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## Laying Siege to the Ivory Tower: Resource Allocation in Response to the Heckler's Veto on University Campuses

Macklin W. Thornton

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# Laying Siege to the Ivory Tower: Resource Allocation in Response to the Heckler’s Veto on University Campuses

MACKLIN W. THORNTON\*

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\* © 2018 Macklin W. Thornton. J.D. Candidate 2019, University of San Diego School of Law; B.A. 2015, University of California, Berkeley. I dedicate this Comment to my teachers and professors who challenged me to ask *how* and *why*. I thank my Faculty Advisor, Larry Alexander, for his encouragement and support as well as Katherine Motsinger, Garrett Gaughan, Anne Kammer, and Danielle Macedo for their feedback and precise editing. I am deeply grateful to the *San Diego Law Review* Editorial Board for this opportunity.

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## I. INTRODUCTION

High in the towers of academia, the lofty ideals of free speech are tossed around with a deceptive ease. However, as legal minds grapple with heady legal doctrines, free speech has concrete consequences down at the foot of those towers. At this ivory base, the line between the university and the community blurs.

January 2017. The University of Washington and the Seattle Police Department sent 124 officers to quell violent demonstrations after a student group invited controversial speaker, and previous Breitbart News editor, Milo

Yiannopoulos, to speak on campus.<sup>1</sup> He spoke to the audience at the cost of a shot-and-wounded protester and \$75,000 in police overtime.<sup>2</sup>

February 2017. A mass of activists, self-identifying as antifascists and dressed in black, moved through Berkeley, California “with clubs and shields[, lighting] fires, hurl[ing] Molotov cocktails, [and] smash[ing] windows” and achieved their sole objective: to prevent Yiannopoulos from speaking at a University of California, Berkeley (UC Berkeley) student organization’s event.<sup>3</sup> UC Berkeley cancelled the speech because of the violence and corresponding public safety concerns.<sup>4</sup>

UC Berkeley appeared on the verge of forsaking its own history as the cradle of modern free speech in 2017.<sup>5</sup> In the 1960s, students promoting

1. Daniel Gilbert, *Milo Yiannopoulos at UW: A Speech, a Shooting and \$75,000 in Police Overtime*, SEATTLE TIMES (Mar. 27, 2017, 8:57 AM), <http://www.seattletimes.com/seattle-news/crime/milo-yiannopoulos-at-uw-a-speech-a-shooting-and-75000-in-police-overtime/>. Yiannopoulos became a pundit by discussing politics in an inflammatory style on the Internet as a “clickbait provocateur” targeting the political left. Dorian Lynskey, *The Rise and Fall of Milo Yiannopoulos—How a Shallow Actor Played the Bad Guy for Money*, GUARDIAN (Feb. 21, 2017, 1:07 PM), <https://www.theguardian.com/world/2017/feb/21/milo-yiannopoulos-rise-and-fall-shallow-actor-bad-guy-hate-speech> [<https://perma.cc/URL6-RDTL>]. A previous contributor to the *Catholic Herald* and the *Daily Telegraph* as well as previous editor of conservative *Breitbart News*, Milo Yiannopoulos ventured into the speaking circuit to combat “political correctness” and is often accused of using “racially charged language.” Thomas Fuller & Christopher Mele, *Berkeley Cancels Milo Yiannopoulos Speech, and Donald Trump Tweets Outrage*, N.Y. TIMES (Feb. 1, 2017), <https://www.nytimes.com/2017/02/01/us/uc-berkeley-milo-yiannopoulos-protest.html>. He became well known during “Gamergate,” which sought to bring ethics to videogame journalism, while still fomenting a hostile environment toward women. Lynskey, *supra*. Propelled by viral videos, memes, and growth of the “alt-right,” he developed into a personality that championed the alt-right into mainstream discourse. *Id.* The Associated Press created guidelines for reporting on the alt-right and define it as “‘an offshoot of conservatism mixing racism, white nationalism and populism,’ or, more simply, ‘a white nationalist movement.’” John Daniszewski, *Writing About the ‘Alt-Right,’* ASSOCIATED PRESS (Nov. 28, 2016), <https://blog.ap.org/behind-the-news/writing-about-the-alt-right> [<https://perma.cc/Y4TQ-S5PM>].

2. Gilbert, *supra* note 1.

3. Matt Saincome, *Berkeley Riots: How Free Speech Debate Launched Violent Campus Showdown*, ROLLING STONE (Feb. 6, 2017), <http://www.rollingstone.com/culture/features/berkeley-riots-inside-the-campus-showdown-over-free-speech-w465151> [<https://perma.cc/BV5X-RFTM>]; Julia Carrie Wong, *UC Berkeley Cancels ‘Alt-Right’ Speaker Milo Yiannopoulos as Thousands Protest*, GUARDIAN (Feb. 2, 2017, 6:56 AM), <https://www.theguardian.com/world/2017/feb/01/milo-yiannopoulos-uc-berkeley-event-cancelled> [<https://perma.cc/G8LP-VEJH>].

4. Pub. Affairs, U.C. Berkeley, *Milo Yiannopoulos Event Canceled After Violence Erupts*, BERKELEY NEWS (Feb. 1, 2017), <http://news.berkeley.edu/2017/02/01/yiannopoulos-event-canceled/> [<https://perma.cc/D49C-ZSYB>].

5. See *infra* Section II.A.

the Free Speech Movement sought to advocate political views on campus and spurred free speech initiatives across the United States.<sup>6</sup> However, Milo Yiannopoulos's speaking tour made clear that the problem of students and nonstudents threatening or using violence to silence controversial speakers is not unique to UC Berkeley.<sup>7</sup> In the current wave of civil rights and social justice debates, public universities face foreboding issues: what should a university and a city do when both nonstudent and student protesters repeatedly employ violence to bar a category of speakers, thus yielding de facto viewpoint discrimination despite viewpoint neutral university speaking policies?<sup>8</sup> Further, what economic liability should a university and a city shoulder in this situation?

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6. Regents of Univ. of Cal., *Free Speech Movement Chronology*, FREE SPEECH MOVEMENT DIGITAL ARCHIVE (Nov. 16, 2005) [hereinafter *Free Speech Movement Chronology*], <http://bancroft.berkeley.edu/FSM/chron.html> [<https://perma.cc/56QX-AC48>]; see also *infra* Section II.A.

7. Similar acts of violence have been used to shut down controversial speakers at the University of California, Davis (UC Davis); University of Washington; North Dakota State University; Iowa State University; and Auburn University. See Alex Connor, *Milo Yiannopoulos Event at Iowa State Canceled*, IOWA ST. DAILY (Dec. 5, 2016), [http://www.iowastatedaily.com/news/politics\\_and\\_administration/campus/article\\_7ec13176-bb3d-11e6-97d3-ebc0806d061b.html](http://www.iowastatedaily.com/news/politics_and_administration/campus/article_7ec13176-bb3d-11e6-97d3-ebc0806d061b.html) [<https://perma.cc/9FXN-7KW7>]; Gilbert, *supra* note 1; Matt Sepic, *NDSU College Republicans Cancel Speech by Breitbart Writer Milo Yiannopoulos*, MPR NEWS (Dec. 5, 2016), <https://www.mprnews.org/story/2016/12/05/ndsu-college-republicans-cancel-speech-by-milo-yiannopoulos> [<https://perma.cc/3C45-W8TK>]; Ben Poston & Shelby Grad, *UC Protests Shut Down Milo Yiannopoulos Talk, Sparking Free Speech Debate*, L.A. TIMES (Jan. 15, 2017, 8:45 AM), <http://www.latimes.com/local/lanow/la-me-milo-yiannopoulos-uc-davis-20170115-story.html> [<https://perma.cc/CTC8-WLES>]. However, this problem is not confined to public schools. Travis M. Andrews, *Federal Judge Stops Auburn from Canceling White Nationalist Richard Spencer Speech. Protests and a Scuffle Greet Him*, WASH. POST (Apr. 19, 2017), [https://www.washingtonpost.com/news/morning-mix/wp/2017/04/19/federal-judge-stops-auburn-from-canceling-white-nationalists-speech-violence-erupts/?utm\\_term=.7945df579872](https://www.washingtonpost.com/news/morning-mix/wp/2017/04/19/federal-judge-stops-auburn-from-canceling-white-nationalists-speech-violence-erupts/?utm_term=.7945df579872) [<https://perma.cc/LQV8-6HBV>]. Private schools have also faced violence in response to controversial speakers, such as at New York University, Middlebury College, and Claremont McKenna College. See Peter Beinart, *A Violent Attack on Free Speech at Middlebury*, ATLANTIC (Mar. 6, 2017), <https://www.theatlantic.com/politics/archive/2017/03/middlebury-free-speech-violence/518667/> [<https://perma.cc/8S9R-TSF8>]; Natasha Roy et al., *Protests and Attacks Cut Gavin McInnes's Speech Short*, WASH. SQUARE NEWS (Feb. 2, 2017), <https://www.nyunews.com/2017/02/02/2-2-news-gavin/> [<https://perma.cc/YF4Q-HG5N>]; Cleve R. Wootson, Jr., *She Wanted to Criticize Black Lives Matter in a College Speech. A Protest Shut Her Down*, WASH. POST (Apr. 10, 2017), [https://www.washingtonpost.com/news/grade-point/wp/2017/04/10/she-wanted-to-criticize-black-lives-matter-in-a-college-speech-a-protest-shut-her-down/?utm\\_term=.ca04d5022011](https://www.washingtonpost.com/news/grade-point/wp/2017/04/10/she-wanted-to-criticize-black-lives-matter-in-a-college-speech-a-protest-shut-her-down/?utm_term=.ca04d5022011) [<https://perma.cc/GY2K-TH2A>].

8. This Comment addresses only public universities and colleges. Under the "state action" doctrine, individual First Amendment rights are framed in relation to the government, not private individuals or private organizations. See, e.g., *Lloyd Corp. v. Tanner*, 407 U.S. 551, 567 (1972).

Courts differentiate speech in schools from speech in other public venues because the nature and purpose of the environment is different in each.<sup>9</sup> Moreover, courts treat speech in the university setting differently than speech in K–12 education because of college students’ assumed level of maturity and the fact that universities serve as forums for open dialogue.<sup>10</sup>

Despite the United States Supreme Court’s establishment of unique free speech doctrines for the school environment, university speech cannot be as cleanly separated from the outside community’s speech.<sup>11</sup> Especially on urban university campuses, speech does not stop at the perimeter of the ivory tower; rather, speech flows between the campus and the community.<sup>12</sup> The dynamic between the university and the community ensures academia

9. The Supreme Court has observed:

[S]tudents do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.” . . . At the same time, we have held that “the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings,” . . . and that the rights of students “must be ‘applied in light of the special characteristics of the school environment,’ . . .”

*Morse v. Frederick*, 551 U.S. 393, 396–97 (2007) (first quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969); then quoting *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682 (1986); and then quoting *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266 (1988)).

10. See *Oyama v. Univ. of Haw.*, 813 F.3d 850, 863 (9th Cir. 2015). Courts are split on the applicability of certain school free speech doctrines from K–12 to the university level. See *id.* at 863 n.9. For example, when high school administrators censored articles in a high school sponsored newspaper, the Supreme Court held “[e]ducators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns.” *Hazelwood*, 484 U.S. at 273. Although some circuits have found the *Hazelwood* standard applicable to universities, other circuits have declined to adapt the standard to higher education. *Oyama*, 813 F.3d at 863 n.9.

11. See *Morse*, 551 U.S. at 396–97.

12. As seen in the university protests in early 2017, many of the violent protesters appear to have been nonstudents. For example, *The New York Times* described the violent protesters at UC Berkeley as invading the university. Fuller & Mele, *supra* note 1. At the University of Washington, the student organization inviting the speaker worried “that people who don’t attend the UW could come on campus and infiltrate peaceful protests with violent acts.” Katherine Long, *UW, WSU Brace for Speech by Milo Yiannopoulos, Breitbart Editor Banned from Twitter*, SEATTLE TIMES (Dec. 19, 2016, 6:20 PM), <http://www.seattletimes.com/seattle-news/education/uw-wsu-brace-for-speech-by-breitbart-editor-banned-from-twitter/>. “Ivory Tower” is a figure of speech that refers to academia or university. Steven Shapin, *The Ivory Tower: The History of a Figure of Speech and Its Cultural Uses*, 45 BJHS 1, 13–17 (2012).

does not become estranged from the communities that its research benefits.<sup>13</sup> However, this fluidity strains university resources in fostering and upholding free speech.<sup>14</sup>

The stress reaches a breaking point when nonstudent speech and the potential for community violence penetrate the university.<sup>15</sup> In certain cases—like that of UC Berkeley—repeated protesting escalates into violence and destruction of property, which causes campus police to shut down the speech.<sup>16</sup> Universities may even cancel the speech in advance of the speaker’s planned visit.<sup>17</sup> Preemptive cancellation, and cancellation during the event, is known as a “heckler’s veto” and results when the government silences a speaker because officials fear that the speaker will provoke a violent reaction from the audience.<sup>18</sup> Despite university policies of accepting diverse viewpoints, the repeated termination of unpopular speech yields de facto viewpoint discrimination through a heckler’s veto: silencing a category of speakers where the specters of violence and property destruction loom beyond the ivory tower’s walls.

It appears the city and university owe controversial speakers some degree of a positive right to protect the speech.<sup>19</sup> Given that there are limited resources,

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13. See e.g., BIRGITTE ANDERSEN & FEDERICA ROSSI, *THE FLOW OF KNOWLEDGE FROM THE ACADEMIC RESEARCH BASE INTO THE ECONOMY: THE USE AND EFFECTIVENESS OF FORMAL IPRS AND ‘SOFT IP’ IN UK UNIVERSITIES* 4 (2010).

14. See Gilbert, *supra* note 1. Although not supported by constitutional mandates, some scholars assert that the university can limit abusive speech to maintain the university’s educational purpose. Robert C. Post, *There is No 1st Amendment Right to Speak on a College Campus*, VOX (Dec. 31, 2017, 11:33 AM), <https://www.vox.com/platform/amp/the-big-idea/2017/10/25/16526442/first-amendment-college-campuses-milo-spencer-protests> [<https://perma.cc/6X77-FBDA>].

15. See *supra* note 12.

16. See Saincome, *supra* note 3; Wong, *supra* note 3.

17. See Susan Svrluga et al., *Ann Coulter Speech at UC Berkeley Canceled, Again, Amid Fears for Safety*, WASH. POST (Apr. 26, 2017), [https://www.washingtonpost.com/news/grade-point/wp/2017/04/26/ann-coulter-speech-canceled-at-uc-berkeley-amid-fears-for-safety/?utm\\_term=.509012784216](https://www.washingtonpost.com/news/grade-point/wp/2017/04/26/ann-coulter-speech-canceled-at-uc-berkeley-amid-fears-for-safety/?utm_term=.509012784216) [<https://perma.cc/357R-3Z5P>].

18. *Brown v. Louisiana*, 383 U.S. 131, 133 n.1 (1966) (citing HARRY KALVEN JR., *THE NEGRO AND THE FIRST AMENDMENT* 140–60 (1965)); *Rosenbaum v. City & Cty. of S.F.*, 484 F.3d 1142, 1158 (9th Cir. 2007); 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, 180 (2016) (quoting Ronald B. Standler, *Heckler’s Veto*, RBS2.com (Dec. 4, 1999), <http://www.rbs2.com/heckler.htm> [<https://perma.cc/84ZN-JEL4>]); see also *Forsyth Cty. v. Nationalist Movement*, 505 U.S. 123, 134 (1992); *Berger v. Battaglia*, 779 F.2d 992, 1001 (4th Cir. 1985); Cheryl A. Leanza, *Heckler’s Veto Case Law as a Resource for Democratic Discourse*, 35 HOFSTRA L. REV. 1305, 1308 (2007).

19. See *Terminiello v. City of Chi.*, 337 U.S. 1, 4 (1949); Leanza, *supra* note 18, at 1308, 1311. Whereas negative rights, “require the government to refrain from certain conduct, [positive rights] impose affirmative duties on the government to take actions or expend resources to meet the needs of certain citizens.” Michael J. Gerhardt, *The Ripple*

how far does this positive right extend? How many resources should universities and their surrounding communities allocate to the protection of diverse and unpopular viewpoints?

In confronting a heckler's veto, public universities should afford speakers the positive right to speak. Given the importance of the free exchange of ideas—especially at the home of modern free speech—the city and the university have an obligation to protect the speaker. In employing their collective resources to protect speech, the city and university should create a nuanced portfolio of high- and low-cost deterrents to defend the speaker in both the short term and long term with the goal of reducing costs over time.

Part II of this Comment examines the historical context of speech at universities and discusses recent acts of violence directed at controversial speakers on university campuses. Part III argues that universities have not followed Supreme Court mandates in the face of a heckler's veto. The disjunction between university actions and court precedent mandates a consistent response: protecting speech—not rejecting speech. Once past this threshold issue, this Comment considers whether the Constitution affords a positive right to free speech, and if so, how much protection universities and their communities owe these controversial speakers.

Finally, Part IV examines possible solutions—both low and high resource intensive options—and ultimately concludes that public universities and the cities must adhere to First Amendment mandates in the face of violence. However, the cost imposed beyond what is reasonable for a university to bear for standard university-related security must be fully borne by the city to prevent chilled speech and to make the local city accountable for curbing the violence.

## II. BACKGROUND AND CONTEXT

Since the 1960s, students have used universities as forums to voice concerns. However, unlike the Free Speech Movement and Campus Occupy protests, students recently have launched protests against controversial speakers instead of against the campus administration. This pivot has forced public universities into an uneasy referee role—struggling to maintain peace while upholding constitutional obligations.

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*Effects of Slaughter-House: A Critique of a Negative Rights View of the Constitution*, 43 VAND. L. REV. 409, 410 (1990); *see infra* Section III.B.

A. *Historical Context: The 1960s Free Speech Movement, 2011  
Campus Occupy Movement, and University Free  
Speech Narrative*

With its epicenter at UC Berkeley in the 1960s, the Free Speech Movement bolstered the First Amendment's commitment to free speech as students worked to advance noncampus related "political and social action."<sup>20</sup>

Berkeley students' off-campus demonstrations amidst the Civil Rights Movement worried university officials who believed that "on-campus political advocacy was partially to blame" for the increased off-campus demonstrations.<sup>21</sup> When the 1964 fall semester began, the Dean of Students barred student organizations from tabling in the campus entrance and proclaimed "that collecting money or recruiting participants for off-campus political activity and taking positions on off-campus political issues [would] be prohibited."<sup>22</sup> Soon thereafter, a collective of student organizations responded with the following two requests:

- 1) *Advocacy of any political viewpoint or action* or to be able to distribute literature to that effect in the Bancroft-Telegraph area.
- 2) Permission to distribute literature from tables, from which they [could] attract, by means of posters, interested people. They said they d[id] not want to force literature on pedestrians, but rather hand out literature to those who approach[ed] them.<sup>23</sup>

After the Dean prohibited students from advocating, recruiting, and soliciting funds for national political issues disconnected from the university, students from the Student Nonviolent Coordinating Committee and the Congress of Racial Equality set up tables in defiance of the new policy and were subsequently suspended.<sup>24</sup> In response to the university's disciplinary action

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20. *Free Speech Movement Chronology*, *supra* note 6. For a thorough chronological history of the Free Speech Movement integrated with primary sources created by UC Berkeley and its special collections library, see FSM Archives, *Visual History: Free Speech Movement, 1964*, FSM50, <http://fsm.berkeley.edu/free-speech-movement-timeline/> [<https://perma.cc/4K8B-FPD8>].

