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

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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

[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

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

[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

[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/A6AaSLfqyviYasB6i3GxEL/ [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 Svrluga, *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. Phelp*s 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 Svrluga & 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).