Unpopular Speech and the Heckler's Veto

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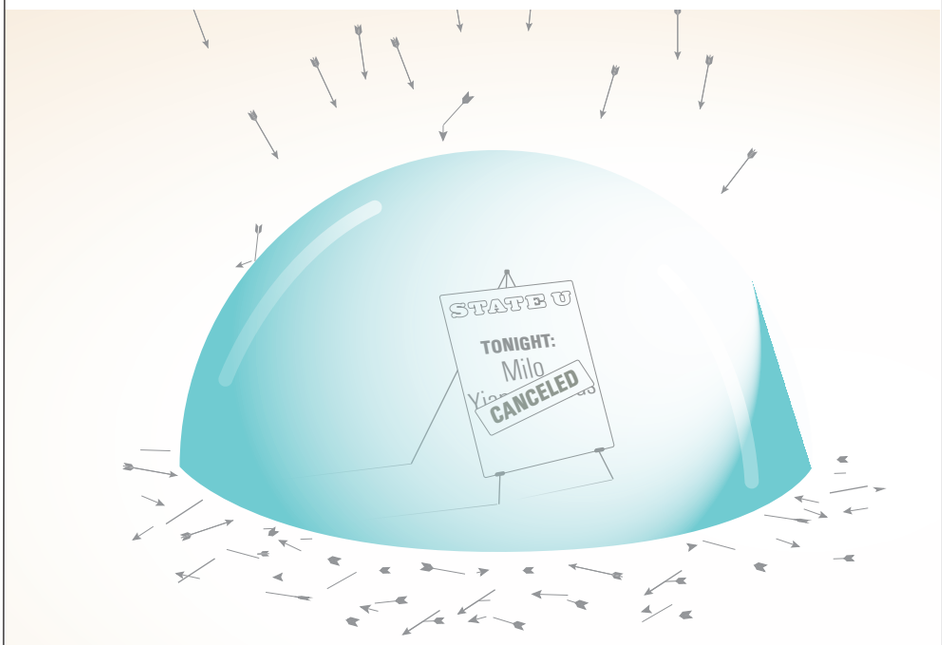

One of our fundamental values is freedom of speech, and the First Amendment protects us against the government abridging that freedom. But that leaves the door open for speech that is offensive or unpopular, perhaps harmful. Should we look for a way to restrict unpopular speech?

It has long been widely held that the solution to objectionable speech is not to have less speech, but to have more speech providing alternative perspectives on a subject. Almost a century ago, Justice Holmes acknowledged the principle of ideas competing in the market, which later came to be expressed as the "marketplace of ideas," in his dissenting opinion in *Abrams v. United States*:

> [T]he ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market . . . . That at any rate is the theory of our Constitution. . . . [W]e should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country.[1]

As municipal lawyers seeking to understand the parameters of constitutional constraints, we typically focus on case law that analyzes government action. Of course, the government is not the only actor that can inhibit speech; private actors can also restrict speech, but their restrictions do not violate constitutional protections.[2] This is more obviously so when those who would inhibit speech are acting as individuals or as a group of protestors. Nonetheless, such private action provides a stage upon which constitutional lessons may be taught.

Rather than participate in the marketplace of ideas, many create noise to drown out unwanted speech. Protestors may seek to silence someone else's speech and remove it from the marketplace, effectively destroying competing ideas. An objector's attempt to use this de facto power to cancel objectionable speech has become known as the "heckler's veto."

Some recent examples of attempts to silence unpopular speech

On its face, the idea of popularity or the lack thereof might seem to be statistically determinable, but it really depends on the universe being polled. Any discussion of "unpopular speech" requires a reference point; speech that is popular with some is unpopular with others, and vice versa.

In recent years, speakers have been subjected to protests by opponents who, at times, are highly vocal and disruptive. A few high-profile examples are briefly discussed below. (These do not directly implicate municipalities but they do illustrate the heckler's veto mechanism.)

Jim Webb declines to accept an award from his alma mater because of protests over his comments in a 38-year-old magazine article.

In March 2017, former U. S. Senator Jim Webb was to be honored by his alma mater, the U.S. Naval Academy, with the Distinguished Graduate Award. However, his selection for the award was met with protests, in response to which he declined to accept the award. In his words from a press release, the Academy's decision to honor him "has been protested by a small but vociferous group of women graduates based on a magazine article that I wrote 38 years ago."[3] In a 1979 article, he had written that women should not be in combat.[4]

Condoleezza Rice withdraws from Rutgers University commencement after protests.

