FREE SPEECH AND ANTISEMITISM: *COLLIN V. SMITH* TODAY

R. George Wright*

INTRODUCTION

The *Skokie*-based *Collin v. Smith* litigation[1] resulted in our law's most significant constitutional response to antisemitic hate speech. The *Skokie* case opinions shed light on how antisemitism was thought of at the time and place in question. More importantly, how we now choose to understand the *Collin v. Smith* cases tells us much about how we conceive of antisemitism and of antisemitic injury today. The argument herein is that our understanding of freedom of speech, and of its value and limits, has significantly evolved over the decades since *Collin v. Smith*. Relatedly, our collective understanding of the harms and injuries inflicted by antisemitic speech has, at the deepest level, been significantly changing as well. In both of these respects, the *Collin v. Smith* litigation has only increased in importance over time.

As a preliminary matter, we adopt herein no particular conception of the meaning of antisemitism. Merely as a point of reference, though, one might usefully think of the phenomenon that is referred to as ressentiment.[2] The philosopher Max Scheler characterizes ressentiment as "a self-poisoning of the mind . . . [involving] the constant tendency to indulge in certain kinds of value delusions and corresponding value judgments. The emotions and affects . . . primarily concerned are revenge, hatred, malice, envy, the impulse to detract and spite."[3] For our

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* Lawrence A. Jegen III Professor of Law, Indiana University Robert H. McKinney School of Law.

[1] For our purposes, the most essential case opinions are *Vill. of Skokie v. Nat'l Socialist Party of Am.*, 373 N.E.2d 21 (Ill. 1978) (per curiam); *Collin v. Smith*, 447 F. Supp. 676 (N.D. Ill. 1978); and then, chronologically last but of greatest authority, *Collin v. Smith*, 578 F.2d 1197 (7th Cir. 1978), *cert. denied*, 439 U.S. 916 (1978).

[2] MAX SCHELER, RESSENTIMENT 25–28 (Lewis B. Coser & William W. Holdheim trans., 1994, Marquette Univ. Press ed. 2010) (1915).

[3] *Id.* at 25. Scheler goes on to claim that "[r]essentiment must . . . be strongest in a society like ours, where approximately equal rights (political and otherwise) or formal social equality, publicly recognized, go hand in hand with wide factual differences in power, property, and education. While each has the 'right' to compare himself with everyone else, he cannot do so in fact." *Id.* at 28. Scheler's discussion of ressentiment owes much to, but does not track, the discussion of ressentiment by Friedrich Nietzsche. *See* FRIEDRICH NIETZSCHE, ON THE GENEALOGY OF MORALS 36–39 (Walter Kaufmann & R.J. Hollingdale trans., 1967) (1887).

present purposes, we may think of antisemitism along similar lines. In any event, let us now turn to the reported opinions in the *Collin v. Smith* litigation itself.

I. THE KEY CASES IN THE *COLLIN V. SMITH* LITIGATION

Chronologically first among the most relevant case opinions is that of the Illinois Supreme Court in *Village of Skokie v. National Socialist Party of America*.[4] The court in *Village of Skokie* noted, importantly, that Skokie "has a population of about 70,000 persons of which approximately 40,500 are of 'Jewish religion or Jewish ancestry,' and of this latter number 5,000 to 7,000 are survivors of German concentration camps."[5]

The Illinois Supreme Court then recounted testimony, at the hearing on Skokie's request for an emergency injunction, that the perceived purpose of the proposed National Socialist demonstration in Skokie was to target the Jewish population in general.[6] In particular, the perceived message was "that we are not through with you"[7] and that "the Nazi threat is not over, it can happen again."[8] The opinion was also expressed that if the proposed Nazi demonstration in Skokie took place, the demonstration "would result in violence."[9]

The proposed demonstration itself was to take place on May 1, 1977, in front of the Village Hall, and was to last from its

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As well, consider Andrew Huddleston, *Ressentiment*, 131 ETHICS 670, 677–78 (2021). Simplifying a bit, Huddleston defines ressentiment as a normatively objectionable state of mind involving suffering, anger, and resentment over a perceivably insulting, demeaning, unfair or unjust injury or state of affairs that is thought to have been caused by some specified person or group, prompting an often obsessive desire for vengeance. *See id.* As to the final element, focusing on a desire for vengeance, consider the language of Klan organizer Clarence Brandenburg, as reported in *Brandenburg v. Ohio*, 395 U.S. 444, 446 (1969) (per curiam) ("We're not a revengent organization, but . . . it's possible that there might have to be some revengeance taken.").

It should go without saying that historically, even some of the otherwise most acutely insightful philosophers have not been immune from various forms of antisemitism. *See generally* Harry Redner, *Philosophers and Anti-Semitism*, 22 MOD. JUDAISM 115 (2002); Laurie Shrage, Opinion, *Confronting Philosophy's Anti-Semitism*, N.Y. TIMES (March 18, 2019), https://www.nytimes.com/2019/03/18/opinion/philosophy-anti-semitism.html.

[4] 373 N.E.2d 21 (Ill. 1978) (per curiam).

[5] *Id.* at 22.

[6] *See id.*

[7] *Id.*

[8] *Id.*

[9] *Id.*

3:00 p.m. start time for about 20–30 minutes.[10] The purported intention of the demonstration was to protest Skokie's permit requirement of $350,000 in insurance.[11] The contemplated 30–50 demonstrators were to march in single file, back and forth.[12]

Importantly, the demonstrators "were to wear uniforms which include a swastika emblem or armband. They were to carry a party banner containing a swastika emblem[13] and signs containing such statements as 'White Free Speech,' 'Free Speech for the White Man,' and 'Free Speech for White America.'"[14] The National Socialists represented that they would not attempt to hand out literature, nor make any ethnically or religiously derogatory statements, nor fail to comply with any reasonable police requests.[15]

The Illinois Supreme Court on this basis then addressed the federal constitutional merits of the case. Oddly, the Court focused initially on the anti-military draft jacket case of *Cohen v. California*.[16] Thus, the Court declared that the decisions of the United States Supreme Court, "particularly *Cohen v. California* . . . in our opinion compel us to permit the demonstration as proposed, including display of the swastika."[17]

Consider, though, that Justice Harlan began his opinion in *Cohen* by observing that "this case may seem at first blush too inconsequential to find its way into our books."[18] This is hardly the way any court would begin any opinion addressing the *Skokie* litigation. More substantively, though, the Court in *Cohen* expressly declared that the case did not involve the so-called "fighting words" doctrine.[19] In direct contrast, the Illinois Supreme Court in *Village of Skokie* crucially relied on the scope, and limits, of the "fighting words" doctrine.[20] *Cohen*'s abstract anti-draft message carried essentially nothing of the personal

