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Skokie Revisited: Hate Group Speech and the First Amendment

*Donald A. Downs**

On April 25, 1977, a group of Holocaust survivors stood before the Board of Trustees of the Village of Skokie, Illinois. One survivor declared:

> It has come to my attention that on May 1 there is going to be a Nazi parade held in front of the village hall. As a Nazi survivor during the Second World War, I'd like to know what you gentlemen are going to do about it. . . . There are thousands of Jewish survivors of the Nazi Holocaust living here in the suburbs. We expect to show up in front of Village Hall and tear these people up if necessary.[1]

The survivor group spoke out because the National Socialist Party of America ("NSPA"), a small Chicago-based Nazi group led by a redoubtable provocateur, Frank Collin, had announced its intention to hold a pro-NSPA and white power demonstration at Skokie's village hall on May 1, 1977. Shock waves shot through the Skokie community after Collin announced that the NSPA would demonstrate.

Although the NSPA hardly represented a reincarnation of Hitler, holocaust survivors recoiled at the thought of a group entering their community flaunting Nazi symbols and doctrine. Collin's threat triggered fears of violence and trauma based on the vulnerability of the survivors to symbolic reminders of past persecution. Consequently, the survivors implored village officials to deny a permit to Collin and his fellow psuedo-Nazis. The survivors prevailed. In late April 1977, village officials obtained an injunction banning the NSPA's march.[2]

In early May, the village fortified its defense by passing three ordinances.[3] These required permits for which the NSPA could not

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1 Meeting of the Skokie Board of Trustees, Apr. 25, 1977 (tape available at Skokie Village Hall).

2 *See* Village of Skokie v. National Socialist Party of Am., 51 Ill. App. 3d 279, 366 N.E.2d 347 (1977), *aff'd in part and rev'd in part*, 69 Ill. 2d 605, 373 N.E.2d 21 (1978).

3 One ordinance stated: "The dissemination of any materials within the Village of Skokie which promotes and incites hatred against persons by reason of their race, national origin, or religion, and is intended to do so, is hereby prohibited." SKOKIE, ILL., CODE OF ORDINANCES § 28-43.1 (1977); *see* Collin v. Smith, 447 F. Supp. 676, 686 (N.D. Ill. 1978). "Dissemination" included "publication or display or distribution of posters, signs, handbills, or writing and public display of markings and clothing of symbolic significance." SKO-

qualify. With the legal assistance of the American Civil Liberties Union ("ACLU"), Collin sued Skokie claiming that its ordinances violated his first amendment rights. In June 1978, after protracted legal struggles, the courts ruled in Collin's favor.[4]

The major principle that dictated this result is the principle of "content neutrality." As defined by the Supreme Court, that principle holds that speech, especially political speech, may not be abridged because of its content, even if that content is verbally assaultive and has an emotionally painful impact.[5] Speech can be abridged only when it interferes in a physical way with other legitimate activities, when it is thrust upon "captive" or unwilling listeners, or when it constitutes a direct incitement to unlawful behavior which is likely to occur.[6] In the absence of these narrow conditions, which concern action rather than speech, political expression in a public forum enjoys well-nigh absolute constitutional protection regardless of the intended negative impact of the speaker.

Despite his legal vindication, Collin abandoned his Skokie plans because angry counter-demonstrators threatened to confront him at Skokie. The threats and fears of violence at Skokie raise serious questions about the validity of the strict content neutrality rule as applied to the public forum. In recent years, commentators have criticized the Court's general use of this principle because of its disutility in some areas of expression and because of the Court's inconsistent application of the doctrine to all categories of expression.[7]

KIE, ILL., CODE OF ORDINANCES § 28-43.2 (1977); *see* 447 F. Supp. at 686. A related feature of this permit required the village manager to deny a permit for any assembly which would "portray criminality, depravity or lack of virtue in, or incite violence, hatred, abuse or hostility toward a person or group of persons by reason of reference to religious, racial, ethnic, national or regional affiliation." SKOKIE, ILL., CODE OF ORDINANCES § 27-56(c) (1977). Another ordinance prohibited the wearing of "military-style uniforms" by members or advocates of political parties in demonstrations or marches. *Id.* § 28-42.1. Finally, Skokie passed an insurance ordinance that required groups of 50 or more demonstrators to procure $350,000 in insurance bonds before a permit could be granted. *Id.* § 27-54. The ordinance, however, allowed the requirement to be waived by the board of trustees.

4 For the injunction case in the Illinois state courts, see Village of Skokie v. National Socialist Party of Am., 51 Ill. App. 3d 279, 366 N.E.2d 347 (1977), *aff'd in part and rev'd in part*, 69 Ill. 2d 605, 373 N.E.2d 21 (1978). For the ordinance case in federal court, see Collin v. Smith, 447 F. Supp. 676 (N.D. Ill.), *aff'd*, 578 F.2d 1197 (7th Cir.), *cert. denied*, 439 U.S. 916 (1978).

5 *See* Police Dep't v. Mosley, 408 U.S. 92, 95 (1972), in which the Supreme Court articulated the content neutrality rule in relation to equal protection. On this development, see Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20 (1975); *see also* L. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 12-1 to -5 (1978).

6 *See, e.g.*, Brandenburg v. Ohio, 395 U.S. 444 (1969).

7 "Despite its repeated invocations of a near-absolute content neutrality rule, the Court has not followed its own precept . . . . [I]t has failed either to reconcile these results with the absolute rule it enunciated or to describe the dimensions of the more limited rule it actually has applied." Stephan, *The First Amendment and Content Discrimination*, 68 VA. L.

The Skokie litigation raises a more specific, doctrinal companion issue of constitutional law: what is the constitutional status of assaultive expression or "fighting words"? This article examines this aspect of the content neutrality rule[8] because it is the most important aspect of the Skokie litigation, and because it poses a significant issue of constitutional and public policy.

In court, Skokie argued that the NSPA's proposed demonstration would constitute "fighting words" (or assaultive speech), which the Supreme Court has ruled do not enjoy first amendment protection. In 1942, the Supreme Court in *Chaplinsky v. New Hampshire*[9] defined fighting words as forms of expression "which by their very utterance inflict injury or tend to incite an immediate breach of the peace."[10] The Court excluded such expression from the Constitution's protection because protecting it would be inconsistent with values and goals of the first amendment.[11]

REV. 203, 205 (1982) (citing Lehman v. City of Shaker Heights, 418 U.S. 298 (1974) (upholding an ordinance that banned political advertising in buses); Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976) (upholding a zoning restriction of adult theatres, but not others); FCC v. Pacifica Foundation, 438 U.S. 726 (1978) (upholding a ban on the radio broadcast of sexually explicit speech during certain hours); *see also* Redish, *The Content Distinction in First Amendment Analysis*, 34 STAN. L. REV. 113, 136 (1981) (criticizes the rule for drawing artificial distinctions based on equality norms that submerge substantive speech claims); *cf.* Van Alstyne, *A Graphic Review of the Free Speech Clause*, 70 CALIF. L. REV. 107, 139-48 (1982); Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537, 560-64 (1982) (demonstrates how equal protection cases involving fundamental rights collapse into simple rights cases and how the concept of equality may skew analysis). On exceptions that the Court has carved to the content neutrality rule, see text accompanying notes 149-219 *infra*.

8 Though the Supreme Court has traditionally treated fighting words as exceptions to the content neutrality rule, *see* L. TRIBE, *supra* note 5, § 12-8, at 605-08, the Court's alteration of the fighting words concept, which dictated the Skokie results, was part and parcel of the Court's development of the content neutrality doctrine during the social upheavals of the 1960's and 1970's. On the broadening of the content neutrality doctrine in the later Warren and Burger Courts, see Stephan, *supra* note 7, at 214-15, 218-27; D. DOWNS, NAZIS IN SKOKIE: FREEDOM, COMMUNITY, AND THE FIRST AMENDMENT 8-13 (1985).

9 315 U.S. 568 (1942).

10 *Id.* at 572.

11 In a classic statement, the Court articulated the ends of free speech:

> There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace . . . . [S]uch utterances are 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 order and morality.

Id. at 571-72 (footnotes omitted). This statement established the basis for definitional balancing, establishing the basic categories of protected speech within which the content neutrality doctrine was to apply. For first amendment theories that employ or advocate a definitional balancing approach, see A. MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE (1960); Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971); Frantz, *The First Amendment in the Balance*, 71 YALE L.J. 1424 (1962); Nimmer, *The Right to Speak from* Times *to* Time: *First Amendment Theory Applied to Libel*

Chaplinsky's concept of fighting words is an essential element of one substantive, normative interpretation of the first amendment that has been advanced. That interpretation is premised on a notion of the contribution of speech to the ends of *reasonable* and *rational* individuals and a reasonable and rational society.[12] An important element of this approach is the notion that there is a relationship between the value of free speech and the value of civility to society.[13] *Chaplinsky* held that expression that intentionally assaults the dignity of others, and hence is patently uncivil, is inconsistent with the norms of the first amendment.[14]

During the 1960's and 1970's, however, the Supreme Court altered the fighting words doctrine to make it consistent with the emerging doctrine of content neutrality in order to protect the speech rights of protesters in the public forum.[15] During this pe-

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and Misapplied to Privacy, 56 CALIF. L. REV. 935, 942-48 (1968). For a critical analysis, see L. TRIBE, *supra* note 5, § 12-8.

12 In an important article defending obscenity's exclusion from first amendment protection, John M. Finnis defends *Chaplinsky's* definitional approach to free speech adjudication as applied to obscenity. In arguing against those who favor constitutional protection of obscenity, Finnis states:

> [The] schools thus fail to discern the core problem of defining "speech," or to appreciate the bedrock concept which underlies the prevailing attempts by the Court to solve this problem. This concept . . . is that *obscene utterances "are no essential part of any exposition of ideas"* [citing *Chaplinsky*] . . . . This contrast . . . [between communications with saving intellectual content and those lacking the exposition or advocacy of ideas] corresponds to a distinction between two often competing aspects of the human mind: the intellect or reason and the emotions or passions . . . . The Brennan theory of free speech is, indeed, . . . a two-level theory . . . . As such, obscenity belongs to a realm outside first amendment protection. The two constitutional levels of speech, in effect, are defined in terms of two realms of the human mind.

Finnis, *"Reason and Passion": The Constitutional Dialectic of Free Speech and Obscenity*, 116 U. PA. L. REV. 222, 223-27 (1967) (original emphasis) (footnotes omitted). This view constitutes a normative standard of expectation concerning human conduct. It is analogous to the objective "reasonable man" test in criminal law. For a defense of this test in criminal law, see Schwab, *The Quest for the Reasonable Man*, 45 TEX. B.J. 178 (1982).

13 On the relation between *Chaplinsky* and the civility value, see H. ARKES, THE PHILOSOPHER IN THE CITY: THE MORAL DIMENSIONS OF URBAN POLITICS 56-91 (1981); Arkes, *Civility and the Restriction of Speech: Rediscovering the Defamation of Groups*, in FREE SPEECH AND ASSOCIATION: THE SUPREME COURT AND THE FIRST AMENDMENT 390, 414-22 (P. Kurland ed. 1975) [hereinafter cited as *Civility*].

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> Such are not part of human discourse but weapons hurled in anger to inflict injury or invite retaliation. This branch of the *Chaplinsky* dictum is best understood as a special application of the "clear and present danger" test, distinguishing words used as "triggers of action" from words used as "keys of persuasion." . . . "More talk" is exceedingly unlikely to cure the injury. . . . Thus, although some first amendment values might be advanced by leaving such communication alone, most of what the first amendment is concerned with is not truly at stake.

L. TRIBE, *supra* note 5, § 12-8, at 605-06 (footnote omitted).

15 On the relationship between *Chaplinsky*'s evisceration and the civil rights movement, see D. DOWNS, *supra* note 8, at 9-13; L. TRIBE, *supra* note 5, § 12-8, at 607; Stephan, *supra* note 7, at 218-23. *See generally* H. KALVEN, THE NEGRO AND THE FIRST AMENDMENT (1965).

riod, the Court overturned decisions by various government authorities denying protest groups, especially civil rights demonstrators, access to the public forum.[16] The Court did not extend this protection by examining the relationship of the protest claims to the normative ends of the first amendment and a just society.[17] Instead, it chose to accommodate the new claims of protesters by fashioning a theory of public *value skepticism.* Rather than demonstrating how the content and the manner of presenting protests advanced the ends of civility, rationality, and the exposition of ideas, the Court argued that all ideas concerning politics, no matter how offensive or evil, enjoyed equal status under the Constitution. Yet this extreme form of the content neutrality rule, while justified in many or even most cases, may sweep too broadly. It sometimes offers first amendment protection to patently unjust and unjustified expression. It did so at Skokie.

The Court took two doctrinal roads in arriving at its content neutrality approach. On one hand, it constructed the "hostile audience" or "heckler's veto"[18] doctrine that does not allow the government to abridge political speech due to a hostile audience's reaction to the speakers.[19] This doctrine helped secure the speech rights of blacks and civil rights demonstrators in the South, and is

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16 On the importance of making claims "public" and the relation between "public space" and justice, see H. ARENDT, THE HUMAN CONDITION 12-16, 22-28 (1958); H. ARENDT, THE CRISES OF THE REPUBLIC 88-96 (1972) (on the 1960's protest movements and the use of the public forum); H. ARENDT, THE ORIGINS OF TOTALITARIANISM 305-88 (1973) (on totalitarian regimes' drive to eliminate the existence of a "public space").

17 In the famous Selma march case, Williams v. Wallace, 240 F. Supp. 100 (M.D. Ala. 1965), Judge Frank Johnson *did* decide in favor of the civil rights marches on the basis of a substantive notion of justice. *See* text accompanying notes 194-200 *infra.*

18 Kalven christened this the "heckler's veto" doctrine. H. KALVEN, *supra* note 15, at 140-45.

19 Key cases in this movement are Gregory v. City of Chicago, 394 U.S. 111 (1969); Cox v. Louisiana, 379 U.S. 536 (1965); Edwards v. South Carolina, 372 U.S. 229 (1963). *See also* Kalven, *The Concept of the Public Forum: Cox v. Louisiana,* in FREE SPEECH AND ASSOCIATION: THE SUPREME COURT AND THE FIRST AMENDMENT 115 (P. Kurland ed. 1975). In this seminal essay, while discussing the earlier public forum doctrine (in Communist and Jehovah's Witness cases), Kalven states:

> We were likely to regard the law that had been developed as one that concerned a luxury civil liberty. It was a sign of how tolerant toward a sharply dissident minority our society could be, if the minority was small and eccentric. It appears that the story is not over.

Id. at 116. Kalven also endorses the content neutrality rule in this essay. *Id.* at 137; *see also* Stephan, *supra* note 7, at 221 n. 77. For a general survey of the issue of hostile audiences, see Note, *Hostile Audience Confrontations: Police Conduct and First Amendment Rights,* 75 MICH. L. REV. 180 (1976). For a comparative perspective, see Barnum, *Freedom of Assembly and the Hostile Audience in Anglo-American Law,* 29 AM. J. COMP. L. 59 (1981). A recent court of appeals decision has reaffirmed the "heckler's veto" doctrine in Kalven-like fashion, stating that "[t]o allow the intolerance (and threats) of a vocal minority (or even the majority) to determine who shall and shall not speak 'would lead to standardization of ideas,' . . . and would 'fictionaliz[e] the rationale of the First Amendment.'" NAACP Legal Defense & Educ. Fund v. Devine, 727 F.2d 1247, 1261 (D.C. Cir. 1984) (quoting Terminiello v. Chi-

justified by both the claims of the speakers and their manner of speech. In the major Supreme Court cases in this area, the demonstrators made no threats or intimidations, and peacefully demonstrated.[20] To allow hostile audiences to cause the abridgement of speech in such instances would be to make audiences the ultimate judges of constitutional rights.[21] Such a result would be especially invalid because of the nature of the protesters' claims and actions. Though many such demonstrations led to tensions and conflicts, they were consistent with *Chaplinsky*'s norms of civility and social value.[22]

The second doctrinal road the Court took altered *Chaplinsky*'s fighting words doctrine by eviscerating its thrust and by undermining its normative premises.[23] As previously noted, fighting words are forms of assaultive speech which are *meant* to inflict an emotional injury. They may be either extremely insulting or intimidating. Whereas the heckler's veto doctrine concerns legitimate, essentially rational speech which is met with anger because of its unpopularity (a by-product, as it were, of presenting a viewpoint by public protest), fighting words are "provocations [that] are not part of human discourse but weapons hurled in anger to inflict injury or invite retaliation."[24] Fighting words thus possess a normative status that differs radically from the protest speech covered by the hostile audience cases.

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cago, 337 U.S. 1, 4 (1949) and Note, *Constitutional Law—Free Speech and the Hostile Audience,* 26 N.Y.U. L. REV. 489, 491 (1951)).

20 In *Edwards,* 372 U.S. 229 (1963), the demonstrators walked orderly to the state capital to protest the general condition of discrimination in the state. No one made any threats of disorder or threatened any person in the audience. They carried placards with such messages as "I am proud to be a Negro" and "Down with Segregation." In *Cox,* 379 U.S. 536 (1965), demonstrators marched peacefully on a public street to protest segregation. The facts in the two cases were very much alike. A recent federal district court decision involving the Ku Klux Klan has stressed the historical link between the "heckler's veto" doctrine and the civil rights movement of the 1960's. *See* Invisible Empire Knights of the Ku Klux Klan v. City of West Haven, 600 F. Supp. 1427, 1434-35 (D. Conn. 1985). The court struck down a set of ordinances and administrative practices that were similar to Skokie's.

21 Such a position would not only threaten first amendment interests, it would also violate the principle of judicial review as a guardian of the Constitution established in Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803). It would take abridgement decisions out of the hands of courts and put them into the hands of hostile audiences—hence the "heckler's veto." Further, it would not be consistent with the doctrine that the Supreme Court is the most authoritative interpreter of the Constitution. For critiques of this doctrine of judicial finality, see S. BARBER, ON WHAT THE CONSTITUTION MEANS 197-99 (1984). *See generally* J. AGRESTO, THE SUPREME COURT AND CONSTITUTIONAL DEMOCRACY (1984).

22 For a comparison of the Selma march and Martin Luther King, Jr., to the Skokie case and Frank Collin, see note 98 *infra* and text accompanying notes 194-200 *infra.*

23 I am indebted to the work of Hadley Arkes, *see* note 13 *supra,* on the Court's evisceration of *Chaplinsky*'s fighting words doctrine. *See also* D. DOWNS, *supra* note 8, at 9-13.

24 L. TRIBE, *supra* note 5, § 12-8, at 605.

Nonetheless, with *Cohen v. California*[25] and subsequent cases,[26] the Burger Court began to alter the fighting words doctrine in order to make it consistent with the goals of the content neutrality rule and its seeming partner, the hostile crowd doctrine.[27] *Cohen* and its progeny altered *Chaplinsky*'s doctrine of fighting words and its principle of social value in three respects: (1) they limited the circumstances under which a speech act could be designated fighting words to "captive" situations in which the target has no reasonable means of escape;[28] (2) they ignored *Chaplinsky*'s notion of the *harm* some assaultive speech may inflict; and (3) they explicitly articulated an extreme moral skepticism or relativity of value which is inconsistent with the basic normative logic of *Chaplinsky*.[29] Follow-

25 403 U.S. 15 (1971).

26 *See* Lewis v. New Orleans, 415 U.S. 130 (1974); Brown v. Oklahoma, 408 U.S. 913 (1972); Rosenfeld v. New Jersey, 408 U.S. 910 (1972); Gooding v. Wilson, 405 U.S. 518 (1972).

27 *Cohen* concerned the prosecution on "offensive speech" grounds of a man who protested the Vietnam War in a Los Angeles courthouse by wearing a jacket with the words "Fuck the Draft" written across its back. In placing Cohen's speech act within the protective umbrella of the first amendment, the *Cohen* Court, per Justice Harlan, drastically restricted *Chaplinsky*'s doctrine of fighting words and its principle of social value. Justice Harlan stated:

> While the four-letter word displayed by Cohen in relation to the draft is not uncommonly employed in a personally provocative fashion, in this instance it was clearly not "directed to the person of the hearer." No individual present or likely to be present could reasonably have regarded the words on appellant's jacket as a direct personal insult . . . [nor was the speech] thrust upon unwilling or unsuspecting viewers . . . . [W]hile the particular four-letter word being litigated here is perhaps more distasteful than most others of its genre, it is nevertheless often true that one man's vulgarity is another's lyric. Indeed, we think it is largely because governmental officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual.

