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## NAZIS IN SKOKIE: FIGHTING WORDS OR HECKLER'S VETO?

Mark A. Rabinowitz\*

*In Village of Skokie v. National Socialist Party of America, the Illinois Supreme Court declared that the display of the swastika before survivors of the Holocaust could not be enjoined. To do so, according to the court, would violate the party members' right to free expression under the First Amendment. This author recognizes the right of the American Nazi Party to express its political beliefs by demonstrating in the Village of Skokie despite the prospect of violent opposition. However, Mr. Rabinowitz contends that the Fighting Words Doctrine prohibits them from displaying the swastika in an intentional attempt to inflict severe emotional distress upon persons who are known to be peculiarly susceptible to such injury by reason of a mental condition or peculiarity. This result, it is argued, accommodates both the party members' interests in freedom of expression and the Skokie residents' right to emotional well-being. Any other result, he asserts, subverts an important legally protected value by blindly overextending another value.*

In January, 1978, the Illinois Supreme Court, in *Village of Skokie v. National Socialist Party of America*,<sup>1</sup> declared that the display of the swastika before survivors of the Holocaust in a march of the American Nazi Party in Skokie, Illinois, could not be enjoined. To do so, according to the court, would violate the defendant party members' right to free expression under the First Amendment.<sup>2</sup> Although the controversial march never took place, the *Village of Skokie* decision portends serious consequences for the constitutional principles underlying the concept of freedom of speech.

The plaintiffs in *Village of Skokie* argued the applicability of the Fighting Words Doctrine, which was announced in the United States Supreme Court's decision in *Chaplinsky v. New Hampshire*.<sup>3</sup> The *Chaplinsky* case established that the utterance of those words, "which by their very utterance inflict injury or tend to incite an immediate breach of the peace,"<sup>4</sup> is not embraced within the protective cloak of the First Amendment and, therefore, can be prohibited or sanctioned. The history of the doctrine's development is characterized by a steady contraction of its scope. In thirty-seven years of judicial refinement of that principle, the Court has consistently refused to approve the doctrine's application to those forms of expression presented in the cases brought before it. In those cases, the Court has invoked

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1. 69 Ill. 2d 605, 373 N.E.2d 21 (1978).

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

3. 315 U.S. 568 (1942).

4. *Id.* at 572.

the Heckler's Veto Doctrine<sup>5</sup> to forbid the restraint of expression which was "merely offensive."<sup>6</sup>

While the scope of the Fighting Words Doctrine was being contracted, a significant development in tort law was occurring which may operate to ultimately preserve that doctrine's vitality—the recognition that a person's emotional well-being is worthy of greater protection.<sup>7</sup> Thus, it is the premise of this Article that the net effect of these countervailing developments is to preserve and reaffirm the core of the Fighting Words Doctrine, while rejecting those applications which were never intended by its creators. It will focus on the attempt of the American Nazi Party to march in the Village of Skokie, a predominantly Jewish suburb of Chicago, as a case which presents a compelling argument for application of the core concept of the Fighting Words Doctrine.

#### THE FACTUAL SETTING

The Village of Skokie, Illinois is a community of 70,000 residents situated in the Chicago metropolitan area.<sup>8</sup> Approximately 40,500, or fifty-seven percent, of its residents are of the Jewish religion, Jewish ancestry or both.<sup>9</sup> Included amongst the Jewish residents are hundreds of survivors of the Nazi concentration camps and many thousands of persons whose families and close relatives perished in the Nazi Holocaust.<sup>10</sup>

The National Socialist Party of America, otherwise known as the American Nazi Party, is an organization, headquartered in Chicago, whose "goals are similar to those of the German Nazi Party."<sup>11</sup> In March, 1977, Frank Col-

5. See note 115 *infra* and accompanying text.

6. See note 116 *infra* and accompanying text.

7. Courts now recognize the intentional infliction of mental distress as a tort. Liability is usually limited to acts of an especially flagrant character. W. PROSSER, HANDBOOK ON THE LAW OF TORTS §12 (4th ed. 1971) [hereinafter cited as PROSSER]. For a history of the development of the law, see articles cited in PROSSER, HANDBOOK ON THE LAW OF TORTS §11 n.9 (1941): Bohlen, *Right to Recover for Injury Resulting from Negligence Without Impact*, 41 AM. L. REG. 141 (1902); Bohlen and Polikoff, *Liability in Pennsylvania for Physical Effects of Fright*, 80 U. PA. L. REV. 627 (1932); Bohlen and Polikoff, *Liability in New York for the Physical Consequences of Emotional Disturbance*, 32 COLUM. L. REV. 409 (1932); Goodrich, *Emotional Disturbance as Legal Damage*, 20 MICH. L. REV. 497 (1922); Green, "Fright" Cases, 27 ILL. L. REV. 761, 873 (1933); Hallen, *Hill v. Kimball—A Milepost in the Law*, 12 TEX. L. REV. 1 (1933); Hallen, *Damages for Physical Injuries Resulting from Fright or Shock*, 19 VA. L. REV. 253 (1933); Harper and McNiely, *A Re-examination of the Basis for Liability for Emotional Disturbance*, WIS. L. REV. 426 (1938); Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 HARV. L. REV. 1033 (1936); Throckmorton, *Damages for Fright*, 34 HARV. L. REV. 260 (1921) (remaining citations omitted); See also the summary in the Report of the New York State Law Revision Commission, Study Relating to Liability for Injuries Resulting from Fright or Shock, Legislative Doc. No. 65(E) (1936).

8. *Village of Skokie v. National Socialist Party*, 51 Ill. App. 3d 279, 282, 366 N.E.2d 347, 349 (1st Dist. 1977).

9. *Id.*

10. *Id.*

11. *Id.* at 288, 366 N.E.2d at 353-54.

lin, the leader of the American Nazi Party, sent a letter to officials of the Village of Skokie announcing the Party's intention to conduct a march in the village on May 1, 1977. The announced purpose of the march was to protest a Skokie Park District requirement that conditioned the use of village parks on the posting of a \$350,000 insurance policy. The letter stated that traffic would not be obstructed by the demonstration, which would consist of thirty to fifty participants who would form a single-file picket line in front of the Skokie Village Hall. The demonstrators would carry placards and banners proclaiming slogans such as "Free Speech for the White Man," but would not distribute handbills. Village officials were informed that the demonstrators would not make derogatory public statements directed to any ethnic or religious group and would obey all laws.<sup>12</sup> It was further announced that the Nazi Party members participating in the march would wear their organization's uniform, which consisted of "the storm trooper uniform of the German Nazi Party embellished with the Nazi swastika."<sup>13</sup>

The announcement of the proposed march stirred great unrest among Skokie residents.<sup>14</sup> A leaflet was distributed by the Nazi Party which announced that they would march in Skokie because the community is "heavily populated by the real enemy—the Jews."<sup>15</sup> Fifteen to eighteen Jewish organizations in the area planned counterdemonstrations in which 12,000 to 15,000 people were expected to participate.<sup>16</sup> Fearing an uncontrollable bloodbath, the Village of Skokie sought and was granted an order restraining the Nazi Party from marching, walking, or parading in its uniform, from displaying the swastika in any fashion, and from distributing any materials which would incite hatred against persons of Jewish faith or any other faith.<sup>17</sup> On appeal, the First Appellate District affirmed in part and reversed in part.<sup>18</sup> It held that the Village had failed to sustain its burden of justifying the presumptively illegal prior restraint of expression except with respect to the display of the swastika.<sup>19</sup> This study will embrace only the

12. *Id.* at 283, 366 N.E.2d at 350.

13. *Id.* at 287, 366 N.E.2d at 353.

14. *Id.* at 282, 366 N.E.2d at 350.

15. Exhibit A attached to Plaintiff's Complaint filed in *Goldstein v. Collin*, Docket No. 77-4367 (Cir. Ct. of Cook County Ch. 1978).

16. 51 Ill. App. 3d at 284, 366 N.E.2d at 351.

17. *Id.* at 284-85, 366 N.E.2d at 351. The order specifically prohibited the Nazi Party from engaging in any of the following acts on May 1, 1977, within the Village of Skokie:

Marching, walking or parading in the uniform of the National Socialist Party of America; Marching, walking or parading or otherwise displaying the swastika on or off their person; Distributing pamphlets or displaying any materials which incite or promote hatred against persons of Jewish faith or ancestry or hatred against persons of any faith or ancestry, race or religion.

*Id.*

18. *Village of Skokie v. National Socialist Party of America*, 51 Ill. App. 3d 279, 366 N.E.2d 347 (1st Dist. 1977).

19. *Id.* at 282, 293, 366 N.E.2d at 349, 357. Relying upon *Cohen v. California*, the Illinois Appellate Court observed that "[i]n the instant case, the evidence shows precisely that substantial numbers of citizens are standing ready to strike out physically at whoever may assault their sensibilities with the display of the swastika." *Id.* at 292, 366 N.E.2d at 356. Having satisfied a

issue of whether the wearing of the swastika may be proscribed constitutionally.

Plaintiffs appealed to Illinois' highest court, where it was determined that since the march could not be constitutionally enjoined, the only remaining issue concerned the injunction of the display of the swastika.<sup>20</sup> Because the display was found not to constitute "fighting words," it was held that it could not be enjoined constitutionally.<sup>21</sup>

#### FIGHTING WORDS V. HECKLER'S VETO

Freedom of speech is commonly regarded as the most significant and delicate of American democratic liberties.<sup>22</sup> It presents a means of individual self-fulfillment and a tool for the acquisition of knowledge and the ascertainment of truth.<sup>23</sup> In a democracy, it is an essential prerequisite to self-government. Thus, for Americans, freedom of expression is "the matrix, the

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subjective test, the Court proceeded to apply the objective test enunciated in *Chaplinsky*. It concluded that "[t]he swastika is a symbol which, as demonstrated by the record in this case and as a matter of common knowledge, is inherently likely to provoke violent reaction among those of the Jewish persuasion or ancestry when intentionally brought in close proximity to their homes and places of worship." *Id.* at 293, 366 N.E.2d at 357. The Court further noted that "[i]f the swastika would naturally offend thousands of Jewish persons in Skokie, then it must be said that it would offend all those who respect the honestly held faith of their fellows, including the ordinary citizen." *Id.* at 292, 366 N.E.2d at 357. After applying the subjective and objective elements of the Fighting Words formulation and finding their conditions to be met, the Court elaborated on the basis of its conclusion:

The swastika is a personal affront to every member of the Jewish faith, in remembering the nearly consummated genocide of their people committed within memory by those who used the swastika as their symbol. This is especially true for the thousands of Skokie residents who personally survived the holocaust of the Third Reich. They remember all too well the brutal destruction of their families by those then wearing the swastika.

