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COSTS AND CHALLENGES OF THE HOSTILE AUDIENCE

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In my own newly famous city of Charlottesville, Virginia,[1] as well as in Berkeley,[2] Boston,[3] Gainesville,[4] Middlebury,[5] and an increasing number of

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1 For extensive description and analysis of the now-notorious events arising out of the "Unite the Right" rally in Charlottesville in August 2017, see Frederick Schauer, *In the Shadow of the First Amendment*, *in* CHARLOTTESVILLE 2017: THE LEGACY OF RACE AND INEQUITY 63 (Louis P. Nelson & Claudrena N. Harold eds., 2018). The most detailed account of all that took place is contained in the report commissioned after the events by the City of Charlottesville. HUNTON & WILLIAMS, FINAL REPORT: INDEPENDENT REVIEW OF THE 2017 PROTEST EVENTS IN CHARLOTTESVILLE, VIRGINIA (2017), https://www.huntonak.com/images/content/3/4/v2/34613/final-report-ada-compliant-ready.pdf. For a brief discussion of the events leading up to the protest, see Kessler v. City of Charlottesville, No. 3:17CV00056, 2017 WL 3474071 (W.D. Va. Aug. 11, 2017), which enjoined Charlottesville from requiring relocation of the previously authorized rally. And although the ninety-six page complaint in the civil action of *Sines v. Kessler* is only a complaint and neither an adjudication nor an unbiased account, it contains a wealth of valuable and seemingly accurate information about the events at issue. *See* Complaint, Sines v. Kessler, 324 F. Supp. 3d 765 (W.D. Va. 2018) (No. 3:17-CV-00072). Much of this is also explored and explained in the court's opinion. *See Sines*, 324 F. Supp. 3d 765 (denying motion to dismiss).

2 *See* Jacey Fortin, *Free Speech Week at Berkeley Is Canceled, but Milo Yiannopoulos Still Plans to Talk*, N.Y. TIMES (Sept. 23, 2017), www.nytimes.com/2017/09/23/us/milo-berkeley-free-speech; *see also* Madison Park, *Ben Shapiro Spoke at Berkeley as Protesters Gathered Outside*, CNN, https://www.cnn.com/2017/09/14/us/berkeley-ben-shapiro-speech/index.html (last updated Sept. 15, 2017) (discussing the events surrounding a speech at Berkeley by Ben Shapiro).

other locations,[6] individuals and groups engaging in constitutionally protected acts of speaking, marching, parading, protesting, rallying, and demonstrating have become targets for often-large groups of often-disruptive counterprotesters.[7] And although most of the contemporary events have involved neo-Nazi, Ku Klux Klan, and other white supremacist speakers who are met with opposition from audiences on the political left, it has not always been so. Indeed, what we now identify as the problem of the hostile audience[8] has often involved more sympathetic speakers confronted by less sympathetic audiences.[9] Yet although the issue is hardly of recent vintage, contemporary events have highlighted the importance of reviewing the relevant constitutional doctrine and of thinking again and anew about how, if at all, the government and the law should respond to the disruptive audience. Indeed, the immediacy of the issue is exacerbated by the way in which existing legal doctrine on the question is less clear than is often supposed. It is now widely believed that restricting the speaker on account of the actual or predicted hostile and potentially violent reaction of the audience gets our

3 *See* Katie Reilly, *Thousands of Counter-Protesters March Against White Nationalism in Boston a Week After Charlottesville*, TIME, www.time.com/4907681/boston-free-speech-rally-protests-charlottesville (last updated Aug. 19, 2017).

4 *See* Frank Cerabino, *White Nationalist Rally in Gainesville Was Storm That Fizzled*, PALM BEACH POST (Oct. 21, 2017), https://www.palmbeachpost.com/news/white-nationalist-rally-gainesville-was-storm-that-fizzled/GDqg4AM6NX8dGsHZvr8iIM/.

5 *See* Stephanie Saul, *Dozens of Middlebury Students Are Disciplined for Charles Murray Protest*, N.Y. TIMES (May 24, 2017), www.nytimes.com/2017/05/24/us/middlebury-college-charles. Whether Charles Murray, the W.H. Brady Scholar at the American Enterprise Institute and coauthor of *The Bell Curve*, written with Richard J. Herrnstein, is accurately or fairly grouped with the white supremacist protesters in Charlottesville, Berkeley, Boston, and Gainesville is deeply contested.

6 Including, of course, the District of Columbia. An August 12, 2018, rally in Lafayette Park, organized by Jason Kessler, the organizer of the Charlottesville rally exactly a year earlier, featured a small number of protesters who were vastly outnumbered by the counterprotesters. *See* Joe Heim et al., *Protest Dwarfs 'Unite the Right' Rally*, WASH. POST, Aug. 13, 2018, at A1.

7 Because many of the recently prominent events have commenced, as in Charlottesville, with groups objecting to what they perceive to be excess government, rampant liberalism, and too little concern for white people, contemporary discourse often describes these groups as "protesters" and those challenging them as "counterprotestors." I will adhere to this usage, even while recognizing that some speakers who attract audience hostility are not protesting anything, thus making the designation "counterprotestors" somewhat of a misnomer.

8 The label "hostile audience" dates in the caselaw to Chief Justice Vinson's majority opinion in *Feiner v. New York*, 340 U.S. 315, 320 (1951), but appeared earlier in academic commentary. *See* Note, *Freedom of Speech and Assembly: The Problem of the Hostile Audience*, 49 COLUM. L. REV. 1118, 1118 (1949).

9 *See, e.g.*, Gregory v. City of Chicago, 394 U.S. 111 (1969) (invalidating restrictions on civil rights demonstrators); Beckerman v. City of Tupelo, 664 F.2d 502 (5th Cir. Unit A Dec. 1981) (same); Wolin v. Port of N.Y. Auth., 392 F.2d 83 (2d Cir. 1968) (protecting antiwar protestors); Dr. Martin Luther King, Jr. Movement, Inc. v. City of Chicago, 419 F. Supp. 667 (N.D. Ill. 1976) (protecting civil rights parade).

First Amendment priorities backward.[10] But it is hardly clear that this belief was ever correct, and, even if it were, it is even less clear that it is sufficient to deal with the constitutional and policy complexities of many of the contemporary encounters.[11] It seems appropriate now to revisit this problem of the hostile audience, not so much to urge a change in existing understandings and legal doctrine as to emphasize how many open questions still remain, and how current events might bear on possible answers to these questions.

I. The Forgotten Denouement of a Remembered Event

As has been extensively documented,[12] in 1977 a group called the National Socialist Party of America, self-described as Nazis and led by a man named Frank Collin, proposed to conduct a march in Skokie, Illinois. The neo-Nazi marchers chose Skokie as their venue precisely because of its substantial Jewish population,[13] which at the time contained an especially large number of Holocaust survivors.[14] And not only did the neo-Nazis select Skokie as a venue in order to inflict the maximum amount of mental distress on Jewish residents, but marchers also, and for the same reason, planned to carry Nazi flags, display the swastika, and wear Nazi uniforms, jackboots and all.[15]

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10 *See, e.g.*, Bible Believers v. Wayne County, 805 F.3d 228, 248 (6th Cir. 2015); Vincent Blasi, *Learned Hand and the Self-Government Theory of the First Amendment:* Masses Publishing Co. v. Patten, 61 U. Colo. L. Rev. 1, 31–33 (1990); Dan T. Coenen, *Freedom of Speech and the Criminal Law*, 97 B.U. L. Rev. 1533, 1555–57 (2017); Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 Wm. & Mary L. Rev. 189, 237–39 (1983).

11 For some of the academic articles inspired by Charlottesville and other recent events, see Timothy E.D. Horley, Essay, *Rethinking the Heckler's Veto After Charlottesville*, 104 Va. L. Rev. Online 8 (2018); JD Hsin, *Defending the Public's Forum: Theory and Doctrine in the Problem of Provocative Speech*, 69 Hastings L.J. 1099 (2018); 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 (2016); R. George Wright, *The Heckler's Veto Today*, 68 Case W. Res. L. Rev. 159 (2017).

12 Comprehensive accounts and analyses of the Skokie controversy include Donald Alexander Downs, Nazis in Skokie (1985); James L. Gibson & Richard D. Bingham, Civil Liberties and Nazis (1985); David Hamlin, The Nazi/Skokie Conflict (1980); Aryeh Neier, Defending My Enemy: American Nazis, the Skokie Case, and the Risks of Freedom (Int'l Debate Educ. Ass'n 2012) (1979); Philippa Strum, When the Nazis Came to Skokie (1999); David Goldberger, *Sources of Judicial Reluctance to Use Psychic Harm as a Basis for Suppressing Racist, Sexist and Ethnically Offensive Speech*, 56 Brook. L. Rev. 1165 (1991).

13 Geoffrey R. Stone, *Remembering the Nazis in Skokie*, Huffington Post (May 20, 2009, 5:12 AM), https://www.huffingtonpost.com/geoffrey-r-stone/remembering-the-nazis-in_b_188739.html. A majority of the town's population in 1977 was Jewish, although prior to World War II Skokie was heavily populated by Christians of German ancestry. *See* Lee C. Bollinger, The Tolerant Society 26 (1986).

14 Approximately five thousand. Stone, *supra* note 13.

15 There is no indication that the neo-Nazis in Skokie had planned to carry firearms, but now, in Charlottesville and elsewhere, protesters (and sometimes counterprotestors) with firearms add an entirely new dimension (including a new constitutional dimension after *District of Columbia v. Heller*, 554 U.S. 570 (2008), and *McDonald v. City of Chicago*, 561

Despite the efforts of the Village of Skokie[16] to prohibit the event, the Nazis' First Amendment right to hold the march was upheld both by the Supreme Court of Illinois[17] and by the United States Court of Appeals for the Seventh Circuit.[18] And although the United States Supreme Court's denial of certiorari[19] was technically not a decision on the merits,[20] the events were so prominently publicized that the Court's refusal to hear the case with full briefing and argument was widely understood by the public, and presumably by the members of the Court as well, as a strong statement that the Nazis' right to march was by then clearly established in constitutional doctrine.[21]

Although the Nazis prevailed in several courts and thus won their right to march when, where, and how they had proposed, it is often forgotten that the march never happened. The Nazis wrapped themselves in their legal victory, but at no time did they actually exercise, at least in Skokie itself, the right that they had won in court. They did hold similar but small events in Chicago on June 24 and July 9, 1978, both without benefit of permit, but the permit they were eventually granted to march in Skokie on June 25 remained unused.[22]

We are still not sure why the Nazis never marched in Skokie. Perhaps they disbelieved Skokie's representation that the town would make "every effort to protect the demonstrat[ion] . . . from responsive violence."[23] Perhaps the Nazis viewed their legal victory as more important than the march

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U.S. 742 (2010)) to the problem of confrontational speech in the public forum, a dimension not discussed in this Article. For a good recent analysis, see Timothy Zick, *Arming Public Protests*, 104 IOWA L. REV. 223 (2018).