403 U.S. at 20, 21, 25. For an analysis that treats the fighting words doctrine and the hostile audience doctrine as distinguishable yet related issues, see Barnum, *supra* note 19, at 73-86.

28 In Barnum's terms, *Cohen* seemed to rule that "nonpersonal insults" are protected by the first amendment—though Barnum himself thinks that *Cohen* is somewhat less restrictive. *See* Barnum, *supra* note 19, at 82-86.

29 Harlan's logic in *Cohen* constitutes a judicial acceptance of the epistemological premises of liberal psychology as critically depicted by Roberto Unger in *Knowledge and Politics*. These premises, according to Unger, include: (1) the separation of reason and desire, with the latter being the primary part of the self; (2) the arbitrariness of desire from the perspective of the understanding; and (3) the principle of analysis: the sum is not greater than its parts, i.e., there is no real community of shared value beyond atomized individuals. The results of these principles are absolute moral skepticism and extreme individualism: "Given the postulate of arbitrary desire, there is no basis on which to prefer some ends to others." R. UNGER, KNOWLEDGE AND POLITICS 53 (1973); *see id.* at 31-53. For another superb critique of arbitrary desire, or "emotivism," as a basis for moral evaluation, see A. MACINTYRE, AFTER VIRTUE 11-34 (1981).

The logic of *Cohen* and its progeny also reflects the distrust of the criminal sanction which Herbert Packer says characterizes the "Due Process Model" of criminal procedure. *See* H. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 163-71 (1968). Archibald Cox states that the Warren Court's criminal law jurisprudence was influenced by sociologists and psy-

ing *Cohen*, the Court applied this new libertarian approach to fighting words cases.[30]

The new approach to fighting words and the content neutrality rule influenced the Skokie litigation and yielded an unjust result. This article will show that such *targeted racial vilification* inflicts significant harms, and hence is inconsistent with the values and goals of the first amendment and the constitutional order. This article will also present a reform proposal for cases, like Skokie, that involve assaultive expression. It will also show that such a proposal is consistent with recent developments in various areas of law, including first amendment law.

I. The NSPA and the Skokie Case

In order to understand the context of the Skokie cases, the motives of the NSPA and the effects of its actions on the holocaust survivors must be examined.

A. *The NSPA's Motives and Actions*

The NSPA's motives for targeting Skokie are important because they reveal an abuse of freedom. Frank Collin and the NSPA targeted Skokie in reaction to the previous abridgement of their speech rights by the Chicago Park District.[31] To understand why the NSPA reacted in that way, the events leading up to its decision to march at Skokie must be explored.

For years, the NSPA's rallies at its home turf of Marquette Park had preyed upon the ever-present racial tension that existed between the Marquette Park district and the neighboring South Side ghetto.[32] In 1976, the Chicago Park District reacted to increasing levels of violence by resurrecting an old, unused insurance ordi-

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chologists who "have cast doubt upon the efficacy of punishment and deterrence in the face of the social, economic, and psychological causes of criminal conduct." A. Cox, THE WARREN COURT 11 (1968). A similar viewpoint may have affected the Burger Court in the area of law under discussion. Arkes states that the *Cohen* decision and its progeny were premised on the outmoded philosophy of logical positivism, which treats all value and normative statements as suspect. *See* H. ARKES, *supra* note 13, at 69-74. For another view of *Cohen v. California*, see Farber, *Civilizing Public Discourse: An Essay on Professor Bickel, Justice Harlan, and the Enduring Significance of* Cohen v. California, 1980 DUKE L.J. 283.

30 *See* cases cited in note 26 *supra*.

31 For portraits of the background events throughout the Skokie confict, see D. HAMLIN, THE NAZI/SKOKIE CONFLICT (1980) (as Executive Director of the Illinois ACLU, Hamlin was a major ACLU participant in the conflict); A. NEIER, DEFENDING MY ENEMY: AMERICAN NAZIS, THE SKOKIE CASE, AND THE RISKS OF FREEDOM (1979) (Neir was national ACLU director during the conflict); *see also* D. DOWNS, *supra* note 8.

32 One long-time resident states that "[a] siege mentality permeates the community of ethnic groups: Lithuanians, Poles, Irishmen, and an increasing number of Latins and Arabs." Boguta, *Chicago Journal*, July 19, 1978, at 6, *quoted in* D. DOWNS, *supra* note 8, at 19. Marquette Park suffers from many of the problems associated with "white militancy": life on the fringes of the slums, a sense of insecurity, threatened property values, and an educa-

nance. This ordinance required $250,000 of liability insurance for demonstrations in Chicago parks. The insurance requirement effectively barred the NSPA from demonstrating, since the NSPA could not afford such coverage, nor were insurance companies likely to sell such coverage to the NSPA even if they could afford it.[33] In the fall, with the aid of the ACLU, Collin filed suit in federal court to challenge the ordinance.[34]

But Collin wanted more immediate satisfaction than he could get from the federal court. After "a stroke of genius,"[35] he decided to hold demonstrations in Chicago's North Shore suburban areas where many Jews lived. Never before had the NSPA taken its messages of hate directly to the heart of a Jewish community. This new tactic dramatically renewed the association of a Nazi party with its historical foe, the Jew.

In pursuit of this strategy, Collin sent applications for demonstration permits to about a dozen North Shore suburbs in September 1976. Only the Skokie Park District responded; the others simply ignored the requests.[36] In addition to sending these letters, the NSPA also covered the entire North Shore area at night with thousands of leaflets which proclaimed "We Are Coming!" in large print at the top of the page. The leaflets also included vile statements about Jews which blamed them for a variety of social ills, and featured a picture of a swastika choking a stereotyped Jew.

In its October 1976 reply to Collin's request, the Skokie Park District (like the Chicago Park District) informed Collin that he would have to provide a bond or insurance coverage for $350,000 in order to receive a permit to demonstrate in the park.[37] A few months later, Collin responded by informing the village of Skokie

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tional background not conducive to drawing fine civil libertarian distinctions. See J. SKOLNICK, THE POLITICS OF PROTEST 225-26 (1969).

33 *See* Transcript of Trial at 4, Collin v. Smith, 447 F. Supp. 676 (N.D. Ill. 1978).

34 Collin v. O'Malley, 452 F. Supp. 577 (N.D. Ill. 1978).

35 Interview with Abbott Rosen, Midwest Director, Anti-Defamation League, in Chicago, Ill. (July 1979).

36 By responding to Collin's request for a permit, the Skokie Park District ironically contributed to making itself a target, since prior to its response, the NSPA had not singled out Skokie. Skokie borders Chicago on the north. As of the late 1970's, it is estimated that the Jewish population comprised 30,000 of Skokie's population of 70,000. Of these 30,000, village and survivor leaders told me that between 800 to 1,200 are survivors of Hitler's persecution of Jews in Europe. Interview with Erna Gans, in Bensenville, Ill. (Apr. 1980). Counting family members, the number is estimated to be 5,000. These survivors are well organized and consider themselves distinct. Their presence as a distinct subcommunity makes Skokie unique in the Chicago area and, perhaps, in the country.

37 The Park District probably hurriedly concocted the requirement after consulting with the lawyers of the Chicago Park District, or by simply acting without advice. *See* Interview with David Hamlin, former Executive Director, Illinois ACLU, in Evanston, Ill. (Apr. 1980). At any rate, because of the similarity to Chicago's requirements, the action ignited Collin's anger and instinct to go for the jugular.

that he intended to assemble outside the village hall on Sunday, May 1st to protest the park district's denial of a permit.[38] Collin used the permit denial as a rationale for holding the demonstration at the village hall, cloaking his desire to cause turmoil in the garb of a classic petition for redress.

At a meeting held with local leaders, including local rabbis and Chicago representatives of the Anti-Defamation League, Skokie governmental officials decided to grant Collin's request for a permit to march at the village hall on May 1. At this April meeting, no one, including the rabbis, dissented from the quarantine policy decision.[39] But, as word spread around the community, survivor resistance and threats of counter-demonstration violence mushroomed. These events forced the village to abandon the quarantine policy and to pass various ordinances to keep the Nazis out.[40]

The evidence reveals that the NSPA targeted Skokie to trigger an upheaval which would serve the nefarious ends of the party. The party had thrived by generating disorder and by receiving the accompanying publicity (a form of "disorder news").[41] More importantly, by creating the potential for fear and violence at Skokie, the NSPA could gain a "hostage." The NSPA could "give Skokie back" by canceling its plans to demonstrate there, *in exchange* for the Chicago Park District's future noninterference with its demonstrations in Marquette Park—quid pro quo.[42] The key element to this plan was the intimidation of the survivors.[43]

To carry out this scheme, the NSPA innundated the North

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38 D. HAMLIN, *supra* note 31, at 32.

39 Skokie officials based their decision on the traditional "quarantine policy" of the Anti-Defamation League, the American Jewish Committee, the Jewish Federation of Chicago, and other major Jewish organizations. In essence, to quarantine is to ignore and avoid a demonstration in the hope that it will pass away without causing disturbance and without attaining widespread publicity. *See* National Jewish Community Relations Advisory Council, Joint Program Plan for Jewish Community Relations, 1979-1980, at 31-32; *see also* National Jewish Community Relations Advisory Council, Joint Program Planning for Individual Freedom and Security (Propositions for Plenary Session Jan. 22-25, 1978).

40 *See* note 3 *supra.*

41 For a depiction of the NSPA, see D. DOWNS, *supra* note 8, at 23-29; Lavelle, *The Nazi*, CHICAGO MAGAZINE, June 1978, at 135. *See generally* NEW ORDER, Oct. 1978, Nov. 1978, Jan. 1979 (the NSPA newsletter). On "disorder news" as a form of publicity for out-groups, see H. GANS, DECIDING WHAT'S NEWS 52-57 (1979). *See also* E. EPSTEIN, NEWS FROM NOWHERE: TELEVISION AND THE NEWS 173, 241, 262-63 (1973).

42 On the use of hostages as a form of extortionate bargaining, see W. MUIR, POLICE: STREETCORNER POLITICIANS 38-40 (1977); T. SCHELLING, THE STRATEGY OF CONFLICT 20, 135, 239 (1960). On the resort to violence as a last resort for powerless groups, see Wilson, *The Strategy of Protest*, 5 J. CONFLICT RESOLUTION 291, 292-93 (1961).

43 Collin confessed to this manipulative strategy in his interview with me:

> The key to Skokie is that the right to free speech was denied us here, in Marquette Park. We fought in the courts from 1975 onward. We were constantly denied . . . . I've got to come up with something within the law, to use the law against

Shore area with tens of thousands of leaflets announcing their plans.[44] Besides the fear generated by these leaflets, the NSPA had capitalized on an earlier opportunity to intimidate when columnist Bob Greene of the *Chicago Sun-Times* wrote an impolitic column about the situation in September 1976. Greene wrote about the wording of the leaflet and reactions of the Jews. He also reported the replies of Collin and another Nazi, Mike Kelley, to questions about the survivors' vulnerability to the leafletting and the NSPA's future plans. They had replied:

> We want to reach the good people—get the fierce anti-Semites who have to live among the Jews to come out of the woodwork and stand up for themselves . . . . Good. I hope they're terrified (the survivors). I hope they're shocked. Because we're coming to get them again. I don't care if someone's mother or father or brother died in the gas chambers. The unfortunate thing is not that there were six million Jews who died. The unfortunate thing is that there were so many Jewish survivors.[45]

Abbott Rosen of the Anti-Defamation League pointed to Greene's column as the catalyst that galvanized the intimidation and the Jewish emotional reaction.

Collin's manipulations paid off. In June 1978, the federal district court ordered the Chicago Park District to give Collin back his speech right in Marquette Park. Yet ten months earlier, the same court and judge (Judge Leighton) had refused to issue such an order, finding that the NSPA had failed to prove that the park district insurance requirement would cost too much or that failure to obtain a permit would cause the NSPA "irreparable injury."[46] The major difference in the two decisions was the advent of Skokie.

B. *The Impact on the Survivors*

The NSPA's plans also succeeded in intimidating their direct targets, the survivors. Although the NSPA threat did engender a host of positive consequences—political, social, and psychologi-

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> our enemy, the Jew . . . I used it [the first amendment] at Skokie. I planned the reaction of the Jews. They are hysterical.

Interview with Frank Collin, at the Marquette Park Headquarters, Chicago, Ill. (July 1979).

44 Rosen, Midwest Director of the Anti-Defamation League, reported that his office received numerous complaints and expressions of fear concerning the leaflets. Interview with Abbott Rosen, at the Anti-Defamation League Headquarters, Chicago, Ill. (July 1979). The leaflets consisted of the words "WE ARE COMING!" emblazoned in large bold-faced type, along with smaller print which stated the NSPA's reasons for targeting the North Shore area: "where one finds the most Jews, there one will find the most Jew haters." The leaflets coaxed "fierce anti-Semites" to action. At the top of the leaflet they printed a hideous picture of a swastika with hands that reached out to choke a picture of a stereotyped Jew.

45 Greene, *Chicago Nazis Switch—Main Target Now is Jews*, Chicago Sun-Times, Sept. 29, 1976, *quoted in* D. DOWNS, *supra* note 8, at 28-29.

46 *See* Collin v. O'Malley, 452 F. Supp. 577 (N.D. Ill. 1978).

cal—of the type that free speech advocates have envisioned,[47] the psychological harms were also substantial.[48] For the survivors, the threatened NSPA rally in their community triggered psychological trauma based on past persecution in Europe.[49] For them the Skokie conflict was a reliving of the past, at least at the beginning.[50]

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47 *See* Whitney v. California, 274 U.S. 357, 374-79 (1927) (Brandeis, J., concurring); A. MEIKLEJOHN, *supra* note 11, at 24-28, 35-36. *See generally* J. MILL, *On Liberty*, in ON LIBERTY AND OTHER ESSAYS 3, 19-65 (1926). These theorists champion free speech because of its contribution to political truth, participation in political issues, self-development, and social change. In my book on the Skokie case, I lump these values together under the label "republican virtue," and show how republican virtue was indeed realized at Skokie despite the significant harms that were perpetrated. *See* D. DOWNS, *supra* note 8, at 15-18, 94-121. For critical treatments of the relation of these values to the first amendment, see Bork, *supra* note 11, at 24-31.

48 These negative results are discussed at greater length in D. DOWNS, *supra* note 8, at 84-93.

49 The magnitude of trauma a survivor experiences in the present is partly a function of his past experiences. In addition, it is determined by the nature of a present stimulus. One psychiatrist depicts this effect:

> When some of these patients hear a knock on the door, this seems to them a dangerous portent. When they see a black limousine coming up and stopping before the door, this evokes a terror. When they see a man in uniform, they respond with panic because all this brings back memories of past horrors. These are classic symptoms of traumatic neurosis.

Bychowski, *Permanent Character Changes as an Aftereffect of Persecution*, in MASSIVE PSYCHIC TRAUMA 75, 78 (1968) (a Wayne State Univ. international conference on the psychiatry of survivorship). There is a voluminous literature on the psychology of survivors. *See, e.g.*, B. BETTELHEIM, SURVIVING AND OTHER ESSAYS (1980); K. ERIKSON, EVERYTHING IN ITS PATH (1976); R. LIFTON, DEATH IN LIFE, SURVIVORS OF HIROSHIMA (1968).

50 One survivor interviewee, Erna Gans, pointed out:

> Yes it did terrorize us. It brought back many hours of anguish. Something we thought was left behind, all of a sudden we might be facing, sometime in the future, if not ourselves, then our children. This realization brought back a terror . . . . [H]ere we are again, in the same position . . . . [F]or some it was very realistic—it is here today and I am going to kill them . . . . So, the terror is real—terror is always real in the eyes of the beholder.

Interview with Erna Gans, in Bensenville, Ill. (Apr. 1980).

Non-survivor witnesses at Skokie corroborated this observation. Perhaps the most poignant observation by a non-survivor was that of Skokie corporate counsel Harvey Schwartz, who pursued the legal cases for the village. Schwartz's observations are credible because of his sobriety and because he originally advocated the quarantine policy. His remarks refer to the actions and states of mind of survivors during an incident in which the NSPA came as close as it would ever come to actually entering Skokie, only to be turned back by an emergency injuction. *See* Village of Skokie v. National Socialist Party of Am., 51 Ill. App. 3d 279, 281, 366 N.E.2d 347, 349 (1977), *aff'd in part and rev'd in part*, 69 Ill. 2d 605, 373 N.E.2d 21 (1978). Schwartz's description of the survivors that day is powerful. His observations were supported by every other interviewee who was present that day:

> I knew these people well, and never recalled any conversations about their experiences in the the death camps. They were regular citizens before this. On this date, however, they were changed people: fanatical, irrational, frightened, angry. No one could possibly appeal to them with any reasonable argument. When we told them at noon that Collin had been served an injunction, many refused to believe us. Many stayed until five o'clock, chanting loudly, etc. It would take a psychiatrist to understand the impact. There seemed to be different states of being: catatonia, frenzy, etc. They were possessed, some of them. It was as if they

C. *The Legal Decisions*

Because of the content neutrality principle and the concomitant evisceration of the fighting words doctrine, however, the courts eventually refused to grant constitutional recognition of the substantial harms caused by the NSPA's threat. Before critically evaluating this position, the bases of the court decisions need to be examined.

The two major areas of litigation during this time were the NSPA's attempt to quash an injunction prohibiting their marching in Skokie, and Collin's suit to have the Skokie ordinances declared unconstitutional. The legal reasoning of each of the decisions in these cases will be examined in turn.

1. The Injunction Case

The original injunction issued by the Cook County Circuit Court in April 1977 enjoined the NSPA from demonstrating in Skokie in uniforms and displaying or handing out any "materials which incite or promote hatred of Jews, and from wearing or displaying the swastika."[51] An Illinois appellate court modified the injunction to prohibit only the display of the swastika.[52] The court held that a "hostile audience" must not be allowed to censor speech,[53] and stated that wearing storm trooper uniforms was a protected form of speech under this doctrine. The court, however, went on to hold that wearing the swastika would constitute fighting words in the context of Skokie and hence could be prohibited.[54]

In January 1978, the Illinois Supreme Court extended the libertarian doctrines of *Cohen v. California* to the display of the swastika itself. The court held that: (1) displaying the swastika is protected symbolic speech intended to convey the thought of the NSPA, (2) such display does not constitute "fighting words"; and (3) prior restraints of expression must satisfy a high burden of justification

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> had repressed something for twenty years that was now loose. It was very disturbing. At this point I realized that the first amendment theory grossly underestimated the impact on these people. This was not the "exchange of ideas;" it was literally an *assault*—the presence of these symbols was the *Beauharnais* type of thing. No case I have read is similar. People there on that Saturday were injured, damaged—I dare say even physically.

Interview with Harvey Schwartz, in Skokie, Ill. (July 1979).

51 *See* 51 Ill. App. 3d 279, 366 N.E.2d 347 (1977), *aff'd in part and rev'd in part*, 69 Ill. 2d 605, 373 N.E.2d 21 (1978).

52 *Id.* Before this, the Supreme Court intervened at the request of the ACLU to order the Illinois court to expedite review. National Socialist Party of Am. v. Village of Skokie, 432 U.S. 43, 44 (1977).

53 51 Ill. App. at 287, 366 N.E.2d at 353.