*Id.* at 293, 366 N.E.2d at 357.

20. 69 Ill. 2d at 611, 373 N.E.2d at 23. The Supreme Court of Illinois noted that "[t]he appellate court opinion adequately discussed and properly decided those issues arising from the portions of the injunction order which enjoined defendants from marching, walking, or parading, from distributing pamphlets or displaying materials, and from wearing the uniform of the National Socialist Party of America." *Id.*, 373 N.E.2d at 22-23. Therefore, the Court explained, "[t]he only issue remaining before this court is whether the circuit court order enjoining defendants from displaying the swastika violates the first amendment rights of those defendants." *Id.*, 373 N.E.2d at 23.

21. *Id.* at 615, 373 N.E.2d at 24.

22. First Amendment freedoms have been accorded special protection as compared to other constitutional rights. For a general discussion of whether the "preferred position" of First Amendment liberties is justified, see G. GUNTHER, *CASES AND MATERIALS ON CONSTITUTIONAL LAW* 1041-54 (9th ed. 1975). A thorough collection of judicial statements in favor of the preferred position proposition appears in McKay, *The Preference for Freedom*, 34 N.Y.U. L. REV. 1182, 1223-27 (1959). Justice Cardozo best expressed the justification for the special respect accorded First Amendment liberties in *Palko v. Connecticut*, 302 U.S. 319 (1937), stating that freedom of speech and thought is "the matrix, the indispensable condition, of nearly every other form of freedom." *Id.* at 327.

23. T. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 6-7 (1970).

indispensable condition, of nearly every other form of freedom."<sup>24</sup> Yet, "[a]ll declare for liberty and proceed to disagree among themselves as to its true meaning."<sup>25</sup>

Debate has raged over the issue of whether the right to free speech should be considered "absolute" and unabridgable or whether competing governmental interests may outweigh such rights. Mr. Justice Black has been most closely identified with the absolutist school of thought. In his dissent in *Konigsberg v. State Bar of California*,<sup>26</sup> he rejected "the doctrine that permits constitutionally protected rights to be 'balanced' away when a majority of this Court thinks that a State might have interest sufficient to justify abridgement of those freedoms."<sup>27</sup> Rather, he argued, "the First Amendment's unequivocal command that there shall be no abridgement of the rights of free speech and assembly shows that the men who drafted our Bill of Rights did all the 'balancing' that was to be done in this field."<sup>28</sup>

However, not even the so-called "absolutists" would forbid all regulation relating to speech. Therefore, they too must decide under what circumstances such regulation is to be tolerated. Not all expressive activity is speech, and a manner must be devised for determining when expression is not protected by the First Amendment because it is a "verbal act."<sup>29</sup> Further, only abridgements of free speech are forbidden, and such proscribed restraints must be distinguished from reasonable regulation.<sup>30</sup> In the final analysis, all absolutists fix some limit beyond which speech is not protected<sup>31</sup> and must therefore employ some form of balancing test.

The absolutists have embraced a categorization approach by which certain limited categories of expression, such as libel, obscenity, or fighting words, are deemed to be outside the scope of constitutional protection. Pursuant to this scheme, all protected speech is totally insulated from direct abridgement.<sup>32</sup> However, in determining whether a particular form of expression falls within a category of unprotected speech the balance test must once again inform the decision. Moreover, "[a]ny exclusion of a class of activities

24. *Palko v. Connecticut*, 302 U.S. 319, 327 (1937).

25. *Breard v. Alexandria*, 341 U.S. 622, 625 (1951).

26. 366 U.S. 36 (1961).

27. *Id.* at 61 (Black, J., dissenting).

28. *Id.*

29. *Gompers v. Bucks Stove and Range Co.*, 221 U.S. 418, 439 (1911).

30. See McKay, *The Preference for Freedom*, 34 N.Y.U. L. REV. 1182 (1959) [hereinafter cited as McKay], where the author points out that

[a]fter all, the amendment only forbids "abridging the freedom of speech." So what seems at first glance to be an absolute prohibition is seen on investigation to permit an inquiry into at least two subsidiary questions: (1) when does speech lose its protection because it is not speech but "verbal acts?"; and (2) where should the line be drawn between "abridging," which is flatly forbidden, and reasonable regulation, which may in some circumstances be permissible?

*Id.* at 1194.

31. McKay, *supra* note 30, at 1194.

32. *Konigsberg v. State Bar of California*, 366 U.S. 36, 69 (1961) (Black, J., dissenting).

from first amendment safeguards represents an implicit conclusion that the governmental interests in regulating those activities are such as to justify whatever limitation is thereby placed on the free expression of ideas."<sup>33</sup> Because even the absolutist approach must "balance, or employ a clear and present danger test, at *some* point,"<sup>34</sup> the debate over the absolutism versus balancing issue is merely an exercise in metaphysics. The absolutist versus balancing approach is a conflict underlying the inquiry as to whether the display of the swastika in Skokie under those particular circumstances constitutes "fighting words," subject to valid restraint, or whether such restraint would confer an unconstitutional Heckler's Veto.

### *The Fighting Words Doctrine*

Although freedom of speech is commonly regarded as the most important and fragile of American democratic liberties, it has never required that all expression remain unrestrained under all circumstances. In *Chaplinsky v. New Hampshire*,<sup>35</sup> the Supreme Court recognized "certain well-defined and narrowly limited classes of speech" which may be constitutionally restrained, including obscenity, profanity, libel, and "fighting words."<sup>36</sup> The refusal to provide First Amendment protection to these categories was based on their lack of social value.<sup>37</sup>

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33. L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 583 (1978) [hereinafter cited as L. TRIBE].

34. Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482, 1501 (1975).

35. 315 U.S. 568 (1942).

36. *Id.* at 572.

37. *Id.* This proclamation of the Fighting Words Doctrine emerged from a case in which *Chaplinsky*, a member of the Jehovah's Witnesses religious sect, was distributing literature on a public street. A crowd had gathered and the City Marshal warned *Chaplinsky* that the crowd was getting restless and upset because he was denouncing religion as a racket. *Id.* at 570. "Some hours later, the crowd got out of hand and treated *Chaplinsky* with some violence." *State v. Chaplinsky*, 91 N.H. 310, 313, 18 A.2d 754, 758 (1941). Although no arrests were made, a police officer who was present at the disturbance brought *Chaplinsky* to the police station for his own protection. *Id.* at 313, 18 A.2d at 758. While en route to the station the City Marshal appeared. *Chaplinsky* claimed that the City Marshal called him a "damn bastard." Evidently, the Marshal denied that allegation. *Id.* at 316, 18 A.2d at 759. The complaint charged that *Chaplinsky* called the Marshal "a God damned racketeer" and "a damned Fascist" and characterized the local government as "Fascists or agents of Fascists." *Chaplinsky v. New Hampshire*, 315 U.S. 568, 569 (1942). *Chaplinsky* was convicted of violating a state statute which prohibited the use of any "offensive, derisive or annoying" language in a public place. *Id.* The state court had construed the statute to forbid only such words "as have a direct tendency to cause acts of violence by the persons to whom, individually, the remark is addressed." *Id.* at 573. The state court had further held that, in applying the statute, "[t]he word 'offensive' is not to be defined in terms of what a particular addressee thinks. . . . The test is what men of common intelligence would understand would be words likely to cause an average addressee to fight." *Id.* The United States Supreme Court held that the statute, as authoritatively construed by the state court, was narrowly drawn so as to punish only "the use in a public place of words likely to cause a breach of the peace," *id.*, and therefore did not apply to constitutionally protected expression. The Court affirmed *Chaplinsky's* conviction, concluding that "the appellations 'damned racketeer' and 'damned Fascist' are epithets likely to provoke the average person to retaliation, and thereby cause a breach of the peace." *Id.* at 574.

The import of the *Chaplinsky* holding was that the utterance of "fighting words" could be prevented or punished as an exercise of a State's power to preserve public order. Those utterances, which under the Fighting Words Doctrine were not embraced within the protective cloak of the First Amendment, were limited to "those which by their very utterance inflict injury or tend to incite an immediate breach of the peace."<sup>38</sup> However, in applying this formula, the Court cautioned, the addressee's subjective reaction to the utterance is not controlling. "The test is what men of common intelligence would understand would be words likely to cause an average addressee to fight."<sup>39</sup>

The Fighting Words Doctrine is grounded in the premise that utterances which are thinly veiled assaults need not be tolerated in a society which otherwise enshrines the individual's right to unrestrained expression. An individual's right to speak and act as he pleases ends where it collides with the rights of others to be free from activity which rises to the level of a physical assault. The Court's formulation of the doctrine was justified by reference to its vision of freedom of speech as limited in its purpose to protecting the "exposition of ideas" as a step toward the ascertainment of truth.<sup>40</sup> The First Amendment is seen as an instrument to preserve the integrity of the "marketplace of ideas"<sup>41</sup> which is essential to the development of "rational social judgment"<sup>42</sup> and "self-fulfillment."<sup>43</sup> From the monocular perspective of this vision of freedom of expression, it follows that utterances which do not represent an "exposition of ideas" are of "such slight social value as a step to truth" that they may be prevented or punished in the public interest.<sup>44</sup>

As formulated in *Chaplinsky*, the Fighting Words Doctrine contains two facets. A State may constitutionally proscribe such utterances which by their very nature (1) inflict injury, or (2) tend to incite an immediate breach of the peace. Although only the latter was involved in *Chaplinsky*, the Court nevertheless saw fit to embrace a bipartite formulation. It did not specify the type or the degree of harm which would qualify as "injury," but at least one commentator has suggested that the first element in the *Chaplinsky* formulation "concerns the prevention of injury other than physical, primarily emotional upset and injury to the 'sensibilities' of addressees or auditors."<sup>45</sup> The second element refers to the prevention of a disturbance of the peace arising from an addressee's violent response to inherently provocative utterances.<sup>46</sup> Case-by-case applications of the doctrine by the Court infused this general formulation with a more specific meaning.

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38. *Id.* at 572.

39. *Id.* at 573.

40. *Id.* at 572.

41. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

42. T. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 7 (1970).

43. *Id.* at 6.

