THE NEW HECKLER'S VETO: SHOUTING DOWN SPEECH ON UNIVERSITY CAMPUSES

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INTRODUCTION

> We are not afraid to entrust the American people with unpleasant facts, foreign ideas, alien philosophies, and competitive values. For a nation that is afraid to let its people judge the truth and falsehood in an open market is a nation that is afraid of its people.
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> —John F. Kennedy[1]

In March of 2017, Dr. Charles Murray was invited by a conservative student group to speak at Middlebury College.[2] The group invited campus members to come to the event and debate his viewpoints. In his introduction to Murray's speech, a representative from the hosting organization implored his fellow students to debate Murray rather than shouting him down.[3] This request was not followed and, as Murray approached the podium, dozens of students in the audience turned their backs and began chanting "Hey, hey ho ho, Charles Murray has got to go," "Your message is hatred, we cannot tolerate it," "Charles Murray go away, Middlebury says no way," and "Shut it down."[4] Murray was forced to leave the event early and was chased off campus by protestors.[5] Even though Middlebury administration took extraordinary measures to ensure that Murray could speak, the event was unsuccessful.[6]

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1 Remarks on the Twentieth Anniversary of the Voice of America (Feb. 26, 1962).

2 Peter Beinart, *A Violent Attack on Free Speech at Middlebury*, ATLANTIC (Mar. 6, 2017), https://www.theatlantic.com/politics/archive/2017/03/middlebury-free-speech-violence/518667/.

3 *Id.*

4 *Id.*

5 *Id.*

6 For an overview of the events leading up to the shout down, see Taylor Gee, *How the Middlebury Riot Really Went Down*, POLITICO (May 28, 2017), https://www.politico.com/

The 2016–17 academic year has been called by some the "year of the shout-down;"[7] a year in which objectionable college campus speakers are "shut down" by protestors shouting over them instead of allowing them to express their views and then debate them.[8] The 2017–18 school year seemed to be even worse than the previous, based on the current rates of "shout-downs."[9] Within these crises are two free speech interests coming to a clash—those of the speaker and those of the protestors. These conflicts continue to persist, as many universities are doing little to protect speakers and those who wish to engage in the discussion. This type of conduct will continue unless universities take steps to help protect the free speech interests of speakers by ensuring that unruly protestors, whose goal is to disrupt the speech, are unable to stop the discussion by excluding them from the room.[10]

This Comment advocates an original position for how universities should deal with this problem, while taking into consideration the existing constitutional framework. There is not much existing scholarship on this specific topic of what I am terming the "New Heckler's Veto," an updated and modified version of the term coined by Professor Harry Kalven.[11] Under the New Heckler's Veto, the heckler uses the volume of his voice, rather than a threat of violence, to shut down speakers who he disagrees with. Free speech

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magazine/story/2017/05/28/how-donald-trump-caused-the-middlebury-melee-215195.

7 Stanley Kurtz, *Year of the Shout-Down: It Was Worse than You Think*, NAT'L REV.: THE CORNER (May 31, 2017, 1:48 PM), https://www.nationalreview.com/blog/corner/year-shout-down-worse-you-think-campus-free-speech/.

8 For an excellent overview of how colleges dealt with other free speech challenges in 2017 that are not discussed in this Comment, see Catherine J. Ross, *Campus Discourse and Democracy: Free Speech Principles Provide Sound Guidance Even After the Tumult of 2017*, 20 U. PA. J. CON. L. 787 (2018).

9 *See* Stanley Kurtz, *Campus Shout-Down Rate Nearly Quadruples*, NAT'L REVIEW: THE CORNER (Nov. 2, 2017, 2:19 PM), https://www.nationalreview.com/blog/corner/campus-shout-down-rate-quadruples-free-speech/ ("[A]s we approach the halfway mark of the Fall 2017 semester, the rate of shout-downs is now nearly quadruple that of last spring."). For purposes of this Comment, a "shout-down" occurs when a protesting group causes a speaker to cancel his speech because he is unable to talk over the volume of the protestors' chanting.

10 Although this Comment only examines shout-downs in the United States, this is not a problem unique to the United States. *See, e.g.*, Colleen Flaherty, *'Hijacking a Fundamental Right,'* INSIDE HIGHER ED (Mar. 21 2017), https://www.insidehighered.com/news/2017/03/21/shouting-down-controversial-speaker-mcmaster-raises-new-concerns-about-academic (discussing a shout-down taking place at a Canadian university). Nor is it a problem that has emerged as a response to the 2016 presidential election. *See, e.g.*, Abby Ohlheiser, *Ray Kelly was Booed off the Stage at Brown University*, ATLANTIC (Oct. 29, 2013), https://www.theatlantic.com/national/archive/2013/10/ray-kelly-gets-booed-stage-brown-university/354606/ (reporting that Brown University canceled a lecture from then New York City Police Department Commissioner Ray Kelly after thirty minutes of shouting and protest from the audience).

11 *See* HARRY KALVEN, JR., THE NEGRO AND THE FIRST AMENDMENT 140 (1965) ("If the police can silence the speaker, the law in effect acknowledges a veto power in hecklers who can, by being hostile enough, get the law to silence any speaker of whom they do not approve.").

on campus has been and continues to be a hot-button issue, particularly within the legal community. The goal of this Comment is to examine how this problem can be combatted by universities and event organizers.[12]

First Amendment cases have shown speech rights are not absolute and that context matters. A classic example of this proposition is that the "most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic." [13] Because the First Amendment is not an absolute prohibition on the regulation of speech, there should be restrictions on shouting during a speaker's event on a college campus. Although a protest chant may be considered protected speech, it should not be protected by universities when it is used in an academic setting as a means of shutting down discussion because it stifles the very thing the First Amendment is designed to protect. In this academic context, new policies that impose time, place, and manner restrictions on the speech rights of protestors are necessary to protect the rights of speakers and attendees. While there have been instances where threats of violence have caused speakers to cancel their events, this Comment does not focus on those. Instead, it focuses on a new form of a "heckler's veto" by which events can be shut down by shouting and being louder than the speaker.

First, this Comment will define the "New Heckler's Veto" by comparing it with what is legally termed the "heckler's veto." Second, it will look at current attitudes of college students towards the New Heckler's Veto and examine examples of it in action. Third, this Comment will examine the importance of discussion to free speech and American society. Fourth, it will survey the First Amendment legal framework and look at an application of the law to analogous situations. Fifth, this Comment will outline and discuss my six-step proposal for how colleges can defeat the New Heckler's Veto.

I. DEFINING THE NEW HECKLER'S VETO

The traditional heckler's veto was established in *Feiner v. New York*.[14] In that case, a man was giving a speech on a corner and "gave the impression that he was endeavoring to arouse the Negro people against the whites, urging that they rise up in arms and fight for equal rights."[15] The statements that he made "stirred up a little excitement" in the mixed-race crowd and

12 Issues regarding extending or retracting university speaking invitations are separate issues and will not be discussed in this Comment.

13 Schenck v. United States, 249 U.S. 47, 52 (1919).

14 340 U.S. 315 (1951).

15 *Id.* at 316–17.

"at least one [onlooker] threatened violence if the police did not act" to stop the speech.[16] The speaker, and not the heckler, was arrested and the Supreme Court upheld his conviction, holding that the conviction was not a violation of the First Amendment.[17] The Court justified its decision by stating that Feiner was "neither arrested nor convicted for the making or the content of his speech. Rather, it was the reaction which it actually engendered."[18] The Court affirmed the conviction because of the objections of the crowd, and not because of the language of the speech itself. Although the Court upheld the conviction, the Court noted that "the ordinary murmurings and objections of a hostile audience cannot be allowed to silence a speaker."[19] By upholding the conviction, the Court implied that it was permissible for crowds to prevent speakers from speaking if they threatened to react violently towards them. This effectively gave the protestors a veto on the content of the speech, as they, with the support of the government, had the ability to object to certain speeches and not others.

