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#Heckled

Josh Blackman

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#HECKLED

Josh Blackman*

The conflict is all-too familiar. A controversial speaker is invited to speak at a university. The overwhelming majority of students on campus don't care one way or the other. A small number of students want to hear what the speaker has to say—primarily, but perhaps not exclusively, those who are inclined to agree with the speaker. However, a protest is staged by an equally small number of students who disagree with that speaker's opinions and indeed object to his mere presence on campus. Most of those students demonstrate outside the event or quietly protest inside the room. The leaders of the pack try a different approach: shout down the speaker in an effort to “deplatform” him.¹

The speaker may respond with aggression and shout back at the students. Or, he may respond with conciliation and engage the students. Or, the speaker may abandon the event altogether—either of his own volition or because security officers forced him to leave. Invariably, the speaker is not able to give the lecture he wanted to give. The students who wanted to hear the

* Associate Professor, South Texas College of Law Houston. I am grateful to participants of the Yale Freedom of Expression Scholars conference for their insightful comments.

¹ Declan McCullagh, *Deplatforming Is a Dangerous Game*, REASON (Feb. 2019), <https://reason.com/2019/01/20/deplatforming/>.

speaker feel cheated. And the students who protested feel vindicated. All sides disagree about whether the heckler's veto succeeded.

This conflict is personally familiar: it happened to me.² In March 2018, the Federalist Society Chapter at the City University of New York (CUNY) Law School invited me to lecture about free speech on campus. About thirty students wanted to hear me speak. About fifty students protested my event. And the remainder of 600-member student body didn't care. For about eight minutes, a handful of the protestors shouted me down through constant interruptions. I was unable to speak more than a few words at a time. Eventually, I engaged the students with a series of questions to defuse the tensions. I tried to find common ground. Soon enough, the hecklers disbanded. I never gave the lecture I planned to give. Instead, during my remaining time, I answered questions on a wide range of topics from the students who didn't flee.

² 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>; see also Josh Blackman, *Students at CUNY Law Protested and Heckled My Lecture about Free Speech on Campus*, JOSH BLACKMAN'S BLOG (Mar. 29, 2018), <http://joshblackman.com/blog/2018/04/12/students-at-cuny-law-protested-and-heckled-my-lecture-about-free-speech-on-campus/>.

To this day, I am still conflicted about the incident at CUNY. My legal analysis is necessarily intertwined with my personal experiences. I had never been protested before, and I have not been protested since. Indeed, the entire situation came as something of a surprise. Before the event, the campus security officer asked me about my “exit plan”—that is, how I would leave the building in the event of an altercation. During the event, the students stood inches over my shoulders, right behind me. The event could have turned violent very quickly; fortunately, it did not.

This essay, however, is not a plea for sympathy. I am a tenured law professor, and I lecture across the country on controversial legal topics.³ Today, this sort of treatment comes with the territory. Rather, in this essay, I will discuss my perspective about the incident as objectively and critically as possible. Easier said than done. I’ll try my level best. Indeed, I waited over a year to write this essay. I needed a detached perspective to consider the legal questions in the abstract. But not completely detached. I will use my experiences to illustrate how

³ Less than twenty-four hours before the protest, the South Texas College of Law Houston’s Board of Directors approved my application for tenure. I am deeply grateful to my colleagues for their vote of confidence. This security will ensure that I can effectively engage protesters and challenge their ideas for many decades to come.

students attempt to promote and inhibit certain types of speech. My goal is to assess how the First Amendment—and broader principles of free speech—should treat the heckler’s veto on today’s college campuses.

Part I explains why certain speakers are invited on campus. Part II addresses the corollary question: why do students protest those speakers? Part III considers the necessary consequence of Part II: how do students *today* protest speakers? This part also recounts my experiences at CUNY, and addresses how the First Amendment protects speakers who get #heckled. Finally, Part IV addresses how the university should respond to student protests.

I. WHY ARE CERTAIN SPEAKERS INVITED ON CAMPUS?

Historically, most speakers could not reach large audiences because of the limited channels of mass media. There were only so many people who could appear on nationwide broadcasts. Today, anyone with a smartphone and a hashtag can instantly reach a global community. Speech is cheap.⁴ On a daily basis, Americans are overwhelmed with a “cacophony of

⁴ See Eugene Volokh, *Cheap Speech and What It Will Do*, 104 *YALE L.J.* 1805 (1995).

competing voices, none of which [can] be clearly and predictably heard.”⁵ Indeed, with a quick YouTube search, college students can hear any perspective on any topic.

What, then, is the purpose of inviting a speaker to campus? To provide a platform for a specific speaker to talk about a specific topic, as a means to personally interact with other students, and generate support for a perspective. And why are *certain* speakers invited? They can offer what I describe as the three Ps: performance, provocation, and persuasion.

First, the most successful, highly-touted campus speakers know how to put on a show: their remarks are engaging, entertaining, and educational. There are “soft” ways of attracting students to an optional extra-curricular event. Free food helps. Especially hot, non-pizza meals. But the biggest draw is always the caliber of the speaker and the salience of the topic. Furthermore, live interaction offers what YouTube cannot: the opportunity to *personally* ask the speaker a question-that-is-really-more-of-a-comment. This one-on-one interaction is extremely valuable and can be uniquely served through on-campus events.

Second, student groups expect the speaker to cause a stir. *Terminiello v. City of Chicago* recognized that “a function of free

⁵ Red Lion Broad. Co. v. FCC, 395 U.S. 367, 376 (1969).

speech under our system of government is to invite dispute.”⁶ Student organizations understand that speakers can most effectively promote their views when they “induce[] a condition of unrest, create[] dissatisfaction with conditions as they are, or even stir[] people to anger.”⁷ Different organizations tolerate different degrees of provocativeness—in my experience, law school students tend to be more risk averse than undergraduates. However, in all cases, students realize a common theme: provocative topics will draw a bigger crowd. Milquetoast speakers are not invited to give equivocal lectures.

Third, the ultimate purpose of these special events is not only to educate; it is to persuade. Professors in college courses are not hired to convince their students that a particular perspective is correct. Their mission is to educate, not pontificate. In theory, at least. Guest lecturers have the opposite mission. Many student groups invite outside speakers in order to persuade their classmates, or at a minimum, make an alternate perspective seem more palatable. More often than not, this viewpoint is underrepresented on campus.

This approach is not insidious. Extra-curricular organizations provide a necessary balance on campus. Active

⁶ 337 U.S. 1, 4 (1949).

⁷ *Id.*

student groups “often have values, views, and ideologies that are at war with the ones which the college has traditionally espoused or indoctrinated.”⁸ When these students “ask for change,” Justice Douglas observed in *Healy v. James*, “they . . . speak in the tradition of Jefferson and Madison and the First Amendment.”⁹ A generation ago, left-wing groups—such as the Students for a Democratic Society chapter in *Healy*—sought change on right-wing campuses. Now, the politics are largely reversed.¹⁰

Today, conservative groups invite conservative speakers to present opinions that local faculties often will not.¹¹ Without outside lecturers, students may never be exposed to certain ideas—take it from my experiences. I frequently visit other law schools to discuss constitutional originalism. I often get the sense that the students were either (a) never exposed to the concept, or (b) briefly exposed to a strawman version of the jurisprudence.

⁸ *Healy v. James*, 92 S.Ct. 2338, 2354 (1972) (Douglas, J., concurring).

⁹ *Id.*

¹⁰ See Josh Blackman, *Collective Liberty*, 67 HASTINGS L.J. 623, 641 (2016) (noting how progressives and conservatives have swapped their perspectives on free speech).

¹¹ Jeremy Bauer-Wolf, Trickle-down Antagonism, Inside Higher Ed (May 10, 2017), <https://www.insidehighered.com/news/2017/05/10/gop-student-groups-mirror-tactics-national-organizations>. (“Right-leaning campus groups said in interviews they don’t attempt to ignite discord, but that in planning certain events -- like the case of Ann Coulter’s canceled speech at University of California, Berkeley -- they simply sought to bring an alternate view to their campuses.”)

Moreover, these events need not be one-sided. Indeed, often the best way to persuade is through a debate: students can independently assess competing sides of an issue. The most effective events pair an outside speaker with a local professor. Students are able to quickly see two sides of the same issue. But make no mistake, debates are sponsored to improve the standing of the student group's perspective. And that purpose is, generally, what occasions protests.

II. WHY DO STUDENTS PROTEST SPEAKERS?

Part I considered why certain speakers are invited to campus. Part II will address why those speakers are protested. Many protests occur because students disagree with the perspective of the presenter. For example, students at CUNY protested me, in part, because they disagreed with my views on immigration, healthcare, and other important topics. This disagreement may or may not be based on an accurate characterization of what the speaker actually believes. Indeed, protests may be premised on assumptions about what a given speaker will say. These assumptions may be unfounded. At least in my case, the CUNY students incorrectly presumed that I held certain beliefs based on the groups I associate with. In other

cases, these assumptions may prove accurate—perhaps the students read the speaker’s writings or watched past lectures.

