

2019

First Amendment Envelope Pushers: Revisiting the Incitement-to-Violence Test with Messrs. Brandenburg, Trump, & Spencer

Clay Calvert

Follow this and additional works at: https://opencommons.uconn.edu/law_review

Recommended Citation

Calvert, Clay, "First Amendment Envelope Pushers: Revisiting the Incitement-to-Violence Test with Messrs. Brandenburg, Trump, & Spencer" (2019). *Connecticut Law Review*. 411.
https://opencommons.uconn.edu/law_review/411

CONNECTICUT LAW REVIEW

VOLUME 51

FEBRUARY 2019

NUMBER 1

Article

First Amendment Envelope Pushers: Revisiting the Incitement-to-Violence Test with Messrs. Brandenburg, Trump, & Spencer

CLAY CALVERT

This Article examines weaknesses with the United States Supreme Court's Brandenburg v. Ohio incitement test as its fiftieth anniversary approaches. A lawsuit targeting Donald Trump, as well as multiple cases pitting white nationalist Richard Spencer against public universities, provide timely springboards for analysis. Specifically, In re Trump: 1) illustrates difficulties in proving Brandenburg's intent requirement via circumstantial evidence; and 2) exposes problems regarding the extent to which past violent responses to a person's words satisfy Brandenburg's likelihood element. Additionally, the Spencer lawsuits raise concerns about: 1) whether Brandenburg should serve as a prior restraint mechanism for blocking potential speakers from campus before they utter a single word; and 2) the inverse correlation between government efforts to thwart a heckler's veto via heightened security measures and Brandenburg's imminence requirement. Ultimately, this Article analyzes all three key elements of Brandenburg—intent, imminence and likelihood—as well as its relationship to both the heckler's veto principle and the First Amendment presumption against prior restraints.

ARTICLE CONTENTS

INTRODUCTION.....	119
I. PRIMERS ON KEY CONCEPTS: INCITEMENT TO VIOLENCE, THE HECKLER’S VETO, AND PRIOR RESTRAINTS ON EXPRESSION	127
A. THE BRANDENBURG TEST FOR INCITEMENT TO VIOLENCE	127
B. THE HECKLER’S VETO PRINCIPLE	135
C. PRIOR RESTRAINTS ON EXPRESSION	137
II. EXAMINING <i>IN RE TRUMP</i> MORE CLOSELY: PROBLEMS WITH PROVING INTENT AND LIKELIHOOD.....	139
A. TRUMP’S INTENT	139
B. TRUMP AND THE LIKELIHOOD OF VIOLENCE: CONSIDERING PRIOR VIOLENCE	143
III. INCITEMENT, PRIOR RESTRAINTS, & THE HECKER’S VETO: EXPOSING AN UNEASY RELATIONSHIP AMONG FREE-SPEECH DOCTRINES THROUGH THE LENS OF THE RICHARD SPENCER LAWSUITS.....	145
CONCLUSION	153



First Amendment Envelope Pushers: Revisiting the Incitement-to-Violence Test with Messrs. Brandenburg, Trump, & Spencer

CLAY CALVERT *

INTRODUCTION

“Get ’em out of here.”¹ So barked candidate Donald Trump upon spotting protestors at a March 2016 presidential campaign rally in Louisville, Kentucky.² Among them was Kashiya Nwanguma, a twenty-one-year-old African American.³ She hoisted a sign depicting the candidate’s head on a pig’s body.⁴

Shortly after Trump’s declaration, Nwanguma and two other protestors, Molly Shah and Henry Brousseau, “were assaulted by three Trump supporters.”⁵ The protestors “allege that they were physically attacked by . . . Matthew Heimbach, Alvin Bamberger and an unnamed [individual] . . .”⁶

Heimbach, a twenty-five-year-old white nationalist, defended himself online. He posted that “[w]hite Americans are getting fed up[,] and they’re learning that they must either push back or be pushed down.”⁷ Conversely, Nwanguma claims being “roughly shoved by several white men”⁸ and

* Professor & Brechner Eminent Scholar in Mass Communication and Director of the Marion B. Brechner First Amendment Project at the University of Florida, Gainesville, Fla. B.A., 1987, Communication, Stanford University; J.D. (Order of the Coif), 1991, McGeorge School of Law, University of the Pacific; Ph.D., 1996, Communication, Stanford University. Member, State Bar of California and the Bar of the Supreme Court of the United States. The author thanks Hannah Beatty, Elena Castello, Jessie Goodman, Mateo Haydar and Emerson Tyler of the University of Florida for their helpful reviews of early drafts of this article.

¹ *In re Trump*, 874 F.3d 948, 950 (6th Cir. 2017).

² *Id.*

³ Ashley Parker, *Riskiest Political Act of 2016? Protesting at Rallies for Donald Trump*, N.Y. TIMES (Mar. 10, 2016), <https://www.nytimes.com/2016/03/11/us/politics/riskiest-political-act-of-2016-protesting-at-rallies-for-donald-trump.html>.

⁴ *Id.*

⁵ See *In re Trump*, 874 F.3d at 950 (explaining that the alleged assault led to the filing of a complaint in Kentucky).

⁶ *Judge to Trump: No Protection for Speech Inciting Violence*, ASSOCIATED PRESS (Apr. 1, 2017), <https://www.apnews.com/6b54b2ed05a246f3a20b499aaf77edb8>.

⁷ Joe Heim, *This White Nationalist Who Shoved a Trump Protester May be the Next David Duke*, WASH. POST (Apr. 12, 2016), <https://www.washingtonpost.com/local/this-white-nationalist-who-shoved-a-trump-protester-may-be-the-next-david-duke/2016/04/12/>.

⁸ Jose A. DelReal, *At Trump Events, Rally and Revolt*, WASH. POST, Mar. 12, 2016, at A1.

witnessing “a new side of humanity [she] hadn’t quite seen before.”⁹ Nwanguma alleges Heimbach is nearly twice her size and repeatedly shoved her “and shouted ‘leftist scum’ at her.”¹⁰ She also asserts that Bamberger, a seventy-five-year-old Korean War veteran,¹¹ later began “shoving her and striking her.”¹²

Similarly, Molly Shah declares she “was shoved hard from behind by” Heimbach and, soon thereafter, “was shoved and pushed by multiple Trump supporters.”¹³ Additionally, Henry Brousseau, who was then seventeen, contends “he was punched in the stomach for shouting ‘Black Lives Matter.’”¹⁴ A video depicting the incident resides online.¹⁵

In April 2016, Nwanguma, Shah, and Brousseau sued Trump, along with Heimbach and Bamberger, in Kentucky state court.¹⁶ The plaintiffs aver, among other things, that Trump “incited a riot”¹⁷ under Kentucky law.¹⁸ More specifically, they assert his speech “was calculated to incite violence against the Plaintiffs and others[] and does not constitute speech protected by the First Amendment to the United States Constitution”¹⁹ Trump removed the case²⁰ to federal court in the Bluegrass State on diversity jurisdiction²¹ grounds.²²

⁹ Heim, *supra* note 7.

¹⁰ Verified Complaint at 8, *Nwanguma v. Trump*, No. 16C101504 (Jefferson Cnty. Cir. Ct. Ky. Mar. 31, 2016) [hereinafter *Nwanguma Verified Complaint*], <https://www.clearinghouse.net/chDocs/public/PR-KY-0001-0001.pdf>.

¹¹ DelReal, *supra* note 8.

¹² Nwanguma Verified Complaint, *supra* note 10, at 8.

¹³ *Id.* at 9.

¹⁴ Phillip M. Bailey et al., *Police Report Filed in Trump Rally Altercation*, *COURIER-J.* (Mar. 2, 2016), <https://www.courier-journal.com/story/news/politics/elections/kentucky/2016/03/02/charges-filed-altercation-trump-rally/81233794/>.

¹⁵ *Young Black Woman Pushed by Attendees at Trump Rally*, *GUARDIAN* (Mar. 2, 2016), <https://www.theguardian.com/us-news/video/2016/mar/02/black-woman-shoved-donald-trump-rally-video>.

¹⁶ Nwanguma Verified Complaint, *supra* note 10.

¹⁷ *See id.* at 15 (arguing that Trump’s actions at the rally violated KY. REV. STAT. ANN. §§ 525.010, 525.040 (West 2017)).

¹⁸ *See* KY. REV. STAT. ANN. § 525.010(5) (West 2017) (defining a riot as “a public disturbance involving an assemblage of five (5) or more persons which by tumultuous and violent conduct creates grave danger of damage or injury to property or persons or substantially obstructs law enforcement or other government function”); *id.* at § 525.040(1) (West 2017) (“A person is guilty of inciting to riot when he incites or urges five (5) or more persons to create or engage in a riot.”). Professor Margot Kaminski points out that Kentucky’s riot statute includes “no mention of imminence, likelihood, or intent”—the three key elements of the United States Supreme Court standard for incitement fashioned in *Brandenburg v. Ohio*, 395 U.S. 444 (1969). *See* Margot E. Kaminski, *Incitement to Riot in the Age of Flash Mobs*, 81 U. CIN. L. REV. 1, 29 (2012).

¹⁹ Nwanguma Verified Complaint, *supra* note 10, at 15.

²⁰ *See* Debra Lyn Bassett & Rex R. Perschbacher, *The Roots of Removal*, 77 *BROOK. L. REV.* 1, 6 (2011) (describing the history of the process of removal of state cases to federal court and noting that “Removal is a popular procedure, transferring approximately thirty thousand cases annually out of state courts and into federal courts.”).

²¹ *See* U.S. CONST. art. III, § 2 (noting that federal judicial power extends to controversies

The lawsuit pivots on whether Trump's words caused the assaults, and in turn, whether the First Amendment²³ safeguards the President's speech. The latter facet is critical because messages that are both directed to and likely to incite imminent violence are not protected²⁴ by the First Amendment.

Incitement is unprotected because of "its similarity to action,"²⁵ and as "speech increases the likelihood of imminent violent action, it becomes analogous to an action"²⁶ Indeed, Professor Jed Rubenfeld asserts that "[w]hen someone *intentionally* uses speech to bring about *imminent* unlawful conduct, and it is *likely* that this result will ensue, he is properly treated as having engaged himself in, as having participated in, that course of conduct."²⁷ Incitement thus blurs, if not obliterates, "the fundamental distinction between speech and conduct."²⁸

In particular, the United States Supreme Court held in 1969 in

"between Citizens of different States"); 28 U.S.C. § 1332 (a)(1) (2012) (providing that federal district courts shall have original diversity jurisdiction over "civil actions where the matter in controversy exceeds the sum or value of \$75,000" and where the case involves "citizens of different States"). As one article summarizes it, diversity jurisdiction "generally permits civil litigants having different citizenships to have their disputes adjudicated in federal court so long as the claims are big enough—even in the absence of any federal cause of action. This form of subject matter jurisdiction has been around since the first Judiciary Act of 1789 and has seen its popularity, among federal judges and other members of the legal profession, wax and wane over the last two centuries." James M. Underwood, *The Late, Great Diversity Jurisdiction*, 57 CASE W. RES. L. REV. 179, 179–80 (2006).

²² Joint Notice of Removal, *Nwaguma v. Trump*, No. 3:16-cv-00247-DJH-HBB, *2 (W.D. Ky. Apr. 29, 2016).

²³ The First Amendment of the U.S. Constitution provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press" U.S. CONST. amend. I. The Free Speech and Free Press Clauses were incorporated more than ninety years ago as fundamental liberties applying to state and local government through the Fourteenth Amendment Due Process Clause. See *Gitlow v. New York*, 268 U.S. 652, 666 (1925) (noting that the fundamental liberties created by the First Amendment are "free from impairment by the States").

²⁴ The U.S. Supreme Court has held that several categories of expression are unprotected by the First Amendment. See, e.g., *United States v. Alvarez*, 567 U.S. 709, 717 (2012) (noting that "advocacy intended, and likely, to incite imminent lawless action" is among the few categories of "content-based restrictions on speech [that] have been permitted"); *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 245–46 (2002) ("The freedom of speech has its limits; it does not embrace certain categories of speech, including defamation, *incitement*, obscenity, and pornography produced with real children." (emphasis added)).

²⁵ Scott Hammack, *The Internet Loophole: Why Threatening Speech On-line Requires a Modification of the Courts' Approach to True Threats and Incitement*, 36 COLUM. J.L. & SOC. PROBS. 65, 77 (2002).

²⁶ *Id.*

²⁷ Jed Rubenfeld, *The First Amendment's Purpose*, 53 STAN. L. REV. 767, 828 (2001).

²⁸ Martin H. Redish, *Fear, Loathing, and the First Amendment: Optimistic Skepticism and the Theory of Free Expression*, 76 OHIO ST. L.J. 691, 700 (2015); see also Randall P. Bezanson, *Is There Such a Thing as Too Much Free Speech?*, 91 OR. L. REV. 601, 601 (2012) ("From its beginning, the First Amendment speech guarantee has rested on two fundamental boundaries: *speech versus conduct* and *liberty versus utility*" (emphasis added)).