The New Heckler's Veto is distinguishable from the heckler's veto established in *Feiner* on four distinct grounds. First, there is a difference in the actors who are providing the censorship. In *Feiner*, the censor was the police, acting on behalf of the government; while in the New Heckler's Veto the censors are private citizens who wish to censor the speech of others.[20] Second, there is a difference in what is being feared by the censors. In *Feiner*, the government feared violence resulting from the speech; while in the New Heckler's Veto, the hecklers fear the speech itself. [21] Third, there is a difference in the method of how the heckler is able to shut down the speech. In *Feiner*, a heckler threatened violence to stop the speech. In the New Heckler's Veto, the hecklers shout over the speaker until he can no longer be heard or gives up. Fourth, there is a difference in location of where the speech is taking place. In *Feiner*, the speech was given on a street corner; while the New Heckler's Veto is used to primarily shut down speeches on university campuses.

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16 *Id.* at 317.

17 *Id.* at 318, 321.

18 *Id.* at 319–20.

19 *Id.* at 320.

20 In effect, the actors in both scenarios might actually be the government. Universities that allow events to be shut down by giving in to the demands of the protestors are similar to the police giving into the demands of the heckler in *Feiner*. However, there are many differences between universities and police, such as the authorization to use force, that make the actors distinguishable in their control over the speakers and protestors.

21 Universities may cancel events due to the fear of violence breaking out. However, violence in the examples given did not seem as imminent or as likely as the scenario in *Feiner*. Real threats of violence bring in additional considerations that are not the subject of this Comment.

These distinctions make it difficult for courts to apply precedent to cases involving the New Heckler's Veto. The four distinctions raise new concerns, particularly because there are two competing private free speech interests. The government is therefore placed in a difficult position of having to choose which rights deserve protection. The government may choose not to get involved at all. The common ground between the New Heckler's Veto and the one in *Feiner* is the most important takeaway: the end of both results in the silencing of the speaker's message. The New Heckler's Veto can be criticized on similar grounds that the one in *Feiner* was criticized for.

Justice Black's dissent in *Feiner*, while addressing government censorship action, is instructive in pointing out the problems of allowing private citizens to hold veto power over speeches. Justice Black begins by stating that upholding the conviction "makes a mockery of the free speech guarantees of the First and Fourteenth Amendments" and that the "end result of the affirmance here is to approve a simple and readily available technique by which cities and states can with impunity subject all speeches, political or otherwise, on streets or elsewhere, to the supervision and censorship of the local police."[22] Justice Black emphasized that the police did not do "[t]heir duty . . . to protect [the speaker's] right to talk" through "available alternative methods of preserving public order."[23] Justice Black concluded that "today's holding means that as a practical matter, minority speakers can be silenced in any city."[24]

The Court recognized the problems of endorsing the heckler's veto within a couple of decades of *Feiner* and began condemning its use. During the 1960s, the heckler's veto was being used as a tool to prevent advances during the Civil Rights Movement, when black protestors were frequently arrested for peacefully occupying segregated areas because their acts unnerved and unsettled onlookers. The Court addressed this practice in *Brown v. Louisiana*, ruling that the demonstrators' First Amendment rights may not be curtailed merely because "their critics might react with disorder or violence."[25] The Court recognized that the heckler's veto was a tool that could be used by a majority to suppress the views and rights of minority

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22 Feiner v. New York, 340 U.S. 315, 323 (1951) (Black, J., dissenting).

23 *Id.* at 327, 327 n.9; *see also* Nelson v. Streeter, 16 F.3d 145, 150 (7th Cir. 1994) ("First Amendment rights are not subject to the heckler's veto. The rioters are the culpable parties, not the artist whose work unintentionally provoked them to violence." (internal citation omitted) (citing Cox v. Louisiana, 379 U.S. 536, 551 (1965)).

24 *Feiner*, 340 U.S. at 328 (Black, J., dissenting).

25 *See* Brown v. Louisiana, 383 U.S. 131, 133 n.1 (1966) ("Participants in an orderly demonstration in a public place are not chargeable with the danger, unprovoked except by the fact of the constitutionally protected demonstration itself, that their critics might react with disorder or violence.").

groups and explicitly rejected it.[26] The Court—as a further rejection of content specific prohibitions of speech—also (and thereafter) recognized that punishing the use of certain words was itself a violation of the First Amendment because "one man's vulgarity is another's lyric."[27]

After rejecting *Feiner*, the Supreme Court came to treat restraints responding to audience hostility as "content" or "viewpoint" discrimination. In both *Forsyth County* and *Reno*, the Court struck down restrictions that impermissibly controlled or banned speech that was seen as "offensive" to at least part of the population.[28] These rejections of content discriminatory laws showed that suppressing offensive speech in an effort to pander to those who are offended by it is per se improper.[29] Offensiveness has been recognized as a feature, rather than a detraction, when it comes to free speech, as the Supreme Court has stated "time and again that 'the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers'"[30] because "[i]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."[31] Though the Court has held the heckler's veto to be

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26 *See* Gregory v. City of Chicago, 394 U.S. 111, 111–12 (1969) ("This is a simple case. Petitioners, accompanied by Chicago police and an assistant city attorney, marched in a peaceful and orderly procession from city hall to the mayor's residence to press their claims for desegregation of the public schools. Having promised to cease singing at 8:30 p.m., the marchers did so. Although petitioners and the other demonstrators continued to march in a completely lawful fashion, the onlookers became unruly as the number of bystanders increased. Chicago police, to prevent what they regarded as an impending civil disorder, demanded that the demonstrators, upon pain of arrest, disperse. When this command was not obeyed, petitioners were arrested for disorderly conduct. Petitioners' march, if peaceful and orderly, falls well within the sphere of conduct protected by the First Amendment." (citations omitted)).

27 Cohen v. California, 403 U.S. 15, 25 (1971); *see also id.* at 25–26 (noting that "governments might soon seize upon the censorship of particular words as a convenient guise for banning the expression of unpopular views.").

28 *See* Reno v. Am. Civil Liberties Union, 521 U.S. 844, 868 (1997) ("[T]he purpose of the [Communications Decency Act] is to protect children from the primary effects of 'indecent' and 'patently offensive' speech, rather than any 'secondary' effect of such speech. Thus, the CDA is a content-based blanket restriction on speech, and, as such, cannot be 'properly analyzed as a form of time, place, and manner regulation.'" (citation omitted) (quoting City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 46 (1986)); Forsyth Cty. v. Nationalist Movement, 505 U.S. 123, 134 (1992) ("Listeners' reaction to speech is not a content-neutral basis for regulation.").

29 There are two types of government responses to the heckler's veto—reacting to situations of hostility or preempting situations of hostility through the enactment of a law. The latter is far more invidious and thus ought to be treated differently because it acts as a form of prior restraint, which has long been recognized as being incompatible with the First Amendment. *See* N.Y. Times v. Sullivan, 376 U.S. 254, 273–77 (1964) (providing an overview and criticism of the Alien and Sedition Acts).

30 Matal v. Tam, 137 S. Ct. 1744, 1763 (2017) (quoting Street v. New York, 394 U.S. 576, 592 (1969)).

31 Texas v. Johnson, 491 U.S. 397, 414 (1989); *see also id.* at 408–09 (1989) ("[A] principal function of

unconstitutional as a content-specific restriction on speech, its spirit lives on today in a different form and is being used as a tool to suppress unpopular views on university campuses.[32]

II. EXISTING STATE OF PLAY ON COLLEGE CAMPUSES

There is a free speech crisis on university campuses[33] and current statistics show the negative attitudes Americans and students have towards free speech on university campuses. Approximately fifty-one percent of college students believe that it is acceptable for a student group to "disrupt[] a speech by loudly and repeatedly shouting so that the audience cannot hear the [controversial] speaker."[34] Additionally, approximately nineteen percent of college students believe that it is acceptable to use violence to disrupt a speaker who is saying "offensive and hurtful" things on campus.[35] Nearly two-thirds (sixty-one percent) of Americans believe that "people often call others racist or sexist to avoid having to debate with them." [36] More than three-fourths (seventy-six percent) of Americans say that recent campus

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free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. It would be odd indeed to conclude *both* that 'if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection,' *and* that the government may ban the expression of certain disagreeable ideas on the unsupported presumption that their very disagreeableness will provoke violence." (citations omitted)).