54 *Id.* at 292-93, 366 N.E.2d at 355-57.

which, given the above conclusions, Skokie did not meet.[55]

The court utilized *Cohen* at length in its decision. Unlike the appellate court, the Illinois Supreme Court held that the absence of a captive audience and the advance notification of the NSPA's intentions were fatal to Skokie's fighting words claim.[56] Additionally, the court supported its decision by referring to the underlying free speech principles proclaimed in *Cohen*.[57]

The court ignored the NSPA's targeting of Skokie to intimidate and ignored the fact that the NSPA hoped that the proposed demonstration would inflict trauma and engender a hostile crowd reaction. Although the court maintained that the swastika display is "symbolic political speech intended to convey to the public the beliefs of those who convey it," this intent actually took a backseat to the intent to win a hostage and to intimidate.[58]

2. The Ordinance Case

Judge Bernard Decker held all three of Skokie's ordinances unconstitutional in February 1978. His opinion relied strongly on the content neutrality rule. Beginning his discussion of "Fundamental Principles," the judge invoked the authority of a key case in the evolution of content neutrality for political expression: "The Supreme Court has held that 'above all else, the First Amendment

55 Village of Skokie v. National Socialist Party of Am., 69 Ill. 2d 605, 373 N.E.2d 21 (1978).

56 *Id.* at 618, 373 N.E.2d at 25-26.

57 The court's lengthy quotation from *Cohen* revealed how *Cohen* had embodied most of the important theoretical and philosophical underpinnings of the contemporary free speech theory:

> The constitutional right of free expression is powerful medicine in a society as diverse and populous as ours. It is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests. *See* Whitney v. California, 274 U.S. 357, 375-77 (1927) (Brandeis, J., concurring).
>
> To many, the immediate consequence of this freedom may often appear to be only verbal tumult, discord, and even offensive utterance. These are, however, within established limits, in truth necessary side effects of the broader enduring values which the process of open debate permits us to achieve. That the air may at times seem filled with verbal cacophony is, in this sense, not a sign of weakness but of strength. . . . How is one to distinguish this from any other offensive word [emblem]? . . . no readily ascertainable general principle exists [to so distinguish] . . . it is nevertheless often true that one man's vulgarity is another's lyric. Indeed, we think it is largely because governmental officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual.

Skokie, 69 Ill.2d at 613-15, 373 N.E.2d at 23-24 (quoting Cohen v. California, 403 U.S. 15, 24-25 (1971)).

58 *See* notes 42-45 *supra* and accompanying text.

means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.' "[59]

In terms of the specific ordinances,[60] Judge Decker ruled that the permit ordinance was unconstitutional because the NSPA could not obtain the necessary $350,000 worth of insurance. Consequently, the ordinance entailed "covert censorship," especially since the city manager could exercise a discretionary waiver. Judge Decker also ruled unconstitutional that part of the permit ordinance which denied permits to those groups that incite racial hatred. He further held that the Military Uniforms Ordinance was unconstitutional because wearing such uniforms is constitutionally protected symbolic expression and political speech.[61]

In the major part of his decision, Judge Decker treated the sections in the various ordinances dealing with "racial slurs" together, designating them as the "Racial Slur Ordinances."[62] The decision declared the relevant sections unconstitutional because they were vague, overbroad, and directed against the content of protected political speech. Citing prominent free speech cases, the opinion stated that even potentially dangerous political speech, including the advocacy of violence, can be abridged only when it constitutes "a 'clear and present danger' of actually inciting the lawless actions advocated."[63]

But Skokie had relied on neither the danger test nor on *Brandenberg v. Ohio*[64] in its brief to the district court.[65] Skokie also downplayed the hostile audience issue, stressing instead that the proposed NSPA speech act would inflict trauma.[66] Skokie thus alleged that the speech act would constitute fighting words as defined by *Chaplinsky v. New Hampshire*.

Skokie also supported its case concerning fighting words by invoking *Beauharnais v. Illinois*,[67] the only group libel or racial defamation case ever decided by the United States Supreme Court. In that 1952 decision, the Court sustained Beauharnais' conviction for dis-

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59 Collin v. Smith, 447 F. Supp. 676, 686-87 (N.D. Ill. 1978) (quoting Police Dep't v. Mosely, 408 U.S. 92, 95 (1972)).

60 See note 3 *supra* for a description of the ordinances.

61 447 F. Supp. at 700.

62 *Id.* at 686-700.

63 *Id.* at 687-88. He thus reaffirmed the highly protective incitement test in Brandenburg v. Ohio, 395 U.S. 444 (1969), which held that an advocacy of lawless action may be prohibited only if it is "directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Id.* at 447.

64 395 U.S. 444 (1969).

65 Defendant's Brief in Response to Plaintiff's Memorandum of Law at 2, Collin v. Smith, 447 F. Supp. 676 (N.D. Ill. 1978); *see also* Collin v. Smith, 447 F. Supp. at 688.

66 Defendant's Brief, *supra* note 65, at 3-9.

67 343 U.S. 250 (1952). For Skokie's use of *Beauharnais*, see Defendant's Brief, *supra* note 65, at 2.

tributing pamphlets which impugned the reputations of blacks. The reliance on *Beauharnais'* group libel doctrine in the context of a fighting words claim was unusual, even though group libel may be viewed as a form of fighting words.[68] Skokie buttressed its reliance on *Beauharnais* by pointing out that many courts had recognized a tort for the intentional infliction of mental suffering.[69] Thus, Skokie compelled Judge Decker to deal with a complex set of racial slur issues which involved questions about fighting words, group libel, and a developing area of tort law.

Despite this fighting words argument, Judge Decker held that Skokie's racial slur ordinances were unconstitutional even though they sought to protect public interests. The decision relied on such cases as *Cohen v. California*,[70] *Gooding v. Wilson*,[71] *Lewis v. City of New Orleans*,[72] and *Rosenfeld v. New Jersey*,[73] which had limited the fighting words doctrine to strictly captive audience situations. The decision also aggressively used the vagueness and overbreadth doctrines.[74]

Decker maintained that statutes such as Skokie's, are overbroad, and thus jeopardize or "chill" the speech that the first amendment is meant to protect. Skokie's ordinance dealing with the dissemination of material which incites racial hatred defined "dissemination" so broadly as "to include such relatively passive activities as distributing leaflets and wearing 'symbolic' clothing. It is clearly not aimed solely at personally abusive, insulting behavior, as was required by *Cohen* and *Gooding*."[75] Decker also intimated that racial slur laws are *inherently* overbroad and vague.[76]

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68 Hadley Arkes makes such an association in his excellent article on *Beauharnais* and *Chaplinsky*, written four years before *Collin v. Smith*. *See Civility*, *supra* note 13, at 390; *see also* H. ARKES, *supra* note 13, at 23-43; Barnum, *supra* note 19, at 73-86, 94-96.

69 Defendant's Brief, *supra* note 65, at 2-6.

70 403 U.S. 15 (1971).

71 405 U.S. 518 (1972).

72 415 U.S. 130 (1974).

73 408 U.S. 901 (1972).

74 *See* Collin v. Smith, 447 F. Supp. at 690-92. Judge Decker held that such statutes are inherently vague because it is impossible to draw the distinction between inciting anger with a social condition and inciting hatred of the person or group perceived to be responsible for that condition with the requisite clarity, and the distinction depends to a great extent upon the frame of mind of the listener. *Id.*

75 *Id.* at 693.

76 The law cannot fashion adequate distinctions in this area of policy:

> Plaintiffs believe that busing school children in order to accomplish integration is a threat to the integrity and quality of the public school system, and they also believe that blacks and Jews are the instigators of busing. They clearly have a constitutional right to say so, and to say so vehemently and forcefully. But at what point does a vehement attempt to arouse public anger at busing become an attempt to incite hatred of blacks and Jews? A society which values "uninhibited, robust and wide-open" debate cannot permit criminal sanctions to turn upon so fine a distinction.

Id. at 692. On the role of the "chilling effect" doctrine in free speech adjudication, see L.

In treating the group libel prong of Skokie's argument in support of its racial slur ordinances, Judge Decker also had to consider the constitutional status of group libel laws in relation to the status of defamatory speech about public officials. Though the Supreme Court had never expressly overruled *Beauharnais*, its status seemed questionable in light of *New York Times v. Sullivan*.[77]

Decker concluded that even though *Beauharnais* had never been overruled by the Supreme Court, it was suspect law due to Supreme Court neglect, critical scholarly commentary, and the development of libel law in the area of public debate following *Sullivan*.[78] In addition, its thrust and potential scope seemed inconsistent with the more protective standards of first amendment law promulgated in recent years:

> [T]here is no doubt that the case's basic premises are still sound: the government may punish speech which defames individual reputation, or which incites a breach of peace. However, as has been seen, a statute directed at unprotected speech may still fall afoul of the First Amendment if it is so broad or vague that it unacceptably inhibits free debate. The standards which the courts apply in determining whether a particular statute has this inhibiting effect have undergone considerable evolution since *Beauharnais*, and much of the analysis the Court employed in that case is obsolete by modern standards.[79]

The criminal statute in *Beauharnais* was based on broad legislative judgments about the general effect of group libel. Yet today, the state must demonstrate an immediate harm in each case before it can prohibit such speech. Given the logic of *Sullivan*, and such subsequent cases as *Garrison v. Louisiana*[80] and *Gertz v. Welch*,[81] criminal group libel laws were, in Decker's view, too restrictive of speech.[82]

TRIBE, *supra* note 5, § 12-24, at 711-12; BeVier, *The First Amendment and Political Speech: An Inquiry Into the Substance and Limits of Principle*, 30 STAN. L. REV. 299 (1978); Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844, 875 (1970).

77 376 U.S. 254 (1964). *Sullivan* held that a public official could not recover from a media defendant for defamatory statements concerning his official conduct without proving "actual malice." *Id.* at 279-80.

78 447 F. Supp. at 694. Examples of criticism include T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 396 (1970) (cited by Judge Decker); L. TRIBE, *supra* note 5, §§ 12-12, -17.

79 447 F. Supp. at 695.

80 379 U.S. 64 (1966).

81 418 U.S. 323 (1974).

82 For example, in *Garrison* the Supreme Court held that truth should be an absolute defense in libel suits involving public officials; yet, in *Beauharnais*, the Court had held that the Illinois trial court had been correct in not allowing Beauharnais to make the defense of truth. The two cases seem incompatible. *See* Collin v. Smith, 447 F. Supp. at 695-96.

Accordingly, Judge Decker held that *Beauharnais* is suspect constitutional law even though the Supreme Court has never overruled it. And, *a fortiori*, the Skokie Racial Slur ordinance was unconstitutional because "libel" is a traditional concept of tort law, whereas "racial" slurs have no settled meaning. *Id.* at 697.

Finally, the decision noted that speech has been protected more aggressively in the decades since *Beauharnais*. Whereas *Beauharnais* held that the Illinois group libel statute was constitutional because it bore a "rational relation" to the state's objective of preventing racial disorder (the standard of traditional, or normal, judicial review),[83] "the Court has since abandoned the rational relation to purpose approach to First Amendment cases, and now requires that laws which restrict free speech and assembly be *necessary* to achieve *compelling* state purposes."[84] With *Beauharnais* rendered nugatory, Skokie's fighting words claim could not stand.

3. United States Court of Appeals and United States Supreme Court Decisions

Skokie appealed immediately from the district court decision. In May 1978, the Seventh Circuit upheld Judge Decker's ruling, with only one partial dissent.[85] Because that decision agreed with Decker's reasoning in virtually every respect, it is unnecessary to examine its content here. This expected decision virtually guaranteed that Collin could appear in Skokie in June 1978, in full uniform.

Skokie then appealed to the Supreme Court. In October 1978, the Supreme Court denied certiorari.[86] By that time, however, the controversy had ended. Collin had decided not to march at Skokie, choosing instead to demonstrate at the Federal Plaza in Chicago on June 25. He chose not to exercise the first amendment right he had won at such great effort to himself and others.

II. Normative and Constitutional Analysis

This section will demonstrate that the type of speech the NSPA intended to use at Skokie engenders harms which justify a reconsideration of the present constitutional law governing racialist expression in the public forum. It will show that *targeted racial or ethnic vilification* is fundamentally different from other forms of racialist expression. The discussion attempts to refute a central assumption in Judge Decker's decision in *Collin v. Smith*: that a "society which values 'uninhibited, robust, and wide-open' debate cannot permit

83 *See* City of New Orleans v. Dukes, 427 U.S. 297 (1976); Williamson v. Lee Optical, Inc., 348 U.S. 483 (1955); United States v. Darby, 312 U.S. 100 (1941).

84 447 F. Supp. at 698 (emphasis added). For a more extensive discussion of the use of strict scrutiny, see L. TRIBE, *supra* note 5, § 12-8, at 602-05 (content based abridgements of speech), § 12-20, at 684-87 (non-content-based abridgements), § 16-6 to -23 (equal protection). See also the different approaches taken in Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978). On strict review of fundamental rights, see C. DUCAT, MODES OF CONSTITUTIONAL INTERPRETATION 193-256 (1978).

85 Collin v. Smith, 578 F.2d 1197 (7th Cir. 1978).

86 439 U.S. 916 (1978).

criminal sanctions to turn upon so fine a distinction" as the one that will be presented here.[87] Such a distinction, however, provides a means to distinguish general group libel—as in *Beauharnais*—from targeted intimidation posing as free speech—as in the Skokie cases. The former should be protected by the Constitution, the latter should not. Since Skokie's ordinances were patterned after the Illinois statute in *Beauharnais*, the following discussion will show that Judge Decker's decision to strike them down was correct. The thrust of his decision was too broad, however, since it would make any laws abridging racialist expression unconstitutional.

A. *Skokie and Other Harmful Cases*

Although Skokie was an especially difficult case due to the survivors' vulnerability, which the ACLU termed the "social" issue in the case, in other respects it actually represents an easier case in "social" terms than other cases of its class. The traumatized survivors, after all, gained the overwhelming support of the community and they galvanized this support into a substantial resistance front.

Other severe cases arise when the targets are less well organized or more isolated from a supportive community. In recent years, hate groups, in particular Ku Klux Klan and Nazi groups, have systematically engaged in targeted intimidations of more or less *isolated* racial or ethnic minorities within majority race areas or neighborhoods.[88]

Most of the acts of intimidation involve physical destruction or trespass which go beyond protected symbolic speech. Yet some involve wearing hoods or other hate symbols in front of homes or in targeted neighborhoods, thereby evoking fear in their targets.[89]

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87 Collin v. Smith, 447 F. Supp. at 692.

88 The Southern Poverty Law Center keeps a constant watch on Klan and Nazi activity and publishes a bi-monthly *Poverty Law Report* which includes a Klanwatch Intelligence Report. In its May/June 1982 edition, the Center reported that the Klan is increasingly engaging in symbolic acts designed to intimidate minorities and to generate publicity:

> Nationwide, while the Klan currently does not appear to be making great strides in recruiting, Klan members themselves are engaging in a wide variety of publicity-seeking activities, ranging from road blocks to cross burnings.
>
> In addition, acts of racially-motivated vandalism, harassment and intimidation by groups and individuals influenced by the militant right continue to occur with alarming frequency.

Seltzer, *Survey finds extensive Klan sympathy*, POVERTY L. REP., May/June 1982, at 6, 12.

89 The California Fair Housing and and Employment Commission held extensive hearings in late 1981 on the disturbing frequency of hate group vandalism and intimidation in Contra Costa County, California. The county sheriff told the commission that the Klan used symbols

> for harassment value. . . . What they are trying to do is scare the people . . . and it's very, very effective. The KKK is a very scary organization . . . [u]sing those things, whether or not they are involved themselves with the KKK, is going to throw some fear into the neighborhoood, that's exactly what they meant to do.

A recent case in the Galveston Bay area of Texas illustrates the problem. In the early 1980's the Knights of the Ku Klux Klan began a campaign of intimidating Vietnamese fishermen in the bay. On one occasion, the Klan and its affiliates took a boat ride near Vietnamese fishermen. The Klan wore full military regalia, brandished weapons, and hung an effigy of a Vietnamese fisherman—all within view of the fishermen. The Vietnamese sued for injunctive relief citing intimidation and distress, contractual interferences, and the violation of property and personal rights as the grounds for their claim. They won.[90] The federal district court's decision against the Klan's free speech claim supports this article's position that forms of targeted racial vilification contradict the normative ends of the first amendment. An examination of this position is presented below.

B. *The Kantian Principle of Ultimate Ends and the Principle of Direct Harm*

In the *Groundwork of the Metaphysics of Morals*, Kant articulates the moral principle of ultimate ends:

> Now I say that man, and in general every rational being, *exists* as an end in himself, *not merely as a means* for arbitrary use by this or that will: he must in all his action, whether they are directed to himself or to other rational beings, always be viewed *at the same time as an end* . . . .
>
> . . . The practical imperative will therefore be as follows: *Act in such a way that you always treat humanity, whether in your own person or in the person of any other, never simply as a means, but always at the same time as an end.*[91]

Under Kant's principle of ultimate ends, society should not unduly sacrifice an individual's interest in the name of greater societal

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Calif. Fair Housing and Employment Comm'n, *Report and Recommendations: Public Hearings on Racial, Ethnic, and Religious Conflict and Violence in Contra Costa County* (Apr. 8, 1982).

90 Vietnamese Fishermen's Ass'n v. Knights of the Ku Klux Klan, 543 F. Supp. 198 (S.D. Tex. 1982); *see also* Vietnamèse Fishermen's Ass'n v. Knights of the Ku Klux Klan, 518 F. Supp. 993 (S.D. Tex. 1981). In these cases the proto-military operations of the Klan and affiliated groups lurked as important background issues. For other cases involving racial terrorism, intimidation or disruption by the Klan, see Invisible Empire Knights of the Klu Klux Klan v. City of West Haven, 600 F. Supp. 1427 (D. Conn. 1985); Waller v. Butkovich, 584 F. Supp. 909 (1984) (suit by rally participants against government officials for alleged complicity in attack by Klan and Nazi groups in Greensboro, North Carolina demonstration); United Klans of Am. v. McGovern, 453 F. Supp. 836 (N.D. Ala. 1978), *aff'd*, 621 F.2d 152 (5th Cir. 1980); United States v. Crenshaw County Unit of the United Klans of Am., 290 F. Supp. 181 (M.D. Ala. 1968); United States v. Original Knights of the Ku Klux Klan, 250 F. Supp. 330 (E.D. La. 1965); United States v. United States Klans, Knights of the Ku Klux Klan, Inc., 194 F. Supp. 897 (M.D. Ala. 1961); Handley v. City of Montgomery, 401 So. 2d 171 (Ala. Crim. App. 1981).

91 I. KANT, GROUNDWORK OF THE METAPHYSICS OF MORALS 95-96 (H. Paton trans. 1963) (emphasis added).

good. In this respect, the principle underlies the theory of individual rights and is a major premise of American constitutionalism.[92]

But strict Kantian moral theory may pose problems when applied to free speech claims. Kant's moral theory is "categorical" in the sense that it is not contingent upon empirical consequences or demonstration of actual harm. Consequently, the Kantian principle of ultimate ends is absolutist in nature.[93] Thus pure Kantian principles would not allow one to distinguish speech acts in terms of the nature of the harm they caused. Any harm would violate these principles.

Hadly Arkes adopts such a Kantian view for racialist expression. He maintains that general racial defamation which does not directly cause the harm of intimidation is just as unjustified and abridgeable as racialist expression that does cause such a harm. Arkes rejects merely singling out direct harms for abridgement because "[t]he estimate of material harms often depends on empirical evidence and conjectures, and on propositions of a statistical nature. It rests, in other words, on what we would have to call 'contingent truths,' rather than the kinds of truth or principles that 'cannot be otherwise.' "[94]

But, as the later discussion will show, laws against *all* racialist expression or group libel threaten first amendment rights, just as many forms of racialist expression do not inflict direct or substantial harm. Thus, the strict Kantian position in this area seems incompatible with what Frederick Schauer calls the "free speech principle," which holds that free speech is so fundamental and independently important to democratic life that it merits special constitutional protection.[95]

When these principles of ultimate ends and free speech collide, a judge must make a prudent, yet principled, choice among values which a strict Kantian would be loath to make. Respect for the free speech principle demands that a balance be struck, and this balance should clearly accommodate free speech. Accordingly, the following rule for the balancing of values is suggested: *the more substantial and direct the harm, the more compelling the principle of ultimate ends*. This

92 *See* J. RAWLS, A THEORY OF JUSTICE 11, 140-42, 179-83, 252 (1971); H. ARKES, *supra* note 13, at 7, 8, 225-26, 335, 388-91.