16 In the ensuing litigation, Skokie stressed its official designation as a "village," presumably as a way of suggesting a small and close community. *See* BOLLINGER, *supra* note 13, at 26. But with a population of over sixty thousand and contiguous with Chicago, Skokie, then and now, is described more accurately as a large suburb than as a village. *See id.*; Stone, *supra* note 13.

17 Vill. of Skokie v. Nat'l Socialist Party of Am., 373 N.E.2d 21 (Ill. 1978), *aff'g in part and rev'g in part* 366 N.E.2d 347 (Ill. App. Ct. 1977).

18 Collin v. Smith, 578 F.2d 1197 (7th Cir. 1978).

19 Smith v. Collin, 439 U.S. 916 (1978) (denying certiorari); Nat'l Socialist Party of Am. v. Vill. of Skokie, 432 U.S. 43 (1977) (per curiam) (staying injunction against the march).

20 *See* Maryland v. Balt. Radio Show, Inc., 338 U.S. 912, 917–20 (1950) (Frankfurter, J., respecting the denial of the petition for writ of certiorari).

21 The conclusion that the Nazis plainly had a First Amendment right to march follows from some combination of by-then-entrenched Supreme Court decisions. *See* Police Dep't v. Mosley, 408 U.S. 92 (1972) (announcing the presumption against content discrimination); Cohen v. California, 403 U.S. 15 (1971) (disallowing offense to unwilling viewers as a justification for restriction); Brandenburg v. Ohio, 395 U.S. 444 (1969) (per curiam) (protecting Ku Klux Klan speaker from prosecution for advocating racial violence); Hague v. Comm. for Indus. Org., 307 U.S. 496 (1939) (recognizing the streets as public forums).

22 Irving Louis Horowitz & Victoria Curtis Bramson, *Skokie, the ACLU and the Endurance of Democratic Theory*, 43 LAW & CONTEMP. PROBS. 328, 330 (1979).

23 *Collin*, 578 F.2d at 1203 n.10.

itself. Or perhaps the publicity surrounding the event made it seem more desirable to the Nazis to march in front of what they hoped would be a larger audience in Chicago. But whatever the reason, the Nazis never marched in Skokie, and thus we do not know what actually would have transpired in Skokie had the Nazis elected to march there.

Because the Skokie march did not take place, we can only speculate about the answers to some number of further potential questions. Some of those questions relate to law enforcement. Assuming that there would have been far more objectors than Nazis[24]—far more counterprotesters than protesters, in the contemporary terminology—and that at least some of those objectors would have been inclined to physically confront or assault the marchers, would the Skokie police department have attempted to prevent the physical encounters and, if so, how, and with how large a force, and with what degree of aggressiveness? And if Skokie's police department, even assuming its best efforts, had not been up to the task simply because of the sheer size and anger of the hostile audience, would the Illinois State Police have stepped in? The Cook County Sheriff's Office? The Illinois National Guard? Would Illinois state authorities have requested federal assistance to protect the exercise of what was and still is, after all, a federal constitutional right?[25] Would federal force have been employed to enforce a constitutional right and a judicial order, even absent a request from the state, as happened when President Eisenhower sent federal troops to Little Rock in 1957?[26] These are all factual and historical questions rather than normative or doctrinal ones, but they suggest a number of issues that are indeed normative or

24 As, for example, in the rally in the District of Columbia marking the one-year anniversary of the original Charlottesville events, a rally that, to the disappointment of the organizers, drew only two dozen protesters and thousands of counterprotesters. *See* Ginger Gibson & Jonathan Landay, *Washington White Nationalist Rally Sputters in Sea of Counterprotesters*, REUTERS (Aug. 12, 2018), www.reuters.com/article/us-usa-protests-washington/washington-white-nationalist-rally-sputters-in-sea-of-counterprotesters-idUSKBN1KX0BF.

25 Consider, for example, the (eventual) decision by President Eisenhower in 1957 to send federal troops to Little Rock, Arkansas, to enforce Supreme Court and lower federal court desegregation rulings that had been resisted not only by much of the local citizenry, but also by state and local officials, most prominently Governor Orval Faubus. *See* Cooper v. Aaron, 358 U.S. 1 (1958); TONY FREYER, THE LITTLE ROCK CRISIS: A CONSTITUTIONAL INTERPRETATION (1984); JAMES F. SIMON, EISENHOWER VS. WARREN: THE BATTLE FOR CIVIL RIGHTS AND LIBERTIES 290–324 (2018). Conceptually, legally, and constitutionally, the events in Little Rock and Skokie may not be as different as the moral gulf between the Nazis and the fighters for desegregation in Little Rock might initially suggest. The Skokie Nazis could have been described as a group seeking to exercise a federal constitutional right that had been explicitly recognized in their case with a federal court injunction against various state officials, just as the basis for Eisenhower's directive was the need to protect a federal judicial order against state officials set on resisting rather than obeying. We do not know what, if anything, President Carter or other federal officials would have done in Skokie had state and local officials either resisted the order, or, more likely, obeyed it only grudgingly and with little expenditure of human and financial resources, but the parallels remain intriguing.

26 *See* discussion *supra* note 25.

doctrinal, or both, about which the current doctrine provides few answers. The question presented by the Nazis' nonmarch in Skokie, and the question presented by so many of the contemporary events, is thus the question of the hostile audience: Assuming the existence of a group or of individuals otherwise constitutionally entitled to say what they want to say where they want to say it, or where they would otherwise be allowed or authorized to say it, then how does the existence of an actually or potentially hostile audience change, if at all, the nature of the speaker's rights or alter, if at all, the obligation, if any, of official responsibility to protect the speakers and their speech?

II. The Doctrinal Foundation—Holes and All

One motivation for this Article, even apart from the way in which current events have highlighted the problem of the hostile audience, is that there is less settled law on the questions raised at the close of Part I than we might have supposed. But what law there is dates to 1940, and the case of *Cantwell v. Connecticut*.[27] Jesse Cantwell, like so many of the individuals who helped forge the modern First Amendment tradition, was a Jehovah's Witness.[28] He, along with his brother and father, set himself up on a street corner in New Haven, where he attempted to sell books and pamphlets in a neighborhood that was approximately ninety percent Catholic, while also playing a phonograph record vehemently attacking the Catholic Church.[29] The content of the record angered several onlookers, one of whom testified that he "felt like hitting" Cantwell if Cantwell did not leave immediately.[30] In fact, he did leave when confronted, but Cantwell, his brother, and his father were nevertheless charged with "breach of the peace" under Connecticut law.[31] The convictions of the brother and father were reversed by the Supreme Court of Connecticut, but Jesse's was upheld.[32] The U.S. Supreme Court, however, reversed the conviction as a violation of the First Amendment, with Justice Roberts writing the unanimous opinion.[33] The Court did hold out the possibility that a conviction might be upheld were a speaker to use profane words, indecent language, epithets, or personal abuse directed

27 310 U.S. 296 (1940).

28 *Id.* at 300; *see, e.g.*, Niemotko v. Maryland, 340 U.S. 268 (1951) (invalidating standardless requirement to obtain permission before using public park for demonstration); Marsh v. Alabama, 326 U.S. 501 (1946) (applying First Amendment to company-owned town); Murdock v. Pennsylvania, 319 U.S. 105 (1943) (following *Schneider* and *Lovell*); Schneider v. New Jersey, 308 U.S. 147 (1939) (invalidating blanket prohibition on door-to-door religious and political canvassing); Lovell v. City of Griffin, 303 U.S. 444 (1938) (same); *see also* Neil M. Richards, *The "Good War," the Jehovah's Witnesses, and the First Amendment*, 87 Va. L. Rev. 781, 782 (2001) (book review) ("It is remarkable that virtually all of these [First Amendment] cases involved a single group of litigants—the Jehovah's Witnesses . . . .").

29 *Cantwell*, 310 U.S. at 300–01.

30 *Id.* at 309.

31 *See id.* at 303.

32 State v. Cantwell, 8 A.2d 533 (Conn. 1939), *rev'd*, 310 U.S. 296.

33 *Cantwell*, 310 U.S. 296.

specifically at particular listeners,[34] or were a statute to have been aimed precisely at conduct such as Cantwell's and have incorporated a legislative finding that such conduct constituted a clear and present danger.[35] But because Cantwell was prosecuted only under the general common-law notion of breach of the peace,[36] and because there had been no profane or indecent direct personal abuse, the Court concluded that Cantwell's conviction could not stand.[37]

Although the *Cantwell* Court did suggest that the reactions of listeners could justify punishing a speaker if the speaker had targeted specific listeners with profane, indecent, or abusive language,[38] or if a legislature had specified the kind of language that might create a clear and present danger on the basis of listener reaction,[39] the case says next to nothing about what a legislature would need to specify to meet this standard, and nothing at all about whether speakers, as opposed to listeners, could be the appropriate objects of legal sanction. And because the audience in *Cantwell* consisted only of a few people to whom Cantwell had generally addressed his words and his recording, the decision in its entirety is at best a precursor to the hostile audience problem, and appears to be more of an angered-listener case than a hostile audience one.[40] The first true hostile audience case was yet to come, but arrived nine years after *Cantwell*, in *Terminiello v. Chicago*,[41] a decision worthy of more extended discussion.

Arthur Terminiello, a suspended Catholic priest, had been invited to Chicago from Birmingham, Alabama, to deliver a well-publicized and virulent anticommunist and anti-Semitic speech. In the speech, Terminiello referred, inter alia, to "atheistic, communistic . . . Zionist Jews" as "slimy scum," accused former Secretary of the Treasury Henry Morgenthau of plotting to cut off the limbs of German babies, charged Franklin and Eleanor Roosevelt and the Supreme Court with being part of the same Jewish communist conspiracy, and announced that the New Deal itself was among the

34 *Id.* at 309–10.

35 *Id.* at 307–08, 311.

