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## Recommended Citation

Elisabeth E. Constantino (2018) "Free Speech, Public Safety, & Controversial Speakers: Balancing Universities' Dual Roles After Charlottesville," *St. John's Law Review*: Vol. 92 : No. 3 , Article 9.

Available at: <https://scholarship.law.stjohns.edu/lawreview/vol92/iss3/9>

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# FREE SPEECH, PUBLIC SAFETY, & CONTROVERSIAL SPEAKERS: BALANCING UNIVERSITIES' DUAL ROLES AFTER CHARLOTTESVILLE

ELISABETH E. CONSTANTINO<sup>†</sup>

## INTRODUCTION

On a humid night in August, 2017, self-proclaimed members of the alt-right gathered in Emancipation Park in Charlottesville, Virginia.<sup>1</sup> Invoking Nazi imagery through clothing and chants, protestors entered the University of Virginia campus.<sup>2</sup> Wielding weapons, marchers pelted protestors “with water bottles, chemicals, tear gas, rocks,”<sup>3</sup> and hurled racist epithets and threats of violence.<sup>4</sup> The protests continued into the next day.<sup>5</sup> On August 12, the city declared a state of emergency.<sup>6</sup> On the same day, a man driving a Dodge Challenger plowed into a group

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<sup>1</sup> Sarah Toy & Charles Ventura, *Federal Judge Allows ‘Alt-Right’ Rally to Go Ahead as Planned*, USA TODAY, Aug. 11, 2017; Clara Turnage & Andy Thomason, *As White Supremacists Wreak Havoc, a University Becomes a Crisis Center*, CHRON. OF HIGHER EDUC. (Aug. 12, 2017), <https://www.chronicle.com/article/As-White-Supremacists-Wreak/240912>.

<sup>2</sup> *See What U.Va. Students Saw in Charlottesville*, N.Y. TIMES (Aug. 13, 2017), <https://www.nytimes.com/2017/08/13/opinion/university-virginia-uva-protests-charlottesville.html> [hereinafter *What U.Va. Students Saw*] (statement of Weston Gobar); *see* Meg Wagner, *‘Blood and Soil’: Protesters Chant Nazi Slogan in Charlottesville*, CNN (Aug. 12, 2017), <https://www.cnn.com/2017/08/12/us/charlottesville-unite-the-right-rally/index.html>.

<sup>3</sup> *What U.Va. Students Saw*, *supra* note 2 (statement of Weston Gobar); Laurel Wamsley, *Charlottesville Violence Highlights Cities’ Struggle to Balance Rights and Safety*, NPR (Aug. 14, 2017), <https://www.npr.org/sections/thetwo-way/2017/08/14/543462419/charlottesville-violence-highlights-cities-struggle-to-balance-rights-and-safety>.

<sup>4</sup> *What U.Va. Students Saw*, *supra* note 2 (statement of Aryn A. Frazier) (describing how one protestor “told a white woman, who was holding a sign promoting peace, that she was a race traitor, and despite her wide hips, he’d be willing to show her what a real man was all about.”); *id.* (statement of Isabella Ciambotti) (describing how she was repeatedly told “I hope you get raped by a [n-word].”).

<sup>5</sup> Lisa Marie Segarra, *Violent Clashes Turn Deadly in Charlottesville During White Nationalist Rally*, TIME (Aug. 12, 2017, 6:56 PM), <http://time.com/4898118/state-of-emergency-declared-as-violent-clashes-in-charlottesville-continue/>.

<sup>6</sup> *Id.*

of peaceful counter-protestors, maiming numerous people and killing one woman, Heather Heyer.<sup>7</sup> To counter-protestors, the purpose of the event was clear: intimidation.<sup>8</sup>

One year earlier, DePaul University hosted an interview on its campus with right-wing political commentator Milo Yiannopoulos.<sup>9</sup> As soon as the interview began, student protestors stormed the stage and chanted over Yiannopoulos, renouncing his views.<sup>10</sup> One student stood onstage and blew a high-pitched whistle into a microphone, drowning out any further comments by Yiannopoulos.<sup>11</sup> The audience pleaded with the protestors, but the protestors refused to leave the stage.<sup>12</sup>

In response to events such as these, students have renounced hate speech and called on universities to silence intolerant and offensive views.<sup>13</sup> Universities have struggled to balance public safety with a commitment to free speech and state legislatures have enacted policies limiting universities' ability to silence controversial speech on campus.<sup>14</sup> Although these policies show an important commitment to free speech, their provisions often fail to strike a reasonable balance between universities' dual obligations to both protect free expression and keep their students safe.

This Note seeks to develop an approach to hateful and controversial speech that protects First Amendment values and students alike. Part I discusses the legal backdrop and First Amendment tradition that underlies a permissive view of hateful

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<sup>7</sup> Kaylee Hartung & Darran Simon, *Charge Upgraded Against Suspect in Charlottesville Rally Killing*, CNN (Dec. 15, 2017, 7:00 AM), <https://www.cnn.com/2017/12/14/us/charlottesville-james-alex-fields-court-appearance/index.html>.

<sup>8</sup> *What U.Va. Students Saw*, *supra* note 2 (statements of Weston Gobar and Brendan Novak).

<sup>9</sup> Andy Thomason, *DePaul President Condemns Protesters Who Shouted Down Controversial Speaker*, CHRON. OF HIGHER EDUC. (May 25, 2016), <https://chronicle.com/blogs/ticker/depaul-president-condemns-protestors-who-shouted-down-controversial-speaker/111605>.

<sup>10</sup> Rob Gray, *Black Lives Matter Protesters Disrupt Milo Yiannopoulos Speech at DePaul University*, YOUTUBE (May 24, 2016), <https://youtu.be/lawEMxTroBk>.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> See Abigail Hauslohner & Susan Svrluga, *Free Speech or Hate Speech? Campus Debates Over Victimhood Put Universities in a Bind*, WASH. POST (Oct. 20, 2017), <https://www.washingtonpost.com/national/free-speech-or-hate-speech-campus-debates-over-victimhood-put-university-officials-in-a-bind/2017/10/20/?hpid=hp>direct=on>.

<sup>14</sup> Beth McMurtrie, *One University Asks: How Do You Promote Free Speech Without Alienating Students?*, CHRON. OF HIGHER EDUC., (Oct. 23, 2016); see *infra* Part II.B.

speech on university campuses. Part I also discusses the roots of time, place, and manner regulations and the public forum doctrine, both of which recent legislation invokes. Part II provides a timeline of events that have highlighted the tension between free speech and public safety on campuses. Part II also discusses the eruption of legislation that these events inspired. Finally, Part III recommends provisions that bills of this type can include, as well as provisions that these bills should avoid. Part III proposes a more effective form that recent legislation can take, which better balances universities' dual roles.

## I. BACKGROUND AND LEGAL FOUNDATION

### A. *Hateful Speech as Protected Speech*

The First Amendment provides that “Congress shall make no law . . . abridging the freedom of speech.”<sup>15</sup> Although this protection is not absolute, it extends to hate speech.<sup>16</sup> Absent a compelling governmental interest to curtail it, state actors cannot restrict hate speech.<sup>17</sup> This policy reflects our First Amendment tradition, which protects even the most offensive speech, notwithstanding the speech's capacity to offend.<sup>18</sup>

#### 1. The Bedrock of Hate Speech Protection: *R.A.V. v. City of St. Paul*

*R.A.V. v. City of St. Paul* provides a framework for evaluating impermissible regulations of hateful speech. In *R.A.V.*, the Supreme Court analyzed the validity of a Minnesota hate speech ordinance.<sup>19</sup> The ordinance made illegal placing hate symbols such as burning crosses and swastikas on either private or public property.<sup>20</sup> The Court recognized that the ordinance only reached expressions that fell under the category of “fighting

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<sup>15</sup> U.S. CONST. amend. I.