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[10] *See id.* at 22.
[11] *Id.* This purpose would seem to logically presume some prior, independent purpose in seeking a permit in the first place.
[12] *Id.*
[13] *Id.*
[14] *Id.*
[15] *Id.*
[16] *See id.* at 23 (citing Cohen v. California, 403 U.S. 15 (1971)).
[17] *Id.*
[18] *Cohen*, 403 U.S. at 15.
[19] *See id.* at 20.
[20] *See Skokie*, 373 N.E.2d at 23–24. The crucial "fighting words" case is *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

impact of the Skokie demonstration on its intended immediate audience.[21]

On the interpretation of the Illinois Supreme Court, the *Chaplinsky* "fighting words" case permitted the restriction only of "extremely hostile personal communication likely to cause immediate physical response,"[22] or, in other words, speech that has "a direct tendency to cause acts of violence by . . . whom, individually, the remark is addressed."[23]

Considering the testimony as to the likelihood of violence in response to the proposed Skokie demonstration,[24] it was hardly unreasonable for the Illinois Supreme Court to apply the *Chaplinsky* "fighting words" test. Still, a reading of *Chaplinsky*, in the Skokie context, suggests that the Illinois Supreme Court completely overlooked the most profoundly relevant aspect of *Chaplinsky*.

The *Chaplinsky* Court, after all, did not limit fighting words to those words which "tend to incite an immediate breach of the peace."[25] There is, instead, an apparently separate and independent form of "fighting words," however misleadingly labeled. In particular, the *Chaplinsky* Court also allowed, separately, for the prohibition of "[words] which by their very utterance inflict injury."[26]

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[21] *Compare Cohen*, 403 U.S. at 16 (explaining defendant was observed in a Los Angeles County courthouse wearing a jacket with the words, "Fuck the Draft" plainly visible), *with Skokie,* 373 N.E.2d at 23 (describing the planned Nazi rally in the Village of Skokie.).

[22] *Skokie*, 373 N.E.2d at 23.

[23] *Id.* For discussion of the difference between, for example, one-on-one hostile speech, and many-on-many hostile speech that may be beyond the application of the Chaplinsky "fighting words" doctrine, see Carl Cohen, *Free Speech and Political Extremism: How Nasty Are We Free to Be?*, 7 L. & PHIL. 263, 273 (1989). For discussion of similar distinctions between personal and group address in the sexual harassment context, see Eugene Volokh, *One-to-One Speech vs. One-to-Many Speech, Criminal Harassment Laws, and "Cyberstalking,"* 107 NW. U. L. REV. 731 (2013). *See also* Richard Delgado & David H. Yun, *Pressure Valves and Bloodied Chickens: An Analysis of Paternalistic Objections to Hate Speech Regulation*, 82 CALIF. L. REV. 871, 884 (1994). For a useful survey and updating of hate speech theory and case law, with an emphasis on the use and limits of the tort theory of intentional infliction of severe emotional distress, see Tasnim Motala, *Words Still Wound: IIED & Evolving Attitudes Toward Racist Speech*, 56 HARV. C.R.-C.L. L. REV. 115 (2021).

[24] *See Skokie*, 373 N.E.2d at 22.

[25] *Chaplinsky*, 315 U.S. at 572.

[26] *Id.*

It is this prong of the "fighting words" doctrine, left undiscussed by the court in *Village of Skokie*,[27] that seems the more deeply relevant and important. We must think carefully about the nature of the injury inflicted by Nazi speeches, signs, emblems, and insignia, and by the organized Nazi presence in Skokie. Initially, though, it should be clear that there typically is no meaningful possibility of a rebuttal to, or counter speech in response to, the public exhibition, in context, of a swastika.[28]

Instead, though, the Illinois Supreme Court fixated on the branch of *Chaplinsky* that addresses the probability of an immediate violent reaction.[29] Following language in *Cohen*, the court took this form of prohibitable fighting words to involve "those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction."[30]

This understanding of "fighting words" is dubious on several grounds. First, it is doubtful in the extreme that the test should, arguably, exclude words directed toward, say, a small or large group of persons, as distinct from an individual.

Second, it is doubtful that the best way to judicially respond to the possibility of some hypothetical hypersensitive speech addressee is to refer instead "to the ordinary citizen." How disposed is the "ordinary citizen" to react violently to direct, personally abuse language? Does not gender matter? Does not age, or physical ability, matter? What degree of knowledge of the Nazi concentration camps is held by the "ordinary citizen?" How disposed is an essentially featureless "ordinary citizen" to immediately physically retaliate, with violence, against the speaker? And most crucially, why should the law specially and distinctively protect, in this respect, abusive speech targeting persons who cannot fight back?

Third, we must wonder whether the meaning and impact of the public display of a swastika is to be found at the level of some individual person, at whom the display of the swastika is directed. Is the impact of the display of the swastika not instead

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[27] *See generally Skokie*, 373 N.E.2d 21.
[28] *See* Delgado & Yun, *supra* note 23, at 884–85.
[29] *See Skokie*, 373 N.E.2d at 23.
[30] *Id.* Note the sheer oddness of asking whether largely elderly Shoah survivors in particular would be likely to physically attack younger demonstrators. Legally incentivizing the verbal abuse of persons who cannot fight back is especially dubious.

largely a matter of social groups, of social identities, and of collective experiences?

Fourth, any focus on the "imminent violence" aspect of fighting words suggests that, apart from the public-school context,[31] threats of violence in response to speech by opponents of the speech cannot be sufficient grounds for restricting the speech in question. It is thought that incentivizing a violent response to speech would give a speech-repressive "heckler's veto" to opponents of the speech's message.[32] The Court has instead declared that among the legitimate purposes of speech is to stir people to anger.[33] The crucial problem, though, is that anger does not begin to exhaust the typical, and intended, reactions to the public display, by professed Nazi Party members, of swastika emblems.[34]

The Illinois Supreme Court throughout adopts an abstract, disembodied, distanced tone that manifests not an admirably detached judicial impartiality, but a failure to meaningfully distinguish among crucially different circumstances.[35] Hence the Court's oddly inapt references to sensitive viewers;[36] to degrees of squeamishness and distastefulness;[37] to the constitutional requirement of "open debate;"[38] and to freedom of speech as the only path compatible with "individual dignity."[39] The possibility that the dignity associated with open debate, which was of course hardly manifested in the *Skokie* case, could conflict with the individual and collective dignity of the victims of the symbolic speech was not explicitly explored.[40]

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[31] Note the incentivizing of threats of violence in response to disfavored speech, in order to encourage the prohibition, in advance, of the speech in question, in *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513–14 (1969).
[32] *See, e.g.*, Terminiello v. Chicago, 337 U.S. 1, 4 (1949) ("[Speech] may indeed best serve its high purpose when it induces a condition of unrest . . . or even stirs people to anger"). *See also id.* at 5. The Court followed up its general rejection of a "heckler's veto" in traditional public fora in Gregory v. Chicago, 394 U.S. 111, 113–14 (1969).
[33] *See Terminiello*, 337 U.S. at 4.
[34] *See Skokie*, 373 N.E.2d at 24 (noting a swastika display as symbolic, though reprehensible, widely offensive, and abhorrent, political speech).
[35] *See, e.g.*, *id.* ("That the air may at times seem filled with verbal cacophony is, in this sense not a sign of weakness but of strength.").
[36] *See id.*
[37] *See id.*
[38] *Id.*
[39] *Id.* at 23.
[40] *See generally Skokie*, 373 N.E.2d 21.

