DISCIPLINING THE "DISRUPTIVE" STUDENT HECKLER

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ABSTRACT

The recent rise of state statutes and policies that discipline disruptive student protestors raises a host of important, yet largely unaddressed, constitutional questions. This Commentary seeks to identify the constitutional issues raised by such disciplinary systems, in addition to making three principal contentions. First, this Commentary argues that any state disciplinary policy that subjects disruptive student protestors to punishment must not be unconstitutionally overbroad. Second, and by contrast, state disciplinary statutes or policies must specify what is prohibited and what is allowed to avoid chilling the expression of constitutionally protected speech. Third, this Commentary normatively contends that a carefully crafted disciplinary sanction regime may encourage civic activism as students will feel more comfortable expressing their views when

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they know which conduct is clearly permitted and which is subject to discipline. Speakers may also find confidence in voicing their perspectives to an audience subject to a disciplinary regime which punishes overly disruptive speech and behavior. In short, a disciplinary sanction regime, accompanied by defined terminology, may further the significant government interest in promoting a sort of marketplace, where students are exposed to a variety of different ideas, and where contrarian points of view are freely expressed on campus.

I. INTRODUCTION

On September 27, 2017, Claire Guthrie Gastañaga took the stage at the College of William and Mary.[1] As the Executive Director of Virginia's American Civil Liberties Union, she was invited to discuss the intersection between college students and free speech rights on college campuses.[2] Minutes into her speech, however, students lined the stage and interrupted the address.[3] The students, who were protesting the ACLU's decision to defend white supremacists' First Amendment rights to march through Charlottesville,[4] shouted over Ms. Gastañaga's remarks with chants of "Shame! Shame! Shame!" and "[y]our free speech hides beneath white sheets."[5] Ms. Gastañaga was unable to continue her speech due to the student heckling.[6] Within days, the ACLU rebuked the student protestors who both disrupted "the robust debate that should be the hallmark of the culture of inquiry on a college campus" and silenced "others who took actions or h[e]ld views based on principles with which they disagree[d]."[7] Ms. Gastañaga also responded directly to the event by "encouraging campus leaders" to "[v]igilantly defend the equal rights of

[1] Jeremy Bauer-Wolf, *Free Speech Advocate Silenced,* INSIDE HIGHER ED. (Oct. 6, 2017), https://www.insidehighered.com/news/2017/10/06/william-mary-students-who-shut-down-aclu-event-broke-conduct-code.

[2] *Id.*

[3] *Id.*

[4] *ACLU Statement on Charlottesville Violence and Demonstrations*, ACLU (Aug. 12, 2017), https://www.aclu.org/press-releases/aclu-statement-charlottesville-violence-and-demonstrations?redirect=news/aclu-statement-charlottesville-violence-and-demonstrations.

[5] Bauer-Wolf, *supra* note 1.

[6] *Id.*

[7] Claire Guthrie Gastañaga, *ACLU-VA Statement Regarding Sept. 27 Event at the College of William & Mary*, ACLU OF VA. (Oct. 5, 2017, 5:15 PM), https://acluva.org/en/news/aclu-va-statement-regarding-sept-27-event-college-william-mary.

all speakers and all ideas to be heard," and prevent a "heckler's veto" from silencing speakers, no matter how controversial their point of view.[8] In the wake of the incident, the College of William and Mary condemned the student protest and acknowledged that the students' disruptive shouting violated the student code of conduct.[9] Public officials at the College nonetheless "declined to answer whether the students would be disciplined" for their heckling.[10]

The use of the heckler's veto to silence a controversial speaker at William and Mary was far from an isolated event. In fact, students increasingly have used disruptive protests to effectively mute visiting speakers with whom they disagree.[11] A number of states have responded with laws designed to discipline students who silence the free speech rights of others.[12] For instance, North Carolina enacted House Bill 527, which directs public institutions to "implement a range of disciplinary sanctions" for anyone who, for example, "substantially interferes with the protected free expression rights of others."[13] Arizona, Georgia, and Texas enacted similar statutes, and the University of Wisconsin-Madison adopted a similar policy, with each implementing a range of disciplinary sanctions for students who interfere with the free speech rights of others.[14]

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[8] *Id.*

[9] Bauer-Wolf, *supra* note 1.

[10] *Id.*

[11] *See, e.g.,* Sam Sanders, *Obama Warns Campus Protesters Against Urge To 'Shut Up' Opposition*, NPR (Dec. 21, 2015,5:00 AM), https://www.npr.org/2015/12/21/460282127/obama-warns-campus-protesters-against-urge-to-shut-up-opposition. In a 2015 interview with NPR, President Barack Obama stressed the importance of intellectually diverse perspectives in higher education. *Id.* Obama specifically commented on the rise of disruptive campus protests aimed at silencing speakers with opposing viewpoints. *Id.* At Howard University's 2016 Commencement Ceremony, Obama again discouraged efforts to "shut folks out . . . no matter how ridiculous or offensive you might find the things that come out of their mouths." Barack Obama, U.S. President, Remarks at the Howard University Commencement Ceremony (May 7, 2016, 11:47 AM), *in* THE WHITE HOUSE OFFICE OF THE PRESS SECRETARY, https://obamawhitehouse.archives.gov/the-press-office/2016/05/07/remarks-president-howard-university-commencement-ceremony.