*Brandenburg v. Ohio*²⁹ “that the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”³⁰ This test is the latest iteration of the nearly century-old clear and present danger standard³¹ articulated in *Schenck v. United States*.³² It is, in fact, “an even stronger version of the original clear and present danger test.”³³

The *Brandenburg* test, as Dean Rodney Smolla summarizes it, has three key elements: “(1) *intent* (embodied in the requirement that such speech be ‘directed to inciting or producing’ lawless action); (2) *imminence* (embodied in the phrase ‘imminent lawless action’); and (3) *likelihood* (embodied in the phrase ‘and is likely to incite or produce such action’).”³⁴ Professor Mark Strasser dubs this “a robust standard by which to protect expression.”³⁵ Indeed, Professor Susan Gilles observes that “*Brandenburg* is a celebrated case, first and foremost, because of its startling commitment to free speech.”³⁶ Today, it stands as “one of the most well-established aspects of modern constitutional doctrine.”³⁷

Are Trump’s words unsheltered by the First Amendment per *Brandenburg*? In March 2017, U.S. District Judge David Hale deemed it “plausible that Trump’s direction to ‘get ’em out of here’ advocated the use of force.”³⁸ Importantly, Judge Hale reasoned that the phrase “‘get ’em out of here’ is stated in the imperative; it was an order, an instruction, a command.”³⁹ Also noting the plaintiffs’ assertion that “the violence began

²⁹ 395 U.S. 444, 447 (1969).

³⁰ *Id.*

³¹ See Susan M. Gilles, *Brandenburg v. State of Ohio: An “Accidental,” “Too Easy,” and “Incomplete” Landmark Case*, 38 CAP. U. L. REV. 517, 520 (2010) (“*Brandenburg* is famous for abandoning the ‘clear and present danger’ test.”); Steven M. Morrison, *The System of Modern Criminal Conspiracy*, 63 CATH. U. L. REV. 371, 389 (2014) (“The ‘clear and present danger’ test gradually evolved into the *Brandenburg* test, which the Court set forth in the 1969 case of the same name . . .”).

³² 249 U.S. 47, 52 (1919) (“The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree.”).

³³ Michael J. Mannheim, *The Fighting Words Doctrine*, 93 COLUM. L. REV. 1527, 1533 (1993).

³⁴ Rodney A. Smolla, *Should the Brandenburg v. Ohio Incitement Test Apply in Media Violence Tort Cases?* 27 N. KY. L. REV. 1, 10 (2000) (emphasis added) (quoting *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969)).

³⁵ Mark Strasser, *Mill, Holmes, Brandeis, and a True Threat to Brandenburg*, 26 BYU J. PUB. L. 37, 56 (2011).

³⁶ Gilles, *supra* note 31, at 520.

³⁷ Steven G. Gey, *The Brandenburg Paradigm and Other First Amendments*, 12 U. PA. J. CONST. L. 971, 977 (2010).

³⁸ *Nwanguma v. Trump*, 273 F. Supp. 3d 719, 727 (W.D. Ky. 2017), *rev’d and remanded*, 903 F.3d 604 (6th Cir. 2018).

³⁹ *Id.*

as soon as Trump said ‘get ’em out of here,’⁴⁰ Judge Hale concluded that Nwanguma, Shah, and Brousseau “alleged a plausible claim of incitement to riot.”⁴¹ He therefore refused to dismiss the case.

This, however, did not end the matter. In August 2017, Judge Hale acknowledged the crucial nature of the *Brandenburg* issue in *In re Trump*, emphasizing “that Trump’s statement, on its face, does not explicitly call for violence.”⁴² He thus certified for immediate appeal⁴³ to the United States Court of Appeals for the Sixth Circuit the following question: “Does the First Amendment protect Donald J. Trump’s March 1, 2016 statement ‘Get ’em out of here,’ or may the statement be found to constitute incitement of a riot?”⁴⁴

Resolving this query is exceedingly difficult, affording ample analytical fodder for this Article. Along with the raft of public universities⁴⁵ denying access to “high-profile white nationalist”⁴⁶ and alt-right leader Richard Spencer⁴⁷ because his words ostensibly could incite violence,⁴⁸ *In re Trump* provides a propitious opportunity to explore

⁴⁰ *Id.* at 728.

⁴¹ *Id.*

⁴² *Nwanguma v. Trump*, No. 3:16-cv-247-DJH-HBB, 2017 U.S. Dist. LEXIS 126039, at *10 (W.D. Ky. Aug. 9, 2017) (order granting motion to certify for interlocutory appeal or to reconsider).

⁴³ See 28 U.S.C. § 1292(b) (2012) (providing that a district judge may certify in writing a question to an appellate court if he or she believes there is “a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal . . . may materially advance the ultimate termination of the litigation”).

⁴⁴ *Nwanguma*, 2017 U.S. Dist. LEXIS 126039, at *13.

⁴⁵ See Susan Svrluga, *University of Michigan Considers Renting Space to White Nationalist Speaker*, WASH. POST, Nov. 23, 2017, at A7 (noting that “lawsuits were filed against Michigan State, Penn State, and Ohio State universities, seeking to force them to allow” Spencer to speak).

⁴⁶ Trevor Hughes, *Decades of Pent-up Anger Feed White Nationalist Crusade*, USA TODAY, Dec. 18, 2017, at 1A.

⁴⁷ Spencer is “a prominent white nationalist.” Sheryl Gay Stolberg & Brian M. Rosenthal, *White Nationalist Protest Leads to Deadly Violence*, N.Y. TIMES, Aug. 13, 2017, at A1. He has also been described as “the most recognizable alt-right voice in America.” Carlos Lozada, *How Racist Trolls Will Upend America, With or Without Trump*, WASH. POST, Nov. 5, 2017, at B1.

⁴⁸ See generally Complaint, *Padgett v. Auburn Univ.*, No. 3:17-cv-00231-WKW (M.D. Ala. Apr. 18, 2017) [hereinafter *Auburn Complaint*], available at <http://www.courthousenews.com/wp-content/uploads/2017/04/Controversial-speaker-lawsuit.pdf>; Plaintiff’s Verified Complaint, *Padgett v. Bd. of Trs. Mich. State Univ.*, No. 1:17-cv-00805 (W.D. Mich. Sept. 3, 2017) [hereinafter *Michigan State Complaint*], available at <http://dailycaller.com/wp-content/uploads/2017/09/Padgett-v-Michigan-State.pdf>; *Padgett v. Bd. of Trs. Ohio State Univ.*, No. 2:17-cv-00919-ALM-KAJ (S.D. Ohio Oct. 22, 2017) [hereinafter *Ohio State Complaint*], available at <http://www.courthousenews.com/wp-content/uploads/2017/10/SpencerOSU.pdf>; *Padgett v. Bd. of Trs. Pa. State Univ.*, No. 4:2017cv01911 (M.D. Pa. Oct. 19, 2017) [hereinafter *Penn State Complaint*], available at <http://www.almcms.com/contrib/content/uploads/documents/402/4903/Richard-Spencer-PSU.pdf>. In January 2018, Michigan State University relented, settling the lawsuit and agreeing to allow Richard Spencer to speak on campus in March 2018, while nonetheless distancing itself from his views. Susan Svrluga, *Michigan State Agrees to Let Richard Spencer Give a Speech on Campus*, WASH. POST (Jan. 18, 2018), http://www.washingtonpost.com/news/grade-point/wp/2018/01/18/michigan-state-agrees-to-let-richard-spencer-give-a-speech-on-campus/?utm_term=.06d9338b681a. Kyle Bristow, the attorney

weaknesses with the *Brandenburg* test as it rapidly approaches its golden anniversary.

Importantly, this Article focuses only on in-person incitement scenarios, where the speaker and audience are in close physical proximity. This sweeps up both Trump's campaign rallies and Spencer's talks at public universities. In contrast, much scholarly ink already has been spilled on the multiple problems with applying *Brandenburg* to high-tech, mediated messages such as emails, texts, and posts on social media.⁴⁹ Those scenarios fall beyond the scope of this Article.

Several items complicate *In re Trump*. For instance, defendant Alvin Bamberger—one of the individuals who attacked Nwanguma—claims he “would not have acted as he did without Trump and/or the Trump campaign’s specific urging and inspiration.”⁵⁰ Bamberger’s attorney contends his client simply acted “in response to—and [was] inspired by—Trump and/or the Trump campaign’s urging to remove the protesters.”⁵¹ Similarly, Matthew Heimbach asserts he “acted pursuant to the requests and directives” of Trump.⁵² As Heimbach bluntly avows, Trump “knew what he was asking for.”⁵³ In brief, Bamberger and Heimbach both maintain they acted in response to Trump’s words. This suggests—at least in part—that those words are not safeguarded under *Brandenburg*.

On the other hand, shortly after Trump uttered “Get ’em out of here,”⁵⁴ he added a dose of message-softening language. Specifically, Trump said,

who filed the lawsuit against Michigan State University on behalf of Spencer, called the settlement “a resounding First Amendment victory for the alt-right” and added that “left-wing censorship of right-wing ideas in academia is unacceptable.” David Jesse, *White Supremacist Richard Spencer Will Speak at Michigan State After All*, DET. FREE PRESS (Jan. 18, 2018), <http://www.freep.com/story/news/local/michigan/2018/01/18/richard-spencer-michigan-state-university/1044354001/>.

⁴⁹ See, e.g., Alan K. Chen, *Free Speech and the Confluence of National Security and Internet Exceptionalism*, 86 *FORDHAM L. REV.* 379, 391–97 (2017); John P. Cronan, *The Next Challenge for the First Amendment: The Framework for an Internet Incitement Standard*, 51 *CATH. U. L. REV.* 425 (2002); Daniel T. Kobil, *Advocacy on Line: Brandenburg v. Ohio and Speech in the Internet Era*, 31 *U. TOL. L. REV.* 227 (2000); Chris Montgomery, Note, *Can Brandenburg v. Ohio Survive the Internet and the Age of Terrorism?: The Secret Weakening of a Venerable Doctrine*, 70 *OHIO ST. L.J.* 141 (2009); Russell L. Weaver, *Brandenburg and Incitement in a Digital Era*, 80 *MISS. L.J.* 1263 (2011).

⁵⁰ Clarence Page, *Is Trump to Blame for the Violence at His Rallies?*, *DAYTON DAILY NEWS (Ohio)*, Apr. 19, 2017, at A9.

⁵¹ Jonathan Turley, *How Louisville Could Decide Trump Immunity*, *USA TODAY*, Apr. 24, 2016, at 7A.

⁵² Attachment to Form Answer of Defendant Matthew Warren Heimbach to Complaint of Plaintiffs Kashtya Nwanguma, Molly Shah and Henry Brousseau at 22, *Nwanguma v. Trump*, No. 3:16-cv-00247-DJH-HBB (W.D. Ky. Apr. 17, 2016), available at <http://www.politico.com/f/?id=0000015b-7dcc-db04-ad5b-7ded76a30002>.

⁵³ David Zucchino, *A Trump Campaign Rally Led to Shoving, and Legal Wrangling, Too*, *N.Y. TIMES*, May 28, 2017, at A16.

⁵⁴ *In re Trump*, 874 F.3d 948, 950 (6th Cir. 2017).

“[D]on’t hurt ’em—if I say ‘go get ’em,’ I get in trouble with the press.”⁵⁵ Such a cautionary, backpedaling admonition seems to militate against finding incitement.

Additionally, one might wonder whether Trump’s initial declaration was really a call for violence or just Trump being Trump—pompously posturing and pandering. The line between unlawful incitement and permissible showmanship—between a plea for physical action and a figurative chumming of political waters—is unclear.

To wit, a March 2016 *Washington Post* article observed that “Trump often says that he loves having protesters at his rallies, that they make his rallies fun. Plus, the interruptions are an opportunity to show him bossing around and mocking liberals, often bellowing, ‘Get ’em out!’”⁵⁶ Or, as a *New York Times* story put it, “Trump tries to turn the interruptions to his advantage, showcasing his large crowds and commanding presence, alternately shouting ‘Get ’em out of here’ and ‘Be nice.’”⁵⁷ Trump argues “his demands were only intended for security guards.”⁵⁸ In the petition for a writ of mandamus,⁵⁹ the President’s attorneys contend his speech is fully protected by the First Amendment.⁶⁰ They assert, among other things, that:

- “[T]he challenged speech was an exercise of Mr. Trump’s clear First Amendment right to exclude disruptive protestors from his campaign rally.”⁶¹
- “[P]olitical campaigns and candidates have a core First Amendment right to associate for the purpose of expressing their political message, which necessarily entails the right to ‘exclu[de]’ disruptive protestors who seek to express ‘views [that] [a]re at odds with positions [the campaign] espouse[s].’”⁶²
- “Mr. Trump and the Campaign had every right to call for the removal of the protestors from the event. Any contrary rule would

⁵⁵ *Id.*

⁵⁶ Karen Tumulty et al., *Vitriol Follows Trump on Campaign Trail*, WASH. POST, Mar. 13, 2016, at A1.

⁵⁷ Parker, *supra* note 3, at A1.

⁵⁸ Jason Silverstein, *Trump Turned Me into Brawlin’ Goon*, DAILY NEWS, Apr. 17, 2017, at News 7.

⁵⁹ See 28 U.S.C. § 1651(a) (2012) (“The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.”); Amy E. Sloan, *Appellate Fruit Salad and Other Concepts: A Short Course in Appellate Process*, 35 U. BALT. L. REV. 43, 57 (2005) (“A petition for a writ of mandamus or prohibition is a request separate from the underlying case that is filed as an original matter with the appellate court.”).

⁶⁰ Petition for Writ of Mandamus, *In re Trump*, No. 17-5830, 2017 WL 3130326 (6th Cir. July 20, 2017), at *1 [hereinafter *Petition for Mandamus*].

⁶¹ *Id.* at *2.

