

VIRGINIA LAW REVIEW ONLINE

VOLUME 104

JANUARY 2018

8–29

ESSAY

RETHINKING THE HECKLER’S VETO AFTER CHARLOTTESVILLE

*Timothy E. D. Horley**

The violent Charlottesville protests of August 12, 2017, raise one of the more vexing questions of First Amendment law: at what point does a given expression’s tendency to provoke a violent response in listeners justify government intervention against the speaker? Current doctrine provides no clear answer, and even suggests that such intervention may never be justified. This Essay argues that in some cases it is justified, and proposes a modified Brandenburg v. Ohio incitement standard to define when that is. Setting such a standard would remedy the existing asymmetry between the law’s treatment of speech that incites violence and speech that provokes it. It would protect speakers’ rights while providing a cognizable pre-violence point at which authorities could intervene without fear of violating the First Amendment.

INTRODUCTION

The Charlottesville Protests

THE weekend that has rendered “Charlottesville” a national byword for white supremacist agitation was planned in advance.¹ It included

* J.D. Candidate 2018, University of Virginia School of Law. I am grateful to Clayton Bailey, Michael Dooley, Martha Durkin, Victoria Granda, Laura Horley, Professor Leslie Kendrick, John Leonardo, Brandon Newman, and Dan Richardson for useful guidance, edits, and feedback on this Essay. All opinions and errors are my own.

Friday, August 11's surprise tiki-torch march on the University of Virginia's Central Grounds² and the major gathering near the city's downtown mall on August 12.³ The focus of this Note will be on the events of August 12.

Jason Kessler, the principal organizer of the "Unite the Right" rally,⁴ applied in May 2017 for a permit to hold his event at the recently renamed Emancipation Park on Saturday, August 12.⁵ The City of Charlottesville gave him the permit a few weeks later. The City subsequently granted permits to a number of opposition groups to hold assemblies of their own within a few blocks of the Park.⁶ After an attempt by the City of Charlottesville to revoke Kessler's permit, Judge Glenn Conrad of the Western District of Virginia granted Kessler an injunction, finding that Kessler's claim that the revocation and modification of the permit was an impermissible content-based restriction on speech would likely succeed on the merits.⁷

Unite the Right was intended to begin at noon, but white nationalist protesters and counterprotesters began gathering near Emancipation Park around eight in the morning.⁸ Among the attendees on both sides

¹ Kessler Discusses KKK, Unite the Right Rallies and His Political Beliefs, Daily Progress (July 11, 2017), <https://perma.cc/92QL-P958>.

² Univ. of Va. Police Dep't, Timeline: August 11, 2017 (Sept. 11, 2017), <https://perma.cc/F838-J5HJ>.

³ Joe Heim, Recounting a Day of Rage, Hate, Violence and Death, Wash. Post (Aug. 14, 2017), <https://perma.cc/RTD5-263K>.

⁴ S. Poverty L. Ctr., Jason Kessler, <https://perma.cc/5TCZ-UFXX> (last visited Jan. 13, 2018).

⁵ *Kessler v. City of Charlottesville*, No. 3:17-CV-00056, slip op. at 1 (W.D. Va. Aug. 11, 2017). Emancipation Park was previously called Lee Park, and the protests were inspired by opposition to the City's renaming of the park and its plans to remove its prominent statue of Robert E. Lee. See *id.*

⁶ *Id.* at 1–2.

⁷ *Id.* at 3.

⁸ I rely primarily on the *Washington Post*'s timeline of events, Heim, *supra* note 3, but also the following: Anna Higgins et al., 'Unite the Right' Rally, Protests in Downtown Charlottesville Turns Deadly, Cavalier Daily (Aug. 13, 2017), <https://perma.cc/5CLS-64W7>; Michael Patrick Leahy, Timeline Leading to Declaration of Unlawful Assembly at Emancipation Park Rally in Charlottesville, Virginia on August 12, Breitbart (Aug. 16, 2017), <https://perma.cc/25CA-SFAM>; Elliott C. McLaughlin, Charlottesville Rally Violence: How We Got Here, CNN (Aug. 14, 2017, 1:25 PM), <https://perma.cc/PYS5-2UYS>; Hawes Spencer, A Far-Right Gathering Bursts into Brawls, N.Y. Times (Aug. 13, 2017), <https://www.nytimes.com/2017/08/13/us/charlottesville-protests-unite-the-right.html>; and A Timeline of the Deadly Weekend in Charlottesville, Virginia, ABC 6 Action News (Aug. 14,

were people armed and armored with shields, helmets, and sticks. A contingent of self-proclaimed militiamen arrived as well, wearing camouflage and carrying pistols and rifles. They told reporters they were there to keep the peace. Some of the protesters openly carried guns too.⁹ Still, at this point early in the morning, one firsthand observer described the atmosphere as “calm,”¹⁰ with a group of twenty or thirty clergy and other counterprotesters linking arms and singing. Then, sometime around 10:30 a.m., skirmishes broke out between the groups. According to one police officer, part of the problem was that the protesters went back on a plan to enter the park from only one side, instead coming in from all directions and clashing directly with counterprotesters.¹¹ As a result some of the protesters and the police were behind metal barricades in the Park itself, while on Market Street in front of the Park, members of both sides directly confronted each other, reportedly with no police intervention.¹² As the groups neared each other, various members of the crowd exchanged chants and insults. The clergy sang “This Little Light of Mine,” while the white supremacists yelled “Our blood, our soil!”¹³ Counterprotesters shouted “Fuck you, Nazis!” while the protesters replied “Fuck you, f——s!”¹⁴

Shortly before 11:00 a.m., a large group of white nationalists approached the Park along Market Street. A group of counterprotesters formed a line across the street in order to block their path. The protesters then charged the line, swinging their sticks, punching, and spraying mace and pepper spray. A number of the counterprotesters fought back in the same manner. Participants threw rocks, water bottles, and balloons

2017), <https://perma.cc/Z555-7DTD>. The factual accounts do not differ substantially, but do have different points of emphasis and levels of detail.

⁹ One of whom, video later showed, actually discharged the firearm in the direction of counterprotesters. At the time, the police did not take any action, but the man has since been arrested. Carla Herreria, Video Shows Man Shooting at Crowd During Charlottesville Rally, with No Police Response, *Huffington Post* (Aug. 26, 2017, 11:38 PM), <https://perma.cc/T8UQ-CSFD>.

¹⁰ Spencer, *supra* note 8.

¹¹ Heim, *supra* note 3.