Philosophical disagreements, however, provide only a superficial justification for protests. Rather, students will often object to the mere presence of the speaker on the campus. This opposition can be premised on many different grounds. Perhaps the speaker takes a position that is antithetical to the position the students hold. For example, the speaker is ardently pro-life or passionately pro-choice.¹² Or, the students perceive the speaker’s message as antithetical to the students themselves.¹³ That is, the speaker is seen as racist, sexist, homophobic, transphobic, xenophobic, etc. The university’s willingness to host that speaker, the argument goes, is tantamount to the university endorsing the speaker’s message.

To be sure, certain well-known speakers contribute little or nothing to campus discourse. Rather, they are invited *solely* to rile up students, create strife, and cause discord. Yet, these sort

¹² Alexandra Descantis, *Students Shout Their Abortions to Disrupt a Pro-Life Display*, NATIONAL REVIEW (May 3, 2019), <https://www.nationalreview.com/corner/students-shout-their-abortions-to-disrupt-a-pro-life-display/>; Kristin Templeton & Tori Thiessen, *Pro-Life group holds anti-abortion demonstration on campus, met with Lee student counter-protest*, LEE CLARION (Mar. 28, 2019), <https://www.leeclarion.com/2019/pro-life-group-holds-anti-abortion-demonstration-on-campus-met-with-lee-student-counter-protest>.

¹³ Katie Steinmetz, *Milo Yiannopolous Finally Spoke at Berkeley. But the Protesters Were Louder*, TIME (Sept. 25, 2017), <https://time.com/4955245/milo-yiannopoulos-berkeley-free-speech-week/>.

of free speech martyrs, who receive a disproportionate share of media attention, are few and far between. There are far more speakers who do nothing of the sort. Yet, because their views are inconsistent with the academic heterodoxy, these speakers are unfairly lumped in with the rest. Indeed, during my CUNY visit, I was tarred as a fascist, a white supremacist, and every -phobe in the book. Far too often, students engage in *reductio ad Hitlerum*: people who disagree with their views must be a Nazi.¹⁴ In my experience, this sort of rhetoric unfairly slanders speakers who hold views outside the mainstream and, regrettably, cheapens the moral opprobrium of actual Nazis.

For one reason or another, students determine that a demonstration is an effective means to counter speech they disagree with. Are protests effective at accomplishing these goals? I'm skeptical. First, anyone on campus can hear a speaker's opinions with a simple YouTube search. Even if the demonstrators are successful at preventing the speaker from lecturing on campus, their classmates can still hear the message by other means. Second, a protest invariably draws attention to a given speaker. The disruption brings *extra* attention to the

¹⁴ Logically Fallacious, *Reductio ad Hitlerum*, <https://www.logicallyfallacious.com/tools/lp/Bo/LogicalFallacies/152/Reductio-ad-Hitlerum> (last visited Oct. 30, 2019).

speaker, especially if the one-sided protest can be highlighted on social media. It worked for me. The recording of my protest garnered over 30,000 views on YouTube. Most of my lectures seldom receive more than a few dozens of views. Third, with poorly-coordinated protests, the demonstrators may look bad, and the speaker looks good in contrast. This dynamic aptly describes my incident at CUNY. In some rare cases the protests turn violent.¹⁵ Here, the demonstrators can make the controversial speaker seem reasonable by way of comparison.

Yet the protests still perform a valuable function: to convey a contrary message and to express discontent that the university allowed the speaker onto campus. Especially if the recording of the protest goes viral.

III. HOW DO STUDENTS TODAY PROTEST SPEAKERS?

Today, students protest speakers with four general approaches: I call them the four Ds. First, students can pressure the administration to *disinvite* the speaker. Second, students can *discourage* their classmates from attending the event, both through in-person and online interactions. Third, students can

¹⁵ Peter Beinart, *A Violent Attack on Free Speech at Middlebury*, THE ATLANTIC (Mar. 6, 2017), <https://www.theatlantic.com/politics/archive/2017/03/middlebury-free-speech-violence/518667/>.

peacefully *demonstrate* outside or inside the event. Fourth, students can *disrupt* the event. (To simplify the constitutional analysis, I will presume these events occur at state institutions, which are bound by the First Amendment.¹⁶)

In each circumstance, the First Amendment dynamics are distinct and interrelated. This essay will consider the issue from four perspectives: (1) the rights of student organizations to invite their own speakers, (2) the right of the speaker to speak, (3) the rights of students to hear the invited speakers, (4) and the rights of demonstrators to protest those speakers. The university has competing responsibilities to consider each perspective. Throughout this section, I will weave in—where relevant—my own experiences at CUNY.

A. Disinvite

In recent years, it has become increasingly common for universities to disinvite speakers.¹⁷ This form of “deplatforming,”¹⁸ as it is known, follows two types of invitations. First, after the university itself invites the speaker. Second, where a student group—with or without the university’s

¹⁶ See *Healy v. James*, 408 U.S. 169, 180 (1972).

¹⁷ See Harvey C. Mansfield, *The Theory Behind My Disinvitation*, WALL STREET JOURNAL (Apr. 14, 2019, 3:21 PM), <https://on.wsj.com/32Vjv2C>.

¹⁸ McCullagh, *supra* note 1.

consent—invites the speaker. The First Amendment analysis differs in each context.

1. The University Invited the Speaker

In some cases, a University may invite a speaker to give a distinguished lecture or to deliver a commencement address. Here, students may object to the invitation. As a constitutional matter, students have a right to petition the administration for redress of their grievances; and the institution is under no obligation to respond.¹⁹ Their demands, which may be objectively unreasonable, do not give rise to any constitutional problems. Post-invitation objections are especially appropriate because, as a general matter, students had no role in selecting the commencement speaker. That decision rested entirely with the administration. Moreover, unlike most extracurricular events—where attendance is sparse—the vast majority of the student body is expected to attend graduation ceremonies.²⁰ Finally,

¹⁹ See *Minn. Bd. Commun. for Colleges v. Knight*, 465 U.S. 271, 285 (1984) (“Nothing in the First Amendment or in this Court’s case law interpreting it suggests that the rights to speak, associate, and petition require government policymakers to listen or respond to individuals’ communications on public issues”).

²⁰ See *Lee v. Weisman*, 505 U.S. 577, 595 (1992) (“Everyone knows that in our society and in our culture high school graduation is one of life’s most significant occasions . . . Graduation is a time for family and those closest to the student to celebrate success and express mutual wishes of gratitude and respect, all to the end of impressing upon the young person the role that it is his or her right and duty to assume in the community and all of its diverse parts.”).

unlike most extracurricular events, there is no opportunity for interaction. Students cannot ask commencement speakers tough questions after their address.²¹ They must sit in the audience like potted plants.²² The administration should carefully choose graduation speakers, in light of the broad reach of their message.

As a policy matter, once the invitation is made, universities should resist the urge to disinvite the speaker. Revoking invitations sets a terrible precedent. Moreover, cancelling an address ultimately shields the student body, and their guests, from learning about a new perspective. However, there are no constitutional problems if the administration revokes the invitation. Under prevailing government speech doctrine, the University can pick and choose the viewpoints it expresses—the justification need not be neutral.²³ The disinvited speaker would not have a cause of action against the University

²¹ Keith Whittington, *Should We Care About College Commencement Speakers?*, THE VOLOKH CONSPIRACY (May 29, 2019, 8:00 AM), <https://perma.cc/WN48-6YAAQ> (“Students and faculty are not expected to line up to ask questions after a commencement address. There is no room for debate or the expression of doubt.”).

²² During a recent commencement address, the speaker made what I thought were inappropriate comments about gun control. Sitting on the stage, I doffed my cap as a sign of silent protest. Several of my colleagues, as well as students in the audience, noticed. After commencement concluded, I told the speaker in the robing room that her remarks were inappropriate. She was incensed that anyone could take offense at what she thought were reasonable remarks. Most students will never have that opportunity.

²³ See *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 135 S.Ct. 2239 (2015); *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009); *Rumsfeld v. Forum for Acad. and Inst.’l Rights, Inc.*, 547 U.S. 47 (2006).

for a violation of the First Amendment. However, the other members of the community—who did not object—are being denied the right to hear the speaker.²⁴ Because the invitation was made, and revoked, by the administration—which has a general prerogative to select their own speakers—there are no direct First Amendment violations. The analysis is different when a student group, rather than the administration, offers the invitations.

2. A Student Group Invited the Speaker

Universities generally allow students to invite their own speakers. In such cases, the university has delegated authority to the students to determine what extracurricular programming exists on campus. Even at private institutions, which are not bound by the First Amendment,²⁵ this sort of delegation reflects an important tenet of academic freedom: students have the right to bring speakers of their choice onto campus to promote

²⁴ See *Kleindienst v. Mandel*, 408 U.S. 753, 759-760 (1972) (recognizing the right of “of American academics who have invited [a foreign speaker] to participate with them in colloquia, debates, and discussion in [universities in] the United States.”).

²⁵ THE FIRE, “Private Universities” <https://www.thefire.org/resources/spotlight/public-and-private-universities/>.

discourse. Once this delegation is made, universities have an institutional obligation to stand by this commitment.

However, universities often attach strings to that discretion. For example, the student groups may have to seek approval from the administration before inviting an outside speaker. This process can serve several different purposes—from mundane to logistical to censorious.

First, the university may require organizations to register events to maintain a centralized calendar of student functions. Such a regime is in no sense problematic, and indeed will help promote attendance.

