

RIGHTS IN CONFLICT: THE FIRST AMENDMENT'S THIRD CENTURY

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I

INTRODUCTION

Over the past four decades of teaching and studying First Amendment law, I have witnessed the resolution, or at least the clarification, of many free speech and press issues. There are, however, persistent issues—those elusive or intractable tensions between free expression and other basic human liberties—that deserve particularly close scrutiny. Three such issues occasion this article: tensions between free expression and privacy, civility, and equality. Examples of each tension abound: Can an aggressive reporter or photographer be barred from using high-tech tools such as infrared cameras and parabolic microphones to gather images and conversations through the walls of a house or office? Can a person be jailed for cursing and using vulgar four-letter words in public? Can “hate speech” be curbed on a college campus to protect vulnerable groups in society? It should be simple to answer such questions, but instead is exceedingly difficult because of a deep national ambivalence toward the proper balance between free expression and other values.

As a nation, we are equally committed to freedom of speech and to those basic values of privacy, civility and equality. We expect the courts to strike the proper balance, to resolve these tensions in ways that will permit us to preserve (and our laws to serve) both sets of values equally well. When the courts fail or falter in this effort, we are deeply disappointed. We expect judges to discover or devise paths of reconciliation, even though they have eluded the rest of us. In the three areas of tension on which this article focuses, the courts have been notably unsuccessful and a breakthrough appears unlikely. Perhaps we should simply acknowledge that resolution of these issues is not possible and that we must accept certain intractable tensions within our First Amendment jurisprudence. Maybe, indeed, we should even be grateful that so few truly irreconcilable conflicts exist.

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II

PRIVACY: WILL THE TRUTH "SET YOU FREE"?

In an ideal system, the legal import of truth would be unmistakably clear. Factual correctness would either provide a complete defense to any claim for invasion of privacy or be legally irrelevant. The courts of this country have, however, been curiously ambivalent about the relationship between privacy and truth. Even individual Supreme Court Justices may fairly be accused of vacillation. One might easily forget that Justice Louis D. Brandeis, who late in his career framed the case for maximum freedom of expression most eloquently,¹ had as a young lawyer written the seminal article first advancing the rationale for imposing legal liability on those whose publication of unwelcome truth invaded the privacy of others.²

Such inconsistency has persisted in ways that underscore the inherent difficulty of the issue. The Supreme Court has consistently declined to recognize truth as an absolute defense when reviewing criminal or civil judgments against those who have published truthful but private information, although the Justices have never sustained such a claim when the accuracy of the material was undisputed. What the Court has said on this issue is helpful but not dispositive: "[S]tate action to punish the publication of truthful information seldom can justify constitutional standards."³ The crucial word, of course, is "seldom"; Chief Justice Burger chose not to say "never." Such a formula poses this intriguing question: Why has the high Court never flatly foreclosed such claims against publishers of truthful information? Instead of setting that standard, the Court has imposed three conditions: (1) The information must be accurate; (2) it must have obvious "public interest"; and (3) it must not have been "unlawfully obtained."⁴ The first criterion is obvious enough; spreading false information would not only subject the publisher to civil liability for defamation, but also would elicit little sympathy even from a court generally committed to protecting free expression and communication.⁵ The second element in the equation—that the published information be of public interest—has turned out to be a kind of *ipse dixit*, since virtually anything that a publisher decides to share with readers or viewers holds, almost by definition, the requisite degree of what the Supreme Court had termed (without definition) "public interest."⁶ The third factor—that the information not have been unlawfully obtained—is the touchstone. We know, of course, that in any effort to *prevent* or *enjoin* publication, illegality in

1. *Whitney v. California*, 274 U.S. 357, 375-76 (1927) (Brandeis, J., dissenting).

2. Samuel Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 219 (1890). Though the name of Warren, the senior partner, appears first among the co-authors, it is widely believed that his young associate actually did most of the writing.

3. *Smith v. Daily Mail Pub. Co.*, 443 U.S. 97, 102 (1979).

4. *Id.*; see also *Florida Star v. B.J.F.*, 491 U.S. 524 (1989); *Cox Broad. Corp. v. Cohn*, 420 U.S. 469 (1975).

5. See, e.g., *Dun & Bradstreet, Inc. v. Greenmoss Builders*, 472 U.S. 749 (1985).

6. Significantly, the Supreme Court seems never, in such a case, to have ruled that published or broadcast material which generated litigation lacked the requisite degree of "public interest."

the origin of the material is constitutionally irrelevant. The Pentagon Papers underlying Neal Sheehan's infamous *New York Times* stories had been stolen, yet the Supreme Court was very clear that the publication even of such purloined material—beyond doubt, “unlawfully obtained”—could not be barred or enjoined.⁷ What the Pentagon Papers case left open, and what the ensuing decades have done little to clarify, is the impact upon a post-publication claim of the theft of the original document.

The Supreme Court's latest judgment in this area, released in the spring of 2001, shed helpful light on the tainted-source issue. In *Bartnicki v. Vopper*, the Justices ruled in favor of a radio talk-show host who had been sued after he broadcast the contents of an audio tape which contained illegally recorded telephone conversations among the major players in a contentious teachers' strike.⁸ One of the speakers, reviewing his options if protracted negotiations between the union and the school board failed, declared that “we're gonna have . . . to blow off their front porches.”⁹ The airing of these conversations violated a 1968 federal statute which penalized “disclosure” of intercepted telephone messages.¹⁰ One of the union officers whose words had been illegally taped sued the broadcaster and recovered substantial damages in the lower courts.¹¹

The Supreme Court, having agreed to review the liability claim, took a very different view of the case and reversed the damage award on First Amendment grounds.¹² Three factors seemed persuasive. First, plaintiffs cited the undisputed truthfulness of the broadcast, the accuracy of the words that had been taped and broadcast,¹³ and the clarity with which the union leader's threats reached the station's listeners.¹⁴ Second, the Justices found there to be a substantial and legitimate public interest in the subject matter of the conversation, which included criminal threats of violence during a labor dispute within the local school system.¹⁵ Thus, observed Justice Stevens for the majority, “the enforcement of the [wiretapping] provision in this case . . . implicates the core purpose of the First Amendment because it imposes sanctions on the publication of truthful information of public concern.”¹⁶

The final element was the unlawful origin of the broadcast.¹⁷ It was clear that someone (never identified) had, in clear violation of federal law, taped telephone conversations which the participants reasonably believed were private and had then turned the tape over to a radio station which was not likely to

7. *New York Times Co. v. United States*, 403 U.S. 713, 719 (1971).

8. 532 U.S. 514, 517 (2001).

9. *Id.* at 518.

10. *Id.*

11. *Bartnicki v. Vopper*, 200 F.3d 109 (3d Cir. 1999).

12. *Bartnicki*, 532 U.S. at 534.

13. *Id.* at 527-28.

14. *Id.* at 534.

15. *Id.* at 535.

16. *Id.* at 533-34.

17. *Id.* at 525.

disregard the potential audience interest (and ratings value) of such material.¹⁸ Such a sullied source might have been thought fatal to the broadcaster's defense, as First Amendment protections have not before been applied to a case where the gathering of the information had been clearly illegal. In earlier cases, there had either been a clearly *lawful* source, or at worst an unspecified source that was not known to have been *unlawful*.¹⁹ Thus, *Bartnicki* was a vital case of first impression.

The Justices now stressed the publisher's innocence, noting that the illegality by which the conversations had been taped could not be attributed either to the station or to the talk-show host who put the material on the air.²⁰ So long as the broadcaster was merely the passive beneficiary of someone else's unlawful action, the First Amendment privilege for the use of such material was unaffected.²¹ With the benefit of this ruling, one might now amend the third element of the formula in this way: The publication of truthful information of public interest incurs legal liability, civil or criminal, only if it can be shown that the publisher was involved in an unlawful news-gathering process. If, as in *Bartnicki*, the publisher's or broadcaster's only sin was the knowledge that *someone* had broken the law in obtaining the material, that knowledge would not forfeit the defense of truth and public interest normally applicable to such a case.²² Seen in this way, *Bartnicki* buttresses the publisher's defense of truth by broadening one of the elements essential to its presentation.