93 In this sense, Kant's position is similar to Weber's ethic of ultimate ends, which espouses moral absolutism, as opposed to the ethic of responsibility, which seeks to balance ethically relevant competing values. *See* Weber, *Politics as a Vocation*, in MAX WEBER: ESSAYS IN SOCIOLOGY 77-128 (H. Gerth & C. Mills eds. 1946).

94 H. ARKES, *supra* note 13, at 7; *see also id.* at 47-48.

95 F. SCHAUER, FREE SPEECH: A PHILOSOPHICAL INQUIRY ch. 1 (1982); *see* T. EMERSON, *supra* note 78; A. MEIKLEJOHN, *supra* note 11, at 24-28; *see also* ARISTOTLE, THE NICHOMACHEAN ETHICS: BOOK SIX chs. 5-7 (L. Greenwood trans. 1973) (maintained that politics is about practical virtue, not theoretical absolutes).

approach is similar to the Supreme Court's balancing of speech versus societal interests under strict judicial review; there the societal interest must be "compelling" in order for a narrowly tailored speech restriction to be valid.[96] This is a weak use of the Kantian maxim concerning the wilful use of individuals as means,[97] however, since it tolerates a prudential, yet principled, balancing of values based on consequences. The strict Kantian position would not allow any such balancing.

This approach also serves as a tool to distinguish justified and unjustified resistance to free speech. There is a difference between a speech act that appeals to reason and conscience, and one which is primarily assaultive; the former treats listeners or targets as rational, autonomous agents, whereas the latter clearly treats them, in Kant's words, "merely as a means for arbitrary use by this or that will." In the previous discussion of fighting words and the NSPA, it was shown that such speech treats targets as victims or as a means to bring about disruption and publicity. The NSPA consciously targeted Skokie for just these reasons.[98]

One means of applying the weak principle of ultimate ends may be derived from Charles Fried's analysis of the distinction between direct and indirect harms, a distinction which can be used to chart the boundaries of the right to free speech. Fried compares two hypothetical cases: (1) plunging a dagger into someone's heart; and (2) revaluing a nation's currency with the foreseeable result that wheat will be less available for famine relief, which will cause greater hunger abroad, and could lead to starvation. Fried maintains that if we could not say that the former act constitutes a special harm that is morally more grievous than the latter, "then our whole position as free moral agent, our status as persons, would be grievously undermined," because we would jeopardize the notion that concrete persons as "particular entities" are the basis of the moral order. He further states: "[I]f the person is to remain at the center of moral judgment, this link to the concrete must be maintained by the very form of our moral norms. We must avoid what I

96 *See* L. TRIBE, *supra* note 5, §§ 11, 16. *See generally* C. DUCAT, *supra* note 84, at 193-256.

97 The criminal law is predicated on the concept of intent as a necessary component of the norm of responsibility (accountability). *See* W. BERNS, FOR CAPITAL PUNISHMENT 11, 14, 23-29 (1979); G. FLETCHER, RETHINKING CRIMINAL LAW 397-401, 444-53, 805-52 (1978); H. GROSS, A THEORY OF CRIMINAL JUSTICE 23-25 (1979).

98 Compare the demonstrations of Martin Luther King, Jr., to those of the NSPA. While King's speech acts were meant to be morally and strategically coercive, they appealed to moral principle and were not designed to intentionally traumatize anyone. Compare, for example, King's *Letter From a Birmingham Jail* in CIVIL DISOBEDIENCE: THEORY AND PRACTICE (Bedau ed. 1969) to Collin's *New Order* newsletter. On King's strategic use of moral coercion, see D. GARROW, PROTEST AT SELMA 221-23 (1979). *See also* the analysis of the NAACP cases, notes 194-205 *infra* and accompanying text.

shall call disintegrating universality."[99]

Fried's theory of disintegrating universality is useful in distinguishing forms of speech, and in balancing the Kantian principle of ultimate ends. Speech acts which directly and purposely harm others, those which "by their very utterance inflict injury" (to use *Chaplinsky*'s language), are morally less justifiable than those which are primarily meant to appeal to reason or conscience, but which result in harm as a secondary consequence. In addition, speech that is threatening in content, but which is *not* directed at a particular target, would not constitute a direct harm. This is a strong application of Fried's harm principle, for here the motive is bad, but the effect is not tangibly or directly harmful.

The Supreme Court has held that political speech is not merely cerebral. It can also be passionate, provocative, and upsetting. The first amendment, however, protects such speech despite these consequences. In *Terminiello v. Chicago*, Justice Douglas stated that "a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger."[100]

The Supreme Court in *Cohen* and the various courts in the Skokie cases used similar logic. These cases express the view that discord, tumult, and stirring up anger are side effects of the core purposes of the first amendment classically stated in *Chaplinsky*. To use Fried's terms, such results are indirect harms; furthermore, any such conflict can also be beneficial to groups and to the system.[101] Yet when the *primary* purpose of speech is not communication, but rather the infliction of harm, the law can no longer construe any resulting harm as a secondary result. In such instances, the principle of disintegrating universality does not apply.[102]

Some actual and hypothetical cases will now be examined. Analyzing these cases will show how *targeted racial vilification* inflicts a direct and special kind of harm which is distinguishable from the harms caused by other forms of unpopular, dispute-causing speech. It will also show how the suggested reform proposal is consistent

99 C. FRIED, RIGHT & WRONG 33 (1978).

100 337 U.S. 1, 4 (1949).

101 *See* J. ORTEGA Y GASSET, CONCORD AND LIBERTY 13-17 (H. Weyl trans. 1946); *cf.* 1 THE DISCOURSES OF NICCOLO MACHIAVELLI 234 (L. Walker trans. 1975) ("It is a sound maxim that reprehensible actions may be justified by their effects, and that when the effect is good, . . . it always justifies the action."). *See generally* L. COSER, THE FUNCTIONS OF SOCIAL CONFLICT (1956).

102 For an analysis of the Supreme Court's recognition of this distinction in free speech cases other than demonstrations in the public forum, see notes 150-74 *infra* and accompanying text.

with the ends of the first amendment, and with judicial principles and doctrines in related cases.

C. *Cases*

1. *Organization for a Better Austin v. Keefe*

This analysis begins with a case which poses a serious hurdle for the proposed approach: *Organization for a Better Austin v. Keefe.*[103] *Keefe* is important because it convincingly establishes the concept that verbally coercive speech directed at selected targets may indeed be entitled to first amendment protection. The discussion below argues that *Keefe* was correctly decided, and thus leads to the conclusion that targeted speech can be distinguished based upon its *content.* Such a conclusion illustrates the difference between targeted racial vilification and other forms of speech. By supporting the *Keefe* decision, it will also show that the suggested position is meant to be limited only to extreme cases.

In the *Keefe* case, an Illinois circuit court had issued an injunction against the Organization for a Better Austin ("OBA"), prohibiting it from distributing leaflets or similar literature in the city of Westchester, a Chicago suburb. The leaflets criticized Keefe, a real estate broker, for engaging in "block busting" and "panic peddling activities."[104] A group of whites and blacks responded to Keefe's panic peddling efforts by forming the OBA. They targeted Keefe by passing out those leaflets at Keefe's church and throughout his neighborhood. They had resorted to the leaflets after previous attempts to dissuade Keefe had failed.

Since both blacks and whites belonged to the organization, the OBA did not call for a segregated neighborhood. Instead, the group called for a "racially balanced" neighborhood. The evidence suggested that their primary motive in leafletting was to put pressure on Keefe to stop his activities which conflicted with their goals. Keefe's legal actions reveal that the leaflets upset him. Does this understandable reaction to targeted expression justify the abridgement of the OBA's right to free speech? It does not, despite the fact that Keefe himself felt vulnerable.

In setting aside the injunction against OBA, Chief Justice Burger stated:

> This Court has often recognized that the activity of peaceful

103 402 U.S. 415 (1971).

104 Panic peddling occurs when a real estate agent, or some other interested party, induces owners to sell their homes by spreading rumors that the quality and value of their neighborhood and homes will soon be diminished because of the entry of racial minorities into the neighborhood or for some other reason. The agent then reaps a windfall profit in commissions.

> pamphleteering is a form of communication protected by the First Amendment. . . . The claim that the expressions were intended to exercise a coercive impact on respondent does not remove them from the reach of the First Amendment. Petitioners plainly intended to influence respondent's conduct by their activities; this is not fundamentally different from the function of a newspaper . . . . Petitioners were engaged openly and vigorously in making the public aware of respondent's real estate practices. Those practices were offensive to them, as the views and practices of petitioners are no doubt offensive to others. But so long as the means are peaceful, the communication need not meet standards of acceptability.[105]

In reaching this conclusion, the Supreme Court's opinion contained the following propositions: (1) the intentional targeting of individuals is acceptable first amendment behavior as long as the targeting is peaceful; and (2) free speech is not limited to the pristine expression of ideas bereft of any coercive impact. As Holmes, and Meiklejohn, have stated, "every idea is an incitement." Indeed, often the controversy surrounding speech is an indication of the speech's importance, since strong emotions are often aroused by advocating change or exposing questionable behavior.[106]

So targeting of an individual is not per se an abridgeable speech act. Nevertheless, such acts may raise serious problems in other situations; such problems arise from both the content and the context of the speech, and the nature of the target. A slight modification of the facts in *Keefe* illustrates these possible problems and raises thorny first amendment problems.

2. *OBA v. Keefe*, Hypothetically Modified

Keeping the same basic set of facts as in *Keefe*, assume that Keefe was Jewish. What if the leaflets had read *Jew Greed Pockets Another Commission: Kike Keefe Cashes in on Families' Homes*? Would a judge feel as comfortable granting speech rights to this type of leafletting? If not, what factors are different in the two cases?

There are two major differences which are interdependent. First, the leaflets now refer to Keefe's ethnic origin or race, and do so in an intimidating fashion. Second, because of the racialist content of the pamphlet, it can be assumed that Keefe possesses a greater vulnerabiity in this case than in the real *Keefe* case. Why? Because the hypothetical reference to Keefe's race or ethnic origin changes the very nature of the speech act from a criticism of Keefe's

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105 *Id.* at 419 (citations omitted). Chief Justice Burger's position is at odds with the strict Kantian categorical imperative. *See* notes 91-98 *supra* and accompanying text.

106 Some psychological and social theorists depict society and culture, at least in part, as a defense mechanism against anxiety. *See generally* S. DeGrazia, The Political Community (1948); E. Durkheim, Suicide (J. Spaulding & G. Simpson trans. 1951).

economic practices to a vilification of something over which Keefe has no control.

The racial vilification constituted more than a reference to Keefe's character. Had the leaflet said something like "Keefe is a scoundrel who sucks profits from innocent homeowners," the charge would have referred to Keefe's moral character. Such a reference would have been much less odious than a reference to race or ethnicity, even if the former reference was unfair. It could still be labeled a verbal assault, but it seems at least a potentially justified verbal assault because of the alleged harms which Keefe had attempted to perpetrate.

Any reference, however, to race or ethnicity seems uniquely noxious and nefarious. There are several factors which distinguish such a reference from other references. First, race and ethnicity are characteristics over which a person has no control. They do not represent roles or chosen lines of action, but rather unchangeable facts of nature for which no individual is responsible. By linking Keefe's actions to his Jewishness, the hypothetical OBA leaflet, in effect, accuses Keefe of being Jewish. It also assumes that race or ethnic background causes immoral action. It thus ironically denies the very autonomy of will upon which responsibility rests and, less ironically, upon which the moral conception of constitutional and human rights rests.[107]

Second, the qualities of unalterability and race heighten the intimidation of the message. This is so not only because there is nothing Keefe can do to alter his ethnicity, but also because targeted racialist speech is inherently vicious and *assaultive*. The history of racism in this and other countries suggests this latter conclusion, especially because racism has led to some great inhumanities. Racism represents an extremist psychological state which is intrinsically irrational[108] and which evokes highly emotional responses.[109]

Targets of racism naturally interpret racialist speech as vicious and intimidating. Skokie "survivors" and other Jews reacted so vehemently to the NSPA's intimidations partly because they understood the denotative meaning of the NSPA's racism; they understood the way in which that racism questioned the legitimacy

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107 *See* notes 92, 97 *supra*.

108 *See* G. ALLPORT, THE NATURE OF PREJUDICE 391-92 (1954); Note, *Group Vilifications Reconsidered*, 89 YALE L.J. 308, 312 (1980).

109 *See* Note, *supra* note 108, at 312-13. On racial defamation as a form of assault, see Lasson, *Group Libel Versus Free Speech: When Big Brother* Should *Butt In*, 23 DUQ. L. REV. 77, 123-26 (1984). Lasson also maintains that racial defamation is "nonspeech" rather than protectable speech which is balanced against other interests. *Id.* This is the approach taken in this article, although context is also taken seriously here.

of their very lives. These trauma-evoking factors are among the reasons that racial classifications in the law are "immediately suspect," according to the Supreme Court.[110]

Another hypothetical modification of the *Keefe* leaflet will help to further clarify these points. Suppose that Keefe were a member of the Libertarian Party, and the leaflet read, "Libertarian Advocate Keefe Unmasks Capitalism's True Face: Real Estate Shark Devours Home Life." This remark does not seem to be as assaultive and disturbing as the hypothetical reference to race in the last modification. Unlike race, the economic and political roles referred to in this example are alterable and freely chosen and may indeed be related to one's political and economic actions. When one criticizes the alleged link between such roles and a person's action, the allegation may be incorrect, but it does not deny the moral autonomy of the target. Reference to a person's political and economic roles thus differs from his race or ethnic origin.

Some commentators maintain that people do not actually choose their most basic beliefs and political theories; instead, those value choices spring more or less spontaneously from subconsious sources deep within the self.[111] But this view seems exaggerated. Value choices are no doubt less autonomous than many rationalists assume, yet this fact does not necessarily mean that they are totally unfree. A person's freedom of will is not an all or nothing proposition. People are certainly freer in their political and economic values than they are in changing their race or ethnic origin. Indeed, criminal law assumes that a person exercises moral choice and autonomy concerning his actions. The state, however, often must establish such autonomy by showing that the defendant had the specific intent to commit a crime.

In addition, criticism of a target's political or economic actions or memberships is normally directed to real, objective actions that have important consequences. Indeed, *Chaplinsky v. New Hampshire's* "two level" or "definitional" approach to free speech presumes that speech about politics is rational. Criticism or vilifica-

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110 . *See* Korematsu v. United States, 323 U.S. 214 (1944); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978); *see also* J. ELY, DEMOCRACY AND DISTRUST (1980); W. LOCKHART, Y. KAMISAR, J. CHOPER, EDS., CASES AND MATERIALS ON CONSTITUTIONAL RIGHTS AND LIBERTIES 881-902, 1002-07 (1981).

111 *See generally* D. HUME, A TREATISE OF HUMAN NATURE (L. Selby-Bigge 2d ed. 1978); J. LOCKE, A LETTER CONCERNING TOLERATION (1963). Leonard Levy argues that this belief in the lack of free will in the choice of values is a major justification for speech libertarianism: we cannot punish people for believing that which they cannot help believing. *See* L. LEVY, LEGACY OF SUPPRESSION epilogue (1968). For a thoughtful, balanced discussion of this issue, see S. HAMPSHIRE, THOUGHT AND ACTION (1960). Although Hampshire is characteristically cognizant of the complexity in this area of value determination, he rejects sheer determinism.

tions directed to the moral character of a target based upon his political or economic actions thus differ fundamentally from racial or ethnic vilification, even if such criticism involves hate or anger.

Another way of clarifying this difference is to compare the treatment of people based on their race when such treatment is vilifying and when it is based on "realistic group conflict." Realistic group conflict is a term used by social psychologists to describe conflicts that are based on objective or tangible conflicts which can exist between or among groups. It does not deal with conflicts due primarily to an irrational psychological displacement which results from a person's being a racial target.

In some areas of the country, for example, whites might have valid reasons independent of race to be angry at certain blacks (or vice versa), or to be involved in disputes with them. Such social phenomena as threats to personal safety, neighborhood security or quality (an issue in the actual *Keefe* case), and the conditions in schools *may* be relevant examples of realistic racial conflict.[112] Many Marquette Park residents may have belonged to this category of conflict. Yet, there the NSPA strove to turn any realistic group conflict into pure racism.

In other cases, the racial vilification can exist for its own sake, independent of objective phenomena and associations. Of course, many racists can find post hoc "objective" reasons for their hate, and some objective phenomena may turn a nonprejudiced person into a prejudiced person. Nevertheless, the basic distinction between realistic group conflict and racial prejudice is still valid.

To vilify race is to allege that a person's race causes his behavior. It denies the very humanity of the target, since the notion of humanity includes the notion of moral autonomy distinct from what Kant calls "necessitation," or the compulsions of passion and an unfree will.[113] Interviews with the survivors in Skokie suggest that one motive for their resistance to the NSPA originated in the way their Nazi persecutors in Europe denied their moral autonomy by using a racist metaphysics which held that race could cause behavior.[114] Observers of colonial master-slave relations and of totalitarian racism have also depicted the existence of the idea that race

112 On realistic conflict theory, see R. LEVINE & D. CAMPBELL, ETHNOCENTRISM (1972); M. Rothbart, *Achieving Racial Equality: An Analysis of Resistance to Social Reform*, in TOWARD THE ELIMINATION OF RACISM (P. Kataz ed. 1976); Cummings, *White Ethnics, Racial Prejudice, and Labor Market Segmentation*, 85 AM. J. SOC. 938 (1980); Kinder & Rhodebeck, *Continuities in Support for Racial Equality*, 46 PUBLIC OPINION Q. 195, 195-215 (1982). For more theoretical and sociological treatments of the difference between rational and irrational conflict, see L. COSER, *supra* note 101; R. SENNETT, THE FALL OF PUBLIC MAN (1976).

113 *See* I. KANT, *supra* note 91, at 80-81.

114 *See* D. DOWNS, *supra* note 8, at 88-89, 101-03.

causes behavior.[115]

One explanation for the virulence of the Skokie survivors' reaction to the NSPA was their need to take purposeful action "in the face" of this type of accusation. Memmi maintains that militant revolt is required psychologically to purge the victim of the sense of inferiority that racism engenders.[116] A similar drive seems to have motivated the reaction of the Skokie survivors. Such targets of racial vilification react with a depth of emotion which signifies the inherent irrationality of the relation between speaker and target. As one Skokie survivor asserted: "You cannot have . . . these people with the same ideas as those who killed my people or my parents [coming into Skokie] because they are protected by the Constitution . . . . We cannot afford to be weak. We have got to fight."[117]

The differences between the speech act of targeting in the *Keefe* case and at Skokie, and our racial vilification hypothetical are thus based on the notions of autonomy, assault, and rationality. Targeted racial vilification is inherently traumatic and assaultive, and thus results in a substantial direct harm. It is a form of direct intimidation (or fighting words), so the classic justifications of free speech, such as the autonomy and self-government principles, do not apply if the Kantian principle of ultimate ends is applied to such instances of direct harm.[118] Any long range benefit that might result from targeted racial vilification cannot justify its expression because of the direct harm it causes. Furthermore, its very nature is inconsistent with the rationality principle of *Chaplinsky*. As one commentator states:

> Group-vilifying speech directly addresses the subconscious needs of the overtly or latently prejudiced hearer, including the needs to externalize self-hatred and anxiety, to project repressed desires, and to stereotype the target group in order to avoid uncertainty.[119]

One final difference between *Keefe* and the hypothetical cases must be mentioned. In the real *Keefe* case, the primary *intent* of the OBA leafletters was to modify Keefe's economic practices. In the "Kike Keefe" hypothetical, the only imaginable motive for the use of the ethnic vilification is to intimidate and emotionally injure—

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115 *See* H. ARENDT, THE ORIGINS OF TOTALITARIANISM 158-221 (1951). *See generally* F. FANON, THE WRETCHED OF THE EARTH (1963); A. MEMMI, THE COLONIZER AND THE COLONIZED (1965). On German racist metaphysics, see generally G. MOSSE, THE CRISIS OF GERMAN IDEOLOGY: THE INTELLECTUAL ORIGINS OF THE THIRD REICH (1981).