<sup>16</sup> See *R.A.V. v. City of St. Paul*, Minn., 505 U.S. 377, 382–83, 391 (1992).

<sup>17</sup> *Id.* at 395–96.

<sup>18</sup> *Texas v. Johnson*, 491 U.S. 397, 414 (1989) (“If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.”).

<sup>19</sup> See *R.A.V.*, 505 U.S. at 380–81.

<sup>20</sup> *Id.* at 380.

words,” an unprotected category of speech.<sup>21</sup> Still, the Court struck down the ordinance, holding that it impermissibly limited speech based on viewpoint.<sup>22</sup> The Court clarified that viewpoint discrimination, even within a generally unprotected category of speech, is impermissible.<sup>23</sup>

The Court then distinguished two distinct types of unprotected speech: (1) speech that falls within narrow categories of unprotected expression, that state actors cannot selectively restrict based on viewpoint, and (2) speech whose utterance violates a further constitutional protection, which state actors may restrict based on viewpoint.

Under the first type, the Court explained that it has adopted a “limited categorical approach” to areas of unprotected speech.<sup>24</sup> The Supreme Court articulated the standard for these narrow categories, holding that areas of unprotected speech 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.”<sup>25</sup> These categories include fighting words,<sup>26</sup> inciting speech,<sup>27</sup> and true threats.<sup>28</sup> The Court in *R.A.V.* added to this standard, holding that the unprotected features of some speech do not relate to their content, but rather their “nonspeech” qualities.<sup>29</sup> The “nonspeech” qualities of this expressive behavior remove it from the realm of First Amendment protection.<sup>30</sup> Still, within this unprotected category, state actors cannot restrict one viewpoint; therefore, the Minnesota ordinance was unconstitutional.<sup>31</sup>

The second type of speech encompasses rare instances where unprotected speech may be prohibited based on viewpoint. The Court gave the example of sexual harassment.<sup>32</sup> States may

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<sup>21</sup> *Id.* at 380–81. “[F]ighting words” are words “which by their very utterance inflict injury or tend to incite an immediate breach of the peace.” *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

<sup>22</sup> *R.A.V.*, 505 U.S. at 391.

<sup>23</sup> *See id.* at 383–84.

<sup>24</sup> *Id.* at 383–88.

<sup>25</sup> *Chaplinsky*, 315 U.S. at 571–72.

<sup>26</sup> *Id.*

<sup>27</sup> *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1968) (per curiam).

<sup>28</sup> *Watts v. United States*, 394 U.S. 705, 708 (1969) (per curiam).

<sup>29</sup> *R.A.V.*, 505 U.S. at 386.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 391.

<sup>32</sup> *Id.* at 389–90.

permissibly proscribe sexual harassment in the workplace, because, although sexual harassment often involves speech, it violates Title VII's prohibition on workplace sex discrimination.<sup>33</sup> The Court emphasized the narrow scope of this exclusion, but concluded that states may limit some expressive behavior that violates other constitutional protections.

In the wake of *R.A.V.*, universities have attempted to adopt codes targeting hateful, valueless speech, but these attempts have been unavailing.<sup>34</sup> “Over 300 colleges and universities adopted hate speech codes in the early 1990s. Every one to be challenged in court was ruled unconstitutional.”<sup>35</sup>

## 2. Pulling Back on the Protection of Hateful Speech: *Virginia v. Black*

Eleven years later, in *Virginia v. Black*, the Supreme Court limited the scope of the protection of hateful speech.<sup>36</sup> In *Black*, the Supreme Court concluded that the state of Virginia could permissibly ban cross burning with an intent to intimidate.<sup>37</sup> In reaching its decision, the Court drew heavily on cross burning's “long and pernicious history as a signal of impending violence.”<sup>38</sup> The Court held that “[i]ntimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death.”<sup>39</sup>

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<sup>33</sup> *Id.*

<sup>34</sup> David L. Hudson Jr. & Lata Nott, *Hate Speech & Campus Speech Codes*, FREEDOM F. INST., <https://www.freedomforuminstitute.org/first-amendment-center/topics/freedom-of-speech-2/free-speech-on-public-college-campuses-overview/hate-speech-campus-speech-codes/> (last updated Mar. 2017).

<sup>35</sup> Opinion, *The Free Speech-Hate Speech Trade-Off*, N.Y. TIMES (Sept. 13, 2017), <https://www.nytimes.com/2017/09/13/opinion/berkeley-dean-erwin-chemerinsky.html> (statement of Erwin Chemerinsky).

<sup>36</sup> See *Virginia v. Black*, 538 U.S. 343, 363 (2003) (plurality opinion); Alexander Tsesis, *Burning Crosses on Campus: University Hate Speech Codes*, 43 CONN. L. REV. 617, 620 (2010) (explaining that in *Black*, the Supreme Court “defined the scope of legitimate limitations on destructive messages.”).

<sup>37</sup> *Black*, 538 U.S. at 363.

<sup>38</sup> *Id.* at 352–57, 363.

<sup>39</sup> *Id.* at 360.

The Court held that *Black's* prohibition did not constitute viewpoint discrimination of unprotected speech, as in *R.A.V.*<sup>40</sup> Although the opinion in *Black* defined an outer limit to *R.A.V.*'s protection, because of its limited scope, the opinion has not subverted the traditional view that hateful speech is protected.

*B. Hateful Speech on Campus: Additional Areas of First Amendment Protection*

1. The Heckler's Veto

Under the doctrine of the "heckler's veto," state actors cannot justify silencing speakers for fear of violent dissent. A "heckler's veto" is "the suppression of speech by the government . . . because of the possibility of a violent reaction by hecklers."<sup>41</sup> In *Berger v. Battaglia*, the United States Court of Appeals for the Fourth Circuit recognized that a significant threat to free speech is "successful importuning of government to curtail 'offensive' speech at peril of suffering disruptions of public order."<sup>42</sup> Universities silencing speakers on campuses due to threats of violence by a speaker's opponents violates this policy.<sup>43</sup>

The issue becomes more complicated when the threat of violence originates from proponents of the speaker, rather than the opponents. In Charlottesville, the act of violence was perpetrated by a supporter of the white supremacist rally against counter-protestors.<sup>44</sup> Such a situation does not fit the traditional definition of the heckler's veto, but still results in silencing a speaker due to risk of a violent response. Although in such a situation, administrators are not necessarily favoring one viewpoint over another—only the speaker's viewpoint is silenced.

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<sup>40</sup> *Id.* at 362.

<sup>41</sup> 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) (alteration in original) (quoting Ronald B. Standler, *Heckler's Veto*, (last updated Dec. 4, 1999)).

<sup>42</sup> *Berger v. Battaglia*, 779 F.2d 992, 1001 (4th Cir. 1985).

