

his *Miranda* rights he invokes.<sup>57</sup>

We should not ignore the fact that a large majority of people whom the police interrogate are the poorly educated and minorities, persons for whom the police station presents an extremely coercive environment. Unwittingly, these people may confess to crimes when, if fully informed, they would refrain from speaking to the police. Perhaps for this reason, the Supreme Court has adopted prophylactic rules that tend to suppress truthful confessions but serve the important function of protecting the individual's constitutional rights. In *Minnick*, however, the Court established a prophylactic rule without showing how it was necessary to further constitutional rights. The Court extended the *Edwards* rule based on reasoning totally divorced from the justification underlying that rule. The result is the creation of an irreconcilable contradiction in the Court's jurisprudence that will cause as much confusion as the bright-line rule of *Minnick* was intended to prevent. In sum, the Court's reasoning in *Minnick* fails to justify this extension of Fifth Amendment protection for criminal suspects.

Stephen L. Coco

REGULATION OF RACIST SPEECH: *In re. Welfare of R.A.V.*, 464 N.W.2d 507 (Minn. 1991).

Judicial treatment of extremist speech under the First Amendment has traditionally held fast to two related principles: a refusal to evaluate the ideas expressed on their merits,<sup>1</sup> and a refusal to deny protection for those ideas because of their

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57. One possible distinction may derive from the Court's opinion in *Arizona v. Roberson*, 486 U.S. 675 (1988), in which the Court stated that "the presumption raised by a suspect's request for counsel . . . [is] . . . that he considers himself unable to deal with the pressures of custodial interrogation without legal assistance." *Id.* at 683. The Court stated that a suspect's decision to cut off questioning does not raise the same presumptions. Invoking the right to remain silent could mean that a suspect feels comfortable dealing with the police on his own. On the other hand, it could mean that the suspect invoking the right to remain silent does not understand enough to ask for counsel. Such speculation about the mental states and capacities of numerous and unknown suspects provides a very flimsy basis for creating such disparate levels of constitutional protection.

1. See *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.").

tendency to offend others.<sup>2</sup> Because they safeguard the rights of unpopular groups to criticize the existing order and put forward agendas for change, these principles have been considered critical to the liberation of oppressed groups. The problem of racist speech, however, brings the interests of free speech and protection of minorities into conflict. In response both to a perception that racial harassment is on the rise in America<sup>3</sup> and to a growing body of empirical work that documents the physical, psychological, and social harms of racist speech,<sup>4</sup> many traditional supporters of free speech have begun to advocate restrictions on speech that harasses or degrades members of minority groups.<sup>5</sup> The courts, however, have not been nearly so willing to abandon First Amendment orthodoxy.<sup>6</sup> In *Doe v. University of Michigan*,<sup>7</sup> a federal district court struck down a university policy aimed at harassment of members of minority groups as unconstitutionally overbroad and vague. In its opinion, however, the court noted that a more narrowly-drawn regulation might be constitutional under the "fighting-words" doctrine, which holds that words that "by their very utterance inflict injury or tend to incite an immediate breach of the peace"<sup>8</sup> are not protected by the First Amendment.

The Supreme Court of Minnesota recently pursued this approach in the case of *In re Welfare of R.A.V.*,<sup>9</sup> in which the court

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2. See *Street v. New York*, 394 U.S. 576, 592 (1969) (citations omitted) ("It is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers.").

3. See generally Lawrence, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431, 431-34; Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2326-33 (1989); Recent Development, *Bringing Hate Crime Into Focus—The Hate Crime Statistics Act of 1990*, 26 HARV. C.R.-C.L. L. REV. 261, 261-62 (1991).

4. For reviews of this literature, see Delgado, *Words that Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133, 135-49 (1982); and Matsuda, *supra* note 3, at 2336-41.

5. See Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 1990 DUKE L.J. 375, 383. For convenience, this Recent Development refers primarily to racist speech, although much of the discussion also applies to harassment based on religion, ethnicity, gender, or sexual orientation.

6. See, e.g., *Texas v. Johnson*, 491 U.S. 397, 414 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.").

7. 721 F. Supp. 852 (E.D. Mich. 1989).