The role of privacy, and the tension between privacy and truth, could hardly have escaped the *Bartnicki* Court's scrutiny. The plaintiffs' case was based not on common-law notions of what ought to be private but on the clear statutory protection for telephonic privacy which had been breached by a wire-tapper who almost certainly stood to gain from the wide dissemination of their ominous exchange.²³ Thus the *Bartnicki* case juxtaposed privacy and public interest claims of an exceptionally high order. Nonetheless, Justice Stevens' answer was clear and forceful: "[P]rivacy concerns give way when balanced against the interest in publishing matters of public importance."²⁴ The Court deftly retrieved an unguarded concession from the 1890 *Harvard Law Review* article, co-authored by the young Louis D. Brandeis, to which we referred earlier: "[T]he right of privacy" for which Warren and Brandeis argued fervently in that article would not "prohibit any publication of matter which is of public or general interest."²⁵

Celebration by the news media may, however, be premature. Despite the reassuring outcome and the salutary language, there is a darker view of *Bart-*

18. *Id.*

19. *Id.* at 528.

20. *Id.* at 525.

21. *Id.* at 534.

22. *Id.*

23. *Id.* at 516.

24. *Id.* at 534.

25. *Id.*

nicki. James Goodale, who was General Counsel to *The New York Times* at the time of the Pentagon Papers case, sees the case in a less hopeful way.²⁶ Indeed, for him, there is more occasion for alarm than for rejoicing. Among other concerns, he cautioned that the Court here “for the first time recognized a First Amendment based right of privacy in truthful private facts” and added that, to the best of his knowledge, the Court had never before declared that “there is a right of privacy that may penalize the publication of truth.”²⁷ Moreover, Goodale is troubled that, for the first time, even so staunch a champion of press freedom as Justice Stevens writes of “balancing” free press interests against those of privacy, though his opinion leaves no doubt which way that balance tips in this case.²⁸ Long-time Supreme Court observer and commentator Tony Mauro noted at the close of the 2000 term that *Bartnicki* “contained ominous language that recognized the importance of the privacy interests in the case” and added his concern that, “had the subject matter of the phone conversation been less newsworthy, it is possible the outcome would have been different.”²⁹ The judgment did reflect a tenuous majority, two of whose members might well defect and support a privacy claim in a less appealing case. Accordingly, for Goodale and others, *Bartnicki* is, at best, a pyrrhic victory for the news media and may contain ominous portents of expanded privacy claims.

There is ample warrant for both views, the antithesis of which underscores the unresolved nature of the tension between privacy and truth. The optimist is right to note that *Bartnicki* brought the Court’s first resolution of—as Goodale himself recognizes—“all doubts as to whether the press can publish information if ‘stolen’ as in the Pentagon Papers case—when the publisher does not participate in the theft.”³⁰ The optimist would add that the outcome in *Bartnicki* is considerably more receptive to news media interests than most of the high Court’s recent rulings involving privacy claims.

Arguably, *Bartnicki* represents the most sympathetic accommodation of these conflicting claims in over two decades. In the late 1970s, a bare majority of the Justices favored the privacy/publicity right of circus performer Hugo Zacchini over a broadcaster’s right to air footage of Zacchini’s death-defying stunt without the performer’s permission, though the film was in no sense “unlawfully obtained.”³¹ More recently, the Court expressed an intuitive preference for the residential privacy of a crime suspect over the news-gathering mission of journalists who “rode along”³² with police officers making an arrest.³³ While

26. James C. Goodale, *Bartnicki: Publish News That’s Private but True?*, N.Y.L.J., Aug. 3, 2001, at 3.

27. *Id.*

28. *Id.*

29. Tony Mauro, *Odd Lot of Cases Tend to Favor First Amendment*, Freedom Forum, at <http://www.freedomforum.org/templates/document.asp?documentID=14397> (July 16, 2001).

30. Goodale, *supra* note 26, at 3.

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

32. Members of the news media were not among the defendants.

33. *Wilson v. Layne*, 526 U.S. 603, 610 (1999).

conceding that the First Amendment “clearly protects press freedom from abridgment by government,” Chief Justice Rehnquist warned, writing for a unanimous Court, “the . . . [journalists] . . . were working on a story for their own purposes [and were not] present for the purpose of protecting the officers, much less the [suspects.]”³⁴ Any suggestion that two *Washington Post* reporters might have been justified in informing the capital area’s readers about local law enforcement activities received no deference from any of the Justices.³⁵ While the actual case did not pose the issue of news media liability for gathering truthful information through means that invaded privacy, it seemingly governed a companion ride-along case in which there were news media defendants. Thus, the view that *Bartnicki* represents essentially good news for the media in the ongoing debate between truth and privacy has ample warrant.

Yet, a less comforting view of *Bartnicki* is also justified, mainly for the reasons that James Goodale invoked. Whatever the outcome, the case was characterized, even by those Justices most strongly committed to press freedom, as a product of “balancing”—a term which conveys clear warning that, on different facts, such a “balance” could as easily tip against truth and favor privacy.³⁶ Specifically, one might read *Bartnicki* as a result driven by exceptionally sympathetic facts, with the clear public interest in airing the contents of the tape and the privacy claims invoked by labor leaders to keep neighbors, parents, teachers, and taxpayers from learning that they had talked freely to one another about “blowing off the front porches” of recalcitrant school board members. Seen in this way, the case could even portend, as Goodale and others apparently fear, future judicial recognition of the very privacy interest for which Messieurs Warren and Brandeis argued over a century ago, but which courts have seldom espoused.³⁷

The immediate issue for us, however, is neither the brighter nor darker of these two options. However one may read *Bartnicki*, nothing the Court said there resolves the most persistent of privacy issues, to which we now turn our attention. There are two quite distinct situations in which the developed standards of privacy are clearly not dispositive and only marginally helpful. One consists of the myriad challenges posed by new and ever more invasive technologies, and the other by increasingly intrusive and damaging disclosures. Each situation merits brief analysis as we contemplate the future of the truth-privacy tension.

Standards that govern traditional threats to privacy are poorly adapted to addressing sophisticated means of gathering private images and information. Historically, it has been a complete answer to an invasion-of-privacy claim to show that the instrument—camera, tape recorder, or other recording device—by which private material was obtained was located on a public street, sidewalk,

34. *Id.* at 613.

35. *Id.* at 611-12.

36. *Id.*

37. Goodale, *supra* note 26, at 3.

or waterway and that there had been no physical invasion of private property.³⁸ That assumption has been made increasingly suspect by the proliferation of highly sophisticated technology, which is capable of capturing images through sharply focused parabolic microphones, or images through infrared cameras, from inside the walls of buildings, and without any physical invasion or trespass.³⁹

Recognizing the need for new theories, the California Supreme Court recently ruled that an actionable invasion of privacy may occur through “offensive intrusion” short of physical entry on private property, if the effect of using such equipment—parabolic microphones, infrared cameras, and the like—is comparable.⁴⁰ As if to indicate their concurrence, California’s lawmakers soon thereafter enacted a law obviously aimed at intrusive paparazzi and their forays against film celebrities, for the first time making legally actionable a “virtual trespass.”⁴¹ This constitutionally untested statute permits recovery of damages against photographers, both still and video, who aggressively pursue subjects or intrude upon their privacy, even by nonphysical means and from public places, to capture private words or images.⁴²

The California anti-paparazzi law reflects a growing anxiety among highly visible people who are prime targets for intrusive or invasive coverage. Indeed, the paparazzi are becoming more aggressive, as exemplified by a recent incident in which a photographer collided with a car and nearly prevented Maria Shriver and Arnold Schwarzenegger from getting their child safely to school.⁴³ Even more, the concern of the famous and infamous focuses on sound and photo equipment that need not commit a physical trespass to capture highly personal and sensitive images and words.⁴⁴ Former Screen Actors Guild President Richard Mazur, testifying in favor of the California bill, warned lawmakers of “infrared cameras that can not only get a usable photo right through a window with a sheer curtain but tremendously detailed photos through Venetian blinds.”⁴⁵ Mazur, added, with an ominous sense of where technology seems to be headed, “soon they’ll be able to shoot right through a wall.”⁴⁶

38. See ROBERT M. O’NEIL, *THE FIRST AMENDMENT AND CIVIL LIABILITY* 86-87 (2001) [hereinafter O’NEIL, *LIABILITY*].

39. See *infra* notes 45-46.

40. *Shulman v. Group W. Prods., Inc.*, 955 P.2d 469, 490-91 (Cal. 1998). See *Wolfson v. Lewis*, 924 F. Supp. 1413 (E.D. Pa. 1996) for an earlier and similar ruling by a federal district judge in a comparable situation not involving physical invasion of private property.

