

INFORMATIONAL HEARING
THE SENATE COMMITTEE ON JUDICIARY

Combatting Hate While Protecting the Constitution

October 3, 2017
9:00 a.m. - 12:30 pm
State Capitol, Hearing Room 4203

BACKGROUND PAPER

I. Introduction

On the evening of August 11, 2017, as part of events associated with a “Unite the Right” rally in Charlottesville, Virginia, hundreds of avowed neo-Nazis and white supremacists carrying tiki torches marched through the campus of the University of Virginia, where they clashed with counter-protestors. The next morning, even larger groups of neo-Nazis, white supremacists, and counter-protesters converged on Emancipation Park, the site of a controversy over whether or not to remove a prominent statue of Confederate General Robert E. Lee. The neo-Nazis, white supremacists, and counter-protesters clashed repeatedly in the Charlottesville streets, leading to dozens of injuries. Then, in the early afternoon, a lone man drove a car into a crowd of the counter-protestors, wounding 19 and killing one.¹

California State Senate leadership swiftly condemned the car attack, the neo-Nazis, and the white supremacists involved and announced public hearings “to ensure California is prepared to protect public safety and free speech in the event of future white supremacist activities.”²

As one of those hearings, the Chair of the Senate Judiciary Committee, Senator Hannah-Beth Jackson signaled that this Committee would “examine how best to protect Californians from the threats of violence by emboldened domestic terror groups and determine whether additional laws are needed to protect members of our communities.”

¹ Aston, Caron, and Victor, *A Guide to the Charlottesville Aftermath* (Aug. 13, 2017) New York Times <<https://www.nytimes.com/2017/08/13/us/charlottesville-virginia-overview.html?mcubz=3>> (as of Sept. 25, 2017).

² *Senate Calls for Hearings on Rise of White Supremacist Movement* (Aug. 21, 2017) <<http://sd24.senate.ca.gov/news/2017-08-21-california-senate-responds-charlottesville>> (as of Sept. 25, 2017).

II. Trends and Incidents Illustrating the Problem

While the violence in Charlottesville triggered this hearing, trends and events both before and since that tragedy illustrate the pressing nature of the challenge and the fact that California is far from immune to the issues raised.

a. Evidence of Increasing Expression of Overt Racism and Other Forms of Hate

There is evidence, both in terms of trends and individual incidents, that overt expressions of racism and other forms of hatred are on the rise nationally and in California. After more than a decade of gradual decline, the number of reported hate crimes in California increased in 2016, according to the California Department of Justice's annual report. Among the key findings from that report:

- hate crime events increased 11.2% from 837 in 2015 to 931 in 2016;
- hate crime events involving a racial basis increased 21.3% in 2016; and
- hate crimes with an anti-black or African American bias motivation continued to be the most common hate crime (31 percent of the total in the past ten years), followed by hate crimes with a sexual orientation bias at 22 percent.³

At the same time, reports of incidents targeting people based on their religious affiliation – particularly Jews and Muslims – have spiked. The Anti-Defamation League reported an 86 percent nationwide increase in the number of anti-Semitic incidents reported during the first three months of 2017 compared with the same three month period in 2016,⁴ and studies by the California State University San Bernardino Center on Hate & Extremism have found dramatic increases in the number of hate crimes directed against Muslims over the past two years.⁵

b. Clashes Between Overt Hate Groups and Counter-Protesters

Even before events in Charlottesville drew national attention, California experienced what in hindsight could perhaps be seen as a precursor on June 26, 2016. That morning, a small group of neo-Nazi's under the guise of the "Traditionalist Worker Party" gathered on the State Capitol grounds pursuant to a permit they had obtained for doing so. Counter-protesters, among them people describing themselves as anti-fascists or

³ Attorney General Xavier Becerra Releases 2016 Hate Crime in California Report (July 3, 2017) California Department of Justice <<https://oag.ca.gov/news/press-releases/attorney-general-xavier-becerra-releases-2016-hate-crime-california-report>> (as of Sept. 25, 2017).

⁴ U.S. Anti-Semitic Incidents Spike 86 Percent So Far in 2017 After Surging Last Year, ADL Finds (Apr. 24, 2017) Anti-Defamation League <<https://www.adl.org/news/press-releases/us-anti-semitic-incidents-spike-86-percent-so-far-in-2017>> (as of Sept. 26, 2017).

⁵ Winton, *Hate Crimes Against Muslims in California Skyrocket 122%, Study Says* (Sept. 1, 2016) <<http://www.latimes.com/local/lanow/la-me-ln-hate-crimes-climb-20160919-snap-story.html>> (as of Sept. 25, 2017).