¹² Sheryl Gay Stolberg, Hurt and Angry, Charlottesville Tries to Regroup from Violence, *N.Y. Times* (Aug. 13, 2017), <https://www.nytimes.com/2017/08/13/us/charlottesville-protests-white-nationalists.html>; A.C. Thompson, Police Stood by as Mayhem Mounted in Charlottesville, *ProPublica* (Aug. 12, 2017, 11:00 PM), <https://perma.cc/NQV6-GG8E>.

¹³ Heim, *supra* note 3.

¹⁴ *Id.*

filled with paint, ink, or urine as “the air was filled with the sounds of fists and sticks against flesh.”¹⁵ At 11:06 a.m., the City of Charlottesville and Albemarle County jointly declared a local emergency.¹⁶ Twenty-two minutes later, Governor Terry McAuliffe declared a state of emergency across the entire Commonwealth.¹⁷

At the same time, around 11:20 or 11:30 a.m.,¹⁸ the police declared the gathering to be an unlawful assembly,¹⁹ and by about 11:40 a.m. were dispersing the crowds, with the white nationalists migrating toward McIntire Park to continue the demonstration.²⁰ Scattered fights and verbal exchanges continued in surrounding areas, but the main rally had been shut down before it was even supposed to begin.²¹ Tragically, it

¹⁵ Spencer, *supra* note 8.

¹⁶ Albemarle Cty., Local Emergency Declared by Charlottesville and Albemarle County, 979 INFO Line Activated (Aug. 12, 2017), <https://perma.cc/E3KS-MHN3>. Local government declared the emergency pursuant to Section 44-146.21 of the Virginia Code. *Id.* This Section allows localities facing disaster or emergency to

“control, restrict, allocate or regulate the use, sale, production and distribution of food, fuel, clothing and other commodities, . . . enter into contracts and incur obligations necessary to combat such threatened or actual disaster, protect the health and safety of persons and property and provide emergency assistance to the victims of such disaster, and proceed without regard to time-consuming procedures and formalities prescribed by law.”

Va. Code Ann. § 44-146.21(C) (2013).

¹⁷ Va. Exec. Order No. 66 (2017), <https://perma.cc/VJA8-9YSD>; Governor Terry McAuliffe, Governor McAuliffe Statement on Emergency Declaration in Response to Violence in Charlottesville (Aug. 12, 2017), <http://governor.virginia.gov/newsroom/newsarticle?articleId=20924>. Governor McAuliffe exercised this authority under Virginia Code Section 44-146.17. See Va. Exec. Order No. 66, *supra*, at 1. The Executive Order mandated, among other measures, the deployment of the Virginia National Guard and Virginia Defense Force. See *id.* at 2–6.

¹⁸ The *Washington Post's* Joe Heim quotes Virginia Secretary of Public Safety and Homeland Security Brian Moran as saying that the unlawful assembly was declared at 11:22 a.m., Heim, *supra* note 3, while Breitbart's Michael Patrick Leahy quotes Albemarle County Director of Communications Lee Catlin as stating that the unlawful assembly was declared at 11:32 a.m. Leahy, *supra* note 8.

¹⁹ See Va. Code Ann. § 18.2-406 (2014).

²⁰ Heim, *supra* note 3; Leahy, *supra* note 8.

²¹ Heim, *supra* note 3; see also Laura Wamsley, Charlottesville Violence Highlights Cities' Struggle To Balance Rights and Safety, Nat'l Pub. Radio (Aug. 14, 2017, 6:43 PM), <http://www.npr.org/sections/thetwo-way/2017/08/14/543462419/charlottesville-violence-highlights-cities-struggle-to-balance-rights-and-safety> (“Think of this Not one window was shattered, not one ounce of property damage, not one shot fired, and not one person went to the hospital, except for the 19 who were hit by a car terrorist. Which, you can't, you

was after the dispersal, when relative calm had returned to the city, that James Alex Fields, Jr., rammed his car into a crowd of pedestrians, killing Heather Heyer and injuring nineteen others.²² Later that evening, two state police officers who were monitoring the city, Lieutenant H. Jay Cullen and Trooper Berke M.M. Bates, died when their helicopter crashed.²³

* * *

There are many questions to be asked after a day like August 12. Perhaps the most fundamental, at least from a legal perspective, is the one Charlottesville Mayor Mike Signer asked on August 13: “How do you reconcile public safety and the First Amendment?”²⁴ The object of this Essay is to provide one incomplete answer to this question in the doctrinal area of First Amendment law known as the “heckler’s veto”²⁵ or “hostile audience”²⁶ problem.

The heckler’s veto or hostile audience problem arises when speech is met with an audience that is likely to turn violent on the speaker—in such a scenario, can the government shut down the speech, or must it allow the speaker to continue? This problem is vexing and active. Commentators point to recent events like University of California, Berkeley’s cancellation of a speech by Milo Yiannopoulos²⁷ and other incidents on college campuses²⁸ to decry the desecration of the freedom

know—there’s no preparation’s [sic] that’s gonna prepare for some nut, some murderer, who’s going to turn his car into a weapon and run through a crowd.” (quoting Virginia Governor Terry McAuliffe).

²² Heim, *supra* note 3 (reporting that the crash happened around 1:10 p.m.).

²³ *Id.*

²⁴ Wamsley, *supra* note 21 (quoting Charlottesville Mayor Mike Signer).

²⁵ See Harry Kalven, Jr., *The Negro and the First Amendment* 140–41 (1965); Ruth McGaffey, *The Heckler’s Veto: A Reexamination*, 57 *Marq. L. Rev.* 39, 39–41 (1973).

²⁶ See Erwin Chemerinsky, *Constitutional Law: Principles and Policies* § 11.3.3.3, at 1059 (5th ed. 2015); Daniel A. Farber, *The First Amendment* 113–16 (4th ed. 2014); Steven H. Shiffrin et al., *The First Amendment* 144–48 (6th ed. 2015).

²⁷ Thomas Fuller & Christopher Mele, *Berkeley Cancels Milo Yiannopoulos Speech, and Donald Trump Tweets Outrage*, *N.Y. Times* (Feb. 1, 2017), <https://www.nytimes.com/2017/02/01/us/uc-berkeley-milo-yiannopoulos-protest.html>.