<sup>43</sup> *See id.*

<sup>44</sup> Jonah Engel Bromwich & Alan Blinder, *What We Know About James Alex Fields, Driver Charged in Charlottesville Killing*, N.Y. TIMES (Aug. 13, 2017), <https://www.nytimes.com/2017/08/13/us/james-alex-fields-charlottesville-driver.html>.

## 2. Political Speech in Schools and Universities

Importantly, not all of the controversial speech on campuses fits within traditional notions of hate speech. Many of the controversial speakers who have sought to speak on university campuses simply espouse controversial political views.<sup>45</sup> These campus speakers enjoy increased protection because their messages are often political in nature. Because protections of political speech are at the core of First Amendment tradition, political speech is afforded not only most exacting scrutiny,<sup>46</sup> but also particular reverence.<sup>47</sup>

In *Tinker v. Des Moines*, the Supreme Court upheld students' rights to engage in non-disruptive political expression in high schools.<sup>48</sup> Although elementary and high school administrators may permissibly control messages that disrupt the school's functioning, public university administrators do not have the same discretion.<sup>49</sup> Universities may not proscribe political speech due to its disruptive nature.

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<sup>45</sup> Take, for example Ann Coulter, who was disinvented from a speaking event at U.C. Berkeley because of her Republican views. See Elliott C. McLaughlin, *Ann Coulter Controversy Tests Berkeley's Free Speech Credentials*, CNN (Apr. 27, 2017, 8:46 PM), <https://www.cnn.com/2017/04/27/us/berkeley-ann-coulter-free-speech/index.html>. Compare merely unpopular speakers such as Coulter to speakers such as Richard Spencer, whose outwardly racist speech more closely fits notions of hate speech. Callum Borchers, *Is Richard Spencer a White Nationalist or a White Supremacist? It Depends on the News Source.*, WASH. POST (Oct. 19, 2017), [https://www.washingtonpost.com/news/the-fix/wp/2017/10/19/is-richard-spencer-a-white-nationalist-or-a-white-supremacist-it-depends-on-the-news-source/?hpid=hp\\_hp-top-table-main-spencer%3Ahomepage%2Fstory&utm\\_term=.9facd9c90e9e](https://www.washingtonpost.com/news/the-fix/wp/2017/10/19/is-richard-spencer-a-white-nationalist-or-a-white-supremacist-it-depends-on-the-news-source/?hpid=hp_hp-top-table-main-spencer%3Ahomepage%2Fstory&utm_term=.9facd9c90e9e).

<sup>46</sup> See *Morse v. Frederick*, 551 U.S. 393, 403 (2007).

<sup>47</sup> See generally *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 329 (2010) (recognizing that political speech is "central to the meaning and purpose of the First Amendment").

<sup>48</sup> See *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 514 (1969).

<sup>49</sup> See *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 686 (1986) (recognizing a high school's ability to impose disciplinary sanctions for conduct "disruptive of the educational process"); 2 RODNEY A. SMOLLA & MELVILLE NIMMER, *SMOLLA & NIMMER ON FREEDOM OF SPEECH* § 17:2.50 (Clark Boardman Callaghan ed., 3d ed. 1996) (noting that the Third Circuit has held that "university officials have less discretion to limit the speech of college students than elementary and high school officials have to limit the speech of students in those lower grades.").

### 3. Time, Place, and Manner Restrictions, and the Public Forum Doctrine

Even protected expression may be subject to some limitations. Specifically, state actors may impose “reasonable time, place, or manner restrictions.”<sup>50</sup> In *Clark v. Community for Creative Non-Violence*, the Supreme Court upheld a time, place, or manner restriction prohibiting camping in public parks.<sup>51</sup> The regulation was valid even though it interfered with a planned protest because the regulation was a content-neutral “reasonable time, place or manner” restriction.<sup>52</sup>

Time, place, and manner regulations are valid in public fora, but are subject to heightened scrutiny. A “public forum,” is a location traditionally considered to be a hub of free speech, including public parks or sidewalks.<sup>53</sup> Speech in public fora receives additional First Amendment protection.<sup>54</sup> Public fora can either be deemed traditional, such as public parks or sidewalks, or limited—a location that the state has opened to the public for a communicative purpose.<sup>55</sup> Speech restrictions in either type of public forum are subject to heightened scrutiny.

In a traditional public forum, content-based speech regulations are afforded strict scrutiny: to impose a content-based restriction on a traditional public forum, the government must show that “regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.”<sup>56</sup> In a traditional public forum, the government may impose time, place, and manner restrictions, but those restrictions must be content-neutral, “narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.”<sup>57</sup> Designated public fora are afforded the same constitutional protections as traditional public fora. The difference between designated and traditional

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<sup>50</sup> *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984).

<sup>51</sup> *Id.* at 289.

<sup>52</sup> *Id.* at 297–98.

<sup>53</sup> 1 SMOLLA & NIMMER, *supra* note 49, at § 8:3.

<sup>54</sup> *See Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983) (“In places which by long tradition or by government fiat have been devoted to assembly and debate, the rights of the state to limit expressive activity are sharply circumscribed.”).

<sup>55</sup> *Id.* at 45–46.

<sup>56</sup> *Id.* at 45.

<sup>57</sup> *Id.*

public fora is that the state is not under an obligation to keep designated fora available to the public.<sup>58</sup>

Public universities may designate spaces to be public fora,<sup>59</sup> and some courts have held that the outdoor space on a university campus is a designated public forum whether or not the university has acted to designate it as such.<sup>60</sup> Legislatures have sought to codify the latter approach and deem the open spaces on university campuses traditional public fora for purposes of First Amendment protection.<sup>61</sup>

## II. RECENT EVENTS: A TIMELINE

This Part describes the recent events leading up to and following the increased adoption of university free speech policies by states, and discusses examples of this legislation. This Part discusses the issues that states have sought to address, as well as the problems the legislation may have created.

### A. *Rising Tensions: 2016–Spring, 2017*

The tension between free speech and campus safety is not new,<sup>62</sup> but the debate has resurged in light of the rise of the “alt-

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<sup>58</sup> *Id.* at 45–46 (noting that limited public fora are “bound by the same standards as apply in a traditional public forum. Reasonable time, place and manner regulations are permissible, and a content-based prohibition must be narrowly drawn to effectuate a compelling state interest.”); see *Widmar v. Vincent*, 454 U.S. 263, 267–68 (1981) (“The Constitution forbids a State to enforce certain exclusions from a forum generally open to the public, even if it was not required to create the forum in the first place.”). *But see* *Warren v. Fairfax Cty.*, 196 F.3d 186, 193–94 (4th Cir. 1999) (applying a two-level approach to limited public fora, distinguishing an “internal standard,” providing strict scrutiny for attempts to exclude a speaker who falls within a group already permitted to speak, and an “external standard,” providing intermediate scrutiny when determining which classes of individuals may be allowed to speak in the limited public forum).

<sup>59</sup> *Widmar*, 454 U.S. at 267–70 (holding that, because the University of Missouri at Kansas City generally made its facilities open to student groups, it thereby created a limited public forum, and discrimination based on religion in that context was impermissible).

<sup>60</sup> This application of public forum doctrine has been adopted by the circuit courts. *Am. Civil Liberties Union v. Mote*, 423 F.3d 438, 444–45 (4th Cir. 2005) (holding that a university, by its very nature as an educational institution, is a limited public forum, and that regulation of speech therein need only be “viewpoint neutral and reasonable in light of the objective purposes served by the forum.”).

