After Charlottesville, How Committed Do We Remain to Free Speech for All?

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The Nazis marching in Skokie[1], Illinois, almost seems like a quaint image now—a twisted Norman Rockwell painting of sorts. Until recently, that protest was a perfect metaphor for our country's cultural commitment to the protection of all speech: a Jewish lawyer for the ACLU takes on the cause of a bunch of Jew-haters who antagonistically picked a peaceful suburb with a sizeable Holocaust-survivor population for their hateful protest.[2] Now that's all-in for the First Amendment.

Indeed, from the 1770 Boston Massacre[3] through the 2017 Women's March after the inauguration of President Donald J. Trump, vehement public protest—even by protestors who offend some or most of us—has been a fundamental part of what makes the United States unique. We gather together to loudly share our views, and we count on the police and the law to protect us.Democracy grows stronger when it encourages public dissent.

Or, so we have all grown up to believe. Somehow, Charlottesville feels like someone threw a can of black paint on that Rockwell image. Since the ugliness there, even some of the most ardent First Amendment advocates among us—to the point of screaming debate in a New York City bar[4]—wonder if we need to rethink our convictions.

To be sure, the law does draw lines between permissible and non-permissible forms of protests in many ways: First Amendment carve-outs for true threats, incitement, fighting words; divining between symbolic speech and pure conduct; protecting the Second Amendment right to bear arms while precluding people from brandishing guns in others' faces; the government's ability to regulate the time, place and manner of speech in content-neutral fashion.

But for those of us who have studied the issue—and argued them in courts—the lines are, at times, very blurry. And the white supremacist in Charlottesville who barreled his car into the crowd killing a protestor—and his club-toting colleagues—clearly come nowhere close to the line protecting freedom of speech.

To further the discussion of where the lines ought to lie, and we are witnessing the case being made to redraw them, we offer this brief review of where they currently are drawn. And some research help to those who continue to struggle with finding sensible solutions in increasingly insane political times.

Hate Speech Is Protected under the First Amendment, Hate Crimes Are Not

"Hate speech" is a colloquial label attached to expressions that are extremely offensive to a particular group of people, or that directly call out and oppose the beliefs, conduct, or identity of others.

Under the First Amendment, however, "hate speech" is treated the same as any other speech. No matter how disgusting, expressions are protected as long as they do not fall into the narrow categories of fighting words, incitement, true threats, or other unprotected speech. As the Supreme Court said, by 1969 it was "firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers."[5] The Supreme Court reaffirmed this principle as recently as July 2017: "Speech that demeans on the basis of race, ethnicity, gender, religion, age, disability, or any other similar ground is hateful; but the proudest boast of our free speech jurisprudence is that we protect the freedom to express the thought that we hate."[6]

This does not mean, however, that expressions of hate never have legal consequences. Forty-five states, the District of Columbia, and the federal government punish hate crimes under criminal law. These laws punish a defendant who selected a victim for a crime because of the person's identity, either by increasing the maximum punishment available or setting a minimum sentence for the underlying offense.[7]

The categories protected by hate crime statutes usually include race, religion, color, disability, sexual orientation, and national origin, but these vary between jurisdictions. For example, Illinois prohibits selecting a victim based on sexual orientation or gender identity, while Wisconsin only addresses sexual orientation—and Pennsylvania addresses neither.[8]

Punishing a person for his or her hateful or biased motivation in this way does not violate the First Amendment. The Supreme Court has made clear that hate crime statutes are constitutional because criminal acts are not protected forms of expression, and "bias-inspired conduct" can be viewed as "inflict[ing] greater individual and societal harm."[9] When it comes to punishing hate, the distinction between hateful *speech* and hateful *conduct* is paramount.

Fighting Words, True Threats, and Incitement

The U.S. Supreme Court has held that the First Amendment does not protect certain narrow categories of speech that form "no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in

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order and morality."[10] Three such categories of unprotected speech are "fighting words," "true threats," and "incitement." Although legally distinct, these categories often overlap and speech is often challenged under two or more categories.

A. "Fighting Words" Are Not Protected

"Fighting words" are "personally abusive epithets" that "by their very utterance inflict injury or tend to incite an immediate breach of the peace."[11] To qualify as "fighting words," the words must be "directed to the person of the hearer," meaning the doctrine has generally been limited to "face-to-face" interactions.[12] The words "must do more than bother the listener; they must be nothing less than 'an invitation to exchange fisticuffs.'"[13]

The "fighting words" exception was established by the Supreme Court in *Chaplinsky v. New Hampshire*, 315 U.S. 573 (1942). In that case, the Court affirmed the defendant's conviction under a state law prohibiting "offensive, derisive or annoying words to any other person" in a public place where the defendant repeatedly told a city marshal "You are a God damned racketeer" and a "damned Fascist."[14] In recent years, however, the fighting words doctrine has become very limited and is rarely invoked successfully, largely because "[s]tandards of decorum have changed dramatically since 1942" and "indelicacy no longer places speech beyond the protection of the First Amendment."[15] Today, a "clear example" of "fighting words" would be where one man, engaged in a face-to-face conversation, became angry and called the other man a "lying motherf***er" leading to a physical altercation.[16]