Similarly, pro-free speech conclusions were then reached shortly thereafter by the local federal district court in the case of *Collin v. Smith*.[41] The district court's opinion here referred, again largely irrelevantly, to the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."[42] Of course, the swastikas in the proposed Skokie demonstration were not intended to target government actors and institutions.[43] More fundamentally, the National Socialist Party's demonstration, given its nature and circumstances, was not intended to contribute to a "debate" in the sense of any ongoing dialogic, interactive, reciprocal, discursive inquiry into the merits of antisemitic opinions and policies.[44]

The district court in *Collin* then declared that "the public expression of ideas may not be prohibited merely because the ideas themselves are offensive to some of their hearers."[45] The problem here is that antisemitism that evokes the experience of the Shoah, individually and collectively, is not merely "offensive" in the sense in which we might think of a vulgar comedy monologue, a crude denunciation of the military draft, or even a public act of personal disrespect in general. Referring to distinctively Nazi symbols and language as "offensive," or even as "highly offensive," amounts to what the philosopher Gilbert Ryle referred to as a "category mistake."[46]

The district court then evoked the references in *Cohen* to "direct personal insult,"[47] to "verbal tumult,"[48] to "slurs and insults,"[49] to "verbal cacophony,"[50] and to "open debate."[51] Where these categories are not largely irrelevant to the *Skokie* litigation, they tend at best to mischaracterize, to one degree or

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[41] 447 F. Supp. 676 (N.D. Ill. 1978).
[42] *Id.* at 689 (quoting N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)).
[43] *See Skokie*, 373 N.E.2d at 23.
[44] It is hardly an abuse of language or of logic to decline to characterize, say, a swastika display as part of a 'debate' between National Socialists and, say, local survivors of the Shoah and their neighbors.
[45] *Collin*, 447 F. Supp. at 690 (quoting Street v. New York, 394 U.S. 576, 592 (1969)).
[46] *See* Ofra Magidor, *Category Mistakes*, STAN. ENCYC. PHIL. (July 5, 2019), https://plato.stanford.edu/entries/category-mistakes/.
[47] *Collin*, 447 F. Supp. at 690 (quoting *Cohen v. California*, 403 U.S. 15, 20 (1971)).
[48] *Id.* at 691 (quoting *Cohen,* 403 U.S. at 24).
[49] *Collin*, 447 F. Supp. at 691.
[50] *Id.* (quoting *Cohen*, 403 U.S. at 24–25).
[51] *Id.*

another, what is distinctively central to the *Skokie* context and circumstances, and upon which we briefly elaborate below.[52]

More usefully, the district court in *Collin* did refer explicitly to the more relevant "fighting words" prong that addresses words that "by their very utterance inflict injury,"[53] along with providing an extended discussion of the now constitutionally dubious case of *Beauharnais v. Illinois*.[54] *Beauharnais* had, twelve years before the Supreme Court first put constitutional free speech limits on the state tort law of libel,[55] upheld a group of libel statutes that prohibited some portrayals of "depravity, criminality, unchastity, or lack of virtue of a class of citizens, of any race, color, creed or religion which said [portrayal] exposes the citizens of any race, color, creed or religion to contempt, derision, or obloquy or which is productive of breach of peace or riots . . . ."[56]

Of course, it is questionable whether the point of the efforts to restrict the planned Skokie demonstration was one of "protecting reputations."[57] The relevance of the claim in *Collin* that "[t]here can be no question that races and religions have been and are the subject of legitimate debate"[58] is similarly doubtful. Interestingly, though, in the *Collin* court's view, "[i]t is particularly difficult to distinguish a person who suffers actual[ ] psychological trauma from one who is only highly offended . . . ."[59] The typical judicial emphasis, in all of the *Skokie* cases, on emotion and subjectivity does indeed deserve attention.[60] The overall tendency in the *Skokie* cases is to treat the proposed demonstration as raising a personal "fighting words" issue, with the emphasis being on the breach of the peace, or violent physical response, prong.[61] This is, again, hardly the most insightful or most valuable approach to the *Skokie* cases.

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[52] *See infra* Section III.
[53] *See Collin*, 447 F. Supp. at 689, *see also* Chaplinsky v. New Hampshire, 315 U.S. 568, 562 (1942).
[54] *See Collin*, 447 F. Supp. at 693–98; 343 U.S. 250 (1952).
[55] *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964).
[56] *Beauharnais*, 343 U.S. at 251 (quoting Ill. Rev. Stat. 1949, ch. 38 § 471). For discussion of the case, see Hadley Arkes, *Civility and the Restriction of Speech: Rediscovering the Defamation of Groups*, 1974 SUP. CT. REV. 281 (1974).
[57] *Collin*, 447 F. Supp. at 696.
[58] *Id.* at 697.
[59] *Id.*
[60] *See infra* Section II.
[61] *See Collin*, 447 F. Supp. at 697–99.