⁶² *Id.* at *10–11 (quoting *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 580 (1995)).

destroy the practical ability of political campaigns to express their own messages at campaign rallies without being sabotaged by hostile protestors.”⁶³

- “Since ‘Get them out of here’ is an entirely natural and proper expression of lawful means to protect the Campaign’s undiluted message and association, it cannot be penalized under the First Amendment (particularly when accompanied by the ‘Don’t hurt ’em’ admonition).”⁶⁴
- “Mr. Trump’s speech is protected under *Brandenburg* because it was devoid of any advocacy of violence. In calling for the removal of disruptive protestors by saying ‘Get ’em out of here,’ he did not say a single word about unlawful force or violence. To the contrary, he affirmatively *discouraged* violence by telling the audience, ‘Don’t hurt ’em.’”⁶⁵
- “Mr. Trump’s call for the removal of protestors was fully protected unless he advocated *a greater degree of force than necessary* to remove them. Absent that type of unlawful advocacy, he cannot be liable for incitement.”⁶⁶

Solid, logical arguments thus exist on both sides as to whether Trump’s speech falls outside the bounds of First Amendment refuge. Put bluntly: reciting *Brandenburg*’s elements⁶⁷ is simple, but applying them is complicated.

To further examine the *Brandenburg* quagmire, Part I lays the foundation for later Sections by providing primers on three subjects: (1) the current incitement standard; (2) the heckler’s veto principle; and (3) the presumption against prior restraints on expression.⁶⁸ Next, Part II drills deeper into *In re Trump*, focusing on the challenges the case exposes for satisfying two facets of *Brandenburg*—intent and likelihood.⁶⁹ Part III then shifts attention to multiple lawsuits filed in 2017 against public universities that denied Richard Spencer campus access because his words allegedly are likely, per *Brandenburg*, to incite imminent lawless action.⁷⁰ The Spencer lawsuits, Part III reveals, illustrate *Brandenburg*’s complex relationship with First Amendment doctrines regarding both prior restraints and the heckler’s veto. Finally, Part IV concludes by calling on the Supreme Court to clarify the meaning and application of *Brandenburg*’s

⁶³ *Id.* at *12.

⁶⁴ *Id.* at *13.

⁶⁵ *Id.* at *14.

⁶⁶ *Id.* at *22.

⁶⁷ See *supra* note 34 and accompanying text (setting forth the three key elements of the *Brandenburg* test).

⁶⁸ See *infra* Part I.

⁶⁹ See *infra* Part II.

⁷⁰ See *infra* Part III.

elements and its relationship to the prior restraint and heckler's veto doctrine as the case nears its fiftieth anniversary.⁷¹

I. PRIMERS ON KEY CONCEPTS: INCITEMENT TO VIOLENCE, THE HECKLER'S VETO, AND PRIOR RESTRAINTS ON EXPRESSION

This Part has three Sections. Section A provides detailed background on the *Brandenburg* test, while Section B addresses the heckler's veto principle. Finally, Section C briefly reviews the general presumption against the constitutionality of prior restraints on expression.

A. *The Brandenburg Test for Incitement to Violence*

As noted above,⁷² in 1969, the Supreme Court held in *Brandenburg v. Ohio* that the “constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”⁷³ In its per curiam opinion, the Court struck down a criminal syndicalism statute because it punished “mere advocacy”⁷⁴ and failed to distinguish it “from incitement to imminent lawless action.”⁷⁵ The Court reiterated this point in 1982, observing that “mere *advocacy* of the use of force or violence does not remove speech from the protection of the First Amendment.”⁷⁶

Indeed, *Brandenburg* draws a crucial dichotomy between “the mere abstract teaching . . . of the moral propriety or even moral necessity for a resort to force and violence”⁷⁷ on the one hand, and speech that is essential for “preparing a group for violent action and steeling it to such action”⁷⁸ on the other.⁷⁹ Furthermore, *Brandenburg* renders “irrelevant whether or not the speech offends; all that matters is the likelihood that the harm of imminent lawlessness will result.”⁸⁰ In a nutshell, *Brandenburg* serves up

⁷¹ See *infra* Part IV.

⁷² *Supra* note 29–30 and accompanying text.

⁷³ *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

⁷⁴ *Id.* at 449.

⁷⁵ *Id.*

⁷⁶ NAACP v. Claiborne Hardware Co., 458 U.S. 886, 927 (1982) (emphasis added).

⁷⁷ *Brandenburg*, 395 U.S. at 447–48 (quoting *Noto v. United States*, 367 U.S. 290, 297–98 (1961)).

⁷⁸ *Id.*

⁷⁹ See O. Lee Reed, *The State is Strong but I Am Weak: Why the “Imminent Lawless Action” Standard Should Not Apply to Targeted Speech That Threatens Individuals With Violence*, 38 AM. BUS. L.J. 177, 190 (2000) (“[In] *Brandenburg v. Ohio*[,] . . . mere abstract advocacy of violence was insufficient to permit the government to limit otherwise free speech.”).

⁸⁰ John T. Nockleby, *Hate Speech in Context: The Case of Verbal Threats*, 42 BUFF. L. REV. 653, 669 (1994).

“a very speech-protective way of drawing the definitional line between advocacy of illegal action that is encompassed within the First Amendment and such speech that is not.”⁸¹

The case centered on a speech by Ku Klux Klan leader Clarence Brandenburg that accompanied a cross burning attended by approximately a dozen Klan members, “some of whom carried firearms.”⁸² Other than one television journalist and a cameraman, no one else was present on the Hamilton County, Ohio farm.⁸³ At this gathering, the Klansman hurled insults about African-Americans and Jews.⁸⁴ He also informed his hooded colleagues that “[w]e’re not a revengent [sic] organization, but if our President, our Congress, our Supreme Court, continues to suppress the white, Caucasian race, it’s possible that there might have to be some revengeance [sic] taken.”⁸⁵

Because no one else was nearby to hear such vitriol—only a dozen Klansmen, a reporter, and a cameraman—it appears evident these admonitions were not likely to produce the brand of imminent lawless action the *Brandenburg* test requires. Furthermore, Clarence Brandenburg qualified his messages in conditional terms rather than expressing them as immediate directives. In particular, “revengeance” was only “*possible*” and simply “*might*” be needed “*if*” government officials continued to suppress whites.⁸⁶

The rambling speech ultimately was protected, as Professor Alexander Tsisis observes, because it consisted merely of “abstract statements voiced only in the presence of like-minded individuals and invited guests.”⁸⁷ Tsisis points out, as noted above, that “the only people present at the rally were Ku Klux Klan members and a camera crew, whom the Klan invited.”⁸⁸

Under *Brandenburg*, as Professor James Wilson explains, “a prosecutor must prove . . . (1) advocacy, (2) of the use of force or of law violation, (3) the intention to incite or produce unlawful action, (4) the imminence of the unlawful act, and (5) the likelihood that such action will be produced.”⁸⁹ Wilson maintains that “prosecutors will have the easiest

⁸¹ Norman T. Deutsch, *Professor Nimmer Meets Professor Schauer (and Others): An Analysis of “Definitional Balancing” as a Methodology for Determining the “Visible Boundaries of the First Amendment”*, 39 AKRON L. REV. 483, 507 (2006).

⁸² *Brandenburg*, 395 U.S. at 445.

⁸³ *Id.*

⁸⁴ *See id.* at 446 n.1 (providing examples of Brandenburg’s repeated use of racial slurs).

⁸⁵ *Id.* at 446.

⁸⁶ *Id.* (emphasis added).

⁸⁷ Alexander Tsisis, *Inflammatory Speech: Offense Versus Incitement*, 97 MINN. L. REV. 1145, 1159 (2013).

⁸⁸ Alexander Tsisis, *Terrorist Speech on Social Media*, 70 VAND. L. REV. 651, 667 (2017).

⁸⁹ James G. Wilson, *Surveying the Forms of Doctrine on the Bright Line-Balancing Test Continuum*, 27 ARIZ. ST. L.J. 773, 804 (1995).

time proving advocacy of the use of force or law violation, more difficulty with mens rea, and either an easier or harder time proving imminence and likelihood, depending on whether or not force or lawlessness eventually occurred.”⁹⁰ Mens rea is “the Latin phrase for a guilty mind.”⁹¹

In other words, the rubber meets the road with the same three factors described earlier—intent (mens rea), imminence, and likelihood.⁹² Professors Julie Seaman & David Sloan Wilson concur that the *Brandenburg* test “encompass[es] the three elements of (1) intent; (2) imminence; and (3) likelihood.”⁹³ These three components of *Brandenburg*⁹⁴ are part of what Professor Christina Wells calls a “weighted”⁹⁵ balancing approach “requiring the Court to weigh the likelihood and magnitude of harm against the right to free expression.”⁹⁶ The test is weighted because, in balancing harm against free speech, it “heavily favors speech in the absence of concrete evidence of intentional and likely imminent harm.”⁹⁷

Professor Jed Rubenfeld, however, disagrees with Wells’s assertion that “magnitude of harm”⁹⁸ is important under *Brandenburg*.⁹⁹ As Rubenfeld views it, magnitude of harm is “a factor with which *Brandenburg* does not concern itself. As far as *Brandenburg* is concerned, a person who deliberately incites others to commit a minor offense is in the same position as a person who incites others to riot. In both cases, the speech is equally unprotected.”¹⁰⁰

Rubenfeld, in fact, rejects Wells’ contention that *Brandenburg* involves a balancing approach.¹⁰¹ Instead, he contends it is better considered “as a test to determine whether an individual has intentionally used speech so closely and directly engaged with a particularized course of prohibited conduct that the individual may be treated as having participated

⁹⁰ *Id.*

⁹¹ John Villasenor, *Technology and the Role of Intent in Constitutionally Protected Expression*, 39 HARV. J.L. & PUB. POL’Y 631, 642 (2016).

⁹² Smolla, *supra* note 34.

⁹³ Julie Seaman & David Sloan Wilson, #FreeSpeech, 48 ARIZ. ST. L.J. 1013, 1028, n.83 (2016).

⁹⁴ See Hannah Steinblatt, *E-Incitement: A Framework for Regulating the Incitement of Criminal Flash Mobs*, 22 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 753, 770 (2012) (“The *Brandenburg* test is comprised of three distinct elements: intent, imminence, and likelihood.”).

⁹⁵ Christina E. Wells, *Bringing Structure to the Law of Injunctions Against Expression*, 51 CASE W. RES. L. REV. 1, 48 (2000).

⁹⁶ *Id.* at 47.

⁹⁷ *Id.* at 48.

⁹⁸ *Id.* at 47.

⁹⁹ See Rubenfeld, *supra* note 27, at 829 (explaining how *Brandenburg* perceives the magnitude of harm).

¹⁰⁰ *Id.* (emphasis added).

¹⁰¹ See *id.* (“Despite appearances, the *Brandenburg* test cannot be understood as a balancing test.”).

in that conduct.”¹⁰²

With this overview in mind, what do the three key elements of *Brandenburg* mean? The following subsections separately examine each one.

1. *Intent*

In *Hess v. Indiana*,¹⁰³ the Court clarified that *Brandenburg*'s “directed to” facet means that a speaker’s words must be “intended to produce”¹⁰⁴ unlawful action.¹⁰⁵ Furthermore, *Hess* suggested that intent can be determined by a “rational inference from the import of the language.”¹⁰⁶

Put differently, the *Brandenburg* standard features a “mens rea requirement that the speaker had the purpose to produce . . . harm.”¹⁰⁷ Including a mens rea or state-of-mind component marked a significant development in the evolution of the incitement doctrine because, as Erwin Chemerinsky writes, “[n]one of the earlier tests had contained an intent requirement.”¹⁰⁸

An intent requirement is vital for protecting free expression because, without it, incitement would be a strict liability crime.¹⁰⁹ Strict liability offenses, in turn, harm First Amendment interests because they chill speech.¹¹⁰ The danger of self-censorship stemming from strict liability, of course, was also a primary reason the Supreme Court adopted the actual malice standard in defamation law in *New York Times Co. v. Sullivan*.¹¹¹

¹⁰² *Id.*

¹⁰³ 414 U.S. 105 (1973).

¹⁰⁴ *Id.* at 108–09.

¹⁰⁵ See Eugene Volokh, *The Freedom of Speech and Bad Purposes*, 63 UCLA L. REV. 1366, 1370 (2016) (“*Hess v. Indiana* held that ‘directed to’ here means intended to persuade people to act illegally.”).

¹⁰⁶ *Hess*, 414 U.S. at 109.

¹⁰⁷ Volokh, *supra* note 105, at 1383.

¹⁰⁸ ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 1375 (5th ed. 2017).

¹⁰⁹ Leslie Kendrick, *Free Speech and Guilty Minds*, 114 COLUM. L. REV. 1255, 1281 (2014) (“Strict liability penalizes a speaker for an unintended aspect of her message and disregards her actual communicative projects. It reaches speakers who do not intend harm and who are reasonably unaware of the harmful aspects of their speech.”).

¹¹⁰ *Id.* at 1277 (“The chilling effect is a free-speech principle that could explain why strict liability is inappropriate without making speaker’s intent intrinsic to speech protection. Speakers who face strict liability will stay silent when uncertain of the accuracy of their information.”); see also Jonathon W. Penney, *Chilling Effects: Online Surveillance and Wikipedia Use*, 31 BERKELEY TECH. L.J. 117, 125 (2016) (“The idea that government laws or actions might chill people’s free activities gained its most prominent early expression in the United States during the Cold War. The ‘chilling effects doctrine,’ a legal doctrine in First Amendment jurisprudence, took shape in a series of cases decided in the 1950s and 60s that dealt with anti-communist state measures. Essentially, the doctrine encouraged courts to treat rules or government actions that ‘might deter’ the free exercise of First Amendment rights ‘with suspicion.’”).

