) (asserting that the Supreme Court "has devised tests to review content-based and content-neutral regulations (strict scrutiny for content-based regulations, a more lenient intermediate scrutiny for those regulations deemed content neutral)"), Minch Minchin, *A Doctrine at Risk Content Neutrality in a Post*-Reed *Landscape*, 22 COMM L & POL'Y 123, 124 (2017) ("If the law only regulates the time, place or manner of speech, then the much more government-friendly intermediate scrutiny standard is applied ")

[106] *See* Reed v Town of Gilbert, 135 S Ct 2218, 2231 (2015) (observing that "content-based restrictions on speech" are permissible only "if they survive strict scrutiny," and noting that strict scrutiny requires a compelling government interest and a statute that is narrowly tailored to serve that interest), United States v Playboy Entm't Grp , 529 U S 803, 813 (2000) ("If a statute regulates speech based on its content, it must be narrowly tailored to promote a compelling Government interest ")

reasonably ask whether safeguarding students, staff, and faculty from threats of violence constitutes a compelling interest[107] sufficient to survive strict scrutiny, but that issue is beyond the scope of this Essay.

Justice Harry Blackmun opined for the *Forsyth County* majority that while "raising revenue for police services" to protect marches and demonstrations "undoubtedly is an important government responsibility, it does not justify a content-based permit fee."[108] Tapping directly into the notion of a heckler's veto,[109] the Nixon appointee emphasized that "[s]peech cannot be financially burdened, any more than it can be punished or banned, simply because it might offend a hostile mob."[110] In brief, as the editors of the *Tampa Bay Times* aptly opined the day before Richard Spencer spoke at the University of Florida, "[t]his is the cost of democracy in action."[111]

University of Florida President Kent Fuchs, however, explained the real-world problems with this situation in the pages of the *Wall Street Journal* shortly after Spencer's visit to Gainesville.[112] He wrote that "[a]t UF, which had nearly 1,000 state and local law-enforcement officers on campus on Thursday, the tab exceeded $600,000, the equivalent of nearly 100 students' annual tuition. In effect, taxpayers heavily subsidized racist speech rather than education or research."[113]

In other words, forcing public universities to comply with *Forsyth County's* heckler's veto principle in order to protect what many people would likely consider low-value speech, rather than intellectual discourse, is troubling. At the University of Florida, where Spencer's National Policy Institute controlled ticket distribution,[114] his speech was "quickly drowned out . . . by a hailstorm of chants, shouting and mockery."[115] It became more spectacle and theater than education and information. Spencer called audience members "shrieking and grunting morons,"[116] while the crowd chanted back, "Go home, racist, go home!"[117]

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[107] *See supra* note 106 (noting that a compelling government interest is required to pass constitutional muster under strict scrutiny)

[108] *Forsyth Cty.*, 505 U.S. at 136

[109] *See* Erica Goldberg, *Must Universities "Subsidize" Controversial Ideas? Allocating Security Fees When Student Groups Host Divisive Speakers*, 21 GEO. MASON U. C.R.L.J. 349, 358 (2011) ("Although the concept of the 'heckler's veto' is never explicitly mentioned by the majority in *Forsyth*, the case is often cited as a classic example of how courts treat this speech principle.")

[110] *Forsyth Cty.*, 505 U.S. at 134–35

[111] Editorial, *UF Opportunity on Free Speech*, TAMPA BAY TIMES, Oct. 18, 2017, at National 6A

[112] Kent Fuchs & Glenn C. Altschuler, *How White Supremacists Exploit Public Higher Education*, WALL ST. J., Oct. 23, 2017, at A17

[113] *Id.*

[114] Paige Fry, *Alt-Right Speech at UF Relatively Peaceful*, PALM BEACH POST (Fla.), Oct. 20, 2017, at A1 ("Spencer's speech at the Phillips Center—which his institute paid UF $10,564 to rent—began at about 2:30 p.m. His institute chose which people were allowed to go inside, leading some to complain they weren't being let in because of their skin color.")

[115] Joe Heim et al., *Spencer Speech Met by Protests*, WASH. POST, Oct. 20, 2017, at A3

[116] *Id.*

[117] Rick Neale, *Spencer's Words Wasted on Unwelcoming Ears in Fla.*, USA TODAY, Oct. 20, 2017, at 2A

It thus became a de facto heckler's veto, but Spencer only had himself to blame for permitting protestors into the auditorium where he spoke at UF. After all, it was his own group—the National Policy Institute—that gave out tickets to the event.[118]

Furthermore, the heckler's veto principle merely protects a speaker against violence, not against counterspeech in the form of verbal insults and disruptions. As the Supreme Court of California observed in 1970, "Audience activities, such as heckling, interrupting, harsh questioning, and booing, even though they may be impolite and discourteous, can nonetheless advance the goals of the First Amendment."[119] It added that First Amendment protection for free speech cannot be confined to scenarios in "which the audience must passively listen to a single point of view."[120] As Professor Johnson encapsulates it:

> It appears that as long as speech is met with peaceful speech and nothing more—not fisticuffs or thrown rocks or bottles, not true threats or fighting words or incitement to imminent lawless action—then law enforcement should allow each side to compete against the other with words and other forms of expression.[121]

Although $600,000 certainly proves that free speech, such as it was, comes at a cost,[122] it also raises serious concerns about just how much any governmental entity can be forced to pay under the First Amendment. Imagine, for instance, that multiple speakers of Richard Spencer's ilk wanted to speak at the University of Florida. If four such other individuals were each

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[118] *See* Noah Feldman, *Richard Spencer Has Only Himself to Blame for Hecklers*, BLOOMBERG VIEW (Oct 19, 2017), https //www bloomberg com/view/articles/2017-10-19/richard-spencer-has-only-himself-to-blame-for-hecklers [https //perma cc/S73E-TYA7] (noting that the hecklers "held tickets distributed by Spencer's own National Policy Institute"), Janae Muchmore, *National Policy Institute Takes over Ticket Distribution for Richard Spencer*, WUFT (Oct 17, 2017), https //www wuft org/news/2017/10/17/national-policy-institute-takes-over-ticket-distribution-for-richard-spencer/ [https //perma cc/S8QZ-MQ9V] (describing how the National Policy Institute took over distribution of all tickets after it "caught wind of local organizations and businesses intent to encourage locals to get tickets and not show up")

[119] *In re* Kay, 464 P 2d 142, 147 (Cal 1970)

[120] *Id*

[121] Johnson, *supra* note 92, at 194

[122] Typically, the cost of free speech is felt in terms of the emotional or reputation harms that individuals must endure, rather than the monetary expenditures necessary to safeguard expression Professor David Han explains

> Although First Amendment doctrine operates under the clear premise that unfettered speech is valuable, it is equally clear that free speech comes at a cost Speech can inflict significant harm on others, it might, for example, persuade someone to commit violent acts, ruin a person's reputation, or directly inflict severe emotional distress The First Amendment has practical meaning only insofar as we are willing to absorb these sorts of speech-related harms to a greater extent than we would with non-speech

David S Han, *Rethinking Speech-Tort Remedies*, 2014 WIS L REV 1135, 1141–42 (2015)

to rent space on campus and the same security measures were necessary to prevent a heckler's veto, then the institution would, in the aggregate, be spending more than $2.5 million,[123] a huge tab for a public university to pick up. It is likely unsustainable for such an institution to continue to foot the bill again and again.