36 *Id.* at 308.

37 *Id.* at 309–11.

38 *Id.* at 309.

39 *Id.* at 311.

40 Although no clear precedent existed when *Cantwell* was decided on the impermissibility of allowing the presence of angered or offended listeners or viewers to justify restrictions on a speaker, subsequent cases made clear what seems only implicit in *Cantwell*. *See, e.g.*, Texas v. Johnson, 491 U.S. 397 (1989) (protecting flag desecration); Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975) (protecting publicly visible nonobscene nudity); Cohen v. California, 403 U.S. 15 (1971) (protecting offensive language). For more recent but somewhat less explicit examples, see Snyder v. Phelps, 562 U.S. 443 (2011) (protecting offensive funeral protest), Virginia v. Black, 538 U.S. 343 (2003) (protecting nontargeted cross burning), R.A.V. v. City of St. Paul, 505 U.S. 377 (1992) (same).

41 337 U.S. 1 (1949).

prominent manifestations of this conspiracy.[42] Terminiello's audience in a rented hall consisted of somewhere between eight hundred and one thousand people, most of them sympathetic but some hostile.[43] Outside the hall gathered another two to three hundred more people who had been turned away for reasons of space, an additional several hundred members of a picket line, and more than one thousand other protesters, all of whom were being monitored by seventy police officers.[44] The police presence turned out to be nowhere near sufficient to prevent the pushing, milling, fighting, and rioting that broke out both inside and outside the hall, and the disorder was marked by the throwing of stones, sticks, bricks, bottles, and other makeshift weapons.[45] In response to this tumult, Terminiello was arrested, tried, and convicted for breach of the peace, and fined one hundred dollars.[46]

On appeal to the Supreme Court, Justice Douglas wrote for a 5–4 majority, relying heavily on *Stromberg v. California*[47] and reversing Terminiello's conviction, largely because the ordinance under which Terminiello had been convicted made it an "offense merely to invite dispute or to bring about a condition of unrest."[48] Chief Justice Vinson and Justice Frankfurter dissented, but it was Justice Jackson's dissent, joined by Justice Burton, which focused most closely both on what Terminiello had said and on the disorder that had ensued.[49] On his reading of the events, Jackson concluded that the existence of a "riot and . . . a speech that provoked a hostile mob and incited a friendly one"[50] justified Terminiello's conviction. Jackson did not, however, draw much of a distinction between the hostile and the friendly mobs, and thus did not distinguish Terminiello's responsibility for the actions of the supporters he incited from his responsibility for the reactions of the opponents he angered. And thus, although the question of the hostile audience was plainly on the table in *Terminiello*, the Supreme Court's decision still produced little guidance about the extent to which a speaker might be responsible not for what he urged others to do, but instead for what his words might prompt others to do to him and his supporters.

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42 *Id.* at 14–22 (Jackson, J., dissenting) (emphasis omitted) (quoting Terminiello's speech). The most extensive discussions of the facts can be found in the state court decisions. *See* City of Chicago v. Terminiello, 79 N.E.2d 39 (Ill. 1948), *rev'd*, 337 U.S. 1; City of Chicago v. Terminiello, 74 N.E.2d 45 (Ill. App. Ct. 1947), *aff'd*, 79 N.E.2d 39, *rev'd*, 337 U.S. 1.

43 *Terminiello*, 79 N.E.2d at 41.

44 *Id.*

45 *Terminiello*, 337 U.S. at 16 (Jackson, J., dissenting).

46 *See* 79 N.E.2d at 41; 74 N.E.2d at 46.

47 283 U.S. 359 (1931). *Stromberg* is remembered now more for holding that the display of a red flag was a form of speech covered and protected by the First Amendment, but its contribution to public forum and hostile audience doctrine should not be forgotten.

48 *Terminiello*, 337 U.S. at 6.

49 *Id.* at 6, 8, 13–37.

50 *Id.* at 13 (Jackson, J., dissenting).

The *Terminiello* scenario was repeated, albeit on a smaller scale, two years later in *Feiner v. New York*,[51] noteworthy in part for being the first judicial use of the term "hostile audience."[52] But again, the facts of the case made the conclusions to be drawn from it less than crystal clear. Irving Feiner had made a speech in Syracuse criticizing President Truman, the Mayor of Syracuse, the American Legion, and others, but the main import of his open-air address to a racially mixed crowd of seventy-five to eighty was "to arouse the Negro people against the whites,"[53] a message that, not surprisingly, produced an angry crowd that appeared to the police that were present to be on the verge of erupting into a number of racially charged fights.[54] The police first requested and then demanded that Feiner stop talking.[55] This he refused to do, and so he was accordingly arrested for disorderly conduct.[56] His conviction was affirmed by the New York Court of Appeals[57] and then by the Supreme Court, the latter, in an opinion written by Vinson, observing that

> [i]t is one thing to say that the police cannot be used as an instrument for the suppression of unpopular views, and another to say that, when as here the speaker passes the bounds of argument or persuasion and undertakes incitement to riot, they are powerless to prevent a breach of the peace.[58]

Justice Black dissented,[59] as did Justice Douglas, joined by Justice Minton,[60] all of them relying heavily on *Cantwell* and on their belief that the real problem was the presence of police who saw their job more as siding with the hostile part of the audience than protecting the speaker.

Feiner is commonly taken to represent the extreme case of allowing the hostile audience to exercise the so-called heckler's veto,[61] but a close reading of the opinion makes that conclusion not nearly so obvious. Was Feiner charged with provoking a hostile audience or instead with inciting a sympathetic one? Was his wrong in making his speech or in disobeying the plausi-

51 340 U.S. 315 (1951).

52 *Id.* at 320.

53 *Id.* at 316–17.

54 *Id.* at 317–18.

55 *Id.*

56 *Id.* at 318.

57 People v. Feiner, 91 N.E.2d 316 (N.Y. 1950).

58 *Feiner*, 340 U.S. at 321.

59 *Id.* at 321 (Black, J., dissenting).

60 *Id.* at 329 (Douglas, J., dissenting).

61 HARRY KALVEN, JR., A WORTHY TRADITION: FREEDOM OF SPEECH IN AMERICA 89–90 (Jamie Kalven ed., 1988); *see also* Cheryl A. Leanza, *Heckler's Veto Case Law as a Resource for Democratic Discourse*, 35 HOFSTRA L. REV. 1305, 1308–09 (2007); Ruth McGaffey, *The Heckler's Veto: A Reexamination*, 57 MARQ. L. REV. 39, 50 (1973). Not surprisingly, recent events have prompted renewed attention to the idea of a heckler's veto. *See* Clay Calvert, *Reconsidering Incitement,* Tinker *and the Heckler's Veto on College Campuses: Richard Spencer and the Charlottesville Factor*, 112 NW. U. L. REV. ONLINE 109 (2018); Horley, *supra* note 11; Wright, *supra* note 11.

ble orders of the police? Could he, as a lone speaker, have been physically removed rather than arrested?[62] Should he have been?

Although *Feiner* is hazy in just these ways, the decisions that mark *Feiner*'s burial contain fewer uncertainties. In three different 1960s cases dealing with civil rights demonstrators and unambiguously hostile audiences, the Supreme Court appears to have eviscerated *Feiner* of whatever authority it may once have had. In *Edwards v. South Carolina*, an 8–1 Supreme Court reversed the breach of the peace conviction of 187 African American civil rights demonstrators who were marching and singing in Columbia, South Carolina.[63] The police, fearing impending violence by an aggressively hostile audience, threatened the demonstrators with arrest if they did not disperse, and the arrest, trial, and conviction of the demonstrators followed their refusal to obey the police demand.[64] For Justice Stewart, this case was "a far cry from the situation in *Feiner*,"[65] and seemed to him to involve "no more than that the opinions which they were peaceably expressing were sufficiently opposed to the views of the majority of the community to attract a crowd and necessitate police protection."[66] Quoting *Terminiello*, Stewart concluded that criminal convictions of the speakers would be permitted only if there was a "clear and present danger . . . ris[ing] far above public inconvenience, annoyance, or unrest."[67]

Facts similar to those in *Edwards* were presented in *Cox v. Louisiana*, where again the leader of a civil rights demonstration, the Reverend B. Elton Cox, was arrested for, inter alia, disturbing the peace in Baton Rouge, Louisiana.[68] As a result of his arrest, Cox was sentenced to a cumulative one year and nine months in jail for leading a group of about two thousand singing, cheering, and clapping demonstrators.[69] In response to the city's claim that action was taken against the demonstration because "violence was about to erupt,"[70] Justice Goldberg again distinguished *Feiner*, pointing out that no actual violence had ensued, that the presence of local and state police appeared sufficient to prevent any violence, and that "constitutional rights may not be denied simply because of hostility to their assertion or exer-

62 The law on the power of the police to move or remove people is largely to the effect that the greater includes the lesser, and thus that if the police may lawfully arrest someone then they may lawfully remove them without arrest. *See* Rachel Harmon, Lawful Orders and Police Use of Force (Sept. 29, 2017) (unpublished manuscript) (on file with author). But an important question, and one that the doctrine neither answers nor even addresses, is whether the First Amendment might require attempted removal prior to arrest, a requirement that does not exist outside of the First Amendment context.

63 Edwards v. South Carolina, 372 U.S. 229 (1963).

64 *Id.* at 233.

65 *Id.* at 236.

66 *Id.* at 237.

67 *Id.* (quoting Terminiello v. Chicago, 337 U.S. 1, 4 (1949)).

68 Cox v. Louisiana, 379 U.S. 536 (1965).

69 *Id.* at 538–39.

70 *Id.* at 550.

cise."[71] And thus by the time similar facts were once again presented in 1969, in a case involving a Chicago antiwar demonstration led by the comedian and civil rights activist Dick Gregory,[72] Chief Justice Warren was able to begin his majority opinion, an opinion that followed *Edwards* and *Cox* in all material respects, with the observation that "[t]his is a simple case."[73]

Although some might suspect that the results in *Edwards*, *Cox*, and *Gregory* were heavily influenced by the Warren Court's sympathy with the civil rights demonstrators and the causes they were espousing,[74] that conclusion is belied[75] by subsequent developments, most directly the Supreme Court's 1992 decision in *Forsyth County v. Nationalist Movement*.[76] Here, the demonstrators were members of a white supremacist organization who proposed to conduct a demonstration in opposition to the federal holiday commemorating the birth of Martin Luther King, Jr.[77] But because the county sought to impose a fee for the demonstration permit under a county ordinance allowing the amount of the fee to vary with the expected costs of law enforcement for the particular demonstration, the demonstrators refused to pay the fee and instead challenged the constitutionality of the ordinance.[78]

Much of Justice Blackmun's majority opinion dealt with the question whether a facial challenge was appropriate in this case,[79] but the most important aspect of *Forsyth County* for present purposes is the Court's conclusion that imposing a fee based on the expected costs of police protection and other security was a form of impermissible content regulation, given that the amount of security required would plainly vary with the content of the

71 *Id.* at 551 (quoting Watson v. City of Memphis, 373 U.S. 526, 535 (1963)).