41. CAL. CIV. CODE § 1708.8 (Supp. 1999); see Robert M. O’Neil, *Ride-Alongs, Paparazzi, and Other Media Threats to Privacy*, 33 U. RICH. L. REV. 1167, 1169 (2000).

42. *Id.*

43. *Id.* at 1181.

44. See, for added background and explanation, an article by the author of the California law, Erwin Chemerinsky, *Protect the Press: A First Amendment Standard for Safeguarding Aggressive News-gathering*, 33 U. RICH. L. REV. 1143 (2000) (insisting that the anti-paparazzi law should pass First Amendment scrutiny).

45. Ann Oldenburg, *Photographers Fear Privacy Law May Cloud View of Shooting Stars*, U.S.A. TODAY, Jan. 4, 1999, at 3D.

46. *Id.*

The courts have yet to address the First Amendment issues posed by legal recourse against “virtual trespass” and related means of surveillance that fall short of physical trespass. It has long been clear that the gathering of news affords no protection to one who does invade another’s property; a journalist can be as much a trespasser as a thief. It has been equally clear that non-trespassory information and image-gathering, however disturbing and unwelcome they may be, are fully protected. Only when such surveillance impedes a subject’s freedom of movement—as with the New York paparazzo who effectively confined Jacqueline Kennedy Onassis and her children to their apartment building⁴⁷—does legal recourse become an option.

One possible relocation of the traditional threshold would be to allow redress where a clear expectation of privacy exists. One example might be cases where images or conversations are recorded behind walls that would otherwise be obtainable only by a physical invasion. It has been argued that, unless curbs are placed on the use of increasingly sophisticated newsgathering technologies of which Richard Mazur and others have recently warned, there will truly be no place to hide—in effect, one’s home may no longer be one’s castle for all purposes.⁴⁸ What we now have, in this new and radically different setting, is an insoluble conflict between two basic human values of equal stature—privacy and truth.

The other intractable tension is not quite so novel, but will prove no less difficult for the courts when it reaches them. The specific breach that inspired Warren and Brandeis to seek legal recognition for privacy in 1890 was the unauthorized publication of the guest list for a Beacon Hill dinner party. Most of the information and images that privacy advocates wished to withhold from public scrutiny were embarrassing or even compromising, but few were capable of ending careers or destroying lives. Today, however, private information and its public disclosure may have far graver consequences. Consider the circumstances of a recent federal court case. An airline ticket agent had been diagnosed as HIV-positive and was fired when his employer learned of his condition, though neither his appearance nor his job performance had suffered in any degree.⁴⁹ The employee sought the aid of New York City’s Human Rights Commission to regain his job.⁵⁰ The agency succeeded and issued a press release recounting its success.⁵¹ Though the release never named the employee, it contained enough detail that some of his colleagues and friends now learned, for the first time, of his illness.⁵² The agent sued the City, claiming the Commission had unconscionably invaded his privacy, with devastating consequences.⁵³ Before the district court or the Second Circuit could reach the merits, the case

47. *Gallella v. Onassis*, 487 F.2d 986, 993 (2d Cir. 1973).

48. *See supra* notes 45-46.

49. *Doe v. City of New York*, 825 F. Supp. 36, 37 (S.D.N.Y. 1993), *rev’d*, 15 F.3d 264 (2d Cir. 1994).

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

was apparently settled—though not before the court of appeals observed with reproof that highly sensitive personal information made available for a very limited purpose had been used in a quite different and extremely harmful fashion.⁵⁴

Suppose that a story based on the release had appeared in a New York daily newspaper and that an invasion of privacy suit had followed. New York law, among the most generous, would seem to permit recovery for such content, even if the publication were truthful.⁵⁵ Such a claim would appear to founder on the time-tested Supreme Court formula: This information would be accurate, it would have obvious public interest, and surely it could not be shown to have been “unlawfully obtained.”⁵⁶ Yet there is something unsatisfying in rejecting such a claim out of hand. Informing the world about a hitherto undisclosed illness of such gravity seems a far cry from embarrassing the hosts or guests of a Beacon Hill dinner party. A court wishing to protect privacy in a situation like that of the hapless airline agent might conceivably raise doubts about the “public interest” requirement by noting that such a revelation would serve only the prurient, and not public, interest. Another possibility seems not to have been foreclosed by *Bartnicki*. Before *Bartnicki*, a court might have said that such information was tainted, even in the newspaper’s hands, because the agency had inexcusably exceeded the purposes for which a client would expect such sensitive and damaging personal information might be used. Today, however, a newspaper that based its story on a seemingly valid press release would be, if anything, better protected than the talk-show host who found the tape in an unmarked envelope and put it on the air.

There are clearly no easy answers. The case for recognizing some sort of legal redress on behalf of a person who may suffer from a breach of privacy has powerful emotional appeal. Allowing recovery, even in the most compelling of circumstances, would exact an unconscionably high price upon the dissemination of truth, even for motives that may not be impeccable. The traditional formula that protects truthful disclosures has served us well and ought not to be modified even to take account of a truly devastating disclosure. The answer the courts have given to Messieurs Warren and Brandeis over the Beacon Hill guest list is probably the same answer that the HIV-positive airline agent must receive, however different in degree and nature are the potential effects of a truthful breach of privacy. We pay a high price in this country for our commitment to protect truthful publications, and that price is likely to climb as the hazards of unauthorized revelations also intensify.

54. *Doe v. City of New York*, 15 F.3d 264, 269-70 (2d Cir. 1994).

55. The New York courts have, however, consistently avoided First Amendment concerns by focusing the privacy laws on “false light” claims.

56. *See, e.g., Smith v. Daily Mail Pub. Co.*, 443 U.S. 97, 102 (1979).

III

CIVILITY AND FREE SPEECH IN AN INCREASINGLY UNCIVIL SOCIETY

In early September 2001, the Idaho Court of Appeals upheld the misdemeanor conviction of one Patrick Suiter.⁵⁷ He was charged with disturbing the peace for publicly using a taboo four-letter word to vent his frustration about what he viewed as unresponsive law enforcement.⁵⁸ Although the court was divided, its majority ruled that “such a personally provocative epithet . . . cannot be reasonably interpreted as the communication of information or opinion safeguarded by the Constitution.”⁵⁹ The dissenting judge (on a court where lack of unanimity was most unusual) insisted that Suiter had uttered no more than “a dismissive expression of disapproval of what the detective had been saying—the vulgar equivalent of ‘go jump in the lake’” for which no criminal sanction was warranted under the First Amendment.⁶⁰

The Idaho court is hardly alone in dealing harshly with the public utterance of such tasteless expletives. Less than two years earlier, intermediate appeals courts in Minnesota and Ohio had reached similar conclusions.⁶¹ Michigan courts are still reviewing the case of the “cursing canoeist,” one Timothy Boomer, charged under a century-old statute that forbids offensive language in public places.⁶² Many states still have laws on the books that punish “any person [who] profanely curses or swears . . . in public.”⁶³ “Curse and abuse” prosecutions actually are still common, especially in cases of impolite telephonic language.⁶⁴

As these recent developments suggest, much confusion surrounds the constitutional boundaries in the quest for civility. On one hand, the Supreme Court has said that a person can be punished for uttering “fighting words” in a public place.⁶⁵ On the other hand, the same person could not be charged for the public display of a taboo or vulgar four-letter word.⁶⁶ The tension between two such rulings, and the consequent difficulty of defining the line between protected speech and unprotected epithets, is apparent. The lack of clarity in this area has

57. *Idaho v. Suiter*, No. 25783, 2001 Idaho App. LEXIS 78, at *17 (Idaho Ct. App. Sept. 4, 2001).