In fact, the University of California, Berkeley in 2017 experienced such a scenario. As a *Los Angeles Times* article explains, the university:

> [I]ncurred at least $1.4 million in security costs since February, when Yiannopoulos' last appearance sparked violent protests. The campus spent $200,000 on security for that event, $600,000 for [Ann] Coulter, whose event ultimately didn't happen, and an estimated $600,000 for the talk recently by conservative writer Ben Shapiro, according to the university.[124]

On top of that, there was an additional estimated $800,000 in security costs for Yiannopoulos's September 2017 speech at Berkeley.[125] All totaled, that is more than $2 million in security costs.[126] It is, as Professor Aaron Hanlon pointed out, "a huge distraction for a university already struggling to reduce a crippling budget deficit of $150 million."[127]

In *Forsyth County*, the ordinance at issue allowed a local "government administrator to vary the fee for assembling or parading to reflect the estimated cost of maintaining public order."[128] The problem, as Justice Blackmun explained, was the utter absence of any established criteria or defined variables by which the administrator could calculate costs.[129] As Blackmun encapsulated it:

> There are no articulated standards either in the ordinance or in the county's established practice. The administrator is not required to rely on any objective factors. He need not provide any explanation for his decision, and that decision is unreviewable. Nothing in the law or its application prevents the official from encouraging some views and discouraging others through the arbitrary

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[123] This figure is based on the University of Florida's original, low-end estimate of $500,000 that it would cost to cover security for Richard Spencer, and then multiplying that figure by five (Richard Spencer plus the four other hypothetical speakers) *See* Paige Fry, *White Nationalist Is Already Unsettling UF*, PALM BEACH POST, Oct 19, 2017, at A5 (reporting that University of Florida President Kent Fuchs "expects security costs—originally estimated at $500,000, or the cost of about 75 full-year undergraduate tuitions—to reach $600,000")

[124] Oreskes & Panzar, *supra* note 52

[125] *Id*

[126] *See* Douglas Belkin, *Colleges Face High Security Expenses*, WALL ST J , Oct 23, 2017, at A3 (reporting that "[s]ecurity for speakers at the University of California at Berkeley has cost the school more than $2 million this calendar year, compared with less than $200,000 annually for security at special events over the past several years")

[127] Aaron Hanlon, *What Stunts Like Milo Yiannopoulos's 'Free Speech Week' Cost*, N Y TIMES (Sept 24, 2017), https //www nytimes com/2017/09/24/opinion/milo-yiannopoulos-free-speech-week-berkeley html [https //perma cc/4W92-AXX3]

[128] Forsyth Cty v Nationalist Movement, 505 U S 123, 124 (1992)

[129] *See id* at 133

> application of fees The First Amendment prohibits the vesting of such unbridled discretion in a government official.[130]

Thus, if the problem in *Forsyth County* was what attorney Nathan Kellum calls "the unconstitutionality of unfettered discretion,"[131] then might a more cabined and confined ordinance that provides clear and precisely defined criteria shackling an administrator's discretion pass constitutional muster? In other words, does *Forsyth County* stand for a broad proposition—"the government may not charge the speaker for the increased security costs"[132]—or a narrow one under which security fees may be ratcheted up if standards are established and applied that rein in government discretion? If the latter is true, then public universities should establish explicit guidelines, such as a set of four or five content-neutral criteria,[133] to apply when determining security costs that can be charged to a speaker.

The other alternative, of course, is to focus on the hostile audience and, specifically, when groups that have caused violence in the past make it clear, in advance of a controversial speaker's appearance, that they intend to show up to protest. To increase the costs on the speaker seems unjust when it is the audience that engages in violence in response to First Amendment-protected expression. As Professor Erica Goldberg points out, "Violent responses to controversial speech are unfortunate, but penalizing speakers for the misdeeds of their listeners is a far greater injustice."[134]

CONCLUSION

The desire to ban controversial speakers from public university campuses is anything but new. There were calls in 1970, for instance, to ban

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[130] *Id*

[131] Nathan W Kellum, *Permit Schemes Under Current Jurisprudence, What Permits Are Permitted?*, 56 DRAKE L REV 381, 397 (2008)

[132] Goldberg, *supra* note 109, at 353

[133] The criteria might include content-neutral factors such as 1) the anticipated number of the speaker's followers who will attend, 2) the anticipated number of protestors who will attend, 3) the size of the venue where the speech is scheduled to occur, 4) whether members of the general public are invited or simply students, staff and faculty of the institution, and 5) whether prior appearances by the speaker on other campuses have resulted in violence, regardless of whether the violence was caused by the speaker's followers or by protestors Erica Goldberg asserts

> [T]he number of audience members attending a speaker's talk affects how many security officers the university requires A talk given in a larger auditorium, with more entrances and exits, may necessitate more security officers Further, if the event is open to the public, or if money is exchanged for selling tickets, more security officers may be necessary

Id at 399

[134] *Id* at 405

Yippie-founder[135] Abbie Hoffman[136] from speaking at the University of Florida in Gainesville.[137] But D. Burke Kibler, then-chair of the Board of Regents and a staunch defender of "the rights of students preaching revolution,"[138] stood firm in welcoming Hoffman to campus while simultaneously condemning him in the harshest of terms.

"I think it would be a sign of infinite weakness to resort to repression as our defense against this scum. It would be rather chilling if our only method of combatting this anarchist Marxist ideology was to repress it," Kibler averred.[139] More than 2,000 people ultimately showed up at the University of Florida's Plaza of the Americas to hear Hoffman talk, and no violence was reported.[140] Kibler took ferocious flak for supporting free speech rights, as did University of Florida President Kent Fuchs thirty-seven years later for allowing Richard Spencer on campus.[141] But presidents, provosts, and professors at public universities today would do well to remember and to find courage in Kibler's strong First Amendment commitment in the face of contentious speakers.[142]

Spencer, to either his enduring credit or blame, now pushes the envelope of free expression on public college and university campuses to its breaking point as he hopscotches across the nation to speak.[143] The

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[135] Wilborn Hampton, *Abbie Hoffman and Hey, His Turbulent Times*, N Y TIMES, Sept 3, 1998, at E7 (reviewing LARRY SLOMAN, STEAL THIS DREAM ABBIE HOFFMAN AND THE COUNTERCULTURAL REVOLUTION IN AMERICA (1998)) ("Hoffman and his comrades formed the Youth International Party (call them Yippies) to oppose the Vietnam War")

[136] Hoffman was a "writer and antiwar protester who founded the Yippie movement in the 1960s and became a symbol of radical activism " John T McQuiston, *Abbie Hoffman, Antiwar Activist and Puckish Protester, Dies at 52*, N Y TIMES, Apr 13, 1989, at B13 Hoffman "rose to national prominence with the Chicago Seven, a group of radicals who stood trial on charges of conspiring to disrupt the 1968 Democratic National Convention in Chicago They were acquitted of conspiracy, but Mr Hoffman and four others were convicted of crossing state lines with intent to riot " *Id*

[137] Miles McMillin, *Hello Wisconsin*, CAPITAL TIMES (Madison, Wis), Dec 15, 1970, at 1

[138] Lindsay Peterson, *Floridian Profile Series D Burke Kibler III*, TAMPA TRIB , Jan 6, 1992, at Baylife 6

[139] McMillin, *supra* note 137, at 1

[140] Lyle Van Bussum, *Hoffman Ridicules Nation's Founders in Speech at UF*, TAMPA TRIB , Nov 18, 1970, at 27

[141] *See* Lori Rozsa & Susan Svriluga, *With White Nationalist Visiting a Campus, Florida Prepares as if for Disaster*, WASH POST, Oct 18, 2017, at A10 (reporting that approximately thirty students demonstrated in front of Fuchs's office "demanding that he resign for allowing Spencer to speak on campus")

[142] *See D Burke Kibler III*, UNIV FLA LEVIN COLL LAW (June 27, 2014), https //www law ufl edu/alumni/d-burke-kibler-iii [https //perma cc/USX7-LQ9C] (noting that the positions Kibler "staked out—which he felt defended the free speech of students and faculty—earned him the enmity of certain members of the political establishment and of students alike")

[143] For example, in mid-October 2017, the University of Cincinnati agreed to allow Spencer to speak on campus, but Ohio State University at that time refused to accommodate a proposed November 15, 2017, speaking engagement by Spencer Dake Kang, *UC White Nationalist Will Be Allowed to Speak, Ohio Universities Latest Targeted for Appearances*, DAYTON DAILY NEWS, Oct 15, 2017, at A8 *See* Editorial, *Ideas Destined to Die Loathsome White Nationalists Will Wither Under the Glare of National Scrutiny*, WASH POST, Oct 13, 2017, at A18 (noting "the spectacles Mr Spencer and his ilk are staging across the country")

institutions, in turn, "are struggling to balance their mission of promoting free speech and the exchange of ideas with their responsibility to keep students safe."[144] As of late October 2017, three lawsuits were pending in federal courts against major universities—Michigan State University,[145] Ohio State University,[146] and Pennsylvania State University[147]—that opted to keep their students safe by denying Spencer on-campus access.