8. *Doe*, 721 F. Supp. at 862 (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942)).

9. 464 N.W.2d 507 (Minn. 1991) (*R.A.V.*).

construed a general bias-motivated disorderly conduct statute narrowly to prohibit only conduct that could be characterized as "fighting words" or incitement to imminent lawless action. Nevertheless, the Minnesota court failed to confront directly the controversy that has arisen since *Chaplinsky* over the meaning of the "fighting-words" standard; successful use of the "fighting-words" doctrine to combat racist speech requires a careful reappraisal of the doctrine itself.

The events that gave rise to the *R.A.V.* case began when Russell and Laura Jones, a black couple with five children, moved into a predominantly white, working-class neighborhood on the east side of St. Paul, Minnesota.<sup>10</sup> The Joneses were subjected to a pattern of harassment that included slashed tires and racial epithets directed toward the children by white "skinheads" on the street and culminated in the burning of a cross on the Joneses' lawn in the early morning of June 21, 1990.<sup>11</sup> Subsequently, a seventeen-year-old boy was arrested<sup>12</sup> and charged with violating a St. Paul ordinance providing that

[w]hoever places on public or private property a symbol, object, appellation, characterization or graffiti, including but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm, or resentment in others on the basis of race, color, creed, religion, or gender commits disorderly conduct and shall be guilty of a misdemeanor.<sup>13</sup>

The trial court dismissed the charges on the ground that the ordinance prohibited expressive conduct protected under the First and Fourteenth Amendments, and was thus unconstitutionally overbroad.<sup>14</sup> The city appealed the ruling, arguing that

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10. See *Burning Cross Greets Black Family on St. Paul's East Side*, Minneapolis Star Tribune, June 22, 1990, at 1A, col. 5.

11. See *id.*

12. See *Ordinance on Cross Burnings is Upheld*, Minneapolis Star Tribune, Jan. 18, 1991, at 1B, col. 6.

13. ST. PAUL, MINN., LEG. CODE § 292.02 (1990).

14. See *R.A.V.*, 464 N.W.2d at 508. Under the Supreme Court's overbreadth doctrine,

an individual whose own speech or expressive conduct may validly be prohibited or sanctioned is permitted to challenge a statute on its face because it also threatens . . . those who desire to engage in legally protected expression but who may refrain from doing so rather than risk prosecution or undertake to have the law declared partially invalid.

*Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 503 (1985). If the challenged provision is substantially overbroad, "the law may not be enforced against anyone, including the party before the court, until it is narrowed to reach only unprotected activity, whether by legislative action or by judicial construction . . ." *Id.* at 503-04.

its ordinance could be narrowly construed to reach only conduct that falls outside First Amendment protection.<sup>15</sup> The Minnesota Supreme Court agreed, holding that the ordinance could withstand constitutional challenge if read to apply only to conduct that constitutes "fighting words" or incitement to imminent lawless action.<sup>16</sup> "So interpreted," the court stated, "the ordinance is a narrowly tailored means toward accomplishing the compelling governmental interest in protecting the community against bias-motivated threats to public safety and order . . . and therefore is not prohibited by the first amendment."<sup>17</sup>

In its holding, however, the *R.A.V.* court failed to come to grips explicitly with the controversy that surrounds the meaning of the "fighting-words" standard. The court defined "fighting words" only by quoting the classic formulation of *Chaplinsky*: "those which by their very utterance inflict injury or tend to incite an immediate breach of the peace."<sup>18</sup> Originally, this standard was believed to be based on the content of the speech itself; the legislature was allowed to presume that certain words would almost certainly bring about the outbreak of violence without close examination of the context in which they were uttered.<sup>19</sup> More recent Supreme Court decisions, however, show a trend toward a standard that focuses on the context in which the speech occurs<sup>20</sup> and protects offensive speech unless it is actually likely to cause a breach of the peace.<sup>21</sup>

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15. See *R.A.V.*, 464 N.W.2d at 508. Statutes are generally voided for overbreadth only if they cannot be narrowed in order to restrict only unprotected speech. As the Supreme Court noted in *Broadrick v. Oklahoma*, 413 U.S. 601 (1973), facial invalidation is "strong medicine," to be applied "sparingly and only as a last resort. Facial overbreadth has not been invoked when a limiting construction has been or could be placed on the challenged statute." *Id.* at 613.

