OFFICE OF THE STATE'S ATTORNEY
McHENRY COUNTY
PATRICK D. KENNEALLY

MEMORANDUM
HUNTLEY HIGH SCHOOL

Two criminal charges could potentially be applied to the minor suspect who recently circulated racist pamphlets at Huntley High School - disorderly conduct and a hate crime. In order to prove disorderly conduct, the State must establish that a defendant:

A. knowingly did any act;
B. in an unreasonable manner;
C. that alarmed and disturbed another; and
D. provoked a breach of the peace.

In order to prove a hate crime, the State must establish that a defendant:

A. committed the offense of disorderly conduct; and
B. did so by reason of the actual or perceived race, color, creed, religion, ancestry…of another individual or group of individuals regardless of the existence of any other motivating factor or factors.

In *In re B.C.*, the Illinois Supreme Court ruled that merely displaying racially charged images publicly may serve as a basis to charge disorderly conduct and a hate crime. *In re B.C.* involved a minor defendant who publicly displayed "a patently offensive depiction of violence toward African-Americans." The supreme court described the image as follows:

> The alleged depictions consisted of a hand drawing of an eerily smiling, hooded Ku Klux klansman who held an axe-like object from which drops of blood apparently fell. At the klansman's feet lay the prone body of a dark complexioned person, whose groin was disfigured and darkened. Beneath the person's body and head were two connected, dark, oblong shapes that apparently represented pools of blood. Five swastikas appeared beneath the scene. The klansman's robe bore the statement, "White power Hitler rules." The following riddle was written alongside the klansman figure. "[H]ey you take a n-

> and chomp off his d- & his fingers and stike [*sic*] it up his a- and then stike [*sic*] it through [*sic*] is [*sic*] head. And [w]hat do [you] get. One [d]ead n- and a lot of blood." Several other hooded Ku Klux klansmen were also depicted, one of which was armed with a knife and apparently displaying his extended middle finger. Apparent gang symbols stated "Supreme White Power," and one hooded klansman appeared before the statement, "The original Boyz in the Hood."

Prior to trial, the defendant sought to have the case dismissed on the grounds that even if the act of displaying the image was disorderly conduct, the disorderly conduct did not amount to a hate crime because the image was not displayed to an African-American (i.e. a member of the one of the classifications protected by the hate crime statute). In rejecting this argument, the supreme court ruled that "when a disorderly conduct charge is heightened to the offense of a hate crime by virtue of a biased motivation for the conduct, the State's burden of proof should not increase to require proof of the existence of a particular individual against whom the alleged conduct is directed."

The minor alleged further that, even accepting the State's evidence as true, the charge of disorderly conduct cannot be sustained because, at best, the evidence showed only that the minor "peacefully expressed unpopular views." The supreme court disagreed and, in support, merely described in detail the odious nature of the minor's display. The supreme court's reasoning here would seem to suggest that any public display of "protected classifications" in a highly offensive manner that disturbs another and provokes a breach of the peace is sufficient to make out a *prima facie* case for disorderly conduct and a hate crime.

In this case, the material in question is a pamphlet entitled "N- Owner's Manual." The premise of the pamphlet is that it is an owner's guide for a person who has purchased an African-American as a slave and provides mock instructions on "Housing Your N-", "Feeding Your N-", etc. One particularly disturbing subheading is entitled "Where Should I Store My Dead N-." The pamphlet makes pervasive use of the N-word, provides "instructions" that if followed would constitute the very worst type of criminal acts proscribed in Illinois, and invokes many of the vilest stereotypes that have assailed the African-American community throughout the often shameful history of race relations in this Country. The bottom of the pamphlet states, "[t]his manual is a joke and is for entertainment purposes only." The pamphlet, as revolting as it is, appears to be meant as satire.

The investigation by the Huntley Police Department found[1] that on February 3, 2016, the minor suspect, a student at Huntley High School, handed out between 10-15 copies of the pamphlet while at school before and between classes and at lunch. The investigation revealed further that the minor suspect did not hand the pamphlet out to any African-American students.

The minor suspect reported that he received 10-15 copies of the pamphlet on February 2, 2017 from another student. The minor suspect admitted to handing out the pamphlet to approximately 12 students.

Many of the students reported being upset by the pamphlet, some reporting that they had to leave class or alter routines to compose themselves. The pamphlet also disrupted classes. Not only did a number of students leave class, many teachers felt compelled to set aside lesson plans for the day to discuss the pamphlet and counsel students.

It's worth noting that Huntley High School has not recently endured similar incidents. It is also worth noting that while it was reported that these pamphlets were pinned or displayed openly on student lockers, this allegation, despite efforts by the Huntley Police Department, could not be verified.