The legal questions regarding incitement that Spencer's possible appearances raise are virtually light-years removed from, in hindsight, the relatively quaint issues spawned about forty-five years ago. That's when a public university-distributed newspaper daringly used the word "motherfucker" in a headline and printed a cartoon "depicting policemen raping the Statue of Liberty and the Goddess of Justice."[148] Some today might invoke "motherfucker" to capture Spencer in all of his unresplendent and unrepentant infamy. Yet, the alt-right leader proves once again that, invariably and inevitably, the fringe elements of society demarcate the metes and bounds of the First Amendment.

For example, it was members of the tiny, Kansas-based Westboro Baptist Church (WBC) in *Snyder v. Phelps* who tested the scope of free speech earlier this decade with their anti-gay, anti-military and anti-family messages.[149] Ruling in favor of the WBC in *Snyder*, Chief Justice John Roberts engaged in dicta[150] about the importance of free expression that clearly resonates when it comes to safeguarding the words of Richard Spencer:

> Speech is powerful. It can stir people to action, move them to tears of both joy and sorrow, and—as it did here—inflict great pain. On the facts before us, we

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[144] Anemona Hartocollis, *University of Florida Braces for Appearance by White Nationalist*, N Y TIMES (Oct 18, 2017), https //www nytimes com/2017/10/17/us/florida-richard-spencer html [https //perma cc/QW7U-HDNV]

[145] Michigan State Complaint, *supra* note 31

[146] Ohio State Complaint, *supra* note 31

[147] Penn State Complaint, *supra* note 31

[148] *Papish*, 410 U S at 667–68 (1973) (involving the expulsion of a University of Missouri graduate student for distributing an edition of a newspaper that featured the headline, "Motherfucker Acquitted," and that on the front cover "had reproduced a political cartoon previously printed in another newspaper depicting policemen raping the Statue of Liberty and the Goddess of Justice")

[149] 562 U S 443, 448, 461 (2011) (concluding that, despite the Westboro Baptist Church's offensive messages such as, "Thank God for Dead Soldiers," "Pope in Hell," "Priests Rape Boys" and "God Hates Fags," the United States of America has chosen "to protect even hurtful speech on public issues to ensure that we do not stifle public debate That choice requires that we shield Westboro from tort liability for its picketing in this case ")

[150] *See* Michael C Dorf, *Dicta and Article III*, 142 U PA L REV 1997, 2000 (1994) ("The term *dicta* typically refers to statements in a judicial opinion that are not necessary to support the decision reached by the court ")

> cannot react to that pain by punishing the speaker. As a Nation we have chosen a different course—to protect even hurtful speech on public issues to ensure that we do not stifle public debate.[151]

Although Spencer maintains he does not want violence,[152] he is turning government property—namely, public universities—into venues for possible physical battles, not simply for wars of words. Spencer's visit to the University of Florida was pulled off without significant on-campus violence, but that may be only because hundreds of law enforcement officers, including rooftop snipers, staged an overwhelming show of force.[153] One must wonder whether militarization of a campus is the price the U.S. Constitution requires for free speech and whether, in turn, the absence of violence on campus at Florida will actually now help Spencer win his lawsuits against Michigan State, Ohio State, and Penn State. Campus militarization or otherwise, Richard Spencer's speech at the University of Florida represented, as one newspaper opined, "a legitimate, if utterly repugnant, display of the First Amendment at work."[154]

In putting the First Amendment to work, however, Spencer illustrates problematic issues with *Brandenburg*'s incitement to violence standard and the high price paid for free speech and preventing a heckler's veto under *Forsyth County*. But as Justice Louis Brandeis famously proclaimed ninety years ago, "Men feared witches and burnt women. It is the function of speech to free men from the bondage of irrational fears."[155] Perhaps it is then simply a cost of doing business—albeit, an exceedingly steep one—that public universities and taxpayers bear for freeing their students, staff, and faculty from the irrationality of believing, that in 2018, the Richard Spencers of the world will force the diminution of free speech rights.

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[151] *Snyder*, 562 U.S. at 460–61.

[152] John Bacon, *White Supremacists Say Rally in Charlottesville Is Model for Protests Across Nation*, USA TODAY (Oct. 9, 2017), https://www.usatoday.com/story/news/nation/2017/10/08/white-supremacists-say-rally-charlottesville-model-more-protests-across-south/744087001/ [https://perma.cc/DND9-WVXY] (quoting Spencer for the proposition "[w]e do not want violence").

[153] *See* Joe Heim et al., *Spencer Speech Met by Protests*, WASH. POST, Oct. 20, 2017, at A3 ("With an intense police presence—snipers were positioned on the rooftops of nearby buildings, hundreds of uniformed state troopers stood at attention behind barricades—the protest outside the speech proved peaceful.") About ninety minutes after Spencer's speech ended, there was a shooting off-campus involving several white nationalists. Susan Svriluga & Lori Rozsa, *Three Men Charged in Shooting After White Nationalist's Speech in Florida*, WASH. POST, Oct. 21, 2017, at A16.

[154] Editorial, *UF Opportunity on Free Speech*, TAMPA BAY TIMES, Oct. 18, 2017, at 6A.

[155] Whitney v. California, 274 U.S. 357, 376 (1927) (Brandeis, J., concurring).

TAB 4.A

THE EVOLVING FACE OF HATE

The Alt-Right Is a Subculture Without a Culture

In everything from fashion to comedy, racists are disguising and spreading their hateful ideas.

By **Allie Conti** | Apr 2 2018, 6:12pm

Image by Alex Tyree

Al Stankard is a racist. He believes that the biggest problem facing humanity is the insistence that everyone is equal, **that a "globalist elite"** is imposing multiculturalism on Europeans, and that black people in the US who demand

reparations are engaging in "seriously violent, vitriolic rhetoric." He effectively disguises these abhorrent views by dressing like, in his own words, a "shit-lib." When I met him on the campus of Rutgers University in the fall of 2017, he was sporting a giant hiking backpack, an oversize flannel shirt, and weather-worn boots. His black hair was unkempt, bordering on a mullet. The 30-year-old philosophy student spends his days lazing around the New Brunswick, New Jersey, campus, drinking green tea out of a silver cup he keeps at his hip, gushing about the hyper-literary indie bands he enjoys like the Mountain Goats. This persona works to his advantage when he attempts to spread his views.

Actually, it's surprising that Stankard hasn't gotten **punched in the face for his beliefs like Richard Spencer**. He proudly identifies as the guy who **chased down** Spencer's assailant, and as a member of the so-called alt-right. He's also the champion of those he described to me as "quiet white males who are normal outwardly but are secretly wanting to go back in time and help Hitler win World War II or something." And as we walked and chatted last November, he stopped, unannounced, to tape up a flyer that declared, "The Only Way to Win the War on Racism Will Be to End It." He's done this before, and to his disappointment, it didn't even make the school paper. That's probably because you'd have to do a double-take to catch what he meant. What Stankard is calling for is not an end to racism itself, but rather the right for self-described racists to peddle their toxic worldview without facing consequences.

"This is one of the problems with being by design so inoffensive is that it's not interesting to people," he told me. "I'm not being incendiary about it, though that's sort of the point."

The millennial's beliefs that whites are actually the underdogs in America didn't come from a Confederate-loving father. Instead, it was something he said he felt deeply as a child and refined both by neoreactionary online journals and racist web series like *Murdoch, Murdoch*, which looks like a crude copycat of *South Park*. After being sufficiently "red-pilled"—or called to consciousness in the parlance of the right—he dedicated himself fully to what he calls his "mature

viewpoint" and now runs a website called Acid Right that he hopes will make those beliefs hip to a certain literary set.

As bizarre as that sounds, his M.O. of appropriating left-of-center literature or politically neutral art and infecting it with racism is not novel. It's actually part of a time-honored culture war waged by right-wing extremists through the ages that helps them normalize their hateful ideas by couching them in familiar or appealing trappings. The "alt-right" is itself a euphemism invented by racists who wanted to lose the stigma of their hateful beliefs, and its foot-soliders know—perhaps better than even their forebears—that the best way to spread their ideas through fashion, music, and comedy is via a Trojan Horse.