²⁸ Zach Greenberg, *Rejecting the “Heckler’s Veto,” FIRE: Found. for Individual Rts. in Educ.* (June 14, 2017), <https://perma.cc/TLR9-WFME> (listing recent events at Berkeley, Middlebury College, Brown University, and Washington State University as examples of the heckler’s veto); Anemona Hartocollis, *University of Florida Braces for Richard Spencer*, *N.Y. Times* (Oct. 17, 2017), <https://nyti.ms/2kUmlTk> (discussing the heckler’s veto in

of speech,²⁹ while government institutions puzzle over how to manage security costs at controversial events consistent with the First Amendment.³⁰

In this Essay I argue that in order to better balance public security with freedom of speech, courts should analyze the hostile audience problem in accordance with the template set out in the incitement test of *Brandenburg v. Ohio*.³¹ The *Brandenburg* standard, discussed in more detail below,³² holds that the government may not proscribe speech advocating violence or unlawful action unless “such advocacy is *directed* to inciting or producing *imminent* lawless action and is *likely* to incite or produce such action.”³³ The *Brandenburg* test, which has served as a durable and speech-protective First Amendment principle since it was first articulated, should serve as the model for a clearer standard in the domain of the heckler’s veto, as follows: the government may not proscribe violence-provoking expression unless it is directed to *provoking* imminent violence and is likely to produce violence.

In order to establish the viability of the proposed approach, the remainder of this Essay proceeds in two Parts. Part I traces three relevant free speech doctrines: the hostile audience problem, “fighting words,”³⁴ and the incitement test of *Brandenburg*. Part II argues that because of the current state of the heckler’s veto and fighting words doctrines, there is an asymmetry between the treatment of speech that is directed toward provoking a violent response in others and the treatment

relation to the planned appearance of alt-right figure Richard Spencer at the University of Florida).

²⁹ See, e.g., Spencer Brown, UC Berkeley: Where Free Speech Dies, Violence Rewarded. Again., *The Hill* (Apr. 20, 2017, 3:30 PM), <https://perma.cc/R978-AHB7>; Hartocollis, *supra* note 28; Walter Olson, *The ACLU Yields to the Heckler’s Veto*, *Wall St. J.* (Oct. 24, 2017, 6:31 PM), <https://www.wsj.com/articles/the-aclu-yields-to-the-hecklers-veto-1508884285>; Jeff Sessions, Att’y Gen., U.S. Dep’t of Justice, Remarks at Georgetown University Law Center (Sept. 26, 2017).

³⁰ See, e.g., Teresa Watanabe, UC, Roiled by 1st Amendment Controversies, to Launch National Free Speech Center, *L.A. Times* (Oct. 26, 2017, 3:00 AM), <https://perma.cc/M6D8-HNPG> (discussing how the law surrounding the costs of security is unclear).

³¹ 395 U.S. 444, 447 (1969).

³² See *infra* Section I.C.

³³ *Brandenburg*, 395 U.S. at 447 (emphasis added).

³⁴ Fighting words are those words that have been found to be of low social value that tend to incite a breach of the peace by their utterance. See *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942); see also *infra* Section I.B (discussing the fighting words doctrine as it relates to the hostile audience problem).

of speech that advocates the use of violence. The normative case for revising the present standard centers on the analytical invalidity of this asymmetry as well as practical concerns. Part II also looks to the three most relevant events of the Charlottesville unrest—Judge Conrad’s court order, the insults traded between protesters and counterprotesters on the day of the rally, and the police department’s declaration of unlawful assembly—in order to determine the extent to which the proposed standard might have influenced the course of events. In doing so, I aim to confront directly that most difficult question: how can public safety be reconciled with the First Amendment?

I. TRACING THE DOCTRINES

First Amendment jurisprudence contains a multitude of overlapping yet distinct doctrines.³⁵ This Essay focuses on three in particular: the hostile audience problem, fighting words, and the incitement test of *Brandenburg v. Ohio*.

A. Hostile Audience Problem or the Heckler’s Veto

The idea of the heckler’s veto was first conceptualized by Professor Harry Kalven,³⁶ who described the problem as follows:

A speaker may threaten a breach of peace in two ways, either by inciting to violence or by irritating an audience so that it responds with violence. In the second case, in which the audience is hostile, a difficult issue is posed. Apart from the “fighting words” point of the *Chaplinsky* case, are there other circumstances in which the police, in order to keep tranquility, are entitled to arrest the speaker rather than the audience? The problem is a genuine puzzle either way it is decided. *If the police can silence the speaker, the law in effect acknowledges a veto power in hecklers who can, by being hostile enough, get the law to silence any speaker of whom they do not*

³⁵ See *Gresham v. Rutledge*, 198 F. Supp. 3d 965, 969 n.10 (E.D. Ark. 2016) (“[M]odern First Amendment jurisprudence contains a plethora of doctrinal formulas[.]” (alterations in original) (quoting 1 Rodney A. Smolla, *Smolla & Nimmer on Freedom of Speech* § 2.50 (3d ed. 1996))); see also 1 Rodney A. Smolla, *Smolla & Nimmer on Freedom of Speech* § 2:2 (3d ed. 1996) [hereinafter *Smolla & Nimmer*] (“Contemporary free speech jurisprudence is a befuddling array of theories, methods, formulas, tests, doctrines and subject areas.”).

³⁶ Frederick Schauer, *Harry Kalven and the Perils of Particularism*, 56 U. Chi. L. Rev. 397, 400 (1989).

approve. But the opposing view, that the police must go down with the speaker, has its own obvious difficulties, too.³⁷

The heckler's veto, which may also be classified as the "hostile audience" problem,³⁸ is indeed difficult, as evidenced by the divergent outcomes of the two canonical cases in the area: *Terminiello v. Chicago*³⁹ and *Feiner v. New York*.⁴⁰

In *Terminiello*, the United States Supreme Court overturned the disorderly conduct violation⁴¹ of the speaker, a polarizing public figure and recently defrocked Catholic priest.⁴² Arthur Terminiello addressed a crowded hall filled with both supporters and detractors. The hall was surrounded on the outside by a much larger group of protesters, some of whom were throwing projectiles through windows and at police officers.⁴³ As he addressed the audience, Terminiello repeatedly referred to his detractors as "scum" and accused them of plotting to violently overthrow the United States, in addition to making numerous anti-Semitic remarks.⁴⁴

Justice William O. Douglas, writing for a five-Justice majority, found that, although the Illinois state courts had held that Terminiello's speech could be proscribed as "fighting words" under *Chaplinsky v. New Hampshire*,⁴⁵ because part of the jury instruction indicated that Terminiello could be found guilty if he was engaging in conduct that "stirs the public to anger, invites dispute, brings about a condition of unrest, or creates a disturbance,"⁴⁶ his conviction was constitutionally void.⁴⁷ Justice Douglas wrote, "[A] function of free speech under our

³⁷ Kalven, *supra* note 25, at 140 (emphasis added) (footnote omitted).