¹¹¹ 376 U.S. 254 (1964). The Court in *Sullivan* held that Alabama’s strict liability provision in its

As Professor Frederick Schauer observed, the chilling effect doctrine played a “critical role”¹¹² in *Sullivan*. Including an intent component in *Brandenburg* thus shields and safeguards what Professor Susan Gilles aptly dubs “the ‘accidental’ inciter—the speaker whose language triggers a riot, but who had no intent to incite such lawlessness.”¹¹³ Additionally, the intent element separates provocative speech (protected) from incitement (unprotected).¹¹⁴

Proving a speaker’s intent, as this Article’s discussion of *In re Trump* later demonstrates,¹¹⁵ is far from easy. Professor Eugene Volokh, for example, points out that:

[A]ny conclusion about the speaker’s purpose will usually just be a guess. There will often be several plausible explanations for just what the speaker wanted—to push an ideology, to convey useful information, to sell more books, to titillate readers by being on the edge of what is permitted, and more.¹¹⁶

In contrast to *Brandenburg*, the Court’s test for another unprotected

libel regime was “constitutionally deficient for failure to provide the safeguards for freedom of speech and of the press that are required by the First and Fourteenth Amendments in a libel action brought by a public official against critics of his official conduct.” *Id.* at 264. The Court reasoned that “[a] rule compelling the critic of official conduct to guarantee the truth of all his factual assertions—and to do so on pain of libel judgments virtually unlimited in amount—leads to a comparable ‘self-censorship.’” *Id.* at 279. To rectify this situation, the Court adopted a fault standard—actual malice—that focuses on the subjective state of mind of the defendant at the time of publication about the veracity of the statements at issue. *Id.* at 279–80. See also Matthew D. Bunker, *Constitutional Baselines: First Amendment Theory, State Action and the “New Realism,”* 5 COMM. L. & POL’Y 1, 22 (2000) (“In *Sullivan*, there is a direct relation between the legal rule (strict liability in defamation) and the inhibition of important political speech about government officials.”); David F. Partlett & Russell L. Weaver, *Remedies, Neutral Rules and Free Speech*, 39 AKRON L. REV. 1183, 1189 (2006) (“In *Sullivan*, the Court was concerned about the chilling effect of defamation judgments on reporting.”); Stephen A. Siegel, *Injunctions for Defamation, Juries, and the Clarifying Lens of 1868*, 56 BUFF. L. REV. 655, 656 (2008) (“Before *New York Times v. Sullivan*, defamation was a strict liability tort.” (citation omitted)); Diane L. Zimmerman, *Requiem for a Heavyweight: A Farewell to Warren and Brandeis’s Privacy Tort*, 68 CORNELL L. REV. 291, 315 (1983) (“The Court ruled that a strict liability libel standard is unconstitutional.”).

¹¹² Frederick Schauer, *Fear, Risk and the First Amendment: Unraveling the “Chilling Effect,”* 58 B.U. L. REV. 685, 705 (1978).

¹¹³ Gilles, *supra* note 31, at 523.

¹¹⁴ Daniel Ortner, *The Terrorist’s Veto: Why the First Amendment Must Protect Provocative Portrayals of the Prophet Muhammad*, 12 NW. U. J.L. & SOC. POL’Y 1, 33 (2016) (“The intent of the speaker, and whether the speech is ‘directed to inciting,’ is critical to determining whether incitement occurred. It is this key element that distinguishes provocative speech from incitement.” (quoting MODEL PENAL CODE § 5.03 (AM. LAW INST. 2015))).

¹¹⁵ See *infra* Part II (explaining that without a concession from Trump regarding the intent of his statements, the evidence of his intent is merely circumstantial).

¹¹⁶ Eugene Volokh, *Crime-Facilitating Speech*, 57 STAN. L. REV. 1095, 1186 (2005). Volokh adds that “when the law really requires a mens rea of purpose . . . decision[-]making necessarily requires a good deal more conjecture.” *Id.* (citations omitted).

category of speech related to violence—fighting words—lacks an intent element.¹¹⁷ Additionally, the Supreme Court has yet to definitively decide whether another brand of unprotected speech that portends violence—true threats—entails a mens rea component.¹¹⁸

2. Imminence

The second key facet of the *Brandenburg* test is imminence.¹¹⁹ Problematically, as Professor Martin Redish points out, “[t]he Supreme Court has never explicitly laid out its understanding of the imminence required by the test.”¹²⁰ Yet Redish asserts that “the test must require at least some showing of temporal imminence, lest the word be rendered linguistically incoherent.”¹²¹

In other words, there must be a likelihood of the unlawful conduct

¹¹⁷ The Supreme Court held in *Chaplinsky v. New Hampshire* that fighting words constitute one of the “well-defined and narrowly limited classes of speech” that are not safeguarded by the First Amendment. 315 U.S. 568, 571 (1942). The Court in *Chaplinsky* defined fighting words as those whose “very utterance inflict injury or tend to incite an immediate breach of the peace.” *Id.* at 572. The Court later specified that fighting words are limited to “personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction.” *Cohen v. California*, 403 U.S. 15, 20 (1971). It added that the words must be directed to a particular person and be interpreted “as a direct personal insult.” *Id.* The fighting words test, however, lacks a mens rea component. As Justice Clarence Thomas recently wrote, fighting words may be prohibited “without proof of an intent to provoke a violent reaction.” *Elonis v. United States*, 135 S. Ct. 2001, 2027 (2015) (Thomas, J., dissenting). Professor Larry Alexander elaborates that “[r]equiring a mens rea of purpose serves no obvious free speech value. Nor is it consistent with the Court’s own approach to fighting words or to hostile audiences, neither of which require, as a precondition to sanctioning the speaker, that the speaker intend to provoke the audience to violence.” Larry Alexander, *Redish on Freedom of Speech*, 107 NW. U. L. REV. 593, 596 (2013) (emphasis in original omitted).

¹¹⁸ In *Elonis v. United States*, the Court resolved a threats case on statutory grounds and thus found it “not necessary to consider any First Amendment issues.” 135 S.Ct. at 2012. The question presented to the Court in the *Elonis* petition was: Whether, consistent with the First Amendment and *Virginia v. Black*, 538 U.S. 343 (2003), conviction of threatening another person requires proof of the defendant’s subjective intent to threaten, as required by the Ninth Circuit and the supreme courts of Massachusetts, Rhode Island, and Vermont; or whether it is enough to show that a “reasonable person” would regard the statement as threatening, as held by other federal courts of appeals and state courts of last resort. Question Presented, *Elonis v. United States*, 730 F.3d 321 (2015) (No. 13-983) (June 16, 2014). See also *Perez v. Florida*, 137 S. Ct. 853, 855 (2017) (Sotomayor, J., concurring) (“The Court should also decide precisely what level of intent suffices under the First Amendment—a question we avoided two Terms ago in *Elonis*.”). Writing subsequent to the Court’s ruling in *Elonis*, Eugene Volokh notes that “the Court hasn’t even resolved whether statements are punishable only (a) if the speaker intends to put a person in fear, or whether it is enough that (b) a reasonable speaker would realize that the statement would put a person in fear.” Eugene Volokh, *The “Speech Integral to Criminal Conduct” Exception*, 101 CORNELL L. REV. 981, 1005 (2016).

¹¹⁹ See *supra* note 34 and accompanying text (identifying the three key elements of the *Brandenburg* test).

¹²⁰ Martin H. Redish, *Advocacy of Unlawful Conduct and the First Amendment: In Defense of Clear and Present Danger*, 70 CAL. L. REV. 1159, 1180 (1982).

¹²¹ Martin H. Redish & Michael J.T. Downey, *Criminal Conspiracy as Free Expression*, 76 ALB. L. REV. 697, 730 (2012–2013).

occurring “in the near future”¹²² and “within a very limited timeframe.”¹²³ As Redish encapsulates it, “most commentators have had little or no trouble concluding that the Court’s opinion in *Brandenburg* adopts a highly protective imminence test.”¹²⁴

Indeed, the Court in *Hess v. Indiana*¹²⁵ made clear that “advocacy of illegal action at some *indefinite future time*”¹²⁶—evidenced by the word “later” in the defendant’s statement “[w]e’ll take the fucking street later”¹²⁷—fails to satisfy the imminence requirement.¹²⁸ Thus, while Gregory Hess’s words during an anti-war protest “might tend to lead to violence, this did not satisfy the requirement that advocacy be directed at inciting or producing *imminent* lawless action that is likely to be produced.”¹²⁹ Professor Dan Coenen recently dubbed this “the indefinite-future logic of *Hess*.”¹³⁰ Professor Michal Buchhandler-Raphael adds that “[i]n light of *Hess*, imminent means nothing but *immediate action*, which is an almost impossible burden to satisfy.”¹³¹

Addressing the imminence element, Professor Enrique Armijo adds that “[a]n unspoken predicate for a finding of imminent incitement has traditionally been a shared physical space between speaker and audience.”¹³² Similarly, Joshua Azriel contends that “[t]he *Brandenburg* test applies to verbally spoken face-to-face speech”¹³³ and “assumes a speaker-audience relationship that does not exist with Web sites.”¹³⁴

Chemerinsky emphasizes that a significant problem is the *Brandenburg* Court’s failure to explain how imminence should be

¹²² *Id.*

¹²³ Asma T. Uddin, *Free Speech and Public Order Exceptions: A Case for the U.S. Standard*, 2015 BYU L. REV. 727, 762 (2015).

¹²⁴ Martin H. Redish, *Unlawful Advocacy and Free Speech Theory: Rethinking the Lessons of the McCarthy Era*, 73 U. CIN. L. REV. 9, 65 (2004).

¹²⁵ 414 U.S. 105 (1973).

¹²⁶ *Id.* at 108 (emphasis added).

¹²⁷ *Id.* at 107.

¹²⁸ See Mark Strasser, *Incitement, Threats, and Constitutional Guarantees: First Amendment Protections pre- and post-Elonis*, 14 U.N.H. L. REV. 163, 173 (2016) (examining the U.S. Supreme Court’s ruling in *Hess* and emphasizing that “[t]he lack of imminence meant the speech at issue could not be criminalized under *Brandenburg*.”).

¹²⁹ R. Randall Kelso, *The Structure of Modern Free Speech Doctrine: Strict Scrutiny, Intermediate Review, and “Reasonableness” Balancing*, 8 ELON L. REV. 291, 328 (2016).

¹³⁰ Dan T. Coenen, *Freedom of Speech and the Criminal Law*, 97 B.U. L. REV. 1533, 1553 n.110 (2017).

¹³¹ Michal Buchhandler-Raphael, *Overcriminalizing Speech*, 36 CARDOZO L. REV. 1667, 1677 (2015) (emphasis added).

¹³² Enrique Armijo, *Kill Switches, Forum Doctrine, and the First Amendment’s Digital Future*, 32 CARDOZO ARTS & ENT. L.J. 411, 459 (2014).

¹³³ Joshua Azriel, *The Internet and Hate Speech: An Examination of the Nuremberg Files Case*, 10 COMM. L. & POL’Y 477, 496 (2005).

¹³⁴ *Id.* at 495–96.

appraised.¹³⁵ In practice, *Brandenburg's* imminence element requires government officials to “exercise restraint in their regulation of expressive freedoms unless the exercise of those freedoms threatens imminent harm.”¹³⁶ In other words, police must refrain from arresting a speaker if the possibility of harm is too distant. As Professor Margot Kaminski states:

Brandenburg suggests that when action is advocated far enough in advance, police can prepare for it and avert danger through preparation; therefore, suppression or punishment of non-imminent speech is not allowed. It is only when the danger is so imminent that police cannot prepare themselves that regulation of incitement is justified.¹³⁷

With this background on *Brandenburg's* imminence component in mind, the next section turns to the likelihood element.

3. Likelihood

The Court in *Brandenburg* held that speech is proscribed as incitement only if it “is likely to incite or produce”¹³⁸ violence or unlawful conduct. Unfortunately, as Professor Thomas Healy points out, “*Brandenburg* does not tell us how likely it must be that speech will lead to unlawful conduct.”¹³⁹ Furthermore, *Brandenburg* fails to answer how likelihood is to be appraised.¹⁴⁰

Despite such flaws, likelihood is an important facet of *Brandenburg*. That is because, even if a speaker intends for violence to occur—the first of the three key elements¹⁴¹—he nonetheless will be protected if he is ineffectual or inept in steeling an audience to action.¹⁴² Put differently, a non-persuasive speaker is less likely to have his words followed. Viewed collectively, *Brandenburg's* likelihood and imminence requirements ensure “that the danger is in fact not speculative and that the government’s interest in preventing the violence is not pretextual.”¹⁴³

It seems clear, however, that past violent reactions to a speaker’s words can serve as evidence in predicting whether they are likely to cause violence in the future. For instance, in considering whether the Internet

¹³⁵ CHEMERINSKY, *supra* note 108, at 1375.

¹³⁶ John Inazu, *Unlawful Assembly as Social Control*, 64 UCLA L. REV. 2, 38 (2017).

¹³⁷ Kaminski, *supra* note 18, at 81.