21. FSM Archives, *Gathering Place*, *supra* note 20.

22. FSM Archives, *Demands and Responses*, *supra* note 20.

23. *Free Speech Movement Chronology*, *supra* note 6 (emphasis added). The Bancroft–Telegraph area refers to the area spanning from the strip of campus property that stretches from the intersection of Telegraph Avenue and Bancroft Way to Sather Gate.

24. *Id.*; FSM Archives, *Students Suspended*, *supra* note 20; Oakland Museum of Cal., *Unforgettable Change: 1960s: Free Speech Movement & The New American Left*, PICTURE THIS, <http://picturethis.museumca.org/timeline/unforgettable-change-1960s/free-speech-movement/info> [<https://perma.cc/8TQZ-ZGBL>]. In September 1964, University President Clark Kerr took a hard stance against the protesters stating:

The University is an educational institution that has been given to the Regents as a trust to administer for educational reasons, and not to be used for direct political action. It wouldn't be proper. It is not right to use the University as a

against those students, student protests began, and the Free Speech Movement was born.<sup>25</sup> The university changed its position over the course of the 1964 fall semester in response to the movement.<sup>26</sup> By the start of the 1965 spring semester, the new interim Chancellor performed an about-face and designated Bancroft-Telegraph-Sproul plaza “as an open discussion area during certain hours of the day.”<sup>27</sup>

Other universities soon followed UC Berkeley’s example and permitted greater student political activity on campus.<sup>28</sup> After the protesters succeeded in their crusade to bring noncampus political speech to campus forums, student protesters used this foothold to debate and influence United States domestic and international policy.<sup>29</sup>

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basis from which people organize and undertake direct action in the surrounding community.

*Free Speech Movement Chronology*, *supra* note 6. For a perspective from a contemporary UC Berkeley Chancellor on the actions of President Kerr and Chancellor Strong, see Nicholas Dirks, *Reflecting on the Legacy of the Free Speech Movement*, DAILY CALIFORNIAN (Oct. 10, 2014), <http://www.dailycal.org/2014/10/10/reflecting-legacy-free-speech-movement/> [<https://perma.cc/8LUS-L7EX>] (“Neutrality could only be achieved through a reliance on robust and free debate, not through the depoliticization of public spaces on campus.”). However, President Kerr’s position still holds traction among scholars such as Professor Post, who argues the university can limit abusive speech to maintain the educational purpose of the university. Post, *supra* note 14.

25. See FSM Archives, *Demonstrators Gather in Sproul*, *supra* note 20.

26. See FSM Archives, *The Beginning of Freedom*, *supra* note 20.

27. *Id.* Chancellor Meyerson’s 1965 policy reflects permissible “time, place, and manner” restrictions under current Supreme Court doctrine. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

28. See John Woodrow Cox, *Berkeley Gave Birth to the Free Speech Movement in the 1960s. Now, Conservatives Are Demanding It Include Them*, WASH. POST (Apr. 20, 2017), [https://www.washingtonpost.com/news/retropolis/wp/2017/04/20/berkeley-gave-birth-to-the-free-speech-movement-in-the-1960s-now-conservatives-are-demanding-it-include-them/?utm\\_term=.39ea60ac86a2](https://www.washingtonpost.com/news/retropolis/wp/2017/04/20/berkeley-gave-birth-to-the-free-speech-movement-in-the-1960s-now-conservatives-are-demanding-it-include-them/?utm_term=.39ea60ac86a2) [<https://perma.cc/BZG9-5XJC>]; FSM Archives, *The Beginning of Freedom*, *supra* note 20.

29. See Robert Hurwitt, *Free Speech Movement at UC Sparked Change Across U.S. Beyond*, SFGATE (Oct. 2, 2014, 5:58 PM), <http://www.sfgate.com/default/article/Free-Speech-Movement-at-UC-sparked-change-across-5769930.php#photo-6877255> [<https://perma.cc/6EBH-94N2?type=image>]. As a result of the Free Speech Movement’s success, both private and public universities followed the UC Berkeley protest model. See Cox, *supra* note 28. The Fall 1964 Free Speech Movement transitioned quickly into the Vietnam antiwar movement that spread through both cities and universities. Hurwitt, *supra*. As a long-term effect, it appears this movement precipitated a trend in increased student engagement and involvement in universities. See *infra* Section III.B.2.

The same free speech issues in the 1960s reappeared during the Occupy Movement Protests in fall 2011 at UC Davis and UC Berkeley.<sup>30</sup> Following the 2008 financial crisis, demonstrations spread throughout cities to protest financial inequality and the power of business interests in the government.<sup>31</sup> Many of these protests included encampments holding hundreds of people in addition to daily protesters.<sup>32</sup> In 2011, the movement came to universities, where students protested against university tuition increases and cuts to public education in addition to the underlying grievances of the city-based Occupy protests.<sup>33</sup> At UC Berkeley, campus police and administrators sought to uphold the campus “no-encampment policy.”<sup>34</sup> When the protesters erected tents, campus police ordered them to remove the tents and disperse.<sup>35</sup> After the protesters refused, university police responded by removing the encampments with forty officers using batons and other types of physical force.<sup>36</sup> At UC Davis, police officers used pepper spray on students, resulting in widespread public outrage.<sup>37</sup>

As opposed to the Free Speech Movement and Occupy Protests, where protesters rallied against university policies and the administration, the recent protests are directed not against the university but against speakers whom student organizations have invited to campus.<sup>38</sup>

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30. See CHRISTOPHER F. EDLEY, JR. & CHARLES F. ROBINSON, RESPONSE TO PROTESTS ON UC CAMPUSES: A REPORT TO UNIVERSITY OF CALIFORNIA PRESIDENT MARK G. YUDOF 5 (2012), <http://campusprotestreport.universityofcalifornia.edu/documents/protest-report-091312.pdf> [<https://perma.cc/BA6W-BYAL>].

31. JESSE CHOPER ET AL., COMM. OF U.C. BERKELEY POLICE REVIEW BD., REPORT ON NOVEMBER 9, 2011, at 12–13 (2012), <http://www.berkeley.edu/news2/2012/06/PRB-Nov9report.pdf> [<https://perma.cc/6LVN-XR7A>].

32. *Id.*

33. *Id.* at 1, 12; CRUZ REYNOSO ET AL., UC DAVIS NOVEMBER 18, 2011 “PEPPER SPRAY INCIDENT” TASK FORCE REPORT 7 (2012).

34. CHOPER ET AL., *supra* note 31, at 13 (“Encampments or occupations of buildings are not allowed on our campus. This means that members of our community are free to meet, discuss, debate, and protest, but will not be allowed to set up tents or encampment structures.” (quoting Chancellor Birgeneau)).

35. *Id.* at 15–17.

36. *Id.* at 18–23. Past public relations nightmares could perhaps incentivize universities to calculate such possible reoccurrences in addressing a controversial speaker. Catherine Rampell, *The Newest Excuse for Shutting down Campus Speech: ‘Security,’* WASH. POST (Sept. 19, 2016), [https://www.washingtonpost.com/opinions/the-newest-excuse-for-shutting-down-campus-speech-security/2016/09/19/21f15762-7e9f-11e6-8d13-d7c704ef9fd9\\_story.html?utm\\_term=.71805efc5a1d](https://www.washingtonpost.com/opinions/the-newest-excuse-for-shutting-down-campus-speech-security/2016/09/19/21f15762-7e9f-11e6-8d13-d7c704ef9fd9_story.html?utm_term=.71805efc5a1d) [<https://perma.cc/BJJ4-DAPC>]. To avert new public relations disasters, many schools appeal to “safety” as a shield against potential viral snafus and censorship allegations. *Id.* As Rampell correctly identifies, the acquiescence to threats to public image or violence “incentivizes more threats of violence.” *Id.*

37. See REYNOSO ET AL., *supra* note 33, at 17.

38. Compare EDLEY & ROBINSON, *supra* note 30, at 7–9 (discussing the 2011 Occupy Protests over university policies), with Saincome, *supra* note 3 (discussing current protests over controversial speakers).

### B. Current Context: Events, Players, and Conflict

In 2017, several student organizations invited speakers to their universities, but threatened protests and hostile acts prevented the speaker from speaking or forced the speaker to step down mid-speech.<sup>39</sup> Universities did not shut down the speech because of the speaker’s viewpoint; rather, they reportedly shut down the speech because of threatened or actual violence and corresponding public safety concerns.<sup>40</sup>

In December 2016, a North Dakota State University student organization invited controversial “alt-right” speaker Milo Yiannopoulos to speak on campus.<sup>41</sup> However, the student organization cancelled Yiannopoulos’s speaking engagement prior to his scheduled visit because of fear of violent protests.<sup>42</sup> Also in December 2016, an Iowa State University unofficial student organization cancelled a planned Yiannopoulos speaking event after the university reportedly raised the security fees.<sup>43</sup>

On January 9, 2017, UC Davis officials cancelled a speech by Yiannopoulos and former hedge fund manager Martin Shkreli.<sup>44</sup> Although campus police

39. See *supra* note 7.

40. See Connor, *supra* note 7; Svrluga et al., *supra* note 17; Wong, *supra* note 3. The public safety concern centers on groups—many of whom are not affiliated with the university—who come equipped and plan to use the campus as a “battleground.” Svrluga et al., *supra* note 17. However, the public safety argument also raises the problem that safety may be used as a pretext for schools wishing to shield themselves from publicity of a violent protest. Rampell, *supra* note 36.

41. Sepic, *supra* note 7.

42. *Id.* The university expressed concern that “destructive non-college students” would foment violence and did not want to jeopardize student safety. Paul Walsh, *Breitbart Speaker’s Visit to NDSU Canceled*, STAR TRIB. (Dec. 5, 2016, 8:53 PM), <http://www.startribune.com/breitbart-speaker-s-visit-to-ndsu-suddenly-canceled/404769426/> [<https://perma.cc/48TB-4B8N>]. Although a student group is not a government agent and thus does not trigger the state action doctrine, cancellations over feared violence is concerning. See *supra* note 8. This comment will give solutions based on transparent policies and expectations for student groups, protesters, and campus agents that will eliminate student groups’ fears of violence. See *infra* Part IV.

43. Connor, *supra* note 7. Although security fees are not the direct focus of this Comment, raising security fees appears to clash with a parallel First Amendment requirement. *Forsyth Cty. v. Nationalist Movement*, 505 U.S. 123, 134–35 (1992) (“Speech cannot be financially burdened, any more than it can be punished or banned, simply because it might offend a hostile mob.”).

44. Poston & Grad, *supra* note 7. Martin Shkreli was a hedge fund manager infamous for raising prices for critical drugs. Renae Merle, *Martin Shkreli is Found Guilty of Three of Eight Securities Fraud Charges*, WASH. POST (Aug. 4, 2017), [https://www.washingtonpost.com/news/business/wp/2017/08/04/martin-shkreli-jury-enters-fifth-day-of-deliberations/?utm\\_](https://www.washingtonpost.com/news/business/wp/2017/08/04/martin-shkreli-jury-enters-fifth-day-of-deliberations/?utm_)

denied there had been any acts of violence or destruction of property, the sponsoring student organization cancelled the event after a few hundred protesters blocked public access to the school building.<sup>45</sup>

As mentioned above, a University of Washington student organization also invited Yiannopoulos to speak on campus on January 20, 2017.<sup>46</sup> Although the speech continued as planned, violent protests formed, and one protester shot and wounded another.<sup>47</sup> Moreover, both the university and Seattle police invested a staggering amount of resources to protect the speaker and uphold public safety: “[t]he officers put in almost 1,000 hours of overtime that day at a combined cost of more than \$75,000, according to records and interviews. . . . rank[ing] among the UW Police Department’s most expensive events in recent years.”<sup>48</sup>

Also mentioned above, UC Berkeley made headlines in February 2017.<sup>49</sup> Approximately 150 masked protesters succeeded in disrupting Milo Yiannopoulos’s speech through violence and destruction of property.<sup>50</sup> After throwing a Molotov cocktail and breaking the venue’s window, the UC Police Department cancelled the speech and evacuated Yiannopoulos.<sup>51</sup> Berkeley experienced another incident when a student group invited conservative commentator Ann Coulter to speak on campus in spring 2017.<sup>52</sup> In late March, the same campus organization invited Coulter to speak, but

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term=fa75d5c33c7b [https://perma.cc/ZZR9-EBX8]. In August 2007, a jury found him guilty of securities fraud. *Id.*

45. Poston & Grad, *supra* note 7. Although threatened violence may suggest a need to silence the speaker, such a position does not comport with constitutional mandates and can be avoided by university and city policy changes that provide transparent expectations. *See infra* Section III.A.3, Part IV.

46. *See* Gilbert, *supra* note 1.

47. *Id.*

48. *Id.* The high security cost associated with protecting public safety and First Amendment protections raises the question, “[s]hould public institutions be spending taxpayer money allocated for higher education on speakers who aren’t there for teaching and learning?” 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>. Such a question is not unique to the University of Washington. *See id.*; *infra* Section IV.E. Although these security expenditures may appear unnecessary, such determinations run counter to First Amendment obligations. *See infra* Section III.A.2.

49. *See supra* Part I.

50. Pub. Affairs, U.C. Berkeley, *supra* note 4; *see also* Fuller & Mele, *supra* note 1.

51. Saincome, *supra* note 3; *see also* Fuller & Mele, *supra* note 1.

52. Thomas Fuller, *Berkeley Cancels Ann Coulter Speech Over Safety Fears*, N.Y. TIMES (Apr. 19, 2017), <https://www.nytimes.com/2017/04/19/us/berkeley-ann-coulter-speech-canceled.html>. Ann Coulter is a conservative pundit who comments on political developments and who makes regular speaking appearances. Emanuella Grinberg & Kyung Lah, *Ann Coulter Isn’t Letting Berkeley off Easy for Messing with Her Speech*, CNN (Apr. 21, 2017, 10:40 PM), <http://www.cnn.com/2017/04/20/us/ann-coulter-uc-berkeley-speech-trnd/index.html> [https://perma.cc/73MS-FV7D].

in mid-April, the University cancelled the speech, citing safety concerns.<sup>53</sup> Shortly after the initial cancellation, the University revised its decision to allow the speech to take place upon finding a proper venue but rescheduled the speech for a time during the final exam study period.<sup>54</sup> Ultimately, Coulter cancelled her speech after losing the backing of the sponsoring student organization.<sup>55</sup>

UC Berkeley made headlines again in September 2017 when a student organization invited conservative commentator Ben Shapiro to speak and then later partnered with Yiannopoulos to create a “Free Speech” week.<sup>56</sup> Shapiro succeeded in delivering his remarks with the aid of “unprecedented

53. Tom Lochner, *Right-Wing Star Ann Coulter to Speak at UC Berkeley*, E. BAY TIMES (Mar. 31, 2017, 2:05 PM), <http://www.eastbaytimes.com/2017/03/30/right-wing-star-ann-coulter-to-speak-at-uc-berkeley/>; *see also* Fuller, *supra* note 52.

54. William Wan, *Ann Coulter Rejects Berkeley’s New Invite; GOP Students Threaten to Sue College*, WASH. POST (Apr. 21, 2017), [https://www.washingtonpost.com/news/post-nation/wp/2017/04/21/ann-coulter-rejects-berkeley-s-new-invite-gop-students-threaten-to-sue-college/?tid=a\\_inl&utm\\_term=.338f0c65459c](https://www.washingtonpost.com/news/post-nation/wp/2017/04/21/ann-coulter-rejects-berkeley-s-new-invite-gop-students-threaten-to-sue-college/?tid=a_inl&utm_term=.338f0c65459c) [<https://perma.cc/ZD8F-E7ET>].

55. Jeremy W. Peters & Thomas Fuller, *Ann Coulter Says She Will Pull Out of Speech at Berkeley*, N.Y. TIMES (Apr. 26, 2017), <https://www.nytimes.com/2017/04/26/us/ann-coulter-berkeley-speech.html>. Although many instances involve the university cancelling the speaker, this is an example where the sponsoring student organization cancelled the event. *See id.* When the student organization pulls its support, there does not appear to be a First Amendment violation given there is no state action. *See supra* note 8. Given the limited public forum status, the speaker’s invitation is contingent upon the student group. *See infra* Section III.A.1. Just as the student group can give a speaker the podium so too can it take the podium away. However, students are responsible for following university policies when inviting a speaker. *See* VICE CHANCELLOR OF STUDENT AFFAIRS, U.C.-BERKELEY, MAJOR EVENTS HOSTED BY NON-DEPARTMENTAL USERS 3–8 (2018), <https://campuspol.berkeley.edu/policies/nondeptusers.pdf> [<https://perma.cc/8FBW-M2DS>]; *see also* PRUDENCE CARTER & R. JAY WALLACE, REPORT OF THE CHANCELLOR’S COMMISSION ON FREE SPEECH 3, 15 (2018), [https://chancellor.berkeley.edu/sites/default/files/report\\_of\\_the\\_commission\\_on\\_free\\_speech.pdf](https://chancellor.berkeley.edu/sites/default/files/report_of_the_commission_on_free_speech.pdf). [<https://perma.cc/2PZC-282B>]. If a speaker is barred based on a student group’s failure to follow such viewpoint neutral policy requirements, the fault lies with the student organization—not the university. *See id.*

56. Javier Panzar & Alene Tchekmedyian, *9 Arrested as Protesters Gather at UC Berkeley for Talk by Conservative Speaker Ben Shapiro*, L.A. TIMES (Sept. 15, 2017, 7:35 AM), <http://www.latimes.com/local/california/la-me-berkeley-protest-shapiro-20170914.htmlstory.html> [<https://perma.cc/XW5Z-SQGC>]; Ashley Wong, *Steve Bannon, Ann Coulter Not Included in New List of Speakers for ‘Free Speech Week’ Released by UC Berkeley*, DAILY CALIFORNIAN (Sept. 19, 2017), <http://www.dailycal.org/2017/09/18/uc-berkeley-releases-updated-list-speakers-free-speech-week/> [<https://perma.cc/E4EV-T9Y6>]. Ben Shapiro is a “conservative thinker and entertainer” who has been labeled “the voice of the conservative millennial movement.” Sabrina Tavernise, *Ben Shapiro, a Provocative ‘Gladiator,’ Battles to Win Young Conservatives*, N.Y. TIMES (Nov. 23, 2017), <https://www.nytimes.com/2017/11/23/us/ben-shapiro-conservative.html?mtref=www.google.com>.

security measures.”<sup>57</sup> These measures included employing concrete barriers to enclose a half-mile-long perimeter around the venue, closing the event to ticket holders, and banning items that attendees could use as weapons.<sup>58</sup> The Berkeley City Council authorized officers to use pepper spray to enable crowd control, which partly reversed a pepper spray ban that had been in effect since 1997.<sup>59</sup> In the end, the security measures cost the university \$600,000.<sup>60</sup> During the following Free Speech Week, the same student group and Yiannopoulos reportedly planned nine speaking events featuring conservative speakers over the course of four days.<sup>61</sup> In the days leading up to Free Speech Week, campus officials announced that only two speakers confirmed their appearance with the university.<sup>62</sup> However, the student group cancelled at the last minute while the university “was in the process of allocating more than \$1 million towards security for Free Speech Week.”<sup>63</sup> Despite the setback, Yiannopoulos sought to hold the event as an individual and berated the university for bullying conservative speakers into silence.<sup>64</sup> The hype surrounding Free Speech Week deflated into a twenty-minute appearance by Yiannopoulos, who addressed a crowd of fifty people while blockades and checkpoints separated 150 protesters.<sup>65</sup> The Chancellor labeled Free Speech Week “political theater . . . designed to be a provocation to try [to get the university] to cancel the event and then to get the news story [the conservative speakers] wanted.”<sup>66</sup>

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57. Javier Panzar et al., *Unprecedented Measures at Berkeley for Conservative Writer’s Speech*, L.A. TIMES (Sept. 14, 2017, 12:20 PM), <http://www.latimes.com/local/lanow/la-me-berkeley-protests-far-right-shapiro-20170914-htmlstory.html> [<https://perma.cc/54AY-D8FE>].

