

~~Erznoznik direct the citizens of Skokie that it is their burden to avoid the offensive symbol if they can do so without unreasonable inconvenience. Accordingly, we are constrained to reverse that part of the appellate court judgment enjoining the display of the swastika. That judgment is in all other respects affirmed.~~

#### QUESTIONS

- 1 What meaning does display of the swastika have for the Jewish community? Does display of the swastika constitute "fighting words"?
- 2 In your view, did the circuit court, the appellate court, or the Illinois Supreme Court provide the most defensible resolution of this case?

### Racist Speech as the Functional Equivalent of Fighting Words

Charles R. Lawrence III

Lawrence argues that face-to-face racial insults are unworthy of First Amendment protection. He gives two reasons: (1) Racial insults produce an immediate injury. (2) Racial insults typically have a preemptive effect on further speech and thus do not cohere with the underlying purpose of the First Amendment, which is to foster speech. Lawrence presents an analysis of the "speechlessness" often experienced by those subjected to racial insults. In his view, racial insults are less likely than other "fighting words" to produce violent responses, in part because of the relative powerlessness of those typically subjected to them. However, Lawrence argues that, since racial insults inhibit speech as much or more than other "fighting words," they are best understood as the "functional equivalent" of fighting words.

... When racist speech takes the form of face-to-face insults, catcalls, or other assaultive speech aimed at an individual or small group of persons, then it falls within the "fighting words" exception to first amendment protection. The Supreme Court has held [in *Chaplinsky v. New Hampshire* (1942)] that words that "by their very utterance inflict injury or tend to incite an immediate breach of the peace" are not constitutionally protected.

Face-to-face racial insults, like fighting words, are undeserving of first amendment protection for two reasons. The first reason is the immediacy of the injurious

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Let Him Go: Regulating Racist Speech  
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impact of racial insults. The experience of being called "nigger," "spic," "Jap," or "kike" is like receiving a slap in the face. The injury is instantaneous. There is neither an opportunity for intermediary reflection on the idea conveyed nor an opportunity for responsive speech. The harm to be avoided is both clear and present. The second reason that racial insults should not fall under protected speech relates to the purpose underlying the first amendment. If the purpose of the first amendment is to foster the greatest amount of speech, then racial insults disserve that purpose. Assaultive racist speech functions as a preemptive strike. The racial invective is experienced as a blow, not a proffered idea, and once the blow is struck, it is unlikely that dialogue will follow. Racial insults are undeserving of first amendment protection because the perpetrator's intention is not to discover truth or initiate dialogue but to injure the victim.

The fighting words doctrine anticipates that the verbal "slap in the face" of insulting words will provoke a violent response with a resulting breach of the peace. When racial insults are hurled at minorities, the response may be silence or flight rather than a fight, but the preemptive effect on further speech is just as complete as with fighting words. Women and minorities often report that they find themselves speechless in the face of discriminatory verbal attacks. This inability to respond is not the result of oversensitivity among these groups, as some individuals who oppose protective regulation have argued. Rather, it is the product of several factors, all of which reveal the non-speech character of the initial preemptive verbal assault. The first factor is that the visceral emotional response to personal attack precludes speech. Attack produces an instinctive, defensive psychological reaction. Fear, rage, shock, and flight all interfere with any reasoned response. Words like "nigger," "kike," and "faggot" produce physical symptoms that temporarily disable the victim, and the perpetrators often use these words with the intention of producing this effect. Many victims do not find words of response until well after the assault when the cowardly assaulter has departed.

A second factor that distinguishes racial insults from protected speech is the preemptive nature of such insults—the words by which to respond to such verbal attacks may never be forthcoming because speech is usually an inadequate response. When one is personally attacked with words that denote one's subhuman status and untouchability, there is little (if anything) that can be said to redress either the emotional or reputational injury. This is particularly true when the message and meaning of the epithet resonates with beliefs widely held in society. This preservation of widespread beliefs is what makes the face-to-face racial attack more likely to preempt speech than are other fighting words. The racist name-caller is accompanied by a cultural chorus of equally demeaning speech and symbols.

The subordinated victim of fighting words also is silenced by her relatively powerless position in society. Because of the significance of power and position, the categorization of racial epithets as "fighting words" provides an inadequate paradigm; instead one must speak of their "functional equivalent." The fighting words doctrine presupposes an encounter between two persons of relatively equal power who have been acculturated to respond to face-to-face insults with violence. The fighting words doctrine is a paradigm based on a white male point of view. In most

situations, minorities correctly perceive that a violent response to fighting words will result in a risk to their own life and limb. Since minorities are likely to lose the fight, they are forced to remain silent and submissive. This response is most obvious when women submit to sexually assaultive speech or when the racist name-caller is in a more powerful position—the boss on the job or the mob. Certainly, we do not expect the black women crossing the Wisconsin campus to turn on their tormentors and pummel them. Less obvious, but just as significant, is the effect of pervasive racial and sexual violence and coercion on individual members of subordinated groups who must learn the survival techniques of suppressing and disguising rage and anger at an early age.

One of my students, a white, gay male, related an experience that is quite instructive in understanding the inadequacy and potential of the “fighting words” doctrine. In response to my request that students describe how they experienced the injury of racist speech, Michael told a story of being called “faggot” by a man on a subway. His description included all of the speech inhibiting elements I have noted previously. He found himself in a state of semi-shock, nauseous, dizzy, unable to muster the witty, sarcastic, articulate rejoinder he was accustomed to making. He suddenly was aware of the recent spate of gay-bashing in San Francisco, and how many of these had escalated from verbal encounters. Even hours later when the shock resided and his facility with words returned, he realized that any response was inadequate to counter the hundreds of years of societal defamation that one word—“faggot”—carried with it. Like the word “nigger” and unlike the word “liar,” it is not sufficient to deny the truth of the word’s application, to say, “I am not a faggot.” One must deny the truth of the word’s meaning, a meaning shouted from the rooftops by the rest of the world a million times a day. Although there are many of us who constantly and in myriad ways seek to counter the lie spoken in the meaning of hateful words like “nigger” and “faggot,” it is a nearly impossible burden to bear when one encounters hateful speech face-to-face.

But there was another part of my discussion with Michael that is equally instructive. I asked if he could remember a situation when he had been verbally attacked with reference to his membership in a superordinate group. Had he ever been called a “honkie,” a “chauvinist pig,” or “mick”? (Michael is from a working class Irish family in Boston.) He said that he had been called some version of all three and that although he found the last one more offensive than the first two, he had not experienced—even in that subordinated role—the same disorienting powerlessness he had experienced when attacked for his membership in the gay community. The question of power, of the context of the power relationships within which speech takes place, must be considered as we decide how best to foster the freest and fullest dialogue within our communities. . . .

#### QUESTIONS

- 1 Does Lawrence provide a compelling analysis of the “speechlessness” often experienced by those who are subjected to racial insults?
- 2 Lawrence claims that “the fighting words doctrine is a paradigm based on a white male point of view.” Do you agree?

# SOCIAL ETHICS

## Morality and Social Policy

EIGHTH EDITION

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