32 *See* Howard Gillman & Erwin Chemerinsky, *Does Disruption Violate Free Speech?*, CHRON. HIGHER EDUC. (Oct. 17, 2017), https://www.chronicle.com/article/Does-Disruption-Violate-Free/241470 ("Contrary to the view of these protesters, individuals do not have a right to prevent others from speaking. It has long been recognized in constitutional law that the 'heckler's veto'—defined as the suppression of speech in order to appease disruptive, hostile, or threatening members of the audience—can be as much a threat to rights of free expression as government censorship.").

33 *See, e.g.*, Clay Calvert & Robert D. Richards, *Lighting A FIRE on College Campuses: An Inside Perspective on Free Speech, Public Policy & Higher Education*, 3 GEO. J.L. & PUB. POL'Y 205, 206 (2005) ("Battles are being waged on campuses across the United States."); Jeff Sessions, Attorney General, Address at the Georgetown University Law Center (Sept. 26, 2017), transcript *available at* http://time.com/4957604/jeff-sessions-georgetown-law-speech-transcript/ ("The American university was once the center of academic freedom—a place of robust debate, a forum for the competition of ideas. But it is transforming into an echo chamber of political correctness and homogenous thought, a shelter for fragile egos.").

34 John Villasenor, *Views Among College Students Regarding the First Amendment: Results From a New Survey*, BROOKINGS (Sept. 18, 2017), https://www.brookings.edu/blog/fixgov/2017/09/18/views-among-college-students-regarding-the-first-amendment-results-from-a-new-survey/. For criticism of this survey and its methodology, see Lois Beckett, *'Junk Science': Experts Cast Doubt on Widely Cited College Free Speech Survey*, GUARDIAN (Sept. 22, 2017, 6:00 AM), https://www.theguardian.com/us-news/2017/sep/22/college-free-speech-violence-survey-junk-science.

35 Villasenor, *supra* note 34.

36 Emily Ekins, *The State of Free Speech and Tolerance in America*, CATO INST. (Oct. 31, 2017), https://www.cato.org/survey-reports/state-free-speech-tolerance-america.

protests and cancellations of controversial speakers are part of a "broader pattern" of how college students deal with offensive ideas.[37] Two-thirds (sixty-six percent) of Americans say colleges and universities aren't doing enough to teach young Americans today about the value of free speech.[38] These numbers and attitudes are not surprising, as they are reflective of the recent actions taken by many students.

There are numerous examples of speakers being shut down on campuses, but this Comment highlights a select few that occurred in 2016–17. While it appears to be primarily a tool to shut down conservative-leaning speakers, like Charles Murray, the New Heckler's Veto has also been invoked to shut down events featuring more liberal speakers as well. In October of 2017, students at William and Mary hosted an ACLU event titled "Students and the First Amendment."[39] After starting the event, protestors from the Black Lives Matter movement streamed into the auditorium.[40] The speaker stated "I'm going to talk to you about knowing your rights, and protests and demonstrations, which this illustrates very well. Then I'm going to respond to questions from the moderators, and then questions from the audience."[41] Those were the last words she was able to speak, as the protestors chanted and drowned out all hope of a meaningful discussion. "Liberalism is white supremacy" and "Shame! Shame! Shame!" they chanted, and organizers were forced to cancel the event.[42] This incident suggests that protestors will silence *anyone* who does not *fully agree* with their own views.[43]

Even schools with strong policies that are meant to protect against the New Heckler's Veto can fall victim to it. In April 2016, the University of Pennsylvania hosted then-CIA Director John Brennan and less than 15 minutes after he was introduced, protestors interrupted the event, chanting

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37 *Id.*

38 *Id.*

39 Emily Zanotti, *Black Lives Matter Shuts Down Campus ACLU Event Because 'Liberalism is White Supremacy*,' DAILY WIRE (Oct. 5, 2017), http://www.dailywire.com/news/21985/black-lives-matter-shuts-down-campus-aclu-event-emily-zanotti.

40 *Id.*

41 *Id.*

42 *Id.*

43 While the cause and motivations are not examined in this comment, the New Heckler's Veto seems to have a prevalent role in our political lives. For example, House Minority Leader Nancy Pelosi was shouted down by Deferred Action for Childhood Arrivals ("DACA") beneficiaries while at a news conference for working with President Donald Trump on DACA. Sarah D. Wire, *Nancy Pelosi Shouted Down at DACA News Conference for Working with Trump*, L.A. TIMES (Sept. 28, 2017, 12:12 PM), http://www.latimes.com/politics/essential/la-pol-ca-essential-politics-updates-nancy-pelosi-shouted-down-at-daca-press-1505760392-htmlstory.html. She attempted to calm the crowd down and talk to them, but after being unable to do so, she left after half an hour and stated, "We need to have a conversation, but that was completely one sided; they don't want any answers." *Id.*

"drones kill kids" and "U.S. out of the Middle East."[44] After the chanting started, University of Pennsylvania Law School's Dean Theodore Ruger returned to the stage to explain Penn's freedom of expression policy and asked the protestors "Are you trying to silence him?"[45] However, his voice was quickly drowned out as protesters continued to yell over him. Some protestors were escorted out of the room, but the moderators were unable to regain control of the room.[46] After the third interruption, the moderators decided to end the event.[47] The protestors were organized by the Students for a Democratic Society, who handed out flyers outside the event, reading: "This event is being disrupted because John Brennan is the head of the most destructive terrorist organization in the world today, the CIA."[48] A member of the group responded to the accusation that the protesters were silencing speech, saying, "I don't think there's any reason to allow speech that supports apartheid, that supports literal genocide. . . ."[49]

The New Heckler's Veto is not being used exclusively by university students, as there are instances where non-students are using it as a tool of their own. In October 2017 at Whittier College in California, Pro-Trump protestors shut down an event featuring California Attorney General Xavier Becerra and California State Assembly Leader Ian Calderon.[50] These disruptors chanted slogans and insults like: "build that wall," "lock him up," "respect our president," and "Americans first." One of the speakers asked the audience to hold applause or booing, remarking "It's important that we have a productive conversation here."[51] The event, scheduled for an hour, concluded after about thirty-four minutes.[52] The disruptors later boasted that they were able to shut the event down.[53]

These are just a few illustrative examples of university campus events

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44 Ally Johnson, *Protests Shut Down CIA Director's Talk at Penn*, DAILY PENNSYLVANIAN (Apr. 1, 2016, 10:25 PM), http://www.thedp.com/article/2016/04/protests-shut-down-cia-director-john-brennan-talk.

45 *Id.*

46 *Id.*

47 *Id.*

48 *Id.*

49 *Id.*

50 Adam Steinbaugh, *Hecklers Shout Down California Attorney General, Assembly Majority Leader at Whittier College*, FIRE (Oct. 13, 2017), https://www.thefire.org/hecklers-shout-down-california-attorney-general-assembly-majority-leader-at-whittier-college/.

51 *Id.*

52 *Id.*

53 *Id.*; *see also id.* (noting that the protestors "weren't interested in an exchange of views" and instead "engaged in a 'heckler's veto'—a form of censorship FIRE emphatically condemns").

being shut down by protestors.[54] Although there are many campus speakers who are able to speak uninterrupted, it is important to note that these actions in a few colleges can have a ripple effect and spread to other colleges and environments.[55] The way these few examples are highlighted by the media helps to quickly spread two opposing ideas—the idea that free speech is under attack and the idea that students and others can get away with shutting down ideas that they find to be offensive. This problem needs to be fixed, but before a solution is proposed and analyzed, it is first important to recognize the importance of free speech, especially its role in higher education.

III. THE IMPORTANCE OF DISCUSSION TO THE FIRST AMENDMENT AND FREE SPEECH

The First Amendment provides a constitutional guarantee of freedom of speech, stating that, "Congress shall make no law . . . abridging the freedom of speech."[56] Numerous Supreme Court cases have interpreted the amendment and its purpose. The prevailing view was stated in Justices Brandeis and Holmes's concurrence in *Whitney v. California*. As to the purpose of the First Amendment, they stated,

> Those who won our independence . . . believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly *discussion* would be futile; that with them, *discussion* affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government. . . . they knew . . . that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to *discuss* freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public *discussion*, they eschewed silence coerced by law—the argument of force in its worst form.[57]

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54 For more examples of the New Heckler's Veto, see Kurtz, *supra* note 9.