Second, the university may require registration to coordinate the location of events. This regime may be benign: given a fixed number of classrooms, the administration needs to be able to coordinate physical space. So long as students are provided a room of an adequate size for the intended event, there is no problem. However, there may be situations where the university deliberately schedules a controversial event in an unpopular, difficult to attend location or in a small space that cannot fit the anticipated crowd size. These approaches may constitute backdoor “deplatforming.”²⁶

²⁶ See Josh Verges, *Did UMN move Ben Shapiro speech to St. Paul due to politics? It's 'plausible', judge says*, ST. PAUL PIONEER PRESS (Feb. 27, 2019),

Third, the administration may restrict the times at which an event may take place. For example, the university may designate a certain time of day for extracurricular events—a bloc that does not conflict with scheduled classes. If this policy is applied neutrally, there are no problems. Yet, difficulties may arise if the university mandates that only one organization can hold an event during a given time—that approach prohibits counter-speech. Some universities impose a limit on the number of events an organization can hold a year. This approach will invariably punish the organizations with the most funding, that can afford to put on several events a year. Several law schools that I have visited have adopted this rule. Though facially neutral, these policies invariably restricted events hosted by Federalist Society chapters.

Fourth, the administration may require the organization to pay for security costs to host a particularly controversial speaker. Often these costs are prohibitive and amount to an effective revocation of the invitation.²⁷ There may be cases where

<https://www.twincities.com/2019/02/27/umn-ben-shapiro-st-paul-speech-university-of-minnesota-campus/>. Cf. Stephen Dethrage, *Students relocate Westboro Baptist Church counter protest after pressure from UA administration*, ALABAMA LOCAL NEWS (Jan. 14, 2019),

https://www.al.com/tuscaloosa/2013/05/students_relocate_westboro_bap.html.

²⁷ See Eugene Volokh, *U. Miami Will Cover Security Costs of Student-Organized Charles Murray Debate on Free Speech*, THE VOLOKH CONSPIRACY (Mar. 15, 2018, 1:26am), <https://perma.cc/FET3-XCFJ> (“[T]he Society is

the university finds it necessary to cover these security costs to promote free speech.²⁸ For example, schools could elect to cover the security costs for one event per organization per year.

In each of these four instances, the university did not *expressly* deny the organization the ability to invite a given speaker. Nor did the university force the organization to revoke the invitation. Rather, they employed different soft approaches to minimize the speaker's impact or to make the invitation cost-prohibitive.

Door number five is far more problematic: the university may require the organization to seek pre-approval of a speaker before an invitation can be sent. At that juncture, the university has unbridled discretion to grant or deny permission to give the invitation. Here, the university may engage in blatant viewpoint discrimination. And, unlike with the commencement address, which constitutes government speech, here the university is restricting student organizations' rights to hear the speaker of their choice. The First Amendment implications in this scenario are far different. However, this cost is often unseen: speakers

covering Murray's transportation costs, honorarium, and the like, as is usual for Federalist Society speakers, and the University is covering the security fees.”).

²⁸ See ERWIN CHERMERINSKY & HOWARD GILLMAN, *FREE SPEECH ON CAMPUS* 130 (2017) (“There must be places on campus available for speech, even if providing them imposes some costs on the university.”).

seldom learn that an organization wanted to invite them but was unable to because of university pressure. (Students at one school I visited told me that the administration spiked an invitation to my colleague; when I told him, he was shocked.) Therefore, these soft “deplatformings” are difficult to perceive and nearly impossible to challenge.

Door number six is the most visible form of disinvitation. Here, the organization is allowed to invite a speaker without having to first seek university approval. Or even worse, the organization seeks approval, and it is granted. However, following a backlash, the university forces the organization to withdraw the invitation. Unlike the previous example, the speaker knew he was invited, and then was uninvited because of intervention by the University. This scenario can give rise to a First Amendment violation.

3. I Was Invited, But Not Disinvited, From CUNY

Every year, I am invited to lecture at approximately fifty law schools—usually by the local Federalist Society chapter.²⁹ I

²⁹ *About Us*, FEDERALIST SOCIETY, <https://fedsoc.org/about-us> (last visited Nov. 19, 2019) (“The Federalist Society for Law and Public Policy Studies is a group of conservatives and libertarians interested in the current state of the legal order.”). This national organization has chapters at most law schools. The

discuss a wide range of topics about the Supreme Court and Constitutional law. In October 2017, the Federalist Society chapter at the City University of New York School of Law invited me to speak on a panel discussion about theories of constitutional interpretation. I had planned to discuss originalism. Alas, the students were not able to find any other professors who were willing to participate in the event.

This phenomenon is fairly common: most law school faculty decline to participate in Federalist Society events for a host of reasons. First, these sorts of discussions do not provide academic bona fides that are helpful for tenure-track professors; they may prefer to attend symposia and other scholarly activities. Second, some professors resent the fact that the outside speaker is paid an honorarium, while the local professor is paid nothing. (The honorarium is paid to compensate the speaker for spending one day or more traveling; the Federalist Society does not pay professors to speak at their own institutions). Third, other professors hold the Federalist Society in low regard for a host of reasons, and want nothing to do with it. (At one school, a professor openly admitted that he was boycotting all Federalist Society events because he disagreed with the organization.)

Federalist Society approves certain speakers to visit these chapters and talk about various legal issues.

After several rounds of emails, I suggested to the CUNY students that we switch topics to free speech on campus. It is a talk I had given before without any problems at several other colleges.³⁰ The topic can be engaging and entertaining. I generally play video clips of other campus protests to draw students in. Invariably, this topic is provocative: more often than not, students on the left protest speakers on the right.³¹ My ultimate goal is to persuade students that free speech need not be a right-left issue. More importantly, progressive students—especially those with views outside the mainstream—stand to benefit the most from robust First Amendment protections. I present my position in a calm, non-adversarial manner. Afterwards, I always take at least ten minutes of questions and provide candid answers. In the past, these talks have been very well received, even by students who disagree with my substantive

³⁰Josh Blackman, *Free Speech and Intellectual Diversity in Law Schools – SIU Federalist Society Chapter*, YOUTUBE (Feb. 13, 2018), <https://www.youtube.com/watch?v=4FZQzNFPQjg&t=565s>; Josh Blackman, *Free Speech on College Campuses: Texas Southern Federalist Society Chapter*, YOUTUBE (Nov. 1, 2017), <https://www.youtube.com/watch?v=HjzKQ8I8K1w&t=1503s>; Josh Blackman, *Free Speech on College Campuses at UMass Law*, SOUNDCLOUD (Apr. 24, 2017), <https://soundcloud.com/josh-blackman-4/free-speech-on-college-campuses-at-umass-law>; Josh Blackman, *Barry University Federalist Society – Free Speech on Campus*, YOUTUBE (Mar. 20, 2017), https://www.youtube.com/watch?v=nFC_PltDROQ&t=1413s.

³¹Jeremy Peters. *In the Name of Free Speech, States Crack Down on Campus Protests*, (June 14, 2018) <https://www.nytimes.com/2018/06/14/us/politics/campus-speech-protests.html>

views. The Federalist Society chapter agreed that this topic would work well at CUNY. But once again, the chapter was unable to find any other professor who would participate in the event. I planned to give the solo version of my talk.

CUNY students tried to lobby the university to disinvite me. They were unsuccessful. Three days before the event, the President of the chapter wrote, “We passed out the flyers today (first day back from spring break) and a large number of students are already up in arms about the event.” The Office of Student Affairs explained that “some enraged students . . . apparently, are planning to protest.” I asked why they were protesting. The Federalist Society President provided an explanation:

These students saw first, that this is a Federalist Society event; and second, they saw a few of your writings (specifically a National Review article praising [Attorney General] Sessions for rescinding DACA and ACA)³², and instantly assume you’re racist; and third, our event being titled about free speech is reminiscent of events that claim free speech just to invite people like Milo Yiannopoulos and Ann Coulter.

He explained that “we have the support of the administration” and the event would proceed as scheduled. Hours before the

³² Josh Blackman, *Jeff Sessions Restores the Rule of Law*, NATIONAL REVIEW (Oct. 16, 2017, 7:10 PM), <https://www.nationalreview.com/2017/10/obamacare-immigration-trump-attorney-general-jeff-sessions-lawmaking-power-from-executive-to-congress/>.

event began, Mary Lu Bilek, the Dean of CUNY Law, sent an email to all students:

As a law school, a public institution, and a school within the CUNY system, we are committed to academic freedom, the free exchange of ideas, and expression of all points of view, including the freedom to disagree with the viewpoints of others.

University policy provides guidelines for how to express disagreement lawfully (including through demonstrations), defines prohibited conduct, and details the procedure for handling disruptive demonstrations at CUNY facilities. Many of us witnessed a demonstration here earlier this year, which is an example of expressive conduct that does not run afoul of any University policy.

We attach a copy of the University's policies and rules, including those covering the processes for dealing with student and employee prohibited conduct.

She attached CUNY's Policy on Freedom of Expression and Expressive Conduct.³³ A member of the CUNY community tweeted, "Only at the 'nation's premier public interest law school' does the Dean send an email about CUNY limits on protest shortly after a conservative student org (Federalist Society) sends a reminder about the vile speaker (Justin [*sic*] Blackman) that they're bringing to campus[.]"³⁴ Here, my invitation was honored.