<sup>61</sup> See *infra* Part II.B.1.

<sup>62</sup> See Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431, 434 (1990).

right” and their focus on university campuses.<sup>63</sup> Far-right and white supremacist groups have taken particular aim at college campuses as locations to host rallies and recruit members.<sup>64</sup> When right-wing speakers hold events on campuses, they are often met with protests, which range from peaceful to uproarious.<sup>65</sup> In May 2016, Milo Yiannopoulos was invited to speak at DePaul University.<sup>66</sup> The speech drew protests, which culminated in protestors jumping onstage, chanting and blowing a whistle to make any further speech by Yiannopoulos inaudible.<sup>67</sup> The event raised questions about the extent to which protestors should be permitted to disrupt speech, and whether universities can provide a platform for opposing views without alienating students.<sup>68</sup> In September 2016, a similar disruption occurred at Georgetown University during a panel discussion of Israeli Prime Minister Benjamin Netanyahu’s career.<sup>69</sup>

In February 2017, the University of California (“U.C.”), Berkeley cancelled a scheduled speech by Yiannopoulos following violent protests and riots.<sup>70</sup> In April 2017, U.C. Berkeley invited Ann Coulter to speak on campus, but subsequently cancelled her

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<sup>63</sup> Goldie Blumenstyk, Nell Gluckman, & Eric Kelderman, *When White Supremacists Descend, What Can a College President Do?*, CHRON. OF HIGHER EDUC. (Aug. 12, 2017), <http://www.chronicle.com/article/When-White-Supremacists/240913>.

<sup>64</sup> Lois Beckett, *White Nationalists’ Latest Tactic to Recruit College Students: Paper Flyers and Tape*, THE GUARDIAN (Apr. 5, 2017), <http://www.theguardian.com/world/2017/apr/05/white-nationalists-posters-college-student-recruitment>; Blumenstyk, Gluckman, & Kelderman, *supra* note 63; Clayton J. Plake & Edna Bonhomme, *Opposing Far-Right and Openly Fascist Groups on Campus*, UNIV. WORLD NEWS (Sept. 15, 2017), <http://www.universityworldnews.com/article.php?story=20170912130021905>; Susan Svrluga, *‘Unprecedented Effort’ by ‘White Supremacists’ to Recruit and Target College Students, Group Claims*, WASH. POST (Mar. 6, 2017), [https://www.washingtonpost.com/news/grade-point/wp/2017/03/06/unprecedented-effort-by-white-supremacists-to-recruit-and-target-college-students-group-claims/?utm\\_term=.a26923964946](https://www.washingtonpost.com/news/grade-point/wp/2017/03/06/unprecedented-effort-by-white-supremacists-to-recruit-and-target-college-students-group-claims/?utm_term=.a26923964946).

<sup>65</sup> Madison Park & Kyung Lah, *Berkeley Protests of Yiannopoulos Caused \$100,000 in Damage*, CNN (Feb. 2, 2017, 8:33 PM), <https://www.cnn.com/2017/02/01/us/milo-yiannopoulos-berkeley/index.html>.

<sup>66</sup> Thomason, *supra* note 9. Although a private university, and beyond the ambit of the state action doctrine, the event has become a symbol of students’ hostility to free speech rights. McMurtrie, *supra* note 14.

<sup>67</sup> Gray, *supra* note 10.

<sup>68</sup> McMurtrie, *supra* note 14.

<sup>69</sup> Cassidy Jensen & Ryan Miller, *Netanyahu Panel Interrupted by Protest*, THE GEO. VOICE (Sept. 11, 2016), <https://georgetownvoice.com/2016/09/11/netanyahu-panel-interrupted-by-protest/>.

<sup>70</sup> Park & Lah, *supra* note 65.

event for fear of further violent protests.<sup>71</sup> The events sparked criticism and a nationwide discussion of free speech on campus.<sup>72</sup> The Foundation for Individual Rights in Education has compiled a running list of speakers who have been disinvited from educational institutions.<sup>73</sup> The list indicates that university speakers disinvited in 2016 and 2017 were cancelled largely, but not exclusively, due to leftists' objections to speakers' political views.<sup>74</sup>

In April 2017, Cameron Padgett, Richard Spencer's college tour organizer, rented out the Foy Arena at Auburn University for the prominent white nationalist to speak on campus.<sup>75</sup> The university, due to concerns that Spencer's presence would endanger public safety, attempted to cancel the event.<sup>76</sup> Shortly thereafter, Padgett sought a temporary restraining order.

A federal judge granted a preliminary injunction, reasoning that “[w]hile Mr. Spencer’s beliefs and message are controversial, Auburn presented no evidence that Mr. Spencer advocates violence.”<sup>77</sup> The court held that because the university “did not produce evidence that Mr. Spencer’s speech . . . [was] likely to incite or produce imminent lawless action,” it was improper for the university to attempt to forbid the speaker from spreading

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<sup>71</sup> Susan Svrluga, William Wan & Elizabeth Dwoskin, *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=.b5fbc6b27e8d](https://www.washingtonpost.com/news/grade-point/wp/2017/04/26/ann-coulter-speech-canceled-at-uc-berkeley-amid-fears-for-safety/?utm_term=.b5fbc6b27e8d).

<sup>72</sup> See, e.g., Susan Svrluga & Brian Murphy, *Trump Lashes Back at Berkeley After Violent Protests Block Speech by Breitbart Writer Milo Yiannopoulos*, WASH. POST (Feb. 2, 2017), [https://www.washingtonpost.com/news/grade-point/wp/2017/02/01/berkeley-cancels-speech-by-breitbart-writer-milo-amid-intense-protests/?utm\\_term=.ba89d604198f](https://www.washingtonpost.com/news/grade-point/wp/2017/02/01/berkeley-cancels-speech-by-breitbart-writer-milo-amid-intense-protests/?utm_term=.ba89d604198f); Stanley Kurtz, *Year of the Shout-Down: It Was Worse Than You Think*, NAT'L REVIEW (May 31, 2017, 9:48 AM), <https://www.nationalreview.com/corner/year-shout-down-worse-you-think-campus-free-speech/>.

<sup>73</sup> *Disinvitation Attempts*, FOUND. FOR INDIVIDUAL RIGHTS IN EDUC. <https://www.thefire.org/resources/disinvitation-database/> (last visited Sept. 10, 2018).

<sup>74</sup> *Id.*

<sup>75</sup> 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=.f71bb08dc081](https://www.washingtonpost.com/news/morning-mix/wp/2017/04/19/federal-judge-stops-auburn-from-canceling-white-nationalists-speech-violence-erupts/?utm_term=.f71bb08dc081); Lois Beckett, *After Charlottesville, White Nationalist's Campus Event Fuels Free Speech Debate*, THE GUARDIAN (Oct. 18, 2017), <https://www.theguardian.com/us-news/2017/oct/18/richard-spencer-university-of-florida-event-free-speech-debate>.

<sup>76</sup> Andrews, *supra* note 75.