116 A. MEMMI, *supra* note 115, at 127-29.

117 Interview with a Skokie survivor, in Skokie, Ill. (July 1979).

118 On autonomy as a central value of free speech, see Scanlon, *A Theory of Freedom of Expression*, 1 PHIL. PUB. AFF. 204 (1972); Wellington, *On Freedom of Expression*, 88 YALE L.J. 1105 (1978). On self-government, see A. MEIKLEJOHN, *supra* note 11, at 24-28, 57.

119 Note, *supra* note 108, at 313 n.22.

why else would racial vilification have been used? The use of the vilification is independent of the economic issue at stake and constitutes an unjustifiable harm despite the justice or truth of the economic claims.

Thus, as in a modern libel case, the coexistence of assaultive speech with true, justified speech should not render abridgement due to the harmful speech constitutionally impermissible. *New York Times v. Sullivan*[120] and *Herbert v. Lando*,[121] which involved the libel of public officials, demonstrate such a judicial investigation and determination of intent. If false statements are made with malice, they lead to civil liability for libel. Such statements are not saved by the first amendment by virtue of any true statements they contain. In other words, the "mixed utterance" doctrine, that holds that bad speech must be protected if it is alongside good speech, loses its validity once it is determined that false statements, even those mixed with true statements, have been made with actual malice. The same principle should apply to racial slurs.

3. Silent Symbolic Intimidation

Now imagine that the OBA failed to influence Keefe with its pamphlets. Consequently, it changed tactics and targeted the homes of black families. At 8:00 p.m. each night, a group of twenty OBA members stood silently on the sidewalk or edge of the street in front of the home of a black family that has just moved into the area.[122]

This example is analogous to actual occurrences in Cicero, Illinois. Arkes describes the situation this way:

> No violence arises; no rocks or bottles are thrown. The crowd merely stands there, chanting in a low tone, and as it stays on through the night, it makes almost no sound at all. There is no breach of the peace, or even anything that fits our usual notion of a public disturbance. The crowd simply stands in silence through the night, intimidating by its presence.[123]

Arkes points out that no physical danger or disorder is posed or threatened, so the danger test does not apply. The speech act, which is more symbolic than expressed, is intended to induce or coerce the blacks to move out. Indeed, it could be said that the OBA is "merely" striving to achieve the same ultimate end it strove for in *Keefe*, to slow down the process of blacks moving into the neighborhood.

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120 376 U.S. 254 (1962).
121 441 U.S. 153 (1979).
122 This action would be unlikely due to the racial mixture of the actual OBA, but let us imagine it for purposes of analysis.
123 *Civility*, *supra* note 13, at 418.

This type of action is a form of "symbolic speech." The Constitution protects such symbolic speech, unless it is allied with non-speech elements that harm state interests.[124] But again, this case can be distinguished from *Keefe*. The difference here is between intimidation designed to trigger immediate emotional trauma, since the speech is intimidating by its very nature, and verbally coercive speech (to use *Keefe*'s terminology) designed to apprise the public and the target of the negative consequences of his actions.

In *Keefe*, the OBA targeted the person allegedly responsible for panic peddling, and made no references to Keefe's ethnicity; in Arkes' hypothetical, they targeted blacks who simply exercised their right to buy a home, and the racial reference is implicit. But what if the OBA crowd carried signs that said, "Property values drop when blacks pour into neighborhoods"? This statement is certainly "political speech," which *Cohen v. California*[125] fully protects, and the statement is quite possibly *true*. In libel cases of public officials, truth is an absolute defense.[126] Thus, true political speech made in the public forum is normally granted full first amendment protection. But the inclusion of true political speech here does not lessen the intentional *intimidation*. The essential nature of the speech act—the intentional infliction of emotional trauma upon an innocent and vulnerable party—is not modified by its being true and authentic political speech. The psychological assault constitutes a harm that cannot be answered; it is inherently not remediable by more speech.[127]

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124 *See, e.g.*, Spence v. Washington, 418 U.S. 405 (1974) (unconstitutional to punish a student for putting a peace symbol on his own U.S. flag for display); Tinker v. Des Moines School Dist., 393 U.S. 503 (1969) (unconstitutional to suspend high school students for wearing black arm bands to school in protest of Vietnam war); United States v. O'Brien, 391 U.S. 367 (1968) (upheld federal law against the destruction of draft cards). Symbolic speech cases often involve content distinctions that are held invalid. *See, e.g.*, Schacht v. United States, 398 U.S. 58 (1970) (a federal law punishing the nonmilitary use of a military uniform if the portrayal discredits the military is unconstitutional treatment of such advocacy). Based on *O'Brien*, the Court's general principle is that the government interest that constitutes abridgement of symbolic speech must be unrelated to the suppression of opinion or its communicative impact. *See* L. TRIBE, *supra* note 5, § 12-2. For a recent case based on this standard, see Clark v. Community for Creative Non-Violence, 104 S. Ct. 3065 (1984). The Court upheld the Park Service's denial of a permit for demonstrators to sleep in symbolic tents in Washington, D.C. to protest the plight of the homeless. The Court upheld the regulations as reasonable time, place, and manner restrictions, and stressed the content neutrality of the regulations.

125 403 U.S. 15 (1971).

126 Garrison v. Louisiana, 379 U.S. 64 (1964).

127 Obscenity cases allow abridgement on similar grounds. Obscenity is patently offensive. Like fighting words, its impact cannot be mitigated by counter-speech since the harm is committed. See note 174 *infra* on the obscenity exception to the first amendment. On obscenity and patent offensiveness, see A. BICKEL, THE MORALITY OF CONSENT 73-74 (1975); H. CLOR, OBSCENITY AND PUBLIC MORALITY: CENSORSHIP IN A LIBERAL SOCIETY 62-65, 69-73 (1969). In Vietnamese Fishermen's Ass'n v. Knights of the Klu Klux Klan, 543 F.

Arkes' hypothetical poses another important issue: the nature of a captive audience in the act of targeting. The Supreme Court has repeatedly held that the first amendment does not give a speaker the right to thrust his views on an unwilling listener.[128] In order to protect free speech as much as possible, however, the Supreme Court applied a test of captivity which requires the target's interest to be "substantial." Justice Harlan's standard for captivity in *Cohen* has been influential:

> [T]he mere presumed presence of unwitting listeners or viewers does not serve automatically to justify curtailing all speech capable of giving offense . . . . The ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is . . . dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner.[129]

Geoffrey Stone points out that the *Cohen* captivity test has four factors that a court must examine: (1) the nature of the privacy interest in a particular case; (2) the substantiality of this interest; (3) the extent to which the person is indeed captive; and (4) whether the state can find ways to protect this interest that are less restrictive than abridging speech.[130]

The substantiality of the privacy interest is a function of the nature of the relevant unwanted speech and the ability of the listener to avoid hearing it. The more intrusive, undesirable, or assaultive the speech, the more substantial the privacy claim. At the same time, in the terms of the captivity issue, "the true measure of an individual's privacy in this context consists, not in his total protection from initial exposure to unwelcome ideas but, rather, in his ability to avoid continued exposure to those ideas once he has rejected them."[131]

Applying Stone's logic to Arkes' hypothetical, it is clear that the black homeowners are a captive audience. Their privacy interest is substantial, because the sanctity of the home has always been supported by the Supreme Court in speech-related and other cases,[132] and the racial intimidation is emotionally assaultive, and

Supp. 198 (S.D. Tex. 1982), the court used the "fighting words" doctrine in its analysis of the defendant's conduct. *Id.* at 208.

128 *See, e.g.*, Rowan v. United States Post Office, 397 U.S. 728, 735-37 (1970); Martin v. City of Struthers, 319 U.S. 141, 148 (1943); Schneider v. State, 308 U.S. 147, 164-65 (1939). For a recent treatment of this issue, see Taylor, *"I'll Defend to the Death Your Right to Say it—But Not To Me"—the Captive Audience Corollary to the First Amendment*, 1983 S. ILL L.J. 211 (1983).

129 Cohen v. California, 403 U.S. 15, 21 (1971).

130 Stone, *Fora Americana: Speech in Public Places*, in FREE SPEECH AND ASSOCIATION 342, 372-73 (P. Kurland ed. 1975).

131 *Id.* at 376.

132 *See* Carey v. Brown, 447 U.S. 455, 471 (1980) ("the State's interest in protecting the

hence highly undesirable.

Even according to the standards weighted in favor of free speech expressed by Stone and *Cohen*, such home dwellers are clearly captive. Although the residents could turn their eyes or shut their blinds, they would probably continue to be intimidated because the group would still be outside.[133] Indeed, their fears would linger even after the "demonstrators" left; intimidation of this sort does not easily wear off. Finally, it should be noted that no means short of abridgement or punishment appear to exist by which the state could protect the privacy interest at stake.

So racialist intimidation, expressed or symbolic, inflicts a substantial harm when directed at a person's home. The Skokie situation, however, posed an additional problem. The NSPA gave advance notice of its intentions and planned to appear in the commercial area surrounding the village hall. These differences, however, should not distinguish Skokie from the cases discussed in this section. The reasons for this conclusion will be discussed later.[134]

4. *Beauharnais, Collin v. Smith*, and the Boundaries of Targeting

Before drawing any conclusions from the consideration of the above cases, an actual case which requires us to draw the line between forms of racialist expression and vilification must be examined. The treatment of *Beauharnais v. Illinois* that follows will demonstrate that laws against general, nontargeted racial vilification, such as Skokie's "racial slur" ordinances and other "group libel" laws, *should* be held unconstitutional because they violate free speech principles. As well, harms caused by such expression are less direct and substantial than those caused by targeted vilification. The treatment of *Beauharnais* thus reveals the prudential balancing of the principle of ultimate ends in favor of free speech in cases where speech of "bad content" does not directly cause a harm.

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well-being, tranquility, and privacy of the home is certainly of the highest order"); *see also* Moore v. City of East Cleveland, 431 U.S. 494 (1977).

133 *See* Paris Adult Theatre I. v. Slaton, 413 U.S. 47 (1973); A. BICKEL, *supra* note 127, at 73-74.

134 It should also be noted that Arkes' hypothetical differs from a case such as Gregory v. Chicago, 394 U.S. 111 (1969), in which blacks marched around Mayor Daly's home protesting Chicago's public school desegregation policies. The difference is analogous to the difference between the actual *Keefe* case and the "Kike Keefe" hypothetical: In *Gregory*, the target of the protest was allegedly involved in action objectively tied to a policy. Yet in Arkes' hypothetical, the targets are held accountable for their race. In addition, Daly was a public official, and such exposure goes with the job, whereas the residents in the hypothetical have not voluntarily put themselves in such a position. For an analysis of libel cases and the voluntary nature of plaintiffs' status, see notes 150-59 *infra* and accompanying text. Had the *Gregory* demonstrators vilified Daly's ethnicity, the "Kike Keefe" hypothetical would then control.

Beauharnais was convicted[135] under an Illinois statute which closely resembled the Skokie racial slur ordinances.[136] Skokie modeled its ordinance on the statute, even though Illinois had revoked it years before the Skokie case.[137] As the critics of group libel laws assert, the statute is excessively vague and broad.[138] No mention is made of the intent or the virulence of the vilification. The statute would provide grounds for punishing such works as *Huckleberry Finn* and *The Merchant of Venice*, since these works fictitiously portray racial and ethnic characters in an unfavorable light. Important works, such as *Mein Kampf*, could also be affected by the law, even if published or used to teach the evil of Nazism. Nor does the act specify the context of the speech act. The mere publication of racialist expression could be punishable even in the absence of a demonstrated harm.

In the only group libel case ever decided by the Supreme Court, Beauharnais' conviction was upheld. The Court held that the alleged truth of Beauharnais' derogatory statements about blacks was immaterial to his speech right. As well, the Illinois legislature's determination of possible *long-range* social violence due to such defamation was enough constitutional justification for punishing the expression. The absence of imminent or clear and present danger was not deemed to invalidate the law.[139]

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135 As president of the White Circle League, Beauharnais organized the random distribution of leaflets which (like Collin's plea at Skokie) were cloaked in the form of "a petition" to the mayor and the Chicago city council. The leaflets beseeched the Council and mayor "to halt the further encroachment, harassment, and invasion of white people, their property, neighborhoods and persons, by the Negro—through the exercise of the Police Power." The leaflets, which Beauharnais distributed randomly at street corners went on to vilify blacks and exhort

> [o]ne million self respecting white people in Chicago to unite. . . . If persuasion and the need to prevent the white race from becoming mongrelized by the negro will not unite us, then the aggressions . . . rapes, robberies, knives, guns and marijuana of the negro, surely will.

Beauharnais, 343 U.S. at 252; H. ARKES, *supra* note 13, at 397.

136 The statute made it a crime to:

> [M]anufacture, sell, or offer for sale, advertise or publish, present or exhibit in any public place in this state any lithograph, moving picture, play, drama or sketch, which publication or exhibition portrays depravity, criminality, unchastity, or lack of virtue of a class of citizens, of any race, color, creed or religion which said publication or exhibition exposes the citizens of any race, color, creed or religion to contempt, derision, or obloquy or which is productive of breach of peace or riots.

Beauharnais v. Illinois, 343 U.S. 250, 251 (1952) (quoting ILL. REV. STAT. ch. 38, § 471 (1949) (repealed 1962)).

137 In its stead, the Illinois Constitution now states that such expression is condemned, thus making the moral condemnation (not the *legal prohibition*) of such speech a constitutional exhortation. *See* ILL. CONST. art. 1, § 20.

138 *See* T. EMERSON, *supra* note 78, at 389-99; D. HAMLIN, *supra* note 31, at 77-78; A. NEIER, *supra* note 31, at 140, 165; Tannenhaus, *Group Libel*, 35 CORNELL L.Q. 261 (1950).

139 Frankfurter favored "balancing" as opposed to giving a "preferred position" to speech (strict scrutiny). *See* Dennis v. United States, 341 U.S. 494, 525 (1951) (Frankfurter,

This type of balancing was criticized[140] in the years following *Beauharnais* for two basic reasons: (1) it is not based on clear guidelines or principles, so it results in either undue judicial discretion which "chills" speech or in undue judicial deference to legislative judgment;[141] and (2) it represents paternalism by allowing legislatures to abridge speech because of its possible effectiveness.[142] As a result of these criticisms, the Supreme Court replaced this type of balancing with strict judicial review in cases involving political speech. Under the standards of strict review, the state must demonstrate an imminent danger or other compelling interest in each case in order to abridge the speech right. Given this new approach, Judge Decker in the Skokie case ruled that *Beauharnais* was no longer valid.[143]

Decker's position on *Beauharnais* and Skokie's racial slur ordinances is correct. The self-government and autonomy principles of free expression seem to apply when racial slurs are not directed at a chosen audience. To be sure, Collin and the NSPA *did* target Skokie; but the Skokie racial slur ordinances were general, applying to broad areas of expression regardless of the context and the particular facts in the case. Accordingly, these ordinances must be treated in the same fashion as the Illinois group libel statute in *Beauharnais*, even though Collin's speech act was different from Beauharnais'. This result is necessary, because in first amendment cases the nature of the statute supercedes the nature of the specific act as far as the constitutional question is concerned.[144]

The essential difference between Beauharnais' speech act and that of the OBA and Frank Collin is targeting. Beauharnais' leaflets were vile and libelous in a group sense; yet they were also constituted pleas concerning public policy and matters of race. They were thus mixed utterances. But more importantly, no evidence showed the infliction of a harm to any individuals or definite group. In *Cohen*, Justice Harlan found that "[n]o individual actually or likely to be present could reasonably have regarded the words

J.); West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 662 (1943) (Frankfurter, J.). On this logic of balancing, see C. DUCAT, MODES OF CONSTITUTIONAL INTERPRETATION 116-92 (1978).

140 For a critique of *ad hoc* balancing in favor of definitional balancing, see Frantz, *The First Amendment in the Balance*, 71 YALE L.J. 1424 (1962).

141 On how free speech requires the strict judicial review of facts and danger in each case, independent of legislative judgment about classes of speech contained in statutes, see L. TRIBE, *supra* note 5, § 12-9. Tribe refers to the *Dennis* case and other cases dealing with the advocacy of subversion.

142 That is, it violates the norms of self-government and autonomy. *See* A. MEIKLEJOHN, *supra* note 11, at 24-28, 57; Wellington, *supra* note 118, at 1121-26.

143 Collin v. Smith, 447 F. Supp. 676, 697-98 (N.D. Ill.), *aff'd*, 578 F.2d 1197 (7th Cir.), *cert. denied*, 439 U.S. 916 (1978).

144 *See* L. TRIBE, *supra* note 5, § 12-24.

["Fuck the Draft"] on appellant's jacket as a direct personal insult."[145] The same conclusion applies to Beauharnais' speech act, even though the content of his speech explicitly singled out blacks for ridicule, whereas Cohen merely denounced the draft.

The key point needed to reach this conclusion is that neither Cohen nor Beauharnais intentionally directed his speech to definite targets. Their speech acts were thus less assaultive than the speech acts of Collin, the OBA in the "Kike Keefe" hypothetical, white groups in Cicero, and various Klan intimidations. Had Beauharnais passed his leaflets out in front of black homes or given them directly to blacks in similar settings, the very nature of his speech act would have been transformed from a racialist plea into an act of intimidation.

General group libel and racial slurs do not normally cause the same type of harm as targeted group libel or racial vilification. Instead they leave the public forum intact for counterargument, because the mental state necessary for counterargument is not destroyed by the direct infliction of an emotional assault. In other words, Beauharnais' speech act is conducive, however problematically, to the self-government and autonomy principles. Thus the state should not abridge his views because of the anticipated fear of their results.

In this respect, those who conclude that *Beauharnais* and *Chaplinsky* deal with the same types of expression—that group libel is per se "fighting words"—are wrong. The distinction between these forms of expression reveals the importance of *context* in determining whether the speech involves fighting or assaultive words. Context in these cases is a matter of the form and content of the expression.

Finally, because general racial slurs do not pose the same harm as targeted racial slurs or similar forms of expressive assault, there may be more problems in applying or implementing the law than in cases of more direct and substantial harm. This potential incapacity in applying the law is a legitimate concern when courts assess such legislation. Group libel laws are subject to abuse in their application because of their vagueness and the discretion they often give to prosecutors and courts. Such laws can also result in the vindication of a defendant's assertions if juries fail to convict.