[12] *See, e.g.,* ARIZ. REV. STAT. ANN. §§ 15-1861—1869 (2019); GA. CODE ANN. §§ 20-3-48—48.2 (2019); N.C. GEN. STAT. §§ 1160-300—304 (2018); TEX. EDUC. CODE § 51.9315 (2019).

[13] N.C. GEN. STAT. § 116-300(7).

[14] *See* ARIZ. REV. STAT. ANN. §§ 15-1861—1869; GA. CODE ANN. §§ 20-3-48—48.2; TEX. EDUC. CODE § 51.9315; *see also*, UW MADISON POLICE DEP'T & UW-MADISON DIV. OF STUDENT AFFAIRS, PROTEST GUIDELINES 4 (Sept. 2018), https://uwpd.wisc.edu/content/uploads/2018/09/Protest-Response-Guide.pdf.

Even though these disciplinary sanctions support public institutions that wish to promote diverse debate and protect the free speech rights of invited speakers, the overly broad language employed by many of these statutes risk chilling the First Amendment rights of students. The breadth of such statutory language may give administrators a discretionary "weapon to strike back against protesters," most of whom are just teenagers.[15]

Risk of overbreadth puts both universities and students in a precarious position. On the one hand, disciplinary sanctions that prevent the use of the heckler's veto assist universities in their efforts to proliferate a marketplace of ideas and protect the rights of speakers like Ms. Gastañaga. Indeed, this Commentary contends that a carefully crafted disciplinary sanction regime may encourage civic activism as students will feel more comfortable expressing their views when they know what conduct is clearly permitted and what conduct is subject to discipline. Speakers may also find confidence in voicing their perspectives to an audience subject to a disciplinary regime that punishes overly disruptive speech and behavior.

On the other hand, if disciplinary sanctions are too broad, they could chill the rights of students to "respond to speech [they] do not like."[16] In fact, the recent rise of state statutes and policies that discipline disruptive student protestors calls attention to the First Amendment's overbreadth doctrine. Make no mistake, the free speech rights of countless students hinge upon the breadth of these statutes and policies.

This Commentary seeks to engage with this development. Part II briefly describes the case law regarding the First Amendment concept known as the "heckler's veto" in the context of college campuses.[17] Part III details the rise of disciplinary sanctions instituted by both state legislatures and universities designed to punish students who silence others. Part IV identifies the overbreadth constitutional issues raised by such disciplinary systems—arguing that any state disciplinary policy that subjects disruptive student protestors to punishment must not be

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[15] Star-News, *Editorial: House Bill 527 likely to endanger free speech, not protect it*, TIMES-NEWS (May 6, 2017, 2:03 PM), https://www.thetimesnews.com/opinion/20170506/editorial-house-bill-527-likely-to-endanger-free-speech-not-protect-it.

[16] United States v. Alvarez, 567 U.S. 709, 728 (2012).

[17] Professor Harry Kalven was the first to conceptualize the theory of the heckler's veto. *See* Frederick Schauer, *Harry Kalven and the Perils of Particularism*, 56 U. CHI. L. REV. 397, 400 (1989).

overbroad. Instead, this Part contends that the statutes or policies must be precisely defined to clearly specify "what is prohibited and what is allowed" to avoid chilling the expression of students' constitutionally protected speech.[18] Part V normatively argues that a carefully crafted disciplinary sanction regime both protects speakers and students' First Amendment rights and promotes the government's significant interest in fostering intellectually engaging and wide-ranging debate on college campuses. Finally, Part VI offers concluding remarks.

II. THE DISRUPTIVE STUDENT'S HECKLER'S VETO

Public universities, which must adhere to the First Amendment's Free Speech Clause as state actors,[19] "are constitutionally required to allow speakers invited by student groups" to voice their perspectives, because public universities cannot engage in viewpoint discrimination.[20] A speaker invited to a college campus therefore cannot be excluded from speaking "based on his or her views," regardless of the offensiveness of the speech.[21] For that reason, universities that open their doors to visiting speakers have a duty "even in the face of widespread discomfort, disgust, and outrage at a speaker's message" to "protect citizens' free speech rights."[22] In certain circumstances, then, the government can use

[18] Erwin Chemerinsky, *The Challenge of Free Speech on Campus*, 61 HOWARD L. J. 585, 595 (2018).