As it happened, though, the district court in *Collin* was famously affirmed on appeal by the Seventh Circuit.[62] The Seventh Circuit in *Collin* recognized that the plaintiff-appellees "know full well that, in light of their views and the historical associations they would bring with them to Skokie, many people would find their demonstration extremely mentally and emotionally disturbing, or the suspicion that such a result may be relished by appellees."[63]

In the view of the Seventh Circuit, the defendant Village of Skokie's concession that it did not then anticipate reactive violence at the planned demonstration[64] was of crucial legal import. The Seventh Circuit first said that the absence of expected reactive violence distinguished the case from the classic subversive advocacy case of *Brandenburg v. Ohio*.[65] The problem here is that *Brandenburg* addressed the possibilities of specifically intentional violence, and of likely or probable violence, on the part of the allies of the speaker.[66] *Brandenburg* did not address the question of reactive violence, or of violence on the part of the targets of the speech.[67]

More centrally, though, the Seventh Circuit in *Collin* said that the absence of expected violence in reaction to the speech "eliminates any argument based on the fighting words doctrine of *Chaplinsky v. New Hampshire* . . . ."[68] This is certainly true of the imminent reactive violence prong of *Chaplinsky*, at least at the stage of any prior restraint on the planned demonstration.[69] But the assumed, or actual, absence of any physical violence on anyone's part again does not begin to address the first of the two alternative *Chaplinsky* "fighting words" avenues, that of words

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[62] Collin v. Smith, 578 F.2d 1197 (7th Cir. 1978), *cert. denied*, 439 U.S. 916 (1978). Justices Blackmun and White would have granted certiorari, partly to examine the contemporary status of the Beauharnais group libel case, and partly to examine possible limitations of freedom of speech more broadly. *See* 439 U.S. at 916–19 (Blackmun, J., dissenting from denial of certiorari).

[63] *Collin*, 578 F.2d at 1200.

[64] *See id.* at 1203.

[65] *Id.* ("This confession takes this case out of the scope of Brandenburg v. Ohio . . . ."); 395 U.S. 444, 447 (1969) (per curiam).

[66] *See Brandenburg*, 395 U.S. at 447.

[67] *Cf. Collin*, 578 F.2d at 1203 (discussing the absence of fear on the part of the Village of "responsive" violence). The classic responsive violence case is *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949) (rejecting the application of a "heckler's veto of speech" because of actual or threatened violence by opponents of the speech in question).

[68] *Collin*, 578 F.2d at 1203.

[69] *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942).

"which by their very utterance inflict injury."[70] Crucially, we should instead consider what kinds of "injuries" may be inflicted in *Skokie*-like cases, and how those kinds of "injuries" should be constitutionally distinguished and addressed.

The Seventh Circuit in *Collin* then declared, revealingly, that "[t]he asserted falseness of Nazi dogma, and, indeed, its general repudiation, simply do not justify its suppression."[71] It is certainly true that the Supreme Court has held that there is free speech value in protecting some statements that are not only clearly false, but which amount to deliberate, calculated, and intentional lies.[72] Classically, John Stuart Mill's defense of freedom of speech encompassed not merely assertedly false, but broadly consensually false, claims.[73] Mill famously argues in particular that even if a popular opinion is entirely true, there can be crucial value in not merely tolerating, but in encouraging, its public challenge.[74] Specifically, unless an entirely true belief is "suffered to be, and actually is, vigorously and earnestly contested, it will, by most of those who receive it, be held in the manner of a prejudice, with little comprehension or feeling of its rational grounds."[75]

The problem here is that the Seventh Circuit in *Collin* opts for a mental model of what is actually taking place in the case that grossly distorts the most crucial realities.[76] The Seventh Circuit adopts here what we might call an otherwise widely appropriate "forensic" view of First Amendment circumstances.[77] At the core of this "forensic" view is the idea of a broad, ongoing, community practice involving the cooperative,

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[70] *See id.*
[71] *Collin*, 578 F.2d at 1203.
[72] *See* R. George Wright, *"What Is That Honor?": Re-Thinking Free Speech in the "Stolen Valor" Case*, 60 CLEV. ST. L. REV. 847 (2012) (discussing United States v. Alvarez, 567 U.S. 709 (2012)).
[73] *See* JOHN STUART MILL, ON LIBERTY 76, 108–09, 116 (Gertrude Himmelfarb ed., 1986) (1859).
[74] *Id.* at 79.
[75] *Id.* at 116. *See also id.* at 98–100 (discussing the distinctive value of sincere, as opposed to mere role-playing, advocacy of an idea).
[76] *See Collin*, 578 F.2d at 1206.
[77] For discussion of the idealized form of "forensic discourse," see generally JURGEN HABERMAS, JUSTIFICATION AND APPLICATION: REMARKS ON DISCOURSE ETHICS (Ciaran D. Cronin trans., reissue ed. 1994). For a condensed version, see R. George Wright, *Civil Disobedience Today: Some Basic Problems and Possibilities*, 51 MEM. L. REV. 197, 218–21 (2020).

competitive, and indeed often fractious mutual discursive exchange of data and opinions.[78]

On this "forensic" model of speech, the logical move is, in accordance with John Stuart Mill's argument,[79] to assume the generally protected status of presumably false and widely rejected Nazi dogma.[80] On this model, the familiar state law tort of the intentional infliction of severe emotional distress[81] raises interesting complications, but any such tort must then be constrained by "forensic" free speech rules.[82] Perhaps a different question would be raised if offensiveness, and even outrageousness, were not to be treated as largely relativist, subjectivist, or inherently contestable. But in our legal culture, they cannot be granted any better-grounded status.[83]

Thus, on the Seventh Circuit's model, the problem with distinguishing *Skokie*-like contexts from other contexts is that all of the cases involve speech that "invite[s] dispute . . . induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger."[84] This language, quoted from the classic "heckler's veto"[85] case of *Terminiello v. Chicago*,[86] was oddly thought by the Seventh Circuit to cover the *Skokie* case.[87]

The alleged indistinguishability of *Terminiello* and the *Skokie* case is, however, difficult to sustain. Merely among the most salient distinctions, for example, is the essentially "neutral" geographical setting in *Terminiello*.[88] Additionally, the speech in *Terminiello* was delivered in a closed auditorium,[89] to invited

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[78] *See* Wright, *supra* note 77, at 218–21.
[79] *See supra* notes 73–75 and accompanying text.
[80] *See Collin*, 578 F.2d at 1203.
[81] *See id.* at 1206 (citing Contreras v. Crown Zellerbach Corp., 565 P.2d 1173 (Wash. 1977) (en banc)).
[82] *See id.* See also, more authoritatively, the military funeral protest case of *Snyder v. Phelps*, 562 U.S. 443, 456–58 (2011) (citing the satiric cartoon case of Hustler Magazine v. Falwell, 485 U.S. 46, 55 (1988)).
[83] *See Collin*, 578 F.2d at 1206 (citing *Contreras*, 565 P.2d 1173); *Snyder*, 562 U.S. at 456–58. See also the relativism and subjectivism of *Cohen v. California*, 403 U.S. 15, 25 (1971).
[84] *Collin*, 578 F.2d at 1206 (quoting Terminiello v. Chicago, 337 U.S. 1, 4 (1949)).
[85] For background, see generally R. George Wright, *The Heckler's Veto Today*, 68 CASE W. RSRV. L. REV. 156 (2017).
[86] *Terminiello*, 337 U.S. at 4.
[87] *See Collin*, 578 F.2d at 1206.
[88] *See Terminiello*, 337 U.S. at 2.
[89] *See id.* at 2–3.