16. See *R.A.V.*, 464 N.W.2d at 510.

17. *Id.* at 511 (citations omitted).

18. *Id.* at 510 (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942)).

19. See L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 12-10, at 850 (2d ed. 1988).

20. See *Gooding v. Wilson*, 405 U.S. 518 (1972). In *Gooding*, the Court invalidated a Georgia statute that prohibited the use of "opprobrious words or abusive language tending to cause a breach of the peace." *Id.* at 519. One factor that the Court cited as demonstrating the statute's overbreadth is that the statute had been interpreted by the Georgia courts to permit the conviction of a speaker even if the abusive language was directed to "one who, on account of circumstances or by virtue of the obligation of office, can not then and there resent the same by a breach of the peace." *Id.* at 526. See also *Hess v. Indiana*, 414 U.S. 105, 107 (1973) (shouting "We'll take the f—ing street later" was not fighting words where the expression was not directed at any particular person).

21. See L. TRIBE, *supra* note 19, § 12-10, at 850-51; Note, *The Fighting Words Doctrine—Is There a Clear and Present Danger to the Standard?*, 84 *DICK. L. REV.* 75, 86-90 (1979).

The *R.A.V.* court's treatment of "fighting words" shows an implicit preference for the content-based approach.<sup>22</sup> This preference is evident in the court's statement that

[b]urning a cross in the yard of an African American family's home is deplorable conduct that the City of St. Paul may without question prohibit. The burning cross is itself an unmistakable symbol of violence and hatred based on virulent notions of racial supremacy. It is the responsibility, even the obligation, of diverse communities to confront such notions in whatever form they appear.<sup>23</sup>

Although the court referred to some aspects of the context in which the city may "without question prohibit" cross-burnings, it did not seem to require any further inquiry into the circumstances in order to determine whether *R.A.V.*'s act was actually likely to bring about a breach of the peace. It would not seem to make a difference, for example, whether Mr. Jones was home at the time, although an actual violent response would presumably be more likely to result if he was present. Similarly, the court ignored the fact that the identity of the perpetrator was unknown at the time of the incident, indicating that *R.A.V.* and the Joneses never came into such close contact as to risk actual violence.<sup>24</sup> Moreover, the court's application of the standard of *Brandenburg v. Ohio*<sup>25</sup> to situations in which the speaker incites violence against himself signifies that the court intends "fighting words" to represent a content-based analysis, while "incitement" represents a context-based analysis of the likelihood of actual violence.<sup>26</sup> By making contextual analysis an explicitly separate category, the court reserved a content-based meaning for "fighting words."

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22. Use of the terms "content-based" and "context-based" with reference to alternative approaches to "fighting words" should not be confused with the distinction between "content-based" restrictions, which regulate speech based on the nature of what is said, and "facially neutral" restrictions, which regulate the time, place, and manner of speech based on a governmental interest independent of the content of the speech itself. Both "fighting-words" approaches are "content-based" in this second sense of the term. See L. TRIBE, *supra* note 19, § 12-2, at 789-94, § 12-10, at 837-41.

23. *R.A.V.*, 464 N.W.2d at 508 (footnote omitted).

24. As of the day following the cross-burning, police had not identified *R.A.V.* as the responsible party. See *Burning Cross Greets Black Family on St. Paul's East Side*, Minneapolis Star Tribune, June 22, 1990, at 1A, col. 5.

25. 395 U.S. 444 (1969).

26. The *Brandenburg* standard has traditionally been applied to situations in which the speaker incites violence by his supporters against others. Some commentators argue, however, that the trend toward context-based analysis of "fighting words" imports the *Brandenburg* idea of "clear and present danger" into the area of "fighting words." See Note, *supra* note 21, at 95.