[19] The Free Speech Clause of the First Amendment was incorporated in *Gitlow v. New York*, 268 U.S. 652, 666 (1925) and provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press." U.S. CONST. amend. I.

[20] Erica Goldberg, *Competing Free Speech Values in an Age of Protest*, 39 CARDOZO L. REV. 2163, 2201 (2018). Although determining which institutions qualify as "public universities" is surprisingly tricky, in *Rosenberger v. Rector*, the Supreme Court deemed the University of Virginia to be "an instrumentality of the Commonwealth" and thereby "bound by the First and Fourteenth Amendments." 515 U.S. 819, 822 (1995); s*ee also* Christian Legal Soc'y v. Martinez, 561 U.S. 661, 685 (2010) (noting that as state actors, public universities cannot discriminate against student speech on a viewpoint basis).

[21] Chemerinsky, *supra* note 18, at 599; *see also* Healy v. James, 408 U.S. 169, 180 (1972) (holding that public colleges and universities may not discriminate against the viewpoint or content of the speaker's speech). The government can punish or deny benefits for speech based on its viewpoint so long as the speech falls within a legally unprotected category. *See id.* at 183. For instance, if the speaker is advocating violence, then the speech can be lawfully suppressed. Timothy E. D. Horley*, Essay, Rethinking the Heckler's Veto After Charlottesville*, 104 VA. L. REV. ONLINE 8, 13 (Jan. 2018). As Timothy Horley notes, "for violence-advocating speech to be proscribable" under the Brandenburg incitement test "there must be intent ('directed to'), imminence, and likelihood of actual violence." *Id.* at 21.

[22] Noah C. Chauvin, *Policing the Heckler's Veto: Toward a Heightened Duty of Speech Protection on College Campuses*, 52 CREIGHTON L. REV. 29, 44 (2018).

the "heckler's veto principle" to silence disruptive audience members—especially when "someone opposed to a speaker's message is able to disrupt the speaker and prevent the message from being delivered."[23] Yet not all heckling can be constitutionally silenced.

It is well recognized that the heckler's veto principle does not immunize speakers from "counterspeech in the form of verbal insults and disruptions."[24] As the California Supreme Court has held: "Audience activities, such as heckling, interrupting, harsh questioning, and booing, even though they may be impolite and discourteous, can nonetheless advance the goals of the First Amendment."[25] The First Amendment, as a consequence, does not dictate that the "audience must passively listen to a single point of view."[26] In fact, the United States Supreme Court recently emphasized that the "First Amendment itself ensures the right to respond to speech we do not like."[27] This doctrinal backdrop makes clear that a certain degree of heckling is constitutionally permissible and even desirable under the First Amendment. But when the protesting becomes so disruptive that it prevents a speaker's message from being delivered, the government may step in and squelch the protestor's speech.[28] What qualifies as sufficiently disruptive, however, is far from clear. The constitutional baseline is nevertheless well-established: the disruption standard undoubtedly permits the silencing of hecklers for "threatened or actual violence" targeted at the speaker.[29] Yet what remains unclear is what other forms of counterspeech are sufficiently disruptive to be constitutionally silenced. Confounding matters even further is the unresolved scope of the First Amendment rights students enjoy on college campuses.[30]

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[23] *Id.* at 33; *see also* Christina E. Wells, *Free Speech Hypocrisy: Campus Free Speech Conflicts and the Sub-Legal First Amendment*, 89 U. COLO. L. REV. 533, 554 (2018) ("When the actions of the hostile audience become violent . . . the government is permitted to intervene and arrest or remove the offending persons." (quoting 1 SMOLLA & NIMMER ON FREEDOM OF SPEECH § 10.39)).

[24] Clay Calvert, *Reconsidering Incitement,* Tinker *and the Heckler's Veto on College Campuses: Richard Spencer and the Charlottesville Factor*, 112 NW. U. L. REV. 109, 127 (2018).

[25] *In re* Kay, 464 P.2d 142, 147 (Cal. 1970).

[26] *Id.*

[27] United States v. Alvarez, 567 U.S. 709, 728 (2012).

[28] R. George Wright, *The Heckler's Veto Today*, 68 CASE W. RES. L. REV. 159, 166 (2018).

[29] *Id.* at 159.