58. *Id.* This Comment addresses barricades and their effective use in deterring violence from fomenting into a heckler’s veto. *See infra* Section IV.B.1.

59. Panzar et al., *supra* note 57.

60. Panzar & Tchekmedyan, *supra* note 56.

61. Wong, *supra* note 56. The University also published a list of prohibited items for the demonstrations. Chantelle Lee, *UCPD Releases List of Banned Items for Potential Demonstrations in Response to Canceled ‘Free Speech Week,’* DAILY CALIFORNIAN (Sept. 23, 2017), <http://www.dailycal.org/2017/09/23/ucpd-releases-list-banned-items-potential-demonstrations-response-canceled-free-speech-week/> [<https://perma.cc/7JLS-VYZG>].

62. Wong, *supra* note 56.

63. Harini Shyamsundar & Chantelle Lee, *Berkeley Patriot Cancels ‘Free Speech Week,’ Support for Milo Yiannopoulos Appearance*, DAILY CALIFORNIAN (Sept. 23, 2017), <http://www.dailycal.org/2017/09/23/berkeley-patriot-canceled-free-speech-week-uc-berkeley-announces/> [<https://perma.cc/84Q4-KL84>].

64. *Id.*

65. Daily Californian News Staff, *Milo Yiannopoulos Makes Brief Speech at UC Berkeley as Hundreds Protest Outside Barriers*, DAILY CALIFORNIAN (Sept. 25, 2017), <http://www.dailycal.org/2017/09/24/milo-yiannopoulos-speaks-uc-berkeley-hundreds-protest-outside-barriers/> [<https://perma.cc/S99E-5TV4>].

66. Hannah Piette, *‘Free Speech Week’ at UC Berkeley was a ‘Political Theater,’ Carol Christ Tells ASUC Senate*, DAILY CALIFORNIAN (Oct. 8, 2017), <http://www.dailycal.org/>

In April 2017, Auburn University and its campus police attempted to cancel a speech by white nationalist Richard Spencer “based on legitimate concerns and credible evidence that it [would] jeopardize the safety of students, faculty, staff and visitors.”<sup>67</sup> However, a federal judge ruled against Auburn and held that the university had to let Spencer speak because “there was no evidence that Mr. Spencer advocate[d] violence [and that d]iscrimination on the basis of message content cannot be tolerated under the First Amendment.”<sup>68</sup>

In assessing how universities have confronted controversial speakers when faced with potentially violent protests, a question remains: what should a university and city do, and what liability do they bear, when nonstudent and student protesters repeatedly employ violence to bar a consistent category of speakers—thus yielding de facto viewpoint discrimination despite neutral university speaking policies?

### III. UNIVERSITIES MUST PROTECT CONTROVERSIAL SPEAKERS CONFRONTED BY HOSTILE PROTESTERS

Public universities are breaching their duty to protect controversial speech from a potentially violent crowd. Universities should and must do more to protect the value of uncomfortable speech. The principles of free speech not only “invite dispute” but also welcome speech that causes unrest and anger so that individuals can vent their concerns in open, public debate.<sup>69</sup> Given the finite resources that universities have and their mission

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2017/10/05/chancellor-carol-christ-reflects-free-speech-week-asuc-senate-meeting/ [https://perma.cc/3BUY-PNXQ].

67. Andrews, *supra* note 7.

68. Stephanie Saul, *Richard Spencer Speech at Auburn U. Greeted by Protests*, N.Y. TIMES (Apr. 18, 2017), <https://www.nytimes.com/2017/04/18/us/judge-rules-auburn-must-allow-richard-spencer-to-speak.html?mcubz=3> (quoting *Padgett v. Auburn Univ.*, No. 3:17-CV-231-WKW, 2017 U.S. Dist. LEXIS 74076, at \*3 (M.D. Ala. Apr. 18, 2017)). Although groups with the good intention of denouncing hate speech may applaud when a university cancels a speaker, such applause is shortsighted; there are consequences, as seen in Auburn. *See id.* The consequences reflect constitutional mandates and can also have financial ramifications. *See* Erwin Chemerinsky, *Hate Speech is Protected Free Speech, Even on College Campuses*, VOX (Dec. 26, 2017, 4:33 AM), <https://www.vox.com/the-big-idea/2017/10/25/16524832/campus-free-speech-first-amendment-protest> [https://perma.cc/T3CZ-H4PF]. A judicial remedy in response to such cancellation can include an injunction allowing the speech, recovered attorney’s fees, monetary damages, and damage to the university’s public image. *Id.*

69. *Edwards v. South Carolina*, 372 U.S. 229, 237 (1963) (quoting *Terminiello v. City of Chi.*, 337 U.S. 1, 6 (1949)). As discussed in this Comment, the Constitution affords

to provide higher education, it is impracticable for universities to bear the total cost of protecting the speaker against violent protesters—especially in light of the fact that universities are not insulated from their surrounding cities.<sup>70</sup> Thus, the surrounding cities also have an obligation to shoulder the cost of protecting the speaker and partner with universities both to ensure public safety and to commit resources to protect speech. First, universities have not followed Supreme Court mandates in the face of a heckler’s veto. Second, confronted with a heckler’s veto, speakers should have a positive right to speak.

#### A. *University Inconsistency with Heckler’s Veto Case Law*

University responses to a potential heckler’s veto do not align with constitutional requirements. Controversial speech is not unprotected speech even when it takes place on a public university campus. As such, university responses should align with constitutional mandates to protect unsettling speech—not reject the speech.

##### 1. *Classifying the Venue at Issue*

A forum analysis illustrates the level of control a university maintains over its spaces, details the requirements for limiting access to the spaces, and ultimately reveals that universities have breached their constitutional duty to prevent viewpoint discrimination effectuated through heckler’s vetoes. The Supreme Court has delineated three categories that dictate how officials may regulate speech on government property: (1) public forum, (2) limited public forum, and (3) nonpublic forum.<sup>71</sup>

First, the most accessible is the public forum.<sup>72</sup> Public forums include traditionally open venues where people are the most free to assemble, such as streets and parks.<sup>73</sup> Second, limited public forums are “state-created semi-public forums opened ‘for use by the public as a place for expressive

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speakers—however controversial—a positive right to speak when confronted with hostility. See *infra* Section III.B.

70. See Gilbert, *supra* note 1.

71. United States v. Kokinda, 497 U.S. 720, 740–41 (1990) (Brennan, J., dissenting). Justice Brennan notes an irony with the forum categories: “these public forum categories—originally conceived of as a way of *preserving* First Amendment rights . . . have been used in some of our recent decisions as a means of upholding restrictions on speech.” *Id.* at 741 (Brennan, J., dissenting) (citation omitted).

72. *Id.* at 740–41 (Brennan, J., dissenting); United States v. Grace, 461 U.S. 171, 177 (1983).

73. See Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 829–30 (1995); *Kokinda*, 497 U.S. at 727; *id.* at 740–41 (Brennan, J., dissenting); *Grace*, 461 U.S. at 177.

activity,’ such as university meeting facilities or school board meetings.’<sup>74</sup> As long as the public entity opens the limited public forum for the purposes established by the government, the forum is subject to the same requirements as a public forum: “[r]easonable time, place, and manner regulations are permissible, and a content-based prohibition must be narrowly drawn to effectuate a compelling state interest.”<sup>75</sup> Third, nonpublic forums include government property that is only open to the public for specialized uses—as opposed to being generally open to the public.<sup>76</sup> Examples of nonpublic forums include jails, military bases, and post offices.<sup>77</sup> In nonpublic forums, the state may control the property and place limits on its use as long as those limits are viewpoint neutral.<sup>78</sup>

The speaking venues at issue fit within the *limited public forum* category because the spaces are “state-created semi-public forums [available] for use by the public as a place for expressive activity.”<sup>79</sup> In the context of a limited forum, the university does not relinquish total oversight over the content presented to the forum to “preserve[] the purposes of that limited forum”; however, the university cannot discriminate against speech based on viewpoint.<sup>80</sup>

74. *Kokinda*, 497 U.S. at 741 (Brennan, J., dissenting) (quoting *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983)).

75. *Perry*, 460 U.S. at 46 (citing *Widmar v. Vincent*, 454 U.S. 263, 269–70 (1981)).

76. See *Kokinda*, 497 U.S. at 727, 730; *id.* at 740–41 (Brennan, J., dissenting).

77. See *id.* at 727; *Greer v. Spock*, 424 U.S. 828, 838 (1976); *Adderley v. Florida*, 385 U.S. 39, 47 (1966).

78. See *Kokinda*, 497 U.S. at 730–32. UC Berkeley’s policy for events hosted by nonacademic departments—such as student organizations—emphasizes that the university will not look at viewpoint when examining applications to host events. VICE CHANCELLOR OF STUDENT AFFAIRS, U.C. BERKELEY, *supra* note 55, at 1. If a speaker is barred based on a student group’s failure to follow such viewpoint neutral policy requirements, the fault lies with the student organization—not the university. The University of Washington takes a similar stance. See Office of Special Programs, *Safety and Security Protocols for Events*, U. WASH. (Sept. 25, 2017), <https://depts.washington.edu/sprogram/office-of-special-programs/policies/safety-and-security-protocols-for-events/> [<https://perma.cc/NBC7-TLEH>]. However, faculty and academic departments do not face such stringent restraints. See Ani Vahradyan, *Renowned Lawyer Alan Dershowitz Confirmed to Speak at UC Berkeley Despite Setback with Guest Speaker Policy*, DAILY CALIFORNIAN (Oct. 2, 2017), <http://www.dailycal.org/2017/10/02/renowned-pro-israel-lawyer-alan-dershowitz-invited-speak-uc-berkeley-law-school-dean/> [<https://perma.cc/9UV6-YNAU>].

79. *Kokinda*, 497 U.S. at 740–41 (Brennan, J., dissenting) (quoting *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983)); see also *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829–30 (1995).

80. *Rosenberger*, 515 U.S. at 830. In *Rosenberger*, the court stated,

For example, in *City of Madison, Joint School District Number 8 v. Wisconsin Employment Relations Commission*, the Court confronted open school board meetings.<sup>81</sup> It held that a nonunion teacher could address the school board because “permit[ting] one side of a debatable public question to have a monopoly in expressing its views to the government is the antithesis of constitutional guarantees.”<sup>82</sup> Similarly, in *Rosenberger v. Rector & Visitors of the University of Virginia*, when a Christian student newspaper asked the student activity fund to help cover publication costs and the fund then denied the application because of the paper’s religious content, the Court held that the university fund had engaged in viewpoint discrimination in light of the university’s prior funding of atheistic publications but not religious ones.<sup>83</sup>

During the controversies of 2017, student groups invited speakers to college and university meeting facilities.<sup>84</sup> The types of facilities included student unions at Iowa State and UC Berkeley.<sup>85</sup> Other alternative venues included auditoriums and miscellaneous event spaces on campus that are similar to the public school board meetings in *City of Madison*.<sup>86</sup> On one hand, these venues are not designed to be completely open to the public at all times given that there are university policies governing the rental of campus space to visiting speakers and performances.<sup>87</sup> On the other hand,

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[I]n determining whether the State is acting to preserve the limits of the forum it has created so that the exclusion of a class of speech is legitimate, we have observed a distinction between, on the one hand, content discrimination, which may be permissible if it preserves the purposes of that limited forum, and, on the other hand, *viewpoint discrimination, which is presumed impermissible when directed against speech otherwise within the forum’s limitations.*

*Id.* at 829–30 (emphasis added).

81. See *City of Madison, Joint Sch. Dist. No. 8 v. Wisconsin Emp’t Relations Comm’n*, 429 U.S. 167, 169 (1976).

82. *Id.* at 175–76. *City of Madison*’s holding bears weight at the current university setting where conservative speakers who align with time, place, and manner restrictions are heckled into silence whereas non-conservative speakers are not. See *supra* Section II.B.

83. *Rosenberger*, 515 U.S. at 822, 830, 835, 837.

84. See *supra* Section II.B. If the speakers were invited to speak at a private, off-campus location, then any issue involving the school would be moot in light of the state action doctrine. See *supra* note 8.

85. See Connor, *supra* note 7; Pub. Affairs, U.C. Berkeley, *supra* note 4.

86. See Saul, *supra* note 68; Deborah Strange, *UF Denies White Nationalist Richard Spencer a Campus Platform*, GAINESVILLE SUN (Aug. 16, 2017, 9:02 PM), <http://www.gainesville.com/news/20170816/uf-denies-white-nationalist-richard-spencer-campus-platform> [<https://perma.cc/97DE-EFX8>]; see also *City of Madison*, 429 U.S. at 174–76.

87. See *United States v. Kokinda*, 497 U.S. 720, 727 (1990); *id.* at 740–41 (Brennan, J., dissenting); *United States v. Grace*, 461 U.S. 171, 177 (1983). Rather than being open to the public without regulation, universities have policies that regulate the time, place, and manner for speakers and events not connected to or organized by individual academic departments. See, e.g., OFFICE OF THE CHANCELLOR, U.C. DAVIS, U.C. DAVIS POLICY AND PROCEDURE MANUAL ch. 400, § 1, at 2–5, <https://ucdavispolicy.ellucid.com/documents/>

these venues are not areas open to the public for only specialized government uses—such as jails, military bases, and post offices—because university auditoriums and student unions are commonly used to host speakers from across the intellectual and political spectrum.<sup>88</sup>

The university meeting spaces at issue would likely be categorized as nonpublic forums when being used for class, considering that the public university's lecture hall is used for the specialized government purpose of giving registered students an education.<sup>89</sup> Yet, in the current context, these student organized speaking events are not part of an academic department lecture; rather, they are meeting spaces open to the public after the sponsoring student organization applies to rent the venue.<sup>90</sup>

## *2. Universities Are Enabling De Facto Viewpoint Discrimination Through a Heckler's Veto*

The Supreme Court has stalwartly refused to permit a heckler's veto. A heckler's veto occurs when the government silences a speaker preemptively or mid-speech based upon an official's fear that the speaker will upset the audience.<sup>91</sup> Unless the speech falls within an unprotected category of speech or is barred by a forum analysis, an audience's violent reaction

view/37. Such regulations for student groups and other groups involve applications, campus security reports, and other requirements to book the venue. VICE CHANCELLOR OF STUDENT AFFAIRS, U.C. BERKELEY, *supra* note 55, at 3–8.

88. See *Kokinda*, 497 U.S. at 727; *Greer v. Spock*, 424 U.S. 828, 838 (1976); *Adderley v. Florida*, 385 U.S. 39, 47 (1966). The Supreme Court refers to and encourages universities' role in public debate. For example, Justice Kennedy warned that the “danger [of] chilling of individual thought and expression. . . is especially real in the University setting, where the State acts against a background and tradition of thought and experiment that is at the center of our intellectual and philosophic tradition.” *Rosenberger*, 515 U.S. at 835.

89. As in *Kokinda*, where solicitation on post office property was barred because it disrupted post office business, speakers can be barred from the daily class-used lecture hall because of disturbance to the specialized government use of the hall to educate registered students. *Kokinda*, 497 U.S. at 732–33.

90. See VICE CHANCELLOR OF STUDENT AFFAIRS, U.C. BERKELEY, *supra* note 55, at 3–8. If an academic department or professor invited a speaker to present, then the forum would be subject to the rules of a nonpublic forum. See *Kokinda*, 497 U.S. at 727.

91. *Rosenbaum v. City & Cty. of S.F.*, 484 F.3d 1142, 1158 (9th Cir. 2007); *Johnson*, *supra* note 18, at 180–81; see also *Forsyth Cty. v. Nationalist Movement*, 505 U.S. 123, 134–35 (1992); *Berger v. Battaglia*, 779 F.2d 992, 1001 (4th Cir. 1985); *Leanza*, *supra* note 18, at 1308. Regardless of whether the government silences the speaker before or during the speech, the critical inquiry is whether the government silences the speaker out of fear that the speaker will upset the audience. *Rosenbaum*, 484 F.3d at 1158.

does not strip the speaker of First Amendment rights.<sup>92</sup> Although judges and scholars have interpreted the Constitution as providing primarily negative rights, the specter of a heckler’s veto is an area where the speaker should have a positive right to police protection in the face of a violent audience.<sup>93</sup> In *Cox v. Louisiana*, the Court held that a heckler’s actions “necessitate[d] police protection” for the speaker.<sup>94</sup> Thus, as one professor has argued, “[n]o matter how unpopular the speech, and regardless of whether the hecklers are expressing the will of the majority, the value of that speech merits affirmative steps to protect it.”<sup>95</sup>

Aside from the First Amendment’s general free speech protection, and the outer boundaries of those protections, a separate free speech doctrine governs K–12 public schools in light of the school environment, the students’ maturity, and schools’ pedagogical goals.<sup>96</sup> However, circuits are split over the applicability of certain K–12 school free speech doctrines at the university level.<sup>97</sup> Despite the additional legal doctrines applicable to public schools, the university-specific doctrines do not address heckler’s vetoes. Consequently, a traditional forum analysis better addresses how the university and city should respond to a heckler’s veto.<sup>98</sup>

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92. *Watson v. City of Memphis*, 373 U.S. 526, 535 (1963); *Bible Believers v. Wayne Cty.*, 805 F.3d 228, 252 (6th Cir. 2015).

93. *See Cox v. Louisiana*, 379 U.S. 536, 551 (1965). *But cf.* Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405, 1417 (1986) (“[A]lthough the doctrine of the heckler’s veto welcomes the strong arm of the law, it does so only on rare occasions, when violence is about to break out, and then only to divert the police action away from the speaker and toward the mob.”).

94. *Cox*, 379 U.S. at 551 (quoting *Edwards v. South Carolina*, 372 U.S. 229, 237 (1963)).

95. *Johnson*, *supra* note 18, at 187. *Johnson* correctly identifies that controversial speech that stirs discomfort is entitled to state protection; however, he fails to address the high costs associated with such protection.