If the goal is to protect people from racist attacks, then a content-based “fighting-words” standard has clear advantages over a standard that focuses on the actual likelihood of a violent response. Focusing on the content of the speech avoids a situation in which the victim’s right to protection depends on his propensity or ability to resort to violence. It seems counter-intuitive, for example, that Mr. Jones should be protected from being called a “nigger” by virtue of his ability to carry out a violent response, while his wife or small children should not be so protected.<sup>27</sup> The children in particular seem most in need of protection despite their inability to credibly threaten violence against the speaker. Even for adults, the unique psychological impact of racist epithets and symbols on a person who has experienced racial oppression may intimidate the victim rather than provoke him to violence. As Matsuda observes, “the effect of dehumanizing racist language is often flight rather than fight. Targets choose to avoid racist encounters whenever possible, internalizing the harm rather than escalating the conflict. Lack of a fight and admirable self-restraint then defines the words as nonactionable.”<sup>28</sup>

The argument for a content-based standard rests on the understanding that the real harm to be prevented in restricting certain types of “fighting words” is not physical violence but the damage inflicted by the words themselves. *Chaplinsky* apparently allows restriction of those words that “by their very utterance inflict injury,” as well as those that “tend to incite an immediate breach of the peace.”<sup>29</sup> No court, however, has ever explicitly based a restriction on the “injury” prong of the *Chaplinsky* test, and some commentators have dismissed it as dictum.<sup>30</sup> Moreover, restriction of speech because of its emo-

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27. The context-based version of the standard has been criticized as “a paradigm based on a white male point of view” because it assumes “an encounter between two persons of relatively equal power who have been acculturated to respond to face-to-face insults with violence.” Lawrence, *supra* note 3, at 453-54 (footnote omitted).

28. Matsuda, *supra* note 3, at 2355-56 (footnotes omitted). See also Balkin, *supra* note 5, at 421 (*Brandenburg* and *Chaplinsky* “do not concern speakers who browbeat their opponents into silence”). A more simple explanation for a passive response to racist speech is that “[i]t is both uncommon and unlikely that whites will insult minorities with racial epithets in contexts where they are outnumbered or overmatched.” Lawrence, *supra* note 3, at 454 n.94. Again, it seems unfair to protect the speaker’s abuse simply because he has taken care to assemble a gang of fellow thugs.

29. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

30. See Strossen, *Regulating Racist Speech on Campus: A Modest Proposal?*, 1990 DUKE L.J. 484, 508 (emphasizing that the New Hampshire statute at issue in *Chaplinsky* had been

tional impact upon the listener appears to fly in the face of the longstanding refusal to prohibit speech simply because "the ideas are themselves offensive to some of their hearers."<sup>31</sup> Nevertheless, the Supreme Court has never squarely rejected the "injury" prong of *Chaplinsky*.<sup>32</sup> The question, then, is under what circumstances can a content-based standard be reconciled with the more general trend in First Amendment doctrine toward protecting offensive speech?

A closer look at three cases that are representative of this trend can provide the beginning of an answer. In *Street v. New York*,<sup>33</sup> the United States Supreme Court reversed the conviction of a man who protested the shooting of civil rights leader James Meredith by burning an American flag. In *Cohen v. California*,<sup>34</sup> the Court reversed the conviction for disturbing the peace by "offensive conduct" of a man who appeared in a Los Angeles courthouse wearing a jacket with the words "F—the Draft" emblazoned on the back. Finally, in *Collin v. Smith*,<sup>35</sup> the Seventh Circuit struck down an ordinance passed by the predominantly Jewish Village of Skokie in anticipation of a march by American Nazis; the ordinance prohibited all public demonstrations that "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."<sup>36</sup> What is important about these cases is that none of them involved face-to-face harassment directed at particular individuals.<sup>37</sup> De-

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construed so as to prohibit only those words that had a direct tendency to cause acts of violence by the addressee).

31. *Street v. New York*, 394 U.S. 576, 592 (1969). See also *Texas v. Johnson*, 491 U.S. 397 (1989); *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988); *Terminiello v. Chicago*, 337 U.S. 1 (1949).