[30] Students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506

In *Tinker v. Des Moines*, the Supreme Court recognized that school officials could sanction student speech if they reasonably conclude that the speech will "materially and substantially disrupt the work and discipline of the school."[31] Notwithstanding a number of post-secondary-speech cases decided after *Tinker*,[32] the Court has never explicitly applied the *Tinker* standard to college campuses. To be sure, in *Healy v. James*, the Court went out of its way to state that no "precedents" support the view that the "First Amendment protections should apply with less force on college campuses than in the community at large."[33] That pronouncement, however, appeared alongside the Court's recognition that there is a "mutual interest of students, faculty members, and administrators in an environment free from disruptive interference."[34] It follows that colleges must "strike[] the required balance"[35] between ensuring that students can "work in an atmosphere free of disruption" while simultaneously maintaining "the interest for students to have freedom of expression."[36] Although the Court clearly was discussing the classroom environment and not the campus environment more generally, the Court's confused guidance has nonetheless "left the federal circuits split to some degree in interpreting the free-speech rights of post-secondary students."[37]

First Amendment scholar Christina Wells interprets the muddled existing precedent in relation to the heckler's veto principle as permitting college students to "be as rude and insulting as they wish," including the right to "tell other speakers to 'shut up' or that their speech is

(1969); *see also* Healy v. James, 408 U.S. 169, 180 (1972) (noting that "state colleges and universities are not enclaves immune from the sweep of the First Amendment.").

[31] *See Tinker*, 393 U.S. at 513.

[32] *See, e.g.,* Board of Regents of the Univ. of Wis. Sys. v. Southworth, 529 U.S. 217 (2000); Rosenberger v. Rector, 515 U.S. 819 (1995); Widmar v. Vincent, 454 U.S. 263 (1981); Papish v. Bd. of Curators of the Univ. of Missouri, 410 U.S. 667 (1973); *Healy*, 408 U.S. at 169.

[33] *Healy*, 408 U.S. at 180.

[34] *Id.* at 171.

[35] *Id.*

[36] Meggen Lindsay, *Tinker Goes to College: Why High School Free-Speech Standards Should Not Apply to Post-Secondary Students—Tatro v. University of Minnesota*, 38 WM. MITCHELL L. REV. 1470, 1484 (2012).

[37] *Id.* at 1480, 1484-87 (cataloging the Circuits' application of free speech rights on college campuses and noting that the First, Second, Third, and Sixth Circuits have granted greater speech protections to university students, the Tenth and Eleventh Circuits have applied *Tinker* to postsecondary speech, and the Fifth, Seventh, and Ninth Circuits have applied secondary standards to universities in a more haphazard fashion).

unacceptable."[38] But even Professor Wells recognizes limits to the permissible scope of student audience disruptions by accepting that the heckler's veto principle represents an exception to the Court's commitment to "the wide-open arena of public discourse between citizens."[39] According to Professor Wells, that exception permits the punishment of a hostile audience member's response if it "proves to be disruptive or violent to the point of exercising a heckler's veto over speech."[40] Sanctioning punishment for disruptive protesting, however, may be difficult to reconcile with the understanding that "subtle types of suppression, such as heckling and jeering," remain constitutionally protected speech "since ordinarily members of the crowd would have an equal right to be heard."[41]

Professor Wells acknowledges the tension between permissible counterspeech and impermissible disruptive speech and cautions against interpreting the term disruptive "loosely."[42] She instead traces the scope of "disruptive" rather precisely. In her view, courts should look at "the protestors' actions, intent, and the effect of substantially altering the course of a planned lecture" to determine whether the heckler is in fact uttering impermissible and sanctionable disruptive speech.[43] Constitutional law scholars Howard Gillman and Erwin Chemerinsky would draw the "disruptive" line more broadly to capture "loud, boisterous, or inciting speech."[44] Both Gillman and Chemerinsky tether their looser understanding of disruptive speech to the principle that "the right to speak does not include a right to use speech to keep others from speaking."[45] The choice and the debate between a broad or a narrow understanding of what qualifies as disruptive accentuates the uncertainty, and potential breadth, of the term itself. Indeed, the breadth of what qualifies as disruptive provides a constitutional reason to worry as states forge ahead with statutes and policies that implement a range

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38 Wells, *supra* note 23, at 552.

39 *Id.* at 553.

40 *Id.* at 555.

41 *Regulation of Demonstrations*, 80 HARV. L. REV. 1773, 1775 (1967).

42 Wells, *supra* note 23, at 556.

43 *Id.* at 556-57.

44 *See* Howard Gillman & Erwin Chemerinsky, Commentary, *Does Disruption Violate Free Speech?,* THE CHRON. OF HIGHER EDUC. (Oct. 17, 2017), https://www.chronicle.com/article/Does-Disruption-Violate-Free/241470.

45 *Id.*

of disciplinary sanctions for students who disrupt and interfere with the free speech rights of others.