Former Secretary of State Condoleezza had been invited to give the commencement address at Rutgers University on May 18, 2014. Some students and faculty members protested that choice because they did not agree with the Iraq war during the Bush administration. [5] The university did not rescind the invitation, but Ms. Rice decided to withdraw, releasing a statement that "'Commencement should be a time of joyous celebration for the graduates and their families. Rutgers' invitation to me to speak has become a distraction for the university community at this very special time.'" [6]

Rioters at UC Berkeley force cancellation of Milo Yiannopolous' speech.

On February 21, 2017, Milo Yiannopoulous was scheduled to speak at the University of California, Bekeley, as "the last stop of a tour aimed at defying what he calls an epidemic of political correctness on college campuses." [7] But, as reported by a San Francisco local news outlet, his speech did not take place. The protestors went well beyond shouting and engaged in violent conduct:

> As the gathered crowd [of protesters] got more agitated, masked "black bloc" activists began hurling projectiles including bricks, lit fireworks and rocks at the building and police.
>
> Some used police barriers as battering

rams to attack the doors of the venue, breaching at least one of the doors and entering the venue on the first floor.

In addition to fireworks being thrown up onto the second-floor balcony, fires were lit outside the venue, including one that engulfed a gas-powered portable floodlight.

The area on Upper Sproul Plaza grew thick with smoke, and later tear gas, as the protest intensified.

At about 6:20 p.m., UC campus police announced that the event had been cancelled. Officers ordered the crowd to disperse, calling it an unlawful assembly. [8]

From this report, it is unclear whether the event was cancelled by the university or by Yiannopolous, but it is clear the cancellation was forced by the violent actions of those who did not like his views. [9]

Just two months later, protestors again forced the cancellation of a speech at UC Berkeley. This time, the coercive act was not violence, but simply the threat of violence, as we see in the next example.

After threats of violence, UC Berkeley cancels Ann Coulter's speech.

Students who belonged to the Young America's Foundation (YAF) at the University of California, Berkeley, invited Ann Coulter to speak on April 27, 2017. However, because there were threats of violence, the university cancelled the event. The YAF sued, claiming that the school applies its "High-Profile Speaker Policy" unfairly in such a way that it "prevent[s] speakers with certain viewpoints." "The 'High-Profile Speaker Policy' required that events be held during normal class hours, in locations that were not convenient for the majority of Berkeley students. Groups were also subject to exorbitant security fees for certain students. The complaint also alleges that Berkeley offered to have Coulter speak during the 'dead week' between the end of classes and examinations where many students would be off campus and unable to attend." [12]

The University of Alabama imposes such high security fees that a Yiannopoulus speech is almost cancelled, but then drops the fee.

The College Republicans at the University of Alabama sponsored an appearance by Milo Yiannopolous on October 10, 2016. The initial estimate of security costs was $800 - $1,200, but after protests, the costs were increased to $4,600 - $4,800. The costs later rose to almost $7,000. After the College Republicans challenged the increased security, the university eliminated the fee entirely. [13]

Parade organizers cancel the annual Rose Festival Parade in Portland, Oregon in 2017 because of threats.