“antifa,” also showed up to the well-publicized rally. According to media reports about the incident, these “antifa” had announced their intention to break up the neo-Nazi rally online, but did not have a permit to gather on the grounds. Violence quickly broke out between the factions. There were multiple injured, including several people who were stabbed, apparently with a knife. According to the California Highway Patrol, which is responsible for security on the State Capitol grounds, the clash also caused significant and costly property damage. Ultimately, after investigation, the CHP recommended criminal charges against 106 individuals involved, ranging from unlawful assembly to assault with a deadly weapon.⁶

c. Clashes Between Other Speakers and Counter-Protesters

In addition to the trends and incidents involving clear and overt forms of racism and hate, there have been numerous other confrontations in California over the past year that followed similar patterns. In these incidents, the people speaking or assembling did not explicitly or directly identify themselves as white supremacists or neo-Nazis (though in several instances, some members of the crowd carried anti-Semitic messages, gave the Nazi-salute, and displayed swastikas). In some cases organizers of the events publicly disavowed such groups. Whether or not the viewpoints expressed by those who did not identify as white supremacists could nonetheless be considered discriminatory, racist, or hateful is subject to debate.

In several of these instances, counter-protesters (frequently associated with the “antifa” group) sought to disrupt the events and to force the speaker or marchers to leave by threatening or engaging in violence and property damage. One of the more prominent of these incidents took place on the UC Berkeley campus on February 1, 2017. A crowd of about 1,500 individuals gathered peacefully in Sproul Plaza to protest a speech by conservative activist Milo Yiannopoulos scheduled for later that evening. According to media reports, partway through the protest a group of about 150 individuals dressed all in black and wearing masks entered the Plaza and began to engage in violence and destruction of property. These figures, widely reported to be affiliated with “antifa” and another organization known as “By Any Means Necessary,” set off fireworks, lit fires, threw rocks at police, attacked some people in the crowd. Law enforcement on the scene proceeded to cancel Yiannopoulos’ speech. Six people were lightly injured during the incident. Police made only one arrest. The University estimated that about \$100,000 in property damage was done.⁷

⁶ Locke, *CHP Recommends Charges Against 106 People in Melee at State Capitol* (Mar. 8, 2017) Sacramento Bee <<http://www.sacbee.com/news/local/crime/article137313578.html>> (as of Sept. 26, 2017).

⁷ Bodley, *At Berkeley Yiannopoulos Protest, \$100,000 in Damage, 1 Arrest* (Feb. 2, 2017) San Francisco Chronicle <<http://www.sfgate.com/crime/article/At-Berkeley-Yiannopoulos-protest-100-000-in-10905217.php>> (as of Sept. 26, 2017).

Other incidents pitting protesters against counter-protesters and leading to physical confrontations or violence took place in California over the course of the spring and summer. For example:

- On March 4, 2017, supporters of President Donald Trump assembled in downtown Berkeley as part of a nationwide series of "March 4 Trump" events. Counter-protesters also gathered. Masked individuals dressed in black appeared among the crowds. Media reports described these individuals as "antifa" or, in some cases, "anarchists." Multiple fights broke out, resulting in seven minor injuries. Police made more than ten arrests, primarily for battery and assault with a deadly weapon.⁸
- On March 25, 2017, around 2,000 supporters of President Donald Trump marched at Bolsa Chica State Beach as part of a "Make America Great Again" event. Approximately 30 counter-demonstrators, some dressed in black and wearing masks, also came to the site of the start of the march. Some of the counter-protesters attempted to block the path of the marchers. Shouting and skirmishes ensued. Police arrested four counter-protesters before the march continued.⁹
- On April 15, 2017, supporters of President Donald Trump held a "free speech" rally at Martin Luther King, Jr., Park in downtown Berkeley. Counter-protesters also converged on the park. Black clad and masked "antifa" were present; some of assembled marchers held anti-Semitic signs up and gave the Nazi salute. According to media accounts, both sides engaged in violence. Eleven people were injured, six of them seriously. Police made 20 arrests.
- On August 20, 2017, "dozens" of participants in an "America First" anti-immigration march were met by roughly two thousand counter-protesters in Laguna Beach, California. Police eventually

⁸ Wang, *Pro-Trump Rally in Berkeley Turns Violent as Protesters Clash with the President's Supporters* (Mar. 5, 2017) <https://www.washingtonpost.com/news/post-nation/wp/2017/03/05/pro-trump-rally-in-berkeley-turns-violent-as-protesters-clash-with-the-presidents-supporters/?utm_term=.4ab92242d99d> (as of Sept. 26, 2017).