A recent case involving anti-gay speech on a college campus illustrates the difference between highly offensive, yet protected speech directed at a crowd, and unprotected "fighting words" directed to an individual. In *Gilles v. Davis*, 427 F.3d 197 (3rd Cir. 2005), a self-styled "campus evangelist," addressed a crowd in a busy public area. He preached invective against the LGBT community, cautioning students to "watch out [because] the homosexuals are after you on this campus" and announced that "nothing is lower than a lesbian." At that point, a woman in the crowd volunteered that she was a Christian lesbian, and he took to pejorative taunting. This engendered angry responses from the crowd, someone called the campus police, and he was arrested for disorderly conduct. He later brought a civil suit against the campus police, claiming they had violated his First Amendment rights. The Third Circuit disagreed. The court held that the speaker's "derogatory language generically directed to the crowd" was protected by the First Amendment as it was "not personally directed at a particular member of the audience" and was "not likely to incite an imminent breach of the peace," but the "epithets directed at the woman who identified herself as a Christian and a lesbian" were "akin to a racial slur" and were "especially abusive and constituted fighting words."

The "fighting words" doctrine has been addressed in a variety of other contexts:

- ***Offensive Speech on Clothing.*** In *Cohen v. California*, 403 U.S. 15 (1971), the Supreme Court overturned a man's criminal conviction for disturbing the peace for wearing a jacket bearing the words "Fuck the Draft" in the public corridors of a courthouse, holding that "no individual actually or likely to be present could reasonably have regarded the words on [the] jacket as a direct personal insult."
- ***Flag Burning.*** In *Texas v. Johnson*, 491 U.S. 397 (1989), the Supreme Court overturned the defendant's criminal conviction for burning an American Flag during a protest, holding that the act was expressive conduct protected by the First Amendment and that the defendant's statements expressing dissatisfaction with the federal government's policies did "not fall within the class of 'fighting words' likely to be seen as a direct personal insult or an invitation to exchange fisticuffs."
- ***Ku Klux Klan Activities.*** In *Virginia v. Black*, 538 U.S. 343 (2003), the Supreme Court held that a state may constitutionally ban cross-burning if done with an intent to intimidate a person or group of people. Although often analyzed under the "true threats" or "incitement" doctrines (see below), cross burning may also constitute "fighting words." For example, a federal district court in Texas found that intimidating statements made by Ku Klux Klan members directed to a class of Vietnamese fishermen living in the area, coupled with overt acts of burning a shrimp boat and cross at a rally, and having a boat parade in which an effigy of a Vietnamese fisherman was hung from the rear deck rigging, were unprotected as "fighting words."[17]
- ***Anti-Gay Speech.*** In *Snyder v. Phelps*, 562 U.S. 443 (2011), the Supreme Court held that anti-gay speech on a matter of public concern cannot be the basis of liability for a tort of emotional distress, even if the speech is viewed as "offensive" or "outrageous." The Court also stated, in *dicta*, that the demonstrators' signs, saying things like "God Hates the USA/Thank God for 9/11," Thank God for Dead Soldiers," "God Hates Fags," "Pope in Hell," "Priests Rape Boys," and "You're Going to Hell," were "not fighting words."[18]
- ***Anti-Muslim Speech.*** Recent cases have held that hateful speech directed against Muslims are protected by the First Amendment unless directed at individuals and likely to incite an immediate breach of the peace. For example:

1. The Sixth Circuit recently held that the First Amendment rights of a group of "selfdescribed Christian evangelists" were violated when they were removed from an Arab International Festival and cited by police. The Christian group

was removed after preaching, "You believe in a prophet who is a pervert" and "God will put your religion into hellfire when you die." The Sixth Circuit held that these statements did not constitute "fighting words" because they were "not directed at any individual" and that "the average individual attending the Festival did not react with violence … only a certain percentage engaged in bottle throwing when they heard the proselytizing."[19]

2. Two federal district courts recently held that municipal transit authorities could not refuse to display antiMuslim advertisements purchased by a pro-Israel advocacy group, including subway ads stating that "IN ANY WAR BETWEEN THE CIVILIZED MAN AND THE SAVAGE, SUPPORT THE CIVILIZED MAN. SUPPORT ISRAEL. DEFEAT JIHAD" and bus ads portraying a menacing-looking man with a head scarf and the statement "Hamas MTV: Killing Jews is Worship that draws us close to Allah. That's His Jihad." However, one court vacated its opinion as moot after the transit authority revised its regulations to prohibit the display of *all* political advertisements, not just those dealing with anti-Muslim issues.[20]

- ***Anti-Abortion Protests***. Offensive signs held by protestors outside abortion clinics will not qualify as "fighting words" unless accompanied by invective likely to incite a breach of the peace directed at individuals working in the clinics, or patients or their families. For example, the Tenth Circuit has held that signs reading "The Killing Place" displayed by protestors outside an abortion clinic were not "fighting words" because they "were not personally abusive epithets so directed that they were 'inherently likely to provoke violent reaction.'"[21] Similarly, a federal district court in Kentucky held that signs containing graphic photographs of an aborted fetus could not be proscribed as fighting words.[22]
- ***Insulting a Police Officer***. In general, insults or swear words spoken to police officers are not punishable as fighting words.[23] For example, a person cannot be punished if, while getting a ticket, he or she tells an officer "this sucks" and "you're a fucking asshole." Similarly, it was not punishable where a person trying to retrieve his automobile from impound at a police station said "you're really being [an] asshole" and "you're really stupid."[24] But if the epithets go beyond merely insulting language, they might be considered "fighting words." For example, where a person made repeated personal attacks on the officers screaming things like "Mother F***ers," "F*** heads," and "F***ing pigs."[25] As one federal court put it: "if calling someone a goddamn f***ing pig' does not exemplify 'fighting words' [the court] was hard pressed to imagine what words could be so construed."[26]