96. *See supra* note 9.

97. *See supra* note 10.

98. As the courts have repeated, students do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.” *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969). However, public schools do not need “to tolerate student speech that is inconsistent with its ‘basic educational mission.’” *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266 (1988) (quoting *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 685 (1986)). Despite the unique free speech doctrines applicable to public schools, they were designed for the primary and secondary education environment—not universities. For example, the *Hazelwood* court held that schools could control “school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns.” *Id.* at 273. The Supreme Court has not extended the ruling to universities and the circuit courts are split on the issue. *See Flint v. Dennison*, 488 F.3d 816, 829 n.9 (9th Cir. 2007). This Comment does not directly rely upon the school free speech doctrines. First, the differing circuit opinions over the doctrine’s applicability to the university setting renders the binding force to this topic uncertain. *See id.* Second, the school speech doctrines center upon speakers’ impact on the closed forum classroom

Pushing against settled law on the impermissibility of heckler's vetoes, universities are permitting heckler's vetoes under the guise of protecting public safety. Some scholars suggest the state should step in to quell the crowd's disorder at the cusp of violence breaking out.<sup>99</sup> Of critical importance is that state action should address the crowd—not the speaker.<sup>100</sup> Indeed, the Sixth Circuit mandates a more proactive approach, warning that states should not “sit idly on the sidelines—watching as the crowd imposes, through violence, a tyrannical majoritarian rule—only later to claim that the speaker's removal was necessary for his or her own protection.”<sup>101</sup>

University of Washington and UC Berkeley presented two opposing methods in addressing controversial speakers in early 2017. At the University of Washington, Yiannopoulos came and completed his talk despite University officers and ninety-five Seattle officers logging nearly one thousand hours

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environment—not outside speakers separate from the academic setting who have followed time, place, and manner restrictions. See *Hazelwood*, 484 U.S. at 273; *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45–46 (1983). Third, the forum analysis perspective better addresses the university setting in a way that encompasses the spirit of the *Tinker–Fraser–Hazelwood* line of decisions. The nonpublic forum doctrine protects the classroom by restricting speech that is not used for the special government purposes. See *United States v. Kokinda*, 497 U.S. 720, 727, 730 (1990); *id.* at 740–41 (Brennan, J., dissenting); *supra* Section III.A.1. As previously explained, the recent protests at universities fall under the limited public forum category, which is not a part of the university class setting; rather, the protests are part of extracurricular student groups distinct from the academic departmental setting. See *supra* Section III.A.1. Thus, adapting the academic K-12 doctrines to the university setting would not only be a leap that many courts have so far been unwilling to take, but also would stretch the doctrine beyond the classroom to the extracurricular setting. See, e.g., *Flint*, 488 F.3d at 829 n.9.

99. See Fiss, *supra* note 93. Fiss's interpretation is consistent with that in *Bible Believers*, where the court found that police must first make a sincere effort to protect the speaker confronted with a hostile crowd. *Bible Believers v. Wayne Cty.*, 805 F.3d 228, 252–53 (6th Cir. 2015)

100. See *supra* note 93.

101. *Bible Believers*, 805 F.3d at 253. As J.D. Hsin takes a nuanced approach to the heckler's veto: he details the problem as a “hostile takeover”—not necessarily a “hostile audience” problem. J.D. Hsin, *Defending the Public's Forum: Theory and Doctrine in the Problem of Provocative Speech*, 96 HASTINGS L.J. 1099, 1124 (2018) (emphasis omitted). He sees government not aiding the hecklers in targeting the speaker; rather, he sees the government targeting the forum. *Id.* In seeing the problem through a forum-focused lens, he argues the government has violated “its duty not to abet the standardization of expression in public forums.” *Id.* Through this lens, Hsin argues the state should focus its attention on “defending the forums.” *Id.* His argument provides a new conceptual framework for assessing a heckler's veto while still holding fast to the tenant that the government has a duty to defend against viewpoint discrimination forced upon either a speaker or a forum by a mob. See *id.*

of work.<sup>102</sup> Inversely, UC Berkeley responded to a Molotov cocktail and property destruction with a “small and non-interventional” campus police action and cancelled Yiannopoulos’ speech.<sup>103</sup> Even when an unexpected occurrence of violence may justify cancelling the speech to ensure public safety, the First Amendment forbids employing public safety as a pretext to silence controversial speech that may stir a crowd’s violent reaction.<sup>104</sup> The UC Berkeley Law Dean wrote, “[a] claim of a threat to public safety never should be a pretext for silencing an unpopular speaker. But there are times when protecting people requires preventing or ending speech.”<sup>105</sup> Universities have engaged in a pattern of cancelling speech in favor of a particular viewpoint because of potential violence and safety concerns from those who disagree with that viewpoint.<sup>106</sup> Thus, in repeatedly ending the speech under the guise of public safety, universities effectively uphold a de facto heckler’s veto that silences a viewpoint.

### 3. *Controversial Speech Is Not Unprotected Speech*

The First Amendment states, “Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”<sup>107</sup> At a minimum, the amendment affords individuals freedom from federal and state governmental interference with their speech.<sup>108</sup> Despite the First Amendment’s sweeping language, the Supreme Court has established that not every utterance is protected.<sup>109</sup> Such unprotected categories of speech include incitement, “the lewd and obscene, the profane, the libelous, and

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102. Gilbert, *supra* note 1.

103. Saincome, *supra* note 3. UC Berkeley’s focus on safety and minimal police interference could be attributed to university officials’ fear of violence similar to the protests at the University of Washington. See Gilbert, *supra* note 1.

104. See Erwin Chemerinsky, *What Can Be Done About Hate Speech?*, BERKELEY BLOG (Aug. 18, 2017), <http://blogs.berkeley.edu/2017/08/18/what-can-be-done-about-hate-speech/> [https://perma.cc/P5JD-4Y2R].

105. *Id.* Although Dean Chemerinsky does not elaborate on what types of situations merit “preventing or ending the speech,” case law appears to set a high bar that requires the state first make an earnest effort to protect the speaker. *Id.*; see *Cox v. Louisiana*, 379 U.S. 536, 551–52 (1965); *Terminiello v. City of Chi.*, 337 U.S. 1, 4 (1949); *Bible Believers*, 805 F.3d at 250.

106. See *e.g.*, *Svrluga et al.*, *supra* note 17; *Wong*, *supra* note 3.

107. U.S. CONST. amend. I. In *Gitlow v. New York*, the Supreme Court incorporated the First Amendment freedom of speech into the Fourteenth Amendment. *Gitlow v. New York*, 268 U.S. 652, 666 (1925).

108. See *Gerhardt*, *supra* note 19, at 410.

109. See *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942).

the insulting or ‘fighting’ words.”<sup>110</sup> The relevant categories of unprotected speech relating to the conflicts on college campuses are incitement and fighting words.

Scholars disagree over how to address radical hate groups that promote hatred, discrimination, and false information.<sup>111</sup> The school likely cannot cancel the speech under these circumstances unless the speaker (1) targets an individual in a direct and hostile manner that would incite an imminent reaction to the speech—fighting words—or (2) encourages the imminent use of violence or lawless action—incitement.<sup>112</sup>

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110. *Chaplinsky*, 315 U.S. at 572 (“It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.”). Since the 1940s, the court has carved out exceptions to the First Amendment’s wide language. *See id.* Fighting words are those that “inflict injury” by their mere utterance and “tend to incite an immediate breach of the peace.” *Id.* at 572 (quoting ZECHARIAH CHAFFEE JR., *FREE SPEECH IN THE UNITED STATES* 149 (7th prt. 1941)). Words inciting violence are not protected when the speaker seeks to and likely will produce “imminent lawless action.” *Brandenburg v. Ohio*, 395 U.S. 444, 447–48 (1969). Public officials cannot recover damages for a defamatory falsehood relating to their official conduct unless the official proves that the statement was made with “actual malice.” *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964). Obscene material is not protected; however, statutes designed to regulate obscene materials must be carefully limited according to three guidelines: (1) whether “‘the average person’ . . . would find that the work . . . appeals to the prurient interest,” (2) “whether the work depicts . . . sexual conduct specifically defined by the applicable state law,” and (3) “whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.” *Miller v. California*, 413 U.S. 15, 24 (1973) (citations omitted) (quoting *Kois v. Wisconsin*, 408 U.S. 229, 230 (1972)). Nudity bans are upheld “when the speaker intrudes on the privacy of the home . . . or the degree of captivity makes it impractical for the unwilling viewer . . . to avoid exposure.” *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 209 (1975). Child pornography is also not protected. *New York v. Ferber*, 458 U.S. 747, 764 (1982). Finally, expressive conduct is unprotected under the First Amendment when (1) the law is not directed at expression, but incidentally burdens expression and (2) the government has a substantial justification for the regulation that is not related to suppressing the message. *United States v. O’Brien*, 391 U.S. 367, 377 (1968).

111. *Compare* *Chemerinsky*, *supra* note 68 (arguing the university cannot bar unpopular speech or hate speech absent the speech falling into one of the categories of unprotected speech), *with* *Post*, *supra* note 14 (arguing that the university can limit abusive speech to maintain the educational purpose of the university).

112. *Lewis v. City of New Orleans*, 408 U.S. 913, 913 (1972) (Powell, J., concurring); *Gooding v. Wilson*, 405 U.S. 518, 522, 524 (1972); *Brandenburg v. Ohio*, 395 U.S. 444, 447–48 (1969); Clay Calvert, *Fighting Words in the Era of Texts, IMs and E-Mails: Can a Disparaged Doctrine Be Resuscitated to Punish Cyber-Bullies?*, 21 *DEPAUL J. ART, TECH. & INTELL. PROP. L.* 1, 4–5 (2010).

### a. Fighting Words

Under the *Chaplinsky v. New Hampshire* fighting words doctrine, the state may silence a speaker if the speaker's words inflict injury by their mere utterance and tend to incite an immediate breach of the peace.<sup>113</sup> The courts have limited the *Chaplinsky* fighting words unprotected speech category over the last several decades.<sup>114</sup> Instead of the category being triggered based on a particular word or series of words, courts require the speaker to address a definable audience "face to face and in a hostile manner" in relation to the specific context.<sup>115</sup> In *Cantwell v. Connecticut*, one of the first cases to undercut *Chaplinsky*'s holding, Cantwell denounced religious organizations "as instruments of Satan" on city streets.<sup>116</sup> Cantwell's speech agitated the listeners, who threatened to attack Cantwell if he did not cease speaking.<sup>117</sup> The Court upheld Cantwell's speech because "a State may not unduly suppress free communication of views, religious or other, under the guise of conserving desirable conditions."<sup>118</sup>

Similarly, in *Terminiello v. City of Chicago*, the Court overturned a speaker's breach of the peace conviction when the crowd threw bottles and rocks at Terminiello after he denounced communists, Jewish people,

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113. *Chaplinsky*, 315 U.S. at 569, 574 (affirming Chaplinsky's conviction when he called a Marshall a "God damned racketeer" and a "damned Fascist"). In *NAACP v. Claiborne Hardware Co.*, the court succinctly described "fighting words" as words that "provoke immediate violence." *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 927 (1982) (quoting *Chaplinsky*, 315 U.S. at 572). One of the rationales for allowing the government to silence fighting words is that such words "are no[t an] essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Chaplinsky*, 315 U.S. at 572 (citing CHAFEE, *supra* note 110, at 150).

114. Calvert, *supra* note 112, at 2; *see also* Johnson v. Campbell, 332 F.3d 199, 212 (3d Cir. 2003) ("The unprotected category of speech called 'fighting words' is an extremely narrow one."). Professor Calvert's article examines the fighting words doctrine in the context of cyber-bullying. Calvert, *supra* note 112, at 12. Such an analysis proves useful when examining whether a controversial speaker can be barred in advance of a speech if the speaker targets students in advance. A possible example could be if Yiannopoulos used his social media to directly attack a student—a variation on when he posted a screenshot from a public Facebook post and Snapchat message. *See infra* note 145.

115. *Lewis*, 408 U.S. at 913 (Powell, J., concurring); *see also* Gooding, 405 U.S. at 524. Professor Calvert has found four elements that have limited fighting words: (1) content of the speech, (2) target of the speech, (3) likelihood of reaction to the speech, and (4) imminence of reaction to speech. Calvert, *supra* note 112, at 4–5, 10 ("[E]xamin[ing] whether the fighting words doctrine . . . provides a mechanism for targeting and punishing the electronic speech of cyber bullies."). The Eleventh Circuit has emphasized that "[t]he words are not inflammatory *per se*, without regard to the circumstances in which they were uttered." *Lamar v. Banks*, 684 F.2d 714, 719 (11th Cir. 1982).

116. *Cantwell v. Connecticut*, 310 U.S. 296, 309 (1940).

117. *Id.* at 303.

118. *Id.* at 308.

and African-Americans as dangers to the United States.<sup>119</sup> The Court upheld such speech against government intervention unless the speech became a “clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest.”<sup>120</sup>

The Court pivoted in *Feiner v. New York*, presenting an alternative view—albeit one that the Court has avoided relying upon in recent decades.<sup>121</sup> In *Feiner*, a man jeered at government officials and organizations while encouraging black audience members to “fight for equal rights.”<sup>122</sup> The police arrested *Feiner* after an onlooker told an officer that he would remove *Feiner* if the police failed to do so.<sup>123</sup> Ultimately, the court upheld *Feiner*’s conviction for disorderly conduct because *Feiner* went beyond the expression of unpopular views; he incited the crowd to riot.<sup>124</sup>

Over the years, the courts have narrowed *Feiner*’s reach.<sup>125</sup> Two of the narrowing cases intersected civil rights and free speech. *Edwards v. South Carolina* and *Cox v. Louisiana* involved black protesters advocating the end of segregation.<sup>126</sup> In both cases, the police arrested the protesters after a crowd gathered and became restless.<sup>127</sup> The *Cox* court relied on *Edwards* and ruled that the peaceful protesters “were sufficiently opposed to the views of the majority of the community to attract a crowd and necessitate police protection.”<sup>128</sup> The Sixth Circuit recently interpreted the Civil Rights cases as requiring police to address a restless crowd that the speaker offended rather than simply silencing a peaceful speaker.<sup>129</sup>

119. See *Terminiello v. City of Chi.*, 337 U.S. 1, 15, 17–22 (1949) (Jackson, J., dissenting).

120. *Id.* at 4 (majority opinion).

121. See *Bible Believers v. Wayne Cty.*, 805 F.3d 228, 245 (6th Cir. 2015); Leanza, *supra* note 18, at 1309.

122. *Feiner v. New York*, 340 U.S. 315, 317 (1951).

123. *Id.* at 330 (Douglass, J., dissenting).

124. *Id.* at 321 (majority opinion).

125. See *Bible Believers*, 805 F.3d at 245; Leanza, *supra* note 18, at 1309. The particular justices sitting on the court could be a possible reason for the change from *Terminiello* to *Feiner*. Johnson, *supra* note 18, at 186. Courts have seemingly shifted *Feiner*’s holding to the doctrine of “incitement” rather than fighting words. *Bible Believers*, 805 F.3d at 245 (“The better view of *Feiner* is summed up, simply, by the following truism: when a speaker incites a crowd to violence, his incitement does not receive constitutional protection.”). Civil rights cases particularly narrowed *Feiner*. See Johnson, *supra* note 18, at 186.

126. See *Cox v. Louisiana*, 379 U.S. 536, 538 (1965); *Edwards v. South Carolina*, 372 U.S. 229, 230 (1963).

127. *Cox*, 379 U.S. at 538; *Edwards*, 372 U.S. at 233.

128. *Cox*, 379 U.S. at 551 (citing *Edwards*, 372 U.S. at 237).

129. *Bible Believers*, 805 F.3d at 250.

Universities cannot rely upon the fighting words doctrine to preemptively bar known controversial speakers. As mentioned above, the courts have limited the fighting words doctrine to unessential utterances delivered in hostile, face-to-face context-specific interactions.<sup>130</sup> In the present university context, the protests appear to be in line with the facts of *Terminiello*, *Edwards*, and *Cox*.<sup>131</sup> As in *Terminiello*, where the crowd threw bottles and rocks at the speaker, the crowd outside of the speaking venue at UC Berkeley destroyed a police spotlight and smashed the student union's windows.<sup>132</sup> Moreover, as in *Edwards* and *Cox*, the campus police silenced the speaker in response to a restless crowd.<sup>133</sup> Given the similarities between case precedent in the holdings of *Terminiello*, *Edwards*, and *Cox* and the current facts, the fighting words doctrine thus is plainly inapplicable.

Students' concern that Yiannopoulos would target specific students' immigration statuses, which would subject them to online harassment, does not trigger the fighting words doctrine.<sup>134</sup> Ahead of the event, UC Berkeley

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130. See *supra* note 115 and accompanying text.

131. See *supra* notes 119, 126–28 and accompanying text.

132. See Pub. Affairs, U.C. Berkeley, *supra* note 4. Unlike other news articles and statements by the rejected speakers, the Public Affairs statement reflects the complexities of protests on urban campuses. The article distinguishes “agitators . . . who came onto campus” from students engaging in a “non-violent protest.” *Id.* This specific language contrasts with those who conflate universities and their students with nonstudents from the community who precipitate violence. See, e.g., Donald Trump (@realDonaldTrump), TWITTER (Feb. 2, 2017, 3:13 AM), <https://twitter.com/realdonaldtrump/status/827112633224544256?lang=en> [<https://perma.cc/G3DK-ZFQG>] (“If U.C. Berkeley does not allow free speech and practices violence on innocent people with a different point of view - NO FEDERAL FUNDS?”).

133. See Pub. Affairs, U.C. Berkeley, *supra* note 4; see also *Cox*, 379 U.S. at 554; *Edwards*, 372 U.S. at 230.

134. See Nanette Asimov, *UC Warns Campus Group: Yiannopoulos Event Could Target Students*, SFGATE (Feb. 1, 2017, 5:29 PM), <http://www.sfgate.com/news/article/UC-warns-campus-group-Yiannopoulos-event-could-10901517.php#photo-12269726> [<https://perma.cc/5XXM-CDS6?type=image>]. The university's letter to the hosting student group expressed concern that Yiannopoulos and “conservative think tank” David Horowitz Freedom Center would employ past tactics of publicizing student information. *Id.* However, this concern appears unfounded because it is unclear how Yiannopoulos would gain such private immigration information. Further, the concern appears to have come from controversial liberal Drexel University professor George Ciccariello-Maher. See Maya Oppenheim, *UC Berkeley Protests: Milo Yiannopoulos Planned to ‘Publicly Name Undocumented Students’ in Cancelled Talk*, INDEPENDENT (Feb. 3, 2017, 3:30 PM), <http://www.independent.co.uk/news/world/americas/uc-berkeley-protests-milo-yiannopoulos-publicly-name-undocumented-students-cancelled-talk-illegals-a7561321.html> [<https://perma.cc/AN5V-8DJJK>]. The source of the concern, Professor Ciccariello-Maher, is significant because he recently resigned in response to the backlash from his own controversial tweets. See Marwa Eltagouri, *Professor Who Tweeted, ‘All I Want for Christmas is White Genocide,’ Resigns after Year of Threats*, WASH. POST (Dec. 29, 2017), [https://www.washingtonpost.com/news/grade-point/wp/2017/12/29/professor-who-tweeted-all-i-want-for-christmas-is-white-genocide-resigns-after-year-of-threats/?utm\\_term=.abee04dfa69a](https://www.washingtonpost.com/news/grade-point/wp/2017/12/29/professor-who-tweeted-all-i-want-for-christmas-is-white-genocide-resigns-after-year-of-threats/?utm_term=.abee04dfa69a). Although the evidence regarding the possibility that Yiannopoulos would publicly reveal immigration statuses was lacking, Yiannopoulos previously

warned the sponsoring student group that Yiannopoulos might reveal students' personal information—thereby “putting students at risk” by possibly disclosing the identities of undocumented students on campus.<sup>135</sup> Although this never occurred and regardless of the reprehensibility of such behavior that would likely make the student a victim to prolonged online harassment, disclosing such information would not qualify as fighting words—even if the speech continued as planned and Yiannopoulos had revealed the undocumented students' identities. Although the disclosures might inflict injury by their mere utterance, the speech has two problems that remove it from the fighting words category: (1) there is no face-to-face interaction because the subject of the speech is not present, and (2) the words would not tend to incite an immediate breach of the peace when compared to the hostile and face-to-face delivery of words such as “God damned racketeer” and “damned Fascist”—even when examined under the high-water mark of *Chaplinsky*.<sup>136</sup> Thus, the fighting words doctrine does not provide universities the means to cancel speech when a crowd uses force to silence a speaker it dislikes.