Before arriving in New Jersey, the New Hampshire-born son of a Frank Sinatra impersonator had musical aspirations. About five years ago, that meant trying to become "the Bob Dylan of the racist movement." Unfortunately for him, his fascist folk fantasy was dashed when he realized he didn't have any rhythm. These days, Stankard fights "the war on racism" through books, poems, and screenplays that he writes under the "groovy, off-kilter" pen name HAarlem VEnison.

At right-wing protests and conferences, he gives away his racist ephemera to attendees with the hope of uniting the online contingent of the alt-right movement with the more seasoned white supremacists who've just been folded into it. Most importantly, though, he believes this subversive culture he is cultivating will also help evangelize the alt-right cause.

"I think it's all cumulative," he said. "If you slip in those red pills enough, people will start having them in their diet. That's what I do. I'm basically invisible. But if I build a corpus, or even a literary movement, it becomes something that people recognize."

The problem there, for Stankard, is that his "corpus" is not very good. "The Bicycle Diaries," for instance, is an amateurish short play that consists of

characters sitting on bar stools making cryptic statements and regurgitating **scientifically dubious theories** of racial inequality—which have been euphemized under the umbrella of "human biodiversity," or HBD, as part of the alt-right's larger rebranding. He also has a book called *Lo! a racist exhile*, which one reviewer (himself the author of a poetry book called *Beatnik Fascism*) **calls** "psychedelic" and reminiscent of the Velvet Underground. Certainly, Stankard is no Samuel Beckett or Lou Reed, but his aping of them offers a window into the twisted way in which the far-right has tried time and time again to graft itself onto broader culture.

Vegas Tenold spent six years embedded with some of the most extreme hate groups in the United States for his book *Everything You Love Will Burn: Inside the Rebirth of White Nationalism* in America. He said it's not hard to understand why music has always been the most effective propaganda tool in a racist's toolkit. It's a visceral medium, and choruses are meant to be drilled into one's head. "I think that's what the far-right understands," he told me. "When you're

hearing this thing over and over and over and over again, you just kind of take it in."

In the 70s, it was swampbilly bad boy Johnny Rebel who made albums like *For Segregationists Only* and the punk rock concert series Rock Against Communism. In the 80s, it was outlaw country acts like David Allen Coe and Oi! bands like Skrewdriver. By the late 90s, the mantel was taken up by NSBM (National Socialist black metal) acts like Burzum and Absurd. Basically, hate has always seemed to find a home in society's subcultures.

According to a paper called "Nazi Punks Folk Off," written by a professor of leisure, music, and culture at Leeds Beckett University named Karl Spracklen, some genres are more likely to become associated with white supremacy than others. English folk, for instance, might be appropriated more readily than hip-hop, because on the surface, it represents a sort of mythicized white past. Extreme forms of metal music might be appropriated before pop music because taboo-breaking, elitism, and nihilism are inherent to various metal subgenres.

But black metal isn't exactly the catchiest music, and therefore has limited ability to proselytize to the mainstream. Though Stankard didn't cut it as a Nazi Mr. Tambourine Man, a group called Right Wing Death Squad Entertainment created an entire trove of parody tracks by artists with grotesque names like Reich Khalifa ("We Dem Goys") and the Red Pillers ("Mr. Right Side"). Though they have been taken down by YouTube, their catalog, which has been **praised** by white nationalists at Counter Currents Publishing for being "post ironic," is apparently available elsewhere. Besides infiltrating niche subcultures, racists have long taken songs, such as the "Battle Hymn of the Republic," and subverted its meaning by substituting the existing lyrics to **advocate for genocide**.

Since 2015, artists like Cyber Nazi have taken the 80s synth sounds of New Order and Depeche Mode that are openly admired by racists like Andrew Anglin and Richard Spencer and mutated them into muzak **they describe as "fashwave."** Most of Cyber Nazi's songs don't contain any lyrics at all. Instead,

they're subtle electro tunes designed to fly under the radar despite their hateful underpinnings. As sites like **Twitter** continue to de-platform racists, this music goes somewhat undetected, thereby reaching more people. When reached for comment, YouTube noted it had started to use machine-learning technology in June of last year to flag certain videos for human employees to review. But it's not exactly an easy task for either an algorithm or a person to figure out what to do with vaporwave music spliced with historical audio of Hitler. The alt-right knows this—they are an adaptive enemy that is constantly changing tactics to subvert the platform's guidelines. (Although YouTube **removed** Cyber Nazi's first video, "Galactic Lebensraum," on March 13, plenty more of his music is still available on the site.)

The same strategy is taking place with regards to clothing. "I think it's a way of blending in, of evading notice, of not being as obvious," said Cynthia Miller-Idriss, a sociologist at American University who **studies the hidden symbols of far-right fashion**. "And that allows you to not have stigma at a workplace or wherever in a public setting. I'm sure that is a big part of the appeal."

In fact, the far right has always appropriated working-class culture, dating back to when members of the fascist political group National Front co-opted the style of non-racist skinheads in 1980s England by donning Doc Martens and Fred Perry polo shirts. Miller-Idriss noted to me that because those brands are now so connected to the far-right as to be name-dropped by the Southern Poverty Law Center, racists have moved on to co-opting other athleisure brands like Lonsdale in the new millennium. She said that a popular tactic among extremist youths is to wear a shirt emblazoned with that company's logo under a zip-up hoodie. That way, when someone is in sympathetic company they can let the letters NSDA (National Socialist German Workers' Party) show, but they can cover up completely when an antiracist, teacher, or cop walks by.

Additionally, much has been made of Richard Spencer's attempts to make Nazis look "dapper," and in the days leading up to the Unite the Right protest in Charlottesville, racist blogger Andrew Anglin recognized that his cohorts had an

optics problem that went beyond their neo-Nazi beliefs. The notorious recluse was concerned that the troll-army who read his ultra-racist site, the Daily Stormer, wouldn't know how to dress "sexy" for a big day out in front of news cameras. In a last-ditch effort to ensure a strong showing, he **published** a PSA: "Look good," he wrote on August 9. "It is very important to look good. We must have Chad Nationalism. That is what will make guys want to join us, that is what will make girls want to be our groupies. That will make us look like bad boys and heroes. That is what we are going for here." In one of his early speeches collected in a 1923 book, Mussolini said democracy took "style" away from the life of the Italian people, and promised that fascism would bring it back. Anglin couldn't really promise that, but he figured he could at least try to **teach** his troll army how to properly wear a shirt.

Anglin was heard loud and clear: There were no white hoods at Unite the Right. And while there weren't any really "sexy" styles on display either, the effect of an army of dudes in white polos and khaki pants storming the University of Virginia was disconcerting to many. As Cam Wolf **put it** for *GQ*, it was also indicative of a new world in which it was necessary to ask: "Is your neighbor

wearing a polo and khakis because he's a style-agnostic dad? Or is he just actively supporting the creation of a white ethno-state?"

This call to khaki was just Anglin taking his sartorial pronouncements one-step further. Immediately after the 2016 election, he **declared** New Balance sneakers the "official shoes of white people" because the company's vice president of public affairs **made pro-Trump comments**. And though it seems counterproductive to thank a business executive for his political stances by dragging his company into controversy, it doesn't seem like the alt-right will stop co-opting brands anytime soon. Racist Matthew Heimbach, co-founder of the **recently imploded** Traditionalist Worker Party, **told** the *Washington Post* that the goal of this strategy was to prove to people that the alt-right was a "reliable economic, social, and political bloc" worth courting. (Considering the speed at which brands scramble to **disavow the endorsement of racists**, it doesn't seem like Heimbach's strategy is working.)

While Anglin wants American racists to dress like Larry David, Spencer wants them to dress like *GQ* models, and Stankard wants them to look like Conor Oberst circa 2001, all three men understand the power that fashion and culture can grant a fledgling movement.

But while the extreme right of the 20th century and today share a penchant for clothing, the differences are stark. Stankard, Anglin, Spencer, and all the garden-variety racists who make up the self-described alt-right today obviously don't have a singular state-sanctioned vision or the authority to mandate one like Mussolini and Hitler. And unlike the skinheads of yesteryear, this group of memelords and shitposters don't even have a set of IRL touchstones to help them forge their identity. At first, that might appear as a weakness. But it's allowed this movement to act like a poisonous gas, inchoate enough to fill up whatever cultural container you want to put it in.