Although the same implementation problems could occur with laws against targeted racial vilification, these problems should not

145 Cohen v. California, 403 U.S. 15, 20 (1971); *cf.* Catholic War Veterans of the United States, Inc. v. City of New York, 576 F. Supp. 71 (S.D.N.Y. 1983) ("Gay Pride Parade" held constitutionally protected due to the content neutrality doctrine despite the claims of church on the parade route that the parade constituted a conspiracy against the values of the church).

determine their legality for two reasons. First, the greater level of harm in such cases outweighs any implemental problems—the harms principle overrides the "chilling of speech"—and given the harm, juries are more likely to take such abridgement laws seriously. Second, the targeting requirement in these cases would eliminate most potential litigation, because most racial vilification is not targeted in the ways previously discussed. Consequently, the potential for abuse of free speech is less in this area than in the area of general racial slurs or group libel legislation.[146]

Given the problems of implementing such laws in America, and of enforcing the Incitement to Racial Hatred provision of the 1965 Race Relations Act in England,[147] general group libel or racial slur laws are not a good idea. This conclusion is reinforced by the fact that the harms such expression normally pose are indirect and long range, thereby rendering the expression amenable to the process of argument and counterargument in the public forum.[148] For these reasons, *Beauharnais* can be distinguished from the cases of targeted vilification discussed elsewhere in this article. Because Skokie's racial slur ordinances were similar to the statute in *Beauharnais*, the federal courts were correct in ruling them unconstitutional, even

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146 There is a large body of literature on the problems of implementing group libel laws. *See, e.g.*, Tannenhaus, *supra* note 138, at 298-302. On the problem in England, see Dickey, *English Law and Race Defamation*, 14 N.Y.L.F. 9 (1968); Leopold, *Incitement to Hatred—The History of a Controversial Criminal Offense*, 1977 PUB. L. 389, 397. For a favorable view of the Race Relations Act, see A. LESTER & G. BINDMAN, RACE AND LAW IN GREAT BRITAIN 343-81 (1972); Cotterrell, *Prosecuting Incitement to Racial Hatred*, 1982 PUB. L. 378. For an excellent defense of group libel laws written before *Beauharnais*, see Riesman, *Democracy and Defamation: Control of Group Libel*, 42 COLUM. L. REV. 727 (1942). For negative appraisals of group libel laws in America, see T. EMERSON, *supra* note 78, at 391-99; F. HAIMAN, SPEECH AND LAW IN A FREE SOCIETY 87-99 (1981); D. HAMLIN, *supra* note 31, at 148-49; A. NEIER, *supra* note 31, at 139-40; Beth, *Group Libel and Free Speech*, 39 MINN. L. REV. 167 (1955); Pemberton, *Can the Law Provide a Remedy for Race Defamation in the United States?*, 14 N.Y.L.F. 33 (1968); G. Stone, *Group Defamation* (Aug. 10, 1978) (Occasional Paper No. 15, Univ. of Chicago Law School). For a favorable view, see W. BERNS, FREEDOM, VIRTUE, AND THE FIRST AMENDMENT 148-55 (1957); H. ARKES, *supra* note 13, at 28, 55-56, 75. On the institutional and implemental weakness of courts, especially in the area of free speech concerning "mixed utterances" and co-existing bad speech, see BeVier, *supra* note 76. For a comparative approach to group libel laws, see Barnum, *supra* note 19, at 82-83; *see also* Lasson, *supra* note 109, at 79-89. Lasson argues that Skokie and similar cases should be covered by group libel laws, not fighting words doctrine. *Id.* at 92-96; *see also id.* at 108-30 (analysis of group libel laws). Lasson's position is not context based as is the position taken here.

Lower federal courts have criticized and rejected *Beauharnais'* group libel concept. *See* Sambo's Restaurants, Inc. v. City of Ann Arbor, 663 F.2d 686, 694 n.7 (6th Cir. 1981); Tollett v. United States, 485 F.2d 1087, 1094-95 (8th Cir. 1973); *see also* Gintert v. Howard Publications, 565 F. Supp. 829 (N.D. Ill. 1983); Michigan United Conservation Clubs v. CBS News, Inc., 485 F. Supp. 893 (W.D. Mich. 1980) (first amendment requires demonstration of group defamation's specific harm to individual).

147 Race Relations Act, 1965; *see* note 146 *supra*.

148 That is, to the autonomy and self-government values.

though Collin's speech act qualified for abridgement because of its assaultive nature.

In summary, the first amendment should not protect *targeted racial vilification*—that is, racial vilification, express or symbolic, that is targeted at a *discrete* individual or group. In the conclusion, a proposed test that addresses this type of abridgement will be presented.

III. Skokie, Content Neutrality, and Related First Amendment Jurisprudence

In the Skokie litigation, the courts treated the content neutrality rule as an almost absolute principle in cases involving political speech in the public forum. In other areas of first amendment law, however, the Supreme Court and lower courts have fashioned exceptions to free speech which take many of the factors previously discussed into consideration. This article will now examine these areas in order to demonstrate how the reform proposal is consistent with first amendment jurisprudence.[149]

A. *Libel and Privacy Cases*

Although *New York Times v. Sullivan* granted unprecedented first amendment protection to critical speech about public figures,[150] its logic supports the proposed targeted racial vilification exception. *Sullivan* itself allows for liability where sufficiently bad and culpable motives exist. Thus, while the decision weighted the balance heavily in favor of the press, it did not grant it an absolute

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149 The fact of the matter is that despite our theroetical commitment to a free and uninhibited marketplace of ideas, we have made all kinds of exceptions to that general principle—some out of clear and compelling necessity, some for dubious reasons, and some with justifications that can be debated persuasively both pro and con. The result is a complex body of law in which legislatures and ultimately the Supreme Court have attempted, often unpredictably, to establish the boundary lines between speech which is protected by the First Amendment and speech which can be prevented or, if already uttered, punished.

Haiman, *Carving Exceptions Out of the First Amendment*, UPDATE, Spring 1980, at 4; *see also* Shiffrin, *Defamatory Non-Media Speech and First Amendment Methodology*, 25 UCLA L. REV. 915, 955 (1978). Any assessment of the legal regulation of communication must begin with the recognition that government does have power to restrict expression because of its content. *See* Lasson, *supra* note 109, at 96-108.

150 *See* Brennan, *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 HARV. L. REV. 1 (1965); Kalven, *The New York Times Case: A Note on "The Central Meaning of the First Amendment,"* in FREE SPEECH AND ASSOCIATION 84-115 (P. Kurland ed. 1975). *Sullivan* changed the burden of proof in such libel cases *in favor* of freedom of press and speech by requiring the plaintiff to prove malice by convincing clarity. *See* Wilson v. Scripps-Howard Broadcasting Co., 642 F.2d 371 (6th Cir.) (burden on plaintiff to prove falsity of an alleged defamatory statement), *cert. granted*, 454 U.S. 962, *cert. denied*, 454 U.S. 1130 (1981) (1981); *see also* Recent Cases, 50 U. CIN. L. REV. 807 (1981) (on the *Wilson* case).

right.[151] Falsehoods printed with actual malice are inconsistent with the first amendment's purposes articulated in *Chaplinsky*.[152]

Perhaps more importantly, the Court's treatment of the libel of private figures reveals a concern for the well-being of the targets of bad speech. In *Gertz v. Robert Welch, Inc.*[153] and subsequent cases, the Court has held that although the states cannot impose liability without fault, the "actual malice" standard does not apply when private figures are defamed by media defendants.[154] Such speech is less associated with (or less a by-product of) valuable aspects of free speech than is libel of public officials. It also harms its targets more because they have fewer resources with which to retaliate or rebuild

151 For an illuminating recent discussion of the Court's options in this regard in light of the recent avalanche of libel suits brought by public officials, including General Westmoreland's suit against CBS, see Lewis, *Annals of Law: The Sullivan Case*, THE NEW YORKER, Nov. 5, 1984, at 52.

152 *Sullivan* was premised on Meiklejohn's notion of self-government, "that in a democracy the citizen as ruler is our most important public official." Kalven, *supra* note 150, at 102; *see also* Brennan, *supra* note 150, at 1, 10-20. Yet Meiklejohn's speech theory is based on the definitional balancing approach sponsored by *Chaplinsky*, and it expressly endorses the abridgement of irresponsible speech that is inconsistent with the virtues of self-government, such as self-control and a concern for the public good. *See* A. MEIKLEJOHN, *supra* note 11, at 21, 79. For a hypothetical treatment of Meiklejohn's position on Skokie, see Jones, *Alexander Meiklejohn on Skokie*, 35 NAT'L LAWYERS GUILD PRACTITIONER 84 (1978).

153 418 U.S. 323 (1974).

154 *Id.* at 347-48; *see id.* at 345-48. *Gertz* repudiated the extension of the *Sullivan* "public figure" doctrine to "public issues," which the Court fashioned in such cases as Time, Inc. v. Hill, 385 U.S. 374 (1967), and Curtis Pub. Co. v. Butts, 388 U.S. 130 (1967). *See* Kalven, *The Reasonable Man and the First Amendment: Hill, Butts, and Walker*, in FREE SPEECH AND ASSOCIATION 207-49 (P. Kurland ed. 1975); *see also* Recent Cases, 50 U. CIN. L. REV. 807, 812 (1981). *Gertz* drew a new balance that favored the state interest in protecting the privacy values of non-public officials or figures. *See* L. ELDERIDGE, THE LAW OF DEFAMATION 282 (1978); Wade, *Recent Developments in Tort Law and the Federal Courts*, 72 KY. L.J. 1, 18 (1983-84). This trend was furthered in Time, Inc. v. Firestone, 424 U.S. 488 (1976) (heiress not a public figure due to a well-publicized divorce); Hutchinson v. Proxmire, 443 U.S. 111 (1979) (subject of Senator's "golden fleece" award not a public figure, and no congressional immunity to Senator); Wolston v. Reader's Digest Ass'n, 443 U.S. 157 (1979) (plaintiff not a public figure simply because of previous involvement in grand jury investigation into Soviet intelligence). Since *Gertz*, most states have chosen the "negligence standard" rather than the stricter "malice" standard of *Sullivan*. *See* Gutman, *The Attempt to Develop an Appropriate Standard for Liability for the Defamation of Public and Private People*, 10 N.C. CENT. L.J. 201, 219-22 (1979). Significantly, the courts have tended to strengthen the *Sullivan* malice test when it comes to public figures. *See* Wilson v. Scripps-Howard Broadcasting Co., 642 F.2d 371 (6th Cir. 1981) (burden on plaintiff to prove falsity). This two-level approach is consistent with Meiklejohn's definitional approach to speech adjudication and with the distinction between targeted racial vilification and general racial vilification. *See* note 11 *supra*. One state court, however, has used an "objective" rather than a "subjective" test as a standard in determining "reckless disregard" under *Sullivan*. *See* Hansen v. Stoll, 130 Ariz. 454, 636 P.2d 1236 (Ariz. Ct. App. 1981). The objective test is less protective of speech than a subjective test, as it allows for liability on the basis of a normative standard that is distinct from the actual subjective mental state of the journalist. *Cf.* Comment, *The Subjective Doubt Requirement for Reckless Disregard: Misapplication of the Actual Malice Standard in Hansen v. Stoll*, 25 ARIZ. L. REV. 211 (1983). For an argument in favor of objective tests of reasonableness as consistent with traditional Western concepts of responsibility and right, see Schwab, *supra* note 12.

their reputations. As well, the targets generally have not voluntarily exposed themselves to public scrutiny, as have public officials.[155] Like the Skokie survivors, the targets of these harmful speech acts have neither provoked their attacks nor voluntarily exposed themselves to such attacks.

The Supreme Court has taken a similar approach in "invasion of privacy" cases, though the number of relevant cases is limited. The Court has held that portraying people in "false light" is constitutionally protected unless conducted with actual malice.[156] The Court has also held that the press has the right to publish the names of rape victims[157] or juvenile offenders listed in public records.[158]

In a similar vein, the Court has recently upheld a trial court's protective order prohibiting a newspaper from publishing or disseminating information about the donors and members of a religious organization obtained from a court-ordered discovery process.[159] Although the Court stressed the need to protect the discovery process, the privacy interest at stake related closely to the integrity of the discovery process.

On the other hand, the Court allowed a damage action against a television station for showing a tape of a performer's "human cannon ball" act without his consent.[160] The Court ruled that the broadcast of the entire performance harmed the plaintiff's "proprietary interest" in his commercial name,[161] so the telecast was actionable even though remarks in it were favorable to the act.[162]

The cases discussed in this subsection reveal the Court's willingness to limit freedom of expression when significant harms to private interests are at stake, or when the motives of speakers are sufficiently inconsistent with the ends of the first amendment.

155 *See Gertz*, 418 U.S. at 351-52. The Supreme Court has recently focused on the issue of whether the plaintiff "thrust himself or his views into a public controversy." *See* Hutchinson v. Proxmire, 443 U.S. 111, 135 (1979); Wolston v. Reader's Digest Ass'n, 443 U.S. 157, 165-67 (1979); *see also* Recent Cases, 50 U. CIN. L. REV. 807, 813 (1981).

156 Time, Inc. v. Hill, 385 U.S. 374 (1967); *see* Haiman, *supra* note 149, at 5.

157 Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975).

158 Smith v. Daily Mail Publ. Co., 443 U.S. 97 (1979). In Landmark Commun., Inc. v. Virginia, 435 U.S. 829 (1978), the Court said the first amendment protected the truthful publication of information about a confidential judicial inquiry board's proceedings. On recent privacy law, see generally J. BARRON & C. DIENES, HANDBOOK OF FREE SPEECH AND FREE PRESS 363-406 (1979).

159 Seattle Times Co. v. Rhinehart, 104 S. Ct. 2199 (1984). The Court's opinion was narrow, however, stressing the press's right to publish information originating in the discovery process obtained independently of that process.

160 Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562 (1977).

161 *Id.* at 575.

162 *See also* Briscoe v. Reader's Digest Ass'n, 4 Cal. 3d 529, 483 P.2d 34, 93 Cal. Rptr. 866 (1971) (upheld invasion of privacy judgment for disclosing truthful fact that a rehabilitated man had been convicted of hijacking 11 years earlier).

Targeted racial vilification, such as the NSPA targeted at Skokie, satisfies both of these negative requirements.

B. *Commercial Speech and Solicitation*

Though the Court has recently granted more first amendment protection to commercial speech,[163] it still treats commercially related speech with less constitutional respect than political speech. In *Virgnia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, the Court explicitly recognized Alexander Meiklejohn's theory which views the first amendment as "primarily an instrument to enlighten public decision-making in a democracy."[164] The case dealt with state restriction on the advertising of drug prices. In reaching its decision, the Court espoused the "enlightenment theory" of the first amendment, which entails "promoting the search for truth, facilitating social change, personal self-fulfillment, and political participation."[165] While the Court no longer readily defers to the state's power to regulate commercial advertising, it has also held that commercial speech does not fulfill these classic free speech values when it contains untruthful or misleading information.[166]

Thus, the Court considers and weighs the social value of the advertising (à la *Chaplinsky*'s definitional approach) in adjudicating commercial speech cases, and thereby draws a balance that is more restrictive of the expression than is the balance governing political speech in the public forum. This methodolgy constitutes an intermediate level of scrutiny.[167]

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163 *See* Virginia State Bd. of Pharmacy v. Virginia Citizens Council, Inc., 425 U.S. 748, 765 (1976). The old doctrine had held that commercial speech is per se outside the purposes of the first amendment. Valentine v. Chrestensen, 316 U.S. 52 (1942).

164 Comment, *Freedom of Speech: Evolution of the Enlightenment Function*, 29 MERCER L. REV. 811, 813 (1978) (quoting *Virginia State Bd. of Pharmacy*, 425 U.S. at 765 n.19); *see also* Bolger v. Youngs Drug Prods. Corp., 103 S. Ct. 2875 (1983) (statute prohibiting mailing of unsolicited ads for contraceptives held invalid); Carey v. Population Servs. Inc., 431 U.S. 678 (1977) (statute prohibiting advertising of contraceptives held invalid).

165 Comment, *supra* note 164, at 815.

166 *Compare* Bates v. State Bar, 433 U.S. 350 (1977) (sweeping ban on lawyer advertising held invalid) *and In re* R.M.J., 455 U.S. 191 (1982) (court unwilling to assume misleading effects of lawyer advertising practices absent a demonstration of a persuasive basis for the claim) *with* Friedman v. Rogers, 440 U.S. 1 (1970) (ban on practice of optometry under trade name upheld because trade name conveys no information about price and the nature of the services).

167 *See* Central Hudson Gas & Elec. Corp. v. Public Serv. Comm., 447 U.S. 557 (1980). Justice Powell developed a four part analysis for the adjudication of commercial speech: whether the expression is covered by the first amendment (i.e. concerns lawful activity and is not misleading), whether the government interest is substantial, whether the interest is directly achieved by the regulation, and whether the regulation is not unduly extensive. *Id.* at 566; *see* BeVier, *Justice Powell and the First Amendment's "Social Function": A Preliminary Analysis*, 68 VA. L. REV. 177 (1982). According to one recent treatise on constitutional law:

> It appears that the justices will prohibit states from banning the truthful conveyance of commercial information but that they will allow the state a much greater

The Court's treatment of lawyer solicitation cases in the commercial speech area is of special importance to this analysis. Solicitation regulation is treated deferentially by the Court because it often involves psychological manipulation or pressure.[168] In *Ohralik v. Ohio State Bar*, the Court ruled that:

> In-person solicitation by a lawyer for remunerative employment is a business transaction in which speech is an essential but subordinate component. While this does not remove the speech from the protection of the First Amendment, as was held in *Bates* and *Virginia Pharmacy*, it lowers the level of appropriate judicial scrutiny. . . . A lawyer's procurement of remunerative employment is a subject only marginally affected with First Amendment concerns.[169]

Ohralik thus addresses the distinction between primary and secondary harm, and, concomitantly, the primary and secondary purposes of speech. In terms of harm, Justice Powell, speaking for the Court, asserted that the state could legitimately protect vulnerable[170] persons from "those aspects of solicitation that involve fraud, undue influence, intimidation, overreaching, and other forms of 'vexatious conduct.' "[171] Moreover, the *Ohralik* Court looked at the ends and motives of in-person solicitation in reaching its decision.[172]

> leeway in protecting against false, deceptive or misleading practices. The lower the informational content of the regulated speech, the greater latitude the Court will give the government in drafting such regulations . . . [T]here will not be an absolute prohibition of regulating any speech activity that might increase information or transaction costs in the marketplace.

J. Nowak, R. Rotunda, & J. Young, Constitutional Law 943 (2d ed. 1983) [hereinafter cited as Constitutional Law].

168 *See* Farber, *Commercial Speech and First Amendment Theory*, 74 Nw. U.L. Rev. 372, 407-08 (1979) (commercial speech regulation often entails contractual functions that are outside of the purposes of the first amendment, thereby making the content-neutrality doctrine less applicable; contractual abuses include duress and psychological pressure); *see also* Constitutional Law, *supra* note 167, at 942 n.89. The Court paid similar heed to the reality of psychological pressure in the context of custodial interrogation of suspects in Miranda v. Arizona, 384 U.S. 436 (1966). The Court also stressed the psychological pressures of de jure segregation in Brown v. Board of Educ., 347 U.S. 483 (1954).

169 436 U.S. 447, 457, 459 (1978). For a discussion of the picketing cases, see note 206 *infra*.

170 *See id.* at 464-66.

171 *Id.* at 462. The Court, however, has been careful not to draw a broad, chilling rule in this area of expression. Solicitation cases are decided on a case-by-case basis. *Compare In re* Primus, 436 U.S. 412 (1978) (state may not discipline an ACLU "cooperating lawyer" for writing a sterilized woman offering free legal aid, for ACLU litigation is a form of non-remunerative political expression) *with Ohralik*, 436 U.S. 447 (1978).

172 The Court stated that:

> Unlike a public advertisement, which simply provides information and leaves the recipient free to act upon it or not, in-person solicitation may exert pressure and often demands an immediate response, without providing an opportunity for comparison or reflection.

Ohralik, 436 U.S. at 457 (footnote omitted); *see also* People v. Rubin, 96 Cal. App. 3d 968,

The same rationale governs the utterance of fighting words and assaultive speech. As discussed previously, the NSPA targeted vulnerable survivors for the primary intent of intimidation. Indeed, targeted racial vilification causes harms that are generally more substantial than in-person solicitation. It normally engages baser motives than mere solicitation. The Court has stated that the distinction between protected and unprotected solicitation is "based in part on the motive of the speaker and the character of the expressive activity."[173] Given the nature of targeted racial vilification, such balancing could also be justifed in public forum cases concerning political speech.[174]

976, 158 Cal. Rptr. 488, 491 (1979), *cert. denied*, 449 U.S. 821 (1980) (solicitation in California by Jewish Defense League member offering $500 reward to anyone who kills, maims, or seriously injures a Nazi party member in Skokie rally is not protected by first amendment).

173 *In re* Primus, 436 U.S. at 438 n.32. *Primus* and *Ohralik* are also distinguishable in terms of the context of targeting. *Primus* dealt primarily with a letter offering a service whereas *Ohralik* dealt primarily with direct personal contact.

174 Obscenity cases represent another relevant area of limitations of free speech. *See* Lasson, *supra* note 109, at 106-08. In Roth v. United States, 354 U.S. 476 (1957), the Court stated that obscenity was outside the first amendment's purpose as envisioned by *Chaplinsky*. The Warren Court, however, allowed obscenity to proliferate under the "utterly without redeeming social value" test. *See* Memoirs v. Massachusetts, 383 U.S. 413, 419 (1966); H. CLOR, OBSCENITY AND PUBLIC MORALITY 77-78 (1969). Yet the Burger Court has reaffirmed the original principles in *Roth*, fashioning a new test that allows more exclusion of obscenity:

> (a) whether "the average person, applying contemporary community standards," would find that the work, taken as a whole, appeals to the purient interest . . . ; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific values.