72 Gregory v. City of Chicago, 394 U.S. 111 (1969).

73 *Id.* at 111.

74 *Cf.* HARRY KALVEN, JR., THE NEGRO AND THE FIRST AMENDMENT (1965) (documenting First Amendment decisions that arose in the context of 1960s civil rights issues).

75 The statement in the text is perhaps too quick. Actually, there are four possibilities. One is that a subsequent willingness to protect morally undesirable demonstrators even in the face of a hostile audience, as in *Forsyth County v. Nationalist Movement*, 505 U.S. 123 (1992), is indeed evidence that the results in *Edwards*, *Cox*, and *Gregory* had little or nothing to do with sympathy to the demonstrators and their cause. Second is that a change in the membership of the Court (only Justices Brennan and White sat for both *Gregory* and *Forsyth County*) makes any generalization across the relevant time period impossible. Third is that stare decisis really does matter for some issues at some times on the Supreme Court, making *Cox*, *Edwards*, and *Gregory* potentially causally influential of the *Forsyth County* outcome. *See* Frederick Schauer, *Has Precedent Ever Really Mattered in the Supreme Court?*, 24 GA. ST. U. L. REV. 381 (2007). And fourth is that the identity of the demonstrators genuinely made a difference, given that the ordinance under attack in *Forsyth County* was enacted not in response to the kind of white supremacist parades at issue in that case itself, but against the background of some number of recent African American civil rights demonstrations in Forsyth County, an overwhelmingly white and undeniably hostile place.

76 505 U.S. 123 (1992).

77 *Id.* at 127.

78 *Id.*

79 *Id.* at 129–36.

speech.[80] And although Chief Justice Rehnquist dissented, joined by Justices White, Scalia, and Thomas,[81] the thrust of his dissent was that no such content-based fee had been imposed in this case, or even in previous demonstrations under the ordinance. As a result, we cannot know how the dissenters would have voted had such a fee been imposed here, but it is at least plausible to speculate that in 1992 all nine members of the Supreme Court believed it a violation of the First Amendment to impose upon demonstrators the cost of police protection and related security to control a hostile audience whose hostility was in response to the content of an otherwise constitutionally protected speech, protest, march, demonstration, parade, or rally.

On the surface, it thus appears that we now have a considerable amount of law on the problem of the hostile audience, a body of doctrine going back at least to the 1930s and continuing through a collection of modern lower court cases applying what seems to be Supreme Court doctrine through *Forsyth County*.[82] But appearances can be deceiving. In a number of important respects, the doctrine leaves substantial and increasingly salient questions unanswered. For example, many of the Supreme Court decisions described above rely heavily or at times almost exclusively on the vagueness of the relevant governing standards,[83] and thus on the consequent worry that such vagueness will allow excess official discretion, a discretion that would create an undue risk of impermissible content-based (and especially viewpoint-

80 *Id.* at 137. In a controversial line of "secondary effects" cases, the Supreme Court has held that secondary effects indirectly caused by the content of speech might be regulated without violating the prohibition on content regulation. Most of those cases have involved zoning and related restrictions on "adult" establishments, where the justification for the regulation was the effect on the neighborhood of such establishments in terms of crime, property value, viability of retail trade, and general quality of life. *See* City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986). For subsequent applications, discussions, and criticism of the secondary effects idea, see City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425 (2002); City of Erie v. Pap's A.M., 529 U.S. 277 (2000); Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991); Charles H. Clarke, *Freedom of Speech and the Problem of the Lawful Harmful Public Reaction: Adult Use Cases of* Renton *and* Mini Theatres, 20 AKRON L. REV. 187 (1986); Heidi Kitrosser, *From Marshall McLuhan to Anthropomorphic Cows: Communicative Manner and the First Amendment*, 96 NW. U. L. REV. 1339 (2002); Philip J. Prygoski, *The Supreme Court's "Secondary Effects" Analysis in Free Speech Cases*, 6 COOLEY L. REV. 1 (1989); Seana Valentine Shiffrin, *Speech, Death, and Double Effect*, 78 N.Y.U. L. REV. 1135 (2003); Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46 (1987); Note, *The Content Distinction in Free Speech Analysis After* Renton, 102 HARV. L. REV. 1904 (1989). But if the secondary effects approach is not to be limited to restrictions on places of adult entertainment, the tension between that approach and *Forsyth County* (and *Terminiello*, as noted by Justice Brennan's dissent in *Renton*, 475 U.S. at 59 (Brennan, J., dissenting)), where an analogous secondary effect was deemed to be content based, is inescapable.

81 *Forsyth County*, 505 U.S. at 137 (Rehnquist, C.J., dissenting).

82 *See* Bible Believers v. Wayne County, 805 F.3d 228 (6th Cir. 2015) (extensively analyzing the doctrine); *see also* Christian Knights of the Ku Klux Klan Invisible Empire, Inc. v. District of Columbia, 972 F.2d 365 (D.C. Cir. 1992); Glasson v. City of Louisville, 518 F.2d 899 (6th Cir. 1975); Smith v. Ross, 482 F.2d 33 (6th Cir. 1973).

83 *E.g.*, Edwards v. South Carolina, 372 U.S. 229, 236–38 (1963); Cantwell v. Connecticut, 310 U.S. 296, 307–08 (1940).

based) discrimination against demonstrators with views opposed to those of the officials making the decisions.[84] But a vagueness determination is often for a court the path of least resistance, allowing courts to skirt the direct question of which kinds of nonvague restrictions are permissible and which are not.[85] As a consequence, we know less than we might—here and elsewhere—about just what kinds of specific, nonvague standards would be permissible, or just how specific the standard must be to avoid invalidation on vagueness grounds.

Other "holes" in the existing doctrine are equally apparent. We know from *Cantwell*, *Terminiello*, and the above-described cases from the 1960s that law enforcement cannot too quickly control an actually or dangerous situation by restricting or arresting the speaker whose words have launched the dangerous situation, and we know that police are required to take all reasonable steps before resorting to speaker control, but we know very little about what is to count as reasonable, what degree of deployment a police department is required to use, and the extent to which a local police department is required by the First Amendment to call upon county law enforcement, state law enforcement, or state military (i.e., the National Guard) forces before taking action against the speaker. Indeed, the problem is especially apparent in places like Skokie and Charlottesville, where a police force of a size normally sufficient to deal with law enforcement problems of a small city must confront a law enforcement issue of far greater magnitude, involving far more people than would typically congregate in a smallish community.

Relatedly, if law enforcement fails to protect the speaker, then what state and federal remedies, if any, are available on behalf of the speaker against the relevant officials and the relevant agencies? Can speakers compel the allocation of law enforcement resources beyond the jurisdiction of those officially employed by that jurisdiction? If so, can they compel the county or the state within which a municipality is located to take action? And so on. What follows is an attempt to explore these and the various other questions that are now arising in the context of an increasing number of increasingly hostile confrontations between speakers and those who would protest and demonstrate against them.

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84 For sources illustrative of First Amendment vagueness, see generally Reno v. ACLU, 521 U.S. 844 (1997); Bd. of Airport Comm'rs v. Jews for Jesus, Inc., 482 U.S. 569 (1987); Kolender v. Lawson, 461 U.S. 352 (1983); Smith v. Goguen, 415 U.S. 566 (1974); Grayned v. City of Rockford, 408 U.S. 104 (1972); Interstate Circuit, Inc. v. City of Dallas, 390 U.S. 676 (1968); Keyishian v. Bd. of Regents, 385 U.S. 589 (1967); Carissa Byrne Hessick, *Vagueness Principles*, 48 ARIZ. ST. L.J. 1137 (2016); Peter W. Low & Joel S. Johnson, *Changing the Vocabulary of the Vagueness Doctrine*, 101 VA. L. REV. 2051 (2015); Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67 (1960).

85 *See* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 177–83 (1962); Melvyn R. Durchslag, *The Inevitability (and Desirability?) of Avoidance: A Response to Dean Kloppenburg*, 56 CASE W. RES. L. REV. 1043, 1046 (2006).

III. How Much Is Enough?

As contemporary events make clear, the most common problem (or at least the problem focused on in this Article) flowing from demonstrations, rallies, and even individual inflammatory speakers is rarely that speakers will urge their listeners to take unlawful actions against third parties, as was the case in *Brandenburg v. Ohio*.[86] Nor is it that listeners may be offended, disgusted, or shocked, as in *Cohen v. California*,[87] although that is surely often the case. Rather, it is that offended, shocked, disgusted, angry, or strongly disagreeing listeners (or viewers) will threaten to take, or will actually take, violent action against the initial speakers and that disorder will ensue, as was the case in the decisions described above, and as would probably have occurred had the Nazis actually marched in Skokie.[88] Often the accounts of such events are unclear and conflicting, and as a result it is probably wise to include in the analysis those situations in which audience reactions eventually lead to violence and disorder, even though it is sometimes unclear exactly who, literally or figuratively, threw the first punch. Still, the basic idea is that a speaker's words or images are sometimes viewed as highly controversial, offensive, or harmful by some portion of an audience, and that genuine physical violence or the imminent threat of it ensues.