<sup>77</sup> Padgett v. Auburn Univ., No. 3:17-CV-231-WKW, 2017 U.S. Dist. LEXIS 74076, at \*2 (M.D. Ala. 2017).

his message.<sup>78</sup> The court reasoned that the school's belief that "listeners and protest groups opposed to Mr. Spencer's ideology would react to the content of his speech by engaging in protests that could cause violence or property damage" was not a sufficient legal justification.<sup>79</sup> In accordance with the court order, Auburn University allowed Mr. Spencer to speak on campus. The event led to protests and skirmishes, but not deadly violence.<sup>80</sup>

### B. *Reactive Legislation: Spring, 2017–Summer, 2017*

In the spring of 2017, states reacted to students' hostility toward offensive views with an explosion of legislation seeking to protect free speech.<sup>81</sup> In addition to reiterating prevailing First Amendment standards, these laws protect free speech rights in two ways: first, some took particular aim at free speech zones, and sought to ban them, sometimes invoking the public forum doctrine; next, others went further, seeking to punish students for interfering with the free speech rights of their fellow students.

#### 1. Bills That Seek to Ban "Free Speech Zones"

Some universities regulate demonstrations by imposing "free speech zones." Free speech zone policies limit demonstrations and protests to particular areas of campuses, and can be valid time, place, or manner regulations.<sup>82</sup> At the district court level, courts have upheld the use of content-neutral campus free speech zone and permit requirements, noting that those requirements did not extend to "those park areas, plazas, sidewalks, and streets of the campus that comprise the irreducible public forums

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<sup>78</sup> *Id.* at \*2–4 ("[A]dvocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing *imminent lawless action* and is likely to incite or produce such action.") (emphasis added) (quoting *Brandenburg v. Ohio*, 395 U.S. 444 (1969)).

<sup>79</sup> *Id.* at \*3.

<sup>80</sup> David J. Philip, *White Nationalist Richard Spencer's Speech at Auburn Sparks Protests, Arrests*, NPR (Apr. 19, 2017), <https://www.npr.org/sections/thetwo-way/2017/04/19/524683153/white-nationalist-richard-spencers-speech-at-auburn-sparks-protests-arrests>.

<sup>81</sup> Lauren Camera, *Campus Free Speech Laws Ignite the Country*, U.S. NEWS & WORLD REPORT (July 31, 2017, 5:40 P.M.), <https://www.usnews.com/news/best-states/articles/2017-07-31/campus-free-speech-laws-ignite-the-country>.

<sup>82</sup> See Samantha Harris, *Free Speech Zones, Then and Now*, FOUND. FOR INDIVIDUAL RTS. IN EDUC. (Dec. 27, 2016), <https://www.thefire.org/free-speech-zones-then-and-now/>.

of the campus.”<sup>83</sup> Nevertheless, some universities have chosen to eliminate free speech zone policies, either unilaterally or in response to legal backlash.<sup>84</sup>

In March 2017, Utah enacted a law designating the outdoor areas of university campuses “traditional public for[a]”<sup>85</sup> The bill also required that an institution only enforce restrictions on expressive activity if they “(a) are narrowly tailored to serve a significant institutional interest; (b) are based on published, content-neutral, and viewpoint-neutral criteria; and (c) leave open ample alternative channels for communication.”<sup>86</sup>

In April 2017, the governor of Colorado signed into law a measure banning free speech zones.<sup>87</sup> The law provides that time, place, and manner regulations may only be imposed if they “(a) Are reasonable; (b) Are justified without reference to the content of the speech; (c) Are narrowly tailored to serve a significant governmental interest; and (d) Leave open ample alternative channels for communication of the information or message.”<sup>88</sup>

In May 2017, Tennessee abolished free speech zones,<sup>89</sup> requiring universities to “maintain the generally accessible, open, outdoor areas of its campus as traditional public forums for free speech by students.”<sup>90</sup> In August 2017, the Florida legislature introduced a law banning free speech zones, empowering individuals to sue universities for violating their expressive rights.<sup>91</sup> In March 2018, the bill was signed into law.<sup>92</sup>

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<sup>83</sup> *Roberts v. Haragan*, 346 F. Supp. 2d 853, 866–68 (N.D. Tex. 2004).

<sup>84</sup> *See Smith v. Tarrant Cty. Coll. Dist.*, 694 F. Supp. 2d 610, 624 (N.D. Tex. 2010) (concluding that the issue of the constitutionality of a campus free speech zone policy had become moot in light of the university’s elimination of the policy); Andy Thomason, *2 Colleges Pay a Combined \$160,000 to Settle Free-Speech Lawsuits*, CHRON. OF HIGHER EDUC. (Dec. 3, 2014), <https://www.chronicle.com/blogs/ticker/u-of-hawaii-pays-students-50000-as-part-of-settlement-of-free-speech-suit/90583>.

<sup>85</sup> H.B. 54, 2017 Legis., Gen. Sess., 2017 Utah Laws 440.

<sup>86</sup> *Id.*

<sup>87</sup> Chris Quintana & Andy Thomason, *The States Where Campus Free-Speech Bills Are Being Born: A Rundown*, CHRON. OF HIGHER EDUC. (May 15, 2017), <https://chronicle.com/article/The-States-Where-Campus/240073>; COLO. REV. STAT. ANN. § 23-5-144(4) (West 2017) (“An institution of higher education shall not designate any area on campus as a free speech zone or otherwise create policies implying that its students’ expressive activities are restricted to particular areas of campus.”).

<sup>88</sup> COLO. REV. STAT. ANN. § 23-5-144(5) (West 2017).

<sup>89</sup> TENN. CODE ANN. § 49-7-2405(a) (West 2018).

<sup>90</sup> *Id.*

<sup>91</sup> C.S./S.B. 4, 120th Reg. Sess. (Fla. 2018).

<sup>92</sup> *Id.*

## 2. Bills that Seek to Ban Interference with Free Speech Rights of Other Students

In February 2017, Illinois introduced a bill that would require the suspension or expulsion of students who infringe upon the free speech rights of others.<sup>93</sup> The legislature is still considering that bill.

In May 2017, California introduced a constitutional amendment involving campus free speech.<sup>94</sup> The amendment would require universities to adopt “[a] range of disciplinary sanctions for anyone under the jurisdiction of the institution who interferes with the free expression of others.”<sup>95</sup> That same month, Michigan introduced a bill requiring that “any student who has twice been found responsible for infringing upon the expressive rights of others . . . be suspended for a minimum of 1 year or expelled.”<sup>96</sup> Both bills are still under consideration.

In July 2017, North Carolina passed a bill, the stated purpose of which was to restore and preserve campus free speech.<sup>97</sup> The North Carolina bill requires universities to “implement a range of disciplinary sanctions for anyone under the jurisdiction of a constituent institution who . . . substantially interferes with the protected free expression rights of others, including protests and demonstrations that infringe upon the rights of others to engage in and listen to expressive activity.”<sup>98</sup>

In March 2018, Louisiana introduced a similar bill prohibiting “protests and demonstrations that infringe upon the constitutional rights of others” by substantially and materially disrupting someone else’s expressive activity.<sup>99</sup> In June 2018, the bill was signed into law.<sup>100</sup>

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<sup>93</sup> Campus Free Speech Act, H.B. 2939, 100th Gen. Assemb., Reg. Sess. (Ill. 2017).

<sup>94</sup> 2017 Cal. ACA-14, Reg. Sess., (Cal. 2017).

<sup>95</sup> *Id.*

<sup>96</sup> S.B. 350, 99th Mich. Leg., Reg. Sess., (Mich. 2017).

<sup>97</sup> H.B. 527, 2017 Gen. Assemb., Reg. Sess. (N.C. 2017).

