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Costing Out Campus Speaker Restrictions

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Frederick Schauer gently points out the challenging, and arguably absurd, situation we find ourselves in today, where a commitment to free expression has enabled provocateurs not only to spew hostile messages into our communities but also to divert extraordinary levels of resources to protect their messaging.

This is not new, of course. As Professor Schauer details, governments and courts have long wrestled with speakers dropping into communities where they are not wanted, generating significant tension and upset, and requiring outsized expenditures in efforts to ensure public safety.

But the challenges have grown exponentially of late, particularly on college campuses. From the time that Donald Trump's candidacy gained traction until now, the quasi-celebrity status of white supremacists, anti-Muslim activists, and misogynists available to speak on campuses has surged. Distinct from the era in which most First Amendment jurisprudence emerged, these speakers have a quick path to national notoriety via Twitter and blogs, which in turn prompts invitations from students, some of whom appear to be more interested in provoking controversy than in bringing meaningful discussion and debate to campus.

Although the psychological costs these speakers impose may be difficult to measure,[1] the financial costs are increasingly clear—and increasingly high in an era when firearms are widely available and open carry is claimed, by some, as an expressive act. Even on campuses and in cities that forbid firearms at protests, the costs associated with safety management along with the attention required by dozens and sometimes hundreds of staff are beyond substantial, as Schauer points out.[2]

So we might read Schauer's paper as requiring that, at a minimum, we engage in the thought experiment of what restrictions on speakers on college campuses might look like. Few if any colleges and universities would claim to have an overabundance of resources, and most or all have substantial needs to hire essential faculty, enhance student services and supports, and maintain their infrastructure. While every dollar spent is arguably an investment in the First Amendment, it is also a diversion of funds from these other uses. Further still, as Schauer observes, the diversion is often away from resources that might benefit the very groups the speaker derides.

In fact, there are certainly schools that simply lack the funds to protect yet another vituperative speaker. What then? The remainder of this comment will pick up where Schauer leaves off and explore, preliminarily and tentatively, several options. To be clear, I do not offer or endorse any of these as a policy recommendation.[3] Each option presents serious difficulties, as I note below. Each may also be, in some respects, in tension with modern First Amendment jurisprudence and the free expression commitments made by many higher education institutions to which the First Amendment does not apply. And yet, as Schauer suggests, we may do ourselves a disservice if we do not take this conversation some steps further. These ideas are intended as a prompt for such conversation.[4]

Since cost is the impetus for reconsidering an all-speakers approach, I offer here three cost-based approaches a college or university might consider when it believes it lacks the resources to manage a contentious situation safely. Each reflects a distinct understanding of how to ascertain the costs that may be imposed by a hostile speaker. Before turning to them, it bears noting Schauer's observation that a public institution could not likely bar a speaker based on expected cost or other concerns unless it had a viewpoint- and content-neutral standard in place. Consequently,

these approaches may be more directly relevant to private institutions, though in the spirit of this thought experiment, they might be worthy of reflection more broadly.

First is an approach that looks to past events to predict future costs. Here, a school might exclude speakers whose recent events have been accompanied by violence or severe disruption or perhaps by protests that are large, vigorous, and non-violent.

Second is an approach that seeks to predict event-management costs based on the risks posed by a speaker's message. Here the focus on would be on the extent to which a speaker's usual message encourages violence and harassment either generally or toward specific groups within the community, even though the message has not previously prompted violence or large, unruly protests.

Third is an approach that focuses on costs *over time* from messages that community members experience as threatening, not necessarily of imminent violence but of longer-term harm. More particularly, this approach would potentially exclude speakers who are known to express derogatory messages that leave certain community members feeling threatened and exposed to increased risk as a result.

One might argue that the first approach is the most rational and feasible cost-management measure in that it relies on past experience to predict the extent of institutional resources required to ensure safety at an upcoming event.[5] But as discussed below, this approach fails to distinguish between the costs associated with securing a campus for self-promoting provocateurs and for speakers—particularly those in government—who have drawn conflict because of their political positions or acts.

Alternately, one might also argue that the second approach—taking account of a speaker's encouragement of violence, either generally or toward specific groups—is actually more relevant to assessing costs than protests in the past. Here, the institution would be on notice that the speaker could be expected to encourage conduct, either by supporters or protesters, that would prove to be unmanageable. On this view, the institution could not responsibly let an event occur without devoting resources for protection against that possible violence. Recent battles in

Charlottesville and Berkeley might be illustrative in that, even without past events as predictors, violent messages contributed to an environment that arguably abetted the violence that subsequently occurred.