32. In *Rosenfeld v. New Jersey*, 408 U.S. 901 (1971), Justice Powell argued that "the exception to First Amendment protection recognized in *Chaplinsky* is not limited to words whose mere utterance entails a high probability of an outbreak of physical violence. It also extends to the willful use of scurrilous language calculated to offend the sensibilities of an unwilling audience." *Id.* at 905 (Powell, J., dissenting from decision to vacate and remand). Similarly, Professor Tribe acknowledges that "[t]he Constitution may well allow punishment for speaking words that cause hurt just by their being uttered and heard." L. TRIBE, *supra* note 19, § 12-10, at 856.

33. 394 U.S. 576 (1969).

34. 403 U.S. 15 (1971).

35. 578 F.2d 1197 (7th Cir.), *cert. denied*, 439 U.S. 916 (1978).

36. *Collin*, 578 F.2d at 1199 (quoting SKOKIE, ILL., ORDINANCES No. 77-5-N-994, § 27-56(C)). See also *Village of Skokie v. National Socialist Party of America*, 69 Ill. 2d 605, 373 N.E.2d 21 (1978) (striking down injunction that prohibited Nazis from displaying the swastika in their march).

37. In *Street*, the defendant was making an overtly political statement directed to the public in general. Similarly, in *Cohen*, the court refused to hold that the defendant's use

spite the latitude given to offensive speech in recent decisions, then, the possibility of restricting direct verbal or symbolic assaults on particular individuals remains an open question.<sup>38</sup>

In the absence of controlling precedent, this question may be resolved by appealing to the principles that are embodied in the First Amendment.<sup>39</sup> Legal scholars have articulated a number of philosophical justifications for free speech. Two of these—the “free marketplace of ideas”<sup>40</sup> and the notion of “self-government”<sup>41</sup>—assume that free speech takes place in the form of rational dialogue; the only sort of speech that is protected is “communication in which the participants seek to persuade, or are persuaded . . . .”<sup>42</sup> “It is reasonable to distinguish,” according to Professor Tribe, “between contexts in which talk leaves room for reply and those in which talk triggers action or causes harm without the time or opportunity for response. It is not plausible to uphold the right to use words as projectiles where no exchange of views is involved.”<sup>43</sup> Direct verbal attacks have exactly this effect of preempting any further exchange of views; according to Professor Lawrence, such speech “functions as a preemptive strike. The racial invective is experienced as a blow, not a proffered idea, and once the blow

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of vulgarity was “fighting words” because no one “could reasonably have regarded the words on appellant’s jacket as a direct personal insult.” *Cohen*, 403 U.S. at 20. The district court in *Collin* likewise noted that the Skokie ordinance was “clearly not aimed solely at personally abusive, insulting behaviour.” *Collin v. Smith*, 447 F. Supp. 676, 690 (N.D. Ill. 1978).

38. A direct verbal assault on an individual *was* at issue in *Gooding v. Wilson*, 405 U.S. 518 (1972), in which the defendant was convicted for using abusive language. The defendant told police officers: “White son of a bitch, I’ll kill you,” “You son of a bitch, I’ll choke you to death,” and “You son of a bitch, if you ever put your hands on me again, I’ll cut you all to pieces.” *Id.* at 519 n.1. The Court did not reach the constitutionality of punishing such statements, however, voiding the statute as overbroad on its face because the Georgia courts had construed it to prohibit language that was merely “harsh and insulting,” including even statements such as “You swore a lie.” *See id.* at 525-27. Moreover, the Court indicated that, had it not disposed of the case on overbreadth grounds, the defendant’s speech might have been protected because the addressee was a police officer. *See id.* at 519 n.1, 526.

39. For a jurisprudential defense of this method of resolving formally indeterminate or “hard” cases, see R. DWORKIN, *TAKING RIGHTS SERIOUSLY* 81-130 (1977).

40. *See Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (“[T]he ultimate good desired is better reached by free trade in ideas . . . . [T]he best test of truth is the power of the thought to get itself accepted in the competition of the market . . . .”). *See also* J.S. MILL, *ON LIBERTY* 19-67 (C. Shields ed. 1956).

41. *See* A. MEIRLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 26-27 (1948) (“[T]he fact that the citizens of the United States must decide political questions by universal suffrage means that they cannot be denied access to any political argument, right or wrong, that might aid their deliberations.”).