58. *Id.* at *2.

59. *Id.* at *12.

60. *Id.* at *31.

61. *Minnesota v. Clay*, No. CX-99-343, 1999 Minn. App. LEXIS 1059 (Minn. Ct. App. Sept. 14, 1999); *Hamilton v. Johnson*, No. CA99-02-025, 1999 Ohio App. LEXIS 5623 (Ohio Ct. App. Nov. 29, 1999). See David Hudson, *Cop-Cursing Defendant Loses Free-Speech Argument Before Ohio Appeals Court*, Freedom Forum, at <http://www.freedomforum.org/templates/document.asp?documentID=10326> (Dec. 3, 1999); David Hudson, *State Appeals Court Won't Allow Free-Speech Plea for Cop-Cursing Defendant*, Freedom Forum, at <http://www.freedomforum.org/templates/document.asp?documentID=10888> (Sept. 17, 1999).

62. *Another Michigan Man Charged Under Cursing Law*, WASH. POST, Dec. 4, 2000, at A5.

63. *E.g.*, VA. CODE ANN. § 18.2-388 (2000).

64. *E.g.*, *Hershfeld v. Commonwealth*, 417 S.E.2d 876 (Va. App. 1992).

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

66. *Cohen v. California*, 203 U.S. 15 (1971).

created much confusion and has led to the adoption of various measures (campus speech codes, for example) that have fared poorly in the courts.⁶⁷

It all began one Saturday afternoon in the town center of Rochester, New Hampshire, shortly before the outbreak of World War II.⁶⁸ A Jehovah's Witness named Chaplinsky had unsettled spectators by loudly denouncing mainstream religious faiths.⁶⁹ The local constabulary, without making an arrest, escorted him toward the police station.⁷⁰ Chaplinsky then turned on the officer and uttered the words which became the basis for an immediate criminal charge and an eventual Supreme Court ruling.⁷¹ The precise words remain in doubt to this day. The arresting officer insisted that he had been called, to his face, "a damned fascist" and "a God-damned racketeer."⁷² Chaplinsky, however, maintained that he had firmly but politely informed the officer that "You, sir, are damned in the eyes of God" and "no better than a racketeer."⁷³ Whatever he actually said, Chaplinsky was convicted of violating a state law which made it a crime to "address any offensive, derisive, or annoying word to any person who is lawfully in any street or other public place, nor call him by any offensive or derisive name. . . ."⁷⁴

The New Hampshire Supreme Court affirmed the conviction, finding the statute properly limited to "face to face words plainly likely to cause a breach of the peace . . . classical fighting words."⁷⁵ A unanimous Supreme Court affirmed, including several Justices who had consistently supported free expression in the past.⁷⁶ Justice Murphy wrote for the Court, and Justices Black and Douglas joined without comment, a brief opinion that allowed states to punish the utterance of mere words, albeit under unusual conditions.⁷⁷ The key to the ruling was the Court's view that "such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."⁷⁸

So dismissive a view of expression that was both provocative and substantive now seems remarkable; it is even more so given the deeply religious context

67. See, e.g., ROBERT M. O'NEIL, *FREE SPEECH IN THE COLLEGE COMMUNITY* (1997) [hereinafter O'NEIL, *FREE SPEECH*].

68. Chaplinsky, 315 U.S. at 569.

69. *Id.* at 569-70.

70. *Id.* at 570.

71. *Id.*

72. *Id.* at 569.

73. This alternative version of Chaplinsky's words, advanced in the trial court by the defendant himself, was rejected in the absence of any third-party corroboration. The judge understandably favored the account given by the arresting officer, which provided the record and, in substantial part, the rationale for successive affirmance of Chaplinsky's conviction.

74. *Id.* at 569.

75. *Id.* at 573.

76. *Id.* at 574.

77. *Id.*

78. *Id.* at 572.

in which Chaplinsky voiced his disdain for the police.⁷⁹ But the Court was convinced that such words lost any claim to First Amendment protection when they were uttered face to face in a manner that was “likely to cause a breach of the peace,” even though no disorder actually ensued.⁸⁰ The New Hampshire law was deemed “a statute punishing *verbal acts*,” which, through interpretation, had been “limited to define and punish *specific conduct* lying within the domain of state power.”⁸¹ Under such conditions, the words Chaplinsky was charged with speaking seemed provocative enough not to merit any First Amendment protection.⁸² Commentators have rightly observed that the decision had two prongs or elements: First, there was an assumption that utterance of epithets under such conditions inherently inflicts injury on a person who is their target.⁸³ Second, when such verbal hostility creates an imminent breach of the peace, government may intercede even though only words are involved.⁸⁴ Justice Murphy’s cryptic opinion offered little guidance to those—law enforcement officers and judges—who would seek after *Chaplinsky* to resolve the inherent tension between the “damaging words” and “breach of peace” theories which the judgment blended.⁸⁵

The *Chaplinsky* decision has caused no end of confusion during the ensuing six decades. This case has been cited with sufficient deference to imply that uttering “fighting words” remains a recognized exception to First Amendment freedoms.⁸⁶ As recently as the “hate speech” decision in 1992, the majority assumed *Chaplinsky*’s continuing vitality, stressing only that fighting words which were used to convey particular messages could not be selectively disfavored on a subject-matter basis.⁸⁷ Moreover, in that ruling Justice Scalia expressly declined an invitation to “modify the scope of the *Chaplinsky* formulation,” a step he deemed unnecessary to the majority’s disposition of the case.⁸⁸ Rumors of *Chaplinsky*’s demise are, therefore, greatly exaggerated and quite premature.⁸⁹

When it comes to factually similar cases, however, the Justices have consistently distinguished *Chaplinsky*. Even when based on verbal affronts and assaults at least as provocative as the events of that long-ago New Hampshire Saturday afternoon, convictions have been set aside.⁹⁰ The lower courts have been understandably confused, however, and have been less reticent to invoke *Chaplinsky* as the basis for affirming the convictions of “in your face” verbal as-

79. *Id.* at 570.

80. *Id.* at 573-74.

81. *Id.* at 574.

82. *Id.*

83. Note, *The Demise of the Chaplinsky Fighting Words Doctrine: An Argument for Its Interment*, 106 HARV. L. REV. 1111, 1129, 1130-31 (1993) [hereinafter *Demise*].

84. *Id.*

85. *Id.*

86. See, e.g., Martin Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 626 (1982).

87. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 387 (1992).

88. *Id.* at 381.

89. *Id.* at 399.

90. *Lewis v. New Orleans*, 415 U.S. 130 (1974); *Gooding v. Wilson*, 405 U.S. 518 (1972).

sailants—believing, quite understandably, that the precedent for doing so remained alive, if not in perfect health.⁹¹

The paradox of civility is not limited to fighting words. At the height of the Vietnam War, Paul Cohen walked about the lobby of the Los Angeles County courthouse wearing a jacket which bore in prominent lettering the words “Fuck the Draft.”⁹² He was arrested, and charged with violating a California breach of the peace law.⁹³ The state courts affirmed the conviction, one of several at the time involving the arrest of protestors who had used the same taboo word in public places, including one at the center of the Berkeley campus during the Free Speech Movement.⁹⁴ To the surprise of most observers, the U.S. Supreme Court agreed to review the conviction. Even greater was the surprise at the outcome—a six-to-three reversal of Cohen’s conviction, with a ringing defense of free speech in a majority opinion by Justice John Marshall Harlan.⁹⁵

The opinion tells more of what the case did not involve than what it did. There was no issue of actual disorder, or of probable disorder, even though breach of the peace had been charged.⁹⁶ Nor was the issue one of incitement; neither Cohen’s intent nor the probable effect of his words could be so characterized.⁹⁷ Obscenity was also not involved since there was no possible appeal to “prurient interest.”⁹⁸ Though the taboo word offended many in the courthouse, they could hardly have been deemed a “captive audience” as long as they could “effectively prevent further bombardment of their sensibilities simply by averting their eyes.”⁹⁹ Any claim based on the undoubted need for courtroom decorum and impartial administration of justice deserved no deference here; on the one occasion that Cohen entered a courtroom, he immediately doffed the jacket when asked to do so by a bailiff, and obscured the offending words by folding the garment over his arm.¹⁰⁰ Nor could Cohen’s message possibly have prejudiced any pending proceeding, since draft resistance cases (of which there were many in process at that time) were tried in federal and not state courts.