³³ THE CITY UNIVERSITY OF NEW YORK POLICY ON FREEDOM OF EXPRESSION AND EXPRESSIVE CONDUCT, <http://bit.ly/2Z8etgU>.

³⁴ @yoyoitsflo, TWITTER (Mar. 29, 2018, 12:07 PM), <https://twitter.com/yoyoitsflo/status/979434905359745025>.

B. Discourage

Often, the protesters' first effort is to pressure the administration to disinvite the speaker. If the invitation is in fact revoked, then the protesters were successful. However, if the event proceeds as planned, students have other options. Specifically, the students can attempt to discourage their classmates from attending the event. This approach leverages speech to counter speech. If done properly, discouragement can be very effective. In my case, the CUNY students researched some of my past writings and lectures. They circulated a pamphlet that criticized several of my positions. The message was stated directly: I was not welcome on campus. Many of the statements were taken completely out of context, but I applauded the students for taking the time to review my record.

Such campaigns can also rely on social pressure: ostracizing students who participate in the event or who cross the protestors' picket line. At CUNY, I counted about five people in the room when the event started. By the time it concluded, there were about thirty people. Several of the late-arrivers told me that they were intimidated by the protesters. Out of fear of retribution, they did not want to be seen with me. Several students thanked me after the event and explained that

conservative speech is stifled on campus not by the faculty, but by the students. The students criticize anyone who does not toe the progressive line. I find this discourse troubling as a policy matter, but it is constitutionally benign. The students are using their own speech to counter that of the invited speaker.³⁵ There is no problem. The right of the speaker is not disrupted. And those who want to hear the speaker are able to, even if they face social stigma for doing so.

C. Demonstrate

Students can demonstrate before, during, and after an event in many ways. I draw a sharp distinction between a demonstration and a disruption. The former approach allows the event to proceed, though the speaker has to deal with some distractions. The latter approach does not allow the event to proceed. I will discuss disruptions in the next part. Here, I will consider demonstrations.

1. Demonstrate Outside the Event

³⁵ See *Whitney v. California*, 274 U.S. 357, 377 (Brandeis, J., concurring) (“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.”).

First, students can demonstrate outside the event.³⁶ This approach appeals to the quintessential marketplace of ideas: respond to speech you disfavor with speech you favor.³⁷ Indeed, perhaps the most effective element of this method is that the invited speaker must walk through the proverbial gauntlet of signs, jeers, and chants. Take it from me—the experience is somewhat intimidating, and the students sent an effective message.

So long as the students do not *physically* block access to the room for the speaker or other students, this sort of demonstration is perfectly lawful. The free speech rights of the demonstrators, speaker, and students are all protected. However, there may be cases where students demonstrate outside the classroom very loudly, such that their commotion makes it difficult to hear the speaker inside the classroom. Such situations should be treated in the same fashion as demonstrations inside the classroom.

³⁶ Debbie Truong, Sarah Larimer & Susan Svrulga, *Georgetown Law students and faculty protest speech by Attorney General Jeff Sessions*, WASH. POST. (Sept. 26, 2017), <https://www.washingtonpost.com/news/grade-point/wp/2017/09/26/georgetown-law-students-plan-to-protest-jeff-sessionss-speech/>.

³⁷ See *Abrams v. United States*, 250 U.S. 616, 630 (Holmes, J., dissenting) (1919) (“[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.”).

The overwhelming majority of the CUNY students who objected to my event engaged in peaceful demonstrations. As I walked through the hallway to the classroom there were several dozen students demonstrating. I encourage you to watch the video to absorb the ambiance.³⁸ They chanted “Shame on you,” booed, and hissed.

They held up signs. Earlier that day, students passed out poster board and markers in the hallway. Many of the signs were directed at me personally: “Josh Blackman, you are not welcome here.” “Pronouns Matter, Josh Blackman does not.” “Oppressors are not welcome here.” “My existence > your opinion.” “I’m White and Afraid of Everything.” “Go home Josh Blackman.” “Racists are not welcome here.” “Anti-DACA not welcome @ CUNY.” My personal favorite: “Your legal analysis is lazy and wrong.” The sign was at least half-right. I framed another sign, which was left on the floor: “Go home and blog about how hard this was.” Indeed, I did.³⁹

Other signs attacked the Federalist Society. “Federalist Society is Racist.” “The Federalist Society Was Founded to

³⁸ The Federalist Society, *Importance of Free Speech on Campus [Prof. Josh Blackman]*, YOUTUBE (Apr. 12, 2018), <https://youtu.be/kuWEFjnwLiA>.

³⁹ Josh Blackman, *Students at CUNY Law Protested and Heckled My Lecture about Free Speech on Campus*, JOSH BLACKMAN’S BLOG (Apr. 12, 2018), <http://joshblackman.com/blog/2018/04/12/students-at-cuny-law-protested-and-heckled-my-lecture-about-free-speech-on-campus/>.

Uphold White Supremacy.” “Conservative hate ≠ intellectual debate.”

Other signs were directed at the First Amendment—the topic of my lecture: “The First Amendment is a weak shield for White Supremacy.” “The First Amendment is not a License to Dehumanize Marginalized People.” “My free speech is fuck you, white supremacist.” “The Constitution is racist.” “Your hate speech is not welcome here.”

Other signs critiqued the notion of the “rule of law” itself: “Rule of Law = White Supremacy.” “Restoring the Rule of Law = White Supremacy.” “Constitutional Originalism = White Supremacy.” “We reject the myth of legal objectivity.”

Other signs faulted CUNY for hosting me: “Shame on CUNY: Don’t give Oppressors a Platform,” “CUNY – You said DACA Students are Welcome here. Where is the Protection? Where is the Safety?” “CUNY Law – You’ve Failed our Students, Past, Present, and Future.”

I could write an entire volume in response to these signs, but my disagreement with their message is irrelevant for present purposes. These students all exercised their rights of free speech to make me as uncomfortable as possible—as they should have. It was quite intimidating to walk through the throng of students

shouting at me. But they got their point across. Indeed, they also conveyed to other students their opinions about me, the Constitution, the Federalist Society, and CUNY. The demonstration in no way disrupted my ability to speak.

The mode of this non-violent demonstration should be lauded. One student did make a half-hearted effort to block my entry into the room with his backpack, but I easily moved past him.

2. Demonstrate Inside the Event

Students can also peacefully demonstrate inside the classroom. As a threshold matter, classrooms used for extracurricular events should be considered limited public forums.⁴⁰ In contrast with a traditional public forum, in a limited public forum, the government may adopt certain reasonable restrictions on who can use the space.⁴¹ However, the government cannot restrict access to these spaces based on the speaker's viewpoint.⁴² For example, students can stand in the

⁴⁰ *Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37, 45 (1982) (“The Constitution forbids a State to enforce certain exclusions from a forum generally open to the public even if it was not required to create the forum in the first place.”).

⁴¹ *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995) (“The necessities of confining a forum to the limited and legitimate purposes for which it was created may justify the State in reserving it for certain groups or for the discussion of certain topics.”).

⁴² *Id.* (“These principles provide the framework forbidding the State to exercise viewpoint discrimination, even when the limited public forum is one of its own creation.”).

back of the room and hold up signs. This approach does not prevent the speaker from conveying his message. Their presence may be distracting to those in the room. That's the point: draw attention to the counter speech. Think of Mary Beth Tinker's black armband.⁴³ Her silent protest was designed to draw attention to her views about the Vietnam war. But the demonstration did not "substantially interfere with the work of the school or impinge upon the rights of other students."⁴⁴ Protesters can also turn their backs on the speaker, walk out when the lecture begins, and wear t-shirts with messages. These forms of silent protest can be effective.⁴⁵

Additionally, after the presentation, students inside the classroom can challenge the speaker by asking effective questions. Most speakers are fairly adept at handling hostile questions, but the mere presence of the questions provides an effective counterpoint—especially if the event is not structured as a debate. But a sharply worded question can put the invited speaker on the ropes. Take it from my experience—every once

⁴³ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969).

⁴⁴ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509 (1969); *see also Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988).

⁴⁵ Maria Danilova, *Protesters carrying signs like "white supremacist" met Betsy DeVos during a speech at Harvard*, BUSINESS INSIDER (Sept. 29, 2017), <https://www.businessinsider.com/harvard-protesters-met-betsy-devos-2017-9>.

in a while, a student manages to trip me up. It happens to the best of us.

These types of demonstrations allow the speaker to speak and ensure that classmates can listen. So long as the demonstration inside the classroom is quiet, there is no problem under the First Amendment. The rights of the speaker and the other students in attendance have not been disrupted.

A different constitutional analysis would apply, however, if the *same* classroom were used for a regularly scheduled class, rather than for an extracurricular, student-sponsored event. In this more traditional context, the classroom serves as a nonpublic forum.⁴⁶ In such a space, the government can impose restrictions based on the content of speech.⁴⁷ Specifically, the space is being utilized to convey a message approved and controlled by the university—indeed, many classes are prerequisites for graduation. Professors lack the traditional free speech rights in

⁴⁶ *Minn. Voters All. v. Mansky*, 585 U.S. ___, 138 S. Ct. 1876, 1885 (2018) (“[I]n a nonpublic forum, on the other hand—a space that ‘is not by tradition or designation a forum for public communication’—the government has much more flexibility to craft rules limiting speech.”) (quoting *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 46 (1983)); *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 70 n.11 (1983) (Brennan, J., dissenting) (“It is noteworthy that *Tinker* involved what the Court would be likely to describe as a nonpublic forum.”).