¹³⁸ *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (emphasis added).

¹³⁹ Thomas Healy, *Brandenburg in a Time of Terror*, 84 NOTRE DAME L. REV. 655, 660 (2009) (emphasis added).

¹⁴⁰ CHEMERINSKY, *supra* note 108, at 1375.

¹⁴¹ See *supra* Section I.A.1 (footnote omitted) (presenting the three elements).

¹⁴² See Gilles, *supra* note 31, at 523 (footnote omitted) (noting that *Brandenburg* protects “ineffective” speakers).

¹⁴³ S. Elizabeth Wilborn Malloy & Ronald J. Krotoszynski, Jr., *Recalibrating the Cost of Harm Advocacy: Getting Beyond Brandenburg*, 41 WM. & MARY L. REV. 1159, 1197 (2000).

postings of white supremacist William White constituted incitement under *Brandenburg*, a federal district court in 2013 reasoned:

[T]he evidence fails to establish that White’s postings have *previously inspired* any action—imminent or otherwise. In the absence of such evidence, the fact that White published his statements to the Internet, alone—although deeply troubling—is not enough to show that the actions suggested therein were likely to be immediately carried out by White’s readers.¹⁴⁴

Thus, likelihood ultimately depends on a contextual approach that accounts not only for the words used, but also the surrounding context in which those words are uttered. Context includes, as Professor David Crump asserts, the medium through which the message is conveyed, the audience to whom it is addressed, and other related messages.¹⁴⁵

With this primer on *Brandenburg* in mind, the next Section briefly reviews the heckler’s veto principle.

B. *The Heckler’s Veto Principle*

The heckler’s veto principle, as Professor Brett Johnson recently wrote, is the precept “that state actors have a duty to protect speakers from hostile audiences who would seek to either do harm to speakers or threaten to do harm and thereby force law enforcement to silence speakers.”¹⁴⁶ A heckler’s veto thus occurs “when a crowd or audience’s reaction to a speech or message is allowed to control or silence that speech or message.”¹⁴⁷

Imagine, for instance, a comedian being heckled off the stage at a comedy club during his act. That would be tantamount to a heckler’s veto. If the club were run by the government, however, it would be obligated to protect the comedian and allow his performance to continue unimpeded.

In the typical heckler’s veto scenario, “an unpopular minority has insisted upon exercising its rights in spite of the probable opposition of the majority of the community.”¹⁴⁸ That certainly is the case when white nationalist Richard Spencer speaks on public university campuses, as Part III later examines. For example, when Spencer spoke in October 2017 at

¹⁴⁴ *In re White*, No. 2:07cv342, 2013 U.S. Dist. LEXIS 133148, at *221 (E.D. Va. Sept. 13, 2013) (emphasis added) (order denying motion for sanctions).

¹⁴⁵ David Crump, *Camouflaged Incitement: Freedom of Speech, Communicative Torts, and the Borderland of the Brandenburg Test*, 29 GA. L. REV. 1, 56 (1994).

¹⁴⁶ Brett G. Johnson, *The Heckler’s Veto: Using First Amendment Theory and Jurisprudence to Understand Current Audience Reactions Against Controversial Speech*, 21 COMM. L. & POL’Y 175, 219 (2016).

¹⁴⁷ CLAY CALVERT ET AL., MASS MEDIA LAW 44 (20th ed. 2018).

¹⁴⁸ Ruth McGaffey, *The Heckler’s Veto: A Reexamination*, 57 MARQ. L. REV. 39, 39 (1973).

the University of Florida, his disquieting views drew overwhelming opposition and required enormous law enforcement presence to maintain the peace.¹⁴⁹

The heckler's veto doctrine holds that public universities, as government actors, must protect Spencer's offensive speech¹⁵⁰ because they cannot "hide behind the unpleasant reaction of some portions of the public in order to silence a speaker."¹⁵¹ As Owen Fiss summarized it, the doctrine "recognizes that when a mob is angered by a speaker and jeopardizes the public order by threatening the speaker, the policeman must act to preserve the opportunity of an individual to speak. The duty of the policeman is to restrain the mob."¹⁵²

By analyzing recent lawsuits filed on behalf of Richard Spencer, Part III explores the tension between the heckler's veto doctrine and *Brandenburg's* likelihood requirement.¹⁵³ Specifically, Part III argues that the more money universities spend on police to prevent a heckler's veto and to safeguard Spencer's right to speak,¹⁵⁴ the less likely it is that his words will constitute unlawful incitement under *Brandenburg*.¹⁵⁵ That is because a massive law enforcement turnout not only reduces the chances of Spencer being attacked by a hostile mob, but also makes it less probable his followers will commit violence, assuming they recognize the increased odds of being arrested. This result, Part III argues, is somewhat disconcerting.

It means there will be some instances where the government pays to protect speech that, were it not for the heckler's veto doctrine and a large police presence, could be cut off and suppressed under *Brandenburg*. In

¹⁴⁹ See Andrew Pantazi & Nate Monroe, *Shouting Match; Hostile Audience Drowns Out White Nationalist's Speech*, FLA. TIMES-UNION (Oct. 20, 2017), at A-1 ("A crowd of protesters filled a University of Florida hall . . . and greeted the white nationalist Richard Spencer with mocking chants and raised fists, denying the provocateur an unchallenged platform to share his widely derided views on race in America . . . Thousands had swamped the university to challenge Spencer's appearance, which cost about \$600,000 for security and had prompted Gov. Rick Scott to declare a state of emergency for the area.").

¹⁵⁰ See Mark A. Rabinowitz, *Nazis in Skokie: Fighting Words or Heckler's Veto*, 28 DEPAUL L. REV. 259, 274-75 (1979) ("The principle underlying the Heckler's Veto Doctrine is that freedom of speech may not be abridged merely because the content of such speech may be offensive to some of the hearers." (footnote omitted)).

¹⁵¹ Cheryl A. Leanza, *Heckler's Veto Case Law as a Resource for Democratic Discourse*, 35 HOFSTRA L. REV. 1305, 1306 (2007).

¹⁵² Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405, 1417 (1986).

¹⁵³ See *supra* Section I.A.3 (addressing the likelihood facet of the *Brandenburg* incitement test).

¹⁵⁴ In *Forsyth Cty. v. Nationalist Movement*, 505 U.S. 123 (1992), the Supreme Court held unconstitutional an ordinance that permitted "a government administrator to vary the fee for assembling or parading to reflect the estimated cost of maintaining public order." *Id.* at 124. Writing for a five-justice majority, Harry Blackmun reasoned that "[s]peech cannot be financially burdened, any more than it can be punished or banned, simply because it might offend a hostile mob." *Id.* at 134-35 (citations omitted).

¹⁵⁵ See *infra* Section III (presenting this argument).

other words, Spencer can get away with words that—were it not for the appearance of police mandated by the heckler’s veto canon—*Brandenburg* would squelch. Attendance by government-paid police thus assists Spencer in two ways: first, by reducing the odds his speech will be silenced by a heckler’s veto, and second, by decreasing the likelihood his speech will spark his supporters to commit violence.

C. *Prior Restraints on Expression*

Although the definition of “prior restraint” is contested,¹⁵⁶ it is generally considered a “restraint on future speech”¹⁵⁷ and frequently takes the form of a “court order[] that actually forbid[s] speech activities.”¹⁵⁸ Put slightly differently, “[a] prior restraint is an official restriction upon a communication before it is published.”¹⁵⁹ Twin tenets of First Amendment jurisprudence, in turn, hold that such restraints are presumptively unconstitutional,¹⁶⁰ and that the government carries a “heavy burden of attempting to overcome that presumption.”¹⁶¹ As Professor Edward Carter writes, “[t]here is a deep and longstanding aversion in First Amendment jurisprudence to prior restraints.”¹⁶²

While prior restraints imposed by the government are presumptively invalid, the Supreme Court allows them in a few specific circumstances.¹⁶³

¹⁵⁶ See Michael I. Meyerson, *The Neglected History of the Prior Restraint Doctrine: Rediscovering the Link Between the First Amendment and the Separation of Powers*, 34 IND. L. REV. 295, 297 (2001) (“[T]here is currently no generally-accepted legal definition of the prior restraint doctrine.”); Marin Scordato, *Distinction Without a Difference: A Reappraisal of the Doctrine of Prior Restraint*, 68 N.C. L. REV. 1, 2 (1989) (“Despite the frequency with which the doctrine of prior restraint is cited in court opinions and the level of general recognition it has achieved, relevant case law does not provide a concise and logically coherent definition of a prior restraint on speech.”).

¹⁵⁷ *Alexander v. United States*, 509 U.S. 544, 550 (1993).

¹⁵⁸ *Id.*

¹⁵⁹ James L. Oakes, *The Doctrine of Prior Restraint Since the Pentagon Papers*, 15 U. MICH. J.L. REFORM 497, 498 (1982).

¹⁶⁰ See *Neb. Press Ass’n v. Stuart*, 427 U.S. 539, 556 (1976) (observing that the First Amendment guarantees of free speech and a free press “afford special protection against orders that prohibit the publication or broadcast of particular information or commentary—orders that impose a ‘previous’ or ‘prior’ restraint on speech”); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963) (“Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity.”).

¹⁶¹ Steven Helle, *Prior Restraint by the Backdoor: Conditional Rights*, 39 VILL. L. REV. 817, 842 (1994) (footnote omitted).

¹⁶² Edward L. Carter & Brad Clark, *Death of Procedural Safeguards: Prior Restraint, Due Process and the Elusive First Amendment Value of Content Neutrality*, 11 COMM. L. & POL’Y 225, 228 (2006).

¹⁶³ See Ariel L. Bendor, *Prior Restraint, Incommensurability, and the Constitutionalism of Means*, 68 FORDHAM L. REV. 289, 299 (1999) (“Like freedom of speech, however, the prohibition against prior restraint of speech is not absolute. A line of exceptions allows the application of prior restraint in certain circumstances.”).

Most notably, Chief Justice Charles Evans Hughes's "famous dicta"¹⁶⁴ in *Near v. Minnesota*¹⁶⁵ in 1931 articulated several instances where prior restraints might be constitutional.¹⁶⁶ Forty years later, Justice William Brennan used a part of that dicta to support his stance in *New York Times Co. v. United States*.¹⁶⁷ Justice Brennan wrote there that "only governmental allegation and proof that publication must inevitably, directly, and immediately cause the occurrence of an event kindred to imperiling the safety of a transport already at sea can support even the issuance of an interim restraining order."¹⁶⁸

Significantly for purposes of this Article, the Court in *Near* suggested that prior restraints may be permissible to protect "[t]he security of the community life . . . against incitements to acts of violence."¹⁶⁹ The Court's current test for incitement to acts of violence, of course, is the *Brandenburg* standard.¹⁷⁰ Thus, when police on the scene believe Richard Spencer's continued speaking will incite imminent and likely violence, they can order him—per *Brandenburg*—to stop talking. This constitutes a prior restraint because Spencer is stifled from continuing with and finishing his speech.

Yet this scenario is particularly troubling because the prior restraint on Spencer occurs without, as First Amendment scholar Martin Redish characterizes it, the benefit of "a full and fair hearing before an independent judicial forum."¹⁷¹ Redish points out that although "[t]he requirement of a full and fair hearing before an independent judicial forum for the adjudication of constitutional rights is a widely accepted premise of modern constitutional thinking,"¹⁷² this "principle has received inconsistent attention in the Supreme Court's decisions applying the prior restraint

¹⁶⁴ Christopher Dunn, *Balancing the Right to Protest in the Aftermath of September 11*, 40 HARV. C.R.-C.L. L. REV. 327, 329 (2005).

¹⁶⁵ 283 U.S. 697 (1931).

¹⁶⁶ *See id.* at 716 (identifying times of war, "obscene publications," and "incitements to acts of violence and the overthrow by force of orderly government" as the "exceptional cases" when a "previous restraint" may be permissible).

¹⁶⁷ 403 U.S. 713 (1971).

¹⁶⁸ *Id.* at 726–27 (Brennan, J., concurring). *See* Mary-Rose Papandrea, *Lapdogs, Watchdogs, and Scapegoats: The Press and National Security Information*, 83 IND. L.J. 233, 279 (2008) (noting that "[Justice] Brennan drew this standard from dicta in the Court's prior opinion in *Near v. Minnesota*," particularly, *Near's* statement "that prior restraints are permissible in cases involving 'actual obstruction to [the government's] recruiting service or the publication of the sailing dates of transports or the number and location of troops'" (quoting *Near*, 283 U.S. at 716).

¹⁶⁹ *Near*, 283 U.S. at 716.

¹⁷⁰ *See* Uddin, *supra* note 123, at 770 ("The Court announced its current test, incitement to imminent violence, in *Brandenburg v. Ohio* in 1969.").

¹⁷¹ Martin H. Redish, *The Proper Role of the Prior Restraint Doctrine in First Amendment Theory*, 70 VA. L. REV. 53, 100 (1984).

¹⁷² *Id.* at 55.

doctrine.”¹⁷³

It is more than a little bit conceivable, in turn, that a judge might later conclude the police, under the heat and pressure of the moment to make a snap judgment, erred in stopping Spencer’s speech—that his words had not risen to the level of *Brandenburg* incitement—and violated his First Amendment rights. This issue, as well as whether *Brandenburg* can serve as a prior restraint tool to preemptively stop Spencer from even appearing on a campus due to earlier violence elsewhere, is explored in Part III.