B. "True Threats" Are Not Protected

"True threats" have been defined as "statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals."[27] The threat itself is the crime, even if never carried out. As the Supreme Court explained in *Virginia*: "The speaker need not actually intend to carry out the threat. Rather, a prohibition on true threats protects individuals from the fear of violence and the disruption that fear engenders, as well as from the possibility that the threatened violence will occur." The Supreme Court further explained that "[i]ntimidation … is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death."[28]

Importantly, "true threats" are distinguished from mere hyperbole or joking or facetious remarks, which are protected by the First Amendment. Thus, in determining whether or not a particular statement is a "true threat," it is necessary to consider the overall context in which the statement was made and the reaction of the listeners. For example, in the seminal "true threats" case of *Watts v. United States,* 394 U.S. 705 (1969), the Supreme Court reversed an 18-year old man's conviction for violating a federal law criminalizing threats against the President based on the man's statements at a Vietnam War protest that he had been ordered to report for a draft physical and "If they ever make me carry a rifle the first man I want to get in my sights is L.B.J." While the Court recognized that "true threats" are not protected by the First Amendment, it held that the statements were mere "political hyperbole" which, taken in context, were nothing more than "a kind of very crude offensive method of stating a political opposition to the President." Similarly, in *Claiborne Hardware*, the Supreme Court reversed the conviction of a man who stated at a boycott rally that if anyone violated the boycott "we're going to break your damn neck." The Supreme Court held that the statement, taken in the context of the man's "lengthy speeches," which "generally contained an impassioned plea for black citizens to unify, to support and respect each other, and to realize the political and economic power available to them," were not punishable.

Federal circuit courts have disagreed about the intent required for a true threat: a majority apply an objective test, which requires only that an objective or reasonable recipient of the communication would regard it as an actual threat, whereas the Ninth Circuit has applied a subjective intent test, which requires that the speaker subjectively intended his statements to be interpreted as an actual threat.[29] The Supreme Court recently passed on an opportunity to resolve this issue in *Elonis v. United States,* __ U.S. __, 135 S.Ct. 2001 (2015), which dealt with a man convicted under a federal statute for making threats on Facebook to his estranged wife and others.

The Court reversed the conviction, but decided that case on statutory grounds, expressly declining to address any First Amendment issues, including what intent—objective or subjective—is required by the First Amendment.

Some examples of cases involving "true threats" include:

- ***Threats to Judges***. Threats against judges are often held to be "true threats." For example, in one case the Ninth Circuit held that the defendant's statement that he wanted to target a judge and "string the motherfucker up and cut her throat, his throat, and make it like a copycat so that people would do the same thing" combined with an offer to provide weapons and money reward was a "true threat" under both an objective and subjective standard.[30] In another case, the Eighth Circuit affirmed a defendant's conviction for obstruction of justice and threatening a federal official where the defendant mailed to the home of a federal district judge a letter stating that a foreclosure the judge had entered against the defendant was unconstitutional and attached a "Public Notice of Treason" which stated in part that "*TREASON* by law, is punishable by the *DEATH PENALTY.*"[31]
- ***Threats to Students.*** Whether a student's threats to harm other students constitutes a punishable "true threat" often depends on the context and demeanor of the speaker. Two cases decided by the Washington Supreme Court are illustrative:

1. A defendant student told the victim that he would "bring a gun to school tomorrow and shoot everyone." The court held this was not a "true threat" because of the defendant's demeanor (he was "half smiling" when he made the threat and "giggling" afterward) and history with the victim (they had known each other for over two years and never had a fight or disagreement, and the defendant had always treated the victim nicely.)[32]
2. A defendant student told a therapist and later a deputy that he wanted to kill fellow high school students who had teased him. The court held this was a "true threat" because of the student's serious change in demeanor when describing his plan to kill the boys, the plan's depth of detail, and the student's failure to acknowledge that shooting the boys would be wrong.[33]

- ***Anti-Abortion Speech.*** Even if highly offensive, speech by anti-abortion protestors is unlikely to qualify as a "true threat" unless directed at specific individuals. In *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 773 (1994), the Supreme Court confirmed that a state can constitutionally ban protestors from displaying "signs that could be interpreted as threats or veiled threats" directed to patients or their families, but held that a law banning all "images observable" from the clinic violated the First Amendment even if the ban was intended to "reduce the level of anxiety and hypertension suffered by the patients inside the clinic." By contrast, the Eight Circuit in *United States v. Dinwiddie,* 76 F.3d 913, 917 (8th Cir.1996), found a true threat when the defendant sent more than fifty messages to an abortion clinic director, including: "Robert, remember Dr. Gunn . . . This could happen to you . . . Whoever sheds man's blood, by man his blood shall be shed. . . ."
- ***Mere Hyperbole***. Speech that others find offensive or even frightening will not constitute a "true threat" if it can be viewed as mere "hyperbole." For example, the Ninth Circuit recently held that a number of messages painted on a Volkswagen van, such as "I AM A FUCKING SUICIDE BOMBER COMMUNIST TERRORIST!," "PULL ME OVER! PLEASE, I DARE YA," "ALLAH PRAISE THE PATRIOT ACT … FUCKING JIHAD ON THE FIRST AMENDMENT! P.S. W.O.M.D. ON BOARD!" were not true threats even though a woman called the police to report that she was frightened by them. The Ninth Circuit explained that they were "obviously satiric or hyperbolic political message[s]," and no "reasonable observer would have believed the statements were serious expressions of an intent to cause harm."[34]
- ***Exhortations to Third-Party Violence***. Whether a speaker's calls for others to engage in violence are "true threats" is a fact intensive inquiry that depends on the circumstances in each case.