42. L. TRIBE, *supra* note 19, § 12-8, at 837.

43. *Id.*



is struck, it is unlikely that dialogue will follow.”<sup>44</sup> Racist verbal assaults thus inhibit the operation of both the free marketplace of ideas and democratic self-government.

Two additional rationales for free speech, however, do not necessarily depend on dialogue. The first focuses on the value of free speech to individual self-fulfillment,<sup>45</sup> while the second emphasizes that free speech may teach the virtue of tolerance by restraining members of society from silencing offensive speakers.<sup>46</sup> If self-fulfillment is the value behind the First Amendment, though, there is no reason that the fulfillment of the speaker should outweigh that of the listener, which is hampered by racism.<sup>47</sup> The tolerance theory, on the other hand, fails to provide a reason why other values, such as equality and respect for others, may not outweigh tolerance in particular cases.<sup>48</sup> Moreover, it seems possible to teach tolerance by requiring that racist *ideas* be tolerated, while protecting civility by disallowing them in the form of direct assaults on particular individuals.<sup>49</sup>

Burning a cross in front of a black family's home thus invokes none of the values associated with the First Amendment, despite the fact that immediate violence is unlikely to result. The

44. Lawrence, *supra* note 3, at 452.

45. See T. EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT 5 (1963) (“[E]xpression is an integral part of . . . the affirmation of self. The power to realize [man’s] potentiality as a human being begins at this point and must extend at least this far if the whole nature of man is not to be thwarted.”). The Supreme Court has recognized that even vulgarities like “F— the Draft” can advance this goal; as Justice Harlan wrote in *Cohen*, expression “conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well.” *Cohen v. California*, 403 U.S. 15, 26 (1971).

46. See L. BOLLINGER, THE TOLERANT SOCIETY 10 (1986) (“[F]ree speech involves a special act of carving out one area of social interaction for extraordinary self-restraint, the purpose of which is to develop and demonstrate a social capacity to control feelings evoked by a host of social encounters.”).

47. See Matsuda, *supra* note 3, at 2339-40; Delgado, *supra* note 4, at 136-43. Professor Delgado argues that the speaker’s self-fulfillment is hampered as well, because “[b]igotry . . . reinforc[es] rigid thinking, thereby dulling [his] moral and social senses and possibly leading to a ‘mildly . . . paranoid’ mentality.” *Id.* at 140 (footnotes omitted) (quoting Allport, *The Bigot in Our Midst*, 40 COMMONWEAL 582 (1944), reprinted in ANATOMY OF RACIAL PREJUDICE 161, 164 (G. Huszar ed. 1946)).

48. See Delgado, *supra* note 4, at 141 (“The failure of the legal system to redress the harms of racism, and of racial insults, conveys to all the lesson that egalitarianism is not a fundamental principle; the law, through inaction, implicitly teaches that respect for individuals is of little importance.”).

49. See D. DOWNS, NAZIS IN SKOKIE: FREEDOM, COMMUNITY, AND THE FIRST AMENDMENT 6-8 (1985). Downs’s argument for civility is much stronger with respect to direct assaults than in the context of the Skokie case itself. On the general necessity of civility and good manners to the functioning of society, see E. BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE 86-88 (T. Mahoney ed. 1955) (1790).

case demonstrates that it makes sense to use a content-based standard for "fighting words" in cases of direct verbal or symbolic assault. It is also important, however, that the lines be drawn as narrowly as possible. The content-based standard should cover only a narrow set of racial epithets, as well as such symbols as the burning cross and swastika. These words and symbols are uniquely harmful because of their historical association with oppression and violence; as Justice Jackson wrote in *Kunz v. New York*:

These terse epithets come down to our generation weighted with hatreds accumulated through centuries of bloodshed. . . . They are always, and in every context, insults which do not spring from reason and can be answered by none. Their historical associations with violence are well understood, both by those who hurl and those who are struck by these missiles . . . .<sup>50</sup>

A general prohibition may be further limited by allowing the application of a content-based standard only if certain contextual factors are present that strengthen the interests of the listener in avoiding the speech. For instance, the Supreme Court has recognized that these interests may become compelling when the listener is in his own home,<sup>51</sup> when he is a "captive audience" outside the home,<sup>52</sup> or when children are likely to be exposed to the speech.<sup>53</sup>

Whatever the shape of the standard eventually adopted, it is important that it be clearly delineated so as to avoid the potentially "chilling" effects of an ambiguous rule. Moreover, a renewed emphasis on the content-based approach to "fighting words" would mark a shift in First Amendment law that should be accompanied by thorough consideration of the issues and a well-articulated judicial rationale. The issue thus deserves a far

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50. *Kunz v. New York*, 340 U.S. 290, 299 (1951) (Jackson, J., dissenting).