One thing that is now settled, if anything is settled, and that the above-described post-*Feiner* cases make reasonably clear,[89] is that in such cases law enforcement may not initially or prematurely arrest the speaker. It also appears settled from the same line of cases that the state may not prosecute on grounds of incitement the speakers whose speech has prompted the reactions. To do so would create what we now call the "heckler's veto,"[90] in which those who would protest against a speech have, in effect, the right to stop the speaker from speaking. And it is probably settled as well that even if getting the speaker to stop speaking would be genuinely necessary to prevent violence, punitive actions against the speaker may not take place until after the speaker has been given the opportunity to leave the venue on his or her

86 395 U.S. 444 (1969) (per curiam). And so too with the earlier cases in the American free speech canon, all of which involved speakers (or writers) who encouraged others to resist conscription or contribute to the overthrow of the government. *E.g.*, Whitney v. California, 274 U.S. 357 (1927), *overruled in part by Brandenburg*, 395 U.S. 444; Gitlow v. New York, 268 U.S. 652 (1925); Abrams v. United States, 250 U.S. 616 (1919); Debs v. United States, 249 U.S. 211 (1919); Frohwerk v. United States, 249 U.S. 204 (1919); Schenck v. United States, 249 U.S. 47 (1919); Masses Publ'g Co. v. Patten, 244 F. 535 (S.D.N.Y. 1917), *rev'd*, 246 F. 24 (2d Cir. 1917).

87 403 U.S. 15 (1971).

88 Sometimes the violence ensues when counterprotesters provoke, in the "fighting words" sense of "provoke." *See* Chaplinsky v. New Hampshire, 315 U.S. 568 (1942); Gooding v. Wilson, 405 U.S. 518 (1972) (narrowing the scope of the "fighting words" exception); *see also* Lewis v. City of New Orleans, 415 U.S. 130 (1974); Rosenfeld v. New Jersey, 408 U.S. 901 (1972) (violent retaliatory reactions from the protesters).

89 *See supra* notes 63–82 and accompanying text.

90 *See supra* note 61 and accompanying text; *see also* Johnson, *supra* note 11.

own, and perhaps, absent the speaker's willingness to depart, there has been an attempt at a nonpunitive removal of the speaker.[91]

But although this much seems more or less clear, what is importantly not clear is just how much the authorities must do before taking some sort of action against the speaker or before bringing the entire event to a halt.[92] In some past cases, as in the civil rights demonstration cases described above,[93] the authorities have done very little, perhaps because the police had greater sympathy with the objectors than with the initial speaker. And in Charlottesville in August 2017, where there had been no credible suggestions of police sympathy with the white supremacist protesters, the police likely underreacted in part out of fear of the consequences of overreaction.[94] But even assuming total good faith and the best intentions and efforts on the part of a municipality, how much must that municipality do? Must it deploy all or most of its police force, even if doing so would create other dangers to safety and security?[95] Must it call on nonlocal law enforcement authorities, such as county police, state police, or even the National Guard?

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91 *See supra* note 62 and accompanying text.

92 For the Virginia unlawful assembly law, which was used in Charlottesville, see VA. CODE ANN. § 18.2-411 (West 2018). The earlier cases conclude that "clear and present danger" is the appropriate standard, *see* Edwards v. South Carolina, 372 U.S. 229, 237 (1963); Terminiello v. Chicago, 337 U.S. 1, 4–5 (1949); Cantwell v. Connecticut, 310 U.S. 296, 308, 311 (1940), but those cases precede the reformulation of "clear and present danger" in *Brandenburg*. *See* Brandenburg v. Ohio, 395 U.S. 444 (1969) (per curiam).

93 *See supra* notes 63–82 and accompanying text.

94 *See* HUNTON & WILLIAMS, *supra* note 1, at 153–65. Not surprisingly, the massive law enforcement presence in Charlottesville on August 12, 2018, when large numbers of counterprotesters (and essentially no white supremacists or their allies) commemorated the one-year anniversary of the events of a year earlier, generated complaints about there being too much police restriction, despite the fact that the events of August 11 and 12, 2018, produced essentially no injuries and no arrests. *See* Tyler Hammel, *Charlottesville Residents Tell Councilors that Aug. 12 Security Measures Went Too Far*, DAILY PROGRESS (Aug. 14, 2018), https://www.dailyprogress.com/news/local/city/charlottesville-residents-tell-councilors-that-aug-security-measures-went-too/article_f6918dd6-a02e-11e8-a892-a31fbb8d562c.html.

95 Several days before the Unite the Right rally in Charlottesville on August 12, 2017, the Charlottesville Police requested the Albemarle County Police (whose jurisdiction does not include the City of Charlottesville) and the University of Virginia Police (whose jurisdiction does not extend beyond the University) to take all of the Charlottesville Police Department's 911 calls. The City made this request because it knew that its security responsibilities for the Unite the Right rally would preclude being able to take or respond to the normal array of 911 calls. The requested departments agreed to this request, although of course they were not required to do so. *See* Lisa Provence, *Police Expect Thousands, Closed Streets Downtown August 12*, C-VILLE WKLY. (Aug. 10, 2017), www.c-ville.com/police-expect-thousands-closed-streets-downtown-august-12. If the requests had been refused, the costs to general security occasioned by providing security to the Unite the Right demonstrators would have been even more obvious. And even with the requests for assistance in taking 911 calls having been granted, was there less county and university security than there otherwise would have been because the county and university security forces had taken on additional responsibilities without additional staffing or funding?

We now know that these problems come with real numbers and real dollars attached to them. The University of California at Berkeley estimates that it cost in the vicinity of four million dollars to provide law enforcement and related services for the actual or planned speeches by only three individuals—Ann Coulter, Ben Shapiro, and Milo Yiannopoulos—in only one month.[96] The City of Charlottesville spent nearly seventy thousand dollars on the August 12, 2017, "Unite the Right" rally[97] and, earlier, thirty thousand dollars on extra police and other services for a July 8 march by the Ku Klux Klan, and additional costs were incurred by county and state police, the University of Virginia, and other official bodies.[98] The University of Florida incurred security costs of five hundred thousand dollars in connection with a lecture by white supremacist Richard Spencer.[99] And when a small number of the white supremacists who initiated the Charlottesville events of 2017 gathered in the District of Columbia a year later to celebrate the anniversary of the earlier event and were met with thousands of counterprotesters, the

96 *See* UNIV. OF CAL. BERKELEY, REPORT OF THE CHANCELLOR'S COMMISSION ON FREE SPEECH (2018), https://chancellor.berkeley.edu/sites/default/files/report_of_the_commission_on_free_speech.pdf. For various media reports with slightly varying numbers, see Jocelyn Gecker, *The Cost of Free Speech Isn't Cheap at UC Berkeley*, AP NEWS (Sept. 15, 2017), https://www.apnews.com/f2d6a139cd6b44d7a743932f2b913677; Chris Quintana, *Berkeley's Leader Saw Hints that 'Free Speech Week' Was a Stunt. Here's Why She Planned for It Anyway.*, CHRON. OF HIGHER EDUC. (Sept. 26, 2017), https://www.chronicle.com/article/Berkeley-s-Leader-Saw-Hints/241299; Elise Ulwelling, *Ben Shapiro's Visit Cost UC Berkeley an Estimated $600K for Security*, DAILY CALIFORNIAN (Sept. 18, 2017), http://www.dailycal.org/2017/09/17/uc-berkeley-security-costs-ben-shapiros-visit-estimated-600k/.

97 Andrew Blake, *'Unite the Right' Rally Costs City $70K in Security: Charlottesville Police Dept.*, WASH. TIMES (Sept. 26, 2017), https://www.washingtontimes.com/news/2017/sep/26/charlottesville-police-place-70k-price-tag-unite-r/.

98 *See* Dean Seal, *CPD, VSP Tally Costs for KK Rally: City Spent $35k, VSP Minimized Trooper Overtime*, DAILY PROGRESS (Aug. 2, 2017), https://www.dailyprogress.com/news/local/cpd-vsp-tally-costs-for-kkk-rally-city-spent-k/article_ea31c9b0-7790-11e7-82bc-333e7f750dd7.html; *see also* Blake, *supra* note 97. In addition, the University of Virginia itself spent another sixty-three thousand dollars on law enforcement for the August 11 white supremacist rally, a rally coordinated with the Unite the Right rally a day later. *See* Ruth Serven, *UVa Spent $63,000 on Response to August Rallies*, DAILY PROGRESS (Sept. 27, 2017), https://www.dailyprogress.com/news/uva-spent-on-response-to-august-rallies/article_75a1cf38-a3ea-11e7-b66f-ab5b5925c684.html. Subsequent reporting and accounting produced a total of five hundred fourty thousand dollars in combined costs for the City of Charlottesville, the County of Albemarle, and the University of Virginia for the July 8, August 11, and August 12 events, although this figure also includes costs (such as six thousand dollars to place a shroud over the statute of Robert E. Lee) not directly attributable to any of the rallies, demonstrators, protests, or counterprotests. *See* Chris Suarez & Allison Wrabel, *Charlottesville Rally Costs Top Half a Million Dollars*, ROANOKE TIMES (Jan. 1, 2018), https://www.roanoke.com/news/virginia/charlottesville-rally-costs-top-half-a-million-dollars/article_aa5d7c2a-2440-5d35-a0cb-c0c6188202ef.html.

99 Claire McNeill, *UF Security Costs Top $500,000 for Richard Spencer's Talk on White 'Separation,'* TAMPA BAY TIMES (Oct. 11, 2017), https://www.tampabay.com/news/education/college/uf-security-costs-top-500000-for-richard-spencers-talk-on-white-separation/2340689.

security expense incurred by the District for this one event exceeded two million dollars.[100]

It might once have been thought that claims about the expense of providing protection for speakers likely to cause[101] a violent confrontation with a hostile audience were prone to be exaggerated by state and local officials eager to prevent the speech in the first place, but today such suspicions rest on a flimsier basis. Now, with the benefit of real events and real numbers, we can understand that officials worried about costs as well as about danger will be concerned that every dollar spent on protecting unpopular or even hateful speakers will be a dollar unavailable for seemingly—at least to them—more worthy purposes.[102]

The question of "how much?" involves a complex intersection of financial, logistical, personnel, jurisdictional, and, of course, philosophical considerations.[103] In the typical hostile audience scenario these days, the size of the hostile audience is substantially greater than the size of the group of "primary" speakers.[104] And often, as was certainly the case in Charlottesville, the

100 *See* Fenit Nirappil, *White-Supremacist Rally Cost D.C. at Least $2.6 Million, Preliminary Estimate Shows*, WASH. POST (Aug. 14, 2018), https://www.washingtonpost.com/local/dc-politics/white-supremacist-rally-cost-dc-26-million-preliminary-estimate-shows/2018/08/14/3edebcce-9ffa-11e8-83d2-70203b8d7b44_story.html?utm_term=.5759063ce1f0.