1. Not True Threats
   - Internet posts by the leader of a white supremacist organization urging others to kill a Canadian civil rights attorney were not "true threats" because the posts did not express the defendant's own intent to kill the attorney, and there was insufficient evidence that defendant had "some control over those other persons" or that the defendant's "violent commands in the past had predictably been carried out."[35]
   - Posts to an online financial discussion board shortly before Barack Obama's election, one of which stated "Re: Obama fk the niggar, he will have a 50 cal in the head soon" although "particularly repugnant" were not "true threats" because there was "no explicit or implicit threat on the part of [defendant] that he himself will kill or injure Obama" but instead just an "imperative that some unknown third party should take violent action."[36]
2. True Threats
   - Defendant who published a blog post declaring that three Seventh Circuit judges "deserve to be killed" and "to be made an example of" for their decision that the Second Amendment did not apply to the states, and posted photographs, work addresses, and room numbers for each

of the three judges, along with a map indicating the location of the courthouse and its anti-truck bomb barriers, and further suggested that the judges "didn't get the hint" sent by a gunman who had murdered the family of another federal judge in Chicago.[37]

- Anti-abortion group that published, in the wake of the murder of several abortion doctors that had been listed on pro-life "Wanted" posters, so-called "Deadly Dozen" posters listing the names and addresses of abortion providers in the area and deeming them "Guilty of Crimes Against Humanity"[38]
- Defendant who published posts on his Facebook page urging his "religious followers" to "kill cops. drown them in the blood of their [sic] children, hunt them down and kill their entire bloodlines" and provided names and later instructed his "religious operatives" that "if my dui charges are not dropped, commit a massacre in the stepping stones preschool and day care, just walk in and kill everybody."[39]

C. "Incitement" Is Not Protected

Under the "incitement" exception, speech is not protected if it is both (1) "directed to inciting or producing imminent lawless action" *and* (2) "likely to incite or produce such action."[40] Importantly, "mere *advocacy* of the use of force or violence" does not constitute "incitement" and is protected by the First Amendment.[41] This is so because "the mere abstract teaching ... of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action."[42]

The incitement doctrine was established in *Brandenberg*, a landmark decision that arose from a Ku Klux Klan leader's speech at a rally that criticized Blacks and Jews and threatened "revengeance" if the "suppression" of the white race continued. The speaker was convicted under a state law that proscribed the advocacy of "crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform." The Supreme Court reversed the conviction, holding that the law was unconstitutional because the First Amendment does "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."[43]

Since *Brandenberg,* the Supreme Court has made clear that the state cannot "assume that every expression of a provocative idea will incite a riot" and must instead give "careful consideration of the actual circumstances surrounding such expression."[44] The Supreme Court's decision in *Claiborne Hardware,* 458 U.S. 886 is instructive. That case arose out of the 1960s civil rights movement and involved a boycott of white merchants in Mississippi. Charles Evers, an official of the NAACP, had stated in speeches that the boycott organizers knew the identify of those who had violated the boycott, and would take action against them. Evers also stated that "[i]f we catch any of you going into any of them racist stores, we're going to break your damn neck" and that the sheriff would be unable to protect boycott violators. The trial court awarded the merchants damages and granted injunctive relief. The Supreme Court reversed, explaining that Evers' lengthy speeches "generally contained an impassioned plea for black citizens to unify, to support and respect each other, and to realize the political and economic power available to them." The Court also explained that while "strong language was used," any acts of violence—with one possible exception—occurred weeks or months after the speech so it did not carry with it an imminent threat of violence.[45]

The "incitement" doctrine differs in two ways from the "fighting words" and "true threats" doctrines. First, for the inciter the goal is to prompt third parties to engage in unlawful acts with some immediacy. By contrast, under the "fighting words" and "true threat" doctrines, the actor's statements are targeted at a specific, identifiable person or group of people, who have been targeted by the speaker as his victims. Second, as to the context, the inciter is advocating imminent lawless action in a public setting and speaking extemporaneously. Specifically, the inciter is typically speaking to an audience urging them to take unlawful action. By contrast, the "fighting words" and "true threats" doctrines focus primarily on whether the statements have been directed at individuals or specific groups of individuals, which is less likely to occur in a public setting where the speaker is communicating broadly to a large group of people. [46]

Guns at Rallies

More modern controversy surrounding rallies has involved the mixture of protestors and guns. The fundamental right to own guns afforded by the Second Amendment, and the fundamental right to congregate and exercise free speech—as Charlottesville has clearly demonstrated—can be a volatile mixture. The courts are still sorting out the path to peaceful protests where people are permitted to bring their guns.

A. The Second Amendment to the U.S. Constitution

The United States Constitution does not grant an express right to bring a gun to a public gathering—a political protest, a town meeting, or some other event held on public or quasi-public property. However, other sources of law, such as state constitutions and statutes, provide rights that are broader than what the Supreme Court has interpreted the Second Amendment to require.