Since 2007, a coalition of local businesses and community organizations in Portland, Oregon, has held a Rose Festival Parade on 82nd Avenue to help improve the perception of that area of the city. What would have been the 11th annual parade, scheduled for Saturday, April 29, 2017, was cancelled following an anonymous email threat to disrupt the event because members of the Multnomah County Republican Party were to be marching in the parade's 67th spot. [14] To show the simplicity of effort that led to the cancellation of a parade, that email is copied in full below (bold print added): [15]

~~~Original Message~~~
From: thegiver@riseup.net [mailto:thegiver@riseup.net]
Sent: Saturday, April 22, 2017 7:29 PM
Subject: Don't make us shutdown the parade
Importance: High

Greetings,

Trump supporters and 3% militia are encouraging people to bring signs that bring hateful rhetoric to the parade and appears you allowed them to register and have a place in the march!

You have two options:

1. Let them march (Here is their event page
https://www.facebook.com/events/1863379970571888/)
2. Cancel their registration and ensure they do not march

If you choose option 1 then we will have **two hundred or more people rush into the parade into the middle and drag and push those people out** as we will not give one inch to **groups who espouse hatred toward lgbt, immigrants, people of color or others.** In case the message was not clear to you this is a sanctuary city and state and we will **not allow these people to spread their views** in East Portland. You have seen how much power we have downtown and that the **police cannot stop** us from shutting down roads so please consider your decision wisely. Let us know your decision by tuesday by emailing back. We will also wheatpaste fliers across the march route naming sponsors and holding them accountable for backing an event with this type of rhetoric which may endanger future parades ability to get sponsors. We will also begin emailing groups who are participating in the march to inform them you are allowing a group of bigots to march in the parade.

This is non-negotiable we already have two events setup ourselves and we will have enough people tools and tactics to shut down a parade in fact this is a walk in the park for us:

https://www.facebook.com/events/942770902532416/
https://www.facebook.com/events/1901987176708736/

We promise there will be **no harm to anyone but we will shut this down and prevent them from marching using non-violent passive blocking** of their movement.

Notice that the explicit threat is to use "two hundred or more [protesting] people" to "drag and push those [objectionable] people out." It is a threat to be taken seriously, despite the closing promise not to harm anyone. There might well have been two hundred or more protestors available and ready to carry out the threat, but the threat itself—even without any crowd of protestors behind it—was sufficient to achieve the goal. This was an extremely effective heckler's veto that came simply by way of an anonymous email.

Government involvement in suppressing protected speech

All the above incidents were either at public universities (USNA, Rutgers, UC Berkeley, Alabama) or on public streets (Portland). The venues were public, but for the most part the speech was not silenced by acts of public officials. Senator Webb and Secretary Rice voluntary withdrew following protests. The Portland

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parade organizers voluntarily (albeit reluctantly) cancelled the parade following threats. The University of Alabama took (public) action to raise the security fee, but upon challenge, dropped the fee altogether. In one of the remaining instances, the University of California, Berkeley, took (public) action to cancel the speech by Ann Coulter, while the other report is unclear about who cancelled the speech by Milo Yiannopolous.

None of those incidents appeared to involve municipalities, yet they illustrate some problems facing municipalities. Cities must exercise caution in responding to these situations or in passing regulatory ordinances: "When a government official is complicit in suppressing protected speech, it undermines the 1st Amendment by silencing the very political discourse the Amendment is meant to protect."[16]

Municipal involvement by police response

The term "heckler's veto" has been recognized in court opinions since at least 1966 in *Brown v. State of Louisiana*,[17] although the concept has deeper roots.[18] The 1951 case of *Feiner v. New York*,[19] for example, provides a helpful introduction to the framework for analyzing the heckler's veto, even though that term was not used.

Arresting the speaker

Irving Feiner was convicted of disorderly conduct arising from his 1949 open-air address in the City of Syracuse, New York. During that address, the "[t]he crowd was restless and there was some pushing, shoving and milling around."[20] Feiner "was speaking in a 'loud, high-pitched voice.' He 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."[21] The Supreme Court described the crowd's response to the speaker, and the police response to the situation:

> The statements before such a mixed audience '**stirred up a little excitement.'** Some of the onlookers made remarks to the police about their inability to handle the crowd and **at least one threatened violence if the police did not act.** There were others who appeared to be favoring petitioner's arguments. Because of the feeling that existed in the crowd both for and against the speaker, **the officers finally 'stepped in to prevent it from resulting in a fight.'** One of the officers approached the petitioner, not for the purpose of arresting him, but to get him to break up the crowd. He asked petitioner to get down off the box, but the latter refused to accede to his request and continued talking. The officer waited for a minute and then **demanded that he cease talking.** Although the officer had thus twice requested petitioner to stop over the course of several minutes, petitioner not only ignored him but **continued talking. During all this time, the crowd was pressing closer around petitioner and the officer.** Finally, the officer told petitioner he was **under arrest** and ordered him to get down from the box, reaching up to grab him. Petitioner stepped down, announcing over the microphone that 'the law has arrived, and I suppose they will take over now.' In all, the officer had asked petitioner to get down off the box three times over a space of four or five minutes. Petitioner had been speaking for over a half hour.[22]

The Supreme Court affirmed Feiner's conviction, agreeing with the "trial judge[']s . . . conclusion that the police officers were justified in taking action to prevent a breach of the peace."[23] The majority opinion noted that Feiner "was thus neither arrested nor convicted for the making or the content of his speech. Rather, it was the reaction which it actually engendered."[24]

In the first of two dissenting opinions in *Feiner*, Justice Black begins by characterizing Feiner's speech as "unpopular" (a term that typically does not suggest a breach of the peace): "The record before us convinces me that petitioner, a young college student, has been sentenced to the penitentiary for the **unpopular views** he expressed on matters of public interest while lawfully making a street-corner speech in Syracuse, New York."[25] Justice Black went on to assert that the majority's opinion approves what later came to be called the heckler's veto: "Here petitioner was 'asked' then 'told' then 'commanded' to stop speaking, but a man making a lawful address is certainly not required to be silent merely because an officer directs it. . . . In my judgment, today's holding means that as a practical matter, **minority speakers can be silenced in any city.**"[26]

Silencing the speaker by threat of arrest

Police officers are sworn to protect the peace, and cities and states can prosecute offenders for breaches of the peace and disorderly conduct. While the arrest of the speaker passed Supreme Court muster in *Feiner* in 1951, each speaker's conduct and each official response must be evaluated on its own. And even the threat of an arrest can silence a speaker.

In Zachary, Louisiana, mid-November 2006, street preacher John T. Netherland positioned himself in a grassy public easement between the street and the parking lot of a restaurant, the Sidelines Grill, and he began:

> . . . quoting Biblical scripture in a loud voice, including I Corinthians 5:9, saying "Know ye not that the unrighteous shall not inherit the Kingdom of God? Neither fornicators, idolaters, adulterers, effeminate, abusers of themselves with mankind, covetous, thieves, revelers, none of these shall enter into the Kingdom of God." He states that he was speaking from a grassy public easement between the Sidelines parking lot and the road. The City claims that Netherland was standing in the parking lot yelling at Sidelines customers that they were fornicators and whores and they were condemned to Hell for going inside the establishment.
>
> The police were called and Netherland was eventually threatened with arrest if he did not stop. He left the scene and later sued for damages, declaratory relief, and injunctive relief . . . .[27]
>
> The basis for police action was Netherland's alleged disturbing of the peace, in violation of the City's disturbing the peace ordinance, quoted here in part:
>
> (a) Disturbing the peace is the doing of any of the following in such a manner as would foreseeably disturb or alarm the public:
> ...

> (2) Addressing any offensive, derisive, or annoying words to any other person who is lawfully in any street, or other public place; or call him by any offensive or derisive name, or make any noise or exclamation in his presence and hearing with the intent to deride, offend, or annoy him, or to prevent him from pursuing his lawful business, occupation, or duty.... [28]

The district court found that the ordinance was unconstitutional on its face, and it granted a preliminary injunction against the City's enforcement of the provision. On the City's appeal, however, the Fifth Circuit vacated the injunction and remanded for reconsideration "[b]ecause the district court did not consider any limiting construction of the Ordinance before finding it facially unconstitutional . . . ." [29]

Mr. Netherland was more compliant than Mr. Feiner had been and left before being arrested. This time, the threat of arrest was enough to silence the speaker. And since the threat of arrest came in response to complaints, it might be characterized as a heckler's veto. The Fifth Circuit did not do so, but there was no need to address it from that perspective because the court was able to dispose of the case on other grounds. Courts must focus on what constitutes disturbing the peace under a given ordinance or statute. And municipalities should focus on that in the first instance, before a matter ever gets to court.