Perhaps most troubling was the state’s claim that Cohen had uttered “fighting words,” and could thus be prosecuted under *Chaplinsky*.¹⁰¹ The Court’s ruling on this point would become one of the growing number of occasions for distinguishing *Chaplinsky*. “[W]hile the four-letter word displayed by Cohen . . . is not uncommonly employed in a personally provocative fashion,”

91. *E.g.*, *Mercer v. Winston*, 199 S.E.2d 724 (Va. 1973), *cert. denied*, 416 U.S. 988 (1974).

92. *Cohen*, 403 U.S. at 16.

93. *Id.* at 17.

94. *Id.*

95. *Id.* at 26.

96. *Id.* at 16-17.

97. *Id.*

98. *Id.* at 20.

99. *Id.* at 21.

100. *Id.* at 19.

101. *Id.* at 17.

observed Justice Harlan, “in this instance it was clearly not ‘directed to the person of the hearer’” and thus could not be deemed a “fighting word.”¹⁰²

The significance of *Cohen* exceeds its clear rejection of various possible theories of liability. Beyond what was essential to the reversal of Cohen’s conviction, Justice Harlan went on to make almost a virtue of the defendant’s choice of language when he noted: “[I]t is often true, that one man’s vulgarity is another’s lyric.”¹⁰³ If government could ban the public utterance of disfavored language, he warned, those in power “might soon seize upon the censorship of particular words as a convenient guise for banning the expression of unpopular views.”¹⁰⁴ Thus it would be unwise and even dangerous for the high Court to assume “that one can forbid particular words without also running a substantial risk of suppressing ideas in the process.”¹⁰⁵

Herein lies the paradox of *Cohen* and its uneasy coexistence with *Chaplin-sky* as an arbiter of civility in public discourse. The most persistent question, which the Justices had no occasion to address in *Cohen* and have managed to avoid ever since, is how far this judgment reflects the *political* context of Cohen’s statement and the “unpopular view” whose expression was enhanced by the use of a taboo four-letter word. A few simple variants will suggest how soon we enter a realm of uncertainty. First, suppose Mr. Cohen had returned to the courthouse to flaunt his Supreme Court triumph, sporting the very same jacket, but having removed “the draft” to leave the offending word in splendid isolation. While charging him with a breach of the peace would still be problematic on the original facts, the gathering of a crowd angered by such language might change the circumstances. Any charge based on the isolated use of a vulgar and taboo word would require some assessment of the anti-war context of the actual *Cohen* case. While there is ample support in Justice Harlan’s opinion for a non-contextual view—“one man’s vulgarity is another’s lyric,” most notably—there are also grounds in the opinion for confining its protection of public incivility to the use of a taboo or vulgar term in order to, as the Court put it, “express unpopular views.”¹⁰⁶

The latter, context-driven and narrower, reading of *Cohen* seems recently to have gained favor. The lower federal courts have reviewed a growing number of charges brought against faculty members on the basis of their classroom use of vulgar and taboo language, usually designed to revive flagging student interest in arcane subject matter.¹⁰⁷ The legal fortunes of professors so charged have varied, more on the basis of particular institutional policies invoked than on broad academic freedom or free speech grounds.¹⁰⁸ The latest such ruling does, however, reopen the larger issue of incivility. John Bonnell, a long-time faculty

102. *Id.* at 20.

103. *Id.* at 25.

104. *Id.* at 26.

105. *Id.*

106. *Id.*

107. *E.g.*, *Cohen v. San Bernardino Valley College*, 92 F.3d 968 (9th Cir. 1996).

108. *E.g.*, *Silva v. Univ. of N.H.*, 888 F. Supp. 293 (D.N.H. 1994).

member at a Michigan community college, was suspended for the occasional use of taboo and sexually offensive words in his classroom.¹⁰⁹ The particular choice of language was deemed to violate the college's sexual harassment policy.¹¹⁰ Bonnell sought redress in federal court and persuaded a district judge that his free speech had been abridged.¹¹¹ The Sixth Circuit, however, took a much less sympathetic view than that of the district court, or of other federal courts that have recently assessed such claims.¹¹² The Sixth Circuit invoked a recent Supreme Court ruling which had sustained curbs on unwelcome approaches to clinic visitors by anti-abortion protestors.¹¹³ In that case, the Supreme Court, in support of a patient's right to be free of unwanted entreaties while seeking clinic access, recalled *Cohen* in this way: "Even in a public forum, one of the reasons we tolerate a protestor's right to wear a jacket expressing his opposition to government policy in vulgar language is because offended viewers can effectively avoid further bombardment of their sensibilities simply by averting their eyes."¹¹⁴ For the Sixth Circuit, this rather cautious use of *Cohen* buttressed its view that "the context in which a message is delivered is often the pivotal factor when determining whether the speech will be protected"—and held that, in Bonnell's case, the speech was protected.¹¹⁵

One citation does not, of course, reflect a trend. Nothing in *Bonnell* necessarily impairs or qualifies *Cohen*'s broad protection for public incivility. On the other hand, there may be some risk in continuing to assume that the unadorned utterance of taboo or vulgar words enjoys full First Amendment protection. That seems to be the premise on which the appellate courts of several states recently relied in the cases noted at the opening of this section.¹¹⁶ The facts in none of those cases would have met *Chaplinsky*'s test for "fighting words," much less the more stringent test the Supreme Court later imposed on such outbursts.¹¹⁷ Yet the holdings in these cases have caused uncertainty over the current balance between the contending interests in civility and free expression.¹¹⁸

Second, one might imagine a different variant on *Cohen* that would most acutely test the current state of the law. Suppose Mr. Cohen were to return to the courthouse wearing his jacket, on which he had now substituted "you" for "the draft." If he simply walked about the lobby, as he did in the actual case, presumably no sanction could be based upon the changed message absent evi-

109. *Bonnell v. Lorenzo*, 241 F.3d 800, 803 (6th Cir. 2001).

110. *Id.*

111. *Id.* at 806-07.

112. *Id.* at 826-27.

113. *Id.* at 819.

114. *Hill v. Colorado*, 530 U.S. 703, 716 (2000).

115. *Bonnell*, 214 F.3d at 819.

116. *E.g.*, *Clay*, 1999 Minn. App. LEXIS 78; *Hamilton*, 1999 Ohio App. LEXIS 5623.

117. *Id.*

118. *See, e.g.*, *R.A.V. v. City of St. Paul: The Continuing Confusion of the Fighting Words Doctrine*, 47 VAND. L. REV. 1143 (1994); Note, *The Fighting Words Doctrine*, 93 COLUM. L. REV. 1473 (1993); *Demise*, *supra* note 83, at 1111, 1129.

dence of an incitement or breach of the peace. But suppose Cohen now takes off the jacket and pointedly displays its message to an occasional passerby, though taking care not to obstruct or block anyone's passage. Presumably such a person would be more deeply offended than were any of Cohen's actual spectators. But would such communication amount to the "fighting words" which *Chaplinsky* strongly implies are unprotected speech? It is true that the Supreme Court, while never overruling or even qualifying *Chaplinsky*, has repeatedly failed to find even in-your-face epithets provocative enough to warrant sanctions. The context of each of those cases seems more redemptive than that of a Cohen who no longer wishes to convey a political message, but simply wants to affront or assault individual passerbys with taboo.