With this primer on the incitement test, the heckler’s veto doctrine and the presumption against prior restraints providing necessary context, the next Part of the Article illustrates how *In re Trump* exposes key problems for courts tasked with applying *Brandenburg* in situations where no clear exhortation to violence exists.

II. EXAMINING *IN RE TRUMP* MORE CLOSELY: PROBLEMS WITH PROVING INTENT AND LIKELIHOOD

This Part has two sections. The first examines the question of intent under *Brandenburg* in *In re Trump*, while the second analyzes the issue of likelihood.

A. *Trump’s Intent*

As addressed earlier, speech that incites violence is unprotected by the First Amendment only when the speaker intends for it to occur.¹⁷⁴ Unless this mens rea requirement is satisfied, *Brandenburg* shields the speaker from criminal punishment. Therefore, a critical question in *In re Trump* is: What was Donald Trump’s intent when, during a 2016 campaign rally, he “responded to protesters by stating, ‘Get ’em out of here,’ followed closely by, ‘Don’t hurt ’em—if I say go ‘get ’em,’ I get in trouble with the press”?”¹⁷⁵ Did Trump intend for those statements to spark crowd members to attack the plaintiffs?

Resolving this issue is anything but straightforward. Why? Because the only possible path for concluding that Trump intended to incite violence runs headfirst through a thicket of circumstantial evidence. One must plow through indirect evidence and contextual clues because Trump denies his words were “directed at the crowd.”¹⁷⁶ Instead, he claims they were “intended for professional security personnel to remove the protestors.”¹⁷⁷

¹⁷³ *Id.* at 56.

¹⁷⁴ See *supra* Section I.A.1 (discussing the intent prong of the *Brandenburg* test).

¹⁷⁵ *In re Trump*, 874 F.3d 948, 950 (6th Cir. 2017).

¹⁷⁶ Answer of Defendants Donald J. Trump, President of the United States, and Donald J. Trump for President, Inc., at 5, *Nwanguma v. Trump*, 273 F. Supp. 3d 719 (W.D. Ky. 2017) (No. 3:16-cv-00247).

¹⁷⁷ *Nwanguma v. Trump*, 273 F. Supp. 3d 719, 725 (W.D. Ky. 2017), *rev’d and remanded*, 903

In other words, rather than calling for violence or unlawful conduct by audience members, Trump contends he simply was “calling for the removal of disruptive protestors”¹⁷⁸ by security officers. In brief, he does not concede *Brandenburg*’s intent element. This means, in turn, that Trump’s intent must be proven by something other than his own admission.

What circumstantial evidence, then, might be relevant of intent? Three items seem important: (1) the actual words used (as well as words not used); (2) the speaker’s understanding of the state of mind of the audience members who hear those words; and (3) the speaker’s familiarity with how those same or similar words were received and interpreted in the past by the same or similar audiences.

As Judge Hale explained, “whether speech constitutes incitement is a fact-specific inquiry”¹⁷⁹ and “context matters.”¹⁸⁰ Examining all of the facts, including the words used and perhaps even the words *not* used, thus is essential.

1. *The Words Used*

Perhaps a suitable starting point is to pose a question: Did Trump’s words directly reference either violence or unlawful action? The answer is no. As Trump asserts, “he did not say a single word about unlawful force or violence.”¹⁸¹ In fact, the president points out “he affirmatively *discouraged* violence by telling the audience, ‘Don’t hurt ’em.’”¹⁸²

In other words, Trump did not utter statements such as “*beat* ’em up,” “*punch* those people” or even “*throw* ’em out of here.” Those three messages all carry physical overtones—beating, punching and throwing. Instead, Trump simply said, “get ’em out of here.”¹⁸³ He added nothing about precisely how the protestors were to be, as it were, gotten out of there.

But at the trial court level, Judge David Hale focused on another aspect of Trump’s words—namely, that they were organized by Trump in the form of “an order, an instruction, a command.”¹⁸⁴ It was “the imperative”¹⁸⁵ nature of Trump’s words that, for Judge Hale, made

F.3d 604 (6th Cir. 2018).

¹⁷⁸ Petition for Mandamus, *supra* note 60.

¹⁷⁹ Nwanguma v. Trump, No. 3:16-cv-247-DJH-HBB, 2017 U.S. Dist. LEXIS 126039, at *2 (W.D. Ky. Aug. 9, 2017) (order granting motion to certify for interlocutory appeal or to reconsider).

¹⁸⁰ *Id.* at *3.

¹⁸¹ Petition for Mandamus, *supra* note 60, at *14.

¹⁸² *Id.*

¹⁸³ *In re* Trump, 874 F.3d 948, 950 (6th Cir. 2017).

¹⁸⁴ Nwanguma v. Trump, 273 F. Supp. 3d 719, 727 (W.D. Ky. 2017), *rev’d and remanded*, 903 F.3d 604 (6th Cir. 2018).

¹⁸⁵ *Id.*

plausible the protestors' claim that Trump was advocating violence. A second circumstantial factor in the intent inquiry therefore is whether words that do not directly reference violence are nonetheless strung together and framed in the form of a directive to take action.

A third circumstantial factor weighing on intent might entail considering the absence of certain clarifying words that Trump failed to utter but easily could have. For instance, if Trump's true intent was to have his security personnel remove the protestors from the rally, then why didn't Trump add one simple, obvious word—specifically, “security”—to his initial utterance? Why didn't he say, “*Security*, get 'em out of here” or “Get 'em out of here, *security*”? This phrasing clearly would militate *against* finding that Trump intended for audience members—as opposed to security officials—to “get 'em out of here.” Thus, was Trump's decision not to use “security” strategic, creating sufficient ambiguity in his message that he knew his followers might construe it as a call to action? A court groping for circumstantial evidence of a speaker's intent therefore might consider not simply the words used, but also the words *not* used—the ones left unspoken that easily could have been voiced.

Fourth, one might consider that Trump has a well-known tendency to utter short, declarative phrases with hyperbolic and rhetorical overtones—particularly on Twitter.¹⁸⁶ His “uninhibited”¹⁸⁷ tweeting and “pugnacious rhetoric”¹⁸⁸ might indicate that similar short statements at campaign rallies—“get 'em out of here”—are not intended to incite violence, but simply are designed to chum the political waters. As one New York judge recently reasoned in dismissing a defamation claim against Trump based on a series of tweets, the President's tweets were “loose, figurative, and hyperbolic.”¹⁸⁹ Such circumstantial evidence of Trump's intent based on his style of tweets, however, seems too far removed from the nature of his in-person words uttered at real-world campaign rallies to be of much relevance. In other words, the context of Twitter is simply too distinct from that of a campaign rally to have any bearing on the issue of intent.

None of this, however, necessarily ends the inquiry into the nature of

¹⁸⁶ See generally Katie Rogers & Maggie Haberman, *Like Father Like Son, Using Twitter as a Foil to Skewer Political Foes*, N.Y. TIMES, July 1, 2017, at A14 (describing President Trump's “affection for Twitter as a weapon against political foes,” and adding that “President Trump tends to fire a digital bazooka when met with a perceived slight, often hitting below the belt and leaving himself open to bipartisan criticism.”).

¹⁸⁷ Peter Baker, *Trump Aims at a Mayor, and Foreign Ties Strain*, N.Y. TIMES, June 5, 2017, at A1.

¹⁸⁸ Sean Sullivan & Mike DeBonis, *Lawmakers Say Trump's Words Matter—and Hurt the Country's Standing Abroad*, WASH. POST (Feb. 18, 2017), https://www.washingtonpost.com/powerpost/lawmakers-say-trumps-words-matter--and-are-hurting-the-countrys-standing-abroad/2017/02/17/1caca9e-f55b-11e6-a9b0-ecce7ce475fc_story.html?utm_term=.ca7dfc4d7064.

¹⁸⁹ *Jacobus v. Trump*, 51 N.Y.S.3d 330, 342 (N.Y. Sup. Ct. 2017).

Trump's statement. Why? As Professor Michael Vitiello notes in reference to an observation by famed Harvard First Amendment scholar Zechariah Chafee, "Marc Antony avoided making explicit incitement to avenge Caesar's assassination. But any reasonable listener would have understood that to be his message."¹⁹⁰ Professor David Crump aptly calls this "camouflaged incitement,"¹⁹¹ meaning situations "without words of express incitement."¹⁹² More bluntly, it is possible for a person to deliberately code a message advocating violence rather than blatantly stating it.

Crump points out that *Brandenburg* says nothing about the incitement test being fulfilled *only* by examining the literal words used.¹⁹³ Instead, "*Brandenburg* leaves all relevant factors open to consideration, including the context, the medium, the audience, and the speaker."¹⁹⁴ It thus is worth considering the state of the audience that attended his Louisville rally in the next subsection.

2. *The Speaker's Understanding of the Audience's State of Mind*

A court might consider, as circumstantial evidence of Donald Trump's intent, his awareness or lack thereof of whether his supporters at the rally were already riled up immediately before he exclaimed "get 'em out of here." In other words, if Trump perceived from his vantage point on the stage that the individuals who were next to (or in very close physical proximity to) the protestors were already agitated or stirred up, this might indicate that he intended his words to spark violence. The logic here—were a court to follow this path—would be that Trump recognized he didn't need to use words directly referencing violence because, under the circumstances, he knew the more neutral sounding "get 'em out of here" would likely produce the same violent result. Trump's understanding of his audience's state of mind—its readiness and willingness to pounce, as it were—thereby might be relevant on the intent inquiry.

Similarly, if Trump knew that there were violent skirmishes between his supporters and protestors immediately *prior* to taking the podium to begin his talk, then this might indicate that Trump intended his words to cause violence. In other words, if Trump knew violence had already transpired—that his supporters were in a fighting mood—then this might indicate that a directive to take action like "get 'em out of here" was intended to spark further trouble.

¹⁹⁰ Michael Vitiello, *The Nuremberg Files: Testing the Outer Limits of the First Amendment*, 61 OHIO ST. L.J. 1175, 1211 (2000).

¹⁹¹ Crump, *supra* note 145, at 2.

¹⁹² *Id.* at 22.

¹⁹³ *Id.* at 54.

¹⁹⁴ *Id.*

3. *The Speaker's Knowledge of Prior Responses to the Words*

If Trump knew that his use of the phrase “get ’em out of here” or something substantially similar to it had triggered violence by his supporters against protestors at prior campaign rallies in other cities, then this might serve as circumstantial evidence of his intent for them to once again spark violence, this time in Louisville. The logic here is that a reasonable speaker who used a phrase in the past that caused violence would avoid using that same phrase again in order to prevent such a disturbance. Who, in other words, would want to use a message that caused trouble in the past? Law abiding people seemingly would not. A person who intended to trigger violence, however, would use the phrase again because of that person’s prior success with provoking it.

Importantly, however, there is a critical difference between mere *knowledge* that violence might occur by using certain words, on the one hand, and the actual *intent* to cause it to occur, on the other.¹⁹⁵ The *Brandenburg* test demands the latter for speech to be unprotected. A judge thus would need to make a leap in logic that bridges knowledge with intent when considering whether knowledge that a message caused violence in the past constitutes circumstantial evidence of present intent.

Ultimately, as the analysis above suggests, fathoming intent to commit violence from circumstantial evidence amounts to little more than a guessing game. In cases such as *In re Trump*—ones in which a speaker both vehemently denies an intent to commit violence and uses words that do not directly reference violence—proving intent under *Brandenburg* is a steep, uphill battle.

B. *Trump and the Likelihood of Violence: Considering Prior Violence*

As described earlier, *Brandenburg* requires that violence or unlawful conduct must be *likely* to occur for speech to fall beyond First Amendment protection.¹⁹⁶ A key issue for cases such as *In re Trump*, therefore, is the weight that should be assigned in the likelihood analysis to prior acts of violence committed by a speaker’s supporters. Indeed, subsequent to the event in Louisville that sparked the lawsuit examined in this article, several incidents of violence arose at Trump rallies.¹⁹⁷ These after-the-fact violent events obviously would not affect the likelihood factor in *In re Trump*. They would, however, be relevant in future incitement cases involving

¹⁹⁵ See Volokh, *supra* note 105, at 1382 (“Indeed, one of the foundational opinions on which *Brandenburg v. Ohio* indirectly rests—Justice Holmes’s dissent in *Abrams v. United States*—made much of the distinction between knowledge and purpose.”).

¹⁹⁶ See *supra* Part I.A.3 (discussing the likelihood prong of the *Brandenburg* test).

¹⁹⁷ See Tumulty et al., *supra* note 56, at A1 (reporting that “[v]iolence at Trump’s rallies has escalated sharply” and noting that a Trump supporter at a Fayetteville, North Carolina, rally “punched a protestor”).

altercations at Trump's speaking engagements.

How, then, should a court determine likelihood of violence in scenarios such as *In re Trump*? As a starting point, a positive correlation between past acts of violence, on the one hand, and a present likelihood of violence, on the other, seems ripe for judicial consideration. In other words, the greater the number of incidents of violence associated with Trump's words in the past, the greater the odds of violence occurring in the present.

In examining past incidents of violence, however, several factors seem essential for judicial examination beyond simply the sheer number of prior acts of violence. In brief, courts must dig deeper than raw numerosity. Three additional factors seem especially relevant. They are proposed immediately below.