Prohibitions against disturbing the peace are supposed to be content neutral, but there is an ambiguity: what disturbs the peace in some settings will not do so in others. In particular, if a crowd does not want to hear what a speaker has to say, then the crowd may get unruly, and we return to *Feiner*. The Supreme Court did not accommodate crowd reaction in *Forsyth County v. Nationalist Movement* when addressing an ordinance that authorizes security fees: "Listeners' reaction to speech is not a content-neutral basis for regulation. . . . Speech cannot be financially burdened, any more than it can be punished or banned, simply because it might offend a hostile mob." [30] The Seventh Circuit, likewise, applied content neutrality in *Ovadal v. City of Madison,* in the context of maintaining order: "The police must preserve order when unpopular speech disrupts it; '[d]oes it follow that the police may silence the rabble-rousing speaker? Not at all. The police must permit the speech and control the crowd; there is no heckler's veto.'" [31]

Cities must strike a balance in using their police power so that they do not violate the rights that they are obligated to protect. "Indeed, the protection against hecklers' vetoes even forbids statutory schemes that would allow a disapproving citizen to silence a disagreeable speaker by complaining on other, apparently neutral, grounds."

Cities must strike a balance in using their police power so that they do not violate the rights that they are obligated to protect. "Indeed, the protection against hecklers' vetoes even forbids statutory schemes that would allow a disapproving citizen to silence a disagreeable speaker by complaining on other, apparently neutral, grounds."[32] But if the speaker is disturbing the peace or creating a danger without reference to the content of his speech, police may stop his speech without violating his constitutionally protected rights. Such was the case when street preacher Ralph Ovadal took his message to pedestrian sidewalks that were on overpasses above a freeway. His demonstrations there "had a noticeable effect on traffic below[,]" and police "forced Ovadal to move from the overpasses on the grounds that his activities were causing a traffic hazard for the motorists below him."[33] Mr. Ovadal argued that he was being subjected to a heckler's veto, but the Seventh Circuit held that his removal from the overpasses was content-neutral and constitutional.[34]

In another recent case, a group of street preachers calling themselves "Bible Believers" attended a festival in Dearborn, Michigan, a festival that is known to draw a very large crowd of Muslims. The preachers mixed with the crowd and spoke a message directed at Islam, which many found to be offensive. The crowd became violent, and the sheriff's deputies determined that the Bible Believers were causing the problem. A deputy chief informed one of the leaders of the Bible Believers that the group "would be cited for disorderly conduct if they did not immediately leave the Festival. . . . [The preacher] complied, and the Bible Believers were escorted out of the Festival by more than a dozen officers."[35]

Municipal involvement by anti-harassment policies

Efforts to silence what some consider objectionable has become institutionalized through speech codes and the rise of "safe spaces" and so-called "free speech zones" on college campuses. In some instances, unpopular speech has been characterized as "hate speech" or harassment and legal restrictions have been imposed or attempted on that basis.[36] This content-based restriction on speech is an attempt to use the "fighting words" concept from *Chaplinsky v. New Hampshire*[37] and expand it into a challenge to the "marketplace of ideas" concept.[38] Scholars with the Newseum Institute's First Amendment Center have explained:

> Many speech codes sought to end hate speech, which code proponents said should receive limited or no First Amendment protection. Supporting this view were many academics who subscribed to so-called "critical race" theory. Critical-race theorists contend that existing First Amendment jurisprudence must be changed because the marketplace of ideas does not adequately protect minorities. They charge that hate speech subjugates minority voices and prevents them from exercising their own First Amendment rights.[39]

Although the Newseum scholars talk about campus speech codes in the past tense in the above excerpt, they later suggest that speech codes might have been reborn in the form of anti-harassment policies: "Some universities dropped their broad, wide-ranging policies . . . in favor of more narrowly crafted anti-harassment or code-of-conduct policies. Whatever the terminology used, many universities still regulate various forms of hate speech." [40] They further note that "Many of the provisions that used to be

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called speech codes are being wrapped into anti-harassment policies[.]" [41] As tempting as it might be to want to protect people from harassment, local governments should be cautious about following that lead.

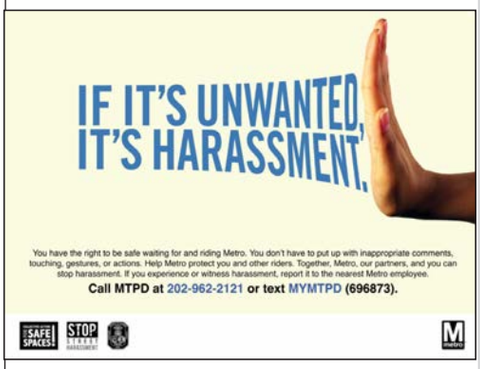
Consider this poster on the side of D.C. Metro cars and on the walls of Metro stations.

The text reads:

> You have the right to be safe waiting for and riding Metro. You don't have to put up with inappropriate comments, touching, gestures, or actions. Help Metro protect you and other passengers. If you witness or experience harassment, report it to the nearest Metro employee.[42]