There is, to be sure, a plausible claim that the very act of flaunting taboo words in a public forum to shock or offend itself conveys a message. Justice Brennan once observed, in rebuking his colleagues for allowing the FCC to ban broadcasts of the "seven dirty words" contained in George Carlin's infamous monologue, that there was reason for "confirming Carlin's prescience as a social commentator," since he had evoked public anger and government sanctions over satire which the author deemed "harmless and essentially silly."¹¹⁹ Perhaps such a theory gives our putative "in your face" Cohen greater extenuation than he deserves. Surely, if *Chaplinsky* was given no such latitude in the course of seeking adherents for his religious faith, one who mindlessly flaunted vulgar words at onlookers should fare no better. Such a case would inevitably demand reconciliation of two judgments that have coexisted, albeit uncomfortably, for over three decades. *Cohen* and *Chaplinsky* cannot coexist indefinitely, because one declares that offensive epithets are "no essential part of any exposition of ideas" while the other insists with equal conviction that "one man's vulgarity is another's lyric."

IV

EQUALITY AND FREE EXPRESSION

Patrick Suiter is not the only Idaho resident whose public utterances have incurred legal action. Not many months before Mr. Suiter's outburst, Lonnie Rae had been in the stands at a high school football game in Boise.¹²⁰ His wife Kim, a newspaper photographer, tried to photograph the referees in order to illustrate an article.¹²¹ The referees objected, and one of them, an African-American named Ken Manley, tried to take Mrs. Rae's camera.¹²² The husband then shouted at Manley, using a racially derogatory and offensive epithet.¹²³ He was promptly arrested and charged with violating a state hate-crime law, aimed

119. *FCC v. Pacifica Found.*, 438 U.S. 726, 777 (1978).

120. Aarika Mack, *Hate-Crimes Bill Raise First Amendment Concerns for Some*, Freedom Forum, at <http://www.freedomforum.org/templates/document.asp?documentID=13756> (Apr. 23, 2001).

121. *Id.*

122. *Id.*

123. *Id.*

specifically at “malicious harassment,” conviction for which could bring a five-year prison sentence.¹²⁴ Although no further proceedings have yet been pursued, the Raes’ attorney has maintained, and the facts confirm, that “the charge is based solely on the language [my client] used.”¹²⁵

Whether such abusive language, uttered at a football game or in any other public place, warrants a criminal sanction poses the third of our persistent tensions. Here, too, we find continuing ambivalence among our own views and those of the courts—hardly a surprise since we greatly esteem both equality and free expression. For most of the past century, protecting vulnerable religious, ethnic, and other groups from extreme verbal assaults has been a high priority.¹²⁶ It has also been a source of much litigation, the results of which are as confusing as our national ambivalence toward the underlying values of equality and expression.¹²⁷ On one hand, the Supreme Court a half-century ago held that states may enact and enforce “group libel” laws against purveyors of hostile and demeaning racist tracts and the like.¹²⁸ Much more recently, a unanimous Court rendered a remarkable and not easily compatible pair of judgments striking down “hate speech” laws while upholding laws that impose harsher sentences on those who commit “hate crimes.”¹²⁹ A journey along this tortuous path of First Amendment law concludes our review of persistent tensions between free expression and other transcendent societal values.

We tend to assume that laws which protect vulnerable groups from verbal assault and abuse have recent origins. In fact, however, the first statute clearly aimed at curbing racist speech was adopted by the New York legislature in 1913.¹³⁰ This earliest version of what would come to be known as group libel laws specifically forbade hotels from discriminatory advertising—that is, publicly announcing a refusal to accommodate guests on the basis of race, color, or religion.¹³¹ No concern about free expression was raised at the time; the only opposition came from those who feared hotels might be unable under the law to refuse rooms to persons infected with tuberculosis.¹³²

By the mid 1920s, at least seven states had adopted similar anti-discrimination laws that targeted hostile words as well as acts.¹³³ Concern for the legal protection of minorities was further heightened in the post-war period by anti-Semitic publications, notably Henry Ford’s *Dearborn Independent* and its focus on the allegedly subversive *Protocols of Zion*. Specific efforts were

124. *Id.*

125. *Id.*

126. O’NEIL, *FREE SPEECH*, *supra* note 67, at 5-7.

127. *Compare* *Wisconsin v. Mitchell*, 508 U.S. 476 (1993) with *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992).

128. *Beauharnais v. Illinois*, 343 U.S. 250 (1952).

129. *R.A.V.*, 505 U.S. at 398.

130. Evan P. Schulz, *Group Rights, American Jews, and the Failure of Group Libel Laws, 1913-1952*, 66 *BROOKLYN L. REV.* 71, 92 (2000).

131. *Id.* at 91.

132. *Id.* at 92.

133. *Id.* at 98-99.

made by a number of cities, with mixed success, to ban distribution of Ford's newspaper.¹³⁴ For the first time, free speech and free press concerns were raised in opposition to such proposals.

The Michigan legislature declined to adopt such a measure largely because of challenge by the state's mainstream media and the fledgling American Civil Liberties Union.¹³⁵ A Cleveland, Ohio, ordinance aimed at the *Independent* was successfully challenged in federal court, producing what is undoubtedly the first judgment invalidating government efforts to suppress racist or ethnically offensive expression.¹³⁶ The American Jewish Committee viewed the events which led to such legislation with intense ambivalence, and the prospects for protection from verbal assaults of the *Dearborn Independent* variety with frustration.¹³⁷ The president of the Anti-Defamation League of B'nai B'rith lamented in 1935 that, although the First Amendment "was never intended as a protection against group libel any more than as an obstacle individual libel," it had nonetheless posed "an insurmountable obstacle in bringing before the bar of justice one of the lowest forms of malefactors."¹³⁸

Events in Europe leading up to World War II would intensify such concerns. The most direct response to the world-wide threat of Nazi propaganda was a two-part article written in 1942 by the young David Reisman, who was a law teacher well before his metamorphosis into the eminent sociologist he became a decade later.¹³⁹ Reisman's plea was for the wider enactment and enforcement of group libel laws, which he saw as the most effective antidote to Nazi propaganda.¹⁴⁰ Though he could hardly overlook the potential conflict with free speech and press that such laws would present, he insisted that, in perilous /times, even Bill of Rights guarantees must yield to national exigency: "[I]t is n[o] longer tenable to continue a negative policy of protection from the state . . . [which] plays directly into the hands of the groups whom supporters of democracy need most to fear."¹⁴¹

In substantial part as a response to Reisman's plea, a number of states did enact laws that specifically targeted racist, anti-religious, and otherwise ethnically demeaning publications.¹⁴² The validity of such laws was bound to reach the Supreme Court, and, in 1951, it did.¹⁴³ The specific context was an Illinois law applied to the publications of a racist group known as the White Circle League.¹⁴⁴ The statute imposed penalties on those who published or exhibited

134. *Id.* at 102-03.

135. *Id.* at 105.

136. *Dearborn Pub. Co. v. Fitzgerald*, 271 Fed. 479 (N.D. Ohio 1921).

137. Schultz, *supra* note 130, at 110-11.

138. *Id.* at 111.

139. David Riesman, *Democracy and Defamation: Control of Group Libel*, 42 COLUM. L. REV. 727 (1942).

140. *Id.* at 777-78.

141. *Id.* at 779-80.

142. *E.g.*, the Illinois statute which the Supreme Court sustained in *Beauharnais*, 343 U.S. at 251.

143. *Beauharnais*, 343 U.S. at 251.