The Second Amendment, in its entirety, states: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." The Court has not directly addressed how this right plays out in the context of protests, rallies, and similar public gatherings.

The Supreme Court has interpreted the Second Amendment as guaranteeing an individual right

(as opposed to a right exercised by states, as some have argued) to "keep and bear arms."[47]The Supreme Court has not directly addressed how this right plays out in the context of protests, rallies, and similar public gatherings.

While there is clearly an individual right to keep and bear arms, federal, state, and local government may limit this right, although the parameters of their authority is still being developed by the courts.[48] The leading Supreme Court cases articulating the scope of this right, *Heller* and *McDonald* and were decided in the last decade, and the Court has not returned to the issue in any significant way since *McDonald* in 2010.

For example, while the Supreme Court found in *Heller* that an outright ban on private handgun ownership was unconstitutional, it has not opined on whether the Second Amendment protects the right to own other forms of firearms, whether firearms may be carried openly in public ("open carry") or in a concealed manner ("concealed carry"), or under what conditions requiring a license to carry is permissible. Most lower federal courts have held that such restrictions are generally constitutional, although one federal court struck down an Illinois law broadly prohibiting open carry in that state.[49]

Furthermore, some restrictions are presumed to be lawful, such as longstanding prohibitions on the possession of firearms by convicted felons and by those suffering from severe mental illness, as well as laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, and provisions imposing conditions and qualifications on the commercial sale of arms.[50] Likewise, the use and ownership of "dangerous and unusual weapons" may be restricted.

Because Second Amendment doctrine is still evolving, addressing the presence of firearms at public protests and rallies will largely require turning to state and local law.

B. Understanding Differences in State and Local Law Is Crucial

There is wide variation in how states and municipalities approach the regulation of firearms. These laws are frequently updated and revised. As such, it is paramount for any government official or concerned citizen to understand the specific local laws that apply in his or her jurisdiction—not only at the state level, but even at county and municipal level. While this patchwork of laws can be complex, both gun rights advocacy organizations and groups advocating for greater regulation of firearms have produced a number of helpful resources to assist the public in understanding gun laws in their respective states.[51] Gun laws are often highly specific with respect to what they prohibit and allow. Minute details and variations will matter a great deal.

1. Open Carry Laws

Among state-specific requirements pertaining to guns at public events, perhaps the most pertinent issue is whether a given jurisdiction permits open carry – carrying a visible firearm in public places – and if so, the scope of that right. However, laws in this area vary widely, with some states banning open carry outright, while others place restrictions such as licensing and permitting requirements.[52]

In recent years, more states have begun allowing for open carry, and the number of states with outright prohibitions is increasingly small. One trend has been for states to adopt what is known as "constitutional carry" (also called "Vermont carry"), in which a state allows individuals to carry a handgun without a license or permit. A related issue is whether, even if a jurisdiction has adopted "constitutional carry," that state allows anyone to open carry, or whether such rights are limited to state residents or perhaps residents of states with comparable open carry regimes.

Where a state has a permissive open carry regime, it will generally be more difficult to restrict guns at rallies and protests. Indeed, most states take the view that the right to bear arms is deserving of protection, entirely separate from the Second Amendment, so it could easily be the case that in a given jurisdiction protected under state law, having guns at a rally is specifically protected while bringing glass bottles, spray paint, or even tennis balls is not. With only a handful of exceptions, state constitutions have provisions that resemble—or even copy verbatim—the language of the Second Amendment.[53] In a constitutional carry state, restraints on firearms at public events may be especially difficult to enforce. On the other hand, if a state requires a permit for open carry, or bans the practice altogether for most individuals, restrictions are more likely to pass muster under state law.

2. Location of a Rally

Even if a state has a permissive open carry regime, state laws may exempt certain locations from otherwise broad open carry policies. Places such as schools, government buildings, police stations, shopping malls, restaurants, and even entire cities may be off-limits for open carry. For example, openly carrying firearms without a permit is generally legal in Pennsylvania, but a state law makes it illegal to carry guns on public streets or property in the city of Philadelphia without a license (or exemption from licensing).[54]

Knowing what venues are exempted from open carry, or are otherwise legally designated as "gun free" zones will be helpful in addressing the prospect of firearms at a public rally. The existence of location-based restrictions could potentially serve as a basis for arguing that firearms should be limited at a specific public event.

3. Carrying vs. Brandishing

The manner in which individuals carry makes a difference, even if a jurisdiction allows for open carry, with or without a permit (as the majority of states do). Some jurisdictions permit carrying a gun but not brandishing it.

For example, in Texas it is a criminal offense to "display[] a firearm or other deadly weapon in a public place in a manner calculated to alarm."[55] Likewise, Virginia law makes it a crime to "point, hold or brandish any firearm…or any object similar in appearance, whether capable of being fired or not, in such manner as to reasonably induce fear

in the mind of another or hold a firearm …in a public place in such a manner as to reasonably induce fear in the mind of another of being shot or injured."[56]

4. Local Options for Further Regulation May Be Limited

City and other local government officials seeking to enact specific measures relating to the presence of firearms at a rally should take care to ensure that any such measures are permissible under state law. For example, even if a city wanted to ban a specific type of weapon or adopt a broader definition of "brandishing," such measures may not be allowed under state law. The majority of states have enacted laws that, in various forms, preempt local government regulation of firearms and ammunition. In most cases, a preemption statute would primarily serve to nullify a local law that is deemed improper as a matter of state law, but a small minority of states have gone further, making local officials personally liable for violating preemption laws.[57]

5. The Mere Act of Carrying a Gun Is Generally Not Protected Speech

The First Amendment does not generally protect the right of a protester to carry a weapon. Having a gun may indeed constitute symbolic speech or expressive conduct, but such speech is only protected from suppression when the government's reason for restraining it relates to its content.