55 *See generally* Sessions, *supra* note 33 (stating that Americans should be concerned with a "permissive attitude toward the heckler's veto" because "Protestors are now routinely shutting down speeches and debates across the country in an effort to silence voices that insufficiently conform with their views.")

56 U.S. CONST. amend. I. The First Amendment was incorporated to apply to the States, through the Fourteenth Amendment, in *Gitlow v. New York*, 268 U.S. 652 (1925).

57 Whitney v. California, 274 U.S. 357, 375–76 (1927) (Brandeis, J., concurring) (emphasis added). Justice Brandeis's view was adopted by the majority in *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

The Justices had a problem with coerced silence, further stating that, "If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence."[58] It is difficult to have offensiveness be the criterion for suppression because "Every idea is an incitement."[59] When society attempts to regulate unpopular opinions, "we should be eternally vigilant against attempts to check the expression of opinions that we loathe," and that "the best test of truth is the power of the thought to get itself accepted in the competition of the market."[60] The case law therefore makes it clear that one of the purposes of the First Amendment is to promote discussion, and what better place to engage in reasoned discussion than on the university campus.[61]

Universities are regarded as the epicenters of thought and discussion—places where theories and ideas are tested and debated. They are places where young bright minds go to learn and become the leaders and thinkers of tomorrow. Universities are the places where students pursue the truth. But why is discussion, and not just the promotion of ideas themselves, important to the pursuit of truth? It is because the nature of discussion helps to promote the pursuit of truth, as truth is not something that can be imposed on society. [62] In a chapter of *On Liberty*,[63] John Stuart Mill discusses how important it is to everyone to allow the free exchange of ideas. He begins by examining the harms that come with silencing opinions that are not generally accepted by society, stating that "[i]f all mankind minus one were of one opinion, and only one person were of the contrary opinion, mankind would be no more justified in silencing that one person, than he, if he had the power, would be justified in silencing mankind."[64] As for the harm itself, he states

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58 *Whitney*, 247 U.S. at 377 (Brandeis J., concurring).

59 *Gitlow*, 268 U.S. at 673 (Holmes, J., dissenting).

60 Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

61 For a greater overview of the evolution of our First Amendment doctrine, see Zachary S. Price, *Our Imperiled Absolutist First Amendment*, 20 U. PA. J. CON. L. 817 (2018).

62 The university is fundamentally important to democracy and the evolution of society, and free and open discussion is a necessary piece of the university. *See* Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 836 (1995) ("The quality and creative power of student intellectual life to this day remains a vital measure of a school's influence and attainment. For the University, by regulation, to cast disapproval on particular viewpoints of its students risks the suppression of free speech and creative inquiry in one of the vital centers for the Nation's intellectual life, its college and university campuses."). The overburdening of speech at the university can lead to a "chilling of individual thought and expression" which can be harmful to our "tradition of thought and experiment that is at the center of our intellectual and philosophic tradition." *Id.* at 835.

63 JOHN STUART MILL, ON LIBERTY (Batoche Books Ltd. 2001) (1859).

64 *Id.* at 18.

that "the peculiar evil of silencing the expression of an opinion is, that it is robbing the human race; posterity as well as the existing generation; those who dissent from the opinion, still more than those who hold it."[65] There is therefore value in having dissenting opinions heard by people in an open forum where the opinions can be debated and discussed.

An opinion that is being silenced can either be correct or false, but that does not justify suppression of that opinion. "If the opinion is right, they are deprived of the opportunity of exchanging error for truth: if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error."[66] Protestors often justify their actions by stating that they are suppressing opinions that are wrong, but "[w]e can never be sure that the opinion we are endeavouring to stifle is a false opinion; and if we were sure, stifling it would be an evil still."[67] It would still be an evil to silence wrong opinions because society can still benefit by hearing the strongest arguments for that side and then have an advocate dispel those arguments. It must be up to an individual, and not an angry mob, to judge that opinion and assess its truth value because the mob has "no authority to decide the question for all mankind, and exclude every other person from the means of judging."[68] Protestors do not have to worry about the spreading of an opinion if it is truly false because it will eventually yield to fact and argument. But there first needs to be open discussion in order to bring the arguments and facts to light, as "[v]ery few facts are able to tell their own story, without comments to bring out their meaning."[69]

Discussion is particularly important in universities because it is a necessary part of learning. Experience alone is not enough to provide support for one's beliefs and "[t]here must be discussion, to show how experience is to be interpreted."[70] Discussion is necessary because the only way we "can make some approach to knowing the whole of a subject, is by hearing what can be said about it by persons of every variety of opinion, and studying all modes in which it can be looked at by every character of mind."[71] It is through the very nature of open debate and discussion that provide the strongest support for holding certain beliefs because the "beliefs which we have most warrant for have no safeguard to rest on, but a standing invitation

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65 *Id.* at 19.
66 *Id.*
67 *Id.*
68 *Id.*
69 *Id.* at 21.
70 *Id.*
71 *Id.* at 22.

to the whole world to prove them unfounded."[72] We are not born into the world with omnipotence to know the truth, and must discuss and debate ideas in order to discover the truth.

Protestors who wish to stifle discussion miss out on some of the benefits that it can have for them. Discussion is important to the protestor who believes that his views and positions are the right ones and is unwilling to provide a platform for the opponent to express his views. The protestor must engage in discussion with the other side in order to be fully exposed to it, because "[h]e who knows only his own side of the case, knows little of that."[73] Although his reasoning may be sound and irrefutable, "if he is equally unable to refute the reasons on the opposite side . . . he has no ground for preferring either opinion."[74] He must hear them from the other side and not from his own teachers, who often provide their own view on how they are stated and how to refute them because that "is not the way to do justice to the arguments, or bring them into real contact with his own mind."[75] He must hear arguments from people who actually believe in the ideas, stated in "their most plausible and persuasive form" so that he will face difficulty in defending the true view.[76] Oftentimes these protestors who wish to shut down speakers they disagree with "have never thrown themselves into the mental position of those who think differently from them, and considered what such persons may have to say; and consequently they do not, in any proper sense of the word, know the doctrine which they themselves profess."[77] A common justification for why protestors wish to shut down certain speakers is because they believe that the speaker's views are not useful to society and may instead be harmful. But the "usefulness of an opinion is itself matter of opinion," which makes it "as disputable, as open to discussion, and requiring discussion as much as the opinion itself."[78] Although hate speech can have a silencing effect on the speech of certain groups, usually minorities,[79] and thus harming democracy itself, permitting groups to regulate hateful speech allows them to effectively regulate too much speech,

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72 *Id.*

73 *Id.* at 35.

74 *Id.*

75 *Id.* at 36.

76 *Id.*

77 *Id.*

78 *Id.* at 23. This draws parallels with the scientific method, under which theories become generally accepted if there is an opportunity for others to attempt to prove them false.

79 *See* Solveig Horne, *Hate Speech — A Threat to Freedom of Speech*, HUFFPOST (Mar. 8, 2017, 4:05 AM), https://www.huffingtonpost.com/solveig-horne/hate-speech--a-threat-to_b_9406596.html (arguing that "[h]ate speech may cause fear and can be the reason why people withdraw from the public debate.").

since hate speech is often difficult to define.[80]

Without discussion, it is impossible to discover truth. Truth is not as simple as we might think, especially on subjects in which difference of opinion is possible, because "the truth depends on a balance to be struck between two sets of conflicting reasons."[81] Though we may wish to perceive an opinion as wholly true or wholly false, it is more likely the case that there are a variety of opinions, each of which contains some truth. In order to fully understand the truth, "the nonconforming opinion is needed to supply the remainder of the truth, of which the received doctrine embodies only a part."[82] Without hearing from the other side, we cannot recognize mistakes in our thinking caused by our own biases. If we are serious about pursuing the truth in the "marketplace of ideas," "every opinion which embodies somewhat of the portion of truth which the common opinion omits, ought to be considered precious, with whatever amount of error and confusion that truth may be blended."[83] The best way to protect each opinion, to ensure that the truth value is not lost, is to subject them to discussion and debate as "a struggle between combatants fighting under hostile banners."[84] Even for matters that we might think are settled, society can still benefit from discussion and debate on the subject. Particularly relevant in the context of the New Heckler's Veto, Mill writes that when there are people "who form an exception to the apparent unanimity of the world on any subject, even if the world is in the right, it is always probable that dissentients have something worth hearing to say for themselves, and that truth would lose something by their silence."[85] Silence is a problem for society because "there is always hope when people are forced to listen to both sides; it is when they attend only to one that errors harden into prejudices, and truth itself ceases to have the effect of truth."[86] Without an advocate on each side and an audience to listen, there is no hope that the truth will be discovered.