*b. Incitement*

Incitement finds its roots in the “clear and present danger” test, which holds that the state may bar speech in the face of violence or public harm.<sup>137</sup> *Brandenburg v. Ohio* modified this standard to permit the state to bar speech only where (1) “the speech explicitly or implicitly encourages violence”; (2) “the speaker intends [the speech to] result in . . . violence” or unlawfulness; and (3) the “imminent use of violence or lawless action is the likely result of [the] speech.”<sup>138</sup>

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publicly disparaged a transgender student's identity at the University of Wisconsin-Milwaukee. Fuller & Mele, *supra* note 1.

135. Asimov, *supra* note 134; *see also* Oppenheim, *supra* note 134.

136. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 569, 571–72 (1942).

137. *Schenck v. United States*, 249 U.S. 47, 52 (1919) (“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.”).

138. *Bible Believers v. Wayne Cty.*, 805 F.3d 228, 246 (6th Cir. 2015) (citing *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (recognizing the First Amendment rights of Ku Klux Klan members to advocate for white supremacy-based political reform)); *see also* *Planned Parenthood/Williamette, Inc. v. Am. Coal. of Life Activists*, 290 F.3d 1058, 1071 (9th Cir. 2001).

The incitement doctrine likewise is inapplicable. The protesters at UC Berkeley did not merely encourage violence but also engaged in acts of violence and destruction of property.<sup>139</sup> The speaker did not even have the opportunity to speak.<sup>140</sup> The inverse of inciting violence—where the crowd instigates violence without the speaker encouraging the violence—does not trigger the government’s ability to silence the speaker under the incitement doctrine.<sup>141</sup> Likewise, students’ concerns over the possibility of Yiannopoulos releasing students’ personal information does not open the door to triggering the incitement doctrine.<sup>142</sup>

Although the university cancelled the speech before Yiannopoulos spoke, the university feared he would use the event to “target individuals, either in the audience or by using their personal information in a way that [would] cause[] them to become human targets to serve a political agenda.”<sup>143</sup> Such public disclosure—if executed—would likely subject the individuals to severe online harassment and possibly deportation. Indeed, before the failed Free Speech Week in September 2017, Yiannopoulos took a screenshot of a transgender student and student body Senator’s public Facebook post that denounced hate directed at marginalized identities and posted it on Instagram.<sup>144</sup> Yiannopoulos also published on Instagram a screenshot of a doctoral student who notified his students that he cancelled class because

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139. Saincome, *supra* note 3.

140. *Id.*

141. *See Brandenburg*, 395 U.S. at 447–48.

142. *See Asimov, supra* note 134.

143. *Id.*

144. Olivia Nouriani, *UC Berkeley Students Harassed After Milo Yiannopoulos Publicly Identifies Them*, DAILY CALIFORNIAN (Sept. 21, 2017), <http://www.dailycal.org/2017/09/21/uc-berkeley-students-harassed-after-milo-yiannopoulos-publicly-identifies-them/> [https://perma.cc/9A4G-78XT]; Milo Yiannopoulos (@milo.yiannopoulos), INSTAGRAM (Sept. 20, 2017), [https://www.instagram.com/p/BZR07\\_rg1To/?hl=en&taken-by=milo.yiannopoulos](https://www.instagram.com/p/BZR07_rg1To/?hl=en&taken-by=milo.yiannopoulos). The student Senator’s public Facebook post denounced “violent chalking” that targeted marginalized identities. Yiannopoulos, *supra*. Yiannopoulos captioned the screenshot on Instagram “VIOLENT CHALKING I AM FUCKING DEAD.” *Id.* Yiannopoulos appeared to mock the student’s language of “violent chalking.” *See id.* “Chalking” refers to the use of chalk to write a message on pavement. *See id.*

of the feared danger during Free Speech Week.<sup>145</sup> Yiannopoulos' Instagram posts inundated both students with online harassment and death threats.<sup>146</sup>

Despite Yiannopoulos's reprehensible actions, they do not fit within the incitement doctrine.<sup>147</sup> Ridicule does not rise to the violence required under *Brandenburg*.<sup>148</sup> Yiannopoulos's social media postings did not encourage any sort of violence that would result in imminent lawlessness. In *Brandenburg*, as other Klan members held guns in the background, one Klan member in the film told the reporter that if the federal government continued to suppress white people "it's possible that there might have to be some revengeance [sic] taken"; he also added that black people should return to Africa and that Jewish people should return to Israel.<sup>149</sup> In contrast to the veiled threats in *Brandenburg*, Yiannopoulos's actions do not appear to trigger the incitement doctrine. Yiannopoulos posted a screenshot of a public Facebook post and of a blurry Snapchat post.<sup>150</sup> This simply does not rise to the level of encouraging imminent lawlessness that the incitement doctrine requires: there is no specific action and, importantly, no call to violence; rather, Yiannopoulos essentially shared social media posts that the students publicly posted.<sup>151</sup> Thus, in situations where the speaker merely re-conveys information from a third party who intentionally disclosed

145. Nouriani, *supra* note 144; Milo Yiannopoulos (@milo.yiannopoulos), INSTAGRAM (Sept. 20, 2017), <https://www.instagram.com/p/BZQ4GV9glH0/?hl=en&taken-by=milo.yiannopoulos>. Like the student Senator's public Facebook post, Yiannopoulos posted a screenshot of a Snapchat message to Instagram of a picture of the doctoral graduate student instructor that had the following accompanying text: "Today my Political Ecology teacher didn't even bother to lecture and spent the whole hour and a half dissing the administration for allowing free speech week[.] He wouldn't even say free speech week[.] he called it Hate and Harassment week[,] and he's cancelling class." Yiannopoulos, *supra*. Yiannopoulos captioned screenshot on Instagram "haha thanks for sharing." *Id.*

146. Nouriani, *supra* note 144.

147. For a personal student reaction to this type of harassment, see Victoria Berdin, *Students Must Resist, Hold Administration Accountable for 'Free Speech Week,'* DAILY CALIFORNIAN (Oct. 3, 2017), <http://www.dailycal.org/2017/10/03/students-must-resist-hold-administration-accountable-free-speech-week/> [https://perma.cc/8EER-XRSC]. Students have a valid concern that their campus is being overrun by speakers who seek media attention at the expense of students who live and study on campus and who want to be free from the waves of harassment and violence that accompany these controversial speakers.

148. See *Brandenburg v. Ohio*, 395 U.S. 444, 447–48 (1969).

149. *Id.* at 446–47 (emphasis added).

150. See *supra* notes 144–145 and accompanying text.

151. See *Brandenburg*, 395 U.S. at 447–48. Even if Yiannopoulos's actions fit within unlawful harassment, "[t]here is no categorical 'harassment exception' to the First Amendment's free speech clause." *Rodriguez v. Maricopa Cty. Cmty. Coll. Dist.*, 605 F.3d 703, 708 (9th Cir. 2010) (quoting *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 204 (3d Cir. 2001)).

information on social media, the incitement doctrine does not provide the means to cancel speech when the crowd uses force to silence a speaker it dislikes.

*c. Controversial Speakers Do Not Warrant a New  
Unprotected Speech Category*

The alternative to the established categories of unprotected speech would be to create another category of unprotected speech applicable to public universities and colleges that would allow them to bar a certain category of speaker.<sup>152</sup> However, the courts are unlikely to allow this option. Justice Kennedy has worried that the danger of “chilling . . . individual thought and expression. . . is especially real in the University setting, where the State acts against a background and tradition of thought and experiment that is at the center of our intellectual and philosophic tradition.”<sup>153</sup> To allow colleges and universities to cancel the same controversial category of speaker repeatedly would result in the impermissible “standardization of ideas” and viewpoint discrimination that the First Amendment is designed to prevent.<sup>154</sup>

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152. For a few of the recognized unprotected speech categories, see *supra* note 110.

153. *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 835 (1995). Justice Kennedy’s concern echoes Chief Justice Warren’s concern in 1957:

The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. No field of education is so thoroughly comprehended by man that new discoveries cannot yet be made. Particularly is that true in the social sciences, where few, if any, principles are accepted as absolutes. Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.

*Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957) (holding that a state Attorney General’s questioning violated a professor’s “academic freedom and political expression” when he questioned the professor regarding his lectures and political party knowledge). The Ninth Circuit recently underscored the Supreme Court’s concern. See *Rodriguez*, 605 F.3d at 708, 710 (holding that a professor’s racially inflammatory emails were “pure speech” and not unlawful harassment).

154. *Edwards v. South Carolina*, 372 U.S. 229, 237–38 (1963) (quoting *Terminiello v. City of Chi.*, 337 U.S. 1, 4–5 (1949)). The Ninth Circuit has stressed the importance of discord over regulated speech, especially at universities:

Intellectual advancement has traditionally progressed through discord and dissent, as a diversity of views ensures that ideas survive because they are correct, not because they are popular. Colleges and universities—sheltered from the currents of popular opinion by tradition, geography, tenure and monetary endowments—have historically fostered that exchange. But that role in our society will not survive if certain points of view may be declared beyond the pale.

#### 4. *Harmonizing University Policy with Constitutional Mandates*

The risk of creating a new category of unprotected speech at universities to preemptively bar controversial speakers is too high. The public universities' position in society does not allow it.<sup>155</sup> The potential for abuse warns against it.<sup>156</sup> The First Amendment's protection against viewpoint discrimination shuns it.<sup>157</sup> The only permissible action is for public universities and colleges to allow divisive speakers and protect their right to speak when a crowd uses force to silence them. This solution protects the government from the compromising position of differentiating between permissible and impermissible speech.<sup>158</sup> Harmonizing university policies with First Amendment policies barring a heckler's veto requires government action to quell a rambunctious crowd rather than the speaker.<sup>159</sup>

Thus, universities should protect the controversial speech instead of silencing the speaker because controversial speech is not unprotected speech and controversial speech does not warrant a new category of unprotected speech.

#### *B. Controversial Speakers Have a Positive Right to State Protection*

Confronted with a heckler's veto, speakers should have a positive right to speak. First, although written in terms of a negative right, the Supreme Court has interpreted the First Amendment as providing a positive right to free speech.<sup>160</sup> Second, the positive right yields a scarcity problem.

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*Rodriguez*, 605 F.3d at 708.

155. See *Rosenberger*, 515 U.S. at 835.

156. See *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 558–59 (1975).

157. See *Rosenberger*, 515 U.S. at 830; *Edwards*, 372 U.S. at 237–38.

158. See *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting); C. Vann Woodward et al., *Report of the Committee on Freedom of Expression at Yale*, YALE C. (Dec. 23, 1974), <http://yalecollege.yale.edu/deans-office/reports/report-committee-freedom-expression-yale> [https://perma.cc/ZKD8-TNVS]. But see Jonathan Wallace & Michael Green, *Bridging the Analogy Gap: The Internet, the Printing Press and Freedom of Speech*, 20 SEATTLE U.L. REV. 711, 718–19 (1997) (“Sunstein, contrary to the opinions of First Amendment analysts supporting the marketplace of ideas metaphor, believes that government should intervene in speech where necessary to promote democratic deliberation.”).

159. See *Cox v. Louisiana*, 379 U.S. 536, 551 (1965).

160. Although sometimes coined “the right to be heard,” Eve H. Lewin Wagner, *Heckling: A Protected Right or Disorderly Conduct?*, 60 S. CAL. L. REV. 215, 216 (1986), the concept can better be labeled as the *right to speak uninterrupted*. Even though the First Amendment “invite[s] dispute” and welcomes speech that causes unrest and anger, there should be a limit within limited public forums. *Edwards*, 372 U.S. at 237 (quoting *Terminiello v. City*

Consequently, third, the scarcity problem creates a tension between upholding the constitutional mandate and facing limited resources.

### *1. The First Amendment and Positive Rights*

Generally, scholars concede that the Constitution guarantees mostly negative rights, “which require the government to refrain from certain conduct, as opposed to positive rights, which impose affirmative duties on the government to take actions or expend resources to meet the needs of certain citizens.”<sup>161</sup> Despite the negative rights interpretation, other scholars argue that the Constitution also confers broader positive rights.<sup>162</sup> Those opposing a positive rights interpretation rely on the Supreme Court’s continued insistence on distinguishing the two types of rights and limiting positive rights to where they are only blatantly clear, such as the Sixth Amendment right to counsel.<sup>163</sup> These critics also highlight a key policy argument against positive rights: “[r]ights do not enforce themselves. . . . [r]ights enforcement requires resources.”<sup>164</sup> In addition to concerns that courts will overreach and legislatures

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of Chi., 337 U.S. 1, 4–5 (1949)). As a limited public forum, the university can limit use of the space through time, place, and manner restrictions. *See Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45–46 (1983)). A failure to apply a limit would dissolve controversial events into shouting matches that would render the right to speech an empty right where the loudest voice wins—not the strongest argument. *See* Erwin Chemerinsky, *UC Irvine’s Free Speech Debate*, L.A. TIMES (Feb. 18, 2010), <http://articles.latimes.com/2010/feb/18/opinion/la-oe-chemerinsky18-2010feb18> [<https://perma.cc/LUA5-2QYQ>]. The heckler events during 2017 took place predominately outside the planned speaking venues. *See supra* Section II.B. Although some protesters blocked doorways to the event, the hecklers threatened or executed violence *outside* of the event forum. *See supra* Section II.B. In such a scenario, the university should apply time, place, and manner restrictions to restrict in-audience disturbances to ensure the invited speaker can communicate the speaker’s message. *See* Wagner, *supra*, at 237. The event policy would simply bar audience members from shouting and disrupting the event. Because the invited speaker—through the sponsoring student organization—followed the university’s time, place, and manner restrictions, the heckler in the crowd should not be free to circumvent those same requirements. As long as the anti-heckler disruption policy is applied in all events, the policy would be applied in a viewpoint neutral manner that would not offend the First Amendment. *See supra* Section III.A.1. This comment does not address the issue of whether nonviolent hecklers who merely make loud noise *within* the auditorium to prevent the speaker from communicating a message triggers a First Amendment violation. For an example where nonviolent hecklers attempted to silence the speaker within the venue, see Chemerinsky, *supra*.

161. Gerhardt, *supra* note 19, at 410.

162. *See e.g., id.*

163. U.S. CONST. amend. VI; *see also* Frank B. Cross, *The Error of Positive Rights*, 48 UCLA L. REV. 857, 871 (2001). Professor Cross argues that even if positive rights were recognized, the political-economic reality of implementing positive rights would make positive rights ineffective. *Id.* at 862. Cross appears to disapprove of a positive right to free speech. *See id.* at 876. However, such a position ignores the constitutional mandates in addressing a heckler’s veto. *See Cox*, 379 U.S. at 551.

164. Cross, *supra* note 163, at 880.

will be forced to increase taxes, scholars fear positive rights will not be enforced and merely relegated to law in name only.<sup>165</sup>

Despite assertions that the Constitution is primarily a negative rights document, the Supreme Court has seemingly found positive rights in heckler's veto cases. In *Cantwell*, the Court held:

When clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace, or order, appears, the power of the State to prevent or punish is obvious. Equally obvious is it that a state may not unduly suppress free communication of views, religious or other, under the guise of conserving desirable conditions.<sup>166</sup>

Later in *Cox*, the Court found that attacks against the protesters advocating racial integration “necessitate[d] police protection” for the speaker.<sup>167</sup> One author has argued, “[n]o matter how unpopular the speech, and regardless of whether the hecklers are expressing the will of the majority, the value of that speech merits affirmative steps to protect it.”<sup>168</sup>

Recently, the Sixth Circuit has taken a more forceful approach in describing the state's obligation: “Our point here is that before removing the speaker due to safety concerns, and thereby permanently cutting off his speech, the police must first make bona fide efforts to protect the speaker from the crowd's hostility by other, less restrictive means.”<sup>169</sup> In providing this positive right, the Sixth Circuit upheld the policy that, “[i]n fact, it is the minority view, including expressive behavior that is deemed distasteful and highly offensive to the vast majority of people, that most often needs protection under the First Amendment.”<sup>170</sup>

165. See e.g., *id.* at 887.

166. *Cantwell v. Connecticut*, 310 U.S. 296, 308 (1940). *Bible Believers* echoes this forceful language. See *infra* note 169.

167. *Cox*, 379 U.S. at 551 (quoting *Edwards v. South Carolina*, 372 U.S. 229, 237 (1963)).

168. Johnson, *supra* note 18, at 188.

169. *Bible Believers v. Wayne Cty.*, 805 F.3d 228, 255 (6th Cir. 2015) The use of the term “bona fide” suggests something stronger than mere lip service and seems to go beyond a standard reasonable effort. *Id.* The State must take genuine action to protect the speech. This forcefulness parallels the language in *Cantwell*, where “the power of the State to prevent or punish [those who inflict riot, disorder, or interference] is obvious.” *Cantwell*, 310 U.S. at 308. Coupled together, both *Cantwell* and *Bible Believers* require strong and effective government action in the face of a heckler's veto.