First, a court might apply what this article calls a *ratio-based factor*—one that contextualizes the number of incidents of past violence at Trump speaking events with the total number of Trump speaking events, including those at which no violence occurred. If, hypothetically, Trump had made 100 speaking appearances in the prior six months and violence had erupted at ten of those events, then does this ten percent frequency provide either a court or a police officer on the scene of a Trump rally with a lawful reason under *Brandenburg* to predict that violence is likely to occur again? What if violence had arisen forty percent of the time at prior Trump speeches? *Brandenburg* offers no such formula or guidance, instead leaving the likelihood determination to a rough, speculative estimate by a judge or officer. Indeed, *Brandenburg* even fails to modify the term “likely” with words such as “reasonably,” “substantially,” or “highly”—modifiers that might add clarity to the test by establishing a threshold of likelihood.¹⁹⁸

Second, courts also should account for the amount of time that has lapsed or transpired since a prior incident occurred. This constitutes a *temporal-distance factor*. Here, the formula is: the longer the lag time, the less the likelihood. This would particularly be the case if several speeches had occurred peacefully subsequent to the last incident of violence. Put differently: the more recent the prior acts of violence, the more likely violence is to occur. Again, however, *Brandenburg* is maddingly silent on such a consideration.

Third, even if there have been *both* numerous and recent incidents of violence, the likelihood factor is not inevitably elevated. That might be the case if—precisely because of such recent incidents—a speaker significantly ratchets up the level of security and law enforcement presence for current and future events. This *law enforcement-presence factor* thus

¹⁹⁸ The decision simply requires that the speech is “likely to incite or produce such action.” *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

requires a judge (in the courtroom after an event) or an officer (on the scene at the event, watching and ready to stop it if need be under *Brandenburg*) to consider how crowd members might respond if they see a massive law enforcement presence. The logic here is that a large turnout by law enforcement would reduce the odds of the speaker inciting violence because crowd members would not want to risk arrest and, in turn, a criminal record and possible incarceration. In brief, a strong, highly visible showing of security forces might deter violence. Deterrence means that the likelihood of violence is reduced, and *Brandenburg* requires violence to be likely for speech to be unprotected. The Court's decision in *Brandenburg*, however, did not address this consideration.

The factual scenario at the heart of *In re Trump* thus illustrates multiple problems with determining likelihood of violence under *Brandenburg*. This Article, in turn, proposes three variables—ones beyond the raw numerosity of prior incidents of violence—to add rigor to the likelihood analysis. The three variables are: (1) the ratio-based factor; (2) the temporal-distance factor; and (3) the law enforcement-presence factor. This list is not intended to exclude other considerations from judicial analysis, but simply is designed to serve as a consistent, core collection of variables.

In summary, this Part used *In re Trump* to demonstrate the complexity of proving both the intent and likelihood elements of *Brandenburg*. Fathoming intent becomes a legal nightmare in cases such as *In re Trump* where the speaker denies desire to foment violence. Circumstantial evidence thus is necessary to prove intent, and this Article has offered four factors to help guide this analysis. These factors are: (1) the words used; (2) the words not used; (3) the speaker's understanding of his audience's state of mind; and (4) the speaker's knowledge of prior responses to the words used. Similarly, this Article has advanced three suggestions to improve the likelihood determination: the ratio of prior acts of violence to all speeches given by the defendant, the lag time or gap between the most recent incident of violence and the present event, and the size and visibility of law enforcement at the present event.

This Article next examines other *Brandenburg* issues that are highlighted by the recent spate of lawsuits filed against public universities on behalf of Richard Spencer.

III. INCITEMENT, PRIOR RESTRAINTS, & THE HECKER'S VETO: EXPOSING AN UNEASY RELATIONSHIP AMONG FREE-SPEECH DOCTRINES THROUGH THE LENS OF THE RICHARD SPENCER LAWSUITS

At the same time *Brandenburg* takes center stage in the case against Donald Trump, the case is enmeshed in multiple lawsuits filed on behalf of

Richard Spencer against major public universities.¹⁹⁹ The institutions caught in the legal crosshairs want to prevent Spencer, “president of the National Policy Institute, a white nationalist think tank,”²⁰⁰ from speaking. They fear that either his mere presence or his words will incite violence.²⁰¹ As University of Florida President Kent Fuchs explained his initial decision to deny Spencer access, “it was about violence”²⁰² and public safety.²⁰³ Indeed, a January 2018 article in the *Washington Post* notes that Spencer’s potential campus appearances “put public schools in the difficult position of balancing the First Amendment with their concerns about safety.”²⁰⁴

For example, Pennsylvania State University President Eric Barron echoed key language from *Brandenburg* when his institution denied Spencer access in August 2017. As Barron put it, “the First Amendment does not require our University to risk imminent violence”²⁰⁵ and “the likelihood of disruption and violence.”²⁰⁶ Those statements tap directly into both the imminence and likelihood elements of *Brandenburg*.²⁰⁷

Fears of trouble caused by Spencer’s presence stem from the August

¹⁹⁹ See *supra* note 48 (identifying lawsuits filed on Spencer’s behalf against Auburn University, Michigan State University, Ohio State University, and Pennsylvania State University, and providing links to the complaints in each of those cases).

²⁰⁰ Leonard Greene, *Rogue’s Gallery: Racist Alt-Right Feeds off Trump Rhetoric as White House Fills up with Fringe Voices*, N.Y. DAILY NEWS (Aug. 14, 2017), <http://www.nydailynews.com/news/national/racist-alt-right-feeds-president-trump-rhetoric-article-1.3408936>.

²⁰¹ The universities also object to hosting Spencer because of his views. At Pennsylvania State University, President Eric Barron stated when he denied Spencer access to the University Park, Pennsylvania, campus, “I disagree profoundly with the content that has been presented publicly about this speaker’s views which are abhorrent and contradictory to our University’s values. There is no place for hatred, bigotry or racism in our society and on our campuses.” Press Release, Pennsylvania State University, Richard Spencer Is Not Welcome to Speak at Penn State (Aug. 22, 2017), <http://news.psu.edu/story/478590/2017/08/22/administration/richard-spencer-not-welcome-speak-penn-state>. But as described later, both viewpoint-based discrimination and censoring offensive statements violate the First Amendment freedom of speech, and thus they do not provide a legal justification for barring Spencer from campus. See *infra* notes 211–17 and accompanying text.

²⁰² Audra D. S. Burch, *Campuses Brace for Angry Words*, N.Y. TIMES, Jan. 18, 2018, at A18.

²⁰³ See *id.* (“On Aug. 16, Florida officially rejected the National Policy Institute’s application, citing public safety concerns. The decision, Mr. Fuchs said, was based on the specter of violence, not Mr. Spencer’s pointed ideology.”); Claire McNeill, *UF’s Move to Deny White Nationalist Richard Spencer a Venue Sets Up a First Amendment Court Fight*, TAMPA BAY TIMES, Aug. 17, 2017, at 1 (quoting Fuchs for the proposition that “[t]he likelihood of violence and potential injury—not the words or ideas—has caused us to take this action”).

²⁰⁴ Susan Svrluga, *Richard Spencer Supporter Sues University, Calling Security Fee for Campus Speech Unconstitutional*, WASH. POST (Jan. 10, 2018), https://www.washingtonpost.com/news/grade-point/wp/2018/01/10/richard-spencer-supporter-sues-university-calling-security-fee-for-campus-speech-unconstitutional/?noredirect=on&utm_term=.bd3f52910cd2.

²⁰⁵ Press Release, Pennsylvania State University, *supra* note 201.

²⁰⁶ *Id.*

²⁰⁷ See *supra* text accompanying notes 92–93 (describing the three key elements of *Brandenburg* as intent, imminence, and likelihood).

2017 violence in Charlottesville, Virginia, where he was present for a Unite the Right rally.²⁰⁸ Although a report released that December blamed the mayhem on factors other than Spencer,²⁰⁹ Charlottesville became central to universities' efforts to deny him access to their campuses. For example, when Michigan State University initially denied Spencer access to its campus, it maintained that "[t]he decision was made due to significant concerns about public safety in the wake of the tragic violence at a rally in Charlottesville."²¹⁰

Brandenburg, as discussed below, may provide public universities with an entrée for stopping Richard Spencer from talking on campus. Several other legal arguments, however, simply don't hold water. For instance, squelching Spencer based on his controversial, white-nationalist position violates the well-established principle against viewpoint discrimination.²¹¹ As Justice Anthony Kennedy explained in 2017, viewpoint discrimination is a "subtype"²¹² of content-based speech regulation.²¹³ It occurs when the government regulates speech within a particular subject matter by singling "out a subset of messages for disfavor based on the views expressed."²¹⁴ Kennedy elaborated that principle with:

The danger of viewpoint discrimination is that the government is attempting to remove certain ideas or perspectives from a broader debate. That danger is all the greater if the ideas or perspectives are ones a particular audience might think offensive, at least at first hearing. An initial reaction may prompt further reflection, leading to a more reasoned, more tolerant position.²¹⁵ Similarly, blocking Spencer from campus because his views offend is unconstitutional. As Justice William Brennan wrote for the

²⁰⁸ See generally Stolberg & Rosenthal, *supra* note 47, at A1 (reporting that Charlottesville "was engulfed by violence . . . as white nationalists and counter[-]protesters clashed in one of the bloodiest fights to date over the removal of Confederate monuments across the South," and noting that the "rally was promoted as 'Unite the Right' and both its organizers and critics said they expected it to be one of the largest gathering of white nationalists in recent times, attracting groups like the Ku Klux Klan and neo-Nazis and movement leaders like David Duke and Richard Spencer").

²⁰⁹ See Joe Heim, *Charlottesville Rally Study Spreads Blame*, WASH. POST, Dec. 2, 2017, at A1 (describing the findings of a report prepared by former attorney Timothy Heaphy of the law firm Hunton & Williams, and noting that "[a]lthough the [Charlottesville] police department received the bulk of the blame, the report also criticized actions by the Charlottesville City Council, attorneys from the city and state, the University of Virginia and the Virginia State Police").

²¹⁰ *Frequently Asked Questions, Free Speech and Controversial Speakers*, MICH. ST. U., <https://msu.edu/freespeech/faq/> (last visited Aug. 25, 2018).

²¹¹ See *Wood v. Moss*, 134 S. Ct. 2056, 2061 (2014) ("The First Amendment, our precedent makes plain, disfavors viewpoint-based discrimination.").

²¹² *Matal v. Tam*, 137 S. Ct. 1744, 1766 (2017) (Kennedy, J., concurring).

²¹³ See *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015) ("Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed.").

²¹⁴ *Matal*, 137 S. Ct. at 1766.

²¹⁵ *Id.* at 1767.

Court in protecting the right to burn the American flag as a form of symbolic expression, “If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.”²¹⁶ In a nutshell, it is unconstitutional to ban a contentious speaker, such as Richard Spencer, either because of his viewpoint or because of the offense others take.

It thus is unsurprising that when U.S. District Judge W. Keith Watkins ordered Auburn University to allow Spencer to speak on campus in April 2017, he reasoned that the institution:

[C]ancelled the speech based on its belief that listeners and protest groups opposed to Mr. Spencer’s ideology would react to the content of his speech by engaging in protests that could cause violence or property damage. However, discrimination on the basis of message content “cannot be tolerated under the First Amendment,” and “[l]isteners’ reaction to speech is not a content-neutral basis for regulation.”²¹⁷

The proper test to apply—the one Judge Watkins, in fact, applied—was *Brandenburg*.²¹⁸ He found that “Auburn did not produce evidence that Mr. Spencer’s speech is likely to incite or produce imminent lawless action.”²¹⁹ Watkins’s decision, however, occurred prior to the Charlottesville violence.

Before examining how *Brandenburg* applies in post-Charlottesville cases involving Richard Spencer, it is important to briefly address the fighting words exception to First Amendment protection established in *Chaplinsky v. New Hampshire*.²²⁰ Might *Chaplinsky* be used successfully to stop Spencer from speaking? It is highly doubtful.

The fighting words exception would only silence Richard Spencer if he used personally abusive epithets directed at specific individuals in a face-to-face situation.²²¹ The fighting words doctrine targets words “that are so insulting in *both* content and delivery that they are likely to provoke the listener to respond violently.”²²² As the Supreme Court explained in 1989, fighting words involve “a direct personal insult or an invitation to

²¹⁶ *Texas v. Johnson*, 491 U.S. 397, 414 (1989).

²¹⁷ *Padgett v. Auburn Univ.*, No. 3:17-CV-231-WKW, 2017 U.S. Dist. LEXIS 74076, at *3 (M.D. Ala. Apr. 18, 2017) (order granting preliminary injunction) (quoting *Forsyth Cty. v. Nationalist Movement*, 505 U.S. 123, 134 (1992)).

²¹⁸ *Id.* at *2–3.

²¹⁹ *Id.* at *3.

²²⁰ 315 U.S. 568 (1942).

²²¹ See *supra* note 117 and accompanying text (addressing the fighting words doctrine).

²²² *NLRB v. Pier Sixty, LLC*, 855 F.3d 115, 124 n.46 (2d Cir. 2017) (emphasis added).

exchange fisticuffs.”²²³ Racist views like Spencer’s positions, standing alone, do not amount to fighting words.²²⁴ Furthermore, the Supreme Court has not upheld a fighting words conviction since *Chaplinsky*.²²⁵ There is no evidence that Richard Spencer yells racist epithets directly at minorities in a face-to-face fighting words scenario.²²⁶

Additionally, because “courts must determine on a case-by-case basis all of the circumstances relevant to whether a reasonable person in the position of the actual addressee would have been likely to respond with violence,”²²⁷ the fighting words doctrine simply cannot be used as a blunt, preemptive-strike mechanism to stop a person from coming to campus. A person must have the opportunity to utter some words before he or she can be squelched for engaging in fighting words.