listeners.[90] The many outside protesters of the speech in *Terminiello* would presumably have had to trespass in order to hear or see anything significant.[91] Had the Court in *Terminiello* reached the applicability of the *Chaplinsky* "fighting words" doctrine,[92] the Court's focus would not have been on the "immediate injury" fighting words branch, but on the largely reactive physical violence to the speech.[93]

All of this would presumably be absent from the planned Skokie demonstration, in ways that clearly command a stronger speech-protection argument in *Terminiello* than in *Skokie*. But the Seventh Circuit's forensic model of speech and debate led it to subsume the proposed Skokie demonstration under the categories of merely inviting dispute;[94] stirring to anger;[95] expressing unpopular views;[96] provoking reactive "intolerance or animosity;"[97] or merely offending an audience.[98] All of these categories abstract away from, and implicitly deny, essential elements of the *Skokie* context.[99]

On this basis, then, we can now attend to how cultural developments related to free speech law affect the way in which we most fundamentally understand and value the free speech interests at stake in the *Skokie* litigation.[100] Moreover, we can also attend to how cultural developments have led us to understand the harms and injuries correspondingly at stake.[101]

II. *COLLIN V. SMITH* IN LIGHT OF OUR SHIFTING UNDERSTANDING OF THE UNDERLYING REASONS FOR PROTECTING SPEECH

[90] *See id.*
[91] *See id.*
[92] *See id.* at 3 ("We do not reach that question . . . .").
[93] *See id.* (referring to crowd sizes and uncontrolled violent incidents); Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942).
[94] *See* Collin v. Smith, 578 F.2d 1197, 1206 (7th Cir. 1978), *cert. denied*, 439 U.S. 916 (1978).
[95] *See id.*
[96] *See id.*
[97] *Id.* (citing Coates v. City of Cincinnati, 402 U.S. 611, 615 (1971) (addressing a vague regulation of an "annoying" public conduct case)).
[98] *See id.* at 1218. Constraints were also permitted on the focused picketing of a specific residential neighborhood home in *Frisby v. Schultz*, 487 U.S. 474 (1988). But the underlying logic of the Seventh Circuit is largely tracked and validated in crucial cases such as *Snyder v. Phelps*, 562 U.S. 443, 457–58 (2011).
[99] *See infra* Section II. For background, see generally R. George Wright, *Freedom of Speech as a Cultural Holdover*, 40 PACE L. REV. 235 (2020).
[100] *See infra* Section II; Wright, *supra* note 99.
[101] *See infra* Section III.

Today, no less than as of the time of the *Collin v. Smith* litigation, the underlying justifications for constitutionally protecting speech are commonly thought to be plural.[102] As of 1970, for example, the scholar Thomas Emerson identified pursuing truth and knowledge, promoting self-fulfillment or autonomy, and facilitating meaningful democratic participation as crucial values thought to underlie freedom of speech.[103] This cluster of values has received continuing endorsement, along with sundry related values, after *Collin v. Smith*.[104]

Among the most fundamental and ultimately most indispensable of these values has been that of the optimal pursuit of truth.[105] But it is fair to say that for broad cultural reasons, the depth, extent, and the very meaning of the pursuit of truth, as a free speech justification and elsewhere, has noticeably evolved since the time of *Collin v. Smith*.[106] In particular, the idea of truth, and of the meaningful pursuit thereof, is now of clearly diminished status.[107]

Certainly, various forms and depths of truth-skepticism in free speech contexts were available even at the time of *Collin v. Smith*.[108] But the relevant cultural trends and schools of thought have moved in that direction across the intervening decades. As the metaphysical depth and meaning of truth for free speech purposes have gradually eroded, the idea of a "post-truth" culture has gained purchase.[109]

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[102] *See generally* THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 6–7 (1970) (listing several underlying justifications for protecting speech).
[103] *See id.*; *see also* FREDERICK SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY (1982).
[104] *See, e.g.*, Kent Greenawalt, *Free Speech Justifications*, 89 COLUM. L. REV. 119, 130–47 (1989); Alexander Tsesis, *Free Speech Constitutionalism*, 2015 U. ILL. L. REV. 1015, 1016 (2015).
[105] *See, e.g.*, Irene M. Ten Cate, *Speech, Truth, and Freedom: An Examination of John Stuart Mill's and Justice Oliver Wendell Holmes's Free Speech Defenses*, 22 YALE J.L. & HUMAN. 35 (2010). For representative examples of Mill's discussion of the pursuit of truth in the context of freedom of speech, see MILL, *supra* note 73, at 76, 108, 116.
[106] *See, e.g.*, C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964, 965 (1978); Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1, 5 (1984); Frederick Schauer, *Reflections On the Value of Truth*, 41 CASE W. RSRV. L. REV. 699, 724 (1991) ("[T]he issue is often power rather than truth.").
[107] *See supra* note 106.
[108] *See supra* note 106.
[109] *See Word of the Year 2016: Post-truth*, OXFORD LANGUAGES, https://languages.oup.com/press/news/2016/12/11/WOTY-16 (last visited Aug. 20, 2021).

Thus, claims as to truth and falsity in political conflict in general are now more frequently thought of as contested social constructs, or as veiled assertions of power, than formerly. Political claims are thus interrogated, rather than examined for any degree of objective insight.[110] At best, truth claims are not merely classically tentative or provisional, but inherently and inescapably linked to some particular adopted perspective.[111]

This trend toward the evacuation of any objective standards for appraising the truth of political and other claims reflects far broader considerations than can be attributed to any movement or school of thought. A leading contemporary philosopher, Professor Simon Blackburn, has argued that "almost all the trends in the last generation of serious philosophy lent aid and comfort to the 'anything goes' climate . . . [and] any hope for a genuine vindication of knowledge and rationality went into retreat."[112] And the modes of thinking at work here clearly extend beyond the realm of not only academic philosophy, but of the academy more broadly.[113]

Of course, the value of the pursuit of truth by itself hardly exhausts the logic of protecting freedom of speech. But it seems unlikely in the extreme that any diminution in the status and coherence of the idea of truth itself can be prevented from similarly affecting any other value that is thought to justify protecting freedom of speech. In this sense, any sensible reason for promoting free speech is inescapably dependent upon current understandings of what the truth can amount to.