Most of us might agree with the quoted text about having "the right to be safe waiting for and riding Metro." D.C. Metro is within its authority to use signs to promote safety, a proper public policy that does not violate constitutional protections. But this poster goes further, asserting that we "don't have to put up with inappropriate comments, touching, gestures, or actions."

We might wish we didn't have to put up with those things, but we probably do—at least to some extent. Like the train it's posted on, the text on this poster begins to move down the track toward a destination—namely, insulation not only against unwanted touching, but also against unwanted comments, gestures, or other actions. If anyone doubts that this is where the policy is headed, it is exclaimed in big letters, all caps, bold, red-on-yellow:



IF IT'S UNWANTED, IT'S HARASSMENT.

Imagine that a Metro passenger witnesses some of the following in a Metro car or station:

- three people praying and reading the Bible
- a man reciting Islamic prayers on a prayer rug in the aisle
- a man wearing a shirt that says "Black Lives Matter"
- a man wearing a shirt that says "Blue Lives Matter"
- a man wearing a shirt that says "White Lives Matter"
- a woman wearing a shirt promoting abortion rights
- a man wearing a shirt that says "Abortion is Murder!"
- a woman wearing a shirt promoting legalization of prostitution
- a woman actually soliciting sex
- a man and a woman kissing
- a man handing out tracts about Jesus dying for our sins
- a person wearing a shirt promoting "trans" rights
- a man wearing a shirt that says "You don't have to stay gay."
- a man wearing a shirt promoting the right to die
- a teenage girl wearing a shirt that says "TRUMP: MAKE AMERICA GREAT AGAIN!"
- a woman breast-feeding
- a man wearing a shirt with a Nazi swastika
- two men kissing
- a man wearing a shirt with a Hindu swastika
- a man staring at a woman who appears not to know him
- a man handing out tracts about Islam having the answers
- a woman patting apparent strangers on their shoulders
- a man making repeated thrusting hand gestures while saying "F*** [Trump or Obama or fill-in-the-blank]"

It's easy to believe that some Metro passengers could be offended by one or more of these actions or expressions. Based on the Metro sign, a person who is offended and doesn't want to see, hear, or feel any of those can consider it harassment and "report it to the nearest Metro employee." This invitation to report perceived harassment appears to tilt the balance toward the person who takes offense. But the constitutional implications arise in the context of Metro's response to those reports. If Metro responds by asking the "offending" person to stop the behavior or leave, that might violate constitutional protections (depending, of course, on the exact nature of the action).[43]

A local government's attempt to protect people from harassment can easily go too far. Municipalities must remember that "[p]rotected speech is not transformed into 'fighting words' by the peculiar sensibilities of the listener[,]" and that free speech rights are not to be "subject to a middle schooler's 'heckler's veto[.]'"[44]

Municipal involvement by denial of parade permits

The anticipation of violence might prompt some cities to deny parade permits. If an ordinance permits a law enforcement authority the discretion to deny a permit for "any reason" that "raises public safety concerns[,]" that ordinance would likely be held unconstitutional for granting a heckler's veto, as the Eleventh Circuit held in *Burk v. Augusta-Richmond County*.[45]

Similar to *Burk*, the Fifth Circuit held in *Beckerman v. City of Tupelo* that an ordinance was unconstitutional that authorized the chief of police to deny a parade permit if he determined that issuing the permit would probably "provoke disorderly conduct" or create a disturbance. The court characterized that provision as sanctioning the heckler's veto.[46]

However, the Fourth Circuit, in *Christian Knights of Ku Klux Klan Invisible Empire, Inc. v. Stuart*, upheld an ordinance of the Town of Pelion, South Carolina, that prohibited the Klan from participating in a Christmas parade because of fear of violence. Critical to that decision was this observation: "Under the facts presented in this case, a 'heckler's veto' is not involved, because the real threat was believed to be presented by Klan members rather than by spectators."[47]

The issue of prospective violence was ultimately overruled in *Iranian Muslim Org. v. City of San Antonio,* where city officials had decided to deny parade permits to Iranian students—who had sought to protest the Shah of Iran—out of fear of violence toward the demonstrators. The lower courts upheld the decision to deny the permit, but the Supreme Court reversed, noting that it constituted a heckler's veto, and holding: "Such fears are not a constitutionally permissible factor to be considered in regulating demonstrations."[48]

As the District of Columbia Circuit has stated: "The First Amendment forbids government to silence speech based on the reaction of a hostile audience, unless there is a 'clear and present danger' of grave and

imminent harm. . . . Otherwise, a vocal minority (or even majority) could prevent the expression of disfavored viewpoints—a result contrary to the central purpose of the First Amendment's guarantee of free expression."[49]

Municipal involvement by imposing fees for security