Both the case law and philosophical works that were influential to our founding show that discussion is essential to a well-functioning society.

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80 *See, e.g.*, David Rutz, *Sasse Asks Zuckerberg to Define 'Hate Speech*,*'* WASH. FREE BEACON (Apr. 10, 2018, 9:33 PM), https://freebeacon.com/politics/sasse-asks-zuckerberg-to-define-hate-speech/ (noting that when Senator Ben Sasse asked Facebook CEO Mark Zuckerberg to define "hate speech," Zuckerberg replied, "I think that this is a really hard question. And I think it's one of the reasons why we struggle with [defining] it.").

81 MILL, *supra* note 63, at 35.

82 *Id.* at 44.

83 *Id.*

84 *Id.* at 45.

85 *Id.* at 46.

86 *Id.* at 49.

Society must permit the free discussion of ideas, even when most people view some opinions to be wrong or harmful to society. Universities play a special role in the realm of free speech because they are places where ideas are supposed to be tried and tested, exposed to young minds, and discussed.[87] College protestors that use the New Heckler's Veto need to understand the importance of open and free discussion on their campuses.[88] Until protestors are willing to accept the rights of others to speak freely on campus, restrictions need to be imposed on them.

IV. COMBATTING THE NEW HECKLER'S VETO WITH TIME, PLACE, AND MANNER RESTRICTIONS

The Supreme Court has not directly addressed the issue of balancing the First Amendment interests of invited campus speakers with the First Amendment interests of protestors. Since public forums often exist within public universities,[89] it would be unconstitutional viewpoint discrimination

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87 *See, e.g.*, Grutter v. Bollinger, 539 U.S. 306, 329 (2003) ("We have long recognized that, given the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition.").

88 The New Heckler's Veto is less of a problem at law schools, places where there is no shortage of controversial speakers. *See* Heather Gerken, *One Campus Arena Where Free Speech is Not up for Debate: Law Schools*, TIME, July 24, 2017, at 20 (noting that law schools "have been largely exempt from ugly free-speech incidents" like those on undergraduate campuses). *But see* Scott Jaschik, *Shouting Down Talk on Campus Free Speech*, INSIDE HIGHER ED (Apr. 16, 2018), https://www.insidehighered.com/news/2018/04/16/guest-lecture-free-speech-cuny-law-school-heckled (reporting that students at CUNY Law School attempted to chant over a speaker); Scott Jaschik, *Speech, Interrupted*, INSIDE HIGHER ED (Mar. 6, 2018), https://www.insidehighered.com/news/2018/03/06/students-interrupt-several-portions-speech-christina-hoff-sommers (reporting the same at Lewis & Clark Law School). Law students are taught the exact values of free speech as Mill advocates for. They are taught to defend arguments that they may not necessarily agree with and see the world as their opponents do. Gerken, *supra*. Even the litigation system is premised on the idea that the truth will emerge if there are advocates on each side of a case advocating for their views. *Id*. Once the immediate threats of the New Heckler's Veto are dealt with, it may be time to turn to see how these values that law students learn can be transmitted to the undergraduate universities. Of course, implementing these values as soon as possible may be another way to solve the problem.

89 The First Amendment applies to only public universities because they are acting under the authority of the state government. *See* Charles R. Calleros, *Paternalism, Counterspeech, and Campus Hate-Speech Codes: A Reply to Delgado and Yun*, 27 ARIZ. ST. L.J. 1249, 1250 (1995) ("Administrators on state campuses are state actors and thus are subject to the negative directive of the First Amendment that government 'shall make no law . . . abridging the freedom of speech.'" (footnotes omitted)). Private universities are able to place restrictions on speech without having to abide by the First Amendment doctrine. *See* Evan G.S. Siegel, *Closing the Campus Gates to Free Expression: The Regulation of Offensive Speech at Colleges and Universities*, 39 EMORY L.J. 1351, 1381 (1990) ("[T]he very nature of a private university's charter and organization allows it to promulgate regulations that need not comply with

to exclude protestors from certain events simply because they disagree with the speaker.[90] However, this does not mean that protestors cannot ever be excluded from events. Restrictions on speech that are viewpoint neutral and subject-matter neutral may permissibly regulate the time, place, or manner of expression if they (1) are content neutral; (2) are narrowly tailored to serve a significant government interest; and (3) leave open ample alternative channels of communication.[91] A regulation is deemed content neutral if it serves purposes unrelated to the content of speech, regardless of whether it incidentally affects certain speakers or messages and not others.[92] Narrow tailoring is achieved when the regulation "promotes a substantial government interest that would be achieved less effectively absent the regulation."[93] An adequate, alternative avenue for the expression of protected speech exists even if the location where that expression must take place is fixed in relation to the forum.[94]

The Supreme Court has recognized a potential conflict between the free speech rights of two different groups. It has noted that,

> The rights of free speech and assembly, while fundamental in our democratic society, still do not mean that everyone with opinions or beliefs to express may address a group at *any public place and at any time*. The constitutional guarantee of liberty implies the existence of an organized society maintaining public order, without which liberty itself would be lost in the excesses of anarchy.[95]

Without restrictions on speech, it is impossible to engage in discussion. Universities, as epicenters of thought and discussion, must embrace and enforce content-neutral time, place, and manner restrictions over protestors. Even though the Court has noted that "the right of free speech . . . does not

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the first amendment.").

90 Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 829 (1995).

91 Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989). Time, place, and manner restrictions inherently involve suppressions of speech. If they did not, the government would not have an effective means of advancing many of its interests. For example, a town can enact a law that regulates the size of signs or the location in which the signs may be placed, but it cannot prohibit signs with particular messages on them. *See* Reed v. Town of Gilbert, 135 S. Ct. 2218, 2233 (2015) (Alito, J., concurring) (listing examples of sign legislation that would be permissible under the First Amendment in order to protect public safety and aesthetic objectives).

92 *Ward*, 491 U.S. at 791; *cf. Reed*, at 2227 (2015) ("Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed.").

93 *Ward*, 491 U.S. at 799 (internal quotation marks and citation omitted) (quoting United States v. Albertini, 472 U.S. 675, 689 (1985)).

94 *See* Heffron v. Int'l Soc'y for Krishna Consciousness, Inc., 452 U.S. 640, 643, 655 (1981) (upholding a rule that confined sale and distribution of all materials at a fair to a fixed area of the fairground as a rule that provided the groups with "adequate means to sell and solicit on the fairgrounds").

95 Cox v. Louisiana, 379 U.S. 536, 554 (1965) (emphasis added).

embrace a right to snuff out the free speech of others," there is little protection of these free speech rights without an enforcement mechanism.[96] Both speakers and protestors have important viewpoints that they wish to convey, but neither can do so without order being imposed on university campuses.

Clashing viewpoints are not unique to university campuses. An illustrative example of how competing interests were resolved was *Startzell v. City of Philadelphia*.[97] In the case, a group known as Repent America believed that homosexuality was sinful and wanted to end OutFest, an event organized by Philly Pride that celebrated "National Coming Out Day."[98] They showed up to the event and brought bullhorns, large signs, and literature to distribute.[99] The group began to convey their message close to the main stage, singing loudly, playing instruments, displaying large signs, and using microphones and bullhorns.[100] The police asked the group to move farther away from the main stage, but Repent America refused to do so and instead marched closer to the main stage area.[101] The police then arrested the group's members for disorderly conduct.[102]

The court was then faced with the task of balancing the free speech interests of the organizers of OutFest and those of Repent America. It recognized that Repent America "posess[es] a First Amendment right to communicate [its] message in a public forum" but also that "[its] rights are not superior to the First Amendment rights of Philly Pride, as permit-holder, to effectively convey the message of its event."[103] Particularly of note was when the court noted that the "right of free speech does not encompass the right to cause disruption" and that the city's interest in protecting the rights of a permit-holder "necessarily includes the right of police officers to prevent counter-protestors from disrupting or interfering with the message of the permit-holder."[104] The Court found that "when protestors move from distributing literature and wearing signs to disruption of the permitted activities, the existence of a permit tilts the balance in favor of the permit-holders."[105] The Court held that the police's order directing Repent America

96 Red Lion Broad. Co., Inc. v. FCC, 395 U.S. 367, 387 (1969).
97 533 F.3d 183 (3d Cir. 2008).
98 *Id.* at 188–89.
99 *Id.* at 190.
100 *Id.* at 190–91.
101 *Id.* at 191.
102 *Id.*
103 *Id.* at 198.
104 *Id.* at 198–99.
105 *Id.* at 199.