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

45. Rutzick, *Offensive Language and the Evolution of First Amendment Protection*, 9 HARV. C.R.—C.L. L. REV. 1, 6 (1974) [hereinafter cited as Rutzick].

46. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 573 (1942).



Thirty-seven years after *Chaplinsky*, the Fighting Words Doctrine stands significantly refined. Although words which by their very utterance inflict injury are still considered "fighting words," it is only when substantial privacy interests are invaded in an essentially intolerable manner that preventable injury will be found to exist. The major case in the development of the doctrine is *Cohen v. California*,<sup>47</sup> in which the defendant was arrested for wearing a jacket bearing the words "Fuck the Draft" in the corridor of a municipal courthouse where women and children were present.<sup>48</sup> He was convicted of violating a statute which prohibited "maliciously and willfully disturb[ing] the peace or quiet of any neighborhood or person . . . by . . . offensive conduct."<sup>49</sup>

*Cohen v. California* refined the Fighting Words Doctrine in five significant respects. First, in holding that Cohen's offensive message was "not directed to the person of the hearer,"<sup>50</sup> the Court was formulating an "actual addressee test"<sup>51</sup> dependent upon whether an "individual actually or likely to be present could reasonably have regarded the words [uttered] as a direct personal insult."<sup>52</sup> The Fighting Words Doctrine, then, is restricted to contexts where an actual addressee of the offensive message is present. In effect, the Court was saying to the occupants of the courthouse, "You can't complain because he wasn't talking to you." In order to determine whether the message was directed to the actual hearer the court formulated a common sense test based on a reasonable interpretation of the context of the utterance.<sup>53</sup>

Second, the Court added a subjective element to the objective test formulated by *Chaplinsky*. In *Chaplinsky*, the Court adopted a State court rule that eschewed concern with "what a particular addressee thinks."<sup>54</sup> The Court there noted that "[t]he test is what men of common intelligence would understand would be words likely to cause an average addressee to fight."<sup>55</sup> The Court applied this objective test in *Cohen* and concluded that

47. 403 U.S. 15 (1971).

48. Cohen entered a courtroom, "removed his jacket and stood with it folded over his arm. Meanwhile, a policeman sent the presiding judge a note suggesting that Cohen be held in contempt of court. The judge declined to do so and Cohen was arrested by the officer only after he emerged from the courtroom." *Id.* at 19 n.3.

49. *Id.* at 16.

50. *Id.* at 20.

51. Shea, 'Don't Bother to Smile When You Call Me That'—Fighting Words and the First Amendment, 63 KY. L.J. 1, 22 (1975).

52. *Cohen v. California*, 403 U.S. 15, 20 (1971).

53. One commentator has opined that the Court's language restricts the fighting words doctrine to the context of a face-to-face confrontation and rejects the proposition that the reaction of "onlookers" or "members of a general group addressed by the speaker" is relevant. *Rutzick, supra* note 45, at 21. However, this conclusion is not supported by the Court's opinion. To the extent that an "onlooker" or "members of a general group addressed by the speaker" constitute persons "actually or likely to be present" who "could reasonably have regarded the words [uttered] as a direct personal insult," they meet the actual addressee test and trigger application of the Fighting Words Doctrine.

54. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 573 (1942).

55. *Id.*

a reasonable interpretation of the words on appellant's jacket would not lead an individual actually or likely to be present to regard the words as a direct personal insult.<sup>56</sup> However, the Court went further and seemed to apply a test based on a subjective inquiry: would a substantial number of citizens stand ready to strike out physically in response to the offensive words?<sup>57</sup>

Third, the Court held that an "undifferentiated fear or apprehension of disturbance" is insufficient to trigger application of the Fighting Words Doctrine.<sup>58</sup> Rather, it must be shown that persons are likely "to strike out physically" at the offensive utterance.<sup>59</sup> In so holding, the Court reiterated its earlier conclusion that the Fighting Words Doctrine is limited to situations in which the expression is "likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest."<sup>60</sup>

Fourth, the Court defined the type of injury that justifies invocation of the Fighting Words Doctrine. It held that the grievant must show an invasion of "substantial privacy interests" in a manner so "essentially intolerable" that the government is justified in prohibiting the discourse.<sup>61</sup>

Fifth, the Court noted that the First Amendment protects both cognitive and emotive elements of communication. The Court's conclusion that Cohen's expression was constitutionally protected was based in part on its conclusion that he used the offensive expletive as a conveyer of emotion rather than of substantive content. Thus, Cohen was merely expressing disapproval of the selective service system in an emotional tone. He simply chose an emotive word rather than a loud voice to convey the intensity of his convictions. The Court thus recognized the "dual communicative function" of expression: "[I]t conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well. In fact, words are often chosen as much for their emotive as their cognitive force."<sup>62</sup> The Constitution protects emotion as well as cognition, the Court observed, since the former "may often be the more important element of the overall message sought to be communicated."<sup>63</sup> Thus, the *Cohen* Court reflected a vision of freedom of expression that was far wider in scope than that envisioned by the *Chaplinsky* Court. The *Chaplinsky* Court recognized the protection of the "exposition of ideas"<sup>64</sup> as the only purpose of freedom of speech, while the *Cohen* Court envisioned a broader role for First Amendment freedoms.<sup>65</sup>

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56. *Cohen v. California*, 403 U.S. 15, 20 (1971).

57. *Id.* at 23.

58. *Id.*

59. *Id.*

60. *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949).

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

62. *Id.* at 26.

63. *Id.*

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

65. *Cohen v. California*, 403 U.S. 15, 24 (1971). The Court here embraced a belief that a wide scope of freedom of expression "will ultimately produce a more capable citizenry and more

The *Cohen* conclusion may be interpreted as a logical extension of the doctrinal trend established by the *Chaplinsky* offspring. From its inception, the Fighting Words Doctrine was limited in its application by the Court. The first important post-*Chaplinsky* case was *Terminiello v. Chicago*,<sup>66</sup> where defendant's appeal from a conviction for disorderly conduct went to the United States Supreme Court in 1949.<sup>67</sup> In reversing Terminiello's conviction, the Court did not decide the issue of whether his offensive remarks could be punished as fighting words. Instead, it found that the particular ordinance involved was overbroad and therefore unconstitutional. The ordinance at issue had been interpreted to forbid speech which "stirs the public to anger, invites dispute, brings about a condition of unrest, or creates a disturbance."<sup>68</sup> The Court held that all except the last of these grounds were constitutionally protected speech, and reversed the conviction because the verdict did not specify which of the grounds had been relied upon in support of the conviction.<sup>69</sup>

Although the *Terminiello* Court did not profess to further hone the definition of "fighting words," the doctrine was refined by implication in this famous opinion written by Justice Douglas. The Justice stated that a fundamental function of free speech is to nourish healthy dispute. Thus the Court held that effects of offensive speech such as stirring the public to anger, inviting dispute, or creating a condition of unrest may indeed be welcome consequences under a policy of free speech for a citizenship.<sup>70</sup> Hence, such effects clearly do not constitute preventable injury under the Fighting Words Doctrine. In thus giving substance to the *Chaplinsky* test, the Court held

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perfect polity and . . . comport with the premise of individual dignity and choice upon which our political system rests."

66. 337 U.S. 1 (1949). *Terminiello* involved a conviction for disorderly conduct in violation of a city ordinance which proscribed the making of "any improper noise, riot, disturbance, breach of the peace, or diversion tending to a breach of the peace." *Id.* at 2 n.1. Terminiello had addressed an audience of approximately eight hundred persons who had assembled in an auditorium to hear him speak under the auspices of the Christian Veterans of America. Two hundred fifty persons had been refused admittance because the auditorium was filled to capacity. Approximately one thousand persons gathered outside the auditorium to protest the address and violence occurred. The address had consisted of a vicious attack on Zionist Jews and there was conflicting testimony as to the audience's reaction. *Id.* at 3.

67. *Terminiello v. Chicago*, 337 U.S. 1 (1949).

68. *Id.* at 3.

69. *Id.* at 5.

70. *Id.* at 4. In the now famous passage, Justice Douglas, writing for the Court, 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. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute, *Chaplinsky v. New Hampshire* [citation omitted], is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest.

that expression does not forfeit its constitutionally protected status merely because the addressee becomes emotionally upset upon hearing the utterance. Most significantly, the Court held that the restraint of fighting words must be limited to those contexts in which the utterance was "likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest."<sup>71</sup>

The Court continued to refine the doctrine, deciding *Street v. New York*<sup>72</sup> in 1969. *Street* involved a statute forbidding the mere utterance of defiant remarks concerning the flag.<sup>73</sup> In reversing *Street's* conviction because the statute involved would allow *Street's* words alone to be an independent source of his conviction,<sup>74</sup> the Court held that his utterances concerning the flag did not amount to fighting words tending to incite an immediate breach of the peace.<sup>75</sup> The most important aspect of the *Street* holding was a rejection of the proposition that expression could be punished because it offends a hearer<sup>76</sup> or shocks a hearer's sensibilities;<sup>77</sup> the

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71. *Id.*

72. 394 U.S. 576 (1969).

73. *Street* was convicted for violating a statute forbidding one to "publicly mutilate, deface, defile, or defy, trample upon, or cast contempt upon either by words or act" any American flag. *Id.* at 578. He had learned from a radio news report that civil rights leader James Meredith had been shot. Believing that inadequate protection of Meredith by law enforcement authorities had allowed the shooting, *Street* became outraged. He carried his own American flag outside to a street corner and, as a protest, set it ablaze and dropped it on the pavement to burn. A police officer observed the burning flag and found *Street* addressing an audience of five to ten persons on the street corner. An additional thirty persons stood near the flag. The officer testified that he heard *Street* say, "We don't need no damn flag." The policeman asked *Street* if he had burned the flag and he replied, "Yes; that is my flag; I burned it. If they let that happen to Meredith we don't need an American flag." *Id.* at 578-79.

74. The Court overturned *Street's* conviction because the statute improperly forbade the mere utterance of defiant remarks concerning a flag. The Court held that "*Street's* words could have been an independent cause of his conviction," and because his utterances constituted "public advocacy of peaceful change in our institutions," and were constitutionally protected, "a conviction for uttering such words would violate the Constitution."