101 The attribution of causation here is tricky. In the "but for" language of American tort law, we can say that the violent confrontation in Charlottesville on August 12 was the "but for" consequence of the march by the Unite the Right demonstrators. The violence was also, however, the "but for" consequence of the existence of so-called counterprotestors, and it may have been the "but for" consequence of the size and nature of the police presence. Attributions of causation under circumstances of multiple causation are often (and perhaps necessarily) morally loaded, however, such that people may be hesitant to attribute the causation of unpleasant consequences to those whose actions we deem morally desirable, and, conversely, prone to attribute causation for such consequences to those we are willing to condemn morally. *See* Mark D. Alicke, *Culpable Causation*, 63 J. PERSONALITY & SOC. PSYCHOL. 368 (1992). On the relationship between moral attribution and other factors people use to attribute causality, see Barbara A. Spellman & Alexandra Kincannon, *The Relationship Between Counterfactual ("But For") and Causal Reasoning: Experimental Findings and Implications for Jurors' Decisions*, 64 LAW & CONTEMP. PROBS. 241 (2001). And thus although both the Charlottesville white supremacist protestors and the politically left counterprotestors were each the "but for" causes of the events that ensued, the subsequent discourse has tended to assign causal responsibility largely to the white supremacists, the constitutional (and not moral) equivalency of their status notwithstanding.

102 *See* Macklin W. Thornton, Comment, *Laying Siege to the Ivory Tower: Resource Allocation in Response to the Heckler's Veto on University Campuses*, 55 SAN DIEGO L. REV. 673, 722–27 (2018).

103 *Cf.* STEPHEN HOLMES & CASS R. SUNSTEIN, THE COST OF RIGHTS: WHY LIBERTY DEPENDS ON TAXES (1999) (discussing costs of rights protections generally).

104 The labels are complex. *See supra* note 7. It is common to refer nowadays to the initial speakers as "protesters" because they are often protesting what they see as a government excessively sympathetic to the claims of racial and religious minorities, and then to refer to the audience as the "counterprotesters." But there is no reason to think that the scenarios are necessarily so limited, and we can imagine events in which a hostile audience is challenging a speaker or group of speakers who are not protesting anything.

size of the hostile audience dwarfs the size of the local police force. In such cases, local law enforcement appears to have a series of choices, and it may be useful to explore several of the alternatives.

One possibility, when faced with the prospect of a large and potentially violent counterdemonstration, is simply for local law enforcement to do the best it can with its existing resources and personnel. If violence then breaks out during the event, or is about to break out imminently, the police could then, but not earlier, use whatever local mechanisms are available—in Charlottesville it was the declaration of an "unlawful assembly"[105]—to bring the event to a halt, and then use law enforcement to restrict or apprehend those who did not obey lawful orders to disperse. Assuming that the restriction and apprehension did not selectively single out the initial speaker (or speaking group) for apprehension or restriction, and assuming that anticipatory restriction requires genuine immediate prospects of violence, there appears to be no First Amendment problem with such an approach. The police do, after all, break up fights all the time, especially ones that break out in bars after angry words are spoken, and no one has ever even suggested that this creates a First Amendment problem, even if, as is so often the case, the fight was ignited by an exchange of what would be, in other contexts, constitutionally protected speech.

For admirable reasons, however, law enforcement officials would generally prefer preventing fights to breaking them up, and here is where matters become more difficult. Assuming, realistically, that law enforcement anticipates disorder prior to some event, and assuming, more and more realistically these days, that local law enforcement believes it is unlikely to be able with existing personnel and resources to control the violence once it erupts, what should the police do? What must it do? As we know from the cases described above, law enforcement cannot simply sanction the speaker or refuse to grant a permit or otherwise refuse to allow the event to take place.[106] And as we know from actual events, local law enforcement will typically request support from regional and state law enforcement, and such requests are commonly granted if reasonable, thus making extrajurisdictional

105 HUNTON & WILLIAMS, *supra* note 1, at 182. See *id.* at 205–06 on the use of VA. CODE ANN. §§ 18.2-406, 18.2-407 (West 2018). On the interaction between such statutes and the First Amendment, see United Steelworkers v. Dalton, 544 F. Supp. 291, 293 (E.D. Va. 1982).

106 Indeed, the previous version of the Virginia unlawful assembly statute had been invalidated for failure to incorporate a "clear and present danger" standard. *See* Owens v. Commonwealth, 179 S.E.2d 477 (Va. 1971). Perhaps chastened by earlier invalidations of viewpoint-based speaker restrictions, *e.g.*, Kessler v. City of Charlottesville, No. 3:17CV00056, 2017 WL 3474071 (W.D. Va. Aug. 11, 2017); Draego v. City of Charlottesville, No. 3:16-CV-00057, 2016 WL 6834025 (W.D. Va. Nov. 18, 2016), Charlottesville granted no permits to anyone for demonstrations marking the one-year anniversary of the events of August 12, 2017. The permit refusals produced no court challenges, and so the question remains open whether the events of a year earlier would have satisfied the clear and present danger tests of earlier Supreme Court cases.

support commonly available.[107] But the costs of that extrajurisdictional or cross-jurisdictional support are considerable, and at some point, although we do not know at what point, a city, county, or state will simply not have the available personnel and not have the available funds. When this point is reached, can a city then deny a permit, or otherwise prohibit the event? And assuming that such decisions will eventually come before the courts, can a city or a county or a state argue that providing more than some amount will then take funds away from school lunches? From emergency medical services? From public housing? From low-income welfare assistance? From providing services that themselves have a constitutional aspect, such as providing a certain quality of unpaid legal assistance for defendants in criminal cases,[108] or, in earlier times, providing police protection for African American children seeking to attend previously segregated schools?[109] Now that we know the actual costs involved in places such as Berkeley, Charlottesville, Gainesville, and the District of Columbia, we cannot avoid confronting the fact that protecting speakers exercising their First Amendment rights will come at some cost to other worthy municipal goals, including, at times, protecting or enforcing other constitutional rights.[110]

These problems are exacerbated by the fact that more extreme speakers are likely to require more protection from hostile audiences. And thus, perhaps perversely, the more extreme a group's views are, the greater will be its ability to call upon public resources for its protection, and the greater the amount of the resources it will require for its protection. And thus, even more ironically or perversely, it may turn out that difficult questions of allocation of state and local resources are being made not by legislatures, and not by courts, but by those who are least representative of the public, which is ultimately supplying the resources.[111]

Alternatively, law enforcement might at some point simply say to prospective demonstrators that it can provide only so much protection, and that any injuries caused by disruption beyond the ability of the police to control the audience will simply have to be borne by those who have suffered them. But although local police may on occasion stand back and let a small number of combatants in a bar fight simply fight it out, such an approach seems morally, politically, and perhaps constitutionally unacceptable both for bar fights

107 HUNTON & WILLIAMS, *supra* note 1, at 101; *see also supra* note 95 and accompanying text.

108 Although the right to appointed counsel in (most) criminal cases has been guaranteed since 1963, Gideon v. Wainwright, 372 U.S. 335, 352 (1963), the quality of representation above a minimal standard of competence is largely a matter of governmental discretion. On these issues, see Peter A. Joy, *Rationing Justice by Rationing Lawyers*, 37 WASH. U. J.L. & POL'Y 205 (2011).

109 For accounts of various episodes, see MARK V. TUSHNET, MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1936–1961 (1994).

110 For a prescient discussion of many of the issues, see THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 336–42 (1970).

111 I am grateful to David Pozen for valuable insights on this point.

and for larger events.[112] And as long as that is so, then there is no avoiding the problem occasioned by the fact that providing security for the exercise of First Amendment rights will draw resources away from other uses.[113]

Faced with this inevitability, the entity responsible for the additional costs might attempt to pass the costs onto others. The Universities of California, Florida, and Virginia could raise tuition, presumably following the lead of the car rental companies and the airlines with their fuel price fees by calling the tuition increase a "First Amendment security fee" or something of that variety. But of course universities operate in competitive and price-elastic markets,[114] and thus attempting to pass costs on to students—or on to faculty by cutting salaries, for example, or on to a university's fan base by reducing the number of football and basketball scholarships—will involve other sacrifices.[115] So too with cities and towns, especially ones that seek to attract business by offering lower taxes or special tax breaks or rebates. Here again, the incentives are almost all in the direction of cities and towns attempting to reduce the costs of what the courts have said they must do in the name of the First Amendment, and as long as it remains generally constitutionally impermissible for federal courts to order state and local governments to raise taxes,[116] the problem appears to be ever more intractable.

Although the problems seem beyond easy solution, it is a mistake to assume that such problems have not been identified previously and in other contexts. Most obviously, the issue of constitutionally mandated and potentially unpopular allocations and reallocations of scarce resources has been

112 On the lack of a constitutional claim against public authorities who do not act against violence, see, albeit in a very different context, DeShaney v. Winnebago Cty. Dep't of Soc. Servs., 489 U.S. 189 (1989) (denying constitutional claim based on state's failure to provide protection against violence). For the argument that *DeShaney* and police inaction in the face of impending violence are conceptually similar, see Barbara E. Armacost, *Affirmative Duties, Systemic Harms, and the Due Process Clause*, 94 MICH. L. REV. 982, 984 (1996); David A. Strauss, *Due Process, Government Inaction, and Private Wrongs*, 1989 SUP. CT. REV. 53.

113 The problem, of course, is not unique to the First Amendment, and arises whenever rights have costs (which they usually do). *See* Katharine G. Young, *Rights and Queues: On Distributive Contests in the Modern State*, 55 COLUM. J. TRANSNAT'L L. 65 (2016).

114 Such genuine competition and price elasticity may be less present for major universities than for major car rental companies and major airlines, and thus as an empirical matter what in antitrust law is called "conscious parallelism," Theatre Enters., Inc. v. Paramount Film Distrib. Corp., 346 U.S. 537, 541 (1954), may exist less often in the market for higher education.

115 Such sacrifices, ironically, may produce further demonstrations, which might then produce further counterdemonstrations. For example, University of California at Berkeley students are inclined toward public protest in the face of proposed tuition increases, and so an attempt to pass along the costs of demonstrations to students is likely to do little other than encourage more demonstrations. *See* Francesca Munsayac, *UC Berkeley Students Rally Against University Tuition Hikes*, DAILY CALIFORNIAN (Jan. 24, 2018), http://www.dailycal.org/2018/01/24/uc-berkeley-students-rally-university-tuition-hikes/.