Take comedy. With the alt-right, humor might be its most diffuse yet noxious offering. In our meme moment, racist comedy has slyly managed to garner significant mainstream appeal.

Sam Hyde is a comedian who first went viral in 2013 for his TED Talk billed as a discussion on challenges facing the world in the 21st century. Instead, Hyde spent 20 minutes mocking the people who usually participate in such events.

His brand of humor is best described as anti-comedy. It's not laugh-out-loud funny, because it contains multiple layers of meaning depending on who's listening. With phrases like "ideas are amazing" peppered throughout, his TED Talk was probably humorous to those who find rhetoric on the left to be idealistic, impotent word-salads. But when he talks about "teaching African refugees Javascript," it only lands as an explicitly racist joke for someone who has been "red-pilled." As evinced by the nervous laughter of the audience, a casual listener might catch on, though converts clearly do. As one YouTube commenter put it: "Never seen an entire audience get cucked before!" Another described Hyde as a "white supremacist Eric Andre."

Hyde's biggest project was his sketch comedy group Million Dollar Extreme's live-action show *World Peace*, which aired on Adult Swim in the fall of 2016. Like his TED Talk, the show apparently featured subliminal messages to the alt-right like **hidden swastikas** before the network removed them, though **references** to David Duke and the **racist moonman meme** remained. The show performed **decently enough** within Adult Swim's lineup that year, reaching almost 900,000 viewers per week on average, which is only slightly less people than *The Eric Andre Show*.

World Peace was not exactly a smash success compared to other Adult Swim programs like *Rick and Morty*—though it did manage to rake in upwards of a million viewers during its premiere, which was **more than** other shows on the programming block with built-in followings. What's more, it is notable in the sense that it's one of the few alt-right cultural products to ever break through

to the mainstream, however briefly. Hyde lost his show just four months after it premiered—a fact that he **attributed** to his support of Donald Trump. After that he was **crowdfunding** about $1,700 a month on Patreon **and** $500 a month on Hatreon. (The latter platform lacks the hate speech restrictions of its mainstream counterpart, though it hasn't been **processing payments** for almost a month.) He uses that money to produce videos, like one of himself pretending to be the extremist who plowed into a crowd in Charlottesville and killed a woman named Heather Heyer, that has since been removed by YouTube.

Although he's now more overt about his alt-right affiliations and YouTube seems better able to flag his content, Hyde was able to exist in the mainstream for an extended period of time partly because it was difficult to discern whether or not he was pulling an Andy Kaufman–style con, in which he was just playing a caricature of an alt-right persona in order to enrage liberals but didn't actually believe the ideas he was pushing. Trying to unpack alt-right figureheads only to fall into a state of self-doubt is a common occurrence among mainstream journalists. During the months that the *Atlantic*'s Luke O'Brien tried to track down Anglin for a **cover story** that came out in 2017, he repeatedly wondered if he was chasing a method actor. When I met up with Hyde just after the presidential election at a Chinese restaurant near his home in Fall River, Massachusetts, for an off-the-record interview, I walked away simultaneously convinced I had either just been in the presence of a genuine American Nazi, or was destined to appear on his YouTube channel as the subject of a prank.

"Mainstream news sources still have yet to catch up to the discursive strategy of the right," M. Ambedkar, who **wrote an essay** about the aesthetics of the alt-right under a pseudonym for fear of getting doxxed, told me. "They still haven't caught up to that element of irony, that evasive element."

That "evasive element" Ambedkar refers to epitomizes why attributing a singular aesthetic to the alt-right is a fool's errand. It's a pair of dad shoes, a lyric-less song, a brand of comedy that's so post-ironic it's impossible to say who's even being mocked. It's a shirt under a jacket that can be zipped and

unzipped depending on who's watching—a message that always remains just out of the reach of whoever attempts to decipher it. It seems like nothing to a teen who's online, but at a certain point, it's embedded into their consciousness. And at that point, it's too late.

*Follow Allie Conti on **Twitter**.*

TAB 4.B

CHARLOTTESVILLE

Inside the Chaos and Hate at Charlottesville

Saturday's alt-right rally was violent from the start. Then it got even worse.

By **Allie Conti**; photos by **Jessica Lehrman** | Aug 13 2017, 2:16pm

The "Unite the Right" rally dissolved into chaos practically before it began. Around noon, a cornucopia of racists had gathered around a statute of Confederate general Robert E. Lee that was set to be removed, and their opponents surrounded them on the streets below. About 20 minutes before the rally's scheduled start time of noon, the two sides were already chucking rocks and water bottles at each other. The air was already so filled with pepper spray it tasted like snuff.

A few minutes later, shield-wielding riot cops from the Virginia State Police declared an unlawful protest and cleared the area around the Confederate monument. Protestors on both sides scattered, with the far-right extremists marching more than a mile and across a highway to another park. The Black Lives Matter protestors who opposed them eventually made their way to a strip mall at the center of town.

At McIntire Park, Eli Mosley wanted to know who had guns, and how many. "I need shooters," said the army vet and white nationalist who has **claimed** to be a sort of alt-right general. "We're gonna send 200 people with long rifles back to that statue."

Surrounding him were old men with Nazi lapels, a guy with chainmail, and a Texas branch of Vanguard America, a white nationalist group, who were joking with each other. Some people wanted to disperse, but Mosley wasn't having it.

He got inches away from the face of another white nationalist who had suggested the whole group head home to avoid arrest. "I'm the fucking organizer," he screamed, with veins bulging and spittle flying. "Listen to what I say, goddamnit!"

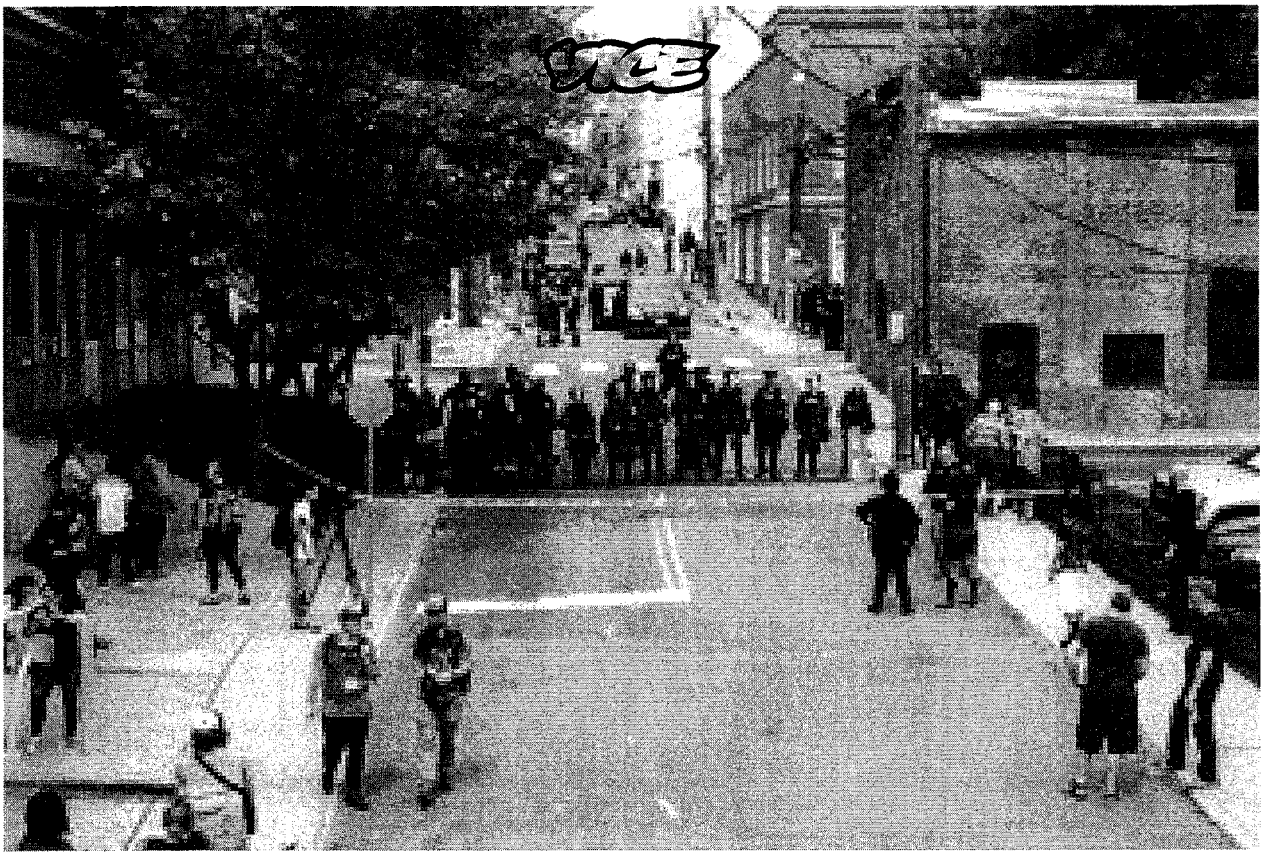
Tensions were high in Charlottesville just before noon as white nationalists inside Emancipation Park faced off against counterprotestors in the streets below