In fact, other crucial justifications of free speech have undergone related transformations. The idea of developing meaningful autonomy through free speech[114] illustrates this trend. Classically, we have had available to us the idea of autonomy in a metaphysically robust, undiluted, non-attenuated

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[110] *See, e.g.*, LEE MCINTYRE, POST-TRUTH 125 (2018).
[111] *See, e.g.*, MICHIKO KAKUTANI, THE DEATH OF TRUTH: NOTES ON FALSEHOOD IN THE AGE OF TRUMP 73 (2018).
[112] SIMON BLACKBURN, TRUTH: A GUIDE 139 (2005).
[113] *See* PAUL BOGHOSSIAN, FEAR OF KNOWLEDGE: AGAINST RELATIVISM AND CONSTRUCTIVISM 2 (2006) (discussing that beyond even the academy, and certainly across the liberal arts, "'postmodernist relativism' about knowledge has achieved the status of orthodoxy").
[114] *See supra* notes 102–03.

sense.[115] Autonomy in this sense requires a belief that considerations of reason can be meaningful and effective as exercises of freedom in choosing among actions, apart from deterministic or merely random material causes.[116]

Any such metaphysically ambitious understanding of autonomy—and of the possibilities opened thereby—is increasingly thought to be implausible, and thus somehow unavailable.[117] The neurobiologist Anthony Cashmore thus holds that "as living systems we are nothing more than a bag of chemicals."[118] Or, if one prefers, "[y]ou . . . are in fact no more than the behavior of a vast assembly of nerve cells and their associated molecules."[119] Otherwise put, "we scientists already know (or think we know) that . . . we are simply complex biological machines."[120]

Of course, we can still talk of "autonomy" in some merely attenuated, minimalist, reductive, or fictionalist sense. Thus in the free speech law context, we might today think of autonomy as something like the ability to successfully pursue some life-path we happen to endorse regardless of how causally we came to adopt and endorse that life-path in the first place.[121] The logic of some sort of gradual transition from a robust Kantian dignity[122] and autonomy to a metaphysically less ambitious concern for,

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[115] *See* IMMANUEL KANT, GROUNDWORK OF THE METAPHYSICS OF MORALS 114–16 (Harper ed., H.J. Paton trans. 1964) (1785).
[116] *See id.*; *see also* CHRISTINE M. KORSGAARD, CREATING THE KINGDOM OF ENDS 25 (1996).
[117] *See, e.g.*, Daniel Stoljar, *Physicalism*, STAN. ENCYC. PHIL., https://plato.stanford.edu/entries/physicalism (May 25, 2021).
[118] Anthony R. Cashmore, *The Lucretian Swerve: The Biological Basis of Human Behavior and the Criminal Justice System*, 107 PNAS 4499, 4504 (2010).
[119] FRANCIS CRICK, THE ASTONISHING HYPOTHESIS, THE SCIENTIFIC SEARCH FOR THE SOUL 3 (1995).
[120] JOSHUA D. GREENE, SOCIAL NEUROSCIENCE AND THE SOUL'S LAST STAND, IN SOCIAL NEUROSCIENCE: TOWARD UNDERSTANDING THE UNDERPINNINGS OF THE SOCIAL MIND 263–64 (Alexander Todorov et al. eds., 2011); *see also* ALEX ROSENBERG, THE ATHEIST'S GUIDE TO REALITY: ENJOYING LIFE WITHOUT ILLUSIONS (2011).
[121] *See* C. Edwin Baker, *Autonomy and Free Speech*, 27 CONST. COMMENT. 251, 253 (2011). *But see* Jon Elster, *Sour Grapes: Utilitarianism and the Genesis of Wants*, in UTILITARIANISM & BEYOND 219–38 (Amartya Kumar Sen & Bernard Arthur Owen Williams eds., 1982). Repressive and non-repressive causes of our current life-plans are thus in this respect apparently treated as on a par.
[122] *See generally* THOMAS E. HILL, JR., DIGNITY AND PRACTICAL REASON IN KANT'S MORAL THEORY (1992).

ultimately, an autonomy perhaps merely comprising arbitrary pleasures and pains[123] may increasingly take hold.[124]

Whether we choose to construe autonomy as largely some sort of a calculus of endorsed or unendorsed pleasures and pains or not, any gradual dilution of the idea of autonomy, in the relevant classic sense, tends to similarly dilute the case for freedom of speech on such grounds. As above, the case for free speech is based on the pursuit of meaningful truths.[125] Why should we sacrifice, perhaps quite substantially, for the sake of promoting a merely diluted form of autonomy that is of minimal meaning and value apart from some forms of mere pleasures and pains?

Importantly, the evolution of values such as autonomy and the pursuit of truth since *Collin v. Smith* does not affect merely the free speech elements of the case. Unavoidably, the attenuation of our sense of what truth, autonomy, and dignity can amount to importantly affects the other side of all such cases. We thus turn to consider how the harms and indignities of antisemitic speech can now, in our culture, be most credibly characterized.

III. *COLLIN V. SMITH* IN LIGHT OF OUR SHIFTING UNDERSTANDING OF THE VERY NATURE OF ANTISEMITIC SPEECH INJURIES

In large measure, the costs of antisemitic speech, as in *Collin v. Smith*, involve psychological trauma or other related injury. Such harms are often treated by the courts as forms of pain or suffering, and the emotions related thereto.[126] Herein, we

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[123] For a classic taxonomy, see JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION ch. IV. (1781) (ebook), http://www.utilitarianism.com/jeremy-bentham/index.html (last visited August 20, 2021).

[124] *Id.* Bentham's approach to pains tends to be methodologically individualist, or aggregative, as distinct from recognizing a harm, injury, or pain that is essentially joint, collective, or deeply communitarian in nature, as presumably characterizes some reactions to antisemitic speech.

[125] *See supra* notes 105–13 and accompanying text.

[126] *See, e.g.*, Donald A. Downs, *Skokie Revisited: Hate Group Speech and the First Amendment*, 60 NOTRE DAME L. REV. 629, 634 (1985) (referring to "assaultive speech . . . meant to inflict an emotional injury"); David Goldberger, *Skokie: The First Amendment Under Attack by Its Friends*, 29 MERCER L. REV. 761, 764 (1978) (referring to the anticipation of being "emotionally harmed by the Nazis' appearance in Skokie because it would trigger memories of their terrible war experiences" and thus "inflict

make no pretense to any real understanding of either emotional suffering and trauma itself,[127] or of the range of injuries suffered by the targets of post-Shoah antisemitic speech.

Inescapably, experiences of pain, suffering, trauma, psychological injury, and the associated emotions are of various sorts. Equally important for our purposes, however, is that these phenomena may differ, in any instance, quite substantially in the nature, depth, and character of what we might call their metaphysical presuppositions. Not all such injuries are qualitatively on a par.