170. *Bible Believers*, 805 F.3d. at 243. This sentiment follows the holding of *Cohen*, which held that a conviction of a man wearing a shirt that stated “Fuck the Draft” while in a courthouse where women and children were present was not supported by the fighting

## 2. *Scarcity and Positive Rights: When the Limited Public Forum Strips the Central Nonpublic Forum of its Resources*

The realities of providing a university education conflict with First Amendment mandates against the heckler's veto. The standard forum analysis categorizes the student-organization-invited speaker as part of the *limited public forum* as opposed to the *nonpublic forum* of the class lecture hall.<sup>171</sup> Despite the different categories, they cannot be separated so cleanly. At a university, the different forums often merge and intertwine. Although the lecture hall might be used for an academic class in one hour, it also might be used for a student organization meeting an hour later. Moreover, the university's financial oversight of its property remains constant despite the forum reclassifications throughout the day. At some point, the high cost of retaining security to prevent an imminent heckler's veto detracts from the university's central mission and focus: its nonpublic forum academic classes.<sup>172</sup>

Universities might be tempted to silence the speaker under the guise of protecting the financial stability of the academic foundation of the university. However, such a view is shortsighted as it takes away from the current multifaceted university education model. Since the 1960s when students sought a voice in university affairs, students have continued to seek opportunities to influence university policy, and universities increasingly encourage students to take an active role in shaping their campus—from inclusion on faculty and administrative search committees to report writing research groups.<sup>173</sup> Students' ability to shape their educational development outside of the classroom is equally, if not more, important than their experience inside the classroom. Thus, universities should continue to defer to student

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words doctrine nor could the state make a simple display of an expletive a criminal offense. *Cohen v. California*, 403 U.S. 15, 16, 20, 25–26 (1971).

171. See *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829–30 (1995); *United States v. Kokinda*, 497 U.S. 720, 740–41 (1990) (Brennan, J., dissenting); *supra* Section III.A.1.

172. See Post, *supra* note 14 (“The *entire* purpose of a university is to educate and to expand knowledge, and so everything a university does must be justified by reference to these twin purposes. These objectives govern *all* university action, inside and outside the classroom; they are as applicable to nonprofessional speech as they are to student and faculty work.”).

173. See CHOPER ET AL., *supra* note 31, at 1; *supra* Section II.A. Students at some colleges have protested class lectures themselves to change curricula and shape their classroom experience. See Chris Bodenner, *The Surprising Revolt at the Most Liberal College in the Country*, ATLANTIC (Nov. 2, 2017), <https://www.theatlantic.com/education/archive/2017/11/the-surprising-revolt-at-reed/544682/> [<https://perma.cc/SR9W-QY65>]. In this case—if it were a public institution—silencing the protesters would be consistent with the First Amendment. As mentioned *supra*, the class itself is a nonpublic forum with the specialized government purpose of faculty educating students. See *supra* Section III.A.1.

organizations and permit them the latitude to invite speakers whom they deem to have educational value, just as universities defer to faculty members' choice of guest lecturers or reading assignments.

Universities may feel tempted to simply bar controversial speakers that administrators believe do not add any educational value to the campus.<sup>174</sup> Such a decision would rob students of the opportunity to seize control of their university education and to seek speakers whom they think would add something new and different to their university experience. Barring controversial speakers would also contribute to the homogenization of viewpoints on campuses.<sup>175</sup> Moreover, under the forum analysis doctrine, once a university opens the door to allow student groups to invite speakers, the university cannot act as a gatekeeping filter that sits in judgment of which speakers pass educational muster.<sup>176</sup> A university could create a policy that makes the university a complete nonpublic forum—barring student groups from inviting guest speakers onto university property. The total nonpublic forum approach would remove the current university conflicts with the First Amendment.<sup>177</sup> However, as mentioned above, such an extreme policy would run against the modern university emphasis on holistic education both inside and outside the classroom and would diminish students' ownership in shaping their education.

### 3. *The Dilemma: First Amendment Mandates and Scarcity*

Yet, a central problem remains: who—or what entity—bears the cost of protecting controversial speakers' right to speak? After all, as mentioned above, “[r]ights enforcement requires resources.”<sup>178</sup> At first blush, universities and colleges seem to be the most appropriate entities to bear the cost of protecting controversial speakers. The incidents occur on campus. The schools

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174. See Post, *supra* note 14. However, preventing speakers that universities feel do not add educational value runs counter to First Amendment case law that bars viewpoint discrimination in limited public forums. See *Rosenberger*, 515 U.S. at 829–30.

175. The homogenization of viewpoints runs counter to “[t]he right to provoke, offend and shock[, which] lies at the core of the First Amendment.” *Rodriguez v. Maricopa Cty. Cmty. Coll. Dist.*, 605 F.3d 703, 708 (9th Cir. 2010).

176. See *Rosenberger*, 515 U.S. at 829–30.

177. See *United States v. Kokinda*, 497 U.S. 720, 727, 730; *id.* at 740–41 (Brennan, J., dissenting).

178. Cross, *supra* note 163, at 880. Professor Cross identifies the economic implications of a positive right: at some point a positive right—or a collective of positive rights—outstrips the government's finite resources. See *id.*

are the ones most familiar with the venues, surrounding area, and student body, and the schools specifically train educators and administrators to work with students. Regardless, they should not bear the total cost. During the 2017 incidents, the violent protesters included nonstudents from the surrounding cities.<sup>179</sup> In many of these open campus environments, people are free to roam between the campus and city—regardless of their status as a student or nonstudent.<sup>180</sup> A university alone is not equipped to handle an influx of protesters from the community.<sup>181</sup> Yet, as illustrated by the protests in Charlottesville, Virginia, city police appear either ill equipped to manage violent protesters, or unwilling to do so, single handedly.<sup>182</sup>

In summary, speech does not stop at the school’s perimeter; rather, the community and the university are part of the same intellectual ecosystem. Thus, cities and open universities should collaborate in ending the violence and paying the cost required to quell the violence—especially when the protests attract students and nonstudents alike.<sup>183</sup>

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179. See Fuller & Mele, *supra* note 1; see also Long, *supra* note 12.

180. See *infra* Section IV.E. Examples of open campuses include Ann Arbor, Michigan; Indiana University Bloomington, Indiana; and the University of California campuses. See *infra* Section IV.E. Cities must share in the financial burden of the costs associated with these incidents because of the fluidity between the campus and the university.

181. See Gilbert, *supra* note 1.

182. For a non-university incident where police did not appear to have enough resources or control to handle violence, see TREVOR GARMY ET AL., HUNTON & WILLIAMS LLP, FINAL REPORT: INDEPENDENT REVIEW OF THE 2017 PROTEST EVENTS IN CHARLOTTESVILLE, VIRGINIA 5–6 (2017), <https://www.hunton.com/images/content/3/4/v2/34613/final-report-ada-compliant-ready.pdf> [<https://perma.cc/Y2NE-8YQF>]; A.C. Thompson, *Police Stood by as Mayhem Mounted in Charlottesville*, PROPUBLICA (Aug. 12, 2017, 11:00 PM), <https://www.propublica.org/article/police-stood-by-as-mayhem-mounted-in-charlottesville> [<https://perma.cc/4KAC-PPN5>]. The August 2017 Charlottesville, Virginia protests involved white supremacists who were part of the “Unite the Right Rally” and who violently confronted anti-racism counter-protesters. Thompson, *supra*. The white supremacists “[came] prepared for violence” with helmets, shields, and makeshift weapons. *Id.* The protests escalated from shoving to “wild melees” to pepper spray attacks. *Id.* “The skirmishes culminated in . . . domestic terrorism” when a white supremacist drove his car into a crowd—killing one and injuring nineteen. *Id.*; see also Robert Faturechi, *Can Police Prevent the Next Charlottesville?*, PROPUBLICA (Aug. 18, 2017, 4:30 PM), <https://www.propublica.org/article/can-police-prevent-the-next-charlottesville> (outlining steps to avoid similar incidents). An independent report prepared by Hunton & Williams LLP revealed the police were not merely unprepared but purposefully responded with passivity. See GARMY ET AL., *supra*, at 6. The police passivity in Charlottesville paralleled passivity of campus police at UC Berkeley in February 2017. See Saincome, *supra* note 3.

183. For an example of a mutual aid policy between a county and university, see DENNIS L. BEENE & DACIA YOUNG, CAL. EMA, LAW ENFORCEMENT MUTUAL AID PLAN 19 (Bruce Wilson ed., 2009), <http://www2.oaklandnet.com/oakca/groups/police/documents/agenda/oak032688.pdf> [<https://perma.cc/VC3Y-V9XY>]; CITY OF SHORELINE, INTERLOCAL COOPERATIVE AGREEMENT TO PROVIDE LAW ENFORCEMENT MUTUAL AID AND MOBILIZATION BETWEEN THE CITIES OF KING COUNTY, UNIVERSITY OF WASHINGTON POLICE, AND KING COUNTY 49, 51, 53 (2003); and UNIV. OF CAL. POLICE, UNIVERSITYWIDE POLICE POLICIES AND

IV. HOW MUCH PROTECTION SHOULD BE GIVEN TO CONTROVERSIAL  
SPEECH—AND TO WHAT EXTENT?

Revisiting the Washington–Berkeley dichotomy presented at the start of this Comment, universities and cities must foster an environment that encourages speech in the face of the high costs necessary to protect it.<sup>184</sup>

Some scholars have suggested a long term intellectual approach “to foster the reasoned deliberation” to reinvigorate the “ideals of deliberative democracy” by encouraging respect between opposing sides.<sup>185</sup> Although an educational and cooperative approach is vital to curbing hostile reactions to speech, this approach loses sight of the integrated nature of the urban university and does not offer a solution when deliberative democracy breaks down and the speech is still exposed to attack. Others suggest the university should pay the costs associated with high profile and controversial speakers.<sup>186</sup> Yet, even though the university may appear to be the most convenient entity to pay for the costs of expensive speech in addition to being the legally obligated entity to shoulder the cost instead of the speaker, the ties between student and nonstudent populations make it unreasonable for universities to bear the full cost of addressing potential reactions from

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ADMINISTRATIVE PROCEDURES § 1308 (2011), <https://policy.ucop.edu/doc/4000382/PoliceProceduresManual> [<https://perma.cc/J57X-4WLP>].

184. Compare Fuller, *supra* note 52 (cancelling speech preemptively over fear of potential violence and safety concerns), and Pub. Affairs, U.C. Berkeley, *supra* note 4 (cancelling controversial speech because of protester’s violence and safety concerns), with Gilbert, *supra* note 1 (continuing speech but having high police cost and a shot-and-wounded protester).

185. Nicholas A. Schroeder, comment, *Avoiding Deliberation: Why the “Safe Space” Campus Cannot Comport with Deliberative Democracy*, 2017 BYU EDUC. & L.J. 325, 358 (2017). There is a key problem with the “deliberative democracy” approach. *See id.* If there were an effective enforcement mechanism, it would need to be applied in a viewpoint neutral manner. *See Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 830 (1995). Thus, universities would need to adopt rules for speakers invited by student organizations that would include an element of “foster[ing] deliberation” or a means to address a counter argument. Schroeder, *supra*, at 357–58. Although permissible if every group needed to adopt similar elements for their speaker events, such a rule would rob the student organization of its ability to craft its preferred event and the speech it sought to present.

186. *See* Robert L. Waring, *Talk is Not Cheap: Funded Student Speech at Public Universities on Trial*, 29 U.S.F. L. REV. 541, 543 (1995). However, such a solution does not consider that much of the costs are often in response to threats by nonstudents from the surrounding community. *See supra* note 40; *infra* Section IV.E. Although UC Berkeley usually spends \$200,000 annually for protest security, the campus spent \$1.5 million by February 2017, spent an additional \$600,000 for Ben Shapiro’s event, and was in the process of allocating \$1 million for Free Speech Week. *See infra* Section IV.E.

the surrounding city.<sup>187</sup> Universities and cities need to work together to develop an intersectional and multifaceted approach that recognizes the overlapping communities that come together to protest and counter-protest. Universities and cities should take several steps: (1) change university student organization guest event policies to provide transparency and clear procedural expectations, (2) deploy hard power deterrent measures to eliminate violence from protests, (3) employ soft power deterrent initiatives to ensure protesters understand the line between protesting and violence, (4) view student organization event applications in a holistic context without making final determinations based on viewpoint, and (5) place the heightened security cost on the surrounding city.

#### A. University Policy Status and Changes

All universities and colleges detailed in this Comment have some type of free speech and expression policy, but the expansiveness of the different universities' policies vary.<sup>188</sup>

Despite investing tremendous resources in protecting Yiannopoulos's speech, the University of Washington has a minimalist free speech policy.<sup>189</sup> It provides blanket language of valuing freedom of expression and "the right . . . to criticize and seek meaningful change."<sup>190</sup> Regardless of any viewpoint neutral internal processes the school may use to adhere to the viewpoint neutral requirements of a limited public forum when a speaker is invited to campus, that internal process is not transparent and fails to define the policy's scope or the factors taken into consideration when an organization applies for event space to host a large event.<sup>191</sup> Instead of campus policy guidelines establishing security recommendations and detailing how the non-departmental user application process functions, universities

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187. See *Forsyth Cty. v. Nationalist Movement*, 505 U.S. 123, 134–35 (1992).

188. See *supra* Section II.B.

189. WASH. ADMIN. CODE §§ 478-124-020, 478-136-030 (2018).

190. *Id.* at § 478-124-020(1). After setting forth this general free speech policy, the Code prohibits the following conduct to effectuate the policy: obstructing access, "[p]hysical abuse," property damage, "[r]efusal to comply with" dispersal orders, possession of firearms and other dangerous items, "[p]ossession . . . of controlled substances," and incitement of any of the previously detailed conduct. *Id.* at 478-124-020(2); see also *id.* at § 478-136-030. Such restrictions pass constitutional muster because they do not apply to a speaker's content and apply to all people on campus. See *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45–46 (1983).

191. See *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829–30 (1995); *United States v. Kokinda*, 497 U.S. 720, 740–41 (1990) (Brennan, J., dissenting). Compare ADMIN. § 478-124-020 (containing a bare-bones statutory framework for addressing campus facilities usage), with VICE CHANCELLOR OF STUDENT AFFAIRS, U.C. BERKELEY, *supra* note 55, at 3–8 (containing a detailed scope and list of procedures and factors for addressing campus facilities usage).

force student organizations into an uncertain process that lacks standards they can address before a speaking event becomes out-of-control.<sup>192</sup> Without clear guidelines, the university's process of allowing student groups to invite guest speakers is a black box disconnected from any policy based on permissible time, place, and manner restrictions.<sup>193</sup> Although this vagueness and lack of transparency seem troublesome, it is the norm.<sup>194</sup>

Iowa State University provides "Facilities and Grounds Use" rules that embrace "public discourse and free speech" along with general time, place, and manner restrictions.<sup>195</sup> The rules do not mention security assessments.<sup>196</sup> Without a clear policy for the role of campus police in creating an event security assessment to ensure event safety—and thus the methods considered when making time, place, and manner restrictions—the students, community, and police cannot understand the role of police on campus.<sup>197</sup> Establishing a clear set of policies for event coordination as well as the police's role during protests can help demonstrators understand the limit to protesting and give universities set procedures to implement time, place, and manner restrictions.

Although not a clear set of policy procedures, North Dakota State University delineates the general role of the university, audience, and speaker.<sup>198</sup> In doing so, it upholds a commitment to viewpoint neutrality: a "courtesy of an uninterrupted presentation" afforded to the speaker, and the audience's right to question and challenge the speaker.<sup>199</sup> Similarly, Auburn University upholds the importance of viewpoint neutrality but requires dissenters to

192. For an example of a university acting against this norm, see VICE CHANCELLOR OF STUDENT AFFAIRS, U.C. BERKELEY, *supra* note 55, at 3–8.

193. See *Rosenberger*, 515 U.S. at 830; *Perry*, 460 U.S. at 45–46.

194. See, e.g., ADMIN. § 478-124-020. The University of Washington developed a safety and security protocol in September 2017. See Office of Special Programs, *supra* note 78. Although the university expresses a commitment to viewpoint neutrality, it remains vague and unspecific. See *id.* For example, the Protocol establishes that the "University will perform an analysis of all event factors." *Id.* The factors remain undefined and amorphous as opposed to the clear procedures adopted by UC Berkeley in January 2018. See VICE CHANCELLOR OF STUDENT AFFAIRS, U.C. BERKELEY, *supra* note 55, at 3–8, 10–11.

195. *Facilities and Grounds Use, Activities*, IOWA STATE UNIV. (Aug. 9, 2016), <https://www.policy.iastate.edu/policy/facilities/use#generalrules> [<https://perma.cc/Z5YT-KR7L>].

196. See *id.*

197. See *Perry*, 460 U.S. at 45–46; EDLEY & ROBINSON, *supra* note 30, at 41–44.

198. See N.D. STATE UNIV., POLICY MANUAL § 325 (2016), <https://www.ndsu.edu/fileadmin/policy/325.pdf> [<https://perma.cc/Z68V-BTKN>].

199. *Id.* Despite the lip service to upholding viewpoint neutrality, the university fails to address criteria for limiting time, place, and manner in accordance with the university's limited public forum. See *Perry*, 460 U.S. at 45–46.

comply with the university's policies and procedures.<sup>200</sup> Unlike the University of Washington, North Dakota State University and Auburn University do not connect their student conduct codes of prohibited conduct to their speech policies.<sup>201</sup>

The University of California's expansive policies exceed mere boilerplate statements upholding viewpoint neutrality.<sup>202</sup> In the wake of the Yiannopoulos and Coulter speaking incidents, U.C. Berkeley created a policy for nonacademic department entities that host events to raise awareness for existing policies and standardize them.<sup>203</sup> The plan includes scope, general procedures, security procedures, cooperation with campus administration and security, and clear administrative roles for those involved in the event approval process.<sup>204</sup> The plan establishes clear expectations of how and why the university applies its time, place, and manner restrictions.<sup>205</sup> Although student organizations may complain about the bureaucratic changes for campus event planning, these changes provide more certainty in the event planning process and thus give student groups a means to hold the university responsible when it goes beyond the limited public forum's time, place, and manner restrictions. Most importantly, these changes allow student groups that invite controversial speakers to defend the speech against a heckler's veto through the security planning process that ensures clear expectations between event organizers and campus police.<sup>206</sup>

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200. See DIV. OF STUDENT AFFAIRS, AUBURN UNIVERSITY EXPRESSION AND DEMONSTRATION POLICY 1 (2018), <https://sites.auburn.edu/admin/universypolicies/Policies/ExpressionAndDemonstrationPolicy.pdf> [<https://perma.cc/8WEQ-WNH6>].

201. See WASH. ADMIN. CODE §§ 478-124-020 (2018). Connecting a university's student code of conduct, free speech policy, and guidelines for students to secure a guest speaker would provide the greatest certainty to all parties as well as make the university publicly responsible to its constitutional time, place, and manner restrictions. See *Perry*, 460 U.S. at 45–46.

202. See OFFICE OF THE CHANCELLOR, U.C. DAVIS, *supra* note 87; VICE CHANCELLOR OF STUDENT AFFAIRS, U.C. BERKELEY, *supra* note 55, at 3–8.

203. See VICE CHANCELLOR OF STUDENT AFFAIRS, U.C. BERKELEY, *supra* note 55, at 3–8. As opposed to the unspecific and vague “event factors” found in University of Washington's Event Protocols, U.C. Berkeley created a comprehensive and clear set of procedures that yields the most transparency and reduces uncertainty. See Office of Special Programs, *supra* note 78; VICE CHANCELLOR OF STUDENT AFFAIRS, U.C. BERKELEY, *supra* note 55, at 3–8.