For example, if the basis for suppressing a protest is that individuals are wearing handgun-shaped lapel pins or carrying inflatable "guns" that no reasonable person could think was an actual firearm or posed a danger of physical harm, suppression of this speech would likely be unconstitutional under the First Amendment. However, if a protestor is carrying a gun unlawfully (e.g., without a permit in a state that requires permitting for open carry or conceal carry), or points a gun in the direction of a counter-protestor for a reason other than self-defense (i.e., "menacing"), these legal violations could independently serve as the basis for preventing a display of firearms without raising any First or Second Amendment concerns. Indeed, even if carrying a gun was speech, such a display could, at a certain point, fall into the realm of being a "true threat" exempt from First Amendment protections.

6. The Prospect of Lawfully Armed Counter-Protestors Is Likely Insufficient Reason to Prevent a Planned Rally

Absent a "clear and present danger of immediate harm," the possibility that a given rally or protest might be met with a vociferous and potentially violent response cannot be the basis for stopping that event from taking place.Behind this doctrine is idea that government cannot punish a peaceful speaker or group as an alternative to dealing with a lawless crowd that might be offended by the speaker or group's message. Thus, if a speaker's message does not fall into a specific category of unprotected speech, such as fighting words, true threats or incitement, police and other public safety officials may have a de facto duty to protect speakers and groups that are met with resistance by other members of the public.

7. Making a Permit to Assemble Contingent on the Absence of Firearms

Whether a municipality or other government body can condition a permit on firearms not being present at a rally implicates both the First and Second Amendments, as well as jurisdiction-specific gun laws.

With respect to the First Amendment, the key question is whether such a requirement is a valid time, place and manner restriction. Generally, such requirements should likely be deemed valid under the First Amendment, although few courts have addressed the issue in a way that is directly analogous to the issue of guns at protests.Permitting schemes must be content neutral and comply various other requirements in order to survive constitutional scrutiny. A generally applicable and consistently applied prohibition on firearms and weapons at public events should not be problematic under the First Amendment, whereas decisions made on a case-by-case basis could be subject to challenge.

With respect to the Second Amendment, the Supreme Court has not specifically addressed the constitutionality of banning guns at rallies and other public events.

State-specific requirements and prohibitions will likely be the most relevant laws to consider. In states that restrict the ability of local governments to regulate firearms, officials will want to review carefully what types of actions are in the scope of their authority. Conversely, in states that generally prohibit or heavily restrict open carry, state laws will likely be of less concern.

Finding the lines in the law that demark where constitutionally protected expression begins and ends has never been easy. Indeed, the winning parties in most of the First Amendment cases we hold dear have been people ranging from strange to downright despicable.[58]

Most of us will remain forever dedicated to the notion that offensive speech has to remain protected. But recent events—especially the brutal images we watched from Charlottesville—may challenge our dedication like never before.

Endnotes

1. *See National Socialist Party of America v. Village of Skokie*, 432 U.S. 43 (1977).

2. Ron Grossman, *Flashback: "Swastika War": When the Neo-Nazis Fought in Court to March in Skokie*, CHICAGO TRIB., Mar. 10, 2017, *available at* http://www.chicagotribune.com/news/opinion/commentary/ct-neo-nazi-skokie-march-flashback-perspec-0312-20170310-story.html.

3. The commitment of Founder John Adams to the fair administration of justice prompted him to defend the British soldiers indicted for firing on the crowds at the Boston Massacre. *See* David McCullough, JOHN ADAMS, Simon & Schuster (2002).

4. For details on this vignette, somebody should subpoena the waitperson who served a group of Media Law Resource Center members gathered after an event at a Gramercy Park pub, very late one hazy night the week after the Charlottesville violence.

5. *Street v. New York*, 394 U.S. 576,

592 (1969) (reversing conviction of protestor for setting fire to American flag in violation of New York law prohibiting flag mutilation).

6. *Matal v. Tam*, __ U.S. __, 137 S. Ct. 1744, 1764 (2017) (citation omitted) (invalidating, under First Amendment, clause in Lanham Act that prohibited registration of trademarks "which may disparage . . . persons, living or dead, institutions, beliefs, or national symbols, or bring them into contempt, or disrepute.").

7. *See, e.g.*, N.Y. Penal Law § 485.10 (increasing grade of offense deemed a hate crime where underlying offense is a misdemeanor or a Class C, D, or E felony; setting minimum sentence for hate crime where underlying offense is a Class B felony or greater).

8. https://www.hrc.org/state-maps/hate-crimes

9. *Wisconsin v. Mitchell*, 508 U.S. 476, 487–88 (1993) (for purpose of resolving constitutional conflict among states, holding defendant's First Amendment rights not violated by application of a criminal provision increasing maximum punishment for aggravated battery where defendant chose victim because he was white), *but see Apprendi v. New Jersey*, 530 U.S. 466, 497 (2000) (holding New Jersey hate crime statute violated due process because statute did not require facts establishing increase in maximum punishment to be proved to a jury beyond a reasonable doubt).