51. See *Federal Communications Comm'n v. Pacifica Found.*, 438 U.S. 726, 748-49 (1978) (upholding Commission's authority to proscribe radio broadcasts that it finds "indecent but not obscene," in part because the broadcast intrudes into the privacy of the home); *Kovacs v. Cooper*, 336 U.S. 77 (1949) (upholding ordinance proscribing the operation of sound trucks in a "loud and raucous" manner, in part because the sound intrudes into the home without the owner's consent).

52. See, e.g., *Lehman v. City of Shaker Heights*, 418 U.S. 298, 307 (1974) (Douglas, J., concurring) (commuters are captives of advertising on municipally-owned buses).

53. See *Pacifica*, 438 U.S. at 749-50; *id.* at 758-59 (Powell, J., concurring) (Federal Communications Commission's authority to restrict indecent speech on the radio also upheld in part because of potential exposure of children). Racist speech is particularly harmful to children, who "possess even fewer means for coping with racial insults than do adults." Delgado, *supra* note 4, at 147.

more thorough treatment than it was given by the Minnesota Supreme Court in *R.A.V.*

Nevertheless, *R.A.V.* is an important first step. Reflexive rejection of "even a symbolic or perceived diminution of our impartial commitment to free speech"<sup>54</sup> is faithful neither to the values that undergird free speech nor to the precedents; as the Supreme Court noted in *Cantwell v. Connecticut*,<sup>55</sup> "[r]esort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution."<sup>56</sup> Although the difficulty of drawing lines should caution courts to move slowly and carefully in this area, Minnesota's attempt to protect both speakers and listeners is worth pursuing.

Ernest A. Young

SANCTIONING CLIENTS UNDER RULE 11: *Business Guides, Inc. v. Chromatic Communications Enterprises, Inc.*, 111 S. Ct. 922 (1991).

Rule 11 of the Federal Rules of Civil Procedure was amended in 1983 in response to increasing concern over frivolous litigation, pre-trial abuses, and mounting caseloads. Part of a package of changes designed to curb abuse of the litigation process, the amended rule has generated tremendous controversy, commentary, and litigation.<sup>1</sup> Recent commentators have expressed hope that the Supreme Court would bring a measure of clarity and uniformity to Rule 11 jurisprudence and resolve some of the more persistent conflicts generated by the rule.<sup>2</sup> The Court's decision in *Business Guides, Inc. v. Chromatic Communica-*

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54. Strossen, *supra* note 30, at 522.

55. 310 U.S. 296 (1940).

56. *Cantwell*, 310 U.S. at 309-10.

1. Rules 7, 16, and 26 were also revised in 1983. Amended Rule 11 has been by far the most controversial of these, generating 688 reported cases at the district court and court of appeals levels by the end of 1987. In 1988 alone, 387 Rule 11 cases were reported at the district court level, and 75 at the appellate level. See Nelken, *Has the Chancellor Shot Himself in the Foot? Looking for a Middle Ground on Rule 11 Sanctions*, 41 HASTINGS L.J. 383, 388 (1990). These figures do not include the many Rule 11 decisions that are not published.

2. See Burbank, *The Transformation of American Civil Procedure: The Example of Rule 11*, 137 U. PA. L. REV. 1925 (1989). Between 1983 and 1991, the Supreme Court decided only two Rule 11 cases: *Cooter & Gell v. Hartmarx*, 110 S. Ct. 2447 (1990), and *Pavelic & LeFlore v. Marvel Entertainment Group*, 110 S. Ct. 456 (1989).