75. *Id.* at 592. The Court stated that "[t]hrough it is conceivable that some listeners might have been moved to retaliate upon hearing appellant's disrespectful words, [it] cannot [be said] that appellant's remarks were so inherently inflammatory as to come within that small class of 'fighting words' which are 'likely to provoke the average person to retaliation, and thereby cause a breach of the peace.'" *Id.*

76. *Id.* The Court noted that "any shock effect of appellant's speech must be attributed to the content of the ideas expressed" and concluded 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." *Id.*

77. *Id.* at 592. One commentator has suggested that "the Court's reference to 'sensibilities' is of special note because it marked the first explicit statement by the Court that 'sensibilities,' denominated as such, are a protectible interest and the first clarification by the Court of its statement in *Chaplinsky* that words which 'inflict injury' but threaten no violent reaction are punishable." Rutzick, *supra* note 45, at 14. Other commentators have reached the opposite conclusion concerning the same language and characterize it as a rejection of the proposition that a state interest in protecting the sensibilities of an addressee from the impact of offensive language justifies restraining that expression. One commentator argues that protection of addressees from shock was "rejected" by the Court in *Street* as "an interest supporting suppres-

mere effect of offending or shocking a speaker does not constitute preventable injury under the Fighting Words Doctrine.

Also in 1969, the Court decided the significant case of *Tinker v. Des Moines Independent Community School District*.<sup>78</sup> In this case, one junior high school and two high school students were suspended for wearing black arm bands to school in order to protest the Viet Nam War. The students' fathers brought a suit seeking nominal damages and an injunction restraining school officials from disciplining the students for an exercise of constitutionally protected expression.<sup>79</sup>

The Court ruled in favor of the students, noting that "[t]he school officials banned and sought to punish petitioners for a silent, passive expression of opinion, unaccompanied by any disorder or disturbance on the part of petitioners."<sup>80</sup> Because "[t]here is no indication that the work of the schools or any class was disrupted," the Court continued, "this case does not concern speech or action that intrudes upon the work of the schools or the rights of other students."<sup>81</sup>

The Court rejected the school's assertion that their fear of a disturbance justified the restraint of expression, stating that "undifferentiated fear or apprehension of disturbance is not enough to overcome the right of freedom of expression."<sup>82</sup> Thus, although the Court did not refer to the Fighting Words Doctrine by name, its decision was grounded in the conclusion that the expression was not likely to incite an immediate breach of the peace. *Tinker* also represents a further refinement of the definition of preventable "injury" in the Fighting Words formulation to exclude "the discomfort and unpleasantness that always accompany an unpopular viewpoint."<sup>83</sup> In this sense, it is a restatement of the holding of *Street v. New York*.

The line of development established by *Terminiello*, *Street*, and *Tinker* was culminated in *Cohen*. One year after *Cohen*, the Court considered

sion of words." Nimmer, *The Meaning of Symbolic Speech under the First Amendment*, 21 U.C.L.A. L. REV. 29, 55 (1973). Another commentator stated that "The Court . . . rejected any state interest in preserving the sensibilities of passers-by." Bell & Mitchell, *First Amendment Protection of Symbolic Speech: Flag Cases Raise the Standard*, 8 LOY. L.A.L. REV. 689, 698 n.41 (1975). However, far from constituting an explicit statement of approval or rejection, the ambiguously worded passage is at most a carelessly worded attempt to dismiss that contention. The Court added to the confusion with this remark in the *Street* opinion: "Even if such a conviction might be upheld on the ground of 'shock,' there is again no indication that the state courts regarded the statute as limited to that purpose." *Street v. New York*, 394 U.S. 576, 592 (1969). Nevertheless, the Court cited *Street* as a repudiation of the existence of a state interest in protecting the sensibilities of hearers. *Spence v. Washington*, 418 U.S. 405, 412 (1974).

78. 393 U.S. 503 (1969).

79. *Id.* at 504.

80. *Id.* at 508.

81. *Id.*

82. *Id.*

83. *Id.* at 509. The Court announced that "[i]n order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint." *Id.*

the Fighting Words Doctrine in *Gooding v. Wilson*.<sup>84</sup> Wilson had participated in an antiwar demonstration in front of U.S. Army Headquarters. The demonstrators blocked the building's entrance in order to prevent the entrance of inductees. A police request to permit access to the building was refused and a fight ensued as police officers attempted to clear the entrance. During the struggle, Wilson addressed the following remarks to two police officers: "White son of a bitch, I'll kill you;" "You son of a bitch, I'll choke you to death;" "You son of a bitch, if you ever put your hands on me again, I'll cut you all to pieces."<sup>85</sup> Wilson was convicted of violating a statute which forbade the use of "opprobrious words or abusive language, tending to cause a breach of the peace."<sup>86</sup>

The Court began its opinion by reaffirming the power of a State "constitutionally to punish 'fighting' words under carefully drawn statutes not also susceptible of application to protected expression."<sup>86a</sup> In the instant case, the Court noted, the statute "makes it a 'breach of the peace' merely to speak words offensive to some who hear them, and so sweeps too broadly."<sup>87</sup> Thus, the Court concluded, the statute is unconstitutionally overbroad because it is not limited to forbidding only such words that "have a direct tendency to cause acts of violence by the person to whom, individually, the remark is addressed."<sup>88</sup> In order to survive constitutional scrutiny, statutes must be narrowly drawn so as to forbid only such utterances that are likely to provoke "an immediate violent response" by the actual addressee.<sup>89</sup>

Later that year the Court remanded three cases for reconsideration in light of *Cohen* and *Gooding*. All three cases concerned state statutes which prohibited obscene or offensive language.<sup>90</sup> In *Rosenfeld v. New Jersey*<sup>91</sup> and *Brown v. Oklahoma*,<sup>92</sup> the defendants, while publicly addressing large

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84. 405 U.S. 518 (1972).

85. *Id.* at 519 n.1.

86. *Id.* at 519.

86a. *Id.* at 523 [citations omitted].

87. *Id.* at 527.

88. *Id.* at 524.

89. *Id.* at 528.

90. In *Rosenfeld v. New Jersey*, 408 U.S. 901 (1972), the defendant was convicted of disorderly conduct in violation of a statute which prohibited the uttering of "loud and offensive or profane or indecent language" in a public place. *Id.* at 904 (Powell, J., dissenting).

In *Brown v. Oklahoma*, 408 U.S. 914 (1972), the defendant was convicted of violating a statute which forbade the utterance of "any obscene or lascivious language or word in any public place or in the presence of females." *Id.* at 911 (Rehnquist, J., dissenting).

In *Lewis v. City of New Orleans*, 408 U.S. 913 (1972), the defendant was convicted of a breach of the peace in violation of a city ordinance forbidding one "to curse or revile or to use obscene or opprobrious language toward or with reference to any member of the city police while in the actual performance of his duty." *Id.* at 909-10 (Rehnquist, J., dissenting). The Court vacated the judgment and remanded the case for reconsideration in light of *Gooding*. *Id.* at 913.

91. 408 U.S. 901 (1972). The facts of this case appear in the dissenting opinion of Justice Powell. *Id.* at 904.

92. 408 U.S. 914 (1972). The facts of this case appear in the dissenting opinion of Justice Rehnquist. *Id.* at 911.

audiences, adjectived their remarks with four-letter profanities.<sup>93</sup> In remanding the cases the Court relied on *Cohen* to support the proposition that expression may not be silenced merely because it offends the sensibilities of its hearers. The Court also relied on *Gooding* in both cases to reiterate that the Fighting Words Doctrine is limited to those contexts in which the utterance creates a clear and present danger of a violent response by the addressee. Thus, if there was no clear and present danger that the audience would resort to violence in response to the speaker's remarks, such expression could not be restrained even under a narrowly drafted statute.

*Rosenfeld* elicited a sharp dissent from Justice Powell. The Justice felt that although certain offensive words are unlikely to result in physical violence, they may offend so grossly and be so emotionally disturbing as to warrant an exception to First Amendment protection.<sup>94</sup>

The third case involved profanity addressed to a policeman. In *Lewis v. City of New Orleans*,<sup>95</sup> the police were arresting Mrs. Lewis' son when she intervened and addressed the officer as the "god damn motherfucker police."<sup>96</sup> The Court relied again on *Gooding* to remand the case.<sup>97</sup> *Lewis* involved an ordinance which prohibited the use of obscene language when addressing a policeman who is performing his duties.<sup>98</sup> Since the statute's

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93. In *Rosenfeld*, the defendant addressed a public school board meeting attended by an audience of one hundred fifty people, including forty children and twenty-five women. In the course of his remarks, he used the adjective "motherfucking" four times to describe the teachers, the school board, the town, and the United States. The State courts had previously limited the applicable statute's scope, see note 90 *supra*, to forbid only words "likely to incite the hearer to an immediate breach of the peace or to be likely, in the light of the gender and age of the listener and the setting of the utterance, to affect the sensibilities of a hearer." *Rosenfeld v. New Jersey*, 408 U.S. 901, 904 (1972) (Powell, J., dissenting), quoting *State v. Protaci*, 56 N.J. 346, 353, 266 A.2d 579, 583-84 (1970).

In *Brown*, the defendant addressed an audience of men and women at the University of Tulsa and presented the Black Panther Party view of current issues. During the course of his remarks, he characterized local police officers as "motherfucker fascist pig cops" and referred to one particular officer as a "black motherfucker pig." *Brown v. Oklahoma*, 408 U.S. 914, 911 (1972) (Rehnquist, J., dissenting).

94. *Rosenfeld v. New Jersey*, 408 U.S. 901, 905-06 (1972) (Powell, J., dissenting). The Justice stated that "[p]erhaps appellant's language did not constitute 'fighting words' within the meaning of *Chaplinsky*. While most of those attending the school board meeting were undoubtedly outraged and offended, the good taste and restraint of such an audience may have made it unlikely that physical violence would result. Moreover, the offensive words were not directed at a specific individual." *Id.* at 905. However, Justice Powell argued, "the exception to the 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. He further explained that "a verbal assault on an unwilling audience may be so grossly offensive and emotionally disturbing as to be the proper subject of criminal proscription." *Id.* at 906.

95. 408 U.S. 913 (1972).

96. The facts of this case appear in the dissenting opinion of Justice Rehnquist. *Id.* at 909. See also note 91 *supra* for the applicable statute.

97. *Id.* at 913.