<sup>98</sup> N.C. GEN. STAT. § 116-300 (2018).

<sup>99</sup> S.B. 364, 2018 La. Leg. Reg. Sess. (La. 2018).

<sup>100</sup> *Id.*

C. *Costly Fallout: Summer, 2017–Present*

To date, twenty-four states have either introduced or passed legislation seeking to protect free speech and expression on public college campuses.<sup>101</sup>

Although it is unclear whether this legislation and proposed new legislation will be effective, in the months following the adoption of many of these bills, universities reluctantly opened their doors to controversial speakers, often in the face of threats of litigation.<sup>102</sup> These decisions have had violent and costly consequences.

Prior to the deadly attack at the white nationalist event in Charlottesville, marchers sought permits from the city to gather in Emancipation Park, adjacent to the University of Virginia campus.<sup>103</sup> The city initially granted the permits, but as the event drew more attention, the Charlottesville city manager attempted to revoke the permits to move the event to a larger park, about a mile from the originally intended location.<sup>104</sup> The city immediately met backlash from the American Civil Liberties Union (“ACLU”).<sup>105</sup>

On August 8, 2017, the ACLU and Rutherford Institute issued a letter, challenging the constitutional basis of the city’s attempt to move the event, and threatening litigation should the city succeed.<sup>106</sup> Following litigation, the city allowed the event to continue in its originally intended location, and onto the University of Virginia campus.<sup>107</sup> The University of Florida faced a similar dilemma when white nationalist Richard Spencer

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<sup>101</sup> Nikita Vladimirov, *MAP: 24 States Have Now Proposed Campus Free Speech Bills*, CAMPUSREFORM (Mar. 19, 2018), <https://campusreform.org/?ID=10656>.

<sup>102</sup> See, e.g., Anemona Hartocollis, *University of Florida Braces for Richard Spencer*, N.Y. TIMES (Oct. 17, 2017), <https://www.nytimes.com/2017/10/17/us/florida-richard-spencer.html> (reporting that the University of Florida initially denied Richard Spencer’s request to speak, only permitting the event after Spencer threatened legal action).

<sup>103</sup> Wamsley, *supra* note 3; Matt Talhelm, *ACLU, Rutherford Institute Urge Charlottesville to Allow Rally at Emancipation Park*, NBC29 (Aug. 8, 2017, 5:14 PM), <http://www.nbc29.com/story/36089526/unite-the-rally-coverage-8-08-2017>.

<sup>104</sup> Wamsley, *supra* note 3.

<sup>105</sup> Talhelm, *supra* note 103.

<sup>106</sup> *Id.*

<sup>107</sup> Wamsley, *supra* note 3; Hawes Spencer & Sheryl Gay Stolberg, *White Nationalists March on University of Virginia*, N.Y. TIMES (Aug. 11, 2017), <https://www.nytimes.com/2017/08/11/us/white-nationalists-rally-charlottesville-virginia.html>.

rented space on campus to speak.<sup>108</sup> When the university denied his request, Spencer's organization threatened legal action.<sup>109</sup> The university allowed him to speak, but the university president released a message renouncing Spencer's views, and urging students to stay away from the event.<sup>110</sup>

During the event, protestors chanted over Spencer. Spencer fielded questions from the audience, and protestors responded to his answers with booing and holding up fists as a symbol of black power.<sup>111</sup> Less than two hours after the event, and about a mile away, three shooters chanting "Hail Hitler!" delivered "Nazi salutes and fired a gun at a group of protesters."<sup>112</sup> The three men, two of whom had connections to white supremacist groups, were charged with attempted homicide.<sup>113</sup>

Protection of hate speech on campus comes at a cost—a cost that universities alone must bear. Despite the violence and discord in Charlottesville, universities continue to host controversial speakers, but must brace themselves for the violent consequences.<sup>114</sup>

### 1. Tangible Cost

When universities choose to host controversial speakers, they often bear a significant financial burden for preventative safety measures.<sup>115</sup> For these events, universities typically need

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<sup>108</sup> Lois Beckett, *White Supremacist Richard Spencer Faces Barrage of Protest at Florida Speech*, THE GUARDIAN (Oct. 19, 2017), <https://www.theguardian.com/world/2017/oct/19/richard-spencer-protest-university-florida-speech-white-supremacist>.

<sup>109</sup> Sarah Larimer, *University of Florida Denies White Nationalist Event Request, Citing Safety Concerns*, WASH. POST (Aug. 16, 2017), [https://www.washingtonpost.com/news/grade-point/wp/2017/08/16/university-of-florida-denies-white-nationalist-event-request-citing-serious-concerns-for-safety/?utm\\_term=.e1798e1c0f56](https://www.washingtonpost.com/news/grade-point/wp/2017/08/16/university-of-florida-denies-white-nationalist-event-request-citing-serious-concerns-for-safety/?utm_term=.e1798e1c0f56).

<sup>110</sup> Hartocollis, *supra* note 102.

<sup>111</sup> Matt Pearce & Les Neuhaus, *White Nationalist Richard Spencer to Noisy Florida Protesters: You Didn't Shut Me Down*, L.A. TIMES (Oct. 19, 2017), <http://www.latimes.com/nation/la-na-florida-spencer-speech-20171019-story.html>.

<sup>112</sup> Lois Beckett, *Three Men Charged After Protesters Shot at Following Richard Spencer Speech*, THE GUARDIAN (Oct. 20, 2017), <https://www.theguardian.com/us-news/2017/oct/20/gainesville-shooting-three-men-charged-florida-richard-spencer>.

<sup>113</sup> *Id.*

<sup>114</sup> Mark G. Yudof & Kenneth Waltzer, *Free Speech, Campus Safety, or Both*, CHRON. OF HIGHER EDUC. (Sept. 15, 2017), <https://www.chronicle.com/article/Free-Speech-Campus-Safety-or/241220>.

<sup>115</sup> *See id.* (reporting that Ben Shapiro's speech at UC Berkeley cost the University over \$600,000 in safety measures).

to draw on university security resources and work with local law enforcement to gather hundreds of security officers to control the violent response.<sup>116</sup>

The University of California, Berkeley, has hosted and attempted to host controversial speakers including Ann Coulter, Milo Yiannopoulos, and Breitbart News editor Ben Shapiro.<sup>117</sup> Even after Ann Coulter's speaking engagement was cancelled,<sup>118</sup> the University still paid approximately \$665,000 in security costs due to resulting protests.<sup>119</sup> Berkeley estimates that it paid approximately \$2 million in protest management costs in 2017.<sup>120</sup> In October 2017, when the University of Florida hosted Richard Spencer, the event cost the university about \$600,000.<sup>121</sup> Despite the money expended, the university was not able to prevent violent repercussions.<sup>122</sup> Whether the speakers, the protestors, or the counter-protestors are truly the cause of anticipated violence, the responsibility for the cost typically falls on the university.

Although the Supreme Court has recognized that universities should have autonomy over their budgets, and have a right "to make academic judgments as to how best to allocate scarce resources,"<sup>123</sup> when faced with First Amendment challenges, universities' autonomy is reduced.