³⁸ See Chemerinsky, *supra* note 26, § 11.3.3.3, at 1059; Farber, *supra* note 26, at 113–16; Shiffrin et al., *supra* note 26, at 144–48.

³⁹ 337 U.S. 1 (1949).

⁴⁰ 340 U.S. 315 (1951).

⁴¹ 337 U.S. at 6. This was a civil offense under Illinois law and resulted in the imposition of a \$100 fine. *Id.* at 12 (Frankfurter, J., dissenting).

⁴² See *id.* at 14–15 (Jackson, J., dissenting).

⁴³ *Id.* at 15–16 (Jackson, J., dissenting).

⁴⁴ *Id.* at 17–22 (Jackson, J., dissenting).

⁴⁵ 315 U.S. 568, 571–73 (1942); see *Terminiello*, 337 U.S. at 3, 6; *infra* Section I.B.

⁴⁶ *Terminiello*, 337 U.S. at 3.

⁴⁷ This is an early application of the overbreadth doctrine. See *Bd. of Airport Comm'rs v. Jews for Jesus*, 482 U.S. 569, 574 (1987) ("Under the First Amendment overbreadth doctrine, an individual whose own speech or conduct may be prohibited is permitted to

system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.”⁴⁸

Terminiello’s speech could not be censored “unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest.”⁴⁹ Therefore, even if in fact Terminiello’s speech had been producing a clear and present danger, the possibility that he was convicted for merely stirring the public to anger and creating unrest rendered his penalization void.

Contrast this holding with the one in *Feiner*, decided two years later. Irving Feiner, a progressive college student who was speaking through a loudspeaker on a crowded street corner, made numerous inflammatory political statements.⁵⁰ He was surrounded by a restless crowd, among whom were people vocally threatening to attack him.⁵¹ The police asked him to step down and stop speaking. He ignored them and continued talking until finally one officer arrested him.⁵² Feiner was convicted of the misdemeanor of disorderly conduct and received a thirty-day jail sentence.⁵³ In this case a six-Justice majority found that Feiner’s speech was not protected. Chief Justice Fred M. Vinson, for the majority, acknowledged that the government “may not unduly suppress free communication of views . . . under the guise of conserving desirable conditions.”⁵⁴ Still, the Court found:

It is one thing to say that the police cannot be used as an instrument for the suppression of unpopular views, and another to say that, when as here the speaker passes the bounds of argument or persuasion and

challenge a statute on its face ‘because it is also threatens others not before the court’” (quoting *Brockett v. Spokane Arcades*, 472 U.S. 491, 503 (1985)).

⁴⁸ *Terminiello*, 337 U.S. at 4.

⁴⁹ *Id.* Here, the Court is setting the outer bounds of protected speech using the “Clear and Present Danger” test first enunciated in *Schenck v. United States*, 249 U.S. 47, 52 (1919). Various articulations of this test were in force in the pre-*Brandenburg* era. See Chemerinsky, *supra* note 26, § 11.3.2.2–4, at 1039–48.

⁵⁰ *Feiner*, 340 U.S. at 316–18.

⁵¹ *Id.* at 317.

⁵² *Id.* at 318.

⁵³ *Id.* at 316.

⁵⁴ *Id.* at 320 (quoting *Cantwell v. Connecticut*, 310 U.S. 296, 308 (1940)).

undertakes incitement to riot, they are powerless to prevent a breach of the peace.⁵⁵

Justice Hugo Black, writing in dissent, was appalled by this holding, characterizing it as “a long step toward totalitarian authority.”⁵⁶ Black argued that rather than arresting the speaker, the police first should have made “all reasonable efforts to protect him[,]” including, if necessary, arresting hecklers who were threatening violence.⁵⁷ Only once such efforts were exhausted would it be acceptable for police to silence the speaker.

Feiner has never been overruled, but in the years since it was decided no case has followed it in upholding a speaker’s conviction.⁵⁸ Indeed, a number of post-*Feiner* cases make it appear as though Justice Black’s dissent has carried the day.⁵⁹ The rule for hostile audiences, therefore, appears to be that police and localities must make reasonable efforts to control the hecklers and protect the speaker, only stopping the speaker “if crowd control is impossible and a threat to breach of the peace imminent.”⁶⁰ The validity of this framing, however, is open to debate, as no Supreme Court case since *Feiner* has directly addressed in what circumstances it is acceptable to shut down speech in order to preserve security. Indeed, the direction of the Court has been to require localities

⁵⁵ Id. at 321.

⁵⁶ Id. at 323 (Black, J., dissenting).

⁵⁷ Id. at 326–27 (Black, J., dissenting).

⁵⁸ Farber, *supra* note 26, at 115.

⁵⁹ See *Gregory v. Chicago*, 394 U.S. 111, 111–13 (1969) (overturning the conviction of civil rights marchers because the only part of marchers’ conduct that could be characterized as disorderly was their refusal to obey a police order to disband, and the onlookers were the ones threatening disorder); *Cox v. Louisiana*, 379 U.S. 536, 550–51 (1965) (overturning a conviction where “[t]he fear of violence seems to have been based upon the reaction” of onlookers, and there was no indication that any of the onlookers threatened violence); *Edwards v. South Carolina*, 372 U.S. 229, 231–33, 238 (1963) (overturning civil rights protesters’ convictions for disobeying a police order to disperse where “police protection at the scene was at all times sufficient to meet any foreseeable possibility of disorder[,]” and there was no violence or threat of violence); *Collin v. Smith*, 578 F.2d 1197, 1199, 1201 (7th Cir. 1978) (barring the village of Skokie, Illinois, from preventing or censoring a planned neo-Nazi parade through the town, which was predominately Jewish and counted among its residents a large number of Holocaust survivors); see also Chemerinsky, *supra* note 26, § 11.3.3.3, at 1061–62 (collecting cases and suggesting that the Court has largely adopted the approach put forth by Justice Black in his *Feiner* dissent).

⁶⁰ Chemerinsky, *supra* note 26, § 11.3.3.3, at 1062.

to protect speakers regardless of cost.⁶¹ Thus it is at a minimum doubtful whether lower courts and localities may follow *Feiner* and allow speech to be prevented on the basis of a hostile reaction. Some authorities go further and suggest that *Feiner* may no longer be good law at all.⁶²

B. Fighting Words

In *Chaplinsky v. New Hampshire*, the Court gave its canonical definition of “fighting words”: words “which by their very utterance inflict injury or tend to incite an immediate breach of the peace.”⁶³ Such speech, along with “the lewd and obscene, the profane, [and] the libelous” is not protected because, the Court reasoned, it is of such low social value that its benefits are outweighed by the social interest in preserving order and morality.⁶⁴ The fighting words doctrine, it would seem, is a good answer to the question of the extent to which speech can be restricted because of the violent reaction it provokes in others: if it is a fighting word, then it is not entitled to constitutional protection, and therefore the government may restrict it in the interest of public safety.⁶⁵

But, similar to what happened to *Feiner*,⁶⁶ since *Chaplinsky* was decided in 1942 the Court has not once upheld a conviction under the fighting words doctrine.⁶⁷ Indeed, the case law demonstrates a steady retreat from *Chaplinsky*’s self-assured classification of fighting words as an unprotected category.