III. STATE DISCIPLINARY SANCTIONS FOR DISRUPTIVE STUDENT PROTESTORS

In response to the rise of student protestors drowning out controversial campus speakers, several states have turned to the Goldwater Institute's proposed model legislation for guidance.[46] Introduced in 2017, the proposed legislation specifically calls for laws which make clear that "protests and demonstrations that materially and substantially infringe upon the rights of others to engage in or listen to expressive activity shall not be permitted and shall be subject to sanction."[47] The proposed legislation also specifies that disruptive students should be subject to "a range of disciplinary sanctions" if they "materially and substantially interfere[] with the free expression of others."[48] Both "material" and "substantial" are defined as "sustained infringements that truly prevent a speaker from being seen or heard by an audience," meaning that "students will not be punished merely for an occasional 'boo' in response to a visiting lecturer."[49] Arizona, Georgia, North Carolina, and Texas recently enacted statutes, and the University of Wisconsin System adopted a similar policy, that closely resemble the Goldwater Institute's proposed legislation.[50]

In 2018, the University of Wisconsin Board of Regents adopted the Board's Commitment to Academic Freedom and Freedom of Expression policy, which outlines "a range of disciplinary sanctions for students . . . who engage in violent or other disorderly conduct that materially and substantially disrupts the free expression of others."[51] Anticipating overbreadth concerns regarding what qualifies as "materially and

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[46] *See* Neal H. Hutchens & Frank Fernandez, *Searching for Balance with Student Free Speech: Campus Speech Zones, Institutional Authority, and Legislative Prerogatives*, 5 BELMONT L. REV. 103, 124 (2018).

[47] Stanley Kurtz, James Manley & Jonathan Butcher, *Campus Free Speech: A Legislative Proposal*, GOLDWATER INST., at 21 (Apr. 1, 2019), https://goldwaterinstitute.org/wp-content/uploads/2019/03/Campus-Free-Speech-A-Legislative-Proposal_Web.pdf.

[48] *Id.*

[49] *Id.* at 6.

[50] Hutchens & Fernandez, *supra* note 46, at 124-26.

[51] Regent Pol'y Doc. 4-21, *Commitment to Academic Freedom and Freedom of Expression*, UNIV. OF WIS. SYS. (Oct. 6, 2017), https://www.wisconsin.edu/regents/policies/commitment-to-academic-freedom-and-freedom-of-expression/.

substantially disrupt[ive]," the UW-Madison Police Department ("UWPD") issued protest guidelines in an attempt to "provide a clear sense of appropriate behavioral parameters for students and the processes related to addressing disruption."[52] The UWPD clarified that protests that impede or "interfere with the free speech of others . . . will prompt a swift and coordinated response."[53] The guidelines, moreover, state that disruptive "[b]ehavior will be evaluated for whether it is disruptive based on when, where, and how it occurs."[54] To ensure sufficient guidance, student protestors are provided with examples of what qualifies as non-disruptive and disruptive behavior.[55] For instance, "[p]roducing noise that interferes with events and activities" will likely qualify as disruptive, whereas "[e]ngaging with a speaker if the speaker chooses to be engaged, understanding that the speaker can decide to stop engaging at any point," will likely not be considered disruptive.[56] The guidelines also guard against arbitrary selective enforcement, as they instruct UWPD enforcement officials when to "intervene" and when to "enforce" the Freedom of Expression policy.[57]

Arizona's House Bill 2563, much like the University of Wisconsin's policy, creates a "range of disciplinary actions for a student who . . . engages in individual conduct that materially and substantially infringes on the rights of other persons to engage in or listen to expressive activity."[58] Arizona's bill goes on to define the phrase "materially and substantially infringes on the rights of other[s]" to mean "conduct by a person who, with the intent to or the knowledge of doing so, materially and substantially prevents the communication of a message."[59] North Carolina, Georgia, and most recently Texas, also enacted legislation subjecting student protestors to disciplinary sanctions for disrupting the

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[52] UW-MADISON POLICE DEP'T, *supra* note 14, at 4-5.

[53] *Id.* at 2.

[54] *Id.* at 4. The "when" prong looks to whether the behavior occurred "during and near the time of an event"; the "where" prong focuses on whether the behavior occurred at "university-run or university-authorized activities"; and the "how" prong looks to whether the behavior "materially and substantially disrupt[ed] another person's freedom of expression or the ability of others to receive the expression," which is determined by "[b]ehaviors that don't cease when requested" and which "UW staff believe are significant and have a significant impact on the event." *Id.* at 4-5.

[55] *See id.* at 5.

[56] *Id.*

[57] *Id.* at 11.

[58] ARIZ. REV. STAT. ANN. § 15-1866(A)(4).

[59] *Id.* § 15-1861(2).

free expression of others.[60] But unlike Arizona's statute, neither Texas, North Carolina, nor Georgia clarify what kind of counterspeech is permissible and what kind is subject to punishment.[61]