98. See note 90 *supra*.

prohibition was not limited to words creating a clear and present danger of a violent reaction, the statute was overbroad.<sup>99</sup> Moreover, the Court may have believed that the circumstances precluded application of the Fighting Words Doctrine even under a narrowly drawn statute, since a police officer can be presumed to be capable of absorbing verbal abuse without responding with violence.<sup>100</sup>

99. Upon remand, the Louisiana Supreme Court sustained Lewis' conviction. The United States Supreme Court then reversed the conviction and held that the statute was overbroad because it forbade the use of words which do not "by their very utterance inflict injury or tend to incite an immediate breach of the peace." *Lewis v. City of New Orleans*, 415 U.S. 130, 132 (1974).

100. *Lewis v. City of New Orleans*, 408 U.S. 913 (1972) (Powell, J., concurring). In his concurrence, Justice Powell stated that "[i]f these words had been addressed by one citizen to another, face to face and in a hostile manner, I would have no doubt that they would be 'fighting words.' But the situation may be different where such words are addressed to a police officer trained to exercise a higher degree of restraint than the average citizen." *Id.* at 913.

An offspring of *Lewis* is *Lucas v. Arkansas*, 416 U.S. 919 (1974). In *Lucas*, a policeman investigating a disturbance heard one of the occupants of a car say: "Well, there goes the big, bad motherfucking cops." He ignored the remark and parked behind a sign. One of the occupants then said: "Look at the chicken shit motherfucker hid over there behind that sign." As the officer approached the car, one of the occupants said: "Now the sorry son-of-a-bitch is going to come back over here." *Id.* at 919 (Blackmun, J., dissenting). The occupants were convicted of breach of the peace in violation of a statute that forbade the "use of any profane, violent, vulgar, abusive or insulting language toward or about any other person . . . which language in its common acceptation is calculated to arouse to anger the person about or to whom it is spoken or addressed, or to cause a breach of the peace or assault." The Court vacated the judgment and remanded the case in light of *Lewis*. *Id.* at 920. See also *id.* at 919, where the facts of this case appear in the dissenting opinion of Justice Blackmun.

Apparently the statute was considered overbroad since it was not limited to forbidding fighting words. Justice Douglas noted that it "does not even require that the words be calculated to cause a breach of the peace; it is enough that they are calculated to arouse anger in the addressee." *Id.* at 930 (Appendix to opinion of Douglas, J., dissenting). Justice Blackmun, in dissent, protested that the statute was not overbroad since it "restricts the fact-finder to language that would, in its common or ordinary acceptation, be calculated to cause a breach of the peace." *Id.* at 920-21 n.2. He argued that the Court had strayed from the *Chaplinsky* formulation. The Justice contended the following:

[T]he statute on its face does not permit or require an inquiry into the respective boiling points of the particular individuals or groups involved in each case . . . In *Chaplinsky*, the Court accepted a limiting construction which held that the statute was "not to be defined in terms of what a particular addressee thinks . . . The test is what men of common intelligence would understand would be words likely to cause an average addressee to fight.

*Id.* at 920 n.2 (Blackmun, J., dissenting). Justice Blackmun quoted the opinion of the State court which held that the utterances were punishable because "they were calculated to arouse to anger the officer to whom they were spoken or addressed." *Id.* at 920, quoting *Lucas v. State*, 254 Ark. 584, 589-90, 494 S.W.2d 705, 708 (1943). He then exclaimed:

I am at a loss to understand what this Court further requires in a narrowing interpretation under its version of the *Chaplinsky* standard espoused in *Gooding*. Apparently, not only must every statute regulating speech in the 50 States parrot the wording the Court desires, but a state court must play the role of a ventriloquist's dummy mouthing ceremonial phrases in order to obtain the seal of this Court's approval.

*Id.* at 920-21. Justice Blackmun essentially criticized the Court for distinguishing between a "state of anger" and "a clear and present danger of violent conduct." However, this ignores the



Thus, after thirty-seven years of evolution, the Fighting Words Doctrine applies only where an expression will, by its very utterance, inflict injury or tend to incite an immediate breach of the peace.<sup>101</sup> Effects of offensive speech such as stirring the public to anger,<sup>102</sup> inviting dispute,<sup>103</sup> creating a condition of unrest,<sup>104</sup> offending a hearer,<sup>105</sup> offending a hearer's personal predilections,<sup>106</sup> shocking a hearer's sensibilities,<sup>107</sup> or creating the discomfort and unpleasantness that naturally accompany the airing of an unpopular viewpoint,<sup>108</sup> will not constitute injuries to be protected under the doctrine. Only when substantial privacy interests are invaded in an essentially intolerable manner does preventable "injury" exist.<sup>109</sup> This means that "fighting words" will usually be limited definitively to contexts in which the utterance constitutes a direct personal insult.<sup>110</sup> In analyzing whether or not the doctrine should apply in a particular case, it is important to note that the Court has stated that First Amendment protection embraces both emotion and cognition. Words do not forfeit their constitutionally protected status merely because they appeal to emotion.<sup>111</sup>

The immediate breach of the peace requirement is as stringent as the injury requirement. There must be a clear and present danger of an immediate breach of the peace in order to inhibit the expression.<sup>112</sup> An undifferentiated fear or apprehension of disturbance cannot operate to silence the speaker.<sup>113</sup> The clear and present danger of violence must be manifested both objectively and subjectively.<sup>114</sup>

#### *Heckler's Veto Doctrine: The Problem of Hostile Audiences*

The logical converse of the Fighting Words Doctrine is the Heckler's Veto Doctrine.<sup>115</sup> The principle underlying the Heckler's Veto Doctrine is that

role that restraint plays in preventing the former from becoming the latter. Moreover, the *Terminiello* case had already incorporated the distinction into the fighting words doctrine.

101. *Chaplinsky v. United States*, 315 U.S. 568 (1942).

102. *Terminiello v. Chicago*, 337 U.S. 1 (1949).

103. *Id.*

104. *Id.*

105. *Gooding v. Wilson*, 405 U.S. 518 (1972); *Street v. New York*, 394 U.S. 576 (1969).

106. *Cohen v. California*, 403 U.S. 15 (1971).

107. *Street v. New York*, 394 U.S. 576 (1969).

108. *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 15 (1971).

109. *Cohen v. California*, 403 U.S. 15 (1971).

110. *Id.*

111. *Id.*

112. *Lewis v. City of New Orleans*, 408 U.S. 913 (1972); *Gooding v. Wilson*, 405 U.S. 518 (1972); *Cohen v. California*, 403 U.S. 15 (1971); *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503 (1969); *Street v. New York*, 394 U.S. 576 (1969); *Terminiello v. Chicago*, 337 U.S. 1 (1949).

113. *Cohen v. California*, 403 U.S. 15 (1971).

114. *Id.*

115. The phrase "heckler's veto" originated in H. KALVEN, *THE NEGRO AND THE FIRST AMENDMENT* 140-45 (1965). A heckler's veto consists of the right to shout down a speaker

freedom of speech may not be abridged merely because the content of such speech may be offensive to some of the hearers.<sup>116</sup> Consideration of both doctrines represents an attempt to reconcile the speaker's interest in safeguarding his First Amendment right to communicate unpopular ideas to the public with the state's interest in preventing violence that might result from the speaker's message.<sup>117</sup>

The theoretical alignment of the Heckler's Veto Doctrine with the Fighting Words Doctrine offers an operating principle that is faithful to the fundamental meaning of freedom of speech. If expression does not inflict preventable injury and create a clear and present danger of a breach of the peace, it may not be suppressed merely because its content disturbs hearers.<sup>118</sup> Restraint of expression is limited to situations in which the utterance constitutes a direct personal insult<sup>119</sup> which would "provoke the average person to retaliation, and thereby cause a breach of the peace."<sup>120</sup>

In *Bachellar v. Maryland*,<sup>121</sup> the Court considered convictions for violating a statute which prohibited "acting in a disorderly manner to the distur-

because of the unpopularity of his message. To confer a heckler's veto on a speaker would condition his right of free speech on the approval of an audience willing to resort to violence.

116. *Street v. New York*, 394 U.S. 576, 592 (1969).

117. Note, *Hostile-Audience Confrontations: Police Conduct and First Amendment Rights*, 75 MICH. L. REV. 180 (1976).

118. In *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943), Mr. Justice Jackson eloquently expressed the rationale underlying the prohibition of a heckler's veto:

The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

*Id.* at 638.

119. *Cohen v. California*, 403 U.S. 15, 20 (1971).

120. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 574 (1942).

121. 397 U.S. 564 (1970). *Bachellar* had participated in a demonstration protesting the Viet Nam War in front of a United States Army recruiting station. The protesters marched in front of the station carrying signs which said: "Peasant Emancipation, Not Escalation," "Make Love Not War," "Stop in the Name of Love," and "Why are We in Viet Nam?" *Id.* at 566. Occasionally, some of the demonstrators distributed leaflets to and conversed with persons in a crowd of onlookers which had gathered. One police officer testified that "he 'overheard' some of the marchers debate with members of the crowd about 'the Viet Cong situation,' and that a few in the crowd resented the protest; [o]ne particular one objected very much to receiving the circular." *Id.* at 567.

*Bachellar* and some of the protesters entered the recruiting station and, after having been refused permission to display antiwar materials therein, staged a sit-in. They were allowed to stay until just before closing time when they were requested to leave. When the protesters refused to leave the station U.S. marshals were summoned to eject them. The Court noted that "[t]here is irreconcilable conflict in the evidence as to what next occurred." Witnesses for the prosecution testified that the protesters were "escorted" outside by the marshals and police and that the protesters then sat or lay down, "blocking free passage of the sidewalk." Allegedly the protesters were bodily carried to a police wagon when they continued to block the sidewalk. However, defense witnesses related a different version of events. Testimony was adduced that

bance of the public peace, upon any public street."<sup>122</sup> The jury had been instructed to return a guilty verdict if it found that the defendants had engaged in any acts which would "offend, disturb, incite or tend to incite" a number of people gathered in the same place. It was also instructed that disorderly conduct may be found where refusal to obey a police command to move could result in a breach of the peace.<sup>123</sup>

In overturning the convictions, the Court concluded that neither the messages on the placards nor the protesters' remarks to the crowd constituted fighting words.<sup>124</sup> The Court thus reaffirmed the principle of *Street v. New York*<sup>125</sup> that a speaker may not be silenced simply because his expression offends its hearers or because onlookers object to peaceful demonstrations.<sup>126</sup>

The Court observed that the protesters could have been convicted merely for their disobedience of police orders or their disturbance of bystanders who were offended by the obstructed sidewalk. Moreover, the convictions could have been based solely on the jury's conclusion that the protest amounted to "the doing or saying . . . of that which offends, disturbs, incites or tends to incite a number of people gathered in the same area."<sup>127</sup> Because the protesters might have been punished solely "because they advocated unpopular ideas,"<sup>128</sup> the Court reversed the convictions.