⁴⁷ *Minn. Voters Alliance v. Mansky*, 585 U.S. ___, 138 S. Ct. 1876, 1885 (2018) (“[T]he government may impose some content-based restrictions on speech in nonpublic forums, including restrictions that exclude political advocates and forms of political advocacy.”).

the classroom they would have in forums outside the classroom.⁴⁸ They are paid to teach a specific topic, though the norms of academic freedom provide considerable leeway for how that topic can be taught. Moreover, the administration and professors routinely exercise control over their students' speech in these nonpublic forums. Students who speak out of turn, or even who quietly disrupt a class, can be disciplined.⁴⁹ The sort of conduct that occurred during my protest at CUNY would never fly in a first-year law school class. This sort of pedagogical control in no way offends the First Amendment.⁵⁰

E. Disruption

The final category of protest involves *disruption*. This mode can be accomplished in two broad fashions. First, there are visual disruptions: standing in front of or behind the speaker. Second, there are auditory disruptions: making noise such that the speaker cannot be heard. Not all disruptions violate the rights of the speaker to speak and of the other students to hear. The

⁴⁸ Stanley Fish, *Free Speech Is Not an Academic Value*, CHRON. HIGHER EDUC.: CHRON. REV. (Mar. 20, 2017), <https://www.chronicle.com/article/Free-Speech-Is-Not-an-Academic/239536>.

⁴⁹ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969).

⁵⁰ *Ark. Ed. Television Comm'n v. Forbes*, 523 U.S. 666, 679 (1998) (“[T]he government does not create a designated public forum when it does no more than reserve eligibility for access to the forum to a particular class of speakers, whose members must then, as individuals, ‘obtain permission,’ to use it.”) (citation omitted).

constitutional analysis should turn on the context in which the disruption occurs, the intent of the disruptors, the duration of the disruption, and whether the speaker is in fact able to give the talk he was invited to give. No simple approach exists to draw these lines. Indeed, I am still not certain if my own talk at CUNY was disrupted.

1. Visual Disruptions

A visual disruption is designed to prevent the audience from seeing the speaker or his presentation. This type of disruption can be performed in several fashions. First, students can stand *in front* of a speaker. Here, the speaker can continue to talk, uninterrupted. However, this tactic blocks the visual connection between the speaker and the audience. Moreover, the close proximity between the speaker and the students could give rise to a security threat: peaceful protests can quickly turn violent with the right catalyst.

Second, students can stand *behind* the speaker. (That's what happened to me at CUNY.) This approach does not block the visual connection between the speaker and the audience. Yet, it heightens the risk of physical violence: the speaker cannot simultaneously keep an eye on the audience and the developments behind his or her head. Moreover, as a matter of

norms, the invited speaker is expected to occupy the front of the room. Other students, who were not invited as speakers, do not have the floor. They can ask questions from the back of the room at the appropriate juncture.

Third, protesters can also disrupt the speaker's demonstrative devices, such as a PowerPoint presentation. For example, students can stand in front of a screen, or block—or even turn off—the projector. Often, a PowerPoint contains core components of a speaker's message. Blocking the screen is tantamount to blocking the speech itself.

These forms of visual disruptions still allow the speaker to speak, but—to varying degrees—not be seen.

2. Auditory Disruptions

A highly effective way to interfere with an event is through an auditory disruption. One common method is the so-called “shout-down.” A basic principle of human communication is that only one person can audibly speak at once. If two people speak at the same time—cross-talk—neither can be heard. Perhaps one party shouts louder. Or the other party uses more extreme language to garner attention. Either way, the parties are unable to engage in a meaningful discourse because

of the shouting contest—a verbal race to the bottom. Think of most primetime cable news tête-à-têtes.⁵¹

Students can shout-down a speaker in several different ways. First, students can shout isolated questions from the audience—questions that they will wait to be answered.

Second, students may shout out the equivalent of an excited utterance: for example, “Shame on you!” or “Come on!” In certain contexts, a brief exclamation, at the right moment, may be appropriate. For example, Jeremy Waldron explains that in the British parliament, it is accepted to speak out of turn during a controversial portion of a member’s address.⁵² This interruption is truly de minimis. But in such cases, the shout is likely intended to engage the speaker and elicit a reaction, not shut him down.

Third, students can continuously sing or chant while the speaker is presenting. These sounds are not designed to foster a dialogue or provide a brief interjection. Rather, these chants

⁵¹ The Rubin Report, *This 10 Second Clip Is The Worst Cable News Video You’ll ever See*, YOUTUBE (Oct. 24, 2014), <https://www.youtube.com/watch?v=oliDEQKiH-g>.

⁵² See Jeremy Waldron, *Heckle: To Disconcert with Questions, Challenges, or Gibes*, (NYU Sch. Of Law, Pub. Law & Legal Theory Working Paper Grp., Paper No. 17-42, 2017), <https://ssrn.com/abstract=3054555>.

serve merely to throw the speaker off her game and prevent other students from listening.⁵³

Fourth, students can stand in front of, or behind the speaker and shout to his or her face. This approach—combining visual and auditory interference—ratchets up the level of hostility. It is difficult to present a prepared lecture when people are yelling at your face.

3. CUNY Students Shouted Me Down

Let's return to my experience at CUNY. After traversing the gauntlet in the hallway, I entered the CUNY classroom. Much to my surprise, there were about five people in attendance. Moments later, student with signs filed in and surrounded all four sides of the room. Those demonstrating in the back of the room were not a problem. However, about a dozen students stood directly behind me.

The President of the Federalist Society Chapter asked the students standing behind me to move. They refused. I didn't raise any objection. Had they stayed there, and not made any noise, I would have continued with my lecture as planned. It was a visual disruption, but a minimal one.

⁵³ See The Rubin Report, *supra* note 44.

But they did not stay quiet. The protesters simultaneously shouted many messages before I even started. “Shame on You.”

“I don’t understand how CUNY allows this.”

“There are students that are directly affected by this hate speech.”

“Legal objectivity is a myth.”

“You still have an opportunity to leave.”

The President began his introduction. The protesters heckled him.

“This is not okay.” As he said my name, someone called out “He’s a white supremacist.” Others booed.

At this point I hadn’t said a word.

One of the protesters observed, “He’s filming us. Just so everyone is aware, he is filming us.”

I told her, “I am.” I record all of my lectures—here I took the additional step of recording the walkup to the event. In advance, I did not quite know what to expect, but my experience is to always have my own recording in the event there were doubts about what I, or others did. YouTube is my insurance policy. In any event, New York is a one-party consent recording jurisdiction.⁵⁴

⁵⁴ N.Y. Penal Law § 250.00.

A few students in attendance clapped as I began to speak.

“Well thank you very much to CUNY for having me,” I said.

In unison, they yelled out, “CUNY is not having you.”

“You are not welcome.”

Another shouted out something about “white men and those who support white supremacy.”

An African-American student who was attending the event replied, “I am not white.”

A protestor, holding a sign that said “Josh Blackman is not welcome here and neither is the Fed Society” asked, “Then why are you here? Why aren’t you with us?”

A member of the Federalist Society Chapter reminded the protesters that they were not allowed to interrupt me once I started. At that point, a member of the CUNY administration entered the room and walked right up to the protesters. She said:

All right, listen. Everybody stop. Let me tell you something. The university rules are people get to speak. You may protest. You may protest. But you may not keep anyone from speaking. If you do, I have other things to do, I will be back. Or you can resolve this yourselves. Or you can have me resolve it.

As she began to walk away, a student asked, “Why are you bringing racists into your school? Can you answer that?”

“Why are you not providing support for students affected by this hate speech?”

The administrator repeated, “Did you hear me?”

A student replied, “We are not children. You can’t talk to us like that.” She never came back.

Professor Franklin Siegel, who was seated in the back, urged the students, “Please don’t take the bait.”

A student muttered, “Franklin, come on.”

He repeated, “Don’t take the bait.”

A student said, “He is threatening us.” The students then discussed amongst themselves whether the administration could punish them.

At this point, about three minutes in, I had only managed to say a single sentence. How should I proceed? I was engaged in a game of chicken. Who would cave first? Would the students stop protesting once I gave my prepared speech? Or would I abandon my prepared speech to stop the protesting? I recognized quickly that if I proceeded to give my speech, as planned, they would have continued to protest. I realized there would be no way for me to present my usual talk. And under the circumstances, playing the videos I planned to play would have been impossible—the students were standing in front of the

screen. As a result, I quickly turned to Plan B. I decided to respond to arguments made in the circulated pamphlets.

I began, “For those of you who are actually here to hear me speak, I’ll try.”

In unison, the students interrupted me, “Nahh.”

I continued, “When I came to campus, there was a sign that said ‘Oppressors not welcome.’”

A student shouted, “You!”