Enacted this summer, Texas's Senate Bill 18 directs all public institutions of higher education to adopt policies that "must . . . establish disciplinary sanctions for students, student organizations, or faculty who unduly interfere with the expressive activities of others on campus."[62] The statute defines "expressive activities" as "any speech or expressive conduct protected by the First Amendment to the United States Constitution" but fails to define "unduly interfere."[63] Likewise, North Carolina's House Bill 527 requires public institutions to "implement a range of disciplinary sanctions" for anyone who "substantially disrupts . . . or substantially interferes with the protected free expression rights of others."[64] The bill goes on to state that "protests and demonstrations that infringe upon the rights of others to engage in and listen to expressive activity when the expressive activity has been scheduled pursuant to this policy" are also subject to discipline.[65] North Carolina's House Bill 527, however, does not define "substantially disrupts," "infringe[s] upon," or "interferes."[66] Similarly, Georgia's Senate Bill 339 "assure[s] that any student . . . may peacefully protest or demonstrate" so long as they "[d]o not interfere with other previously scheduled events or activities on campus occurring at the same time."[67] In the next subsection, Georgia's Senate Bill 339 further states that colleges "shall establish a range of disciplinary sanctions" to discipline anyone "who is found by his or her conduct to have interfered with the board of regents' regulations and policies relevant to free speech and expression."[68] Nowhere does Georgia's Senate Bill 339 define "interfere."[69] Georgia, North Carolina, and Texas's decisions not to define critical terms in their statutes, which subject student protestors to punishment for their

[60] *See* N.C. GEN. STAT. § 116-300; GA. CODE ANN. § 20-3-48; TEX. EDUC. CODE § 51.9315.
[61] *See, e.g.,* ARIZ. REV. STAT. ANN. § 15-1861(2)(a)—(c).
[62] TEX. EDUC. CODE § 51.9315(f)(2).
[63] *Id.* § 51.9315(a)(2).
[64] N.C. GEN. STAT. § 116-300(7).
[65] *Id.*
[66] *Id.*
[67] GA. CODE ANN. §§ 20-3-48(a)(7), (a)(7)(A).
[68] *Id.* § 20-3-48(b).
[69] *Id.* § 20-3-48.

speech, raise serious constitutional concerns under a First Amendment overbreadth analysis.

IV. STUDENT HECKLER DISCIPLINARY REGIMES AND OVERBREADTH CONCERNS

When the University of Wisconsin Board of Regents gathered to decide whether to pass its free speech policy discussed above, the current governor of Wisconsin worried that the breadth of the law's language would likely "chill and suppress free speech on . . . campus."[70] Democratic State Representative Chris Taylor voiced similar concerns, asking, "Who's going to show up to a protest if they think they could be potentially expelled?"[71] The First Amendment's overbreadth doctrine proceeds in two steps to determine whether a law is unconstitutionally overbroad because it punishes a substantial amount of constitutionally protected speech.[72] In conducting an overbreadth analysis, the first step "is to construe the challenged statute," because "it is impossible to determine whether a statute reaches too far without first knowing what the statute covers."[73] At the second step, the properly construed statute is invalidated if "a 'substantial number' of its applications are unconstitutional, 'judged in relation to the statute's plainly legitimate sweep.'"[74] The overbreadth doctrine is designed to prevent a chilling effect on protected speech—a common occurrence when a statute "sweeps within its ambit other activities that in ordinary circumstances constitute an exercise of freedom of speech."[75] Although the United States Supreme Court has yet to address an overbreadth challenge to a statute or school policy that punishes disruptive student hecklers, the Michigan State Supreme Court decided a case in 2012 squarely confronting the question.[76]

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[70] Todd Richmond, *University of Wisconsin approves free speech policy that punishes student protesters*, CHI. TRIB.: NATION & WORLD (Oct. 6, 2017), https://www.chicagotribune.com/nation-world/ct-university-of-wisconsin-protest-punishment-20171006-story.html.

[71] *Id.*

[72] Virginia v. Hicks, 539 U.S. 113, 118-20 (2003).

[73] United States v. Williams, 553 U.S. 285, 293 (2008).

[74] Washington State Grange v. Wash. State Republican Party, 552 U.S. 442, 449 n.6 (2008) (quoting New York v. Ferber, 458 U.S. 747, 769-71 (1982) (internal citation omitted)).

[75] Thornhill v. Ala., 310 U.S. 88, 97 (1940).

[76] *See* People v. Rapp, 821 N.W.2d 452 (Mich. 2012).

In *People v. Rapp*, the defendant was charged with violating a Michigan State University Ordinance, which provides that "[n]o person shall *disrupt* the normal activity or molest the property of any person, firm, or agency while that person, firm, or agency is carrying out service, activity or agreement for or with the University."[77] The Court was asked to determine whether the undefined use of "disrupt" in Section 15.05 of Michigan State University's Ordinance could survive a First Amendment overbreadth challenge.[78] The Court first determined that "the plain language of the ordinance allows its enforcement for even *verbal* disruptions," because the ordinance lacked a definition of "disrupt" and did "not specify the types of disruptions that are prohibited."[79] The Court next turned to the dictionary definition of disruption, concluding that "a person can 'disrupt' another person by either (1) interrupting that person or (2) causing disorder or confusion."[80] Since "interrupting" a person or asking a "person several questions" may result in "confusion or disorder," the Court held that the ordinance was unconstitutionally overbroad because a person is subject to punishment for engaging in "constitutionally protected . . . purely *expressive* conduct."[81] In sum, because the "ordinance could be violated numerous times throughout any given day given that there are seemingly infinite ways in which someone might 'disrupt' another," it failed overbreadth scrutiny.[82]