"to move to another location within OutFest" was content-neutral and not unconstitutional because "they were merely imposing a content-neutral time, place, or manner restriction" on the group's actions.[106] The court next held that "[t]he City's actions in this case were narrowly tailored to serve its significant interests" in ensuring that "OutFest's permit to engage in its speech activities is respected."[107] Lastly, the court found that Repent America "had alternative ways to express themselves without causing disruption, such as through the use of smaller signs without bullhorns so that the performances on the stages would not be obscured."[108]

It is worthwhile to speculate what might have happened if the police had not intervened in an attempt to move Repent America farther away from the main stage. In all likelihood, Repent America would have marched towards the stage, bullhorns in hand, and attempted to drown out and draw attention away from OutFest. Violence could have also erupted. Repent America's goal, after all, was to bring the event to an end.

V. THE PROPOSAL: SIX STEPS FOR UNIVERSITIES

One solution to the problem of the New Heckler's Veto on university campuses is to apply Supreme Court precedent in the same manner as it was used in *Startzell*. However, there are some important distinctions to make between university speakers and speakers at an event like OutFest. This first is the venue itself. OutFest took place outside on the streets of Philadelphia, while most campus speaker events are held indoors in either auditoriums or classrooms. This is a practical distinction that frustrates Supreme Court precedent—the protestors must be allowed *inside* the venue. A narrow definition of the venue would state that the protestors must be allowed inside the room where the speaker is presenting and be free to exercise their free speech rights. However, this would not solve the problems of the New Heckler's Veto, because they are indoors and in close proximity to the speaker, meaning that their voices can still drown out the speaker. A better approach to defining the venue would be to view it more broadly, including an area close to but outside of the classroom or auditorium. Therefore, their message is still given an ample opportunity to be heard, but not at the expense of the speaker's message. Of course, if protestors want to engage substantively with the discussion, they should be allowed into the room itself; it is only when they wish to shut down the event or drown out the speaker

106 *Id.* at 200.
107 *Id.* at 202.
108 *Id.*

that they should be required to leave the room.

The next distinction is the security and who is responsible for providing it. The police themselves cannot be expected to bear the burden of showing up to college events where protestors may get rowdy, and so private security is often hired to assist. Placing the burden of paying for security on student groups would likely be unconstitutional, since "[s]peech cannot be financially burdened, any more than it can be punished or banned, simply because it might offend a hostile mob."[109] Security is one of the most expensive elements of hosting a speaker, and many student groups will be unable to afford the fees.[110] To have the university not provide security would place the group in a difficult position of trying to go on without security and getting shut down, or bankrupting the student group with security fees. This would essentially operate as a tax on certain viewpoints, which would be unconstitutional viewpoint discrimination. Luckily, most times universities will comply and pay for the security fees for the student group.[111] With security present, the hosting group would have a valid enforcement mechanism to protect the speaker's rights if the audience attempts to shut him down.

With these distinctions in mind, it is possible that university campuses can prevent the New Heckler's Veto from shutting down speakers on campuses. Because speech silencing expressive activities is not unlimited, "courts will allow the state to regulate hecklers in order to maintain an environment

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109 Forsyth Cty. v. Nationalist Movement, 505 U.S. 123, 134–35 (1992); *see also* Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 828–29 (1995) ("[T]he government offends the First Amendment when it imposes financial burdens on certain speakers based on the content of their expression.") (citing Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 115 (1991))).

110 Security fees can range from $15,000 to upwards of $900,000, depending on the extent of the protests. Megan Schellong, *Here's How Much Security Costs When an Incendiary Speaker Comes to Campus*, USA TODAY (Sept. 13, 2017, 11:00 AM), http://college.usatoday.com/2017/09/13/heres-how-much-security-costs-when-an-incendiary-speaker-comes-to-campus/.

111 *See, e.g.*, Celine Ryan, *UCLA Caves, Agrees to Pay for Security at Shapiro Event*, CAMPUS REFORM (Nov. 1, 2017, 3:01 PM), https://www.campusreform.org/?ID=10090 (reporting that UCLA agreed to pay for security costs for a speaker event after "being threatened with legal action"); Drew Van Voorhis, *UMiami Agrees to Pay Security Fee for Charles Murray Talk After Pressure from Conservative Law Students*, COLLEGE FIX (Mar. 13, 2018), https://www.thecollegefix.com/post/42898/ (detailing University's willingness to pay for security after receiving student group's complaints about viewpoint neutrality); *cf.* Katherine Long, *College Republicans Threaten to Sue UW Over $17,000 Security Fee for Saturday Rally*, SEATTLE TIMES (Feb. 3, 2018, 3:11 PM), https://www.seattletimes.com/seattle-news/education/college-republicans-threaten-to-sue-uw-over-17000-security-fee-for-saturday-rally/ (last updated Feb. 5, 2018, 5:52 PM) (reporting that a student group plans to sue the University of Washington after the University told the group that it had to pay for its own security fees).

where voices that cannot shout the loudest will still have an opportunity to be heard."[112] The task comes down to where the line must be drawn between the two competing interests, but it is often difficult to know in advance "when the expressive activities of certain private speakers interfere so substantially with the ability of other speakers to communicate that state regulation of speech is justified."[113]

In the case of universities, the six-step plan explained below is the best way to balance those interests and establishes where the line should be drawn. This plan is not required by the First Amendment but is instead a permissible regulation of the protestors' speech rights under the First Amendment. First, universities should implement policies that prevent students from disrupting or shouting over any invited speaker, regardless of their political affiliation or their message.[114] This regulation would be a content neutral regulation because it has nothing to do with the subject matter of the speech. It would also be viewpoint neutral because it applies to everyone who wishes to disrupt speakers, and not just to those who wish to disrupt speakers with certain viewpoints. Even if this has a greater impact on certain viewpoints, it will still likely be held to be content and viewpoint neutral.[115] Second, universities should provide security to student groups who ask for it if they fear that there will be attempts to shut their speaker down. As previously mentioned, providing security and requiring student groups to pay for it would be placing an impermissible burden on their speech.[116] Providing the hosting student group with security would provide them with an enforcement mechanism so that they will no longer be helpless in front of a mob that attempts to take over their event. In addition to the enforcement purpose of the security, the presence of security at an event will also serve as a deterrent, showing protestors that they will have a difficult time shutting down an event and may be stopped before they can achieve their desired result.

Third, if the university is aware of a protest or of attempts to shut down a speaker, the university should set up a "protest zone" outside of the room where the speaker is talking. This way both groups will be able to communicate their messages without directly conflicting with the other. To

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112 Alan E. Brownstein, *Justifying Free Exercise Rights*, 1 U. ST. THOMAS L.J. 504, 538 (2003).

113 *Id.* at 538–39.

114 *See* Gillman & Chemerinsky, *supra* note 32 ("[T]hose who have been given access to the space for certain purposes have the right not to be disrupted in that activity.").

115 *See, e.g.*, Hill v. Colorado, 530 U.S. 703, 723–25 (2000) (upholding a statute that prohibited knowingly approaching within eight feet of another person near a health care facility without consent as content neutral, even though the statute particularly burdened one viewpoint of speech).