⁶¹ See *Forsyth Cty. v. Nationalist Movement*, 505 U.S. 123, 134–36 (1992) (striking a city ordinance requiring that demonstrators pay in advance for estimated security costs as based on public reaction to the speech, which “is not a content-neutral basis for regulation”). Citing *Terminiello*, the Court added: “Speech cannot be financially burdened, any more than it can be punished or banned, simply because it might offend a hostile mob.” *Id.* (citing *Terminiello*, 337 U.S. 1).

⁶² Smolla & Nimmer, *supra* note 35, § 10:41.

⁶³ 315 U.S. at 572.

⁶⁴ *Id.* at 571–72.

⁶⁵ For the relationship between racist “hate speech” and fighting words, see, for example, Hadley Arkes, *Civility and the Restriction of Speech: Rediscovering the Defamation of Groups*, 1974 *Sup. Ct. Rev.* 281, 313–17; David O. Brink, *Millian Principles, Freedom of Expression, and Hate Speech*, 7 *Legal Theory* 119, 140 (2001); Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim’s Story*, 87 *Mich. L. Rev.* 2320, 2355–56 (1989).

⁶⁶ See *supra* Section I.A.

⁶⁷ Farber, *supra* note 26, at 115.

In *Cohen v. California*, the Court assessed the scope of the fighting words doctrine as it applied to profane language printed on a jacket.⁶⁸ In finding that the message did not constitute fighting words (and more generally, was protected by the First Amendment), the Court put a series of new glosses on *Chaplinsky*, finding that, in order to be considered fighting words, the message on the jacket would need to be directed at an individual listener, and subject to the reasonable interpretation that the message was a “direct personal insult.”⁶⁹ Because the message on Paul Cohen’s jacket was not aimed at anyone in particular, and could not be interpreted as a direct insult, it lay outside the newly formulated fighting words doctrine.⁷⁰

The year after *Cohen*, the Court decided four more cases that further call into question the continued relevance of the fighting words doctrine.⁷¹ The first of these, *Gooding v. Wilson*, involved the following words spoken to a police officer at an antiwar rally: “White son of a bitch, I’ll kill you.”; “You son of a bitch, I’ll choke you to death.”; and “You son of a bitch, if you ever put your hands on me again, I’ll cut you all to pieces.”⁷² The Court overturned the speaker’s conviction for violating a Georgia law making it a misdemeanor to use “opprobrious” language “tending to cause a breach of the peace,”⁷³ finding the statute overbroad and therefore facially unconstitutional under the First Amendment.⁷⁴ The other three cases were resolved similarly.⁷⁵

⁶⁸ 403 U.S. 15, 16, 20 (1971). Paul Cohen wore a jacket that said “Fuck the Draft” into a Los Angeles County courthouse. *Id.* at 16.

⁶⁹ *Id.* at 20.

⁷⁰ *Id.* The Court also refined *Feiner* such that, in order to stop a violence-provoking speaker, the government would need to show that the speaker was *intentionally* provoking a hostile response from listeners. *Id.* (citing *Feiner*, 340 U.S. 315; *Terminiello*, 337 U.S. 1). More broadly, *Cohen* announced a new paradigm in First Amendment law by “turning the presumptions in *Chaplinsky* around: instead of presuming that profane or defamatory speech was beneath constitutional protection, [the Court] presumed that the speech was protected and that the burden of proof lay with those who would restrict it.” Arkes, *supra* note 65, at 316.

⁷¹ *Brown v. Oklahoma*, 408 U.S. 914 (1972); *Lewis v. City of New Orleans*, 408 U.S. 913 (1972); *Rosenfeld v. New Jersey*, 408 U.S. 901 (1972); *Gooding v. Wilson*, 405 U.S. 518 (1972); see also Farber, *supra* note 26, at 114 (“[S]ince *Chaplinsky*, the Court has taken a very narrow view of the fighting words doctrine, to the point where it is no longer clear whether the doctrine retains any vitality.”).

⁷² *Gooding*, 405 U.S. at 519 n.1.

⁷³ *Id.* at 519 (citing Ga. Code Ann. § 26–6303 (1933)).

⁷⁴ *Id.* at 527–28.

In light of these and subsequent decisions, the extent to which the fighting words doctrine carves out any room for governments to regulate violence-provoking speech must be considered gravely in doubt.⁷⁶ If the fighting words doctrine is to serve as a limitation on how far speech can go before it is subject to regulation, then there is in effect almost no limit at all.

C. *The Incitement Test of Brandenburg v. Ohio*

In *Brandenburg*, a Ku Klux Klan leader was caught on film addressing a group of supporters.⁷⁷ In the racially charged speech, he made vague threats about taking “revengeance” on the U.S. government for its efforts to “suppress the white.”⁷⁸ As a result he was convicted under an Ohio statute criminalizing advocacy of “the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform.”⁷⁹ The Court struck down the statute for violating the First Amendment, in the process formulating a new standard for advocacy of violence:

[T]he 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.⁸⁰

⁷⁵ See Chemerinsky, *supra* note 26, § 11.3.3.2, at 1055–56.

⁷⁶ See, e.g., *Texas v. Johnson*, 491 U.S. 397, 409–10 (1989) (stressing that fighting words represent a “small class” of conduct); *Houston v. Hill*, 482 U.S. 451, 461–62 (1987) (discussing breadth that First Amendment affords in directing “verbal criticism and challenge” at police officers). Further circumscribing *Chaplinsky* is the Supreme Court’s holding in *R.A.V. v. St. Paul*, 505 U.S. 377, 381 (1992), that even in “unprotected” categories like fighting words and obscenity, government regulation must be content-neutral, except under certain exceptional circumstances. See *id.* at 383–90. As such, a fighting words statute like the one in *R.A.V.* would need to be content-neutral or face strict scrutiny. One relevant exception is “[w]hen the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable.” *Id.* at 388. This exception has been applied to uphold an ordinance banning cross burning with the intent to intimidate, because if the activity is done with this intent it constitutes a “true threat.” *Virginia v. Black*, 538 U.S. 343, 357–63 (2003) (quoting *Watts v. United States*, 394 U.S. 705, 708 (1969)).