Thus, in the simplest Benthamite[128] cases, pain and suffering do not presuppose much in the way of chains of reasoning, or of any metaphysical ambition. Here, we might think of cases such as exposure to cold or heat, or less unequivocally, the most primal reactions to being, say, physically beaten or stabbed. But pain and suffering, of whatever sort, typically involve some more or less elaborate process of reasoning on the part of the sufferer. At a minimum, for example, we may distinguish between being inadvertently tripped, and being deliberately tripped.[129] The injuries in these two circumstances are significantly different.

More elaborately, though, pain and suffering and their related emotions may well be affected by, for example, the perceived nature of the relationship between perpetrator and victim. Perceived betrayal, or ingratitude, for example, attending a physical injury may well affect the victim's response.[130] And the sense of ingratitude must logically depend upon some more or less elaborate chain of reasoning, any step of which, crucially, may be either justified or unjustified.

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emotional trauma"); Mark A. Rabinowitz, *Nazis in Skokie: Fighting Words or Heckler's Veto?*, 28 DEPAUL L. REV. 259, 260 (1979) (focusing on "the recognition that a person's emotional well-being is worthy of greater protection").

[127] *See, e.g.*, O. Giotakas, *Neurobiology of Emotional Trauma*, 31 PSYCHIATRIKI 162 (2020).

[128] *See supra* note 123–24 and accompanying text.

[129] Thus "[a]s Holmes observed, even a dog knows the difference between being tripped over and being kicked." W. PAGE KEETON, DAN B. DOBBS, ROBERT E. KEETON & DAVID G. OWEN, PROSSER AND KEETON ON TORTS § 8, at 33 (5th ed. 1984).

[130] *See, e.g.*, WILLIAM SHAKESPEARE, KING LEAR act 1, sc. 4 (1606) ("How sharper than a serpent's tooth it is to have a thankless child.").

Even more importantly, the reactions of hate speech victims are conditioned not only by the literal assertions made by their tormentors, but by what we might call the metaphysical depth of the speech in question. Mere expressions of subjective distaste do not carry the same weight as condemnation that is supposedly mandated by some objective fundamental principle.

Consider, for example, the widely known hostile speech case involving Victor Hugo's character of Quasimodo.[131] In a grotesque episode, an elaborate parade of various social outcasts is presided over by a contemptuously invested Pope of Fools.[132] Thus "[h]igh upon [a] litter, mitered, coped, resplendent, and carrying a crosier, rode the new Pope of Fools, the bell-ringer of Notre Dame, Quasimodo . . . ."[133]

The target of the Parisian crowd's gleeful mockery—the term 'hathos'[134] is apt—was, however, someone who was unable to appreciate the irony of the circumstances.[135] Thus, according to Victor Hugo:

> It is difficult to give an idea of how much pride and beatific satisfaction was registered on the usually sad and always hideous visage of Quasimodo as he rode . . . . It was the first moment of self-love he had ever enjoyed . . . . Until now he had known only humiliation, disdain for his condition, and disgust for his person . . . . What did it matter if his subjects were a mob of fools . . . . Still they were people and he was their king. He took seriously all the ironical applause, all the mock respect . . . . Only joy filled his heart;

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[131] *See* VICTOR HUGO, THE HUNCHBACK OF NOTRE DAME 69–70 (Walter J. Cobb trans., 1965) (1831).
[132] *See id.*
[133] *Id.* at 69.
[134] "Feelings of pleasure derived from hating someone or something." *Hathos*, URB. DICTIONARY, https://www.urbandictionary.com/define.php?term=hathos (last visited Aug. 25, 2021).
[135] HUGO, *supra* note 131, at 69–70.

> pride showed even in his poor bearing.[136]

Quasimodo's emotionally favorable response to what he fails to recognize as contemptuous hostile speech is clearly amiss. His logical inferences are at points clearly mistaken. The question, though, for detached observers such as ourselves, is how to respond to the overall circumstances, including Quasimodo's own reactions.

A Benthamite utilitarian,[137] for example, would, complications aside, do some sort of overall hedonic calculus, with all relevant pains and pleasures assessed impartially according to the various dimensions of the Benthamite schemata.[138] One would want to account, certainly, for the subtle hedonic effects of intrinsically collective or joint activities; interactive effects between hostile speakers and their uncomprehending target; and such indirect and long-term hedonic effects as one can envision.

Inescapably, the hedonic character of the Pope of Fools episode is overwhelmingly favorable. The gleeful mob has its hathotic delight.[139] Quasimodo's own reaction is both multidimensional and, however mistakenly, of nearly undiluted joy and delight, along several Benthamite dimensions.[140] In a typical hate speech context, there would of course instead be a stark hedonic conflict as between speakers and targets. Here, in Quasimodo's case, the delight of the crowd, which might ordinarily by itself massively outweigh the disutility of a single target, is additively reinforced by Quasimodo's deluded reactions.[141] But are these sorts of calculations, however sophisticated, really the way we are to assess the various circumstances under which hate speech takes place?

Inescapable as well, though, is the broader sense that anything like a Benthamite, or any more sophisticated preference-based, utilitarianism must miss the point. Thus, when Bentham's antithesis Immanuel Kant condemns contemptuous

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[136] *Id.*
[137] *See supra* notes 123–24 and accompanying text.
[138] *Id.*
[139] *See* HUGO, *supra* note 131, at 69.
[140] *Id.*
[141] *Id.*

mockery,[142] he does so not on the grounds of some assessment of pain, or suffering, or trauma, or overall utility.[143] Kant in fact stipulates that "a mania for caustic mockery . . . has something of fiendish joy in it . . . ."[144] For Kant, at least, the "fiendish joy" in caustic mockery "makes it an even more serious violation of one's duty of respect for other human beings."[145] The metaphysics, or the absence thereof, thus matters.

In the context of the *Collin v. Smith* litigation, the question is one of how much metaphysical depth we, as a culture, are now still willing to ascribe to any of the prospective injuries inflicted by antisemitic speech. In particular, are we still open to assigning anything remotely like any version of Kantian-level metaphysical depth to any suffering and any emotional responses to the prospective speech? If, on whatever logic, the idea of the intrinsic and inviolable dignity and respect-worthiness of all persons is no longer credible,[146] this judgment must constrain our reactions to the case. At least in some antisemitic speech cases, there is still some inclination to supplement our concern for suffering, given especially twentieth century historical experience, and both individual and collective memories thereof. Thus, the leading Canadian antisemitic speech case refers not only to "the pain suffered by target group members,"[147] but, as well, to the often more metaphysically ambitious value of the "equality and the worth and dignity of each human person."[148]

Of course, ideas such as the equality and sanctity of persons, the intrinsic worth of the person, and essential human dignity can be redefined in some diluted or attenuated fashion, rejected as metaphysical, or essentially ignored.[149] This option is