As noted above, the Heckler's Veto Doctrine is, in one sense, merely the logical converse of the Fighting Words Doctrine. Therefore, the cases<sup>129</sup>

each protester was bodily thrown through the station door, landing on his back, that the protesters did not completely block the sidewalk, and that no police command was given to disperse. Rather, they contended, the police restrained them from standing and held them on the pavement until they could be carried into the police wagon. *Id.* at 568.

When the protesters were on the sidewalk they sang "We Shall Overcome" and were surrounded by other demonstrators bearing signs. From this evidence the Court concluded that "petitioners remained obvious participants in the demonstration even after their expulsion from the recruiting station." *Id.* at 568-69.

A crowd of between 50 and 150 persons was present at this time. A police officer testified that "two uniformed marines in the crowd appeared angry and that a few other bystanders were debating back and forth about Bomb Hanoi and different things and I had to be out there to protect these people because they wouldn't leave." *Id.*

122. *Id.* at 564.

123. The jury was specifically instructed to find defendants guilty if they were responsible for "the doing or saying or both of that which offends, disturbs, incites or tends to incite a number of people gathered in the same area." It was also instructed that "[a] refusal to obey a policeman's command to move on when not to do so may endanger the public peace, may amount to disorderly conduct." *Id.* at 565 n.3.

124. The Court observed that "[a]ny shock effect caused by the placards, remarks, and peaceful marching must be attributed to the content of the ideas being expressed or to the onlookers' dislike of demonstrations as a means of expressing dissent." *Id.* at 567.

125. 394 U.S. 576 (1969).

126. *Id.* at 592.

127. *Bachellar v. Maryland*, 397 U.S. 564, 570 (1970).

128. *Id.*

129. *Gooding v. Wilson*, 405 U.S. 518 (1972); *Cohen v. California*, 403 U.S. 15 (1971); *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503 (1969); *Street v. New York*, 394 U.S. 576 (1969); *Terminiello v. Chicago*, 337 U.S. 1 (1949).

which support the proposition that speech may not be restrained merely because its message is offensive to some of its hearers may be examined as cases establishing and developing the Heckler's Veto Doctrine as well as limiting the scope of the Fighting Words Doctrine.

*Mental Distress and the Future of Fighting Words*

Since the announcement of the Fighting Words Doctrine in *Chaplinsky*, the United States Supreme Court has never approved its application to those forms of expression presented in the cases brought before it. This reluctance to extend protection to the addressee's mental and psychological well-being has also been reflected in the development of tort law. It is only recently that courts have recognized an independent tort action for the infliction of mental distress.<sup>130</sup> In 1947 the American Law Institute amended the *Restatement of the Law of Torts* to provide that "[o]ne who, without a privilege to do so, intentionally causes severe emotional distress to another is liable (a) for such emotional distress, and (b) for bodily harm resulting from it."<sup>131</sup> There has been a continuing expansion of the protection accorded to emotional health. The limits of this area of judicial growth are presently indeterminable.<sup>132</sup> However, future applications of the Fighting Words Doctrine will be likely to embrace a recognition of the protected status recently accorded the interest in emotional well-being.

The history of the development of the Fighting Words Doctrine has been characterized by a contraction of the category of those effects of offensive speech which qualify as preventable "injury." Under the Court's present formulation, offensiveness to a hearer's sensibilities or the public morality do not warrant state censorship of speech.<sup>133</sup> However, during the three and

130. See note 7 *supra*.

131. RESTATEMENT (FIRST) OF TORTS § 46 (1934 & Supp. 1948). The present formulation of the SECOND RESTATEMENT provides as follows:

§ 46(1) 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 the other results from it, for such bodily harm. RESTATEMENT (SECOND) OF TORTS § 46(1) (1965).

§ 46 f. The extreme and outrageous character of the conduct may arise from the actor's knowledge that the other is peculiarly susceptible to emotional distress, by reason of some physical or mental condition or peculiarity. *Id.* at § 46, Comment f.

§ 46 i. *Intention and recklessness.* The rule stated in this Section applies where the actor desires to inflict severe emotional distress, and also where he knows that such distress is certain, or substantially certain, to result from his conduct. It applies also where he acts recklessly, . . . in deliberate disregard of a high degree of probability that the emotional distress will follow. *Id.* at § 46, Comment i.

§ 46 j. *Severe emotional distress.* The law intervenes only where the distress inflicted is so severe that no reasonable man could be expected to endure it. . . . Severe distress must be proved; but in many cases the extreme and outrageous character of the defendant's conduct is in itself important evidence that the distress has existed. *Id.* at § 46, Comment j.

132. W. PROSSER, *supra* note 7, at 50.

133. Rutzick, *supra* note 45, at 27.

one half decades of the doctrine's evolution, the Court has not considered a case in which injury resulted or was threatened which was more severe than mere offense to the hearer's sensibilities.<sup>134</sup> The Court has indicated that injury more severe than mere offense to sensibilities may justify silencing a speaker, providing a clear and present danger of violence exists as well.

Has the Court collapsed the two branches of the original *Chaplinsky* formulation into one? To the extent that individuals naturally react to the infliction of severe injury with violence, a clear and present danger of a breach of the peace exists when such injury is inflicted. Moreover, the premise of the breach of the peace branch of the Fighting Words Doctrine is that individuals respond to expression with physical force *because* it has injured them and hence act in self-defense. Thus, the *Chaplinsky* formulation of the Fighting Words Doctrine—that restraint of expression is limited to those words which “by their very utterance inflict injury *or* tend to incite an immediate breach of the peace”—has been revised to define such words as those which inflict injury *and* thereby incite an immediate breach of the peace. The *Chaplinsky* formulation attempted to separate cause and effect and was unsuccessful.

By limiting application of the Fighting Words Doctrine to contexts in which a clear and present danger of a breach of the peace is created by the intentional infliction of emotional harm, the Court forbade a State to restrain the speech of one who intends to verbally inflict emotional injury upon a person who is incapable of violently retaliating. For example, one with a physical disability presumably presents no danger of a breach of the peace. However, this contention ignores the fact that even a disabled person will, if sufficiently provoked, attempt to retaliate and thereby create a clear and present danger of a breach of the peace. Moreover, at a certain point, speech ceases to be expression and may be regulated as conduct. For instance, shouting “Boo!” at a cardiac patient<sup>135</sup> is no more expressive than a physical assault and may be treated as such. Governmental restraint here would not be concerned with the content of the message incidentally communicated.<sup>136</sup>

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134. Although the actual holdings of the cases have “recognized as a valid state interest only the prevention of violent reactive conduct,” *id.*, the Court has noted that a State may restrain expression when “substantial privacy interests are being invaded in an essentially intolerable manner.” *Cohen v. California*, 403 U.S. 15, 21 (1971).

135. Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482, 1501 (1975).

136. Professor Tribe demonstrates the problematic character of an attempt to develop a principled distinction between speech and conduct:

The distinction between “expression” and “action” or “speech” and “conduct” is essentially unhelpful because it asks a question which is answerable only if one has already decided, on independent grounds, whether the act is protected by the first amendment. The persistence of the distinction in the language of the Court may be attributable to a reluctance to concede that the first amendment has any relevance whatsoever to political assassinations, radical bank robberies, or other violent modes of expression, and a corresponding intuition that the efficacy of the first amendment in other areas may be impaired by any attempt to bend its doctrines to such acts, so as to uphold the government's authority to forbid them. For whatever reason the

Thirty-seven years of judicial refinement of the Fighting Words Doctrine suggest that the following legislative embodiment of the rule would survive constitutional scrutiny.

- 1) Any person who, with intent to inflict severe emotional distress, addresses another using language which would be likely to inflict such harm upon a person of ordinary sensibilities and to thereby provoke violent retaliation and who thereby creates a clear and present danger of a breach of the peace shall be guilty of a misdemeanor.
- 2) Any person who, with intent to inflict severe emotional distress and with knowledge that another is peculiarly susceptible to severe emotional distress by reason of some physical or mental condition or peculiarity, addresses that person using language which is likely to inflict such harm and to thereby provoke violent retaliation and who thereby creates a clear and present danger of a breach of the peace shall be guilty of a misdemeanor.
- 3) For the purposes of §§ 1 and 2, one intends to inflict severe emotional distress only when the infliction of such harm is the primary purpose of his action.

Such an articulation of the rule embraces both cause and effect, thus opening the door for a proper application of the Fighting Words Doctrine. Adoption of this formulation would legislatively collapse the two branches of the *Chaplinsky* standard and afford courts a solution to the problem of post-*Chaplinsky* cases.

#### SWASTIKAS IN SKOKIE

The unique circumstances of *Village of Skokie* suggest that an injunction forbidding the display of the swastika should be permitted under the Fighting Words Doctrine. Unfortunately, the Illinois Supreme Court rejected the contention that the display of the swastika in the proposed march constituted fighting words. The court quoted extensively from *Cohen* to support its decision, inserting bracketed words so as to apply the statements to the case before it, and concluded that the risk of the suppression of ideas outweighed the injury concomitant with the display of the emblem.<sup>137</sup> The court then

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distinction survives, it may be taken at most as shorthand for an inquiry into the aim of the government's regulation. . . . While it would probably be better to bury the distinction entirely, it is likely to remain in the vocabulary of the Court and can do little harm if it is recognized that the words cannot and do not stand for a distinctive approach to the resolution of first amendment issues.

L. TRIBE, *supra* note 33, at 601 (1978).

137. 69 Ill. 2d at 614-15, 373 N.E.2d at 24.