⁹ Bharath, *Pro-Trump Rally Draws 2,000 Marchers, Some Protesters and a Violent Brawl* (Mar. 27, 2017) Orange County Register <<http://www.ocregister.com/2017/03/27/pro-trump-rally-draws-2000-marchers-some-protesters-and-a-violent-brawl/>> (as of Sept. 27, 2017).

disbursed everyone after extensive shouting matches. No violence was reported but police made three arrests.¹⁰

- On August 27, 2017, between 2,000 and 4,000 individuals converged on Martin Luther King, Jr. Park in downtown Berkeley. The overwhelming majority were there for a "Rally Against Hate" that had been organized in opposition to a "Say No to Marxism" demonstration. Neither gathering had obtained permits to use the park. Before it began, the "Say No to Marxism" rally was cancelled due to safety concerns, but a small group of activists, some of whom are affiliated with white supremacist groups, appeared anyway. According to nearly all accounts, the demonstrations were peaceful on all sides until a group of about 100 "antifa" activists wearing black and wielding sticks and shields breached security barriers and attacked the small group of protesters. At least five people were injured, including a police officer. Police escorted the activists who had been attacked away from the scene.¹¹

Most recently, in late September 2017, plans for a "Free Speech Week" ostensibly featuring a number of prominent conservative activists largely disintegrated when it became clear that the student group behind planning for the event (the Berkeley Patriot) did not in fact have agreements with most of the announced speakers. The group later announced that it was cancelling "Free Speech Week." In the meantime, however, members of the Berkeley Patriot filed a complaint with the U.S. Department of Justice alleging that the University had violated their First Amendment rights. UC Berkeley administrators reported having dedicated approximately \$1 million to security measures in anticipation of the events that had been announced.¹² The next day, a handful of the conservative speakers still associated with the "Free Speech Week," made a short appearance on the campus, taking selfies, singing the national anthem, and making brief remarks. Protesters shouted opposition from

¹⁰ Grigoryants, *'America First' Protesters Face Off With Opponents at California Beach Rally* (Aug. 21, 2017) Reuters <<https://www.reuters.com/article/us-usa-protests/america-first-protesters-face-off-with-opponents-at-california-beach-rally-idUSKCN1B10PH>> (as of Sept. 26, 2017).

¹¹ Swenson, *Black-Clad Antifa Members Attack Peaceful Right-Wing Demonstrators in Berkeley* (Aug. 28, 2017) Washington Post <https://www.washingtonpost.com/news/morning-mix/wp/2017/08/28/black-clad-antifa-attack-right-wing-demonstrators-in-berkeley/?utm_term=.4ac3d37be4a2> (as of Sept. 26, 2017).

¹² Deruy, *UC Berkeley's 'Free Speech Week' Officially Canceled, Appeared to be Set-Up From the Start* (Sept. 23, 2017) San Jose Mercury News <<http://www.mercurynews.com/2017/09/23/uc-berkeley-free-speech-week-officially-canceled/>> (as of Sept. 26, 2017).

nearby. Law enforcement limited access to Sproul Plaza, site of these events, to a single entrance with security screening.¹³

III. Public Hate Speech: Constitutional Rights and Permissible Limitations

How are government officials and institutions, like public university administrators and law enforcement, to respond to situations such as those described above?

The First Amendment to the United States Constitution states, in relevant part, that: “Congress shall make no law... abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.” (U.S. Const., Amend. I.) The U.S. Supreme Court has ruled that the First Amendment applies to the states as well, through incorporation into the Fourteenth Amendment. (*Gitlow v. New York* (1925) 268 U.S. 652; *NAACP v. Alabama* (1958) 357 U.S. 449.) These federal constitutional restrictions do not apply, however, to private actors.¹⁴ Thus, while private actors such as businesses and property owners are by and large free to restrict speech on the job or on private property, the government and public institutions generally cannot.

Nonetheless, the courts have determined that the right to freedom of expression is not absolute.

a. What Restrictions Can Government Actors Place on Speech?

First, in the circumstances relevant to the incidents in Charlottesville and those described earlier in this background paper, where both speakers and counter-protesters are in public forums like streets, sidewalks, public university campus grounds, and parks, government actors may impose reasonable limitations on the time, place, and

¹³ Tucker, Veklerov, Johnson, and Asimov, *Yiannopoulos Visits Sproul for 15 minutes; UC Berkeley Spends \$800,000* (Sept. 24, 2017) San Francisco Chronicle <<http://www.sfgate.com/bayarea/article/Yiannopoulos-visits-Sproul-for-15-minutes-UC-12225043.php>> (as of Sept. 26, 2017).