## 2. Intangible Costs: Disruption and Harassment

University administrators have observed that the broader purpose of educational institutions is better served when universities host more discussions and more speech rather than less.<sup>124</sup> Yet, legal scholars have also pointed out the destructive

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<sup>116</sup> See Suhauna Hussain, *The Costs of the Campus Speech Wars Are Piling Up for the Police*, CHRON. OF HIGHER EDUC. (July 3, 2017), <https://www.chronicle.com/article/Free-Speech-Campus-Safety-or/241220>.

<sup>117</sup> *Id.*; Jennifer Calfas, *How Much White Nationalist Richard Spencer Is Costing the University of Florida*, TIME (Oct. 18, 2017), <http://time.com/money/4987460/how-much-white-nationalist-richard-spencer-is-costing-the-university-of-florida/>.

<sup>118</sup> Hussain, *supra* note 116.

<sup>119</sup> *Id.*

<sup>120</sup> Calfas, *supra* note 117.

<sup>121</sup> Beckett, *supra* note 108.

<sup>122</sup> See *supra* Part II.C.

<sup>123</sup> *Widmar v. Vincent*, 454 U.S. 263, 276 (1981).

<sup>124</sup> Pub. Affairs, U.C. Berkeley, *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/>.

effect certain speech can have on students.<sup>125</sup> The events in Charlottesville, particularly the presence of armed protestors on campus, using violent epithets and invoking Nazism have proven distracting and disturbing for students.<sup>126</sup> Scholars have also pointed out the particular impact that these events may have on racially diverse students—both exaggerated immediate impact, and latent psychological impact. Psychological studies have documented a positive correlation between racial trauma and both mental and physical health problems.<sup>127</sup> Psychologists recognize that the events in Charlottesville could amount to racial trauma both at the university and beyond.<sup>128</sup> Scholars further predict that racial harassment, “[i]f unaddressed . . . can negatively impact college safety, pedagogy, and class attendance.”<sup>129</sup>

Notwithstanding the trauma that students can experience as a result of violent, intimidating, and threatening speech, speech that does not directly advocate violent conduct does not lose First Amendment protection.<sup>130</sup>

### III. A NEW APPROACH TO CAMPUS FREE SPEECH CODES

Universities often falter when balancing their role as educational institutions with their duty to protect students when controversial speakers use these institutions as platforms. When students call for speakers to be prohibited from campuses, and

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<sup>125</sup> See, e.g., Tsesis, *supra* note 36, at 621–24; Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2332–38, 2370–73 (1989).

<sup>126</sup> See *What U.Va. Students Saw*, *supra* note 2 (statement of Nojan Rostami) (describing trauma associated with the possibility that “armed militiamen” who “beat and pepper-sprayed” his friends and murdered a young woman were allowed free access to his home).

<sup>127</sup> Jason Silverstein, *How Racism Is Bad for Our Bodies*, THE ATLANTIC (Mar. 12, 2013), <https://www.theatlantic.com/health/archive/2013/03/how-racism-is-bad-for-our-bodies/273911/>. Psychologists forecast that the events at UVA may have a similar traumatic impact, but because of the latent nature of the injury, it is difficult to document the results immediately. *Steve Fund Podcast #3 The Psychological Impact of Charlottesville*, (Aug. 25, 2017) <http://www.stevfund.org/psychological-impact-charlottesville-steve-fund-podcast-3/>.

<sup>128</sup> *Steve Fund Podcast #3: The Psychological Impact of Charlottesville*, *supra* note 127.

<sup>129</sup> Alexander Tsesis, *Campus Speech and Harassment*, 101 MINN. L. REV. 1863, 1877 (2017).

<sup>130</sup> See *Padgett v. Auburn Univ.*, No. 3:17-CV-231-WKW, 2017 U.S. Dist. LEXIS 74076, at \*2 (M.D. Ala. 2017).

state legislatures seek to impose stronger free speech protections, administrators' dilemmas become more complicated.

This Part draws on legislation that several states have proposed to draft a model campus speech code that better balances universities' dual roles, while not running afoul of the First Amendment. State legislatures, in attempting to resolve the dilemma that universities face, often only focus on a university's role as a state actor, and lose sight of its custodial responsibilities. Because of this bias, these bills cannot adequately resolve the problem. Therefore, this Part recommends that state legislatures encourage but do not impose campus free speech policies for universities to adopt. This Part proposes viewpoint-neutral preventative policies that ensure free expression while controlling the damaging effects of harassment and intimidation. This Part also recommends policies that state legislatures ought not recommend, such as those which impose mandatory punishment for infringing on free speech rights of students, or limit universities' ability to adopt reasonable time, place, and manner restrictions, including imposing restrictions on free speech zone policies.

#### A. *What Campus Policies Should Do*

##### 1. States Should Encourage Universities to Impose Viewpoint-Neutral Safety Measures

States should encourage universities to establish time, place, and manner safety restrictions, which ensure student safety but do not restrain speech. One such measure is disallowing weapons at campus events and protests. This can ensure student safety by limiting the potential for and extent of violence on university campuses.<sup>131</sup> Disallowing weapons also safeguards protected expression because, although viewpoint-neutral, the measure decreases the likelihood that otherwise protected speech will veer into categories of unprotected speech, such as speech intending to intimidate, fighting words, and true threats.

Another measure that states should encourage is restricting attendance at speech events to students, faculty, and alumni. In Charlottesville, and at the University of Florida, acts of violence were committed by non-university community members.<sup>132</sup> At

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<sup>131</sup> Yudof & Waltzer, *supra* note 114.

<sup>132</sup> Bromwich & Blinder, *supra* note 44; Beckett, *supra* note 112.

U.C. Berkeley, leading up to Ann Coulter and Milo Yiannopoulos' speaking engagements, commentators noted that students largely supported Coulter's right to speak, and engaged in peaceful protests, while non-community members were responsible for rioting.<sup>133</sup> Limiting audience membership to community members is a viewpoint-neutral measure that universities could use to curtail violent repercussions of protests, and limit costs of these events.

Further, universities could limit speakers to those who have actually been invited by community members to speak on campus. Richard Spencer was never invited to speak at either the University of Florida or Auburn University; he rented the space unilaterally. The university was not under an obligation to host him, unless its policy was to allow any speaker to rent space on their campus to host speaking events. A viewpoint-neutral policy requiring that outside speakers be invited by students or faculty is constitutionally permissible. Requiring that students or faculty invite outside speakers would likely limit the ability of outside groups to target university campuses to spread violent messages.

## 2. States Should Encourage Universities to Adopt Viewpoint-Neutral Cost Policies

Time, place, and manner restrictions of this type can be costly to enforce. For example, to disallow weapons, a university would likely require searches, or require that protestors pass through metal detectors, all at a significant cost to the university. The University of Florida president noted that even though Spencer was not invited to speak on campus, but arranged the event himself, the university was not permitted to pass the cost of keeping the event safe on to Spencer.<sup>134</sup> States should work with universities to provide strategies that universities can use if they face situations such as these, or if the cost of keeping an event safe becomes prohibitive. These strategies should include allowing and facilitating transfers to locations that can accommodate larger crowds, costs, and risk of violence. When protests or events become cost-prohibitive, universities should be able to exercise other options for allowing the speech as valid time, place, or manner regulations.

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<sup>133</sup> McLaughlin, *supra* note 45.

<sup>134</sup> Hartocollis, *supra* note 102.