144. *Id.* at 252-53.

material that “portrays depravity, criminality, unchastity, or lack of virtue of a class of citizens, of any race, color, creed, or religion which said publication or exhibition exposes the citizens of any race, color, creed, or religion to contempt, derision, or obloquy or which is productive of breach of the peace or riots.”¹⁴⁵

The officers of the White Circle League were charged with organizing the distribution of a provocative leaflet that urged the Chicago city government to “halt the further encroachment, harassment and invasion of white people, their property, neighborhoods and persons by the Negro” and called upon “one million self respecting white people in Chicago to unite.”¹⁴⁶ The leaflet also warned of ominous prospects—“the rapes, robberies, knives, guns, and marijuana of the Negro”—should such pleas not be heeded by the white community.¹⁴⁷

The Illinois courts sustained the convictions, rejecting First Amendment and due process claims, noting that the statute provided a defense only for publication “with good motives and for justifiable ends.”¹⁴⁸ The state courts also rejected the defendants’ plea that a “clear and present danger” must exist before such a sanction could be imposed on expression, however hateful.¹⁴⁹ A sharply divided U.S. Supreme Court in *Beauharnais v. Illinois* upheld the convictions and the validity of group libel laws.¹⁵⁰ The majority found persuasive an analogy to individual civil redress for defamation, and also by recent and earlier racial tensions in Chicago area: “We would deny experience,” wrote Justice Frankfurter for the Court, “to say that the Illinois legislature was without reason in seeking ways to curb false or malicious defamation of racial and religious groups, made in public places and calculated to have a powerful emotional impact on those to whom it was presented.”¹⁵¹ Since libel at that time claimed no First Amendment protection, there was no constitutional imperative for a clear and present danger standard.¹⁵²

The dissenters were dismayed by such a ruling; Justice Black (who often cited *Beauharnais* as the Court’s very worst judgment during his three and one-half decades) insisted that the majority “acts on the bland assumption that the First Amendment is wholly irrelevant.”¹⁵³ Even Justice Stanley Reed, seldom counted among champions of free speech, dissented here, albeit more on due process than First Amendment grounds.¹⁵⁴ Justice Robert Jackson, usually found on the other side of such issues after his experience as chief War Crimes

145. *Id.* at 251.

146. *Id.* at 252.

147. *Id.*

148. *Id.* at 254.

149. *Id.*

150. *Id.* at 267.

151. *Id.* at 261.

152. *Id.* at 267.

153. *Id.*

154. *Id.* at 277.

prosecutor at Nuremberg, also dissented from what he deemed an unsupportable inference of danger or threat from a misguided racist tract.¹⁵⁵

Despite universal condemnation in later years¹⁵⁶ and ample opportunity, the Court has never overruled *Beauharnais*. Though one would today rely upon it at very considerable peril, as recently as a decade ago the Court cited *Beauharnais* as illustrative of categories of speech that had been denied First Amendment protection.¹⁵⁷ The central premise of *Beauharnais* may survive in a different and more ominous form. To what extent persistent efforts to curb racist, sexist, anti-religious, and homophobic rhetoric may have taken comfort from the survival of this precedent, albeit without honor, is impossible to tell. The fact remains that the past half-century has been a time of pervasive and recurrent effort to protect vulnerable groups in our society from words that may wound or offend because of racial, religious, ethnic or other differences.¹⁵⁸ This question has taken several forms beyond the criminal sanctions against “group libel” that were theoretically validated in *Beauharnais*.

In the late 1970s, a dozen or so states, including New York and California, did enact laws that imposed civil sanctions on those who uttered racially or religiously hostile words.¹⁵⁹ It was on the basis of such statutes, for example, that an upstate New York gift shop was ordered to remove from its window an abacus device jokingly labeled “Polish calculator”¹⁶⁰ and that a downstate restaurant owner was ordered to apologize in writing to a waitress whom he had denounced publicly as a “Jewish Broad” because she allegedly sought special treatment.¹⁶¹ While such laws were occasionally challenged, they seem to have remained on the books, largely forgotten and apparently seldom, if ever, enforced.¹⁶²

The ensuing decade saw renewed focus on the protection of vulnerable groups in a very different form. Several hundred colleges and universities, responding both to minority student pressure and to an institutional quest for civility, adopted restrictive speech codes.¹⁶³ The precise approach varied substantially from campus to campus. Some such constraints were added to existing harassment codes,¹⁶⁴ while others buttressed anti-bias rules,¹⁶⁵ and a few targeted

155. *Id.* at 287.

156. *See, e.g.*, HARRY KALVEN, JR., *THE NEGRO AND THE FIRST AMENDMENT* 15-16, 50-51 (1965).

157. *New York v. Ferber*, 458 U.S. 747, 763 (1982).

158. *See, e.g.*, O'NEIL, *FREE SPEECH*, *supra* note 67, at Chapter 1.

159. *E.g.*, N.Y. EXEC. LAW § 296 (1980).

160. The order was reversed by the Appellate Division, and the reversal was sustained by a sharply divided Court of Appeals. *State Div. of Human Rights ex rel. Gladwin v. McHarris Gift Center*, 419 N.Y.S.2d 405, *aff'd*, 418 N.E.2d 393 (N.Y. 1980).

161. *Imperial Diner, Inc. v. State Human Rights Appeals Bd.*, 417 N.E.2d 525 (N.Y. 1980).

162. *See* Robert M. O'Neil, *Second Thoughts on the First Amendment*, 13 N.M.L. REV. 577, 588-89 (1983).

163. *See* O'NEIL, *FREE SPEECH*, *supra* note 67, at Chapter 1.

164. *Id.* at 8.

165. *Id.* at 8-9.

racially or religiously oriented “fighting words.”¹⁶⁶ Legal challenges by civil liberties groups were not far behind.

By the mid 1990s, every speech code challenged in court was found wanting, chiefly because of imprecise language, often drafted in haste, that left the campus community genuinely uncertain about what language was prohibited.¹⁶⁷ Moreover, there was little evidence that the existence of such speech codes genuinely made a difference—either in the sensitivity of the campus racial climate, or in the civility of discourse.¹⁶⁸ Occasionally, even today, a university may consider adopting a speech code in response to racial or other campus tensions despite the dismal record of such regulations in the courts and the meager proof of positive impact.¹⁶⁹

It is the latest attempt to balance free speech and equality that has produced the Supreme Court’s conundrum. Even as speech codes were being challenged, some communities adopted “hate speech” laws.¹⁷⁰ The St. Paul, Minnesota, ordinance, which brought the issue to the high Court, was representative. That law made it a crime to place on public or private property “a symbol, object . . . or graffiti including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender.”¹⁷¹ One of the first persons so charged was a juvenile who had burned a cross on the lawn of an African-American family.¹⁷² Although charges for trespass, arson, and other clearly unlawful conduct would have been in order, the prosecutor opted to use the newly enacted ordinance.¹⁷³

Minnesota’s courts rejected First Amendment challenges to the law, and the Supreme Court granted certiorari.¹⁷⁴ The unanimity of the Justices in reversing the conviction in *R.A.V. v. St. Paul* masked a deep philosophical division within the Court.¹⁷⁵ For Justice Scalia, writing for the new majority, the fatal flaw of the ordinance was its reliance on content differentiation.¹⁷⁶ Even though the expression involved in such a case might well be less than fully protected—as fighting words, for example—its status did not empower government to “regulate [its] use based on hostility—or favoritism—towards the underlying message expressed.”¹⁷⁷ While the City might well have forbidden all expression of a certain type, it could not selectively target only regulable speech which evoked ten-

166. *Id.* at 9.

167. *E.g.*, Doe v. University of Michigan, 721 F. Supp. 852 (E.D. Mich. 1989).

168. See O’NEIL, FREE SPEECH, *supra* note 67, at 12-13.

169. For a relatively recent revival of such interest at Rutgers University, see John Carlin, *Racial Slur Sparks Student Revolt Against “PC” Notions*, THE INDEPENDENT, Feb. 19, 1995, at 16.

170. *E.g.*, ST. PAUL, MINN. LEGIS. CODE § 292.012 (1990).

171. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 379 (1992).

172. *Id.*

173. *Id.* at 380.

174. *Id.* at 380-81.

175. *Id.* at 379.

176. *Id.* at 381.