204. See VICE CHANCELLOR OF STUDENT AFFAIRS, U.C. BERKELEY, *supra* note 55, at 3–8, 10–11.

205. See *id.*; see also *Perry*, 460 U.S. at 45–46.

206. See Revati Thatte, *UC Berkeley Student Groups Face Revised Event Policy*, DAILY CALIFORNIAN (Oct. 26, 2017), <http://www.dailycal.org/2017/10/26/uc-berkeley-student-groups-face-revised-event-policy/> [<https://perma.cc/H94M-MYQA>].

## B. Hard Power Deterrence

A hard power deterrent approach is the most expensive and controversial way to prevent violence from overpowering a speaker.<sup>207</sup> However, it can be the most effective and immediate solution, given the police's status as first responders.<sup>208</sup> Deterrence through proactive policing ensures the protection of both free speech and public safety. The following are several options available to universities and police forces that can be used individually or paired together.

### 1. Precautions Before the Event

University and city police forces can work together to help shape the protest environment before it begins. In planning for a protest, if officers fear potential clashes between protesting and counter protesting groups, they can employ "strategically placed blockades that keep the two sides separate," as U.C. Berkeley successfully employed for Ben Shapiro's event.<sup>209</sup> Although the separation may impact how the speech is executed, it would not discriminate against a specific viewpoint. Physical division would be applied in a content neutral manner consistent with permissible time, place, and manner speech restrictions because such barriers are not contingent on what the speakers say but on the narrow government interest of ensuring public safety.<sup>210</sup>

Even if protesters argue that the barriers infringe upon their message in a public forum outside of the event venue, their argument will fail. First,

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207. Many activists see police militarization as inflammatory and dangerous for minority groups who have been historically and systematically targeted by police. CARTER & WALLACE, *supra* note 55, at 9–10; *see also* Liyah Kaprice Brown, *Officer or Overseer?: Why Police Desegregation Fails as an Adequate Solution to Racist, Oppressive, and Violent Policing in Black Communities*, 29 N.Y.U. REV. L. & SOC. CHANGE 757, 760–62 (2005); Adam Goldman, *Trump Reverses Restrictions on Military Hardware for Police*, N.Y. TIMES (Aug. 28, 2017), <https://nyti.ms/2gjItVt>. Using a hard power deterrence approach gets close to—or even aligns with—this concern, given the high security measures taken to prevent a heckler's veto. *See* Panzar et al., *supra* note 57. To best minimize police forces targeting certain groups while still deterring a heckler's veto, universities must limit the use of force to when protesters act violently. This result requires adherence to the nine recommendation areas established in EDLEY & ROBINSON, *supra* note 30, at 2–3.

208. *See* Sean Douglass, Note, *From the Blue Lights of "Police" to the Red Lights of "First Responders": The Changing Rhetoric of Law Enforcement in Michigan v. Bryant*, 100 GEO. L.J. 1311, 1312 (2012).

209. Faturechi, *supra* note 182; Panzar et al., *supra* note 57; *supra* Section II.B.

210. *See Perry*, 460 U.S. at 45–46.

the barriers do not hinder their ability to denounce or support a speaker—only where they do so. Second, even if the barriers were deemed part of the protesters’ message, such an argument would fail under *Ward v. Rock Against Racism*, where the Court upheld a city noise ordinance requiring performers to use equipment provided by the city.<sup>211</sup> The barriers do not silence the protester’s message but instead aim to protect the speaker. Further, similar to when the Court upheld a National Park regulation based on the interest of protecting parkland that banned camping in specific parks for a homeless awareness demonstration, the barriers here serve the narrow government interest of promoting safety and speech by reducing the threat of a heckler’s veto.<sup>212</sup> Finally, because the barriers only extend the event venue’s perimeter, the protesters have multiple alternative areas outside the barriers to convey their message.

Officials could also use preemptive monitoring and community engagement tactics before and during the event. To dissuade protesters from attending events when there is a potential for violence, city and university officials may employ social media to inform protesters about the speaker and the planned event.<sup>213</sup> Social media engagement can give prospective protesters and curious onlookers details that may dissuade them from adding more unknown variables to an unmanageable crowd. Although the speaker can claim such dissuasions hamper speech, the university does not lose the ability to uphold its public safety role or to use its First Amendment right to add its own opinion.<sup>214</sup>

## 2. Precautions During the Event

Police also can use drones to monitor large groups of protesters to identify potential individuals who may intend to employ violence.<sup>215</sup> In addressing police militarization concerns, police could employ special units “in distinctive

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211. *Ward v. Rock Against Racism*, 491 U.S. 781, 784, 803 (1989).

212. *See Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 298 (1984). The time, place, and manner restrictions imposed by the barriers are not too broad because they surround a defined area deemed a safety concern in light of past protests and are not too restrictive in a way that closes access to the entire university. Rather, the closures are confined to an area deemed a safety risk. *See Emily DeRuy, Ben Shapiro at UC Berkeley: What You Need to Know*, MERCURY NEWS (Sept. 14, 2017, 1:38 PM), <https://www.mercurynews.com/2017/09/13/ben-shapiro-at-uc-berkeley-what-you-need-to-know/> [https://perma.cc/7ZYU-VHPW].

213. This is a method that the City of Berkeley has used for city protests. Faturechi, *supra* note 182.

214. *See Chemerinsky, supra* note 104; *infra* note 218. A protester’s subjective claim of chilled speech is not sufficient to bring a First Amendment claim. *Laird v. Tatum*, 408 U.S. 1, 13–14 (1972).

215. *See Faturechi, supra* note 182.

yellow vests, and without riot gear, so they can mix in with the demonstrators less threateningly.”<sup>216</sup> As with drones, specialized police within the crowd can spot problems before they escalate and can also serve to remind protesters that there are legal consequences when they move beyond exercising their First Amendment rights to taking violent action.<sup>217</sup> Despite a potential chilling effect of adding police to crowds, officials only seek to chill unlawful crowd behavior—not their speech.<sup>218</sup> Further, police presence at large events and protests is a typical and standard procedure inside and outside of college campuses, regardless of the content or viewpoint of the speech.<sup>219</sup> These specialized protest police units would ideally have ongoing “situation-oriented” training to build officers’ “perceptual skills, helping them develop the emotional intelligence to read members of crowds and make sound judgments about which situations are truly dangerous. . . . [to] achieve positive, nonfatal outcomes.”<sup>220</sup>

When preemptive measures fail and violence threatens not only the speech but also public safety, officers need to act. Police cannot stand by as the protesting audience harms peaceful protesters and destroys property.<sup>221</sup> Nor can police “silence the speaker as an expedient alternative to containing or snuffing out the lawless behavior of the rioting individuals.”<sup>222</sup> Such conduct

216. *Id.* German police forces utilize this methodology. *Id.*

217. *See id.*

218. *See id.* A possible chilling effect does not render police presence a First Amendment violation. As seen in *Chaplinsky* and *Brandenburg*, the State does not lose its ability to enforce the law. *See Brandenburg v. Ohio*, 395 U.S. 444, 447–48 (1969); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942). In coupling First Amendment jurisprudence with Article III Standing, the Supreme Court has asserted “[a]llegations of a subjective ‘chill’ are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm; ‘the federal courts established pursuant to Article III of the Constitution do not render advisory opinions.’” *Laird*, 408 U.S. at 13–14 (quoting *United Pub. Workers of Am. v. Mitchell*, 330 U.S. 75, 89 (1947)).

219. *See Feiner v. New York*, 340 U.S. 315 (1951); VICE CHANCELLOR OF STUDENT AFFAIRS, U.C. BERKELEY, *supra* note 55, at 2–3.

220. Faturechi, *supra* note 182. The specialized training would also equip police to address protesters seeking to provoke police.

221. U.C. Berkeley’s response included minimal police response before police evacuated the speaker and dispersed the crowd. Saincome, *supra* note 3. However, this was likely intentional in light of the 2011 Occupy Protests and the subsequent reforms at UC Davis and U.C. Berkeley. *See id.*; EDLEY & ROBINSON, *supra* note 30, at 68. The 2011 protests are distinguishable from the 2017 protests because the former focused on challenging university policies and the latter focused on challenging controversial speakers to campus. *See EDLEY & ROBINSON, supra* note 30, at 68; Saincome, *supra* note 3.

222. *Bible Believers v. Wayne Cty.*, 805 F.3d 228, 252 (6th Cir. 2015).

would violate the speaker's First Amendment rights.<sup>223</sup> The role of police at a large event is not mere window dressing.<sup>224</sup> Police have a substantive duty to protect speech and promote public safety. Police must ensure the state maintains a monopoly on the use of force.<sup>225</sup>

### 3. Police Mutual Aid Policies

Protecting campus speakers and ensuring public safety require “Mutual Aid Plan[s].”<sup>226</sup> These plans “describe[] the standard procedures for acquiring aid and ensuring coordination between law enforcement agencies.”<sup>227</sup> Although universities are equipped to handle university students and their events, officials’ ability to manage crowds and ensure safety is overextended when community members from outside the university join students for campus events and protests.<sup>228</sup> In these instances, the presence of community police would aid protesters in recognizing the intersectionality with university events. On the other hand, these mutual aid policies create problems in training differences, information gaps, and command–control shortfalls.<sup>229</sup> The University of California created the Robinson–Edley Report, an extensive action plan to address these problems after the 2011 campus Occupy movement.<sup>230</sup> Similar plans should be circulated to other universities and

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223. *See id.*

224. Officers have a substantive duty not to “sit idly on the sidelines—watching as the crowd imposes, through violence, a tyrannical majoritarian rule—only later to claim that the speaker’s removal was necessary for his or her own protection.” *Id.* at 253.

225. *See* ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA, at ix (1974).

226. EDLEY & ROBINSON, *supra* note 30, at 41–45.

227. *Id.* at 41; BEENE & YOUNG, *supra* note 183, at 19, CITY OF SHORELINE, *supra* note 183, at 49–57; UNIV. OF CAL. POLICE, *supra* note 183.

228. *See* Saincome, *supra* note 3. Despite claims that an enlarged police presence might chill protester’s speech, such claims have no standing absent “specific present objective harm or a threat of specific future harm.” Laird v. Tatum, 408 U.S. 1, 14 (1972).

229. EDLEY & ROBINSON, *supra* note 30, at 41.

230. *Id.* at 1. University of California President, Mark Yudof, commissioned the Robinson–Edley Report after the 2011 campus Occupy movement to detail recommendations for how the University of California should address protests and civil disobedience. *Id.* at 5–6. Although the Report reacted to 2011 campus Occupy protests over university policies and social inequality, President Yudof wanted the Report to address not just past protests but also future protests and to avoid future use of force, which makes this report helpful in addressing protests reacting to an invited speaker. *Id.* at 5. The Report concludes with forty-nine recommendations covering nine general areas: (1) civil disobedience challenges—which “point[] out the need for the University to define and communicate more clearly the free speech rights and responsibilities of all members of the University community”; (2) relationship building—“to increase trust and understanding among campus stakeholders, by better utilizing existing communication channels and by building new ones”; (3) role definition and coordination—to establish a “system for coordination between police and administrators, with well-defined roles and a shared understanding that ultimate responsibility for the campus’s response rests with the Chancellor”; (4) hiring and training—which involves “hiring police

cities to effectuate proper police response and coordination across police forces to supplement barebones mutual aid plans. Although some campus police have adopted a deescalation approach in response to the 2011 campus Occupy movement, they cannot abdicate their roles of ensuring public safety and upholding the speech of controversial speakers.<sup>231</sup> By establishing and implementing clear deterrence policies, universities can prevent protesters from becoming an independent censorship police and put the monopoly on force back in the government's publicly accountable hands.<sup>232</sup>

### *C. Soft Power Deterrence*

In addition to funding campus police and training officers how to confront and engage with protesters, universities, colleges, and cities need policies and initiatives to guide police approaches. More importantly, universities should craft initiatives to steer students and nonstudents away from violent demonstrations and toward open dialogue.

University officials can impose campus regulations on the protesters themselves. One regulation could require a meeting before the potentially violent demonstrations where officers and protest leaders meet to discuss the protest.<sup>233</sup> This approach falls in line with the “deliberative democracy” approach to foster civility in disagreement.<sup>234</sup> UC Berkeley’s amended policy requires a “security assessment meeting” between campus officials and the

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officers and better training them about how to respond to civil disobedience”; (5) communications with protesters—to avoid civil disobedience “[w]ith strong communications between demonstrators and the campus Administration”; (6) response during events—noting the “decisions made by administrators can directly affect whether the protest ends peacefully rather than with violence”; (7) documenting activity during demonstrations—recommending “several parallel methods for creating an accurate record of the actions of police and demonstrators during demonstrations”; (8) post-event review—recommending “the University adopt a systemwide structure located outside of the police department and the campus Administration for reviewing the response to civil disobedience”; and (9) implementation—to “suggest a process for implementing the recommendations in this Report.” *Id.* at 2–3.

231. See Saincome, *supra* note 3.

232. See NOZICK, *supra* note 225, at ix.

233. Faturechi, *supra* note 182.

234. Schroeder, *supra* note 185, at 355. This approach advocates providing each viewpoint a designated area to give the same crowd the opportunity to assess the differing viewpoints and allow the crowd to decide which arguments hold merit. *Id.* at 355–56. This approach meets “constitutional muster” because the university would be offering spaces for different viewpoints and not silencing one side of the speech. *Id.* at 356 (citing *United States v. O’Brien*, 391 U.S. 367, 377 (1968)).

hosting organization for large events.<sup>235</sup> A meet-and-confer meeting between protesters and the event organizers would comport with the requirements of a limited public forum as long as it satisfies three requirements.<sup>236</sup>

First, the university policy must be content neutral.<sup>237</sup> The meet-and-confer meeting would be content neutral as long as the meeting is standard for every group and the viewpoints expressed in the meeting do not form the basis for approving or denying a speaker. Second, the meeting must serve a “narrowly tailored” government interest.<sup>238</sup> The narrow interest here is less certain. If the university can prove such meetings deescalate potential violence and thus promote public safety, then perhaps this interest is sufficient. Despite the weakness of this second element, the meeting does not require the organizing group to make any alternatives to its event. Thus, as long as there is a sufficient alternative, or in this case no alternative needed, the government can likely win with a weak interest.<sup>239</sup> Third, the restrictions must give the student organization alternative channels of expressing its message.<sup>240</sup> Here, alternative channels are not needed because this meeting does not restrict the speech of the actual event. Despite the case law and good intentions of this potential policy, this meeting would likely be ineffective in creating a dialogue with student and nonstudent protesters. The meet-and-confer meeting would be ineffective because nonstudent protesters often instigate the violence, nonstudents have no requirement to meet with the administration, and the administration would need to somehow predetermine and reach out to forecasted protest groups. Thus, when a protest forms that does not go through the university’s policy steps, this type of security meeting fails to serve a preventative measure.

Another possible solution would be implementing “Anti-Mask Laws” to prevent protesters from covering their faces.<sup>241</sup> Often, protesters implement a “black bloc” tactic in which “a group protests anonymously, faces concealed by T-shirts, bandannas or masks to avoid detection and protect

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235. VICE CHANCELLOR OF STUDENT AFFAIRS, U.C. BERKELEY, *supra* note 55, at 5.

236. *See Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989); *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45–46 (1983); *supra* Section III.A.1.

237. *See Ward*, 491 U.S. at 791 (citing *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984)). Further, the meeting’s substance or discussions cannot be used to approve or deny the speaker’s invitation status because doing so would make viewpoint a determination in approving a speaker. *See Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829–30 (1995).

238. *See Ward*, 491 U.S. at 791.

239. Michael Ramsey, Hugh & Hazel Darling Found. Professor, Univ. of San Diego Sch. of Law, Constitutional Law I Class Lecture: Content-Neutral Restrictions of Speech (Apr. 19, 2017).

240. *Id.*

241. Faturechi, *supra* note 182.

from pepper spray.”<sup>242</sup> However, there are First Amendment implications to anti-mask laws—especially in California where the California Supreme Court held an anti-mask statute unconstitutional on the basis of free speech for being overbroad and lacking a compelling state interest.<sup>243</sup> On the other hand, anti-mask laws targeting criminal behavior would likely pass constitutional muster and thus could be enforceable when protesters become violent.<sup>244</sup>

A final controversial regulation involves barring protesters from carrying weapons on campus.<sup>245</sup> In a clash with the Second Amendment, the Supreme Court has found that the Second Amendment has exceptions, which include longstanding “presumptively lawful regulatory measures” such as “laws forbidding the carrying of firearms in sensitive places such as schools.”<sup>246</sup> Many other universities share this view and already have policies on firearms and other weapons on campus.<sup>247</sup>

In addressing students who partake in violence, universities can employ their student conduct process as an alternative to arrests if conditions and the offense warrant.<sup>248</sup> Officers and administrators often confront the challenge of distinguishing peaceful protesters and onlookers from the few protesters who wish to cause havoc and who merge with the mass of bodies.<sup>249</sup> Thus, campus police can only determine a student’s status after the police detain a protesting student. Universities can attempt to dissuade students from coming to potentially violent events and partaking in the violence by announcing consequences for illegal behavior and by using the internal

242. Andrew Beale & Sonner Kehrt, *Behind Berkeley’s Semester of Hate*, N.Y. TIMES (Aug. 4, 2017), <https://nyti.ms/2htYXdB>.

243. Ghafari v. Mun. Court, 87 Cal. App. 3d 255, 261 (1978) (holding that a broad anti-mask law was unconstitutional on First Amendment grounds for being overbroad, vague, and unsupported by a compelling state interest when the protesting Iranian nationals feared retaliation in Iran); see also Stephen J. Simoni, Note, “Who Goes There?”—Proposing a Model Anti-Mask Act, 61 FORDHAM L. REV. 241, 245, 257 (1992); Matthew Haag, *Is It Illegal to Wear Masks at a Protest? It Depends on the Place*, N.Y. TIMES (Apr. 26, 2017), <https://nyti.ms/2pkUaNR>.

244. See Simoni, *supra* note 243, at 243 n.17.

245. See Chemerinsky, *supra* note 104.

246. District of Columbia v. Heller, 554 U.S. 570, 626, 627 n.26 (2008).

247. See WASH. ADMIN. CODE § 478-124-020 (2018); *Berkeley Campus Regulations Implementing University Policies*, U.C. BERKELEY (Aug. 23, 2011), <http://sa.berkeley.edu/uga/regs> [<https://perma.cc/Q3JV-RQ5N>]; *Facilities and Grounds Use, Activities*, *supra* note 195.

248. See EDLEY & ROBINSON, *supra* note 30, at 66.

249. See Beale & Kehrt, *supra* note 242.

student conduct process.<sup>250</sup> UC Irvine has successfully used the student conduct alternative—despite being a cost and resource intensive option.<sup>251</sup> Student conduct uses an educational and self-awareness framework “designed to encourage students themselves to assume responsibility for their own behavior and discipline” rather than relying on the criminal justice system.<sup>252</sup> Although a useful tool for addressing certain student protesters, University of California Police Chiefs expressed concern over enforcement inconsistency in referring students to the university conduct office while arresting nonstudents for the same type of civil disobedience.<sup>253</sup> The Police Chiefs offered a legislative suggestion to remedy the inconsistency: pass a law that allows police to have discretion in issuing civil disobedience citations as an alternative to arrest.<sup>254</sup>

As previously mentioned, universities and cities can dissuade community members from coming to violent protests through establishing transparent police protest policies.<sup>255</sup> By understanding how an officer will respond in a protest, demonstrators can self-monitor their actions with full knowledge of what behavior will trigger a police response. With this transparency, campus police may be able to mitigate the number of bystanders and protesters who respond violently in the heat of the moment.