In some situations, local governments can charge for the cost of providing security, but it must be imposed on a content-neutral basis. In *Forsyth County v. Nationalist Movement*, the Supreme Court addressed an "assembly and parade ordinance that permits a government administrator to vary the fee for assembling or parading to reflect the estimated cost of maintaining public order." In a rural Georgia county with a "troubled racial history[,]" a civil rights "March Against Fear and Intimidation" was held on January 17, 1987, consisting of some 90 civil rights demonstrators. The marchers were met by about 400 counterdemonstrators affiliated with the Ku Klux Klan, greatly outnumbering police officers. The counterdemonstrators shouted racial slurs and threw rocks and beer bottles, "forc[ing] the parade to a premature halt[.]" The civil rights parade organizers returned the following weekend, January 24, and the parade "developed into the largest civil rights demonstration in the South since the 1960's[,]" involving some 20,000 civil rights marchers, about 1,000 counterdemonstrators, and "more than 3,000 state and local police and National Guardsmen. . . . The demonstration cost over $670,000 in police protection, of which Forsyth County apparently paid a small portion."[52]

As a result of those two demonstrations, Forsyth County enacted an ordinance that "required the [parade] permit applicant to defray these [security] costs by paying a fee, the amount of which was to be fixed 'from time to time' by the Board."[53]

Two years later, the Nationalist Movement sought a permit for a demonstration on Martin Luther King, Jr. Day in Forsyth County, and the county imposed a $100 fee. The group did not pay the fee, and it did not hold the rally, instead filing suit seeking an injunction against the ordinance as unconstitutional. The Supreme Court described the constitutional problem with the ordinance:

In a 5-4 decision, the Court held: "[T]he provision of the Forsyth County ordinance relating to fees is invalid because it unconstitutionally ties the amount of the fee to the content of the speech and lacks adequate procedural safeguards; no limit on such a fee can remedy these constitutional violations."

> The decision how much to charge for police protection or administrative time—or even whether to charge at all—is left to the whim of the administrator. There are no articulated standards either in the ordinance or in the county's established practice. The administrator is not required to rely on any objective factors. He need not provide any explanation for his decision, and that decision is unreviewable. Nothing in the law or its application prevents the official from encouraging some views and discouraging others through the arbitrary application of fees. The First Amendment prohibits the vesting of such unbridled discretion in a government official.[55]

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The Connecticut Supreme Court reached a different outcome, on different grounds, in *Morascini v. Comm'r of Pub. Safety*, holding as constitutional a Connecticut statute requiring an event operator to pay a fee to cover the cost of police protection for events where the police chief determines that such protection is necessary, reasoning that it is not a heckler's veto.[57]

Aside from the issue of security fees that are exorbitant or that are arbitrarily imposed, municipalities should be cautious about high profile speakers policies like that of U.C. Berkeley above. If a municipality adopts such a policy, it should take care that it does not implement that policy in any manner that would favor one view over another.

Conclusion

As noted at the outset, speech that is popular with some is unpopular with others. While many high-profile cases of the heckler's veto occur between private parties, there are several ways that local governments might become involved, including arrests or threat of arrests, denial of parade permits, imposition of security fees, and adoption of anti-harassment policies. Municipalities must proceed with care in balancing the interests of speakers with those of protestors, and must maintain the peace while avoiding an inadvertent endorsement of the heckler's veto.

Notes

1. Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).
2. Hudgens v. N.L.*R.B.*, 424 U.S. 517, 513 (1976) ("It is, of course, a commonplace that the constitutional guarantee of free speech is a guarantee only against abridgment by the government, federal or state. Thus, while statutory or common law may in some situations extend protection or provide redress against a private corporation or person who seeks to abridge the free expression of others, no such protection or redress is provided by the Constitution itself.") (internal citation omitted).
3. Jim Webb, Press Release, Mar. 28, 2017, http://www.jameswebb.com/news/webb-declines-usna-distinguished-graduate-award (last accessed Mar. 30, 2017).
4. Daniel Chaitin, "Jim Webb declines Naval Academy alumni award amid controversy," *Washington Examiner*, March 28, 2017, https://www.washingtonexaminer.com/jim-webb-declines-naval-academy-alumni-award-amid-controversy (last accessed April 09, 2018);
Dan Lamothe, "Under pressure, Jim Webb declines to be recognized as distinguished Naval Academy graduate," *The Washington Post*, March 28, 2017, https://www.washingtonpost.com/news/checkpoint/wp/2017/03/28/jim-webb-has-been-named-a-distinguished-naval-academy-graduate-and-some-alumni-are-furious/?utm_term=.fd12703656df (last accessed April 09, 2018);
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5. Emma Fitzsimmons, "Condoleezza Rice Backs Out of Rutgers Speech After Student Protests," *The New York Times*, May 3, 2014, https://www.nytimes.com/2014/05/04/nyregion/rice-backs-out-of-rutgers-speech-after-student-protests.html (last accessed April 09, 2018);