I continued, “It says at the bottom, ‘we reject the idea that his views,’ my views, ‘merit space on this campus and reject the myth of legal objectivity. Josh Blackman is not welcome at CUNY Law.’ Congratulations, you’ve made me feel very unwelcome. But I’m still going to say what I’d like to say.”

A student interrupted, “You’re very brave.”

I told him, “Thank you, thank you I try.”

They continued to shout over me. One said, “CUNY Law is threatening us and protecting speakers.”

I said, “I actually want to start by using the one legal argument you actually made.” (I deliberately paused to give them a chance to get the laughter out of their system.) I continued, “That violence exists in the law and it is a myth that law is inherently neutral. You said there is a myth of legal

objectivity. So, let me talk about legal objectivity for a few minutes. Someone did some excellent opposition research. Whoever did this, I applaud you.” I tried to build some kind of bond with humor and flattery. “You found seven or eight bullets on various videos I’ve given over the years. I’d like to make a few points. You wrote, that I supported the President’s decision to rescind DACA. Now let me tell you something. I actually support the DREAM Act.”

There were audible gasps in the room. “This might surprise you. I think the DREAM Act is a good piece of legislation.”

Someone yelled out “Gaslighting.” That is, I was trying to make them question their own reality.⁵⁵

I continued, “Were I a member of Congress.” Someone interrupted me. I said, “Let me speak, please.”

A number of students shouted out “Nah.”

I continued, “Were I a member of Congress, I would vote for the DREAM Act. My position is that the policy itself was not consistent with the rule of law. Which teaches a lesson.”

⁵⁵ Stephanie A. Sarkis, *11 Warning Signs of Gaslighting*, PSYCHOLOGY TODAY (Jan. 22, 2017) <https://www.psychologytoday.com/us/blog/here-there-and-everywhere/201701/11-warning-signs-gaslighting>.

Someone started snapping and booing. “The lesson is you can support something as a matter of policy.”

Someone shouted, “What about human rights?”

I ignored the question, and continued, “but find that the law does not permit it. And then the answer is to change the law.”

A student shouted out “Fuck the law.” This comment stunned me.

I replied, “Fuck the law? That’s a very odd thing. You are all in law school. And it is a bizarre thing to say fuck the law when you are in law school.” They all started to yell and shout over me.

One student yelled at me, “You chose CUNY didn’t you. You knew what would happen.”

At the time, I didn’t appreciate the significance of her question. The students believed I picked CUNY because I wanted to be protested. This question shed light on the “Don’t take the bait.” That is, I came to CUNY to bait them into protesting against me. To the contrary! I had never been protested before. I was shocked that a lecture about free speech would occasion such a protest. Yet, once I found out they were going to protest me, I was not going to back down and withdraw.

The hecklers at this public institution would not veto my speech. I would stand there as long as needed to make my point.

Amidst the cacophony, I interjected, “Let me speak. Let me speak. Fuck the law, right? That’s a good mantra. Fuck the law.”

A student, looking at the small number of people in attendance, said, “Look how many of us and how many of them there are.”

I replied, “I am actually very impressed, let me say this, I am actually impressed that there are so many of you.” Again, I tried to flatter the students to build some kind of bond. “You could be anywhere right now, and you chose to come out here and exercise your constitutional rights. You want to exercise your rights. And I’ll do the same.”

A student shouted, “CUNY Law is not acting right.”

I continued, “I’m going to express my views. Let me go down this checklist. I think DACA. . . .”

I started to make a comment about DACA, when the student standing immediately to my right said, “I don’t want to hear this.” Then they started to exit.

I said, “You want to go? Please leave, by all means.” They began to exit. I said, “I think DACA is a good policy.”

A student replied, “I think you’re tired.”

I admitted, in full candor, “No, I’m feeling pretty good.”

At that point, the speakers realized they lost the game of chicken.

I was going to speak.

A student shouted, “You’re lying to yourself.”

Another said, “You’re a white supremacist.”

Another said, “This is really about CUNY Law and how you let this happen.”

Another said “Shame on you” to the students in attendance.

Then, the dialogue shifted to the back of the room. The African American student mentioned earlier said, “I don’t support this guy,” but “I want to hear him speak.” The protesters tried to shame him for attending. He continued, “I want to ask him a very hard question. And we should all try to ask him very hard questions. Like about the notion of legal objectivity.”

Sensing the event had taken a different direction, I said, “Let’s talk about that.” The protesters then heckled and shouted over the student asking the question. I interjected, “let him talk, let him talk.” The students were not only protesting me. They were protesting their own classmate—one who strenuously disagreed with me!

After the protest died down, he said, “I respect the fact that you have a right to speak, and you came here. I do not support anything you are writing or your politics, but I do respect the fact that we can have a dialogue and ask some tough questions.”

At that point—about eight minutes after I was introduced—the protesters left the room. (I learned they marched to the Dean’s office to complain.) After they left, I took questions from the students for over an hour. I did not present any of my prepared remarks. Instead, I spoke about originalism, textualism, the separation of powers, DACA, affirmative action, criminal procedure, and wide range of other topics. The conversation was civil and professional. I was very proud of the students who stayed till the end. (Well, there was one Trump supporter in the room who called me a “cuck” for not being #MAGA enough—I can’t win!) Indeed, though there were only five people at the start of the event, by the time it concluded, I counted about thirty people.

4. Was My CUNY Event Disrupted?

Was my CUNY event disrupted, such that my First Amendment rights were violated? I'll consider this question at three stages of the event.

First, did the protesters outside the room, who yelled and held signs, violate my rights? Absolutely not. They were exercising their rights to use speech (spoken and written) to make me feel as uncomfortable as possible. Though, their conduct *could* have changed the entire nature of the event. I pose a question to everyone reading this article: if you were told that fifty people were standing outside the event forum and would boo and hiss at you, would you walk to the event? If the campus security officer asked about your "exit plan," and could not guarantee your safety? This question is more difficult than it may seem.

Second, did the protesters inside the room, who stood inches over my shoulder, cross the line? This question is much closer. My ability to speak depends, in some measure, on my physical safety. I did not feel threatened—there were certainly no "true threats"⁵⁶ made—but the situation could have escalated

⁵⁶ See *Elonis v. United States*, 135 S. Ct. 2001, 2016 (2015) (Alito, J., concurring) ("A threat may cause serious emotional stress for the person threatened and those who care about that person, and a threat may lead to a violent confrontation.").

quickly. I was very much aware that the sole plain-clothes security officer in the back of the room would have been unable to prevent violence. I pose another question: if you were surrounded by demonstrators during a prepared lecture, would you have exited the room? I suspect many professors would not have lingered.

Third, did the protesters violate my rights when they shouted over me? That is, did the eight-minute disruption, out of an hour-long lecture, violate my First Amendment rights? The Supreme Court's Takings Clause jurisprudence may offer a helpful analogy to understand the scope of the CUNY protest. Consider *Pennsylvania Coal Co. v. Mahon*.⁵⁷ In this old chestnut, the state prohibited the mining of coal on part of a parcel.⁵⁸ Justice Holmes's majority opinion found that the government effected a taking without just compensation. "The general rule," he wrote, "is, that while property may be regulated to a certain extent, if regulation goes *too far*[,] it will be recognized as a taking."⁵⁹ Justice Brandeis wrote a solo dissent. He offered a different test: instead of only considering the small parcel of land on which mining was prohibited, the Court should consider the

⁵⁷ 260 U.S. 393 (1922).

⁵⁸ *Id.* at 412.

⁵⁹ *Id.* at 415 (emphasis added).

“value of the whole property.”⁶⁰ That is, the other parts of the property on which mining, and other gainful activities, were permitted. This test would become known as the “parcel as a whole” test.

The Supreme Court would embrace Justice Brandeis’s dissent five decades later in *Penn Central Transportation Co. v. New York City*.⁶¹ The Penn Central Transportation Corporation wanted to build a tower atop Grand Central Terminal in Manhattan.⁶² To block this change, New York City designated the train station as an historical “landmark.”⁶³ Penn Central argued that the landmark designation was an unconstitutional “taking” of the air rights over its land.⁶⁴ The Supreme Court upheld the designation.⁶⁵ Justice Brennan wrote the majority opinion.⁶⁶ Even though New York’s law diminished the value of the air rights, Penn Central could still benefit from using other portions of Grand Central Terminal. Therefore, there was no taking.⁶⁷ In other words, because the Court considered the

⁶⁰ *Id.* at 419 (Brandeis, J., dissenting).

⁶¹ *Penn Cent. Transp. Co v. New York City*, 438 U.S. 104, 131-32 (1978).

⁶² *Id.* at 116.

⁶³ *Id.* at 115-16.

⁶⁴ *Id.* at 130.

⁶⁵ *Id.* at 138.

⁶⁶ *Id.* at 107.

⁶⁷ *Id.* at 138.

“parcel as a whole,” as Brandeis propose, the diminution in value did not go “too far.”

CUNY Dean Mary Lu Bilek appealed to Brandeis—on the Takings Clause, alas, not the First Amendment. She said the protest was reasonable because of its limited duration:

For the first eight minutes of the seventy-minute event, the protesting students voiced their disagreements. The speaker engaged with them. The protesting students then filed out of the room, and the event proceeded to its conclusion without incident. This non-violent, limited protest was a reasonable exercise of protected free speech, and it did not violate any university policy. CUNY Law students are encouraged to develop their own perspectives on the law in order to be prepared to confront our most difficult legal and social issues as lawyers promoting the values of fairness, justice, and equality.⁶⁸

She embraced the *Penn Central* parcel as a whole test. Because the disruption lasted only eight minutes out of seventy minutes, the argument goes, my rights were not violated.