Thankfully, no one listened to Mosley. But the day ended horrifically shortly afterward nonetheless after a car plowed through a crowd of protesters, injuring at least 19 people and killing a 32-year-old woman named **Heather Heyer**. Police arrested James Alex Fields, a 20-year-old from Ohio and **charged him with** second-degree murder, three counts of malicious wounding, and leaving the scene of an accident.

In the aftermath, politicians from both major parties condemned the rally and the car attack, with **Republican Texas Senator Ted Cruz calling it** "domestic terrorism." (Fields has so far not been charged with terrorism.) But President Donald Trump **avoided calling out white supremacists** specifically, instead denouncing violence from "many sides."

That oversight seemed particularly galling given how alarmed many were by the imagery of the Unite the Right rally, which spread rapidly on social media. On Friday night, **white supremacists bearing torches** marched spookily through the University of Virginia campus in what looked like a Klan rally without the hoods. The next day, they were out in force again, openly waving symbols of Nazism and other far-right movements.

The rally was ostensibly about protesting the removal of the Robert E. Lee statue, but it really served as a convention for some of the country's most extreme white nationalists, as well as anti-fascists and others set on opposing them. For far-right leaders, it was a chance to see how many of their sympathizers would be willing to gather publicly, rather than in pseudonymous online forums.



Virginia State Police crawled the streets of downtown Charlottesville pushing people out of what they said was an unlawful protest.

Experts said that Charlottesville was set to be an inflection point for the "white identity" movement—not only the biggest American gathering of racists in at least a decade, but also a point at which various fringe groups would merge with the online trolls who became politically active during Gamergate to form a broad and unprecedented coalition.

For people like alt-right movement leader Richard Spencer and Daily Stormer site-runner Andrew Anglin, the goal was clearly to rope in people who might not be openly racist but who disagreed with "multiculturalism"—a view becoming more acceptable in mainstream discourse during the Trump era.

"They hope to be bigger than the sum of their parts by broadening their constituency from stoking the fears of an increasing and elastic pool of disenfranchised whites who feel politics has ignored them, during a time of unease at a changing demographic and cultural landscape that has left them

behind," Brian Levin, the director of the Center for the Study of Hate and Extremism at California State University San Bernardino, told me.

These friends who are unaffiliated with any group drove to Charlottesville from rural Virginia partially as entertainment and to defend the statue of Robert E. Lee

Jason was one of those people. He told me at McIntire Park that he'd never been called to political action before but drove about five hours from western Pennsylvania to meet other extreme right-wingers for the first time. The 25-year-old, who works in business sales and did not want to give his name because he works for a Fortune 500 company and feared losing his job, had only one other friend who might have shown up at Unite the Right, but he decided to attend a wedding instead.

Jason is a 9/11 truther and started listening to Alex Jones as a young teenager but before Unite the Right he had been afraid to become active with the alt-right, even online. Still, he'd felt called to Charlottesville by increasing political tensions and what he felt was the need to defend himself against the left, who in

his mind saw no difference between people with MAGA hats on and people with neo-Nazi flags.

He was disappointed that people were scattering out of McIntire, because he'd had hopes of everyone meeting up afterward to socialize—perhaps to grab a beer and celebrate what he thought had been a successful day.

"National socialism, fascism, whatever you want to call it, this is real unity," he told me. "The multiculturalism and political correctness pushed by the media—you can put up all the stickers and the posters you want, but at the end of the day, the people you talk to at work, you make small talk with them, you talk for convenience, but this is actual real unity, it's class unity."

Chris Howell, on the other hand, seemed to show up mostly out of boredom. He was born and raised in New Castle, Virginia, which has a population of fewer than 200 people and zero traffic lights as he tells it. But this weekend, an uncharacteristic thing happened: A Facebook friend promised excitement in a college town about two hours away. For the 22-year-old railroad construction worker and his three friends, Unite the Right was the weekend's most promising

entertainment on offer, as well as their chance to defend a piece of Confederate history from hordes of incoming coastal leftists.

Howell said his favorite part of the day was sitting down with a protestor who opposed the statue and sharing a dialogue—but when things got heated, he was attacked with a cane. As members of the National Guard and state police marched toward us from opposite sides downtown Charlottesville and a helicopter roared overhead, his friend nursed a bloody wound on his skull. The group was preparing for the trip back to New Castle but knew that there were more battles on the horizon—the deadly act of terrorism had practically ensured it.

"They don't help us at all," Howell said of the man who had just been taken into custody at the police station. "They make us just look worse. Everyone's gonna walk away with nothing but more hatred."

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TAB 4.C

EXTREMISM

'Unite the Right 2' Was an Incredible Self-Own for Racists

This wasn't hard to see coming.

By **Allie Conti** | Aug 13 2018, 4:00am

Jason Kessler leading the Unite the Right 2 rally. All Photos by Brad Smith

Practically no one showed up to the **Unite the Right 2 rally**, held on the one-year-anniversary of the **notorious Charlottesville demonstration that dissolved into chaos** and ultimately left a woman dead. Although the event's website had some slick production value that hinted at the possibility of

organizational aptitude, fewer than 20 people actually participated IRL, by my own count. And while threat-assessment reports issued in the lead-up to the event suggested protestors might be outnumbered by their opponents four-to-one, that ratio ended up being extremely conservative. Between hundreds of antifa-style counter-protestors, as well as Black Lives Matter movement members and other various non-racists, the "white civil rights" side's relative lack of turn out was frankly pretty embarrassing for them.

In hindsight, this wasn't hard to see coming.

"Lots of white supremacists are telling people to stay away," Mark Pitcavage, senior research fellow at the Anti-Defamation League's Center on Extremism, told me before things kicked off—to the extent they did at all. "Some of it has to do with avoiding a repeat of the post-Charlottesville backlash, but a lot of it also has to do with the fact that they can no longer stand organizer Jason Kessler."

It's true: Some people in the right-wing media have taken to **floating** the idea that Kessler is some kind of deep-state plant who wants to divide America and make Trump look bad. It's also true marquee names like Richard Spencer stayed home and the Daily Stormer's Andrew Anglin **told followers** that taking part wasn't worth being publicly ostracized.

But another factor that contributed to UTR2 being a complete non-event was the sheer volume of police keeping people separated from each other starting well before it began in the afternoon and continuing into the early evening. The UTR2 website said the plan was for the racists to arrive via convoy at a metro station in Vienna, Virginia, and head to DC from there. But counter-protesters (and the press) were barred from entering the Vienna station, and not permitted to mill around at the Foggy Bottom stop where the far-right contingent arrived in DC, either. Meanwhile, a small army of police officers flanked the racist crowd from the moment Kessler emerged from the subway, grinning in a blue suit and holding out an American flag.