[T]he principle contended for by the State seems inherently boundless. How is one to distinguish this from any other offensive word [emblem]? Surely the State has no right to cleanse public debate to the point where it is grammatically palatable to the most squeamish among us. Yet no readily ascertainable general principle exists for stopping short of that result were we to affirm the judgment below. For, while the particular four-letter word [emblem] being litigated here is perhaps more distasteful than most others of its genre, it is nevertheless often true that one man's vulgarity

presented extensive quotations in support of the proposition that a hostile audience's offended sensibilities or disagreement may not silence a speaker. Because advance notice of the demonstration was given by the Nazis, the court explained, offended viewers may simply stay away. As for those persons presented involuntarily with the swastika, the court observed that they had a burden to avert their eyes.<sup>138</sup>

The details of the Nazi Holocaust need not be repeated. What is recorded in history as mankind's darkest hour is common knowledge. For the relatively few survivors of Hitler's Final Solution, the grisly memories of the death camps are still all too vivid.<sup>139</sup> To a survivor of the Nazi concentration camps, the swastika is a direct personal assault having all the effect of physical force.<sup>140</sup> One Jewish resident of Skokie, a survivor of the Holocaust, testified as to the effect that seeing the swastika has on him: "It reminds me. It reminds me [of] my closest family who were sent to death by the swastika, and it reminds me [of] a threat that I am not safe with my life. It reminds me that my children are not safe with their lives."<sup>141</sup> He further stated that he does not presently intend to use violence against the Nazi party members should they appear in Skokie, but that when he sees the swastika, he does not know if he can control himself.<sup>142</sup> When a survivor of the Holocaust views the swastika, severe psychological impairment is inflicted and an involuntary violent reaction results. He suffers physical injury and uncontrollably strikes out in self-defense to stop the assault on his person.<sup>143</sup> The Supreme Court of Illinois characterized the effect on a survivor of viewing the swastika as "strong feelings" or "offense." This characterization ignores

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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. Finally, and in the same vein, we cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process. Indeed governments might soon seize upon the censorship of particular words [emblems] as a convenient guise for banning the expression of unpopular views.

*Id.*

138. "As to those who happen to be in a position to be involuntarily confronted with the swastika," the Court observed, "the burden normally falls upon the viewer to 'avoid further bombardment of [his] sensibilities simply by averting [his] eyes.'" *Id.* at 618-19, 373 N.E.2d at 25, quoting *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 210-11 (1975), quoting *Cohen v. California*, 403 U.S. 15, 21 (1971).

139. D. RABINOWITZ, *NEW LIVES: SURVIVORS OF THE HOLOCAUST LIVING IN AMERICA* (1976).

140. See note 139 *infra*.

141. Testimony of Sol Goldstein, Transcript at 83, *Village of Skokie v. National Socialist Party*, Docket No. 77-2702 (Cir. Ct. of Cook County Ch. 1978).

142. 51 Ill. App. 3d at 284, 366 N.E.2d at 351.

143. David Guttman, Professor of Psychiatry at Northwestern University Medical School and Chief of the Psychology Division of Northwestern University's Department of Psychiatry and Behavioral Sciences, rendered the following professional opinion concerning "the psychological impact" of the proposed march of the American Nazi Party in the Village of Skokie "upon persons who are the object of such conduct." His statement of opinion was introduced into evidence as Defendant's Exhibit 13 in *Collin v. Smith*, 447 F. Supp. 676 (N.D. Ill. 1978):

the evidence that severe psychological impairment rising far above the level of offended feelings or sensibilities and resulting in physical symptoms will be suffered.

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The adult is threatened when his own prior experience, as part of a racial or ethnic group, has been particularly painful, and has left him with a deep and abiding sense of vulnerability in regard to his affiliation. The recipient of the insult is reminded that his group is not only disparaged, but also under attack; if his past experience, or the past experience of his group, has been one of vulnerability and persecution, then he will experience the slur as a danger signal, one that links a traumatic past to a potentially dangerous future. To the extent that the victim has a capacity for rational thinking, he will not believe the content of the insult; but that same rationality will lead him to take the threat aspect of the insult very seriously. While he may not credit the disparaging connection between self, group, and evil, the public announcement of a racial slur tells him that the deadly connection has already been made in the racist mind, and that this connection is sufficient, in itself, to stimulate the politics of persecution, and even murder. The victim's quite realistic reaction—whether it takes the form of apprehension, outright fear, or retaliatory rage—can be psychologically and even physically damaging. Depending on their severity, such reactions can lead to mild agitation, to psychosomatic symptoms—e.g., headaches, ulcers, or hypertension—or to outright mental breakdown. The strength of the reaction to the racial insult will vary according to the temperament of the victim, but also according to his experience—direct, or vicarious—of racial violence. If the victim, or the group with which he identifies has been exposed to situations in which racial insults were integral parts of a larger scenario of persecution and violence, then his subsequent reaction, to the racial slur alone, will also be particularly violent, and psychologically unsettling. I am now referring to a well known psychological principle, delineated by the noted developmental psychologist, Heinz Werner: each component of a situation implicated in strong emotional arousal can, by itself, and at a later date, stimulate the sentiments that were once generated by the total situation. This *pars pro toto* principle is at the basis of most traumatic neuroses and phobias. By extension then, when individuals and/or the group with which they are affiliated have been subjected to severe and repeated traumatic experiences, these individuals will be prone to respond to any reminders of their persecution in a total fashion, as if they were again subjected to the totality of noxious conditions under which their painful associations were originally formed.

The Jews have known persecution in all times and in virtually all lands. Though larger in scale, the Holocaust was only one among many mass murders, and many reasonable Jews believe that it was not the last. Thus, Jews are aware that the attitudes and words of even polite anti-Semitism can—all too easily—become the preludes and accompaniments of murder. Accordingly, the Jew is not being paranoid when he takes anti-Semitic epithets very seriously, and views them with great apprehension, as intrinsic parts of a larger scenario that can include persecution and mass murder. What would be paranoia for others is sober realism for Jews. This Jewish apprehension is, of course, magnified in regard to American Nazis, who—through their symbols, their rhetoric, and their political acts—have openly identified themselves with the party of genocide. Given the history that is shared by identified Jews and committed Nazis, the words of any Nazi to any Jew have, by definition, lost the usual intent and limitation of words: they are symbolic continuations of the Holocaust, literal perpetuations of the climate of the Holocaust, and preparations for a new Holocaust. No matter what words their placards bear, when Nazis march in Skokie, their presence and their regalia says to Jews: "You thought you escaped. You did not. We know where you are. When our strength is sufficient



The severe psychological injury threatening Holocaust survivors upon confrontation with the swastika is precisely the type of harm to which the Fighting Words Doctrine was designed to apply. As previously noted, the United States Supreme Court has never before been presented with a case under the Fighting Words Doctrine in which injury resulted or was threatened which was more severe than mere offense to the hearer's sensibilities. The Court has repeatedly rejected offense to sensibilities as injury sufficiently severe to qualify for protection under the doctrine and in *Cohen* expressly noted that only the invasion of substantial privacy interests in an intolerable manner would trigger application of the rule.

Moreover, the Illinois Supreme Court states that those faced with involuntary confrontations with the swastika carry the burden of avoiding further injury by averting their eyes.<sup>144</sup> However, the premise of the Fighting Words Doctrine is that the infliction of certain forms of injury result in uncontrollable, violent retaliation. The Court would do as well to advise one suffering from an epileptic fit to calm down. Uncontrollable responses are, by definition, not subject to conscious direction. Moreover, the burden to avert one's eyes was imposed on viewers in *Cohen* only because the message was not personally directed at them. Survivors of the Holocaust, on the other hand, satisfy the "actual addressee" test of *Cohen* since they may "reasonably regard" the swastika as "a direct personal insult," and therefore they have no duty to avert their gaze.<sup>145</sup> To assert that the infliction of severe psychological injury which automatically results in uncontrollable, violent, physical retaliation is not punishable is to abolish the Fighting Words Doctrine entirely. That doctrine, like the right of self-defense, recognizes an individual's natural right to ward off attackers.

The circumstances of *Village of Skokie* also fulfill both the objective and subjective elements of the clear and present danger test. The First Appellate District held that the swastika was inherently likely to elicit a violent reaction when intentionally paraded in Skokie.<sup>146</sup> Further, the court noted that the particular circumstances of *Village of Skokie* showed precisely that substantial numbers of citizens would be ready to strike out physically at those displaying the swastika.<sup>147</sup>

The Illinois Supreme Court stated that it was compelled to allow the swastika's display by the authority of *Cohen*. However, the Court labored under an erroneous impression since, rather than commanding that the swastika's

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and when the time is ripe, we will come and get you." In effect, the Nazis agree with the Jews that their seeming security in Skokie may only be a temporary hiatus between two Holocausts.

In my estimation then, the psychological costs of the projected march would be very great.

144. 69 Ill. 2d at 618-19, 373 N.E.2d at 26.

145. *Cohen v. California*, 403 U.S. 15, 20 (1971).

146. 51 Ill. App. 3d at 292, 366 N.E.2d at 357.

147. *Id.* at 292, 366 N.E.2d at 356.

display be allowed, that case supports the proposition that such activity is enjoined as fighting words. In *Cohen*, the Fighting Words Doctrine was held to be inapplicable because the expression was "not directed to the person of the hearer" since "[n]o individual actually or likely to be present could reasonably have regarded the words on appellant's jacket as a direct personal insult."<sup>148</sup> The viewer's objections to the expression were based solely on "personal predilection" which could not justify restraint of speech.<sup>149</sup> Moreover, the Court noted, no clear and present danger of a breach of the peace existed since there was "no evidence that substantial numbers of citizens are standing ready to strike out physically at whoever may assault their sensibilities with execrations like that uttered by Cohen."<sup>150</sup> Unlike the expression considered in *Cohen*, the circumstances of the instant case satisfy the criteria necessary to invoke the protection of the Fighting Words Doctrine.

As previously noted, the display of the swastika in *Skokie* is directed to the person of the hearer and satisfies both the objective and subjective elements of the clear and present danger test.<sup>151</sup> Moreover, Holocaust survivors are not reacting to its display because their sensibilities are being offended. They are being forced to protect themselves from the infliction of real harm.<sup>152</sup> Most significantly, the Court in *Cohen* observed that application of the Fighting Words Doctrine was limited to circumstances in which substantial privacy interests were invaded in an intolerable manner. Rather than compelling the result reached by the Illinois Supreme Court, *Cohen* decreed that the threatened infliction of severe psychological injury in circumstances such as those present in *Village of Skokie* should trigger application of the Fighting Words Doctrine.

Invocation of the Heckler's Veto Doctrine is not persuasive here since the addressee is reacting to the infliction of severe injury; he is not acting because he disagrees with the speaker's message. In fact, because the Nazis would be free to conduct the same demonstration without the swastika, it is clear that only the assaultive manner of their expression would be restrained.<sup>153</sup>

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148. *Cohen v. California*, 403 U.S. 15, 20 (1971).

149. *Id.* at 21.

150. *Id.* at 23.