116 *See* Missouri v. Jenkins, 515 U.S. 70 (1995).

widely discussed in the context of judicially enforced social welfare rights.[117] Such rights—typically to housing, education, welfare, health care, and pensions—are not much part of the American constitutional landscape, but do have a larger presence elsewhere. And thus when the Constitutional Court of South Africa mandates greater governmental expenditures on housing,[118] is it forcing the South African Parliament to allocate scarce resources among, say, housing, education, food, and health, in a way other than that which would have been chosen by Parliament? And when the same court mandates the provision of antiretrovirals to those suffering from AIDS, is it taking resources away from those suffering from other illnesses?[119] This is not the place to replay the many debates that already exist on the subject,[120] but it is a reminder that the constitutionalization of an interest will produce resource reallocations, and when constitutionalization is accompanied by judicial enforcement, what is then produced is a judicial determination of social resource allocations.

The issue of judicial determinations of governmental priorities among worthy goals is obvious with respect to positive social welfare rights, but exists as well with most other rights. The issue most clearly exists with respect to those constitutional rights that actually do require affirmative government expenditures, as with the right to counsel.[121] But even rights that do not seem so obviously to require expenditures—so-called negative rights, such as the rights of freedom of speech and press—are still indirectly costly, in the sense that by imposing limits on what the state—in its own unconstrained wisdom—might decide to do as a matter of policy, the existence and enforcement of a negative right is itself a cost.[122] But although when and how this is so deserves further analysis, for our purposes here the clearer and thus better analogy is simply to the example of positive social welfare rights. And thus the normative question is about the way in which requiring protection for

117 *See generally* MARK TUSHNET, WEAK COURTS, STRONG RIGHTS: JUDICIAL REVIEW AND SOCIAL WELFARE RIGHTS IN COMPARATIVE CONSTITUTIONAL LAW (2008); KATHARINE G. YOUNG, CONSTITUTING ECONOMIC AND SOCIAL RIGHTS (2012).

118 *Gov't of the Republic v. Grootboom* 2001 (1) SA 46 (CC) (S. Afr.). Perhaps recognizing the difficult allocational problems involved in mandating concrete housing expenditures, the Constitutional Court refused to specify minimum expenditures, requiring only that governmental determinations of housing expenditures be reasonable. *Id.* at 66.

119 *See Minister of Health v. Treatment Action Campaign* 2002 (5) SA 721 (CC) (S. Afr.).

120 *See supra* note 117.

121 *See, e.g.*, Gideon v. Wainwright, 372 U.S. 335 (1963). Such concerns about resource allocation might conceivably have been behind subsequent decisions setting both the nature and the limitations of what the state is required to provide. *Compare* Ross v. Moffitt, 417 U.S. 600 (1974) (no right to appointed counsel for discretionary appeals), *with* Mayer v. City of Chicago, 404 U.S. 189 (1971) (right to state-provided transcript).

122 *See* Frederick Schauer, *Constitutionalism and Coercion*, 54 B.C. L. REV. 1881 (2013); Frederick Schauer, *The Annoying Constitution: Implications for the Allocation of Interpretive Authority*, 58 WM. & MARY L. REV. 1689 (2017). For an impatient critique of the common tendency to engage in counterfactual (or at least contested) empirical assumptions as a way of avoiding confronting the costs of rights, see Frederick Schauer, *Rights, Constitutions and the Perils of Panglossianism*, 38 OXFORD J. LEGAL STUD. 635 (2018).

those who would exercise their First Amendment rights requires the state to spend more than it would have spent had it possessed the ability simply to prohibit the speech, and requires the state—or other governmental entity—either to secure additional resources for such a purpose or to reallocate resources toward the First Amendment and away from other potentially worthy goals. Moreover, as noted above, the problem is not that the reallocation is at the direction of a less-popularly responsive court. There is no reason here to replay several generations of angst about the so-called countermajoritarian difficulty.[123] Rather, the point is only that a First Amendment–driven reallocation of governmental resources turns out to be substantially in the control of the speaking groups themselves, and so the greater the provocation, the greater the reallocation. Provocative speakers have the ability to capitalize on this phenomenon by forcing the state to spend money for their protection, money that might otherwise be spent in ways of which the provocative speaker disapproves. And hostile audiences themselves have the ability to prevent the reallocation by keeping their hostility nonviolent, or nonprovocative of speaker retaliation. But whether and when this will in fact happen is anyone's guess.

At least some of the problem of the hostile audience, and the problem of the resource reallocation it occasions, appears to be fueled by the reluctance of officials to impose very much in the way of serious penalties when actual violence breaks out at a rally or demonstration. The causes for this reluctance are multiple. Some of the reluctance might stem from a general unwillingness of law enforcement to employ arrest and prosecution as a remedy for street disturbances, regardless of their nature. Some might be attributable to law enforcement sympathy with counterprotesters and hostility to the protesters whose words and symbols have caused outrage in others. And some might arise out of the difficulty in identifying actual perpetrators under circumstances in which angry words and then angry gestures and then physical contact appear to come from both sides.[124] But whatever the cause, it is impossible completely to discount the possibility that the actual or impending violence that creates the need for massive and expensive law enforcement presence is not completely unrelated to the fact that for many members of a hostile audience the initiation of physical contact, often by the throwing of various projectiles or by the wielding of sticks and poles, seems to them to be a relatively risk-free act. And thus, perhaps again ironically, a hostile audience may at times draw resources away from their use on governmental goals of which the members of a hostile audience might very well approve.

123 *See, e.g.*, BICKEL, *supra* note 85, at 16–20; ADRIAN VERMEULE, THE SYSTEM OF THE CONSTITUTION 55–58 (2011); Richard H. Fallon, Jr., *The Core of an Uneasy Case for Judicial Review*, 121 HARV. L. REV. 1693 (2008); Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 YALE L.J. 153 (2002).

124 On the larger problem of applying traditional free speech principles and doctrines to the presence of multiple voices, sometimes attempting to speak simultaneously, see R. George Wright, *Public Fora and the Problem of Too Much Speech*, 106 KY. L.J. 409 (2017–2018).

IV. On the Responsibilities—Legal and Otherwise—of the Hostile Audience

Although actual physical violence has, tragically, ensued from rallies and demonstrations in Charlottesville and elsewhere, far more often a hostile audience manifests its hostility in non–physically violent ways. Sometimes such tactics include blocking speakers' access to the designated location for the demonstration, as happened in Charlottesville when a group of religious leaders locked arms in an attempt to block the white supremacists from reaching the park where the rally was to occur.[125]

This kind of blocking does not appear to raise important conceptual or theoretical issues. Such blocking or obstructing is typically unlawful,[126] and the reluctance to sanction the blockers is often likely a combination of law enforcement sympathy for their cause and law enforcement fear of embarrassing publicity, especially in an age when everything is photographed by someone with a smartphone, if the blockers must be carried away or otherwise physically removed. But there is little doubt that such blocking activity is ordinarily unlawful under statutes or common-law principles dealing with the obstruction of free passage,[127] and we would scarcely hesitate before concluding that the police and the legal system may intervene to sanction those who would keep people from getting to their home, to their place of business, or even to the bus stop. And there is even less doubt that the police may not constitutionally respond to the blocking by sanctioning or moving the speakers rather than the blockers. If the speakers are prevented by others from getting to where they have a legal and constitutional right to be, the remedy cannot, at least in theory, and at least under the post-*Feiner* hostile audience cases discussed above, be to tell the speakers that they must go elsewhere.

There remains an interesting question, however, as to what private remedies are available against those who would obstruct others in the exercise of constitutional rights. If the obstruction of a speaker constitutionally entitled to speak is physical, presumably an injunction against the obstructer would be available, but the typical demonstration scenario provides little notice in advance and involves time periods that are shorter than the ability of formal legal processes to respond to them. Still, there might also be after-the-fact common-law remedies that might, depending on the circumstances, undergird an action for false imprisonment,[128] for obstructing free passage,[129] for

125 *See* Bo Erickson, *Religious Leaders Criticize Police Response in Charlottesville, Virginia*, CBS News, https://www.cbsnews.com/news/charlottesville-virginia-car-attack-religious-leaders-criticize-police/ (last updated Aug. 13, 2017).

126 *See, e.g.*, Lewry v. Town of Standish, 984 F.2d 25 (1st Cir. 1993) (discussing Maine statute prohibiting the obstruction of public ways and the obstruction of free passage).

127 *See* Marcavage v. City of New York, 689 F.3d 98 (2d Cir. 2012) (upholding arrest of political protesters under obstruction of free passage ordinance).

128 On the tort of false imprisonment, see Restatement (Second) of Torts § 42 (Am. Law Inst. 1965); William L. Prosser, *False Imprisonment: Consciousness of Confinement*, 55 Colum. L. Rev. 847 (1955).

assault, for creating a public nuisance,[130] or possibly for interference with advantageous relations,[131] even though any of these,[132] in most circumstances, would be somewhat of a stretch as a matter of tort law. Perhaps more plausible would be some variety of civil rights action, given that the blockers are interfering with the exercise of a constitutional right. And here it appears that the most likely civil rights action would be based, ironically, on § 1985(3) of Title 42 of the United States Code,[133] which creates a private cause of action against those who would conspire to deprive others of their civil rights. The problem, however, is that § 1985(3) does not on its face apply to those who would deprive others of all or any of their civil rights, but only to those who would conspire to deprive others of the "equal protection of the laws," or of their "equal privileges and immunities under the laws."[134] And so although the latter phrase might be argued to apply to interference with the exercise of free speech rights, especially if we conveniently ignore the repetition of the word "equal," the far more likely textual conclusion, and one supported by the cases, is that neither § 1985(3) nor any other federal statute makes it a crime, or creates a private cause of action, for private persons to interfere with the free speech rights of others.[135]

This does not mean, of course, that a community could not enact an ordinance prohibiting such interference, or that a police officer might not issue a lawful order to counterprotesters to stop interfering, the disobedience with which would constitute the independent offense of disobedience of a lawful order of a police officer. And so although some number of universities have rules forbidding students from interfering with speakers at public university events,[136] there do not appear to be parallel state or local laws that specifically make interference with the exercise of free speech rights unlawful. At the present time, therefore, those who would wish for sanctions

129 *See supra* notes 126–27 and accompanying text.

130 On actionable creation of a public nuisance as encompassing obstructing free passage, see CAL. CIV. CODE §§ 3479, 3480 (West 2018).