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Not that the event was for the faint of heart. Some anti-racist activists approached the street demonstrations in pink pussy hats and ultimately turned away, apparently because it was more than they bargained for. And at one point it did seem like violence was near. Although UTR2 was officially permitted to rally at Lafayette Square, near the White House, those who opposed them were barred from going there. In response, black-bloc protestors set up a makeshift barrier constructed from shopping carts to keep Kessler and his cohorts from leaving the vicinity. Fireworks and eggs flew at the cops, but no tear gas was deployed in response. Eventually, authorities told the people attempting to intercept Kessler that he had somehow been escorted out of the area unscathed and unnoticed, and the most formidable anti-racists on the scene moved on before 6 PM.

Pointing out that things went better than they did last year in Charlottesville seems like a pretty low bar. But having attended the first, tragic nightmare, it's

safe to say the general unrest in DC was about ten orders of magnitude less extreme than it was that day in Virginia. Still, the fact that regular people thought it was completely chill to hang out in a Peet's Coffee on Pennsylvania Avenue and 17th Street—in full view of the massive standoff between cops and antifa activists that threatened to turn into a riot, just the latest front in a larger battle between the white supremacist far-right and everyone else in America—made for its own disturbing takeaway.

In other words, even if "white civil rights rallies" aren't necessarily something many people are keen to attend in 2018, plenty seem to have accepted them as a fact of life.

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TAB 4.D

CAMPUS SPEECH

Racist Instagram Photos Tore a California High School Apart

Schools across the country don't know how to deal with students who post toxic things online.

By **Allie Conti**; illustrated by **Lia Kantrowitz** | Jun 14 2017, 5:24pm

Anika Mallard was sitting in math class when a friend passed her the phone. It was pulled up to an Instagram account containing pictures of the 16-year-old and several other black students with nooses around their necks and side by side with monkeys.

This was a shocking bit of racism, even by the recent standards of California's Albany High, where **seven of Mallard's peers had** been caught giving one another the Nazi salute in the hallway. "It was really weird, and I wasn't expecting it," she told me of the photos. "I thought these people [who were involved with the account] were my friends. I've known some of these people since middle school, since elementary school."

The trauma of being targeted by people she once trusted caused Mallard to miss crucial weeks in her junior year and left her feeling brutalized. And the controversy over the racist Instagram account roiled the school, culminating in a near-riot targeting the teens behind the account.

Albany High initially suspended 13 students associated with the private account for five days and threatened one with expulsion. Then, as most of the students prepared to reintegrate into the school, emails went out from the school district's superintendent and the school's principal identifying them as "racists" and "abusers." Parents later received another missive about a noose found at a local park, though cops later clarified it was a broken swing. A lawsuit brought forth by the families of four of the accused kids says that these messages—regardless of their veracity—helped create a pressure cooker that went off on March 30, when the students returned to school.

> ***Related: My interview with Milo Yiannopoulos***

According to a **complaint** filed in federal court, on that day the offending kids "were forced to march through the high school and were lined up in full view of all or most of the student body. School administrators allowed the student body to hurl obscenities, scream profanities, and jeer at the Plaintiffs and the other suspended students, who were all not allowed to leave what the school considered an act of 'atonement' but was rather a thinly veiled form of public shaming."

That afternoon, the students were brought to a closed-door "restorative justice" session orchestrated by a group called SEEDS. The group, which did not return request for comment, describes itself online as an organization focused on "creating a safe space that enables the restoration of relationships and community healing through dialogue."

Whatever dialogue and healing occurred behind closed doors, the hallways those students walked out to after their session was far from safe, according to the April suit. Mallard, who was among a group of students and others who gathered in those halls, remembers waiting for hours for the restorative justice session to end. When the suspended students finally emerged, tensions were high. People were hot and tired, and wanted to make their anger at the perpetrators of the account known. As the kids attempted to get through the crowd and out to their cars, some of them got struck in the head by some of the nearly 100 demonstrators who had gathered. One of the students allegedly had his nose broken.

According to the complaint, a plainclothes Albany cop wouldn't protect the suspended kids from the crowd. "You caused this," the officer allegedly said.

Lawyers are arguing that Albany's administrators were overly harsh in doling out punishment to the students who merely "liked" or commented on the racist photos. They say the majority of their clients still haven't returned to school out of fear for their safety. (An **additional lawsuit** filed on behalf of two more students in May says pretty much the same.)

"The district takes great care to ensure that our students feel safe at school, and we are committed to providing an inclusive and respectful learning environment for all of our students," Albany Unified School District superintendent Valerie Williams **said** in a statement to the *Los Angeles Times* in May. She did not return my request for comment. Jeff Anderson, who was principal of Albany High during these incidents and was reassigned as a result, could not be reached.

"The residents of Albany are ultra-liberal almost to the point of being inflexible in their beliefs," Darryl Yorkey, one of the attorneys, told me. "The school is trying to stamp out injustice wherever they can find it, and focus on these macro-concepts instead of what they should be paying attention to, which is school education. The school has done pretty much everything but provide tar and feathers for the rest of the students to ostracize them."

What happened at Albany is a flash point in a nationwide debate that's trickled down from college campuses to high schools: What should be the punishment for racist social media posts? It's far from an academic question. High schoolers have been expelled or threatened with expulsion over hate speech in Illinois, Oregon, and Michigan. Kids across the country have engaged in racially tinged, **often Trump-influenced**, acts of bullying.

The incident at Albany is significant, and not just because the outrage resulted in actual physical violence against the perpetrators. The liberal town is just down the road from Berkeley, where a national debate was sparked by **left-wing protesters who shut down** a Milo Yiannopolous speech there in February. Arguments over when speech becomes intolerable and what should be done when that line has been crossed have already turned violent; now the kids are involved. Call it the baby Battle of Berkeley.

Watch: The Pulse nightclub tragedy, one year later

The story of Albany's founding goes back to the early 20th century, when Berkeley ran out of space to store its trash, leading to an outbreak of bubonic plague. Berkeley's solution was to dump its excess waste in an unincorporated community then known as Ocean View. The people who lived there didn't like that very much, which caused a group of women to try to ward off the incoming garbage wagons with shotguns. When that didn't work, the people of Ocean View drew up a charter, established Albany, and adopted an ordinance against storing outside waste as a way to end the so-called **Garbage Wars**.

Today, Albany's an overwhelmingly liberal place of about 18,000 people, 85.5 percent of whom **voted** for Hillary Clinton in November. Out of the 1,200 students who attend the local high school, only about **5 percent** are black. It's the kind of sleepy suburb where a two-story Target store is considered an attraction. And it's once again dealing with toxic runoff from its neighbor.

An outbreak of intolerance in such a deep-blue area must have come as a shock—but it's the sort of shock that has become common in America. What do you do when a front in the culture war opens right on your doorstep?

In the adult world, certain corners of the right have embraced the idea that when people are saying and posting hateful things, that exercise of "free speech" shouldn't lead to them losing their jobs, say, or being protested by outraged liberals. Back in the much more innocent time of 2012, journalist

Adrien Chen exposed the real name of a man who moderated a jailbait community on Reddit, causing that man to get fired. The larger Reddit community of moderators **fired back** by banning links from the site where Chen worked until he atoned by posing in a tutu and posting it online.

This kind of controversy has become increasingly common. Take for example, *Million Dollar Extreme* show runner Sam Hyde who **claims he was ousted** from Adult Swim in December over his support of Donald Trump and his show's alleged overtures to the alt-right. Last week, Breitbart editor Katie McHugh **lost her job** after tweeting that there would be no terrorist attacks in the UK if Muslims didn't live there. A **campaign** to support her that was started on an alt-right crowdfunding platform raised over $7,000. "You tick off the Jew When you write what is true," one of the contributors wrote.

Nearly no one argues that people like McHugh and Hyde don't have the legal right to say and think whatever they like—but it's up to their employers to decide whether they want to be associated with such toxic views. (Or schools, in the case of prospective Harvard students who were **denied admission** after it was discovered they traded racist memes on Facebook.) But free speech arguments are much more complicated when it comes to teenagers, as evinced by what's happened at Albany High.

In the Vietnam War era, the Supreme Court ruled that teens had the right to wear black armbands to school as a gesture of protest, meaning they legally maintained their free speech rights on campus. But in the 80s, the court **said** administrators at a school in Ohio had the right to censor a student newspaper on the grounds that offended kids wouldn't be able to simply skip school to avoid the material. That distinguished between student speech that takes place on campus and off it.