116 Forsyth Cty. v. Nationalist Movement, 515 U.S. 123, 134–35 (1992).

facilitate both groups, university officials can notify the community of both the event and the protest so as to prevent any confusion about where certain messages can be engaged substantively. Fourth, protestors should be allowed inside the speaker room so long as they are not chanting or using large signs to block the view of spectators. If the protestors want to substantively challenge the speaker on his views, the protestors should be encouraged to do so. However, if chanting and attempts to shut down the speaker begin to occur, security will remove them from the event. Fifth, security should prevent a large group of people from the "protest zone" from coming into the event all at the same time. A group of that size can reasonably be believed to wish to shut down the speaker, and therefore the time, place, and manner restriction should take effect to prevent them from doing so. Sixth, students who disrupt or attempt to disrupt the event should face disciplinary action. Without disciplinary action, the protestors will not recognize that shutting down opposing viewpoints is inappropriate, and there would be no disincentive to engage in such conduct.[117] These policies will not only withstand a constitutional challenge, but also better promote the purpose of both the First Amendment and university—to promote discussion and discourse.[118] Without discussion and discourse, students cannot discover the truth for themselves, and they would be better suited saving their tuition money and investing in some more books instead. This does not mean, however, that these restrictions would not be challenged on First Amendment grounds.

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117 *See* Zach Greenberg, *Rejecting the "Heckler's Veto,"* FIRE (June 14, 2017), https://www.thefire.org/rejecting-the-hecklers-veto/ ("By giving the heckler power to veto disfavored speech, colleges teach students that drowning out, shouting down, and assaulting those expressing differing opinions is an acceptable response to speech that they find offensive. Rewarding the bottle thrower by punishing the speaker only leads to more bottle throwers—and fewer speakers.").

118 *See, e.g.*, *Guidelines on Open Expression*, UNIV. OF PA. OFFICE OF THE PROVOST, https://catalog.upenn.edu/pennbook/open-expression/ (last visited June 15, 2018) (providing a framework for freedom of expression on campus). Penn's Guidelines on Open Expression are an example of a university policy that takes into account the considerations listed in this paper. *See id.* ("Individuals or groups violate these Guidelines if: [t]hey interfere unreasonably with the activities of other persons. The time of day, size, noise level, and general tenor of a meeting, event or demonstration are factors that may be considered in determining whether conduct is reasonable." (footnote omitted)).

A. Challenges to Content Neutral Regulations

Just because a regulation is content neutral does not mean it is immune from challenges. In *McCullen v. Coakley*, a content neutral regulation was struck down for not being narrowly tailored.[119] In that case, the state enacted a statute which made it "a crime to knowingly stand on a 'public way or sidewalk' within 35 feet of an entrance or driveway to any place, other than a hospital, where abortions are performed."[120] A group of individuals who were prevented from approaching women to dissuade them from having abortions challenged the statute as a violation of the First Amendment.[121] The Court found that the statute was content neutral and noted that promoting "public safety, patient access to healthcare, and the unobstructed use of public sidewalks and roadways" were significant government interests, but found that the thirty-five feet "buffer zones impose serious burdens on [the protestors'] speech."[122] Four Justices, however, found that the law was not content neutral because it was "a blanket prohibition on the use of streets and sidewalks where speech on only one politically controversial topic is likely to occur[] and where that speech can most effectively be communicated."[123]

In the case of exclusion from campus events, protestors may argue that being excluded from the room is just like the protestors in *McCullen* being restricted from the entrances to abortion clinics. This argument is unlikely to be persuasive on several grounds. First, the buffer zone restriction was struck down because there was another way to promote the government's interests without burdening more speech than necessary. In the case of protestors at university speaking events, there is no narrower way to tailor the restriction. Allowing protestors free reign over their movements and occupation of the speaker's room would essentially be the same as if the protestors in *McCullen* were allowed to block the entrances to abortion clinics.[124] The time, place, and manner restriction is enacted for the very

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119 McCullen v. Coakley, 134 S. Ct. 2518, 2537–39 (2014).

120 *Id.* at 2525.

121 *Id.*

122 *Id.* at 2535; *see also* Bay Area Peace Navy v. United States, 914 F.2d 1224, 1229 (9th Cir. 1990) (internal quotation marks and citation omitted) (holding that a 75-yard security zone that prevented demonstrators assembling near a pier "does not leave open ample alternative channels of communication").

123 *McCullen*, 134 S. Ct. at 2543 (Scalia, J., concurring in the judgment); *accord id.* at 2549 (Alito, J., concurring in the judgment). This disagreement among the Justices shows that even the Court is not unified in its definition of content neutrality, which may pose some difficulty in evaluating the content neutrality of my own proposal.

124 The Court in *McCullen* noted that part of the challenged act, which prohibited this sort of behavior,

purpose of preventing this kind of behavior. Second, there are ample alternatives for campus speaker protestors to communicate their message. Having a set "protest zone" outside the event would actually help promote their message, rather than hinder it, because it provides a meeting area for protestors to engage with others and convince them of their viewpoints.

In deciding whether a restriction on speech is narrowly tailored, the restriction cannot "burden substantially more speech than is necessary to further the government's legitimate interests."[125] In *Schenck v. Pro-Choice Network of Western New York*, the Supreme Court was confronted with both floating and fixed buffer zones around abortion clinics that prevented abortion protestors from getting too close to the women entering the clinics.[126] The Court struck down the floating buffer zones for burdening more speech than necessary because they prevented protestors "from communicating a message from a normal conversational distance or handing leaflets to people entering or leaving the clinics who are walking on the public sidewalks."[127] The Court recognized that the prohibition was overbroad, "both because of the *type of speech* that is restricted and the *nature of the location*."[128] The fixed buffer zones around doorways, driveways, and driveway entrances were upheld as "necessary to ensure that people and vehicles trying to enter or exit the clinic property or clinic parking lots can do so" because "the record shows that protesters purposefully or effectively blocked or hindered people from entering and exiting the clinic doorways, from driving up to and away from clinic entrances, and from driving in and out of clinic parking lots."[129]

In the context of university speaker protests, the "protest zones" discussed earlier are more analogous to the analysis of fixed buffer zones rather than that of floating buffer zones. Unlike in *Schenck*, where the protestors had to get close to others to communicate their message through handing out literature, during university protests the protestors do not need to get close to others because their method of communication is primarily oral. Nothing is getting in the way of them distributing literature outside of the venue, so that type of speech is not unnecessarily burdened. The only

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was more narrowly tailored than the challenged provision. *McCullen*, 134 S. Ct. at 2537 (majority opinion).

125 Ward v. Rock Against Racism, 491 U.S. 781, 799 (1989); *see also* Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 765 (1994) ("We must ask instead whether the challenged provisions of the injunction burden no more speech than necessary to serve a. significant government interest.").

126 Schenck v. Pro-Choice Network of W.N.Y., 519 U.S. 357, 361 (1997).

127 *Id.* at 377.

128 *Id.* (emphasis added).

129 *Id.* at 380.

speech that is burdened is oral speech inside the venue itself. Restricting protestors to areas outside the venue does not burden more speech than necessary. While this is a restriction on their speech, it is a necessary one supported by events that have already taken place. At the Brennan event at the University of Pennsylvania, protestors were allowed into the event and escorted out when they attempted to disrupt the event, but *still* the event failed.[130] Room control cannot be regained once the chanting begins, and the speakers show that they cannot control the audience. Therefore, the establishment of protest zones and restricting speech inside the venue is necessary to defend a legitimate government interest, just like the fixed buffer zones in *Schenck*.

The "protest zones" will leave open ample alternative channels of communication for speaker protestors. In *Phelps-Roper v. Ricketts*, the Eighth Circuit Court of Appeals heard a challenge to the Nebraska Funeral Picketing Law ("NFPL"), which "prohibits picketing within 500 feet of a cemetery, mortuary, or church from one hour prior through two hours following the commencement of a funeral."[131] The court upheld the law as content neutral, narrowly tailored, and one that left open ample alternative channels of communication for the Westboro Baptist Church.[132] The Court stated that the Westboro Baptist Church members are "free to lawfully picket and protest throughout the remainder of the city" and "are free to disseminate their message and publicize their views by (1) going door-to-door to proselytize, (2) distributing literature through the mail, (3) contacting residents by telephone, (4) writing letters to the editors of newspapers, and (5) using social media and the internet.[133]

Here, like in *Phelps-Roper*, there is nothing preventing speaker protestors from protesting throughout the remainder of the campus. Thus, the protestors "retain great latitude to express any viewpoint or discuss any topic at nearly any location and nearly any time throughout the rest of the [campus], except [inside the venue itself]."[134] Therefore, the restrictions discussed above provide ample alternative channels of communication for university speaker protestors to express their disapproval of the speaker's views. Whether protestors are willing to accept these alternative channels

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130 Johnson, *supra* note 44.