10. *Snyder v. Phelps*, 562 U.S. 443, 465 (2011) (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942)).

11. *Chaplinsky*, 315 U.S. at 572; *see also Cohen v. California*, 403 U.S. 15, 20 (1971); *NAACP v. Claiborne Hardware Co*., 458 U.S. 886, 927 (1982) (describing fighting words as "those that provoke immediate violence").

12. *See Cohen*, 403 U.S. at 20 (defining fighting words as a "direct personal insult" and holding that defendant's jacket reading "Fuck the Draft" was not "directed to the person of the hearer.").

13. *Johnson v. Campbell*, 332 F.3d 199, 212 (3d Cir.2003) (quoting *Texas v. Johnson*, 491 U.S. 397, 409 (1989)).

14. *Chaplinsky*, 315 U.S. at 573.

15. *Greene v. Barber*, 310 F.3d 889, 896 (6th Cir. 2002).

16. *See, e.g., Burns v. Bd. of County Comm'rs of Jackson County*, 330 F.3d 1275, 1279, 1285 (10th Cir. 2003).

17. *Vietnamese Fishermen's Ass'n v. Knights of the Ku Klux Klan*, 543 F.Supp. 198, 208 (S.D. Tex. 1982).

18. *Snyder*, 562 U.S. at 451 n. 3.

19. *Bible Believers v. Wayne County*, Michigan, 805 F.3d 228, 234, 246 (6th Cir. 2015).

20. *See Am. Freedom Def. Initiative v. Washington Metro. Area Transit Auth.*, 898 F.Supp.2d 73, 80 (D.D.C. 2012); *Am. Freedom Defense Initiative v. Metropolitan Transit Auth.*, 70 F.Supp.3d 572 (S.D.N.Y. April 20, 2015), *order vacated* in 109 F.Supp.3d 626 (S.D.N.Y. June 19, 2015).

21. *Cannon v. City and County of Denver*, 998 F.2d 867, 869, 873–874 (10th Cir. 1993).

22. *World Wide Street Preachers' Fellowship v. City of Owensboro*, 342 F.Supp.2d 634 (W.D. Ky. 2004).

23. *Johnson v. Campbell*, 332 F.3d 199, 213 (3d Cir. 2003) ("Swear words, spoken to a police officer . . . are not 'fighting words.'").

24. *See Merenda v. Tabor*, 506 F. App'x. 862, 864 (11th Cir. 2013); *Greene v. Barber*, 310 F.3d 889, 896 (6th Cir. 2002); *see also United States v. Poocha*, 259 F.3d 1077, 1082 (9th Cir. 2001) (clenching fists, sticking out chest, and yelling "f*** you" to officer was not fighting words); *Buffkins v. City of Omaha*, 922 F.2d 465, 472 (8th Cir. 1990) (calling a police officer an a**hole was protected speech); *L.A.T. v. Florida*, 650 So. 2d 214, 215–18 (Fla. Dist. Ct. App. 1995) (words such as "You f***ing cops, what the h*ll do you think you're doing? You are full of bull sh*t" were not fighting words); *State v. John W.*, 418 A.2d 1097, 1103, 1108 (Me. 1980) (holding that "Hey, you f***ing pig, you f***ing kangaroo" were not fighting words).

25. *McCormick v. City of Lawrence*, 325 F. Supp. 2d 1191, 1197, 1201-02 (D. Kan. 2004); *see also Pringle v. Ct o Com. Pl.*, 604 F. Supp. 623, 626 (M.D. Pa. 1985) (holding that calling a police officer a 'goddamn f***ing pig' were fighting words); *Woodward v. Gray*, 241 Ga. App. 847, 527 S.E.2d 595, 599–600 (2000) (listing as examples of fighting words: "son of a b*tch," "motherf***er," "bastard," "b*tch," "motherf***ing pig," and "pig"); *Commw. v. Mastrangelo*, 489 Pa. 254, 414 A.2d 54, 55–56, 58 (1980) (holding that "f*** ing pig" and other epithets were fighting words); *City of Springdale v. Hubbard*, 52 Ohio App. 2d 255, 369 N.E.2d 808, 810–12 (1977) (finding "f* * *ing pigs" to be fighting words).

26. *Pringle*, 604 F.Supp. at 626 .

27. *Virginia*, 538 U.S. at 359–60.

28. *Id*.

29. *Compare United States v. Mabie*, 663 F.3d 322, 332–33 (8th Cir. 2011) *cert. denied*, 568 U.S. 829, (2012) (applying an objective test for determining whether a communication is a "true threat," and citing the majority of other circuits applying an objective standard) with *United States v. Cassel*, 408 F.3d 622 (9th Cir. 2005) and *United States v. Bagdasarian*, 652 F.3d 1113 (9th Cir. 2011) (applying a subjective intent test).

30. *United States v. Stewart*, 420 F.3d 1007, 1015 (9th Cir. 2005).

31. *United States v. Schiefen*, 139 F.3d 638 (8th Cir. 1998).

32. *State v. Kilburn*, 151 Wash.2d 36, 39, 84 P.3d 1215 (Wash. 2004).

33. *State v. Trey M.*, 186 Wash. 2d 884, 906-07, 383 P.3d 474 (Wash. 2016).