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6. *Id.*

7. "Riot Forces Cancellation Of Yiannopoulos Talk At UC Berkeley," *CBSlocal.com* (February 1, 2017) http://sanfrancisco.cbslocal.com/2017/02/01/berkeley-braces-for-protests-at-yiannopoulos-talk/ (last accessed April 9, 2018).

8. *Id.* (underscoring added).

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10. Christine Rousselle, "'A Dark Day For Free Speech In America' Ann Coulter Berkeley Speech Canceled Due To Violent Threats," *Townhall* (April 26, 2017) https://townhall.com/tipsheet/christinerousselle/2017/04/26/ann-coulter-cancels-berkeley-speech-n2318634 (last accessed April 09, 2018);
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11. Christine Roussell, "Berkeley Sued . . . ".

12. *Id.*

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14. Jamie Hale, "Residents hope the 82nd Avenue of Roses Parade will change negative public perception," *The Oregonian/Oregon Live* (April 15, 2014) http://www.oregonlive.com/events/index.ssf/2014/04/residents_hope_the_82nd_avenue_of_the_roses_parade.html (last accessed April 09, 2018);
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Katie Mettler, "Portland rose parade canceled after 'antifascists' threaten GOP marchers," *Washington Post* (April 27, 2017) https://www.washingtonpost.com/news/morning-mix/wp/2017/04/27/portland-rose-parade-canceled-after-anti-fascists-threaten-gop-marchers/?utm_term=.8d55fdc4995b (last accessed April 09, 2018).

15. The threatening email is included in an email string between some of the parade organizers and counsel, and it is available online at https://www.scribd.com/document/346378772/Threat-against-Multnomah-County-Republican-Party-during-Avenue-of-Roses-Parade (last accessed April 09, 2018).

16. "The Troubling Resurgence of the 'Heckler's Veto'," *FIRE: Foundation for Individual Rights in Education*, Jan. 26, 2005, https://www.thefire.org/media-coverage/the-troubling-resurgence-of-the-hecklers-veto/ (last accessed April 10, 2018).

17. 383 U.S. 131, 133 n.1 (1966).

18. The term "heckler's veto" is attributed to Professor Harry Kalven, Jr., of the University of Chicago Law School, in his book, *The Negro and the First Amendment*, (Univ. of Chicago Press) (1966), based on lectures he delivered at the Ohio State Law Forum in April 1964.

19. 340 U.S. 315 (1951).

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

21. *Id.*

22. *Id.* at 317-18 (bold print added).

23. *Id.* at 319.

24. *Id.* at 319-20.

25. *Id.* at 321-22 (Black, J., dissenting) (internal footnotes omitted; bold print added).

26. *Id.* at 327-28 (bold print added).

27. Netherland v. Eubanks, 302 Fed. Appx. 244, 245-46 (5th Cir. 2008).

28. Zachary Code Ordinance § 58-93.2, quoted in *Netherland*, 302 Fed. Appx. at 245.

29. *Netherland*, 302 Fed. Appx. at 245.

30. 505 U.S. 123, 134-35 (1992).

31. 416 F.3d 531, 537 (7th Cir. 2005) ("*Ovadal I*") (citing *Hedges v. Wauconda Cmty. Unit Sch. Dist. No. 118,* 9 F.3d 1295, 1299 (7th Cir.1993)).

32. Frye v. Kansas City, Missouri, Police Dept., 375 F.3d 785, 793 (8th Cir. 2004) (Beam, J., Dissenting) (citing Reno v. ACLU, 521 U.S. 844, 880 (1997)).

33. Ovadal v. City of Madison, 469 F.3d 625, 627 (7th Cir. 2006) ("*Ovadal II*").

34. *Id.* at 629, 631.

35. Bible Believers v. Wayne County, 805 F.3d 228, 240 (6th Cir. 2015).

36. David L. Hudson, Jr., and Lata Nott, "Hate Speech & Campus Speech

Codes," *NewseumInstitute.org*, March 2017, http://www.newseuminstitute.org/first-amendment-center/topics/freedom-of-speech-2/free-speech-on-public-college-campuses-overview/hate-speech-campus-speech-codes/ (last accessed April 10, 2018).
37. Chaplinsky v. New Hampshire, 315 U.S. 568, 571 (1942) ("[I]t is well understood that the right of free speech is not absolute at all times and under all circumstances.")
38. *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting).
39. Hudson and Nott, "Hate Speech & Campus Speech Codes."
40. *Id.*
41. *Id.* (internal quotation marks omitted) (quoting First Amendment expert and law professor Robert Richards of the University of Pennsylvania).
42. David Post, "Heckler's veto, anyone?" *The Volokh Conspiracy* (Dec. 17, 2015) https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/12/17/hecklers-veto-anyone/?utm_term=.61930388fb7b (last accessed 03/29/2018).
43. If Metro were an entirely private entity, then it could ask the offending person to stop the behavior or leave without implicating the constitution.
44. People in Interest of R.C., 411 P.3d 1105, 1109 n.3 (Colo. Ct. App. 2016) (juvenile disorderly conduct case).
45. 365 F.3d 1247, 1257 (11th Cir. 2004). (Note Judge Barker's concurring opinion at 1258-59, contending that ordinance requiring permit for public demonstrations in groups of five or more, and granting Sheriff discretion to deny a permit "for 'any reason' that in his own mind raises public safety concerns[,]" effectively "grants the Sheriff the authority to enforce a 'heckler's veto.'").
46. 664 F.2d 502, 509 (5th Cir. 1981).
47. 934 F.2d 318 (Table) at *2 (4th Cir. 1991).
48. 615 S.W.2d 202, 206-07 (Tex. 1981).
49. Steffan v. Aspin, 8 F.3d 57, 69 (D.C. Cir. 1993) (describing prohibition of heckler's veto).
50. 505 U.S. 123, 124 (1992).
51. *Id.* at 125.
52. *Id.* at 125-26.
53. *Id.* at 126.
54. *Id.* at 127.
55. *Id.* at 133 (internal footnotes omitted).
56. *Id.* at 137.
57. 675 A.2d 1340, 1349-50 (Conn. 1996). **ML**