151. See notes 146 & 147 *supra*.

152. See note 143 *supra*.

153. In *Davis v. Norman*, 555 F.2d 189 (8th Cir. 1977), the Court held that the application and enforcement of a municipal ordinance (requiring enclosed storage of abandoned, wrecked, or inoperative motor vehicles on public or private property for more than fifteen days) to the symbolic display of a wrecked vehicle as a protest against police abuse of authority was "unrelated to the suppression of free expression" since "[b]oth the governmental interest and operation of the ordinance are limited to the noncommunicative aspect of [Appellant] Davis' conduct" and "any infringement on [Appellant] Davis' First Amendment rights is incidental." *Id.* at 190-91. The United States Supreme Court, in *United States v. O'Brien*, 391 U.S. 367 (1968), has held that:

[W]hen "speech" and "nonspeech" elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech

The Illinois Supreme Court stated that it was unable to discern a "general principle" which would allow it to forbid the swastika's display in Skokie as fighting words and yet would not risk abridging constitutionally protected expression.<sup>154</sup> Therefore, it concluded that the proposition is "inherently boundless."<sup>155</sup> It is submitted that the Court prematurely surrendered, leaving unfinished a task that is peculiarly within the ambit of the judicial function.<sup>156</sup> Certainly this case is no less susceptible to principled decision-making than the myriad other cases involving the clash of fundamental constitutional principles.

The task of precisely refining a legal doctrine must be left to the deliberate process of case by case applications. As Justice Holmes has observed, no "faculty of generalization" can ever hope to achieve the same principled results in evolving a rule of law as "a series of determinations on the same subject matter."<sup>157</sup> However, "the main constituent of the judicial process is precisely that it must be genuinely principled."<sup>158</sup> The decision must rest "on reasons with respect to all the issues in the case, reasons that in their generality and their neutrality transcend any immediate result that is involved."<sup>159</sup> Therefore, the validity of the proposition asserted here—that a principled (i.e., general, neutral) formulation of the Fighting Words Doctrine can apply to true fighting words yet not trample upon protected expression—may be tested by application to various hypothetical situations.

element can justify incidental limitations on First Amendment freedoms. . . . [A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is not greater than is essential to the furtherance of that interest.

*Id.* at 376-77.

Professor Tribe has argued that "regulatory choices aimed at harms not caused by ideas or information as such are acceptable so long as they do not *unduly* constrict the flow of information and ideas." L. TRIBE, *supra* note 33, at 581-82. See *Kovacs v. Cooper*, 336 U.S. 77, 89 (1949), where the Court upheld an ordinance which forbade soundtrucks from broadcasting in a "loud and raucous manner" on the streets and noted that "[t]here is no restriction upon the communication of ideas or discussion of issues by the human voice, by newspapers, by pamphlets, by dodgers."

154. 69 Ill. 2d at 614, 373 N.E.2d at 24.

155. *Id.*

156. The Court thus invoked the principle that "you should not now do an admittedly right action for fear you, or your equally timid successors, should not have the courage to do right in some future case, which *ex hypothesi*, is essentially different, but superficially resembles the present one." Of course, this principle leads to the conclusion that "nothing should ever be done for the first time." Cornford, *Excerpts from "Microcosmographia Academica: Being a Guide for the Young Academic Politician,"* 3 J. LEGAL EDUC. 571 (1951).

157. Holmes, *Codes and the Arrangement of the Law*, 5 AM. L. REV. 1 (1870), reprinted in 44 HARV. L. REV. 725 (1931).

158. Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 15, 19 (1959).

159. *Id.*

Would the principle forbidding the public display of swastikas in Skokie also prohibit a march by civil rights activists in a racially segregated white Southern community? Is it not likely that residents would suffer psychological injury from a perceived threat to their way of life and would react violently? Today, of course, the marchers' goal—integration—is protected by law, while the Nazis' goal—genocide—is illegal. However, a distinction based upon the fragile concept of the present and perhaps temporary legality of the marchers' platform is wholly unsatisfactory, as can be seen by postulating instead that the civil rights march occurred in 1953. Such a distinction would limit constitutional protection to expression in support of the present order and would undermine the very basis of self-government—peaceful change. Moreover, it has been held that “the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”<sup>160</sup>

Nevertheless, the psychological disturbance that might be suffered by a bigot is different in kind from that inflicted upon a Holocaust survivor in Skokie. The unrest felt by the bigot is the result of his disagreement with the marchers' advocacy of peaceful institutional change. To the extent that the civil rights marcher knows that emotional distress is reasonably certain to be inflicted by his activity, he intends to inflict it. Yet, his primary intent is to advocate peaceful institutional change and the infliction of psychological disturbance is merely ancillary to his exercise of that constitutionally protected right. Society must tolerate the injury incidentally inflicted by the exercise of constitutionally protected rights.<sup>161</sup> On the other hand, the concentration camp survivor's psychological injury stems from the marchers' advocacy of his death. Although the advocacy of genocide is generally accorded constitutional protection unless it is “directed to inciting or producing imminent lawless action and is likely to incite or produce such action,”<sup>162</sup> society may constitutionally protect its members from the intentional infliction of grave psychological injury which stems from advocacy of the genocide of the hearer's race. Such advocacy may be restrained only when it produces a clear and present danger of a breach of the peace. The Nazis' primary intent is to inflict severe psychological injury, not to protest perceived injustices. It is submitted that one may not act with a primary intent to inflict severe psychological harm if such harm is indeed likely to result.

The Illinois Supreme Court observed that “one man's vulgarity is another's lyric,”<sup>163</sup> and therefore concluded that proscription of the swastika's display would risk the suppression of ideas. It is submitted that one may not communicate his message when it constitutes a song of death aimed at

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160. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

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

162. *Id.*

163. 69 Ill. 2d at 614, 373 N.E.2d at 24.

inflicting severe psychological injury on a captive and uniquely sensitive and vulnerable audience.

One may recover damages for the intentional infliction of mental distress where one acts in a manner "calculated to cause 'severe emotional distress' to a person of ordinary sensibilities" and one actually inflicts such harm.<sup>164</sup> Moreover, when the defendant is aware of and takes advantage of the plaintiff's singular sensitivities, recovery will be allowed where there otherwise would not have been tortious conduct.<sup>165</sup> Of course, recovery may not be granted for "mere vulgarities, obviously intended as meaningless abusive expressions."<sup>166</sup> However, the Illinois Supreme Court has observed that "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."<sup>167</sup> The Court thus recognized that "peace of mind is an interest of sufficient importance to receive protection from the law against intentional invasion."<sup>168</sup> This interest in peace of mind is precisely that recognized by the United States Supreme Court in *Cohen*. It is the interest in being free from the invasion of substantial privacy interests in an intolerable manner—the interest that is protected by the Fighting Words Doctrine.

Of course, not all tortious expression/conduct rises to the level of a crime. In balancing the individual's interest in unrestrained expression and the government's interest in regulating expression which rises to the level of a verbal act, the First Amendment may forbid the imposition of criminal sanctions for certain expression which is properly the basis of a cause of action grounded in tort.<sup>169</sup> However, when one intends to inflict egregious injury

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164. *Knierim v. Izzo*, 22 Ill. 2d 73, 86, 174 N.E.2d 157, 157, 164 (1961), quoting *Slocum v. Food Fair Stores of Fla.*, 100 So. 2d 396, 398 (Fla. Sup. Ct. 1958). In *State Rubbish Collectors Ass'n v. Siliznoff*, 38 Cal. 2d 330, 240 P.2d 282 (1952), the Supreme Court of California held that "a cause of action is established when it is shown that one, in the absence of any privilege, intentionally subjects another to the mental suffering incident to serious threats to his physical well-being, whether or not the threats are made under such circumstances as to constitute a technical assault. . . ." *Id.* at 336, 240 P.2d at 284-85. The Court thus rejected the argument that tort liability for threats is limited to the context in which "immediate physical harm" is threatened. *Id.* at 335-36, 240 P.2d at 284. In the instant case, although the immediate commission of genocide is not threatened, grave psychological injury will be intentionally inflicted by the threatened consummation of Hitler's uncompleted task.

165. W. PROSSER, *supra* note 6, at 58.

166. *Knierim v. Izzo*, 22 Ill. 2d 73, 86, 174 N.E.2d 157, 164 (1961).

167. *Id.* at 85, 174 N.E.2d at 164.

168. *Id.* at 87, 174 N.E.2d at 165.

169. "Assuming that specific individuals could proceed in tort under this theory to recover damages provably occasioned by the proposed march, and that a First Amendment defense would not bar the action, it is nonetheless quite a different matter to criminalize protected First Amendment conduct in anticipation of such results." *Collin v. Smith*, 578 F.2d 1197 (7th Cir. 1978). See *Gertz v. Welch*, 418 U.S. 323, 342-43 (1974), where the Court held that a different standard of First Amendment protection applies to allegedly libelous expression, depending on whether the plaintiff is a public or private individual.

in circumstances which qualify for application of the Fighting Words Doctrine. such conduct may properly be subject to criminal proscription and prior restraint.

The law presumes that one intends the foreseeable consequences of his actions. Just as "to publicly carry a Nazi flag into a synagogue would certainly be calculated to incite disorder,"<sup>170</sup> to thrust a swastika in front of a Holocaust survivor would certainly inflict severe psychological injury since such harm is the inevitable, not merely foreseeable, result of such conduct. As Justice Holmes observed, "[t]he most strident protection of free speech would . . . not even protect a man from an injunction against uttering words that may have all the effect of force."<sup>171</sup>

#### CONCLUSION

Thus, despite the fact that the history of the Fighting Words Doctrine has been characterized by a steady contraction of its scope, that principle, as presently refined, represents a viable exception to the general rule of constitutionally protected expression and serves to protect an individual's right to be free from certain narrowly defined utterances which rise to the level of a physical assault. Application of this principle in the context of the illustrative case explored in this study recognizes the right of the American Nazi Party to express its political beliefs by demonstrating in the Village of Skokie despite the prospect of violent opposition. However, at the same time it prohibits them from displaying the swastika in an intentional attempt to inflict severe emotional distress upon persons who are known to be peculiarly susceptible to such injury by reason of a mental condition or peculiarity. This result accommodates an individual's interests in both freedom of expression and emotional well-being. Any other result subverts an important legally protected value by blindly overextending another value.

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170. *Anderson v. Vaughn*, 327 F. Supp. 101, 106 (D. Conn. 1971).

171. *Schneck v. United States*, 249 U.S. 47, 52 (1919).