The Michigan Supreme Court's analysis in *People v. Rapp* may provide a roadmap for a constitutional challenge to the broad prohibitions on speech that interferes with or disrupts campus speakers found within Georgia, North Carolina, and Texas's campus speech statutes. Sure enough, it is unsurprising that Susanna Birdsong, policy counsel for the ACLU's North Carolina chapter, voiced worry about the "overly broad language" of North Carolina's disruption provision because its wording "risks chilling a range of First Amendment-protected

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[77] *Id.* at 456 (emphasis added) (quoting MSU ORDINANCE § 15.05).

[78] *Id.* at 453.

[79] *Id.* at 456.

[80] *Id.* at 459.

[81] *Id.*

[82] *Id.* at 456-57. Another driving concern for the Court was that the language of the ordinance did not "prevent a police officer from choosing to enforce the ordinance when there [was] a complaint or simply when the officer witnesse[d] somebody disrupting another person's activity," which provided "the police with unfettered discretion to arrest individuals for *words or conduct* that annoy or offend them." *Id.* at 457-58.

activity."[83] Birdsong asked whether "'interference' mean[s] any kind of counterspeech or counterprotest."[84] The broad, undefined language also gave Birdsong reason for concern about the authorities using their "imagination" when deciding whether to enforce the "shall-be-disciplined language" against students engaging in disruptive and interfering behavior.[85]

Indeed, concern about the discretionary and arbitrary enforcement of laws disciplining disruptive student hecklers was the source of the UWPD's inspiration for clarifying what was and was not covered by the policy's broad language.[86] UWPD Captain Brent Plisch stated that application of the Board of Regents's "policy to campus protest[s]" failed to specify what constituted disruptive interference, thereby empowering "police with no First Amendment training" to decide "who to shut down and when."[87] Captain Plisch realized that what qualifies as disruptive or interfering is not as clear as what constitutes "running a stop light or speeding."[88] Going forward, then, according to Captain Plisch, any disciplinary sanction regime should specify how it serves a significant government interest, and more importantly, it should be narrowly tailored to ensure constitutionally protected speech does not fall prey to arbitrary punishment.[89] The Michigan State Supreme Court stressed this point in *People v. Rapp*, noting that the overbreadth doctrine's "first concern is that the threat of enforcement of an overbroad law may have a chilling effect on protected expression, which is harmful because it deprives society of an uninhibited marketplace of ideas."[90] Operating under the uncertain assumption that college students enjoy unabridged First Amendment speech rights on college campuses, this Commentary contends that states cannot silence all disruptive counterspeech because student protestors maintain the right to challenge what the speaker says.

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[83] Ray Gronberg, *Rights group has qualms about 'free speech' bill targeting UNC*, HERALD SUN (May 5, 2017, 2:02 PM), https://www.heraldsun.com/news/local/education/article 148662214.html.

[84] *Id.*

[85] *Id.*

[86] *See generally* UW-MADISON POLICE DEP'T, *supra* note 14.

[87] Kamala Kelkar, *Inside the 'free speech' debate that rocked a Wisconsin campus, with ripples across the country*, PBS NEWS HOUR (May 13, 2018, 6:25 PM), https://www.pbs.org/newshour/nation/inside-the-free-speech-debate-that-rocked-a-wisconsin-campus-with-ripples-across-the-country.

[88] *Id.*

[89] *Id.*

[90] People v. Rapp, 821 N.W.2d 463 (Mich. 2012).

Nor can states empower officials with the arbitrary enforcement power to subject students to punishment based on ill-defined, broad language. By contrast, state statutes and policies must be meticulous in defining terms like "disruptive" and "interfere" so as not to unconstitutionally chill protected speech.

V. CAREFULLY DEFINED LANGUAGE PROLIFERATES THE MARKETPLACE OF IDEAS

If one believes that intellectually engaging and wide-ranging debates on college campuses, along with student exposure to diverse points of view, represent a significant government interest, then disciplinary sanction regimes may further the promotion of that interest. That is not to say that sanction-permitting policies should utilize overbroad terminology. Instead, if any state resorts to implementing disciplinary policies that will punish students for expressive speech, the First Amendment requires that such policies and laws be drafted with precision, for they "must be specific about what is prohibited and what is allowed."[91] Without the requisite level of specificity, the laws and policies may very well cut against their intended goal, because far too many students will be afraid to say their piece "for fear that they will be singled out for arbitrary (or ideologically-based) punishment based on unclear standards."[92] But narrowly tailored laws and policies permitting discipline, with sufficiently defined terms, foster "the right to receive ideas," which "follows ineluctably from the *sender's* First Amendment right to send them."[93]

Defining the parameters of disruption and interference will also diminish arbitrary enforcement concerns. Public officials tasked with enforcing the disciplinary sanctions will be guided by clear language. Clearly defined language is especially important because the "[g]overnment's assurance that it will apply" overbroad terminology "far more restrictively than its language provides" does not transform an unconstitutional statute or policy into a constitutional one.[94]

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91 Chemerinsky, *supra* note 18, at 595.