But the “parcel as a whole” test is a very poor fit for free speech jurisprudence. This property-centric approach presumes stability while campus protests are volatile. In *Penn Coal*, the parties understood exactly how much land could not be mined. And in *Penn Central*, the parties knew exactly how much of the train station could still be utilized. That model works for metes

⁶⁸ Scott Jaschik, *Shouting Down Talk on Campus Free Speech*, INSIDE HIGHER ED (Apr. 16, 2018), <https://perma.cc/4AZR-W75W>.

and bounds. It doesn't work for a real-time discourse. Hindsight is always 20/20. When the event began, I had no idea how long the disruption would last. For all I knew, the students could have made noise nonstop.

Why did the students at CUNY not protest me for the full hour? I take some credit. Rather than trying to deliver my lecture as planned, or shout over the students, I tried to engage them. I asked them questions to try to forge a common ground. That strategy defused the situation. But it could have backfired. The students could have shouted at me for the entire hour—or worse, continuously clanked a cowbell! The event also could have turned violent. Even after the students exited, I had a concern they would return at some point.

The campus security officer did ask me about my “exit plan.” He explained that there were certain safe ways to exit the building. When I said I planned to leave via car, and not the subway, he was relieved. It was a question I had never before considered. Although he initially told me he did not want to be present in the room, he escorted me from the elevator to the classroom. At the time, I considered what would happen if the event became violent. On the one hand, I would want to leave if my safety was at risk. On the other hand, I worried that the

university could cite a risk of violence as a pretext to placate the protesters, and thereby silence my message. This situation resembles the proverbial heckler's veto at issue in *Terminiello v. City of Chicago*.⁶⁹ I was not prepared to leave unless good cause existed. The school would have had to remove me.⁷⁰

I quickly made the decision to abandon the lecture I had intended to give and instead answered questions for an hour. This fluid situation demonstrates that you cannot measure the effect of a protest simply by dividing the numerator (how many minutes the disruption lasted) by the denominator (how long the event was scheduled to last).

How would you have handled that protest? Consider several hypotheticals. Professor A could have been intimidated by the throng of students in the hallway, and never entered the room. Professor B could have refused to talk over the protesters, and simply left the room. Professor C could have tried to give the lecture as planned, and been unable to because of interruptions. Professor D could have lost his temper and shouted back at the

⁶⁹ *Terminiello v. Chicago*, 337 U.S. 1 (1949).

⁷⁰ *See* *Feiner v. New York*, 340 U.S. 315, 318 (1951) (“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.”).

students—thus escalating the event. Professor E could have demanded that the administration remove the protesters, and when the administration took no action, stormed out of the room. In these cases, Professors A through E would have spoken for zero minutes. Even under Dean Bilek’s framework, there was a disruption—but that outcome was, in part, a factor of my own sensibilities.

If a speaker deemed the circumstances unsafe or unproductive, and exits, his case against the university would be much stronger. However, because I engaged the protesters, my case against the University is weak. I quickly reached this conclusion.

IV. HOW SHOULD UNIVERSITIES RESPOND TO DISRUPTIONS?

This essay concludes by addressing the most difficult question: how should universities respond to disruptions? I will consider four different general approaches. First, the administration can do nothing at all. That is, the university could allow speaker to fend for himself in response to the disruption. Second, the administration can ask the participants to stop the disruption—but nothing more. If the disruption continued, the speaker would still have to fend for himself. Third, the

university's security force can order the disruptors to leave the room. If they failed to do so, the disruptors could be arrested. Fourth, after the event concludes, the administration could discipline the disruptors. This type of punishment could range from a mere warning, to denial of certain academic privileges, to suspension or expulsion, and beyond.

A. Do Nothing

The path of least resistance for the administration is to do nothing: simply allow the disruption to proceed, and let the speaker fend for himself. Consider a recent incident at Portland State University, a public institution in Oregon. The College Republicans invited Michael Strickland, a conservative blogger, to campus.⁷¹ Two years earlier, Strickland drew a gun during a Black Lives Matter protest at the university.⁷² He was convicted for that offense.⁷³ Strickland was banned from the campus for two years.

⁷¹ *Campus police no match for heckler with cowbell who hijacked speech at Portland State*, FIRE (Mar. 12, 2019), <https://www.thefire.org/campus-police-no-match-for-heckler-with-cowbell-who-hijacked-speech-at-portland-state/>.

⁷² Sophie Concannon, *Protesters silence controversial speaker at College Republicans event*, PSU VANGUARD (Mar. 11, 2019), <https://psuvanguard.com/protesters-silence-controversial-speaker-at-college-republicans-event/>.

⁷³ Aimee Green, *Man who pointed Glock at 'Don't Shoot PDX' protesters banned from owning guns*, THE OREGONIAN (May 3, 2017), https://www.oregonlive.com/portland/2017/05/man_who_pointed_gun_at_dont_sh.html.

When he returned to campus in 2019, his event was disrupted. One protestor circled the room and clanked a cowbell for more than an hour.⁷⁴ Here, the student's goal wasn't to entertain everyone with a cowbell recital. His intent was to make it impossible for Strickland to speak—and it was personal.

The protestor told Strickland, "I didn't touch you, and you pointed a gun at me. I'm just exercising my First Amendment rights."⁷⁵ He added, "We want to deplatform you. We want you to stop fucking talking."⁷⁶ The event eventually continued after a full hour of disruption.

Several campus security officers were in the room during the altercation, but they took no action.⁷⁷ Students often see law enforcement as a hostile and antagonistic force.⁷⁸ In the presence of uniformed police officers, some students may not be

⁷⁴ Andy Ngo, *College Republicans PSU Event Gets Shut Down*, YOUTUBE (Mar. 6, 2019), <https://youtu.be/EU9Ax19JZf0>.

⁷⁵ Concannon, *supra* note 65.

⁷⁶ Stumptown Matters, *Mike Strickland PSU Speaking Event Interrupted By Anarchist - Part 1 of 4*, YOUTUBE (Mar. 9, 2019), <https://youtu.be/d20IkgDybOI>.

⁷⁷ Eugene Volokh, *Police Officer Stands by While Portland State University College Republicans Event Is Shouted (and Cowbelled) Down*, THE VOLOKH CONSPIRACY (Mar. 8, 2019), <https://reason.com/2019/03/08/police-officer-stands-by-while-portland/>.

⁷⁸ Daarel Burrette, *A Fight to Build Trust With School Police*, EDUCATIONWEEK, <https://www.edweek.org/ew/articles/2017/02/01/a-fight-to-build-trust-with-school.html>

comfortable expressing themselves.⁷⁹ Here, the presence of campus police had no effect.

Though the university prevented any physical violence, they did nothing to ensure that the speaker was allowed to speak and took no action to stop the disruption. However, under the “parcel as a whole” theory, the fact that Strickland was eventually able to speak proves that his rights were not violated.

I disagree. Speakers and students should not have to endure an hour of cowbelling to hear a message. Here, the university’s nonfeasance resulted in the deprivation of the speaker’s right to speak and the students’ right to listen. The protesters, who may not have been students, were able to exercise the heckler’s veto.

B. Ask the Disruptors to Stop

CUNY chose an alternate path. A few minutes after the disruption began, an associate dean entered the room. She told the students that they could not keep me from speaking. She also said that if they did not let me speak she would “be back.” She

⁷⁹ See Charlie Kolodziej, *Pro-Palestinian Protesters Interrupt Anti-BDS Talk at Law School, Escorted Out by UCPD*, THE CHICAGO MAROON (Apr. 10, 2019), <https://www.chicagomaroon.com/article/2019/4/10/pro-palestinian-protesters-interrupt-anti-bds-talk/> (“Several students who witnessed the incident expressed frustration with the presence of police officers in the Law School and questioned the University’s application of its free speech policy by allowing the protesters to be removed.”).

never came back. Her warning was completely empty and perfunctory. The students quickly called her bluff and ignored the associate dean. The disruption continued for several minutes after she left, and only dissipated when I engaged the students.

There is no practical difference between the approach taken by Portland State (do nothing) and the approach taken CUNY (do nothing effective). In both cases, the disruption continued. Though, I commend the CUNY administration for voicing support for free speech, at least superficially.

C. Remove the Disruptors Who Refuse to Stop

Universities have a third option: order the disruptors to stop, and if they refuse, remove them from the room. This approach differs from the precatory CUNY approach, in which an associate dean sternly asked the students to stop. A recent event at the University of Chicago demonstrated this more forceful approach. The University is a private institution, but it has a longstanding and well-known commitment to free speech.⁸⁰

Students at the University of Chicago Law School invited Professor Eugene Kontorovich to lecture about the First

⁸⁰ Press Release, Ass'n of Am. Univs., AAU Presidents and Chancellors Reaffirm Commitment to Free Speech on Campus (Apr. 18, 2017), <https://www.aau.edu/newsroom/press-releases/aau-presidents-and-chancellors-reaffirm-commitment-free-speech-campus>.