In summary, dual First Amendment doctrines that prohibit viewpoint discrimination and protect offensive expression tilt in favor of Richard Spencer’s right to speak at public universities. Additionally, the fighting words exception to First Amendment protection does not permit banning him from campus; it would only apply if he starts to speak and then engages in targeted, personally abusive epithets. Public universities are therefore largely left clinging to the *Brandenburg* test if they want to permissibly silence Richard Spencer on campus.

This raises an important series of questions. Can *Brandenburg* be used to stop Richard Spencer from ever stepping foot on campus? Does it provide a public university with a tool for enacting a prior restraint on his presence based upon past violence on other campuses? Or alternatively, does *Brandenburg* come into play only after Spencer begins speaking? Must an individual like Spencer—one who carries with him (at least, as public universities want to portray it) a past history of violence—be afforded the chance to start talking before *Brandenburg* becomes relevant?

As described above, prior restraints are presumptively unconstitutional.²²⁸ Yet, the Supreme Court in *Near v. Minnesota*²²⁹ suggested they are permissible to protect “[t]he security of the community

²²³ *Texas v. Johnson*, 491 U.S. 397, 409 (1989).

²²⁴ Racial slurs directed at the person slurred may, however, constitute fighting words. See William C. Nevin, “Fighting Slurs”: *Contemporary Fighting Words and the Question of Criminally Punishable Racial Epithets*, 14 FIRST AMEND. L. REV. 127, 148 (2015) (“[A] few courts have argued that racial slurs are powerful enough unto themselves to instantly provoke a reasonable person to violence and are therefore fighting words without having to consider any other circumstances.”).

²²⁵ See Burton Caine, *The Trouble with “Fighting Words”*: *Chaplinsky v. New Hampshire is a Threat to First Amendment Values and Should be Overruled*, 88 MARQ. L. REV. 441, 445 (2004) (“[T]he Supreme Court since *Chaplinsky* has never again upheld a conviction for fighting words . . .”).

²²⁶ The author could find no authority contradicting this proposition.

²²⁷ *Connecticut v. Baccala*, 163 A.3d 1, 10 (Conn. 2017).

²²⁸ *Supra* notes 160–62 and accompanying text.

²²⁹ 283 U.S. 697 (1931).

life . . . against incitements to acts of violence . . . ”²³⁰ In other words, *Near* provides a bridge to *Brandenburg*. Interpreted broadly, this suggests *Brandenburg* can function as a prior restraint vehicle—but this is only partially correct.

Brandenburg is merely a cutoff mechanism; it can be used to cut off a person who is presently talking, thereby restraining in advance whatever portion of the person’s planned speech remains. More colloquially, *Brandenburg* can only quiet a person based upon what he is saying, not based upon what he has said on prior occasions. Until a person begins saying something, *Brandenburg* is impotent to stop him. In brief, Richard Spencer must be given the opportunity to begin speaking. Once he commences, police may then stifle him under *Brandenburg* if they believe his words are both intended and likely to produce imminent violence.

Using *Brandenburg* preemptively—specifically, using it to stop Spencer before he even has a chance to begin his speech—would allow government entities to silence him merely because they *think* they know what he is going to say in the future. In other words, Public University X would be able to stop Spencer from speaking on its campus because it *believes* he is going to say the exact same thing he said on the campus of Public University Y. Using *Brandenburg* in this fashion would permit the government to stop speech based on mere speculation and supposition about not only what a person would be saying, but also about what his intent (a key element of *Brandenburg*²³¹) would be with those words. Thus, much like a libel-proof plaintiff who is condemned by his prior bad acts,²³² Spencer would be perpetually damned in the eyes of the law under *Brandenburg* based upon his past bad words.

It is not inconceivable that Spencer might, in fact, want to test out a different tack or approach to conveying his message when visiting campuses, hoping to find a better way to market and sell his views. After all, if Spencer wants to win over potential new followers, why would he keep peddling a failed product?²³³ To ban Spencer based on his past speech is to cynically suppose that his views—or at least his strategies for conveying them—will never evolve or change. He must be provided the

²³⁰ *Id.* at 716.

²³¹ See *supra* Section I.A.1 (addressing the intent component of *Brandenburg*).

²³² See David L. Hudson, Jr., *Shady Character: Examining the Libel-Proof Plaintiff Doctrine*, 52 TENN. B.J. 14, 14 (2016) (“The essence of the libel proof plaintiff doctrine is that the plaintiff has no good reputation to protect and, thus, has no valid claim.”); Joseph H. King, Jr., *The Misbegotten Libel-Proof Plaintiff Doctrine and the “Gordian Knot” Syndrome*, 29 HOFSTRA L. REV. 343, 349 (2000) (“This rule holds that in some circumstances the prior reputation of the plaintiff has already become so tarnished that, with respect to the imputation in the defendant’s statement, the plaintiff is libel-proof, and therefore a court should dismiss or at least ultimately deny his defamation claim.”).

²³³ It is also possible that Spencer wants to provoke controversy in order to call media attention to his message, thereby reaching a large audience. Yet, it is not beyond belief that Spencer genuinely also wants to attract followers by convincing them, through his words, that his views are correct.

opportunity to speak before censorship under *Brandenburg* is permitted.

Furthermore, *Brandenburg*'s imminence requirement dispels the notion that the test can be used preemptively.²³⁴ This is due to the fact that, if imminence requires a close temporal connection between the words uttered and the violence that is likely to follow, then stopping a speaker based on words that were uttered days, weeks, or even months in the past fails to satisfy this *Brandenburg* criterion. The gap in time is simply too long to satisfy *Brandenburg*'s imminence facet. The Richard Spencer cases thus reveal the complex relationship between prior restraints and incitement of violence.

The cases also illustrate the relationship between *Brandenburg*—specifically, *Brandenburg*'s “likelihood” requirement²³⁵—and the heckler's veto doctrine.²³⁶ As Professor R. George Wright describes it, the heckler's veto doctrine states that “opponents of a speaker should not be permitted to suppress the speech in question through their own threatened or actual violence.”²³⁷

When law enforcement personnel turn out in large numbers to prevent Richard Spencer from being the victim of a heckler's veto—as illustrated by this exact occurrence at the University of Florida in October 2017²³⁸—the *Brandenburg* analysis is necessarily impacted. The larger the presence of police to prevent a heckler's veto, the less likely it is that violence will occur—assuming, of course, that most reasonable people do not want to be arrested.²³⁹ In brief, there is an inverse correlation between the number of police at a Spencer campus speech, and the likelihood of that speech causing violence; as the number of police officers increases, the likelihood of violence decreases because the odds of being arrested are higher.

The canon against allowing a heckler's veto thus helps Richard Spencer in two ways. First, it prevents him from being attacked by

²³⁴ See *supra* Section I.A.2 (addressing the imminence component of *Brandenburg*).

²³⁵ See *supra* Section I. A.3 (addressing the likelihood component of *Brandenburg*).

²³⁶ See *supra* Section I.B (addressing the heckler's veto doctrine).

²³⁷ R. George Wright, *The Heckler's Veto Today*, 68 CASE W. RES. L. REV. 159, 159 (2017).

²³⁸ See Paige Fry, *Peace Lasts at UF During White Nationalist's Speech*, PALM BEACH POST (Oct. 20, 2017), <https://www.palmbeachpost.com/news/peace-lasts-during-white-nationalist-speech/1oyq50QsB0eoMR8CCBbQeI> (“The state's flagship public university spent more than \$600,000 on security on and near its campus to prepare for Richard Spencer's appearance and brought in more than 500 uniformed officers to police streets and control crowds under a state of emergency declared by Gov. Rick Scott.”).

²³⁹ Some individuals may want to be arrested as a form of civil disobedience to protest a university's decision to allow Spencer to speak on campus. There were, however, no such arrests based on civil disobedience motives when Spencer spoke at the University of Florida. The three people who were arrested in relation to Spencer's talk at the University of Florida were arrested on attempted homicide charges off-campus after the event. Susan Svrluga & Lori Rozsa, *'Kill Them': Three Men Charged in Shooting After Richard Spencer Speech*, WASH. POST (Oct. 20, 2017), https://www.washingtonpost.com/news/grade-point/wp/2017/10/20/kill-them-three-men-charged-in-shooting-after-richard-spencer-speech/?noredirect=on&utm_term=.07d8b30e4a9f.

protestors. The government, in fact, funds the police, as it did at the University of Florida, to keep Spencer out of harm's way and to allow him to speak.²⁴⁰ As University of Florida President Kent Fuchs noted, there were “nearly 1,000 state and local law-enforcement officers on campus” when Spencer spoke,²⁴¹ which cost the University more than \$600,000.²⁴²

Second, the heckler's veto doctrine allows Richard Spencer to successfully espouse more of his views because the police presence necessary to protect him from a hostile crowd also reduces the *likelihood* of violence that *Brandenburg* requires for speech to be cut off. In other words, Spencer is less likely to incite his own followers to commit imminent violence because they know—by witnessing a sizable police turnout—they are more likely to be arrested than in the absence of such a turnout.

The police officers who must be present at Spencer's campus speeches due to the heckler's veto doctrine thus prevent violence by both protestors and supporters. The irony is that, were it not for the heckler's veto doctrine and the ratcheted-up security it requires to safeguard Spencer, his speech could more easily be censored under *Brandenburg*. That's because—at least in theory—the less intense the police presence, the more likely it is for violence to occur. In turn, the more likely it is for violence to occur, the more likely the speech in question will be stopped under *Brandenburg*.

Imagine, for example, that Spencer were to give the exact same speech using the exact same words at two different campuses in front of the exact same number of protestors. At Campus A, there are 200 police officers on the scene. At Campus B, however, there are only five officers present.

The theory posed here is that the presence of 200 officers reduces the likelihood of Spencer inciting violence on Campus A more than the presence of only five officers on Campus B. This reduction in likelihood of violence on Campus A, in turn, also reduces the ability of those officers to stop Spencer from speaking under *Brandenburg*. In brief, the government-funded security mandated by the heckler's veto doctrine not only serves the intended purpose of preventing protestors from attacking Spencer, but also effects the unintended consequence of allowing Spencer to get away with more hateful, race-baiting speech under *Brandenburg* by reducing the likelihood of violence.

In summary, the battles now being fought between Richard Spencer's supporters and public universities highlight issues surrounding

²⁴⁰ The University of Florida “spent more than \$600,000 on security on and near its campus to prepare for Richard Spencer's appearance.” Fry, *supra* note 238.

²⁴¹ Kent Fuchs & Glenn C. Altschuler, *How White Supremacists Exploit Public Higher Education*, WALL ST. J. (Oct. 22, 2017), <https://www.wsj.com/articles/how-white-supremacists-exploit-public-higher-education-1508702485>.

²⁴² *Id.*

Brandenburg's relationship to the doctrines against both prior restraints and hecklers' vetoes.

CONCLUSION

The *Brandenburg* incitement test, as Professor Mark Strasser observes, "is thought by many to represent an extremely speech protective doctrine."²⁴³ Indeed, the United States Court of Appeals for the Sixth Circuit recently noted that "[i]t is not an easy task to find that speech rises to such a dangerous level that it can be deemed incitement to riot."²⁴⁴ This Article, however, illustrates that it is also not an easy task to apply the *Brandenburg* standard. Specifically, there are multiple problems with *Brandenburg*'s application, as illustrated by analysis of *In re Trump* and the Richard Spencer lawsuits.

In re Trump demonstrates the difficulty with proving *Brandenburg*'s intent requirement when a speaker both denies an intent to incite violence and when the speaker's words do not directly reference violence. This Article has proposed multiple ways of using circumstantial evidence to address this problem.

Additionally, *In re Trump* highlights problems regarding the extent to which past acts of violence at a speaker's events should influence *Brandenburg*'s likelihood analysis. This Article has proposed three variables besides the raw number of acts of prior violence—namely a *ratio-based* factor, a *temporal-distance* factor, and a *law enforcement presence* factor—for courts to consider on the likelihood issue. These variables should add rigor to judicial review of *Brandenburg*'s likelihood requirement.

The Richard Spencer lawsuits raise the issue of whether *Brandenburg* can be used as a prior restraint mechanism by government entities, with public universities as a leading example, to halt a speaker before he even begins his speech. *Brandenburg* is merely a cutoff mechanism, not one for making preemptive strikes that ban a speaker from appearing on campus.

Additionally, the Spencer cases illustrate the complex relationship between the heckler's veto doctrine and *Brandenburg*'s incitement test. Ultimately, the heckler's veto doctrine has the unintended consequence of letting individuals like Richard Spencer safely deliver more of their ideological speech under *Brandenburg*.

As *Brandenburg* approaches its fiftieth anniversary in 2019, it begs for judicial clarification on the application of all three of its prongs—intent, imminence, and likelihood—and its relationship to both prior restraints and

²⁴³ Mark Strasser, *Advocacy, True Threats, and the First Amendment*, 38 HASTINGS CONST. L.Q. 339, 339 (2011).

²⁴⁴ *Bible Believers v. Wayne Cty.*, 805 F.3d 228, 244 (6th Cir. 2015).

the heckler's veto doctrine. Clarence Brandenburg, Donald Trump, and Richard Spencer all—in their own provocative ways—have pushed the envelope of First Amendment protection for speech to its breaking point.