92 *Id.*

93 Board of Educ. v. Pico, 457 U.S. 853, 867 (1982).

94 United States v. Stevens, 559 U.S. 460, 480 (2010).

Another surprising positive of defined language is that it will benefit both the student protestor and the protested speaker. Clear language spelling out what student protestors can and cannot say and do enables protestors to plan their disruption in compliance with the law—avoiding unwanted and unintended disciplinary consequences. In this regard, Professor Wells is correct to call for precise language that carefully delineates what is, and what is not, sanctionable, disruptive speech.[95] The protested speaker, likewise, will be able to plan his or her speech knowing full well what to expect from the heckling audience. A defined disciplinary regime in compliance with the Free Speech Clause thus provides protestors with an "incentive to cease the oppressive conduct," because student disruptors are no longer "free to silence others without fear of consequence."[96]

In sum, a carefully crafted disciplinary sanction regime accompanied by defined terminology strikes the perfect balance. On one side of the ledger, student protestors will know what disruptive behavior and speech is permissible and what is subject to sanction. A precise policy may in fact encourage civic activism and promote student protests, as students will feel more comfortable expressing their views when they know their conduct clearly is permitted and not subject to discipline.

On the other side of the ledger, speakers will find confidence in voicing their perspectives to an audience subject to a disciplinary regime which punishes overly disruptive speech and behavior. In addition to increased student and audience member exposure to diverse views, prominent scholars, businesspersons, politicians, and others of the same ilk may be more willing to share wisdom with college students on college campuses knowing that student disruptors may be silenced, rather than student disruptors silencing them. By this logic, disciplinary policies and laws may further the significant government interest in promoting a "marketplace, where students are exposed to a variety of different ideas, and where they express contrarian points of view" on campus.[97]

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[95] Wells, *supra* note 23, at 557, 564.

[96] GOLDWATER INST., *Campus Free Speech Act Model Legislation: Frequently Asked Questions* 2-3, https://drive.google.com/file/d/1zFpB-mle4hqhut4w-g_Jmh6dhWUFU6hS/view (last visited Oct. 13, 2019).

[97] Chad Flanders, *Are Universities Schools? The Case for Continuity in the Regulation of Student Speech*, 93 N.Y.U. L. REV. ONLINE 137, 145 (2018).

VI. CONCLUSION

Our nation's third president, Thomas Jefferson, described the public university as a place where "we are not afraid to follow truth, wherever it may lead, nor to tolerate error so long as reason is left free to combat it."[98] Jefferson displayed a dedication to the dissemination of wide-ranging points of view in the college atmosphere and a general aversion to attempts at suppressing speech.[99] Although problematic when the language is overbroad, laws and policies that discipline student protestors for their disruptive interference with the free speech rights of others, if narrowly tailored, can serve the important interest of introducing young minds to a marketplace full of differing ideas. Indeed, our nation's commitment to intellectually engaging and diverse debate is tethered to our human understanding that speech can move people "to tears of both joy and sorrow," it can "inflict great pain," but it can also teach all of us lessons about how others think and why they think the way they do.[100] No matter how hurtful a viewpoint may be, a disagreeable perspective should not move us to "react to that pain by punishing the speaker" or protesting the speaker into silence.[101] Rather as our nation's forty-fourth president, Barack Obama, encouraged, we should listen and engage, and if what is uttered is hurtful or wrong, then the answer is not to silence, but to confront the speech on the "battlefield of ideas."[102] Disciplining the disruptive student heckler, under a carefully crafted policy or statute "ensure[s] that we do not stifle public debate"[103] by tolerating "enforced silence."[104]

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98 Alvin L. Goldman, *The University and the Liberty of its Students-A Fiduciary Theory*, 54 KY. L.J. 643, 646 (1966) (quoting 7 The Writings of Thomas Jefferson 196 (1861)).

99 *Id.*

100 Snyder v. Phelps, 562 U.S. 443, 460-61 (2011).

101 *Id.* at 461; *see also* Joe Dryden, *Protecting Diverse Thought in the Free Marketplace of Ideas: Conservatism and Free Speech in Higher Education*, 23 TEX. REV. L. & POL. 229, 264 (2018) ("We can protect someone's right to express unpopular viewpoints without agreeing with their views.").

102 Obama, *supra* note 11.

103 *Snyder*, 562 U.S. at 461.

104 Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).