⁷⁷ 395 U.S. 444, 445 (1969).

⁷⁸ *Id.* at 446.

⁷⁹ *Id.* at 444–45 (quoting Ohio Rev. Code Ann. § 2923.13 (1958)).

⁸⁰ *Id.* at 447 (emphasis added).

Thus for violence-advocating speech to be proscribable, there must be intent (“directed to”), imminence, and likelihood of actual violence.⁸¹ This kind of advocacy is to be distinguished from “abstract teaching [of] the moral propriety or even moral necessity” of violence.⁸² Because Ohio’s statute did not make this important distinction, the Klansman’s conviction could not be upheld.⁸³

Subsequent cases demonstrate how *Brandenburg* is applied. In *Hess v. Indiana*, for example, a group of antiwar protesters took to the streets, blocking traffic.⁸⁴ Law enforcement arrived and the protesters moved to the sidewalks on either side of the road, but as they did so one protester allegedly shouted, to no one in particular, “We’ll take the fucking street later.”⁸⁵ The speaker was arrested and convicted under a disorderly conduct statute for these words.⁸⁶ In reversing the conviction, the Court found that the statement “could be taken as counsel for present moderation” or, at worst, “nothing more than advocacy of illegal action at some indefinite future time.”⁸⁷

NAACP v. Claiborne Hardware Co. took the imminence requirement a step further.⁸⁸ In that case, a civil rights activist urging other members of the movement to adhere to a boycott of white-owned businesses told a crowd of supporters, in the midst of a lengthy and passionate speech, “If we catch any of you going in any of them racist stores, we’re gonna break your damn neck.”⁸⁹ The Court, in applying *Brandenburg* to the statement, found that because the speaker did not actually authorize,

⁸¹ The exact level of intent required to meet the first prong of the test is not totally clear. See Eugene Volokh, *Crime-Facilitating Speech*, 57 *Stan. L. Rev.* 1095, 1193 (2005) (“The incitement cases, though, have never fully explained why an intent-imminence-likelihood test is the proper approach (as opposed to, say, a knowledge-imminence-likelihood test). Moreover, . . . the main barrier to liability under the *Brandenburg* test has generally been the imminence prong, not the intent prong; and given the imminence prong, it’s not really clear whether it makes much of a difference whether the incitement test requires intent or mere knowledge.”).

⁸² *Brandenburg*, 395 U.S. at 448 (quoting *Noto v. United States*, 367 U.S. 290, 297–98 (1961)).

⁸³ *Id.* at 448–49.

⁸⁴ 414 U.S. 105, 106 (1973).

⁸⁵ *Id.* at 106–07.

⁸⁶ *Id.* at 107.

⁸⁷ *Id.* at 108.

⁸⁸ 458 U.S. 886, 928–29 (1982).

⁸⁹ *Id.* at 902.

ratify, or directly threaten violence, and his rhetorical appeals did not *in fact* incite lawless action, his speech was protected.⁹⁰

Hess and *Claiborne* emphasize the importance of the imminence requirement.⁹¹ In *Hess*, the speaker's use of temporally indefinite language ("later") was enough for the Court to find that imminence was not met,⁹² and in *Claiborne* the lack of actual violence immediately following the speech, especially in the context of an emotional plea to supporters, meant the expression was protected.⁹³ Thus, there is a high threshold for imminence under *Brandenburg*, resulting in a very speaker-protective doctrine.⁹⁴

II. REVISING THE VIOLENCE-PROVOKING SPEECH STANDARD AND APPLYING IT TO THE EVENTS IN CHARLOTTESVILLE

A. A Better Approach

What separates *Brandenburg v. Ohio* from whatever remains of *Feiner v. New York* and *Chaplinsky v. New Hampshire* is the clarity of the standard enunciated. While the *Brandenburg* test even protects speakers who believe in violence and advocate for it in an abstract or rhetorical manner, it also clearly allows for restrictions at the extremes.⁹⁵ For example, if a radical anarchist instructed a loyal crowd to pick up whatever projectiles they could find and immediately launch them at passersby, the police could certainly intervene to stop the speech; intent, imminence, and likelihood are easily met. Thus *Brandenburg* serves the

⁹⁰ Id. at 928–29.

⁹¹ Smolla & Nimmer, *supra* note 35, § 10:29–30; see also Volokh, *supra* note 81, at 1190, 1193 (arguing that because of the importance of the imminence prong, the intent prong may not be particularly relevant in incitement cases).

⁹² 414 U.S. at 107–08.

⁹³ 458 U.S. at 928–29.

⁹⁴ Chemerinsky, *supra* note 26, § 11.3.2.5, at 1050.

⁹⁵ See, e.g., *Rice v. Paladin Enters.*, 128 F.3d 233, 243 (4th Cir. 1997) (holding that the publisher of a manual for how to become a contract killer could be liable in tort for aiding and abetting murder where the manual was used to help commit three murders); *People v. Sanchez*, 888 N.Y.S.2d 352, 358–59 (N.Y. Crim. Ct. 2009) (holding that assembling to prepare for criminal action is not protected under *Brandenburg*, and noting that “the First Amendment would not have protected a meeting of Al Qaeda to plan the attack on the World Trade Center even if that attack were not to occur until months later”); Smolla & Nimmer, *supra* note 35, § 10:30 (pointing out that it would not violate *Brandenburg* for police to intervene where a group of protesters is communicating in preparation to set off a bomb).

dual purposes of ensuring wide latitude for speakers while providing adequate notice of when speech may cross the boundaries of constitutional protection.

As the above discussion in Sections I.A and I.B demonstrates, there is at present no comparably clear outer limit for violence-provoking speech. In theory, after *Cohen v. California*, a speaker who was deliberately trying to provoke a violent response from a listener could be subject to speech restriction.⁹⁶ But in the absence of further elaboration, it is difficult to see how such actual intent could be proven, especially given the unlikelihood that a speaker would truly intend for another person to attack her.

This difficulty suggests that, as with *Brandenburg*, the appropriate prong to focus on is imminence.⁹⁷ Focusing on imminence allows governments to make assessments about public security in a way that will allow for as much speech as possible, because even highly inflammatory speech will be allowed to continue up to the point where violence is imminent. Thus, the proposed hostile audience standard is that violence-provoking speech is to be protected unless it is directed to⁹⁸ provoking *imminent* violence and is *likely* to precipitate violence.

