

Free expression should not have a price tag

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The year 2016 may well go down as the year of the “heckler’s veto,” through which aggressive mobs try to shut down speakers through violence, and often succeed. In recent weeks, anti-Israel students barricaded a film screening at UC Irvine, blockaded San Diego State University President Elliot Hirshman’s car to compel an apology, and rioters assaulted police and spectators at multiple Donald Trump events.

Some colleges and cities have answered this intimidation in a way that infringes free speech and rewards violence — by demanding the besieged speakers pay for the extra security needed to protect them. Just last week, UC Irvine initially penalized a student group for not paying insurance costs before bringing Milo Yiannopoulos to campus. These demands are unconstitutional and dangerous. UC Irvine officials have since changed their mind.

Universities may not discriminate when funding speech based on the speakers’ viewpoint, as the Supreme Court has established. The security bill acts as negative funding, a tax on disfavored speakers. But this discrimination derives not from speakers’ views, but from their opponents’ willingness to use violence. A more perverse rule cannot be imagined. If opponents use (or threaten) enough violence, they can drive up the cost of speaking, and shut down whomever they dislike.

The U.S. Supreme Court invalidated a “pay-to-speak” rule in 1992. After Ku Klux Klansmen throwing rocks and bottle interrupted a civil rights “March Against Fear and Intimidation,” Forsythe County, Ga., passed law requiring any speaker wishing to hold a public meeting or parade to pay a fee in advance, based on the expected costs of protecting the speakers and marchers.

The Supreme Court held the law violated the First Amendment: “Speech cannot be financially burdened, any more than it can be punished or banned, simply because it might offend a hostile mob.” A Fifth Circuit court later applied the rule to the college campus as well (*Sonnier v. Crain*).

Schools imposing extra fees on speakers due to their opponents’ potential violence might seek some support from the 9th U.S. Circuit Court of Appeals’ 2014 *Dariano* decision. Students celebrating Cinco de Mayo at a Northern California high school threatened violence against students wearing American flag T-shirts, so the principal intervened — to ban the shirts. Although students could not wear American flag shirts, they were free to wear Mexican ones, because no one had threatened violence against students wearing those. The school asserted this was not unconstitutional viewpoint discrimination, because only the American flag shirt wearers had been threatened, so keeping the peace required suppressing only their speech. The court agreed that the school had acted properly, treating “all students for whose safety they feared in the same manner.” Such reasoning could not apply outside the high school context, because Forsyth County held, “Listeners’ reaction to speech is not a content-neutral basis for regulation.”

These “speech taxes” not only violate the Constitution, they reward violence. A dissenting judge in *Dariano* lamented that restricting a peaceful student’s attire “sends a clear message to public school students: by threatening violence against whom you disagree, you can enlist the power of the state to silence them The demands of bullies become school policy.” Violence pays.

This mindset prevails in Europe, where police answered a wave of sexual assaults by advising women to stay home at night and planners of a Holocaust commemoration excluded Jews because they might feel “unsafe” at the gathering. Allowing violent groups to express their message without inhibition while denying that right to peaceful groups will not “prevent violence,” it will ratify it. Winning the public debate will depend on groups’ ability to intimidate, not persuade.

If there must be a “tax,” it should be paid by those who engage or threaten violence, not its victims. Extra funding should come from a post-conviction restitution fee. Not only will that impose costs fairly, it will deter such incidents for the future.

Reasonable people may differ over which services should be provided by government and which should be run privately. But both sides of the political spectrum should agree that protecting the free exchange of ideas, and the physical safety of those who engage in it, must rank near the top of public imperatives. Free expression cannot be a luxury for only those who can afford private security.

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