131 The typical "interference with advantageous relations" tort action is premised on interference with commercial, economic, or contractual relations. *See* Shawsheen River Estates Assocs. v. Herman, No. 95-1557, 1995 WL 809834 (Mass. Super. Ct. Apr. 11, 1995). There does not appear to be a reported decision applying such a cause of action to interference with the exercise of a constitutional right.

132 My colleague Leslie Kendrick, a teacher and scholar of both the First Amendment and torts, refers to these as the "back of the book" torts, a characterization that says a great deal about the frequency of their use.

133 42 U.S.C. § 1985(3) (2012). I say "ironically" because the statute was originally enacted in 1871 as the Ku Klux Klan Act, designed to provide a cause of action *against* the Klan, even though an action to interfere with the exercise of a constitutional right might, in 2017, be brought *by* the Klan. *See* Kevin E. Irwin, Note, *The Reach of 42 U.S.C. § 1985(3): Sex Discrimination as a Gauge*, 25 CLEV. ST. L. REV. 331, 332–33 (1976).

134 42 U.S.C. § 1985(3).

135 *See* United Bhd. of Carpenters, Local 610 v. Scott, 463 U.S. 825 (1983).

136 *See, e.g.*, *Responding to Speaker Disruptions on Campus*, COLUM. UNIV. (Oct. 16, 2017), https://universitylife.columbia.edu/speaker-disruptions-on-campus.

against interference must rely on what are likely to be understood as expansive and unusual interpretations of existing criminal law or tort law.

The real problem, however, even assuming some sort of rule prohibiting interference, is the definition of "interfere." We have to this point been considering only physical interference, where the application of various existing criminal, civil, and regulatory laws might be at least plausible, but what of the counterprotesters who bang on drums, engage in loud (and amplified with bullhorns) yelling, or create deafening noises with Freon or vuvuzela horns? The use of such aural obstruction is these days as common as it is effective, but then the question arises as to whether there is (or should be) a remedy for it.[137] Presumably a venue might impose a content-neutral noise regulation, along the lines of the regulation upheld for the public streets in *Kovacs v. Cooper*,[138] but such a regulation would be most plainly constitutional only if it restricted the original speakers as well as those who are trying to keep them from being heard. The more difficult question is whether a content-neutral restriction on those who would, with noise or signs or otherwise, interfere with the lawful speech of a speaker can be sustained against the claim that the objectors have no fewer free speech rights than does the original speaker. We worry about the so-called heckler's veto, but the First Amendment, after all, presumably protects the hecklers as well as the hecklees.[139]

Although it is plain that hecklers do have free speech rights, the argument that they have rights to drown out other speakers seems strained. As long as reasonable and content-neutral time, place, and manner restrictions are permissible, then it is at least plausible that some sort of first-come-first-served or other regulations designed to ensure that speakers can at least be heard would be permissible as well.[140] In response, there might be the objection that such a regulation privileges those who get there first, or rewards those who have the resources to secure a permit in advance, but such arguments seem weak when compared to the argument for at least the reasonableness of regulations that are aimed at making the right to free speech effective, and restricting those who would make its exercise meaningless.[141]

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137 Professor Emerson had little doubt that heckling that interferes with the ability of a speaker to be heard "is the equivalent of sheer noise" and, in the context of protecting a speaker against it, was equivalent to "physical force." EMERSON, *supra* note 110, at 338.

138 336 U.S. 77 (1949).

139 *See* Mark Tushnet, *What the Constitution Says Berkeley Can Do When Controversial Speakers Come Knocking*, VOX, https://vox.com/the-big-idea/2017/9/22/16346330/freespeech (last updated Sept. 23, 2017); *see also* Mark Tushnet, *Free Speech on Campus*, BALKINIZATION (Sept. 24, 2017), https://balkin.blogspot.com/2017/09/free-speech-on-campus.html.

140 *See In re* Kay, 464 P.2d 142 (Cal. 1970) (in bank); SEANA VALENTINE SHIFFRIN, SPEECH MATTERS 126 (2014).

141 As I note in the Conclusion, the claim in the text is soundest if we see a free speech regime as in some sense interactive, as most versions of the arguments based on searching for truth or engaging in democratic decisionmaking and deliberation would maintain. For arguments based on searching for truth, see, for example United States v. Alvarez, 567 U.S. 709, 727–28 (2012) (plurality opinion); JOHN STUART MILL, ON LIBERTY 93–94 (2d ed. London, John W. Park & Son 1859); Brian C. Murchison, *Speech and the Truth-Seeking Value*,

Even if restrictions on disruption or interference with speakers lawfully entitled to speak when and where they are speaking are permissible, however, questions about what forms of behavior are to count as interference persist, although they are as much questions of cognitive science as they are of law. Consider, for example, the experiences and reactions of many of us when the person next to us at the theater, at a concert, or at the movies is loudly chewing gum. And what if, instead, those people were holding blocks of limburger cheese? Or pieces of dog poop? Or nibbling on the carcass of an uncooked dead bat? These increasingly disgusting examples are designed to suggest that interference need not come only when greater decibels are produced by the audience than by the speakers, but also when there are any of a large number of other behaviors that some would consider only mildly annoying and easily ignored, but that others would find as obstructing of their ability actually to hear and appreciate the speaker as are the distractions caused by drums and loud horns. Indeed, the same might be said about visual distractions, and it is hard to imagine a pro-choice speaker not feeling interfered with were a large number of audience members holding up signs portraying aborted fetuses, or even jars containing aborted fetuses in formaldehyde.[142]

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39 COLUM. J.L. & ARTS 55 (2015); Frederick Schauer, *Free Speech, the Search for Truth, and the Problem of Collective Knowledge*, 70 SMU L. REV. 231 (2017). For arguments based on engaging in democratic decisionmaking and deliberation, see, for example, ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM 8–78 (1965); ROBERT C. POST, CONSTITUTIONAL DOMAINS (1995); Ashutosh Bhagwat, *The Democratic First Amendment*, 110 NW. U. L. REV. 1097 (2016); James Weinstein, *Hate Speech Bans, Democracy, and Political Legitimacy*, 32 CONST. COMMENT. 527 (2017). On the other hand, if the arguments for a distinct right to free speech are largely individualistic arguments based on self-expression or some conception of individual autonomy, then it is less clear that assuring an environment in which speakers can be understood is all that important. For arguments based on self-expression, see, for example, C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH (1989); SHIFFRIN, *supra* note 140; Seana Valentine Shiffrin, *A Thinker-Based Approach to Freedom of Speech*, 27 CONST. COMMENT. 283 (2011); Susan H. Williams, *Free Speech and Autonomy: Thinkers, Storytellers, and a Systemic Approach to Speech*, 27 CONST. COMMENT. 399 (2011). But for those of us who are skeptical of the self-expression arguments, the purported right of a heckler to drown out a speaker seems far less important, even though the self-expression or autonomy theorist might come to a different conclusion. For scholarship expressing skepticism of the self-expression arguments, see, for example, FREDERICK SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY 47–72 (1982); Frederick Schauer, *Free Speech on Tuesdays*, 34 LAW & PHIL. 119 (2015); Frederick Schauer, *On the Distinction Between Speech and Action*, 65 EMORY L.J. 427 (2015).

142 There are also connections between the issues raised in this paragraph and the concerns about silencing that have been prominently raised by the feminist anti-pornography movement. *See* CATHARINE A. MACKINNON, ONLY WORDS (1993); *see also* RAE LANGTON, SEXUAL SOLIPSISM (2009); SPEECH AND HARM (Ishani Maitra & Mary Kate McGowan eds., 2012). If the speech of one (or many) can effectively silence the speech of another by changing the meaning or the force of what another says, as the theorists just mentioned believe (correctly) it can, is such speech to count as an interference for legal purposes? And if it is not to count as interference for purposes of legal remedies, is it nevertheless to count as interference for purposes of moral or political evaluation? We

The question of interference is thus not only the question of physical interference, although such interferences appear to be the ones most amenable to legal remedies. It is also the question of which forms of nonphysical interference should be sanctioned in some way, which forms should be applauded, which forms should be encouraged, and which forms should be condemned or discouraged. But to answer those questions we need to confront directly the largest issues of just what it is that a free speech regime—legal and otherwise—is designed to accomplish.

Conclusion: The Limits of the Law

There is more that can and should be said about the law of interference with demonstrations, such as it is, but, as is so often the case, the behavior that takes place in the world is often more or less than what the law permits or requires.[143] Although this Article has commenced with the hard law of the First Amendment as it has in the past and does now apply to the problem of the hostile audience, that inquiry has exposed some larger issues about speaker and listener behavior beyond the law. For all but the self-expression justifications for freedom of speech,[144] and thus under the arguments from truth finding and from democratic deliberation,[145] among others, free speech is about a certain kind of environment in which we learn from each other, deliberate with each other, and engage in forms of collective communicative activity. In important respects the actively hostile audience challenges not only the speaker, but also the legal and social environment in which the speakers are protected. But whether *that* challenge, in the age of the neo-Nazis, in the age of the resurgence of the Klan, and in the age of the

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believe, correctly, that picketers against a speaker whose picketing is outside the venue have First Amendment rights to picket no less than the First Amendment rights of the speaker, but we would be foolish to deny that such picketing may at times simply change the nature of the speaker's speech. Just as Marcel Duchamp's mustached Mona Lisa has made it impossible for me ever to see the real *Mona Lisa* without distractingly wondering where the mustache is, and just as *The Lone Ranger* has made it for most people of my generation impossible to undistractedly appreciate Gioachino Rossini's *William Tell Overture*, see Frederick Schauer, *The Ontology of Censorship*, *in* Censorship and Silencing: Practices of Cultural Regulation 147, 147, 157 (Robert C. Post ed., 1998), so too can counterprotesters alter the nature of a speaker's speech without ever engaging in physical interference and thus without ever risking legal liability. But when the counterprotesters should do so, when we should praise or castigate them for doing it, and whether such actions are inconsistent with the deeper purposes of free speech regime, are questions that go beyond and beneath the law, even as they may be more important than the questions about the law.

143 *See* Risa Goluboff, *Where Do We Go From Here?*, *in* Charlottesville 2017: The Legacy of Race and Inequity, *supra* note 1, at 82.

144 *See supra* note 141 and accompanying text.

145 *See* Vincent Blasi, Ideas of the First Amendment 318–474, 766–875 (2006); Schauer, *supra* note 141, at 15–46.

rise of other white supremacist speakers, is fundamentally sound or fundamentally misguided is a question that can hardly be answered in the context of the more focused treatment offered here.