131 Phelps-Roper v. Ricketts, 867 F.3d 883, 888 (8th Cir. 2017).

132 *Id.*

133 *Id.* at 895–96.

134 *Id.* at 895 (internal quotation marks omitted) (quoting Phelps-Roper v. City of Manchester, 697 F.3d 678, 695 (8th Cir. 2012)). This is especially crucial because the intended audience is the entire university.

has yet to be determined.

B. Arguments Against and Rebuttal

As with any argument, there is an opposing view that should be engaged and discussed. [135] Some critics argue that there is no free speech crisis on university campuses at all and that attempts to regulate protests on campus are both unnecessary and harmful.[136] For example, one critic asserts that the poll by Villasenor[137] that stated over half of college students accepted the New Heckler's Veto is flawed and that "[e]mpirical data suggests that free speech is alive and well on campus."[138] He points out that conservatives have "lost the battle of persuasion, and largely [been] swept from the campus environment" and the "rich marketplace of ideas."[139] He asserts that "[t]here is virtually no support for, or interest in these events at the schools being targeted" and that college students are "exposed to some of the most intellectually open environments that have ever existed in a human society."[140] This critic justifies the exclusion of certain ideas from campuses because they are "ideological position[s] with little rational basis."[141]

These assertions are characteristic of the very type of mindset that is incompatible with the First Amendment. Excluding ideas from campuses based on their supposed merits is viewpoint discrimination. If he believes the ideas of conservatives are unpersuasive, why then do opponents of the ideas need to resort to tactics in which they shout over speakers and chase them from campus? Why not expose the flaws in their arguments? According to Mill, "[w]rong opinions and practices gradually yield to fact and

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135 Additionally, it would not fit within the spirit of the Comment to not address the other side.

136 Research shows that it is only a handful of speakers that are affected by the New Heckler's Veto. *See* Sanford J. Ungar, *Campus Speech Protests Don't Only Target Conservatives, and When They Do, It's Often the Same Few Conservatives, Georgetown Free Speech Tracker Finds*, MEDIUM (Mar. 26, 2018) https://medium.com/informed-and-engaged/campus-speech-protests-dont-only-target-conservatives-though-they-frequently-target-the-same-few-bda3105ad347 (finding that most of the shout downs were for Milo Yiannopoulos, Ben Shapiro, Charles Murray, Ann Coulter, and Richard Spencer). But the New Heckler's Veto should be concerning to all because it is a tactic that *could* be employed to shut down *any* speaker, so long as a small, vocal group wants to do so. Just because something is not an epidemic now does not mean we should turn a blind eye to finding solutions to it.

137 *See* Villasenor, *supra* note 34.

138 Chris Ladd, *There is No Free Speech Crisis on Campus*, FORBES (Sept. 23, 2017, 3:20 PM), https://www.forbes.com/sites/chrisladd/2017/09/23/there-is-no-free-speech-crisis-on-campus/#489b9a3728cb.

139 *Id.*

140 *Id.*

141 *Id.*

argument"—but that can only happen if there is in fact argument and discussion.[142] This critic does not respond to this, and asserts that the New Heckler's Veto does not have a "chilling" effect on free speech. He makes assumptions that there is an "atmosphere of open, fact-driven debate" on campuses, but this runs contrary to what is actually happening when ideas are shouted down rather than debated.[143]

Another common criticism of regulating speech on campuses comes from those who assert the importance of counter-speech. One such critic points out that "much of the social pressure that critics complain about is itself speech" and that denouncing someone as "racist" or a "white nationalist" are simply activists "exercising their own right to free expression."[144] He asserts that "[e]ven heckling, though rude and annoying, is a form of expression" and is protected speech.[145] He does not deny that "all counter-speech has a potential chilling effect" because "the implicit goal of all argument is, ultimately, to quash the opposing view" so that it "will become so discredited that it is effectively, although not officially, silenced."[146] He concludes by asserting that society "should accept the legitimacy of insults, shaming, demonizing, and even social ostracism" as forms of argument that "say something about the merits" of a campus speaker.[147]

Although the article makes great points regarding the importance of counter-speech, it fails to adequately consider whether any restrictions should be imposed on counter-speech. While this critic points out that "heckling that is so loud and continuous a speaker literally cannot be heard is little different from putting a hand over a speaker's mouth and should be viewed as antithetical to the values [of] free speech," he does not assert that anything should be done about it.[148] He instead punts on the question of how to deal with situations in which hecklers silence speakers by shouting over them by stating that "Americans must determine what degree of pressure we think is acceptable."[149] Instead of waiting out the New Heckler's Veto, universities must implement policies that impose time, place, and manner restrictions on protestors who seek to silence other speakers with the

142 MILL, *supra* note 63, at 21.

143 Ladd, *supra* note 138.

144 Thomas Healy, *Who's Afraid of Free Speech?*, ATLANTIC (June 18, 2017), https://www.theatlantic.com/politics/archive/2017/06/whos-afraid-of-free-speech/530094/.

145 *Id.*

146 *Id.*

147 *Id.*

148 *Id.*

149 *Id.*

volume of their voices.[150] Counter-protests play an important role in American society, but they should not be allowed to trump competing free speech interests through unruly heckling tactics.[151]

CONCLUSION

"If we don't stop the epidemic of shout-downs now, chaos and civil conflict may follow someday soon."[152] To avoid a descent into chaos, universities must enact new policies that place content neutral time, place, and manner restrictions on the speech rights of event protestors who wish to shut down speaking events on campus. The New Heckler's Veto is appealing to protestors because it is an easy and readily available method of combating viewpoints that they disagree with. It works in the short run but will have dire consequences in the long run as it becomes accepted by all groups across the political spectrum in retaliation for its past use. As Justice Holmes put it, "[W]e should be eternally vigilant against attempts to check the expression of opinions that we loathe."[153] Though we may despise certain speakers and their views, we should point out the flaws in the arguments, not coerce them into silence. Universities must institute policies that ultimately provide respect for all viewpoints in order to revitalize discussion and debate on university campuses. Perhaps without the policies, discussion on university

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150 This is not to say that nothing is being done on campuses to balance the interests of protestors and school administrators, as there are speech codes implemented on campuses, seminars held on the topic of participating in and responding to protests, and literature on protests that is being distributed. *See, e.g.*, EDUC. L. ASS'N & NASPA RESEARCH & POL'Y INST., RESPONDING TO CAMPUS PROTESTS: A PRACTITIONER RESOURCE 5 (2014), http://www.nacua.org/docs/default-source/meetings/responding-to-campus-protests-legal-links.pdf ("A well-crafted speech and assembly policy is a sturdy fulcrum upon which an institution of higher education can balance its educational needs and the speaker's interests in expression."); *see also* Kathleen Santora, *CEO's Corner*, NAT'L ASS'N OF COLL. & UNIV. ATTORNEYS (Oct. 2017), https://www.nacua.org/news/nacuanews/ceo-corner/ceo-corner-101 (describing a two-part seminar that was hosted by the National Association of College and University Attorneys in August 2017, which had 650 attendees for the first part and 424 attendees for the second part).

151 Although speech codes are one method of regulating protestors and student organizations, universities should be cautious against implementing overbroad speech codes that infringe on the First Amendment rights of students. *See* FIRE, SPOTLIGHT ON SPEECH CODES 2017: THE STATE OF FREE SPEECH ON OUR NATION'S CAMPUSES 5–6 (2017), *available at* https://www.thefire.org/spotlight-on-speech-codes-2017/ (finding that 39.6 percent of 449 colleges analyzed maintain policies that "clearly and substantially" infringe upon the free speech rights of students).

152 Stanley Kurtz, *Pro-Trumpers Shout-Down Liberal Speakers at Whittier College*, NAT'L REV.: THE CORNER (Oct. 13, 2017, 8:40 PM), https://www.nationalreview.com/corner/pro-trumpers-shout-down-liberal-speakers-whittier-college/.

153 Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

campuses will become "solitary, poore, nasty, brutish, and short"[154] and will no longer embody the spirit of the American debate and discussion.

154 THOMAS HOBBES, LEVIATHAN 84 (A.R. Waller ed., Cambridge Univ. Press 1904) (1651).