177. *Id.* at 386.

sion or hostility “on the basis of race, color, creed, religion or gender” and not for other reasons or in other realms of advocacy.¹⁷⁸

For the four Justices who concurred only in the result, such a novel approach departed sharply from familiar First Amendment jurisprudence, and potentially created far more problems than it solved—indeed, for one of these Justices, potentially “an aberration.”¹⁷⁹ They were “puzzled” by the notion that otherwise unprotected speech, such as fighting words, might gain protection if targeted because of specific content.¹⁸⁰ For them, the same result should have been reached, and the conviction overturned, because of the overbreadth of the ordinance.¹⁸¹ Under a narrower and more precise prohibition aimed at such activity, three of the concurring Justices strongly implied they would have been ready to recognize state power to proscribe such hateful activity, even if it incidentally included some expression.¹⁸²

That suggestion soon proved prophetic. In the very next term, again with unanimity, the Court held in *Wisconsin v. Mitchell* that states might decree harsher sentences for those who commit certain criminal acts on the basis of the race of the victim.¹⁸³ Many states had, even while rejecting hate speech laws and codes, enacted versions of a model law which required a stiffer sentence if it were proved that the defendant had “select[ed] the person against whom the crime is committed because of the race, religion, color, disability, sexual orientation, national origin or ancestry of that person.”¹⁸⁴

Distinguishing hate crimes from hate speech might have proved an impossible task. The defendant in *Mitchell* had insisted that a racially hostile motive or animus could be established only by evidence of the very type of speech that *R.A.V.* seemed to protect from direct criminal sanctions.¹⁸⁵ Thus, the precise words that could not be reached directly because of the Court’s concern about content selectivity now seemed vulnerable to collateral use for the purpose of justifying a substantially harsher penalty.

The *Mitchell* Justices were not deterred. The Court reasoned that to the extent that a sentence-enhancement law targeted motive, it was not markedly different from reliance on motive for a host of other purposes.¹⁸⁶ Here the Court invoked two recent rulings that had allowed trial judges to take account of racial animus in the sentencing process and overlooked the difference between what was in those cases a discretionary use of words that revealed bias, and the mandatory use of such evidence under the Wisconsin law.¹⁸⁷ *R.A.V.* was distin-

178. *Id.* at 391.

179. *Id.* at 415.

180. *Id.* at 402.

181. *Id.*

182. *Id.* at 417.

183. 508 U.S. 476, 490 (1993).

184. *Id.* at 483.

185. *Id.* at 488.

186. *Id.* at 485.

187. *Id.* at 486-87.

guished in a few sentences as an *ipse dixit*. Although the law struck down the year before “was explicitly directed at expression (i.e., ‘speech’ or ‘messages’), the statute in this case,” declared the *Mitchell* opinion, “is aimed at conduct unprotected by the First Amendment.”¹⁸⁸ Such a distinction was not satisfying at the time and, though the Court has not revisited the hate speech/hate crime distinction, it remains troubling a decade later.

If perfect consistency in so complex and contentious a field as First Amendment law is unrealistic, the current tension between free expression and equality leaves much to be desired. As though to illustrate, one of the Supreme Court’s most recent rulings compounds the confusion. A divided Court ruled that the Boy Scouts of America could not, as a First Amendment matter, be compelled to accept a gay person as a scoutmaster in violation of longstanding policy and its declared mission.¹⁸⁹ In several previous encounters with comparable conflicts between freedom of association and anti-bias laws, the First Amendment claim had been forced to yield to a compelling state interest in equal access to places of public accommodation.¹⁹⁰ Thus, service organizations and even private social clubs had been required to admit women despite long traditions as all-male entities.¹⁹¹ Now, however, the balance tipped the other way. What the Chief Justice found crucial was that compelled acceptance of a gay scoutmaster would “force the organization to send a message” abhorrent to its mission and its traditions.¹⁹² In that respect, the majority found guidance in an earlier judgment which declined to force the organizers of a St. Patrick’s Day parade to accept a gay and lesbian contingent, even though state law defined the parade as a “place of public accommodation” for such purposes.¹⁹³ In the parade case, the anti-bias law had been stretched well beyond its customary reading, and there was little doubt that having to include an unwelcome group in a two-hour event would have conveyed, if not compelled, an abhorrent message.¹⁹⁴

Such concerns were substantially muted, however, in the Boy Scout case. To the four dissenters, the private club precedents were dispositive, save for one implicit distinction.¹⁹⁵ “The only apparent explanation for the majority’s holding,” concluded Justice Stevens, “is that homosexuals are simply so different from the rest of society that their presence alone—unlike any other individual’s—should be singled out for special First Amendment treatment.”¹⁹⁶ Such a critique seems both harsh and warranted—though no harsher than the claim of Justices Scalia, Thomas, and Kennedy that, in sustaining curbs against anti-

188. *Id.* at 487.

189. *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 661 (2000).

190. *E.g.*, *Roberts v. United States Jaycees*, 468 U.S. 609 (1984).

191. *E.g.*, *New York State Club Ass’n v. New York*, 487 U.S. 1 (1988).

192. *Id.* at 653.

193. *Id.* at 653-54.

194. *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group*, 515 U.S. 557, 574-75 (1995).

195. *Dale*, 530 U.S. at 696.

196. *Id.*

abortion protest, the Court has acted “in stark contradiction of the constitutional principles we apply in all other contexts.”¹⁹⁷

The culprit, in the Boy Scout case at least, is in substantial part our deep and persistent ambivalence about equality and expression.¹⁹⁸ Under the First Amendment, we highly value all speech. Almost alone among nations, we extend such protection fully to material that is racist, sexist, anti-Semitic, and homophobic.¹⁹⁹ Even Canada, whose values are remarkably similar to ours in virtually all respects, imprisons virulent anti-Semites and racists.²⁰⁰ We still insist, at least in theory, that we do not recognize different levels of protection on the basis of favored and disfavored messages. Indeed, the teaching of *R.A.V.* is that even material which normally deserves less than full protection may somehow acquire such protection if it is targeted on the basis of its treatment of race, gender, religion, or sexual orientation.

Somehow our view of the relationship between equality and speech remains confused, and the tension unresolved. *Beauharnais*, to the extent it survives, suggests that certain sanctions may be appropriate for such expression where they would not (even a half century ago) have been acceptable for less volatile material. The Court’s seemingly clear aversion to hate speech laws was sharply tempered by its readiness to embrace not easily distinguishable hate crime or sentence enhancement provisions. So it has been for well over a half century. Easy answers are not a ready prospect.

V

CONCLUSION

For each of the three persistent tensions we have revisited—the conflicts between free expression and privacy, civility, and equality—there has surely been no shortage of litigation. Yet the tension persists in each area, for reasons that seem to have eluded the process of constitutional adjudication. Anomalous rulings like *Chaplinsky*’s ban on “fighting words” and *Beauharnais*’ validation of “group libel” laws survive, occasionally discredited, but never repudiated. Indeed, the situation becomes ever more confusing as lawmakers and regulators craft new solutions, without exhausting the potential of those already on the books—California’s “virtual trespass” law to protect privacy against new threats, or new types of campus speech codes, or new rules to enhance civility in

197. *Hill v. Colorado*, 730 U.S. 703, 742 (2000).

198. See, e.g., Steven Shiffrin, *Racist Speech, Outsider Jurisprudence, and the Meaning of America*, 80 CORNELL L. REV. 43 (1994).

199. See, O’NEIL, LIABILITY, *supra* note 38, at 14-15.

200. E.g., *R. v. Keegstra*, [1990] 3 S.C.R. 697. The Canadian Human Rights Commission recently ruled that Holocaust denier Ernst Zundel must close down his Internet website because of the hateful messages it contained and disseminated. Noting that, on the Zundelsite, as it is often cited, “Jews are vilified in the most rabid and extreme manner,” the Commission answered Zundel’s free speech claims by observing that material such as that which he regularly posted “can erode an individual’s personal dignity and self worth.” See Kirk Makin, *Rights Group Orders Zundel to Kill Hate Site*, TORONTO GLOBE & MAIL, Jan. 19, 2002, at A7 (summarizing a sixty-nine page opinion rendered by the Commission the previous day).

the workplace and elsewhere. What we have failed to do is to resolve the old tensions and conflicts and anomalies before we create new ones, thereby reducing still further the prospect that we will ever impose reason and order in any of these sectors of free expression.