Amendment and anti-BDS laws (Boycott, Divestment, and Sanction of Israel).⁸¹ Several protesters, who were not students at the University, repeatedly shouted over Professor Kontorovich: “Free, free Palestine, protesting is not a crime.”⁸² Kontorovich opted to talk over the chanting, but recordings from the event reveal that it was very difficult to hear him.⁸³ Professor Kontorovich also tried to engage the protesters, by answering their questions. Unlike at CUNY, the students did not respond well to the engagement.

After ten minutes of disruption, the Dean of Students entered the room. The campus newspaper relayed that the Dean “repeatedly asked the protesters to stop chanting or to leave the room.” One student in attendance said the protesters “smiled at him and continued chanting.” Someone—not the Dean—called the university police. The authorities escorted the protesters from the room.⁸⁴ Several protesters who were not students were issued trespass warnings, and they left.⁸⁵

⁸¹ Kolodziej, *supra* note 71.

⁸² *Id.*

⁸³ Josh Blackman, *Protest at the University of Chicago (4/9/19)*, YOUTUBE (Apr. 9, 2019), <https://youtu.be/SdpKzeczq170>; Josh Blackman, *Protest at the University of Chicago (4/9/19) #2*, YOUTUBE (Apr. 9, 2019), <https://youtu.be/WnNJGOBTqSA>; Josh Blackman, *Protest at the University of Chicago (4/9/19) #3*, YOUTUBE (Apr. 9, 2019), https://youtu.be/pLvm_8FIZXI.

⁸⁴ *Id.*

⁸⁵ *Id.*

Following the event, the Dean sent a campus wide email.⁸⁶ First, he explained that the “chanting did violate the University’s polices.”⁸⁷ All invited speakers have the “right to be heard” and those “who choose to be present” have the right “to hear the speaker.”⁸⁸ Those who disagree with the speaker have the right “to ask tough questions.” But they cannot exercise a heckler’s veto, which is “contrary to our principles.”⁸⁹ He added, “Protests that prevent a speaker from being heard limit the freedoms of other students to listen, engage, and learn.”⁹⁰

Second, the Dean discussed methods of protest that are “consistent with [the university’s] policy and principles.” For example, “[s]tudents may hold up signs and turn their backs on speakers so long as they do not block others, or they may ask tough questions of those with whom they disagree.” In addition, “[v]ocal protests are also permitted outside of events provided that they do not infringe on the rights of the speakers or attendees.”

Third, the Dean reasoned that the protesters “would have been allowed to remain” if they “bec[a]me silent” after they were

⁸⁶ Email from Office of the Dean of Students, University of Chicago (Apr. 9, 2019), <http://bit.ly/2SuTthS>.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

asked to “cease their chanting.” In that case, “nothing further would have happened.” Or, they could have “continued their chanting after exiting the room and moved away from the corridor where lunch talks were taking place.” However, because they did not respond to a request to “cease the disruption,” then “the next step [was] to request the assistance” of the authorities. The Dean did not call the police in this case, but he stated that he would have taken that next step.

Fortunately, the protests at both CUNY and Chicago were not violent. The protesters left peacefully. But what if they refused to leave? Should they be dragged out of the room, kicking and screaming? That outcome would be awful. Colleges should resist the urge to use physical force to remove a non-violent protestor. Let them make noise, and mete out discipline afterwards. But a physical arrest would be largely counterproductive and overwhelm any positive dialogue that can occur. In most cases, it should be sufficient to ask the students to leave.

D. Discipline the Disruptors

After the event concludes, the administration is faced with one final question: should those who disrupted the event be punished? Universities can use a range of possible disciplinary

measures. First, at the most basic level, the school could issue a warning not to take similar actions in the future. If the prospective protesters ignore that warning, then more forceful punishments could be used. But if the admonishment was limited to a mere oral warning, there would be no paper trail. Second, students could be denied certain academic privileges, such as the ability to participate in extracurricular activities and other student organizations. Third, repeat offenders could be suspended from classes. In the most egregious instances—perhaps where violence is involved—expulsion may be warranted. Fourth, when law students disrupted protected speech, the college could make a reference to character and fitness boards.

The gravity of the punishment should be premised on the purpose the school seeks to advance: is the student being disciplined as a punishment for his act, or as a means to deter other students from engaging in similar behavior? I am skeptical the latter model works. Student bodies change from year-to-year, and institutional memory of such punishments quickly fade. Therefore, the punishment should be determined based on whether the rights of the speakers and other students were violated. Specifically, schools should consider whether the

protestor's intent was to prevent the speaker from speaking, or to dissuade other students from listening. Only the former should warrant discipline. The latter should be tolerated. Here, intent matters. And figuring out a speaker's intent can be extremely complicated.

It is fairly straightforward to answer how and why protesters should be punished. Schools are very familiar with meting out discipline. The far more difficult question is *when* protesters should be punished.

Consider my incident at CUNY. Should the students who disrupted the event be disciplined? This question is extremely complicated. If a student engaged in disruptive behavior during a regularly scheduled class, virtually all administrations would consider imposing some form of discipline. But it is too facile to analogize the extra-curricular event with a classroom. Invited speakers do not have the right to speak in front of a passive audience. There may be circumstances where, at the right juncture, a sharp question or comment is warranted—even before the question and answer phase begins. The proverbial excited utterance. I will indulge that possibility, because the interjection serves as effective counter-speech. Indeed, an effective speaker will use that question as an opportunity to

advance her point. And the student who asks the question must allow the speaker to answer.

Merely asking a question to prevent others from hearing the speaker's voice is a very different matter. The speaker's right is violated because he cannot convey the message he was invited to give. Additionally, other students are deprived the opportunity to hear that message. Here, discipline may be warranted—especially when the students are standing near the speaker. The risk of violence is real. Therefore, disruptions to prevent the speaker from being heard should result in disciplined. However, no discipline should be meted out when the students use silent means inside the classroom to protest, and vocal means outside the classroom to protest.

Where is the line? The case law is largely unhelpful.⁹¹ Consider the facts of *Healy v. James*. Students at Central Connecticut State College started a local chapter of Students for a Democratic Society (SDS). The President of the College refused to recognize the chapter, and the students brought suit under the First Amendment.

⁹¹ See Frederick Schauer, *The Hostile Audience Revisited*, EMERGING THREATS (Nov. 2017), <https://knightcolumbia.org/content/hostile-audience-revisited> (“The value of returning to the question of the hostile audience is heightened by the fact that existing legal doctrine on the question is, at best, murky.”).

The Court explained that, “state colleges and universities,” like the high school at issue in *Tinker* “are not enclaves immune from the sweep of the First Amendment.”⁹² Justice Powell explained “[t]he college classroom with its surrounding environs is peculiarly the ‘marketplace of ideas,’ and we break no new constitutional ground in reaffirming this Nation’s dedication to safeguarding academic freedom.”⁹³ Yet, again like in *Tinker*, the Court observed that “First Amendment rights must always be applied ‘in light of the special characteristics of the . . . environment’ in the particular case.”⁹⁴ The Court highlighted the University’s role in promoting speech on campus: “If an organization is to remain a viable entity in a campus community in which new students enter on a regular basis, it must possess the means of communicating with these students.”⁹⁵ Justice Powell added, “the organization’s ability to participate in the intellectual give and take of campus debate, and to pursue its stated purposes, is limited by denial of access to the customary media for communicating with the administration, faculty members, and other students.”⁹⁶ Those “means” and

⁹² Healy, 408 U.S. at 180 (1972).

⁹³ *Id.* at 180-81.

⁹⁴ *Id.* at 180.

⁹⁵ *Id.* at 181.

⁹⁶ *Id.* at 181-82.

“media” would include the ability to host outside speakers that are able to speak.

But what about when members of that group—either Students for a Democratic Society or the Federalist Society—cause a disruption? The Court admitted that the University may require student groups to “affirm that they intend to comply with reasonable campus regulations.”⁹⁷ And what if students “violate the rules?” Then, Justice Powell observed, the university “may also impose sanctions” “to assure that the traditional academic atmosphere is safeguarded.”⁹⁸ But those actions must be restrained. “While a college has a legitimate interest in preventing disruption on the campus, which under circumstances requiring the safeguarding of that interest may justify such restraint, a ‘heavy burden’ rests on the college to demonstrate the appropriateness of that action.”⁹⁹

V. CONCLUSION

I end this essay on an admittedly unsatisfying note. I am not confident courts can PROVIDE meaningful standards that consider the rights of all parties involved. Campus disruptions are fluid and dynamic events. Judicial review months, or even

⁹⁷ *Id.* at 193.

⁹⁸ *Id.* at 194.

⁹⁹ *Id.* at 184.

years, later is largely unhelpful. By the time all of the appeals are exhausted, the students will have graduated, the speakers will have moved onto other topics, and the story will be long forgotten.

The critical moment is when the speaker, the students, and the demonstrators come face-to-face. How the university handles that moment, in the moment, will define how free speech is promoted on the campus. Settlements or consent decrees years later will be little more than an academic footnote. Here, the University of Chicago struck the right balance; CUNY paid lip service to free speech; and Portland State abdicated its constitutional duty.