Yet it might be even more sensible, arguably, to take seriously the third approach: exclusion of speakers whose messages are perceived by students and others as threatening. Here the argument is that these threats will have an enduring—and costly—effect on the campus community with respect to future physical safety risks and increased need for resources to support community members' sense of well-being, which in turn contributes to academic and workplace success.

In short, cost predictions do not provide much in the way of definitive guidance for schools trying to identify principles by which they might exclude certain provocative speakers from campus.[6] Each approach discussed above rests on a theoretically sound rationale: relying on the past to predict the future; linking messaging to outcomes; and recognizing the diffusion of harms as a consequence of targeted hostile messages. Yet because the different approaches focus on a distinct aspect of the relationship between a speaker's message and audience, each is also likely to identify different speakers for exclusion. Citing "cost," in other words, does not itself answer the question how a school might approach this task.

Perhaps another layer of analysis will help. One might consider which of these approaches would be "least harmful" to the underlying goals of the First Amendment's expressive freedom protections.

Taking Schauer's view first, the question could be framed as whether any of the cost-focused approaches better protects speech that enables the search for truth or engagement in democratic decisionmaking. Unfortunately, this does not seem to provide much guidance as applied. It is possible, at least in theory, that messages arousing passionate protests, encouraging certain forms of violence, or expressing ideas that leave some listeners feeling threatened are consistent with truth-seeking and reasoned deliberation.

The self-expression arguments for free speech, of which Schauer is skeptical, also do not provide much assistance in determining which speakers to exclude. Perhaps this assessment would lead to the adoption

of whichever rule would restrict the fewest speakers. But it would be unduly simplistic to assume that more speakers necessarily means more self-expression, both because speakers might engage in self-expression to differing extents and because the commentary of some speakers might disproportionately stifle self-expression of others in the community.

Of course, each approach must also contend with the more conventional arguments against restrictions on speech—including that the line-drawing necessary to decide which threat levels are unacceptable raises serious risks that unpopular speech, including the speech of vulnerable minorities, will be swept into these restrictions. Put another way, messages that one group perceives as stirring up hatred may be experienced by another as a necessary articulation of basic truths or rights.[7] At institutions that value academic freedom, these risks are likely to be particularly troubling.

But recall that our thought experiment assumes the institution is truly unable to afford security and must explicitly or effectively disallow some speakers—so that the question is not whether but how to make such determinations.

In this situation, it may be that the least imperfect from among imperfect choices is to create a two-step process. The first step would be to make all reasonable efforts to predict costs, perhaps based on some combination of the approaches set out above or others that might do better work. Among these approaches, the third—which involves assessing the increased sense of community members' vulnerability and related costs of addressing the effects that can be attributed to the speaker—may be most popular with those on campus who object to the harm flowing from certain types of hostile or offensive messages. But it will almost certainly also be the most difficult to measure effectively.[8]

Yet even if each of these approaches could produce a reliable number, cost prediction is too blunt an instrument on its own. It misses the difference between speakers who are primarily hostile provocateurs and speakers whose messages advance discussion and debate in the educational environment, even if their ideas are deeply unpopular.

For this reason, an additional step would be needed as a check against overzealous or non-nuanced cost assessment that elides important academic values. This second step would ask, in essence, whether the proposed speaker contributes, undermines, or is neutral vis-à-vis the school's commitments to teaching, research, service, or any other core aims. We might think of this as a "mission screen."[9] This, too, is clearly subject to the content-based value judgments that First Amendment jurisprudence generally abhors.

Yet, if a proposed speaker will require security or generate other expenses that outstrip the institution's capacity *and* could reasonably be viewed as undermining the school's capacity to fulfill its mission based on the speaker's recent expression,[10] then imposing the restriction may be the best approach in an admittedly challenging environment.[11] One might even go further and ask whether such dire economic straits should be required or desirable before an institution conducts an analysis along these lines. But that, along with a full assessment of the costs and risks associated with any such restriction, is best left for another day, with thanks again to Fred Schauer for prompting an important and, indeed, invaluable conversation.

[+] This comment, at the invitation of the Knight First Amendment Institute, explores ideas in my personal capacity only. It does not express views for or on behalf of Columbia University, nor does it address or interpret the University's policies regarding speakers on campus.