¹⁴ California law, both in statute and through the State Constitution, goes further than federal law in terms of protecting the right to free expression against interference or suppression by *private actors*. For example, California Labor Code Section 102 states that: “[n]o employer shall coerce or influence or attempt to coerce or influence his employees through or by means of threat of discharge or loss of employment to adopt or follow or refrain from adopting or following any particular course or line of political action or political activity.” Similarly, in the context of some private property – shopping malls in particular – the California Supreme Court has ruled (and the U.S. Supreme Court has upheld) that Californians’ right to free expression extends beyond what the federal Constitution demands, thus giving legal protection to expression in those locations even if the property owner wants it to stop. (See *Pruneyard Shopping Center v. Robins* (1980) 447 U.S. 74. Finally, California’s “Leonard Law” makes both federal and state constitutional free speech provisions applicable to public and private post-secondary educational institutions in California, with an exception for certain religious schools. (Ed. Code Secs. 66301 and 93467). The role of private actors in permitting or attempting to suppress expression is, however, beyond the scope of this hearing.

manner of expressive activities, though such restrictions must not foreclose adequate alternative forums for speech. Thus, government can restrict the use of amplified sound outside of a library, for example, or limit the number of people allowed in a small space. Any licensing or permit requirement must be clear, leave no discretion to the authority issuing the permit or license to discriminate between viewpoints, and provide for a way to appeal denials. Finally, the restriction must be narrowly tailored to achieve an important government interest.

Second, under very specific circumstances, the government may restrict or punish speech that incites others to commit illegal activity, including violence. In the seminal case *Brandenburg v. Ohio* (1969) 395 U.S. 444, the U.S. Supreme Court reviewed the conviction of a Klu Klux Klan leader for his role in a rally which included racist and anti-Semitic speech and where firearms were prominently displayed. In deciding the case, the Court ruled that government can restrict speech that "is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Id.* at 447. Notably, however, the Court ruled that the expressive activity at the Klan rally did not meet this test and overturned the conviction.

Third, the government may restrict and punish speech that constitutes a "true threat" against someone else. According to the U.S. Supreme Court, a "true threat" is a statement by which the speaker "means to communicate a serious intent to commit an act of unlawful violence to a particular individual or group of individuals." *Virginia v. Black* (2003) 538 U.S. 343.

Fourth, in certain contexts such as on a public university campus, and under very specific circumstances, the government must not allow speech that amounts to discriminatory harassment. Civil rights laws require that universities receiving federal funds cannot discriminate on the basis of gender and race, among other protected classes. (42 U.S.C. Sec. 2000d et seq. and 20 U.S.C. Sec. 1681 et seq.) Such prohibited discrimination can include failure to stop harassment of students based on those categories. Finding the appropriate line between what constitutes free speech and what meets the definition of harassment, however, has proven challenging in many instances. Conservative faculty and students, in particular, have complained that discriminatory harassment allegations are being used to attack and suppress their political viewpoint.¹⁵

b. What Restrictions Are Constitutionally Impermissible?

First and foremost, government agencies and public institutions cannot restrict speech based on its content, unless the restriction can meet strict legal scrutiny. Put another

¹⁵ See Chemerinsky and Gillman, *Free Speech on Campus* (2017), pgs. 118-123. Yale University Press, for an in-depth discussion.

way, in addition to being constitutionally permissible otherwise, any government restriction on speech must be neutral in relation to the content of the speech regulated. *RAV v. St. Paul* (1992) 505 U.S. 377. The case from which this precedent springs illustrates the point. In the *RAV* decision, the U.S. Supreme Court struck down a municipal law banning cross-burning. Banning setting fires generally or placing restrictions on how fires could be set outdoors presumably would have been acceptable, since such regulations do not relate to the message that the fire could convey. Since cross-burning, though certainly a form of hate speech, expresses a particular message, the Court ruled it could not be banned constitutionally. While burning a cross cannot be prohibited generally, it can be prohibited when it is done in a manner that constitutes a "true threat." *Virginia v. Black, supra*, 538 U.S. 343.