3. States Should Encourage Universities to Use Anti-Harassment Policies to Mitigate Intimidating or Threatening Expression

a. *Viewpoint-Neutral Anti-Harassment Measures*

Anti-harassment policies can solve the problem of threatening speech, and can provide recourse for students who suffer one-on-one verbal attacks. *Virginia v. Black* may provide a framework for expanding campus policies that target harassment and intimidating speech.<sup>135</sup>

The plurality in *Black* allowed regulation of symbols that invoke a long and pernicious history as signals of impending violence. Indeed, under *Black*, universities may be empowered to permissibly ban protestors like those in Charlottesville, who were armed, wearing Nazi regalia, and marching through residential university campuses. Like *Black*, the symbols the offenders in Charlottesville invoked have a uniquely violent history. When protestors target campuses in huge groups, when they wield weapons, and when they invoke a history of genocide to support their message, their speech should fall within the “intent to intimidate” category, the proscription of which *Black* allows.<sup>136</sup>

While such policies would address the most extreme examples of intimidation on campus, most merely controversial speech would likely not reach *Black*’s threshold. For speech that does not reach this threshold, universities should still be empowered to limit one-on-one incendiary speech, inciting speech, and violent expressive behavior—all of which the Supreme Court has carved out as unprotected.

b. *Viewpoint-Specific Anti-Harassment Policies*

When adopting policies, states should be conscious of the outer limits of free speech protections that the Supreme Court has recognized. In *R.A.V.*, the Court noted that viewpoint-based restrictions are permissible, and even mandatory, when the constitutional rights of the speaker clash with the constitutional rights of the listener. The Court noted that viewpoint-based restrictions are appropriate if, for example, an employer seeks to limit sexually derogatory “fighting words,” the utterance of which would violate Title VII’s prohibition against sexual

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<sup>135</sup> See *supra* Part I.A.2; Tthesis, *supra* note 36 at 653–54.

<sup>136</sup> See *supra* Part I.A.2 and accompanying notes.

discrimination in the workplace.<sup>137</sup> Title VI prohibits public universities, as institutions that receive federal funding, from providing a hostile environment on the basis of race or sex.<sup>138</sup> For a student to raise a claim under Title VI, he or she must show the alleged harassment is so severe and pervasive that it deprives the victim of access to educational benefits.<sup>139</sup> Although this is a high standard, in light of the rise in bias and hate incidents, and the particularized targeting of university campuses,<sup>140</sup> the impact of these events could rise to that level.

*B. What Campus Speech Policies Should Not Do*

1. States Should Not Impose Overbroad Punishments for Infringing on Speech Rights

A common regulation in the bills that Illinois, Louisiana, and California proposed, and in the bill that North Carolina passed, is a mandatory punishment for demonstrators who infringe on the expressive rights of others. This policy is problematic, as it seeks to solve the problem of restricted free speech by silencing the dissent.

The incident at DePaul can be instructive in determining the extent to which protestors may disrupt controversial speakers. At DePaul, the dissenting students chanted, making the controversial speaker inaudible. Silencing dissenters for disruptive speech is likely unconstitutional. Dissenters' political speech is likewise protected, and silencing such speech would, in effect, prioritize the First Amendment right of the primary speaker. Universities should be free to cordon protests, and advise students against disruption. But punishing students for engaging in peaceful disruption goes too far, and infringes on the rights of the demonstrators.

One disruptive student at DePaul used a whistle to drown out the sound of the controversial speaker. This strategy too, is likely unconstitutional, as it amounts to a non-speech act, which is not afforded First Amendment protection.<sup>141</sup> In *R.A.V.*, the Court likened unprotected speech to a "noisy sound truck,"

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<sup>137</sup> *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 389–90 (1992).

<sup>138</sup> 42 U.S.C. § 2000d (1964); *see also* *Qualls v. Cunningham*, 183 F. App'x 564, 567 (7th Cir. 2006).

<sup>139</sup> *See Qualls*, 183 F. App'x at 567.

<sup>140</sup> Lawrence, *supra* note 62, at 431–34.

<sup>141</sup> *R.A.V.*, 505 U.S. at 386.

because such behavior does not advance a viewpoint, and its non-speech aspects are the grounds for limiting it.<sup>142</sup> Non-speech acts used to silence speakers go beyond peaceful political dissent, and may be permissibly prohibited.

Protecting the free speech rights of controversial speakers should not come at the expense of dissenters' free speech rights. States should refrain from imposing this expense.

## 2. States Should not Prevent Universities from Effecting Time, Place, or Manner Restrictions

States should not limit universities' ability to enact reasonable time, place, or manner restrictions justified by protection of public safety. Universities should have autonomy in making decisions for student safety because universities are charged with the responsibility to keep students safe. Time, place, and manner regulations are by definition viewpoint-neutral, and ensure that universities can exercise their responsibility for students without interfering with free speech rights.

When states seek to define the open spaces of campus as traditional public fora, they limit universities' ability to impose time, place, and manner regulations, and they necessarily make residential university campuses less secure. These policies limit universities' ability to control who may demonstrate on their campuses; any such restriction is presumptively invalid under this type of policy.

Universities, with respect to time, place, and manner regulations, should be held to the federal constitutional standard, and universities should be free to designate parts of their campus limited public fora at their discretion. This standard provides sufficient protection to free speech, but allows universities autonomy in preventing violence. This is important in the case of campus speakers because the broad range of potential risks that controversial speakers may pose. For example, a university should react differently to a white supremacist march through campus than to a conservative speaking event. Allowing universities more autonomy allows them to exercise discretion, and therefore better protect students' physical safety. Valid time, place, and manner restrictions are tools that should be available to universities in exercising this discretion.

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<sup>142</sup> *Id.*

It could be argued that universities should be considered public fora because, for students, their campuses function as a microcosm of society, and should therefore be treated no differently from real society. Furthermore, some university campuses contain landmarks and parks that fit within the definition of a traditional public forum.<sup>143</sup> But this argument fails because of the heightened custodial and legal duties that universities owe to their students.<sup>144</sup> In bearing a duty to protect students, universities should not be unreasonably limited in the means by which they protect students, and exercise this duty. This illuminates the conflict between the dual roles of universities: one as educator—responsible for creating a space where students can and will confront challenging ideas; and one as guardian—responsible for students' safety and protection. Universities should have discretion in striking this careful balance, circumscribed by the protections that the First Amendment affords.

#### CONCLUSION

The line between protection of free speech and protection of student safety is difficult for universities to tread. Universities should not be restricted in protecting the physical safety of students merely because acts of hate are being wrapped in banners of free speech. Nor should universities exercise unfettered control over the messages allowed to be disseminated on their campuses. The problems of hostile crowds and controversial speakers cannot be solved by only focusing on protecting free speech; to do so only accounts for half of the problem. The approach this Note proposes takes into account both sides of the careful balance that universities must strike. This Note proposes providing universities with guidelines and autonomy, in order to empower institutions to protect student safety, without engaging in censorship.

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<sup>143</sup> Holly Epstein, *Do Controversial Figures Have a Right to Speak at Public Universities?*, USA TODAY (Apr. 20, 2017), <https://www.usatoday.com/story/college/2017/04/20/do-controversial-figures-have-a-right-to-speak-at-public-universities/37431059/>.

<sup>144</sup> See, e.g., *Nero v. Kan. State Univ.*, 861 P.2d 768, 773, 779 (Kan. 1993) (recognizing that although whether a special relation imposing tort duty exists is a matter of law, such a relation between student and university existed).