Imagine, for instance, that a neo-Nazi group entered a predominately Jewish neighborhood whose residents included a high number of Holocaust survivors and descendants of Holocaust victims.⁹⁹ The demonstrators wear Nazi regalia, carry symbols of Nazism, and direct deeply wounding and insulting anti-Semitic language at residents. For the purposes of this hypothetical, let us imagine that these insults are as heinous as possible, referencing real, brutal crimes that the listeners

⁹⁶ See *supra* note 70.

⁹⁷ See *supra* notes 81, 91 and accompanying text.

⁹⁸ The intent requirement to be applied in heckler's veto cases is complicated. It would of course be troublesome to prove that a given speaker actually *intended* for a listener to physically attack him. To get around this difficulty, the Court could instead require that the speaker have knowledge that a listener would respond violently. Alternatively, the intent requirement could be dropped altogether, focusing the inquiry on imminence and likelihood only. For present purposes, it is enough to suggest that *Brandenburg in practice* be followed. As argued above, *supra* notes 91–94 and accompanying text, the *Brandenburg* inquiry as applied centers on imminence, so the proposed standard follows suit.

⁹⁹ This hypothetical is similar to what might have happened had the plaintiffs in *Collin v. Smith* actually held their proposed event. 578 F.2d 1197, 1198–99 (7th Cir. 1978); see also Frederick Schauer, *The Hostile Audience Revisited*, *Emerging Threats*, Nov. 2017, at 3–4, <https://perma.cc/3QJJ-S93E> (raising the planned Nazi event in *Collin* to ask what the police might have done—or been able to do—had the march turned violent).

themselves experienced, or that directly affected the listeners' family members. It is possible, in such a scenario, that even listeners with peaceful intentions and dispositions might temporarily be unable to control themselves, and react with hostility. Under the proposed standard, the police could intervene and shut down the Nazis' speech. This is so because the expression is directed to¹⁰⁰ provoking imminent violence and such violence is very likely to occur. Imminence and likelihood are present given the directness of the communication as well as the broader context of extreme antipathy between speaker and listener. Although the police in such circumstances would of course be justified in restraining the hostile audience from attacking the demonstrators, they would also be allowed to prevent the demonstrators from continuing their violence-provoking speech.

B. Would the New Standard Have Made a Difference?

1. Judge Conrad's Preliminary Injunction

If the new violence-provoking speech standard were correctly applied, it would have no effect on the outcome of enjoining the revocation of the protest permit in *Kessler v. City of Charlottesville*.¹⁰¹ As the court in that case noted, the city revoked Kessler's permit, but not the counterprotesters', which provided evidence that the "eleventh-hour" revocation was based on the content of Kessler's message.¹⁰² City Councilmembers' anti-Kessler social media posts provided further support for this conclusion.¹⁰³ As a content-based restriction, the permit modification would be subject to strict scrutiny.¹⁰⁴ Based on the factual circumstances present, in short, the City had very little hope of showing that its action was narrowly tailored to further a compelling state interest.

With the benefit of hindsight, Judge Conrad's finding that "there is no evidence to support the notion that many thousands of individuals are

¹⁰⁰ This prong, as discussed *supra* note 98, is difficult, but here, given the context and the imminence and likelihood of a violent response, the intent could be inferred.

¹⁰¹ No. 3:17-CV-00056 (W.D. Va. Aug. 11, 2017).

¹⁰² *Id.* at 1, 3–4.

¹⁰³ *Id.* at 4.

¹⁰⁴ *Id.* at 3–4. The First Amendment almost never permits content-based restrictions on speech. See *Davenport v. Wash. Educ. Ass'n*, 551 U.S. 177, 188 (2007) ("It is true enough that content-based regulations of speech are presumptively invalid.").

likely to attend the demonstration”¹⁰⁵ seems to ignore certain realities, but his legal conclusions were surely sound. The proposed hostile audience standard does not change that in the slightest. Courts should still scrutinize government actions that appear content-based, and the high imminence threshold of the standard means that *ex ante* suppression through a permit change would remain a virtual nonstarter.¹⁰⁶

2. *Verbal Exchanges on August 12*

Among the words the protesters were reported to have spoken at the rally were: “Our blood, our soil!”¹⁰⁷ “Fuck you, f——s!”; “Go the fuck back to Africa!”; “Fuck you, n——!”; and “Dylann Roof was a hero!”¹⁰⁸ The counterprotesters, in turn, are recorded as saying: “Fuck you, Nazis!” and “Go the fuck home!”¹⁰⁹ Any of these statements would almost certainly have been considered fighting words by the *Chaplinsky*-era Court, which upheld a conviction for someone who said “damned Fascist.”¹¹⁰ Indeed, the white supremacists’ statements in particular seem the very definition of violence-provoking speech. Nonetheless, any statute that attempts to proscribe this speech would have to be very narrowly tailored so that (a) it could be applied *only* to truly violence-provoking (under the proposed intent-imminence-likelihood standard)—and therefore unprotected—speech¹¹¹ and (b) it did not discriminate

¹⁰⁵ *Kessler*, slip. op. at 4.

¹⁰⁶ Thus, although extreme cases of advocacy of unlawful conduct can still be prosecuted under *Brandenburg*, see *supra* note 95, the violence-provoking standard allows for shutting down speech only where truly immediate violence will ensue. Cf. Smolla & Nimmer, *supra* note 35, § 10:30 & nn.1–2 (noting how the “government may not penalize speech on the grounds that it is about to cause injury unless the speech is on the very verge of causing that injury”).

¹⁰⁷ A variation on a Hitler-era Nazi slogan. See Meg Wagner, ‘Blood and Soil’: Protestors Chant Nazi Slogan in Charlottesville, CNN (Aug. 12 2017, 7:10 PM), <https://perma.cc/PUM8-QLXJ>.

¹⁰⁸ Heim, *supra* note 3. Dylann Roof murdered nine African Americans in a church in 2015. Jamiles Lartey, Dylann Roof Found Guilty in Charleston Church Shooting, *Guardian* (Dec. 15, 2016, 3:33 PM), <https://perma.cc/QM8N-ZB44>.

¹⁰⁹ Heim, *supra* note 3.

¹¹⁰ See *Chaplinsky v. New Hampshire*, 315 U.S. 568, 569, 574 (1942).

¹¹¹ See *Bd. of Airport Comm’rs v. Jews for Jesus*, 482 U.S. 569, 574 (1987) (“Under the First Amendment overbreadth doctrine, an individual whose own speech or conduct may be prohibited is permitted to challenge a statute on its face ‘because it also threatens others not

based on content within the unprotected category.¹¹² A revitalized violence-provoking speech standard makes a statute that could bar and permit state intervention in these circumstances theoretically possible, while under current doctrine this possibility is doubtful.