Second, and contrary to frequently held belief, government actors cannot restrict or punish speech based on the anticipated response of the listener. The idea that so-called "fighting words" are not protected as a form of speech emanates from the case *Chaplinsky v. New Hampshire* (1942) 315 U.S. 568. In that case, the U.S. Supreme Court upheld the conviction of a Jehovah's Witness who publicly denounced other religions from a street corner and insulted people who engaged with him. Technically, *Chaplinsky* has never been overruled, but legal commentators suggest that the "fighting words" exception, if it still exists, is so narrow as to be functionally non-existent.¹⁶

However, a different, but related line of cases suggests that there may be limitations on what a speaker can express if the reaction of the audience results in a "clear and present danger" to public peace and order. (*Cantwell v. Connecticut* (1940) 310 U.S. 296.) In the instances in which the issue has come before it, the U.S. Supreme Court has primarily used this test to affirm the rights of speakers who were restricted based on fears about the crowd's response. (See, e.g. *Edwards v. South Carolina* (1963) 372 U.S. 229; *Cox v. Louisiana* (1965) 379 U.S. 536; *Gregory v. City of Chicago* (1969) 394 U.S. 111; but see *Feiner v. New York* (1951) 340 U.S. 315.) Nonetheless, the doctrine suggests that there is some point at which the risk of violent confrontations over speech could rise sufficiently to compromise law enforcement's ability to control the situation, thus creating a "clear and present danger."

There may be some tension in the case law in this area. Even where the law is clear, much seems to depend on factual nuance and context. However, the fact that First Amendment doctrine today seems largely to prohibit consideration of speech's effect on the listener has profound implications for how governments and universities must respond to counter-protesters like "antifa" that seek to use violence or the threat of violence to try to shut down speakers. In such circumstances, rather than preventing the

¹⁶ See, e.g. Chemerinsky, *Constitutional Law Principles and Policies*, Fifth Edition (2015), pp. 1053-1054. Wolters Kluwer.

speaker from exercising the right to free expression, the state of First Amendment doctrine appears to require government to strive to provide the necessary security to make sure that counter-protesters or hecklers are not able to prevent speakers from expressing themselves, no matter how hateful the content of their speech. Only when violence breaks out or is immediately imminent, or when one of the other exceptions described above apply, can government officials respond by suppressing the speaker.

Finally, government actors cannot create restrictions on speech that are vague or overbroad. The proscription against vague laws assures that speakers can ascertain clearly what is acceptable speech and what is not. Otherwise, constitutionally protected speech may be chilled by the cloud of doubt hanging over it. Similarly, when government imposes limitations on expression, those restrictions must be tightly focused on only that expression that may be limited constitutionally. When laws creep over the line and restrict constitutionally protected speech in addition to speech that is not constitutionally protected, courts will strike down the entirety of the statute. These two doctrines, vagueness and overbreadth, are what led courts to strike down the "hate speech codes" that many university campuses adopted during the 1990s.

c. Putting it Together

Where does this leave government actors and public institutions? In summary, under current free expression doctrine, government actors like law enforcement and public university administrators must allow peaceful public demonstrations that express racist beliefs and other forms of hate. They must even strive to protect those speakers against complete disruption or attacks by counter-protesters. At the same time, government actors can restrict speech when it crosses the line into true threats, creates an imminent danger, or, in the case of college campuses, constitutes discriminatory harassment under civil rights law. And, government actors can use reasonable, content-neutral, and narrowly tailored restrictions on the time, place, and manner of speech to help reduce the risk that violence will result. Without restricting, disrupting, or using its power to retaliate against hate speech that is constitutional, government actors can also express their own contrary viewpoints and provide forums for others to express outrage, hurt, and an alternative vision of greater inclusion, respect, and equality. Finally, government actors can stake affirmative steps to help ensure that individuals who are adversely affected by hateful speech have other appropriate supports and resources.

IV. Conclusion

As the brief discussion above demonstrates, combatting hate while protecting the Constitution is a complex task that defies simple solutions.

This hearing will nonetheless seek to confront the issues head-on. To set forth the contours of the challenge, the hearing will begin with testimony from a renowned constitutional scholar. Then, to understand the scope and nature of hate groups within California, the program will turn to an expert who researches them. Next, to underscore the seriousness the harm that hate groups inflict, the Committee will hear from representatives of communities that have been targeted. Finally, to learn from the experience of those who have been grappling directly with the challenge of providing public spaces that must be welcoming, safe, and yet open to the expression of even hateful ideas, the Committee will engage in conversation with university legal counsel and law enforcement leaders. We hope to obtain recommendations from them for Legislative action based on what they have observed.

The aim will be to emerge better informed and to seek, throughout the discussion, mechanisms by which the Legislature can provide the greatest possible support to the goal of a California that fully embraces the strength of its diversity and the constitutional rights of all.