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[142] *See* IMMANUEL KANT, THE METAPHYSICS OF MORALS 213 (Mary Gregor trans., 1996) (1797).
[143] *See id.*
[144] *Id.*
[145] *Id.*; *see also id.* at 211; IMMANUEL KANT, LECTURES ON ETHICS 211–12 (Peter Heath trans., reprint ed. 2001) (1785).
[146] *See supra* Section II.
[147] Regina v. Keegstra, [1990] 3 S.C.R. 697 (Can.).
[148] *Id.* at 700.
[149] For a sampling of a range of such approaches, see generally Walter Sinnott-Armstrong, *Moral Skepticism*, STAN. ENCYC. PHIL., https://plato.stanford.edu/entries/skepticism-moral (May 17, 2019); Chris Gowans, *Moral Relativism*, STAN. ENCYC. PHIL., https://plato.stanford.edu/entries/moral-relativism (Mar. 10, 2021); MARK ELI KALDERON, MORAL FICTIONALISM (Peter Ludlow et al. eds., 2005); RICHARD JOYCE, THE MYTH OF MORALITY (2001); J.L.

famously exercised by the American pragmatist philosopher Richard Rorty. Rorty purportedly sets aside questions of metaphysics and, in particular, of the pursuit of any objective truth or falsity in moral contexts.[150]

This means that without endorsing relativism, Rorty is left, ultimately, with the phenomenon of moral disputes among communities that simply cannot be resolved on any supposedly neutral or objectively reasonable basis.[151] There is no "neutral ground on which to stand and argue that either torture or kindness are preferable."[152] This stance presumably encompasses antisemitic encounters.

Rorty, however, then declares that "we liberals cannot tolerate enemies of tolerance beyond a certain point. Our mutual respect does not, and should not, extend to anti-Semitic hate speech."[153] The problem with this otherwise heartening sentiment, however, is that on Rorty's own terms, this belief, however fervent, rises no higher than, and is no more securely grounded than, the mere localized preferences, based largely on the exchange of self-consciously sentimental stories and anecdotes, of the one or more relevant communities with which one chooses to identify.

To the extent that Rorty's, or any other, approach that dilutes, denies, or simply abandons any robust metaethics of dignity and equality has become influential, we are left with, at a minimum, an obvious practical question. Are the harms and injuries imposed by antisemitic speech best addressed by setting aside any aspiration to any objective moral truth or to any other form of any metaphysical ambition? Which approach, we might wonder, would an antisemitic group itself strategically prefer that

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MACKIE, ETHICS: INVENTING RIGHT AND WRONG (1977); SIMON BLACKBURN, ESSAYS IN QUASI-REALISM (1993); J.O. URMSON, THE EMOTIVE THEORY OF ETHICS (1968).

[150] *See* RICHARD RORTY, OBJECTIVITY, RELATIVISM, AND TRUTH: PHILOSOPHICAL PAPERS 21–24 (1991); RICHARD RORTY, TRUTH AND PROGRESS: PHILOSOPHICAL PAPERS 1, 11 (1998) (rejecting the idea that true beliefs correspond to intrinsic reality, as well as, crucially, the idea that some better theory of truth should now be sought). Whether Rorty can or does consistently adhere to his own specified constraints is doubtful.

[151] *See* RICHARD RORTY, CONTINGENCY, IRONY, AND SOLIDARITY 173 (1989).

[152] *Id.* One might prefer kindness, perhaps, on doubtless elaborately articulable grounds, where those grounds are, however, ultimately reducible to an arbitrary preference.

[153] Richard Rorty, *Review of Stanley Fish's The Trouble with Principle*, 82 NEW LEADER 15 (1999).

their opponents adopt and rely upon? Does the abandonment or dilution of the metaphysics of antisemitic harm and injury not amount, in practice, to a form of partial forensic disarmament?

Here, in response, we might think of the words of the earlier American pragmatist William James. James, in his time, argued that

> [i]f this life be not a real fight, in which something is eternally gained for the universe by success, it is no better than a game of private theatricals from which one may withdraw at will. But it *feels* like a real fight,—as if there were something really wild in the universe which we . . . are needed to redeem . . . . For such a half-wild, half-saved universe our nature is adapted.[154]

IV. CONCLUSION

Our collective understanding of the *Collin v. Smith* litigation has evolved over time. Herein, the emphasis has largely been on academic thinking on freedom of speech and on the real nature and depth of the harms suffered by the victims of antisemitic speech. This emphasis tracks the observation of John Maynard Keynes that practical decision makers commonly reflect the sentiments of some earlier "academic scribbler."[155] Thus, we assume, academic trends tend to diffuse throughout layers of practical policymaking, and thus into the broader culture.

Over the most recent decades, the pursuit of truth and of autonomy have gradually lost some of their status, force, and

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[154] WILLIAM JAMES, THE WILL TO BELIEVE 62 (Project Gutenberg Literary Archive Foundation ed. 2009) (1896) (ebook), http://www.gutenberg.org/files/26659/26659-h/26659-h.htm.

[155] JOHN MAYNARD KEYNES, THE GENERAL THEORY OF EMPLOYMENT, INTEREST, AND MONEY 340 (1st ed. 2018) (1938). For an intriguing exploration of the theory of moral responsibility, and of its limits, in the context of antisemitic acts, see generally Paul Zawadzki, *Some Epistemological Issues in the Public Debate on Contemporary Antisemitism in France*, 37 CONTEMP. JEWRY 295 (2017).

cogency in justifying the protection of harmful speech.[156] Not unrelatedly, academic understandings of the nature of the harms associated with antisemitic speech have evolved as well. In some quarters, all versions of ideas such as the intrinsic, perhaps infinite or otherwise incomparable, dignity of the person have been variously rejected, set aside, or diluted. Unsurprisingly, this initially largely academic trend has diffused, in doubtless simplified and otherwise altered forms, into judicial decision making and popular culture as well.[157]

This is hardly to suggest that exponents of these cultural tendencies cannot also oppose antisemitism with intense emotional fervor.[158] The real question is instead whether the proper scope of freedom of speech, as well as the most practically effective case against antisemitism and antisemitic speech, are most likely to be developed and sustained, over the impending decades, by metaphysically ambitious, or instead by metaphysically evacuated, understandings of both the value of free speech and the genuine harms of speech.

In general, any balancing of conflicting interests in free speech cases should recognize the theoretical and very practical differences between an ultimately arbitrary or merely subjective expressed preference for some policy, however emotionally fervent that preference may be, and a policy preference that is intended to reflect the speaker's assessment of the metaethically objective basic interests at stake in the case.

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[156] *See supra* Section II.
[157] *See supra* Section III.
[158] *See, e.g.*, Rorty, *supra* note 153.