34. *Fogel v. Collins*, 531 F.3d 824, 827, 831–32 (9th Cir. 2008).

35. *United States v. White*, 670 F.3d 498, 506, 513 (4th Cir. 2012).

36. *Bagdasarian*, 652 F.3d at1119, 1122.

37. *United States v. Turner*, 720 F.3d 411, 413 (2d. Cir. 2013).

38. *Planned Parenthood of the Columbia/Williamette, Inc. v. Am. Coalition of Life Activists*, 290 F.3d 1058 (9th Cir. 2002).

39. *United States v. Wheeler*, 776 F.3d 736, 738 (10th Cir. 2015).

40. *Hess v. Indiana*, 414 U.S. 105, 108 (1973).

41. *Claiborne Hardware Co*., 458 U.S. at 927.

42. *Brandenberg v. Ohio*, 395 U.S. 444, 448 (1969) (quoting Noto v. United States, 367 U.S. 290, 297-298 (1961)).

43. *Brandenberg*, 395 U.S. at 447–48 (1969).

44. *Johnson*, 491 U.S. at 409.

45. *Claiborne Hardware Co.*, 458 U.S. at 928-29.

46. *See, e.g.*, Jennifer Elrod, *Expressive Activity, True Threats, and the First Amendment*, 36 CONN. L. REV. 541, 566–69 (Winter 2004).

47. *District of Columbia v. Heller*, 554 U.S. 570, 628 (2008)(striking down the District of Columbia's strict handgun ban on Second Amendment grounds, with the majority asserting that "the inherent right of self-defense has been central to the Second Amendment right," and concluding that the Second Amendment confers on private individuals a

right to keep basic firearms, including handguns, at home for self-defense).

48. *McDonald v. City of Chicago*, 561 U.S. 742 (2010)(holding that the Second Amendment is a "fundamental right," which limits state and local governments as well as the federal government, as Heller had only addressed the Second Amendment as applied to the federal government).

49. *Hightower v. Boston*, 693 F.3d 61 (1st Cir. 2012) (finding that a Massachusetts statute governing the revocation of licenses to carry firearms did not on its face violate the Second Amendment); *Kachalsky v. Cnty. of Westchester* (limiting carrying of handguns in public to those with "a special need for self-protection."); *Drake v. Filko*, 724 F.3d 426 (3d Cir. 2013) (holding that a New Jersey requirement that applicants demonstrate a "justifiable need" to publicly carry a handgun for self-defense qualified as a "presumptively lawful," "longstanding" regulation and thus did not burden conduct within the scope of the Second Amendment's guarantee of an individual right to bear arms); *Woollard v. Gallagher*, 712 F.3d 865 (4th Cir. 2013) (upholding as constitutional a Maryland requirement that handgun permit applicants demonstrate "good and substantial reason"); *Peruta v. Cty. of San Diego*, 824 F.3d 919 (9th Cir. 2016), cert. denied sub nom. *Peruta v. California*, 137 S. Ct. 1995 (2017) (holding that the Second Amendment right to keep and bear arms does not include the right to carry concealed firearms in public); *Peterson v. Martinez*, 707 F.3d 1197 (10th Cir. 2013) (concluding that the Second Amendment's guarantee does not include a right to carrying concealed firearms); *but see Moore v. Madigan*, 702 F.3d 933 (7th Cir. 2012) (striking down an Illinois law prohibiting outright the public carrying of firearms).

50. *Heller*, 561 U.S. at 626.

51. *See* State Gun Laws, National Rifle Association Institute for Legislative Action, *available at* https://www.nraila.org/gun-laws/state-gun-laws; Law Center to Prevent Gun Violence, *available at* http://smartgunlaws.org/search-gun-law-by-state.

52. For example, South Carolina criminalizes open carry with respect to handguns, even if an individual holds a concealed carry permit. S.C. Code Ann. § 16-23-20. Iowa, on the other hand, allows concealed carry permit holders to open carry. Iowa Code § 724.4.

53. *See e.g.*, Nebraska State Constitution Art. I, § 1 ("All persons are by nature free and independent, and have certain inherent and inalienable rights; among these are life, liberty, the pursuit of happiness, and the right to keep and bear arms for security or defense of self, family, home, and others, and for lawful common defense, hunting, recreational use, and all other lawful purposes, and such rights shall not be denied or infringed by the state or any subdivision thereof"); *see also* Constitution of Hawaii Art. I, § 17 ("A well regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed"); Vermont Constitution Ch. I, art. 16 ("That the people have a right to bear arms for the defence of themselves and the State -- and as standing armies in time of peace are dangerous to liberty, they ought not to be kept up; and that the military should be kept under strict subordination to and governed by the civil power").

54. 18 Pa. Stat. and Cons. Stat. Ann. § 6108.

55. Tex. Penal Code Ann. § 42.01 (a)(8).

56. Va. Code Ann. § 18.2-282 (A).

57. See e.g., Ariz. Rev. Stat. § 13-3108 (I)("If a court determines that a political subdivision has knowingly and willfully violated this section [preempting local firearms regulations], the court may assess a civil penalty of up to fifty thousand dollars against the political subdivision.").

58. *See* Charles D. Tobin, Inglorious Bastards and Other Patriotic Americans, COMMUNICATIONS LAWYER, June 1, 2011 (ABA Forum on Communications Law).