On the other hand, although arrest under a statute would likely raise problems under numerous areas of free speech law, police intervention through removal or detention of speakers without any arrests could be possible upon the utterance of some of these insults.¹¹³ The fact that in Charlottesville many of these insults were immediately followed by physical clashes suggests that violence *was* in fact imminent and likely. Thus, upon hearing these exchanges and observing the scene, under the proposed standard, police might have intervened sooner and prevented physical confrontation.

3. *Declaration of Unlawful Assembly*

On August 12, after street violence had been under way for about an hour, the police declared that the gathering at Emancipation Park and the surrounding streets was unlawful under Section 18.2-406 of the Virginia Code.¹¹⁴ This section reads, in full:

Whenever three or more persons assembled share the common intent to advance some lawful or unlawful purpose by the commission of an act or acts of unlawful force or violence likely to jeopardize seriously public safety, peace or order, and the assembly actually tends to inspire persons of ordinary courage with well-grounded fear of serious and immediate breaches of public safety, peace or order, then such assembly is an unlawful assembly. Every person who participates in any unlawful assembly shall be guilty of a Class 1 misdemeanor. If any such person carried, at the time of his participation in an unlawful

before the court” (quoting *Brockett v. Spokane Arcades*, 472 U.S. 491, 503 (1985)); supra notes 71–75 and accompanying text.

¹¹² See supra note 76.

¹¹³ Cf. Smolla & Nimmer, supra note 35, § 10:41 (“If the only feasible alternative is to remove the speaker, then in the case of a peaceful speaker whose only ‘offense’ is that his or her words are causing a violent reaction, the *speaker should merely be taken into protective custody from the scene and transported to safety, but not arrested and charged.*”).

¹¹⁴ Leahy, supra note 8.

assembly, any firearm or other deadly or dangerous weapon, he shall be guilty of a Class 5 felony.¹¹⁵

Interestingly enough, the current version of this statute was amended after a 1971 Virginia Supreme Court case held the previous version unconstitutionally overbroad because it included “assemblies that pose no clear and present danger.”¹¹⁶ Thus the current version, enacted in 1975, added a likelihood requirement (“likely to jeopardize seriously¹¹⁷ public safety”) and, with the language “tends to inspire persons of ordinary courage with well-grounded fear of serious and *immediate* breaches of public safety,” an imminence requirement as well. As such, Virginia’s unlawful assembly statute appears to conform with the constitutional requirements of *Brandenburg*, and indeed the Eastern District of Virginia later found that “[o]n its face, Section 18.2-406 does not impermissibly infringe upon . . . first amendment rights.”¹¹⁸

Under this Essay’s proposed approach, this statute might have been invoked earlier, since the police declared unlawful assembly after violence had already broken out. The current wording of the statute does not require the police to wait for the commission of illegal acts for an assembly to be declared unlawful, the violence-provoking standard would allow the police to consider both the actions and the words spoken by those assembled, in the context of the imminence and likelihood of violence, to determine when to break up the gathering.

On August 12, this might have happened as soon as protesters and counterprotesters faced each other directly on Market Street and exchanged insults. The words themselves would not have been enough to show imminence or likelihood of violence, but the physical nearing of the groups and the possession of weapons, *combined* with the virulence of the epithets, could have provided a basis for declaration of unlawful assembly. Setting out a violence-provoking standard would give police the confidence that in such extreme cases, intervention could happen sooner rather than later. It would also provide notice to speakers that

¹¹⁵ Va. Code Ann. § 18.2-406 (2014).

¹¹⁶ See *Owens v. Virginia*, 179 S.E.2d 477, 479–80 (Va. 1971); see also *United Steelworkers of Am. v. Dalton*, 544 F. Supp. 282, 288–89 (E.D. Va. 1982) (outlining the differences between the pre-*Owens* unlawful assembly statute and the amended version).

¹¹⁷ “Seriously” appears also to add a seriousness element, which is not part of *Brandenburg* but was part of earlier U.S. Supreme Court-generated tests.

¹¹⁸ *Dalton*, 544 F. Supp. at 289.

both actions *and* language of escalation could lead to a premature end to their expressive activity.

4. *A Road Not Taken: Disorderly Conduct*

Virginia's disorderly conduct statute, Virginia Code Section 18.2-415,¹¹⁹ presents another avenue that Charlottesville police might have taken to prevent violence.¹²⁰ Some of its language tracks the proposed violence-provoking speech test.¹²¹ Although it prohibits "*conduct* having a direct tendency to cause acts of violence" by those at whom the conduct is directed, the statute also makes clear that this conduct "shall *not* be deemed to include the utterance or display of any *words*."¹²² Virginia courts have confirmed that any application of Section 18.2-415 to speech would be unconstitutional.¹²³ Under the proposed violence-provoking speech standard, a disorderly conduct statute that included the intent, imminence, and likelihood requirements could constitutionally be applied to words in addition to actions.

CONCLUSION

Revitalizing a test whereby violence-provoking speech could, under the appropriate circumstances, be unprotected would not likely effect a revolution in the operation of the freedom of speech. But it would provide law enforcement and speakers with a workable set of boundaries allowing for prevention of needless violence.

When racist agitation turns to civil unrest and ultimately to tragedy, it is rational to ask what can be done to prevent it from happening again.

¹¹⁹ Va. Code Ann. § 18.2-415.

¹²⁰ The violent, threatening conduct of many of the participants at the rally appears to have met the elements of disorderly conduct, apart from the words they used. Indeed, at least one person was arrested for disorderly conduct in connection with the August 12 protests. See Jason Hanna et al., Virginia Governor to White Nationalists: "Go Home . . . Shame on You," CNN (Aug. 13, 2017, 1:34 AM), <https://perma.cc/F57K-T9N7>

¹²¹ Va. Code. Ann. § 18.2-415(A) ("A person is guilty of disorderly conduct if, with the intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof, he . . . [i]n any street, highway, public building, or while in or on a public conveyance, or public place engages in conduct having a direct tendency to cause acts of violence by the person or persons at whom, individually, such conduct is directed.").

¹²² *Id.* § 18.2-415(A), (C).

¹²³ *Battle v. Virginia*, 647 S.E.2d 499, 501 (Va. Ct. App. 2007); *Howard v. City of Roanoke*, 654 S.E.2d 322, 325–27 (Va. Ct. App. 2007).

2018]

Rethinking the Heckler's Veto

29

The answer outlined here is far from complete, but it is at least a first step toward reconciling public safety with the freedom of speech.