[1] For discussion of efforts to measure the effects of hostile speech on individuals and communities in the context of the Nazis' 1977 plan to march in Skokie, Illinois, see, for example, Donald A. Downs, *Nazis in Skokie: Freedom, Community, and the First Amendment* (1985) (analyzing interviews of and data regarding Holocaust survivors in Skokie). For discussion of studies showing negative physical effects of verbal abuse and other similar adversity, see Lisa Feldman Barrett, *When Is Speech Violence?*, N.Y. Times (July 14, 2017), https://www.nytimes.com/2017/07/14/opinion/sunday/when-is-speech-violence.html (citing studies showing negative physical effects of verbal abuse and other similar adversity). *But cf.* Philippa Strum, *When the Nazis Came to Skokie: Freedom for the Speech We Hate* 147-48 (1999) (arguing that Skokie residents benefited from challenging the attempted march).

[2] Schauer cites the University of California at Berkeley's expenditure of roughly $2 million for three speeches. The University of Florida similarly indicated, in a Q&A published prior to a white nationalist speaking on its campus, that "[m]ore than $500,000 will be spent by UF and other agencies to enhance security on our campus and in the city of Gainesville for this event." Q&A for Richard Spencer 10/19 Event, University of Florida, https://freespeech.ufl.edu/qa-for-1019-event (last visited Oct. 30, 2017).

[3] I also want to be clear, again, that I offer these thoughts in my personal capacity and not in connection with any aspect of Columbia University's policies.

[4] Many have already written thoughtfully and extensively about this challenge, primarily in the context of hate speech. *See, e.g.,* Richard Delgado and Jean Stefancic, *Four Ironies of Campus Climate*, 101 Minn. L. Rev. 1919, 1922 (2017) ("[M]any campus administrators are committed to the goal of educating students for roles in a multicultural and multiracial world, and if the campus is cold or hostile, this goal will be difficult to achieve." (citations omitted)); Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 Duke L.J. 431, 435-36, 458-61, 472-76 (describing the negative effects of hostile speech on students from marginalized social groups); Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 Mich. L. Rev. 2320, 2321-23, 2336-41, 2370-73, 2375-78 (1989) (same). I offer these ideas with their work in mind and with apologies upfront that, because of time and space constraints, it is not possible to engage this body of scholarship sufficiently here.

[5] Even this approach, though, may not sufficiently take account of a multiplier effect on the risk of violence resulting from the combination of actual previous incidents (for example, the violence in Berkeley or Charlottesville) and the amplification of competing views about the permissibility of that violence.

[6] For all three approaches, there is also the basic risk of over-inclusiveness in that speakers cannot be counted on always to deliver the same message. As a result, under each of these approaches, some speakers would potentially be barred even from delivering a non-hostile or non-provocative message.

[7] For thoughtful arguments and legislative models that seek to distinguish "hate speech" from other forms of speech, see generally Jeremy Waldron, *The Harm in Hate Speech* (2012) (arguing that Americans should give greater consideration to the harm caused by hate speech).

[8] At the most basic level, evaluators would have to identify the extent to which the speaker's message might elevate individuals' sense of being threatened and the marginal cost of increased services to respond to that sense of threat. Among the difficulties here: measuring the sense of threat, evaluating the causal link between a speaker's message and an individual's sense of vulnerability, and concretizing the degree to which expanded services would provide redress. The assessment of security costs at or near the time of an event, as required by the other options, involves many fewer variables, though it may also be less effective in capturing an event's long-term costs. Indeed, another potential but nearly impossible-to-predict cost of contentious speakers is to an institution's ability to recruit and retain students and employees.

[9] Robert Post offers a related observation in a recent commentary. Robert C. Post, *There Is No 1st Amendment Right to Speak on a College Campus*, Vox (Oct. 25, 2017), https://www.vox.com/the-big-idea/2017/10/25/16526442/first-amendment-college-campuses-milo-spencer-protests (arguing that universities "can support student-invited speakers *only* because it serves university purposes to do so. And these purposes must involve the purpose of education.").

[10] Here I would suggest that reasonableness could be gauged by some combination of the institution's administrative and faculty leadership, as these are individuals engaged daily and over the long term in efforts to carry out the mission. For this reason, legislators, trustees, and students are, I would argue, less well positioned to make this assessment in the context at hand.

[11] In another essay, I address the interests schools might have and the steps schools might take to address costs to community members' well-being where excluding hostile speakers is not a meaningful option. *See* Suzanne B. Goldberg, *Free Expression on Campus: Mitigating the Costs of "Dangerous" Speech*, 41 Harv. J.L. & Pub. Pol'y (forthcoming 2018).

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