Miller v. California, 413 U.S. 15, 24 (1973). In cases after *Miller*, the Burger Court has sanctioned obscenity regulations that marginally intrude on "unworthy" speech interests—i.e., those that approach obscenity in content. In Ward v. Illinois, 431 U.S. 767, 773 (1977), the Court allowed states a measure of discretion in determining the scope of the "patently offensive" category. In Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976), the Court upheld a zoning ordinance that affected borderline, but technically non-obscene, material because the negative effect was not too extensive and "there is surely a less vital interest in the uninhibited exhibition of material that is on the borderline between pornography and artistic expression than in the free dissemination of ideas of social and political significance . . . ." *Id.* at 61. This approach is normative in *Chaplinsky*'s sense, entailing judicial consideration of the value of the expression to the societal and individual ends of the first amendment. *See* Goldman, *A Doctrine of Worthier Speech:* Young v. American Mini Theatres, Inc., 21 ST. LOUIS U.L.J. 281, 300-04 (1977). However, the Court limited the reach of *Young* in Schad v. Borough of Mt. Ephraim, 452 U.S. 61, 72-74 (1981) (village abridged too much expression and failed to demonstrate a link betweeen the expression and neighborhood deterioration). *See also* Alexander v. City of Minneapolis, 698 F.2d 936 (8th Cir. 1983) (invalidating zoning of adult bookstores).

In a recent case, however, the Burger Court unanimously extended the *Young* principle to a case involving the use of children in pornography. In New York v. Ferber, 458 U.S. 747 (1982), the Court upheld a statute that punished the *showing* of pornographic films of children under 16 years of age on grounds that such showing constituted advocacy and promotion of such conduct (advocacy of even illegal *political* action is protected by Brandenburg v. Ohio, 395 U.S. 444 (1969)). Though *Ferber* may be viewed as part of the Court's traditional "variable obscenity" doctrine, *see* Mishkin v. New York, 383 U.S. 502 (1966);

C. *The Tort of Emotional Assault and Racial Insults*

1. The Tort of Racial Insult

In recent years some courts have recognized a tort action for the intentional infliction of racial insults, epithets, and "name-calling."[175] State and federal courts have held that such expression is tortious on one or more of the following grounds: (1) the tort of outrage;[176] (2) assault and battery;[177] (3) intentional infliction of emotional distress;[178] (4) defamation;[179] and (5) if the speaker is a state official, the statutory provisions of the federal civil rights laws.[180]

In an article on the tort of racial insults, Richard Delgado discusses the social ends which he alleges the tort serves. These include protecting human dignity,[181] preventing psychological assault,[182] and promoting racial justice.[183] Delgado also addresses

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Ginzburg v. United States, 383 U.S. 463 (1966), it also represents the extension of *Young*'s ranking principle. *Ferber* triggered an avalanche of law review commentary, too extensive to cite. One seminal article on *Ferber* that deals with many of the normative issues discussed here is Schauer, *Codifying the First Amendment:* New York v. Ferber, 1982 SUP. CT. REV. 285.

The Burger Court's obscenity cases are predicated on a notion of community values. In Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973), Chief Justice Burger emphasized "the interest of the public in the quality of life and the total community environment . . . [and] 'the right of the Nation and of the State to maintain a decent society.'" *Id.* at 58-60 (quoting Jacobellis v. Ohio, 378 U.S. 184, 199 (1964)). For a critique of this view, see Chesler, *Imagery of Community, Ideology of Authority: The Moral Reasoning of Chief Justice Burger*, 18 HARV. C.R.-C.L. L. REV. 457, 466-68 (1983).

175 *See* Delgado, *Words that Wound: A Tort Action for Racial Insults, Epithets, and Name Calling*, 17 HARV. C.R.-C.L. L. REV. 133 (1982) [hereinafter cited as *Words that Wound*]. For criticism of Delgado, see Heins, *Banning Words: A Comment on "Words that Wound,"* 18 HARV. C.R.-C.L. L. REV. 585 (1983). For Delgado's response, see Delgado, *Professor Delgado Replies*, 18 HARV. C.R.-C.L. L. REV. 593 (1983).

176 *See* Contreras v. Crown Zellerbach Corp., 88 Wash. 2d 735, 565 P.2d 1173 (1977); *Words that Wound, supra* note 175, at 133.

177 Fisher v. Carrousel Motor Hotel, Inc., 424 S.W.2d 627 (Tex. 1967); *Words that Wound, supra* note 175, at 150-51.

178 Wiggs v. Courshon, 355 F. Supp. 206 (S.D. Fla. 1973); Agarwal v. Johnson, 25 Cal. 3d 932, 603 P.2d 58, 160 Cal. Rptr. 141 (1979); Alcorn v. Anbro Engineering, Inc., 2 Cal. 3d 493, 468 P.2d 216, 86 Cal. Rptr. 88 (1970); Contreras v. Crown Zellerbach Corp., 88 Wash. 2d 735, 565 P.2d 1173 (1977); *Words that Wound, supra* note 175, at 151-57. For verdicts against the plaintiff, see cases cited in note 184 *infra*.

179 Irving v. J.L. March, Inc., 46 Ill. App. 3d 162, 360 N.E.2d 983 (1977); Bradshaw v. Swagerty, 1 Kan. 2d 213, 563 P.2d 511 (1977); *Words that Wound, supra* note 175, at 157-59.

180 *Words that Wound, supra* note 175, at 159-165; *see* cases cited in note 179 *supra*.

181 *Words that Wound, supra* note 175, at 135, 145-47.

182 *Id.* at 146-47.

183 *Id.* Some recent federal cases dealing with official labor relations reveal the role of all these values in non-tort insult cases. *See* NLRB v. Katz, 701 F.2d 703 (7th Cir. 1983) (company's allegation that racial and religious slurs were made by priest at union organization meeting in conjunction with other threats of violence and loss of jobs established prima facie case for overturning union election); NLRB v. Silmerman's Men's Wear, Inc., 656 F.2d 53 (3d Cir. 1981) (court denied enforcement of bargaining order because union official referred to company vice-president as a "stingy jew" six days before election); *see*

the relationship between the tort and first amendment law.

Although *Collin v. Smith* (the Skokie ordinance case) invalidated the criminal punishment of racial insults in the public forum, the federal district court refused to decide the constitutionality of a tort for racial insults, since the tort was not at issue.[184] But the court's position on the constitutionality of racial slur laws in that case, coupled with *Sullivan*'s limiting of the tort of libel of public officials, pose questions about the constitutionality of the tort of racial insults. The constitutional status of racial insults per se, however, has not been decided in any case in the wake of *Collin*.[185]

Delgado points out that the tort of racial insults should be constitutional even in the wake of *Collin* and *Cohen*:

> Racial insults are easily distinguishable from the inscription in *Cohen*. One cannot avert one's ears from an insult. More importantly, a racial insult is directed at a particular victim; it is analogous to the statement "Fuck you," not the statement "Fuck the Draft." Finally, a racial insult, unlike the slogan in *Cohen*, is not political speech; its perpetrator intends not to discover truth or advocate social action but to injure the victim.[186]

The two key factors in this position are the intent to harm rather than inform, and the presence of targeting—the two key factors in the NSPA's speech acts directed at Skokie.

2. The Tort of Emotional Distress

Many courts have recognized a more general tort action for the intentional use of speech to inflict a mental injury.[187] An important Illinois case, *Knierim v. Izzo*,[188] granted a woman a cause of action for the infliction of emotional harm against a man who threatened to kill her husband. The court concluded that "peace of mind is an interest of sufficient importance to receive protection from the law

also Advertisers Manuf. Co. v. NLRB, 677 F.2d 544, 546 (7th Cir. 1982); Manale v. City of New Orleans, Dep't of Police, 673 F.2d 122 (5th Cir. 1982) (former police officer recovers for falsely being called a "little fruit").

184 Collin v. Smith, 447 F. Supp. 676, 695 n.12 (N.D. Ill.), *aff'd*, 578 F.2d 1197 (7th Cir.), *cert. denied*, 439 U.S. 916 (1978). In addition, tort law applies to personal insults or infliction of harm, not what we have called "non-personal" insults or fighting words.

185 *See Words that Wound*, *supra* note 175, at 172. However, the federal district court's decision in Vietnamese Fishermen's Ass'n v. Knights of the Klu Klux Klan, 543 F. Supp. 198 (S.D. Tex. 1982), could be construed to have dealt with the issue.

186 *Words that Wound*, *supra* note 175, at 175.

187 The Restatement of Torts states:

> One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to another results from it, for such bodily harm.

RESTATEMENT (SECOND) OF TORTS § 46(1) (1965); *see also* ILL. CONST. art. 1, § 20 (condemns, although does not prohibit, group and racial defamation).

188 22 Ill. 2d 73, 174 N.E.2d 157 (1961).

against intentional invasion of the kind here involved."[189] The *Knierim* court also stated that the following criteria were important in terms of constituting a cause of action:

> Whether the aggressive invasion of mental equanimity was unwarranted or unprovoked, whether it is calculated to cause severe emotional disturbance in the person of ordinary sensibilities, and whether there was special knowledge or notice [of atypical vulnerability] *are all questions that will depend on the particular facts of each case.*[190]

Knierim emphasized that the unprovoked intent to cause severe harm through speech could be actionable. In addition, *Knierim* assumed that courts could distinguish between valid and invalid claims.[191]

A private tort suit on behalf of the Skokie survivors was based on the tort of emotional distress as emphasized in *Knierim*.[192] But because the Illinois court dismissed the suit, the constitutional status of the tort in relation to *Collin v. Smith* was not determined.[193]

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189 *Id.* at 87, 174 N.E.2d at 165. *Knierim* cited a line of decisions from other states sanctioning the tort of the intentional infliction of emotional distress. *Id.*

190 *Id.* at 86-87, 174 N.E.2d at 165 (emphasis added). *Knierim* also sought to distinguish severe emotional harm from "indiscriminate actions" that "would encourage neurotic overreactions." *Id.* at 85, 174 N.E.2d at 164. It therefore endorsed an objective test of harm and reaction in order to protect speech interests and values.

191 The court stated: "[A] line can be drawn between the slight hurts which are the price of a complex society and the severe mental disturbances inflicted by intentional actions wholly lacking in social utility." *Id.* at 85, 174 N.E.2d at 164. This assumption, of course, is precisely the normative assumption of Chaplinsky v. New Hampshire, 315 U.S. 568 (1942). For a discussion of cases that are premised on *Chaplinsky's* logic, see notes 150-74 *supra*. One recent example of a court's ability to distinguish legitimate from illegitimate causes of action on emotional assault grounds is Fleming v. Benzaquin, 390 Mass. 175, 454 N.E.2d 95 (1983), in which the court dismissed an action against a radio talk-show host for defamation and the intentional infliction of mental distress on the grounds that the vituperative remarks were merely unactionable opinions. *Cf.* People v. Jackson, 122 Ill. App. 3d 166, 460 N.E.2d 904 (1984) (upheld the imposition of a 40-year sentence for rape based on the finding of accompanying brutality and infliction of serious emotional trauma on the victim).

192 *See* Plaintiff's Petition for Rehearing, Goldstein v. Collin, No. 50176, (Ill. Jan. 17, 1978).

193 *See id.* For related cases subsequent to *Knierim*, see Geist v. Martin, 675 F.2d 859 (7th Cir. 1982) (whether a defendant's conduct involved the exercise of a legal right is an important factor in determining whether the conduct is sufficiently outrageous for liability); Durant v. Surety Homes Corp., 582 F.2d 1081 (7th Cir. 1978) (no recovery of mental distress damages where there was no evidence that the defendant builder resisted the plaintiffs' repair demands only to inflict distress); Garris v. Schwartz, 551 F.2d 156 (7th Cir. 1977) (no recovery of emotional distress damages where there was no allegation that the defendants gave the plaintiff erroneous legal advice for the purpose of causing her emotional distress); Munson v. American Nat'l Bank & Trust Co., 484 F.2d 620 (7th Cir. 1973) (based on *Knierim*, punitive damages can be awarded only when the wrongful act is accompanied by wantonness, malice, oppression, or circumstances of aggravation); Eckenrode v. Life of America Ins. Co., 470 F.2d 1 (7th Cir. 1972) (life insurer's delay in paying a widow's claim in order to compel a compromise settlement held actionable due to special emotional vulnerability of plaintiff); Smith v. Metropolitan Life Ins. Co., 550 F. Supp. 896 (N.D. Ill. 1982) (discussion of the tort of the intentional infliction of emotional distress and with regard to

D. *Other Cases Concerning Substantive Justice and the Ends of the First Amendment*

In the famous Selma march case, *Williams v. Wallace*,[194] Judge Frank Johnson, a noted civil libertarian,[195] upheld the Selma marchers' right to march in the face of a hostile crowd reaction.[196] In reaching this result, Johnson explicitly considered the *ends* of the demonstration and the claims of substantive justice, stating:

> [T]here must be in cases like the one now presented, a "constitutional boundary line" drawn between the competing interests of society. . . . In so doing, it seems basic to our constitutional principles that the extent of the right to assemble, demonstrate and march peacefully along the highways and streets in an orderly manner *should be commensurate with the enormity of the wrongs* that are being protested and petitioned against. In this case, the wrongs are enormous. The extent of the right to demonstrate against these wrongs should be determined accordingly.[197]

At the time it was decided, U.S. Attorney General Nicholas Katzenbach called Judge Johnson's Selma decision "unusual," stating that Johnson "had to interpret existing doctrine imaginatively in order to give the march from Selma to Montgomery the protection of a court order."[198]

Such a decision would also be unusual under the reign of the current content neutrality rule, which ascended the throne after the Selma march, for another reason: it takes the substantive justice of the speech claim seriously.[199] Given Judge Johnson's logic, Collin would have lost at Skokie, due to the historical "enormity of the wrong" that had been committed by Nazis against Jews, not vice versa. Like the victims of libel and intentionally inflicted emotional trauma, Skokie survivors and Jews did not deserve the injuries in-

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insurers); Taylor v. Jones, 495 F. Supp. 1285 (E.D. Ark. 1980) (plaintiff entitled to relief under Civil Rights Act of 1866 on grounds of racial discrimination in employment renewal decision), *modified*, 653 F.2d 1193 (8th Cir. 1981); Bureau of Credit Control v. Scott, 36 Ill. App. 3d 1006, 345 N.E.2d 37 (1976) (bill collector's frequent calls to plaintiff's place of work held actionable); Carter v. General Motors Corp., 361 Mich. 577, 106 N.W.2d 105 (1960) (workmen's compensation law applied to psychological breakdown).

194 240 F. Supp. 100 (M.D. Ala. 1965).

195 *See* J. BASS, UNLIKELY HEROES 78-82, 307-08, 331 (1981); D. GARROW, *supra* note 98, at 95-96, 111-14.

196 240 F. Supp. at 108-11.

197 *Id.* at 106 (emphasis added). For Johnson's articulation of the commensurity theorem, see Johnson, *Civil Disobedience and the Law*, 44 TUL. L. REV. 1, 4 (1969).

198 Katzenbach, *Protest, Politics, and the First Amendment*, 44 TUL. L. REV. 439, 443-44 (1970); *see* D. GARROW, *supra* note 98, at 278 n.43. On the rise of substantive constitutional interpretation in the 1970's, see generally Wiseman, *The New Supreme Court Commentators: The Principled, the Political, and the Philosophical*, 10 HASTINGS CONST. L.Q. 315 (1983).

199 According to one source, contemporary constitutional commentary is now characterized by a concern for substantive justice. Yet the relevant commentators use substantive justice to argue for the extension of the speech right. *See generally* Wiseman, *supra* note 198.

flicted upon them by vicious parties. Judge Johnson's logic in the Selma case would have accounted for these facts. Yet given the content neutrality rule and present first amendment doctrine, Johnson's "commensurity theorem"[200] is not legitimate because it incorporates the ends and substance of the speech.

In cases concerning legislative investigations, however, the Supreme Court has been more willing to examine the relationship of the speech claim to the substance and content of the speech claimant's views. In cases dealing with legislative investigation in the 1960's, the Supreme Court treated the claims of the NAACP with more constitutional respect than the claims of the Communist Party. The Communist Party was held to be subversive in its nature, organization, and goals, while the NAACP was not. The Court compared the *ends* of the organizations, and ruled in a manner consistent with Judge Johnson's approach in the Selma case.[201]

In *Shelton v. United States*,[202] the Court of Appeals for the District of Columbia upheld a legislative investigation of the Ku Klux Klan because of the Klan's link to illegal activity.[203] In *NAACP v. Alabama ex rel. Patterson*,[204] however, the Supreme Court ruled that Alabama could not require the NAACP to divulge its members' names to the state attorney general because the disclosure would harm the group's ability to exercise its freedom of association.[205]

The governing standards in these cases, and those cited previously, reveal that the courts have indeed considered such matters as

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200 D. GARROW, *supra* note 98, at 278 n.43.

201 *Compare* Barenblatt v. United States, 360 U.S. 109 (1959) (upheld the convictions of Communist Party members for contempt of Congress) *and* Uphaus v. Wyman, 360 U.S. 72 (1959) (subversive activities of World Fellowship, Inc., justified disclosure and conviction for contempt) *with* Gibson v. Florida Legislative Investigation Comm., 372 U.S. 539 (1963) (overturning a similar conviction of an NAACP leader for contempt of a committee of the Florida legislature). In *Gibson*, the Court stressed that the NAACP is "legitimate and non-subversive." 372 U.S. at 548. The *Gibson* Court distinguished *Wyman* on grounds of subversion. *Id.* at 550. *But see* Brown v. Socialist Workers, 459 U.S. 87 (1982) (Ohio campaign disbursement disclosure statute invalid as applied to party due to past and probability of future harrassment); Federal Elections Comm'n v. Hall-Tyner Election Campaign Comm., 678 F.2d 416 (2d Cir. 1982) (Communist party exempt from federal campaign disclosure requirements due to evidence of the probability of threats and harassment).

202 404 F.2d 1292 (D.C. Cir. 1968).

203 In addition, members of subversive groups may be denied employment, provided they possess knowledge of the organization's ends and possess the requisite specific intent to further these ends. *See* Elfbrandt v. Russell, 384 U.S. 11 (1966) (knowledge of ends alone insufficient for dismissal if specific intent is lacking). *But see* Blameuser v. Andrews, 473 F. Supp. 767 (E.D. Wis. 1979) (government may constitutionally deny self-proclaimed Nazi admission as cadet in Advanced Army Reserve Officers' Training Corps program), *aff'd*, 630 F.2d 538 (7th Cir. 1980).

204 357 U.S. 449 (1958).

205 *See also* NAACP v. Claiborne Hardware Co., 458 U.S. 886, 920 (1982) (tort judgment against NAACP due to economic boycott invalid because, among other reasons, it did not possess unlawful goals and the individuals did not possess a specific intent to further unlawful goals).

primary intent, the nature and ends of organizations, and substantive justice when deciding free speech cases outside of the public forum. According to one constitutional treatise:

> Protection for the actions of groups or individuals is not unlimited under the first amendment rights of assembly and petition. In several instances, courts have justified limitations on those rights. The initial broad limitation on these rights is that they must be enjoyed in a law abiding manner. Courts have stated that the rights may not be used as a shield to violate valid statutes, *nor may they be used as the means or pretext for achieving substantive evil.*[206]

Vietnamese Fishermen's Association v. Knights of the Klu Klux Klan[207] represents an important instance in which a lower federal court applied this approach to a case that resembles Skokie. There the court ruled that the Klan's putative "free speech" targeting of the Vietnamese fishermen was a mere pretext for intimidation. In reaching its decision, the court noted the intent and purpose of the boat ride near the fisherman,[208] the probable and natural impact on the targets of the demonstration,[209] and the ways in which the symbolic speech act was inconsistent with the norms and ends of the first amendment.