Although universities cannot stop controversial speakers from coming to campus because of the speakers’ views, universities can denounce speakers’ views. Allowing a speaker to come onto campus does not necessarily mean the university endorses that speaker’s views.<sup>256</sup> Universities do not have to sit in silence when confronted with hateful, discriminatory, or false speech. Rather, colleges and universities can, and should, use their own speech to counter these messages in hope of using truth and reason to crowd-out hate

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250. See Howard Blume, *Protesters Disrupt Talk by Pro-Police Author, Sparking Free-Speech Debate at Claremont McKenna College*, L.A. TIMES (Apr. 9, 2017, 10:20 AM), <http://www.latimes.com/local/lanow/la-me-ln-macdonald-claremont-speech-disrupted-20170408-story.html> [<https://perma.cc/G6TY-2DZS>].

251. EDLEY & ROBINSON, *supra* note 30, at 67.

252. Mahaganee D. Shaw, *The Influence of Campus Protest on Student Conduct Policies: The Case of Indiana University Bloomington*, 2012 J. IND. U. STUDENT PERS. ASS’N 14, 23, <https://scholarworks.iu.edu/journals/index.php/jiuspa/article/view/1335/1953> [<https://perma.cc/TS2R-HZLC>] (citation omitted).

253. EDLEY & ROBINSON, *supra* note 30, at 67 n.242. This concern surrounds civil disobedience and not necessarily destruction of property and other more serious offenses. *See id.* at 67. “Civil disobedience” rests on a spectrum somewhere between lawful compliance with time, place, and manner restrictions and violent activity that threatens or “significantly damages property.” *Id.* at 4.

254. *Id.* at 80.

255. *Id.* at 24.

256. See N.D. STATE UNIV., *supra* note 198.

and falsities.<sup>257</sup> Although the speaker may perceive a subjective chilling effect, such an action does not yield a First Amendment violation absent a “specific present objective harm or a threat of specific future harm.”<sup>258</sup> Opposing student organizations can also work informally with the student groups inviting these speakers in the hopes of encouraging them to seek speakers that do not rely on emotional appeals of hate.

In the same vein of encouraging the university to speak out against hateful and false speech, universities and cities can forge educational initiatives that foster an understanding that uncensored controversial speech has value. Students and greater community members need to understand there is a line between protesting the speaker’s views and protesting violently with the purpose of silencing a speaker. Protesting has limits; those limits need to be clear.

#### *D. Addressing the Context of the Speech*

When confronting an event with a high potential for violence, university and city officials need to look at the context of the speech to ensure violence does not silence minority speech. In preventing viewpoint discrimination, campus officials should not blindly examine each type of event in preparation because each event requires a different level of response. Rather, they need to recognize the context of speech in the current socio-political climate, which includes ascertaining who the speaker is, how other members from the speaker’s category have been confronted by protesters on other campuses, and how similar speakers have been confronted by protesters on their own campus. After the student organization follows the viewpoint neutral event application process and the university approves the event, the most controversial and well-known speakers will need greater protection. Thus, campus officials need to look at the broad context of the proposed speaking engagement to

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257. See Carol Christ, *Chancellor Christ: Free Speech Is Who We Are*, BERKELEY NEWS (Aug. 23, 2017), <http://news.berkeley.edu/2017/08/23/chancellor-christ-free-speech-is-who-we-are/>. At first blush, it may seem the university is promoting a particular viewpoint opposed to the invited speaker’s viewpoint. However, the university is not silencing the speaker’s viewpoint; it is merely adding its own opinion and viewpoint—something encouraged by the First Amendment. See *Pleasant Grove City v. Summum*, 555 U.S. 460, 467–70 (2009); Steven D. Smith, *Why Is Government Speech Problematic? The Unnecessary Problem, the Unnoticed Problem, and the Big Problem*, 87 DENV. U. L. REV. 945, 949 (2010); Chemerinsky, *supra* note 104; *supra* note 218.

258. *Laird v. Tatum*, 408 U.S. 1, 14 (1972); *supra* note 218.

assess the degree of proportional police response necessary to protect minority speakers' rights intended by the First Amendment.<sup>259</sup>

In assessing the context, campus officials need to differentiate between protests against controversial speakers and protests against the university. For example, the University of California's Robinson–Edley Report addresses campus protests challenging the university and its policies.<sup>260</sup> The present protests do not target university policies alone; rather, they target the views of a speaker that a university group or student group has invited.<sup>261</sup> In doing so, universities need to tailor police response to different settings.<sup>262</sup>

### *E. Who Bears the Cost?*

In sum, universities and cities need to split the tab. Public universities have an affirmative duty to prevent viewpoint discrimination.<sup>263</sup> However, they face a heavy financial weight that should give pause about whether financially burdened universities should spend their resources on extracurricular security costs at the expense of funding their academic objectives.<sup>264</sup>

In the aftermath of the failed Free Speech Week, English Professor at Colby College Aaron Hanlon asked, “[s]hould public institutions be spending taxpayer money allocated for higher education on speakers who aren’t there for teaching and learning?”<sup>265</sup> UC Berkeley typically budgets \$200,000

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259. See Sotirios A. Barber, *Judicial Review and The Federalist*, 55 U. CHI. L. REV. 836, 857–58 (1988).

260. EDLEY & ROBINSON, *supra* note 30, at 7–9.

261. See *supra* Section II.A.

262. The University and its police force should retain decision-making and oversight roles. As the Robinson–Edley Report notes, there are two potential problems when non-university police engage protesters on campus: (1) the non-university officers are not accustomed to the campus population and its values and (2) the appearance of outside officers add to campus tension. EDLEY & ROBINSON, *supra* note 30, at 43. University of California policy states that “[s]upervision of mutual aid personnel is the responsibility of the host campus.” UNIV. OF CAL. POLICE, *supra* note 183. California’s Law Enforcement Mutual Aid Plan establishes local supervisory authority. CAL. EMA, *supra* note 183, at 19 (“Unless otherwise expressly provided, or later agreed upon, the responsible local law enforcement official of the jurisdiction requesting mutual aid shall remain in charge.”). The University of Washington has a similar stance in giving command to the local agency. See CITY OF SHORELINE, *supra* note 183, at add. A (“[T]he primarily responsible agency shall assume incident command . . .”).

263. See *supra* Section III.B.

264. See Hanlon, *supra* note 48.

265. *Id.* Recently, legal scholars such as Professor Schauer at the University of Virginia School of Law have begun to ask questions on the cost associated with free speech and controversial speakers. See FREDERICK SCHAUER, *THE HOSTILE AUDIENCE REVISITED* 11–14 (2017), [https://knightcolumbia.org/sites/default/files/content/Schauer\\_Hostile\\_Audience.pdf](https://knightcolumbia.org/sites/default/files/content/Schauer_Hostile_Audience.pdf) [<https://perma.cc/GJE4-MZBW>]. Professor Schauer places the resource dilemma in the context of the larger “problem of constitutionally mandated and potentially unpopular allocation and reallocation of scarce resources.” *Id.* at 14. However, Professor Schauer does

per year on security costs.<sup>266</sup> By February 2017, the campus had spent \$1.5 million for security.<sup>267</sup> Hosting Ben Shapiro's two-hour speech cost the university \$600,000.<sup>268</sup> The university forecasted an additional \$1 million for Free Speech Week.<sup>269</sup> This cost is beyond what a university should spend on security to uphold free speech. Although campus officials stated that the expenses did not cut into university funding, the money should have been spent on the university's core functions.<sup>270</sup> There is a point where the security costs associated with the school's First Amendment obligations strip the school of finances needed to fulfill its educational mission.<sup>271</sup> Although scholars have rightly expressed concern over the high cost, universities and cities need to work together to ensure that the cost is reduced while preventing a heckler's veto.<sup>272</sup>

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not suggest where to best place the cost nor does he note the dynamic nature of protests on campuses that includes student and nonstudent protesters.

266. Hanlon, *supra* note 48.

267. *Id.*

268. Panzar & Tchekmedyan, *supra* note 56.

269. Hanlon, *supra* note 48; *see also* Jocelyn Gecker, *The Cost of Free Speech Isn't Cheap at UC Berkeley*, U.S. NEWS (Sept. 15, 2017, 4:22 PM), <https://www.usnews.com/news/politics/articles/2017-09-14/uc-berkeley-under-tight-security-for-conservative-speaker>; CARTER & WALLACE, *supra* note 55, at 12–13. The Commission was divided on the issue on how to confront a speaking event that carries a high cost for the university. CARTER & WALLACE, *supra* note 55, at 13. The Commission appears to adopt a standard of denying speakers “if accommodating such challenges would impose costs above a generally applied threshold.” *Id.* at 13 (emphasis omitted). After expressing uncertainty on where to place the cap, they confront the issue of scarce resources on one hand and legal obligations on the other. *Id.* Instead of delving into this problem, the Commission punts the decision for another day: “[t]he Commission suggests further exploration of this question.” *Id.*

270. *See* Gecker, *supra* note 269.

271. *See* Post, *supra* note 14 (“It is a genuine challenge, therefore, how to analyze student-invited speakers in terms of the goals of the university. . . . Unless they are wasting their resources on frolics and detours, they can support student-invited speakers *only* because it serves university purposes to do so. And these purposes must involve the purpose of education.”). Moreover, the security presence concerns faculty and students who worry their campus will become a militarized zone in an effort to protect controversial speakers. *See* Audrey McNamara & Harini Shyamsundar, *UC Berkeley Faculty Members Call for Boycott of Classes During ‘Free Speech Week,’* DAILY CALIFORNIAN (Sept. 14, 2017), <http://www.dailycal.org/2017/09/13/uc-berkeley-faculty-members-call-boycott-classes-free-speech-week/> [<https://perma.cc/5M9X-XF5N>]. At UC Berkeley, over one hundred faculty members called for a class boycott to protest Free Speech Week, advocating that the university should “cancel classes and tell students to stay home; close buildings and departments and allow staff to stay home, and not penalize students who are afraid of coming to campus.” *Id.*

272. *See* Chemerinsky, *supra* note 68; CARTER & WALLACE, *supra* note 55, at 12–13.

At first blush, the cost may be best placed on the student organization. A student organization that knowingly invites a controversial speaker could simply bear the financial burden of their guests. Despite the simplicity of placing the cost on the student organization, such an allocation does not pass constitutional muster and fails to place the burden on the group or people causing the violence.<sup>273</sup> Under *Forsyth County v. Nationalist Movement*, the Court held an ordinance that allowed the government to adjust an assembly fee based on the “cost of maintaining public order” unconstitutional.<sup>274</sup> Invalidating the ordinance, the court asserted “[s]peech cannot be financially burdened, any more than it can be punished or banned, simply because it might offend a hostile mob.”<sup>275</sup> In addition to constitutional restraints on placing the cost on the student organizations, the allocation fails to put the cost on the people largely responsible for the violence—the nonstudents.<sup>276</sup> Thus, the student group should not bear the heightened security costs because *Forsyth* does not permit it and such a solution fails to place the cost on the people bringing violence.

These protests largely consist of nonstudents from the surrounding cities.<sup>277</sup> University police exist to ensure student safety and address campus matters. Although university police can be trained to address these hecklers, they should not be required to have this training to defend against an outside wave of violent protesters. University security costs should be allocated to their designated purpose: addressing university and student security issues. When nonstudents enter the university and instigate violence, the university becomes more than a forum for students, and the clean lines between the city and university blur: the university becomes engulfed by the city.<sup>278</sup> Although campus police are better trained to address student safety and the campus environment, the city should and must provide extra security and personnel support.

A question remains: at what point is the university considered *engulfed by the city*, thus triggering city economic responsibility? While the total cost of a protest can only be assessed after the public entities spend money in preparation for the protest, the determination of who comprises a protest can be only determined during or after a protest. However, in advance of a projected large-scale protest, university police may call for mutual aid from city police but may not need the assistance on the day of the event if

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273. See *Forsyth Cty. v. Nationalist Movement*, 505 U.S. 123, 134–35 (1992).

274. *Id.* at 124.

275. *Id.* at 134–35.

276. See Hanlon, *supra* note 48.

277. See *id.* (“For the most part, both sides have little to do with college students who are, by and large, angry to see their campus overrun by outsiders.”); see also Fuller & Mele, *supra* note 1; Long, *supra* note 12; Saincome, *supra* note 3.

278. See Hanlon, *supra* note 48; Long, *supra* note 12.

(a) the university overestimated the protest's potential for violence or (b) university and city policy deterred a violent protest from forming. In both scenarios—despite final costs being tallied after the protest—the money will be spent in preparation for the protest in advance. In the case of the former, there should be a good faith reliance test. If university police believed they needed additional officers based on previous similar protests and information suggesting a large and potentially violent group of nonstudents, then the economic burden should fall with the city. In the case of the latter, the same result should apply. If police believed they needed such preemptive deterrence procedures based on past similar protests and information on a violent nonstudent group and such deterrence succeeded, the city should carry the cost. Thus, triggering city support requires a pre-protest good faith determination that there will likely be a risk of violent protesters from the community.

The cost shifting from the university to the city for these large protests involving nonstudents accomplishes three goals: (1) it preserves the government's duty to prevent viewpoint discrimination; (2) it places accountability in the hands of the city, which is in the best position to address the violence; and (3) the accountability shift prevents a heckler's veto.

First, the controversial speech is protected. As mentioned above, public schools and public entities have a duty to refrain from infringing upon First Amendment rights—absent an unprotected speech exception.<sup>279</sup> Shifting the financial burden to the city does not change this duty. Rather, the shift provides room for reducing both the ballooning security costs and the increased violence associated with controversial speakers.

Second, shifting the cost to cities puts accountability in the hands of the entity that can best address both the high security costs and violence. Protests are an important part of civic engagement and thus have an economic and social cost. Protests also have a limit: violence is unacceptable and places an unreasonable economic burden on universities.<sup>280</sup> If the entire cost is borne by public universities, then state taxpayers bear the cost. The wide cost distribution diffuses the high bill to a wide tax base that can support the bill. Such a distribution encourages cities to ignore their citizens' heckler's veto because the cost is borne by the entire state and not solely the city. The protest security cost is a small fraction of the state budget. Thus, the unreasonable cost is distributed among state taxpayers with no close scrutiny,

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279. See *supra* Section III.B.

280. See Hanlon, *supra* note 48.

as the cost is dwarfed within the size of the state budget, resulting in continued security costs as the violent heckler's vetoes persist.

Shifting the cost to the cities surrounding the universities would force the same financial burden on a smaller tax base. Under this high tax bill, cities would be forced to confront the violence to address the high financial burden.<sup>281</sup> Moreover, the cost should be absorbed by the people and areas that incite the violence—not the millions of state taxpayers who are not in the immediate area nor acted violently in an attempt to overthrow a controversial speaker.

Third, the security cost shift to localities would create a heavy financial burden that would force local entities to act to prevent a heckler's veto. The burden would force cities to address the violence by updating local ordinances, changing city policing strategies, and engaging with the local citizenry in new ways to curb the violence.<sup>282</sup> Once saddled with the specter of increased security costs, local taxpayers would be forced to hold one another accountable and become active bystanders in their communities.<sup>283</sup>

A problem with this system is if protestors abuse the cost shift to the city. The financial shift to the city and the potential increased tax liability on the citizens discourages abuses. The greater the desire for protestors to abuse and overwhelm the deterrent measures, the greater the ultimate cost lies with those protestors. However, the disincentive is most ineffective with student protestors. Given students may be domiciled among their university campus, within the city around their university, or their hometown, the financial cost would target nonstudent protestors disproportionately higher than student protestors. Nevertheless, financial pressure is not the only disincentive for student protestors. Because the university has disciplinary oversight over its students, it may employ its student conduct system to create further academic disincentives as an additional deterrent that would prevent student protestors from overpowering the financial burden shift.

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281. Justice O'Connor's federalism theory of accountability can be adapted to the present issue. *See New York v. United States*, 505 U.S. 144, 168 (1992). Although placing the cost on the universities would diminish local tax liability by spreading it across the state taxpayers, the small size of the financial burden in light of a much more expensive state budget does not cause state taxpayers to heavily scrutinize the violence in an attempt to snuff it out. Shifting the cost to the local city government would empower local governments to take responsibility and accountability for the violence. *See id.* at 177.

282. The city of Berkeley already attempted to meet constitutional mandates to prevent a heckler's veto when it altered its pepper spray policy. Panzar & Tchekmedyian, *supra* note 56.

283. For a view of spreading liability among entities in the best position to carry the burden, see Justice Traynor's tort products liability loss-spreading theory. *Escola v. Coca Cola Bottling Co.*, 24 Cal. 2d 453, 462 (1944) (Traynor, J., concurring). "Active bystanders" are bystanders that intervene in harmful situations to reduce or eliminate threatened harm. Sarah L. Swan, *Bystander Interventions*, 2015 WIS. L. REV. 975, 981–91 (2015).

Thus, to uphold universities' duty to prevent viewpoint discrimination coming from a violent nonstudent protest, the extra security costs should be borne by the surrounding cities. The financial burden shift allows a university to conform with constitutional mandates, places financial accountability on the population causing the violence, and uses economic forces to reduce both net security costs and violence.

## V. CONCLUSION

Recent years were eventful in the history of campus protesting that differed markedly from the 1960s Free Speech Movement and 2011 Occupy protests. As opposed to past protests, the current wave of protests is not responding to university policies but rather to controversial speakers invited by student organizations.<sup>284</sup> In the past, university officials adopted a deescalation framework when confronting student protesters.<sup>285</sup> Nevertheless, the current protests require a joint campus and city response to uphold speakers' positive rights and to confront the heckler's veto.<sup>286</sup>

Although campus officials cannot silence a speaker based on viewpoint, colleges and universities have engaged in de facto viewpoint discrimination where protesters repeatedly resort to violence to bar a category of speakers. Campus security has been unable to quell the violent demonstrators: security removed the speaker to preserve the speaker's and the student's safety rather than targeting the hostile crowd.

In addressing this problem, universities need to align their speaking policies with constitutional mandates. Although positive rights are a controversial topic among constitutional scholars, the Supreme Court has seemingly afforded a positive right to speakers confronting a heckler's veto.<sup>287</sup> In the face of the high costs required to protect the speaker, the city and university have a joint duty to cover the cost together, given the integrated nature of student and nonstudent protesters. Cities and universities must collaborate to form joint proactive policies and procedures to address protests that border on heckler's vetoes. When confronted by a mass of violent protesters, the city

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284. Compare EDLEY & ROBINSON, *supra* note 30, at 7–9 (describing the 2011 Occupy Protests over university policies), with Saincome, *supra* note 3 (describing current protests over controversial speakers).

285. See EDLEY & ROBINSON, *supra* note 30, at 61–65.

286. See *supra* Section IV.E.

287. See *supra* Section III.B.1.

and the university have the obligation to fortify the ivory tower to ensure that an invited speaker may speak.