It's only recently that courts have started issuing opinions on what kids can get away with publishing on social media when they aren't in class—a relatively new form of speech, one that dominates both on- and off-campus life. In 2011, a federal judge in West Virginia **ruled** that administrators were not out of bounds in suspending a senior for creating a MySpace discussion group shaming another girl for having herpes. That same year, a Missouri court **found** that a school was justified in giving an indefinite suspension to a teen who jokingly discussed shooting up his school over instant messenger. However, there has yet to be a court ruling about a case involving a private Instagram account or text thread.

Social media allows students to make racist jokes and taunts publicly, while also adding the risk that incidents formerly relegated to closed-door PTA meetings can now potentially become viral news, forcing administrators into acting quickly and harshly. To avoid a PR nightmare, some school officials have been applying zero-tolerance policy--originally designed to punish kids who bring weapons to school or sell drugs there--to hate speech. (Zero-tolerance was the justification the Albany Unified School District used when suspending students associated with the Instagram account.)

Swift and sharp punishment for racism might seem appropriate or even necessary, but experts say that, if anything, a student expelled for racist behavior is more likely to become radicalized than to reform, and that the law hasn't yet caught up to the technology teens use to communicate.

Zero-tolerance policies emerged from the war on drugs and the Gun-Free Schools Act, both of which were extremely influential on public school policy in the 90s. Getting drugs and guns out of the schools is obviously important, yet soon these policies—whose application varied across school districts—wound up being applied to even minor infractions, and disproportionately led to the suspension and expulsion of black and Latino students. A 2014 study **conducted** by the Justice Department found that students of color were three times more likely to get suspended or expelled under zero-tolerance than white kids.

Ruth Cusick is a senior staff attorney for Public Counsel, the largest pro bono public interest law firm in the country. Her job is to try to reduce the number of expulsions in Los Angeles County that are justified by zero-tolerance. She cares about this issue in particular because these policies disproportionately affect kids of color and other marginalized groups. But she also thinks that kicking kids out of school for saying something horribly racist is an abuse of the policy as originally intended. Not only that, she argues it's detrimental to society as a whole since its more likely to lead to a cycle of antisocial behaviors rather than rehabilitation.

"Expelling them, and kicking them out of school, and communicating to them that they don't have a right to belong in their school community, can only produce really negative and probably psychological ramifications," she told me.

The American Psychological Association seems to agree with her. According to a 2008 **report** on zero-tolerance policies, kicking kids out of school before their brains develop is unfair; expulsion can increase alienation, rejection, and breaking of healthy adult bonds. That report argued there wasn't enough research to evaluate the costs and benefits of a federally mandated policy that

often leads to lost educational opportunity for emotionally underdeveloped youths.

Lead author Cecil Reynolds says that's still the case nearly a decade later. "That kind of shaming and denying education and not using things like this as a way of teaching is an abdication of responsibility," he told me. "You should teach kids about free speech and the responsibility that goes with it rather than punishing them for speech you disagree with."

Zero-tolerance policies have resulted in some blatantly unjust punishments. Reynolds gave me the example of a girl who's mother packed a **butter knife** in her lunch and who got suspended after turning it over to a teacher. Another girl he mentions was apparently suspended for **bringing ibuprofen** to school for menstrual cramps. Reynolds says this is happening because in a litigious and highly charged era, adults want a "clear, bright line" to follow rather than exercising critical thinking. All of this adds up to something very toxic, in his opinion.

"Punishment is very ineffective in changing behavior over the long term," Reynolds says. "It results in a lot of resentment and anxiety."

> **"Expelling them may seem appropriate but that's not gonna teach them to accept people. It's gonna teach them that they don't belong somewhere."**

Even if school administrators accepted that harsh punishments for racist posts are unlikely to result in the student learning their lesson, they would still be in a conundrum—schools still have a responsibility to protect the right of students of color to feel safe.

In the wake of the Instagram account, Mallard **made** a nine-minute video called "We Are NOT Afraid." In it, she and other students of color at Albany talk out the psychological effects of knowing that they go to school with students who harbor hateful beliefs. They also try to suss out an answer to the question of an appropriate punishment. Mallard thinks that the offending students should be expelled, although not all of her peers agree.

"Theres no form of punishment that will teach them how to accept people," one of the targeted students says in the video. "Expelling them may seem appropriate but that's not gonna teach them to accept people. It's gonna teach them that they don't belong somewhere. They have to talk things out if they truly wanna change."

The video made by Mallard:

Pulling offending students out of school seems to be the knee-jerk response for many administrators.

Last September, girls at Marist High School in suburban Chicago were invited to attend a Catholic spiritual retreat called Kairos and were told that any comments related to it would be confidential. The idea was that they could discuss doubts about their faith, problems with their parents, and questions about their sexuality without adults intervening.

On November 5, an off-duty Chicago police officer shot and killed a black man **named** Joshua Beal, leading to massive protests and a tweet from a self-professed member of the Gangster Disciples who said he was going to kill white kids as retaliation. In a group text thread set up for Kairos, one student **responded** to the threat by **saying** "I FUCKING HATE NIGGERS," and four other girls agreed with her. Screenshots of the conversation appeared on Twitter and were posted on the school's Facebook page, which lead to widespread media coverage.

A group of six young activists known as Youth for Black Lives threatened to shut down the school with protests, although they eventually backed off with the promise that they would have regular meetings with the Chicago Police Superintendent Eddie Johnson that were open to the public. The idea was to come up with a curriculum that the CPD could use to better handle protests and to interact with Black Lives Matter. The teen girls were also **expelled**, which led to two of their parents filing a lawsuit.

But there hasn't been any meeting since January. And according to Maxine Aguilar of Youth For Black Lives, it almost didn't happen at all. Just days before the discussion was set to take place, the Department of Justice **released** a report criticizing the Chicago police, which made the idea of an open forum seem like a PR nightmare for the cops. There was also a last-minute venue change because the school district decided the meeting couldn't be held at any of their schools as originally decided. Even after all that was sorted, the young activists had doubts that Superintendent Johnson would show up at all.

"This story went viral on Chicago Twitter," Aguilar says. "I think the image of these six black girls sitting there and waiting forced him to come."

But after chatter of the viral news story died down, so did the urgency around the meetings. Aguilar and her friends have been dealing with scheduling issues for months, though they hope to present their curriculum before August. In the meantime, the girls with the text thread eventually **returned** to Marist.

As a 17-year-old junior at Jones College Prep, Aguilar has access to resources like a Black Student Union. She told me that expulsion was never going to fix anything, and that Marist not having any club like that was at the root of the racial tensions.

Watch: The Mormon War on Porn

The same month that the controversy at Marist blew up on social media, teens in Oregon faced **expulsion** over Snapchat videos that targeted their principal and and fellow classmates. Two Michigan teens are currently **facing expulsion** for doctoring a monkey's face over a high school basketball player's photo and sharing the image on social media back in February.

The national media controversy around these types of situations often dies down as quickly as it flares up—or it simply moves onto the next controversy. But the students swept up in these controversies must grapple with the aftermath for a long time.

Lawyers for the Albany students argue that because the Instagram account was private, what was posted there was no different from a drawing made by someone in their own home—an idea that seems to be undercut by the fact that Mallard saw it in the first place. Given the fact that one of the attorneys told me he had to download Instagram just to take on the case, it's clear that adults are having a hard time porting over old legal arguments into the age of Snapchats and screenshots and the like.

More convincing is their argument against what they told me was a "*Game of Thrones*-style shaming" and the suggestion that the recent riot at Berkeley caused administrators to be heavy-handed in order to avoid a PR disaster in an era of heightened political tensions.

"A high school in the middle of Albany, California, can't solve all of the social ills that are befalling the United States, and that's essentially what they're trying to do," attorney Yorkey told me.

The question that has yet to be answered is if school administrators can even solve the social ills befalling their campuses.

Mallard is back at school now, and says she feels relatively safe since most of the perpetrators are gone. She thinks it's ridiculous that the people behind the Instagram account are trying to fight back using the language of victims.

"If you're saying stuff like that, it's a hate crime," she says. "You don't have your First Amendment rights when you're doing that."

*Follow Allie Conti on **Twitter**.*