The court declared the demonstration unprotected on two grounds: (1) it was "conduct," not speech;[210] and (2) it included "provocative statements" that constituted fighting words.[211] In making this conclusion the court cited only *Chaplinsky*, and limited its statement of the fighting words doctrine to *Chaplinsky's* reference

206 CONSTITUTIONAL LAW, *supra* note 167, at 1007 (footnotes omitted) (emphasis added). The Supreme Court has taken a similar position in picketing cases, striking down blanket statutes that prohibit all picketing, *see* Thornhill v. Alabama, 310 U.S. 88 (1940); International Brotherhood of Teamsters v. Vog't, Inc., 354 U.S. 284 (1957) (suggesting that picketing is different from pure speech because it involves more than communication); Cox, *Strikes, Picketing and the Constitution*, 4 VAND. L. REV. 574, 591-602 (1951) (picketing as inducement); T. EMERSON, *supra* note 78, at 285-92 (picketing as a signal and as "publicity").

207 543 F. Supp. 198 (S.D. Tex. 1982).

208 *Id.* at 207.

209 *Id.* at 206-07.

210 *Id.* at 208. The court cited the famous symbolic expression cases: United States v. O'Brien, 391 U.S. 367 (1968) (draft card burning); Spence v. Washington, 418 U.S. 405 (1974) (improper use of the flag). Compare these cases with Clark v. Community for Creative Non-Violence, 104 S. Ct. 3065 (1984) (protestors sleeping in tents in Lafayette Park in Washington, D.C. to protest the plight of the homeless is not protected symbolic expression). In an interesting note, Laurie Magid argues that the protest in this case is protectable yet ambiguous. She states that courts look to the intent of the communication and the natural understanding of the targets of the expression to determine if symbolic expression is present, and she argues that courts should consider the relevance of the challenged conduct to the actor's message. She stresses the context of the speech. *See* Note, *First Amendment Protection of Ambiguous Conduct*, 84 COLUM. L. REV. 467, 477-81, 491, 503 (1984). In the Skokie and Galveston Bay contexts, the symbolic expression was unambiguously assaultive.

211 543 F. Supp. at 208.

to words which "by their very utterance inflict injury *or* tend to incite an immediate breach of the peace."[212] Most importantly, the court also pointed out that the *targeting* of the intimidating act and the nature of the targets were important factors in its holding.[213]

The only relevant fact in that case that was completely absent at Skokie was the brandishing of weapons. The court, however, did not rely heavily on this fact in its decision, so the case is similar to Skokie in all other relevant respects. To be sure, the NSPA's targeting of Skokie was less specific than the Klan's in *Vietnamese Fishermen.* Had the NSPA singled out a survivor neighborhood or a cluster of homes, the analogy would be complete. The targeting of the Skokie community, however, had the same affect in terms of both intent and impact. Nevertheless, the NSPA's actions prior to the proposed rally at Skokie ensured the intimidation of a discrete, targeted group.

The *Vietnamese Fishermen* case could signify a southern court trend to treat Klan demonstration cases somewhat differently from other types of demonstration cases. Klan groups still engage in terrorist activites and murder,[214] and these acts are not antiseptically separable from planned Klan free speech demonstrations in the public forum.

For instance, in *Handley v. City of Montgomery*,[215] the Alabama Court of Criminal Appeals upheld the conviction of Klansmen for unlawful assembly and parading without a permit. In conjunction with Montgomery's traffic code, the law required permits for parades and processions. When Handley applied for a permit to make a "white power" march from Selma to Montgomery (in reverse imitation of King's Selma march in 1965), the city told him that because of the potential for violence, the demonstration would

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212 *Id.* (emphasis added). The "or" means that the very infliction of injury justifies abridgement. *See Civility, supra* note 13, at 417, 423; *see also* H. ARKES, *supra* note 13, at 63-64.

213 The court stated:

> Most notably, the Ku Klux Klan's military activities were not directed towards the general population of Kemah-Seabrook, but instead were directed specifically against this class of Vietnamese fishermen. That plaintiff class is subject to special injury separate and distinct from that of the general public was clearly manifested by defendant Beam at the Klan-Fishermen rally held in Santa Fe, Texas in March, 1981 . . . .

543 F. Supp. at 212.

214 *See* Waller v. Butkovich, 584 F. Supp. 909 (M.D.N.C. 1984) (Greensboro conspiracy case); Calif. Fair Housing and Employment Comm'n, *supra* note 89, at 42-43; Seltzer, *supra* note 88.

215 401 So. 2d 171 (Ala. Crim. App. 1981), *cert. denied*, 401 So. 2d 185 (Ala. 1981); *see also* Cologne v. Westfarms Assocs., 192 Conn. 48, 469 A.2d 1201 (1984) (previous disruptive Klan demonstrations at shopping center justified denial of permission to demonstrate to woman's advocacy group); *cf.* Invisible Empire Knights of the Klu Klux Klan v. City of West Haven, 600 F. Supp. 1427 (D. Conn. 1985).

be delayed nine days. In important civil rights cases in the 1960's, the Supreme Court had ruled that time is often of the essence in public forum free speech cases; so "time, place, and manner" regulations—while constitutional if applied fairly—may not unduly delay planned demonstrations in the public forum.[216] The Alabama court, however, noted the Klan's threats of violence in anticipation of the demonstration[217] and concluded that while the first amendment protected the planned demonstration professing white power, the special circumstances of the case justified the time restraint and Handley's conviction for violating the permit ordinance.[218]

Although the Alabama court did not distinguish between the Klan's 1981 Selma march and Martin Luther King's 1965 march in terms of substantive justice, the threatening and assaultive nature of the Klan's expressive provocations played a role in the court's deliberations. In the original Selma case, Judge Johnson refused to delay the march; in *Handley* the court sanctioned a delay due to the potential for violence. Though the difference is not abridgement and nonabridgement, it nonetheless signifies differential treatment deriving from the substance or content of expression.[219]

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216 *See* Shuttlesworth v. Birmingham, 394 U.S. 147 (1969); Carroll v. President & Comm'rs, 393 U.S. 175 (1968) (involving a "White Supremacist" organization).

217 Official intelligence reports of Klansmen with axe handles, pick axes, hoe handles, bows and arrows, shot-guns, and rifles were known to the police department before the arrest of the defendant. Also, a Klansman was quoted as saying, "We will destroy the enemy on our march to the Capital of Montgomery." *Handley*, 469 A.2d at 183. As in the *Vietnamese Fishermen* case, the court looked at all relevant contextual facts in the case. Though abridgement per se was not at stake in *Shuttlesworth* and *Carroll*, as in *Vietnamese Fishermen*, the "totality of circumstances" justified differential treatment of the Klan and a compromise of the "timeliness" doctrine.

218 The court stated:

> Protection, not only for the public, but for Klan members was of concern to city officials. Anxiety over the safety and welfare of all individuals involved, both the marchers and the public, was not unfounded. A highly sensitive and potentially explosive situation was present.
>
> Under the circumstances, simple notice to the city officials that a march was going to take place would not have been sufficient or realistic. Obviously, arrangements had to be made to prevent jeopardizing public safety and welfare; any contrary evaluation would demonstrate a reckless indifference to the value of human life and public property. Such indifference cannot be licensed under the guise of First Amendment freedom.

401 So. 2d at 183.

219 Along with the *Vietnamese Fishermen* case, it also signifies a greater concern for the larger context of speech, the "totality of circumstances" that gives contextual and phenomenological meaning.

Another recent development should be noted. In January 1985 the U.S. District Court for the Eastern District of North Carolina issued an order pursuant to a consent decree that barred the Confederate (formerly Carolina) Knights of the KKK from marching in predominantly black neighborhoods, from harassing or intimidating North Carolina citizens, and from operating a paramilitary organization. The agreement was reached in a civil suit brought against the Klan by a black prison guard who claimed he and his family were intimidated by the CKKKK. *See* Order, Person v. Carolina Knights of the Ku Klux Klan, No. 84-

IV. Conclusion: A Proposal for a New Approach To Racial Vilification

As discussed, courts have indeed considered the content, ends, intents, and motivations[220] of speech acts in first amendment adjudication. Despite the rhetoric used in some decisions, first amendment jurisprudence has heeded the substantive justice of free speech claims. In public forum cases such as Skokie, however, the content neutrality doctrine holds powerful sway. But speech such as the NSPA intended to target at Skokie can inflict substantial harms for patently unjust reasons. Consequently, some forms of racial vilification should be abridged.

At the same time, any reform of constitutional policy in this area must be principled and limited in order to secure free speech values and interests. Accordingly, the following elements should be present to justify abridgement: (1) assaultive content (expressed, as at Skokie or in the *Vietnamese Fishermen* case, or implied, as in the Cicero example discussed above); (2) the intent to be assaultive; and (3) the presence of targeting as an operational indicator of intent and harm. As discussed, targeting lies somewhere between the narrow doctrine of captive audience in *Cohen v. California* and Beauharnais' distribution of leaflets. The nature and content of these components will now be examined. A test will then be proposed for the treatment of racial vilification. This tentative proposal is designed to help stimulate further discussions of a potential test limiting targeted racial vilification.

A. *Assaultive Content*

The term "assaultive content" would include degrading slurs or epithets, or vilification that was accompanied by or entailed threats of violence. In addition, *implicit* threats or assaults could be

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534-CIV-5 (D.N.C. Jan. 18, 1985). The parts of the lawsuit directed to the actions of three individual dependants are still continuing.

Recently, the Supreme Court has sanctioned a measured return to the "totality of circumstances" methodology in the criminal law adjudication of the validity of search warrants. *See* Illinois v. Gates, 104 S. Ct. 2317 (1983) (determination of validity of affidavit in support of search warrant to be based on the "totality of circumstances" rather than the two-pronged test of Aguilar v. Texas, 378 U.S. 108 (1964), and Spinelli v. United States, 393 U.S. 410 (1969)). This type of approach in free speech cases and criminal law cases constitutes a rejection of the principle or method of "analysis." Unger favors what he calls the principle or method of "synthesis," which maintains that we cannot understand facts or individuals outside of their place in larger wholes. *See* R. UNGER, *supra* note 29, at 47; *see also* L. STRAUSS, NATURAL RIGHT AND HISTORY 125-26 (1953) (knowledge and understanding presuppose "a fundamental awareness of the whole"). The courts in the Skokie cases, however, steadfastly refused to consider the contextual totality of circumstances which gave the NSPA's proposed speech act its meaning.

220 On the difference between "intent" and "motive," see generally H. GROSS, *supra* note 97, at 88-103.

abridged. A case where threats are present is clearly intimidating, whereas the presence of intimidation in the case of degrading slurs or epithets would depend upon the context of targeting and the content of the expression.

The limits on the context that would imply assaultive content will now be examined. In terms of slurs and epithets, words which are commonly accepted, by a reasonable man, as vilifying or derogatory would be abridgeable. So would expression that means the same thing. Richard Delgado provides a sensible legal standard in his article on the tort of racial insults that can be used here: "Language . . . addressed to him or her by the defendant that was intended to demean through reference to race; and that a reasonable person would recognize as a racial insult."[221] Our standard would substitute "targeted at a definable audience" for "addressed to him or her."

In terms of implicit or symbolic assault, the standard should be similar: what a reasonable person would construe to be assaultive. Yet in such cases the context and intent of the "speaker" must be examined closely. The NSPA's antecedent acts at Skokie would have been relevant under this analysis, as well as its intent to display the swastika. The district court's treatment of the relevant facts in *Vietnamese Fishermen* should also be recalled. This article's previous treatment of symbolic intimidation showed that nonverbal expression may cause harms that justify the abridgement of expression. Prior to such abridgement, however, intent to demean or intimidate, as determined by a reasonable person, must be present.

B. *Intent*

Intent would normally be presumed in the very act of targeting assaultive expression. Yet the prosecution should be required to demonstrate harm as the result of the expressive act,[222] especially because a harm principle has been used in the present analysis. The defense of "truth" should not normally be allowed, since as noted previously, the harm exists independently of any truth contained in the expressive act. However, such defenses as reasonable ignorance of the nature of the target should be allowed because in such cases the specific intent to harm is absent.

In addition, provocation should be either a defense or a mitigating factor, even if such provocation may be hard to imagine in the contexts of this analysis.[223] For example, a court might find that

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221 *Words that Wound*, *supra* note 175, at 179.

222 *See id.* at 150-59, 179-80 (the need to show harm in the tort of racial insult).

223 Provocation is normally a partial defense in murder cases. *See* Patterson v. New York, 432 U.S. 197 (1977); Mullaney v. Wilbur, 421 U.S. 684 (1975); *see also* H. GROSS, *supra* note 97, 157-58, 174-75.

provocation existed if the NSPA targeted its swastika at the American Jewish Committee's headquarters after the AJC had baited the NSPA by ridiculing party members or by giving an anti-Nazi speech the night before. A clearer provocation would exist if the NSPA targeting were an *immediate* reaction, because a "reasonable" provocation defense should diminish with time. At any rate, consideration of alleged provocation would be necessary in the determination of the specific intent which is required for culpability under this approach. But normally, only a racialist provocation should justify a racialist response. The previous discussion of the "Kike Keefe" hypothetical demonstrated the injustice of the reference to Keefe's ethnicity despite Keefe's alleged responsibility for panic peddling.

C. *Targeting*

As discussed previously, targeting can exist in contexts beyond the narrow captive audience doctrine of *Cohen*. In finding targeting, juries or judges would be required to consider all relevant evidence in the speech act, as the courts did in *Vietnamese Fishermen* and *Handley*, rather than simply focusing on a particular act of presenting views in the public forum.

This approach can be compared to Skokie where even though Skokie's counsel presented evidence of the NSPA's leafletting, platform statements, and press statements,[224] the courts eventually disregarded that evidence when determining the NSPA's first amendment rights. Had the courts considered this evidence in framing a picture of the nature of the NSPA's speech act, the picture would have looked more assaultive than the image of "pure speech" which emerged from the courts' focus on the proposed demonstration at the village hall. The courts viewed this proposed speech act in *isolation* from the acts which targeted Skokie ahead of time and which transformed the denotative and connotative meaning of the speech act from "pure speech" into a calculated assault. The present judicial methodology, which requires courts to disregard past statements and acts of hate groups and to consider only the speech act at hand, prevents the courts from comprehending the true meaning of such assaultive speech.

Courts should be allowed to consider all relevant evidence to determine whether vilifying racialist or ethnic expression actually targets identifiable groups, thereby rendering it assaultive or a form of invasion. In some cases, as in the "Kike Keefe" hypothetical,

224 *See* Transcript of Trial, *supra* note 33, at 13-19; Transcript of Emergency Injunction Hearing on Apr. 28, 1977, at 51-70, Village of Skokie v. National Socialist Party of Am., No. 77 CH 2702 (Ill. Cir. Ct.-Ch. Div.).

Arkes' Cicero-like case, the *Vietnamese Fishermen* case, and the types of neighborhood intimidations discussed in the Contra Costa County study, the determination of targeting can be derived from the nature of the speech act itself. Though these cases may not entail strictly captive audiences, they do involve unacceptable forms of intimidation through the explicit targeting of homes or neighborhoods.

In rarer cases, such as Skokie, it may be possible to target not only a specific home or neighborhood, but an entire ethnic community or set of neighborhoods. Because these targets are larger, expression targeted at them is less clearly associated with the harms of captivity or direct assault than are invasions of neighborhoods or the area of privacy surrounding the home. The previous discussion of the Skokie case, however, shows that vilifying expression may indeed be felt as an assaultive invasion of the entire community.

In such cases, a jury or judge should be required to find sufficient evidence to warrant a finding of targeting. Advance notice of the assaultive intent of the demonstration, such as the NSPA leaflets and press statements at Skokie, would be material evidence in making this determination, especially if the actual demonstration took place in only a single location on the periphery of the ethnic community. An actual "march" into the community could itself constitute targeting, as could other dramatic "pointed" acts performed at the time of the actual demonstration. In these cases, the speaker already would have determined whether an act of targeting had occured by his actions prior to or during his demonstration in the public forum. The test that a court should use, however, should be objective. It should be based on what a reasonable person would construe to be targeting.[225]

The following legal standard of targeting, the formulation of which is amenable to more definite judicial construction, is suggested:

> When vilifying or assaultive expression is directed at an individual, home, neighborhood, or community in such a way as to single out an individual or specified group as the definite target of the expression, it can be abridged.

D. *The Proposed Test*

The full test can now be stated. The test suggests the guidelines for a minimal abridgement of speech when there is targeted racial vilification.

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225 For a philosophical defense of the objective, reasonable man test in criminal law, see generally Schwab, *supra* note 12.

Speech in the public forum involving race or ethnicity may be abridged:

> 1) when such expression is accompanied by the advocacy of death or violence perpetrated against a group as determined by a reasonable person; *or* when such expression explicitly demeans or vilifies through reference to race or ethnicity as determined by a reasonable person; *or* when such expression so vilifies or demeans in a symbolic or implicit manner as determined by a reasonable person; *and*
> 2) such expression and harm are intended by the speaker and are unjustifiable due to the lack of significant provocation; *and*
> 3) such expression is directed at an individual, home, neighborhood, or community in such a way as to single out an individual or specified group as the definite target of the expression.

E. *Targeting, Intent, and the Context of Expression*

This proposal's treatment of targeting and intent entails taking the *context* of speech in the public forum more seriously than does present free speech doctrine.[226] The Skokie decisions were the result of a free speech jurisprudence that is excessively libertarian in the sense that it treats the act of political expression in the public forum in isolation from its context, intent and impact. The delicate balance of liberty and social value which the Supreme Court practiced in *Chaplinsky* is now absent. The previous analysis of the Skokie case, both empirical and normative, has demonstrated that the Supreme Court should seriously examine the *Chaplinsky* social value principles and fighting words doctrines. Such reconsideration would put the first amendment back in touch with substantive justice and the civility and protective functions of the just community; it would also make public forum jurisprudence more consistent with the norms and aspirations of other first amendment domains.

The method of free speech adjudication proposed would require the courts to consider context and community values. By forbidding courts to consider all relevant evidence in order to ascertain the intent and, therefore, the full meaning of speech, the present method of adjudication resembles the anti-community principle and method of "analysis" which Roberto Unger criticizes in *Knowledge and Politics*. Simply stated, the principle of analysis involves the dissection of "wholes" into constituent parts which then stand isolated from their former contextual meaning. It boils down to "the proposition that in the acquisition of knowledge the whole is the sum of its parts."[227] The relationship between the principle

226 For another example of a contextual approach to public forum symbolic speech cases, see Note, *supra* note 210, at 470 n.22, 481-82, 499-503.

227 R. UNGER, *supra* note 29, at 46; *see id.* at 81.

of analysis and the principle of libertarian individualism is apparent: each focuses on individual entities in isolation from the contexts or environments within which they are embedded. Unger contrasts the principle of analysis with the principle of "synthesis," which maintains that people cannot understand facts or individuals outside of their places in larger wholes.[228] In social terms, the principle of synthesis recognizes the individual as a social person.

If Unger is correct, it is no accident that first amendment jurisprudence concerning political speech in the public forum exalts individualism in isolation from the community at the same time as it practices a method which is analytical in nature. The context, intent, and associated expression that give meaning to any individual speech act are ignored in honor of the individual's particular right at a particular time to exercise his first amendment right. It was this type of jurisprudence which prohibited the judicial consideration of wider context in the fighting words cases after *Cohen v. California*.

But man is a political, communal animal in addition to being an individual. Indeed, his development and growth require adequate socialization and learning from his culture. The acts of individuals have important consequences, as the science of ecology teaches us in a different realm. Accordingly, the most prudent jurisprudence should *balance* individualism and community, the principles of analysis and synthesis. The definitional balancing approach of *Chaplinsky* and its conception of fighting words are steps in this direction. So is the policy proposal of this article, which is premised on a synthetic, contextual evidentiary analysis that is more conducive to the value of community than is present first amendment jurisprudence concerning racial vilification.

228 *Id.* For a discussion of the "totality of circumstances" methodology in search warrant adjudication, see *id.*