Based on these alleged facts and in accordance with *In re B.C.*, we may have probable cause to charge the minor suspect with disorderly conduct and a hate crime. This, however, does not end our analysis, because the supreme court in *In re B.C.* explicitly left unresolved whether charging a defendant with disorderly conduct and a hate crime for peacefully sharing highly offensive depictions or descriptions of members of a "protected classification" is permissible under the First Amendment.

We abide by the principle that we will not charge a suspect merely because we have probable cause to do so. Rather, we charge only those suspects that we have a moral certainty are guilty and can be proven guilty beyond a reasonable doubt. Just as we would not charge a person for battery who properly used force in self-defense, we will not charge the minor here if it appears he was exercising his constitutional right to free speech.

---

1 **Members of the public are reminded that this press release contains only facts <u>alleged</u> by the Huntley Police Department in police reports. These facts have not been established by a trier of fact beyond a reasonable doubt or otherwise. From a legal perspective, the minor suspect should be presumed innocent of any and all crimes and should he ever be charged under these facts, is entitled to a fair trial in which it is the State's burden to prove his or her guilt beyond a reasonable doubt.**

The First Amendment provides that "Congress shall make no law [abridging] the freedom of speech…. As stated by Justice Black:

> The phrase 'Congress shall make no law' is composed of plain words, easily understood. [The] language is absolute. [Of] course the decision to provide a constitutional safeguard for [free speech] involves a balancing of conflicting interests. [But] the Framers themselves did this balancing when they wrote the Constitution. Courts have neither the right nor the power [to] make a different [evaluation].

The First Amendment is premised on the ideal that freedom of expression, even of those ideas perceived as most odious, is the most effective means at arriving at truth. The search-for-truth rationale was first enunciated by John Stuart Mill:

> [The] peculiar evil of silencing the expression of an opinion is, that it is robbing the human race; posterity as well as the existing generation; those who dissent from the opinion, still more than those who hold it…[First:] the opinion which is attempted to be suppressed [may] be true. Those who desire to suppress it [are] not infallible. They have no authority to decide the question for all mankind, and exclude every other person from the means of judging. [Of course, it is not the case] that truth always triumphs over persecution. [But the] real advantage which truth has [is] that when an opinion is true, it may be extinguished once, twice, or many times, but in the course of ages there will generally be found persons to rediscover it, until [eventually] it has made such head as to withstand all subsequent attempts to suppress it…
>
> [Second: the received opinion may be true. But however true an opinion] may be, if it is not fully, frequently, and fearlessly discussed, it will be held as a dead dogma, not a living truth. [He] who knows only his own side of the case, knows little of that. [Even if] the received opinion [is] true, a conflict with the opposite error is essential.

Justice Holmes enunciated a similar rationale:

> "[W]hen men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas – that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out."

A broad and unfettered application of the First Amendment is also based on the notion of self-governance. This rationale was best set forth by Professor Alexander Meiklejohn.

> [The] Constitution [ordains] that all authority to exercise control, to determine common action, belong to "We, the People.' [Under this system, free men] are governed by themselves…
>
> The First Amendment, then, is not the guardian of unregulated talkativeness. It does not require that, on every occasion, every citizen shall take part in public debate. [Rather,] the vital point, as stated negatively, is that no suggestion of policy shall be denied a hearing because it is on one side of the issue rather than another. [Citizens] may not be barred [from speaking] because their views are thought to be false or dangerous. [The] reason for this equality of status in the field of ideas lies deep in the very foundation of the self-governing process. When men govern themselves, it is they – and no one else – who must pass judgment upon unwisdom and unfairness and danger. [Just] so far as, at any point, the citizens who are to decide an issue are denied acquaintance with information or opinion [which] is relevant to that issue, just so far the result must be ill-considered. [It] is that mutilation of the thinking process of the community against which the First Amendment [is] directed. The principle of the freedom of speech [is] not a Law of Nature or of Reason in the abstract. It is a deduction from the basic American agreement that public issues shall be decided by universal suffrage.

The United States Supreme Court in *R.A.V. v. City of St. Paul,* ruled that the First Amendment prevents the government from proscribing speech [because] of disapproval of the ideas or content expressed. Content-based restrictions are presumptively invalid. In *R.A.V.*, the Supreme Court upheld the dismissal of a petition charging a minor with violating St. Paul's Bias-Motivated Crime Ordinance. The Ordinance read:

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

The minor defendant in *R.A.V.* allegedly burned a cross in the front yard of an African-American family's home.

The Supreme Court began by clarifying that the law does not regard all forms of speech regulation as "presumptively invalid." First, courts have recognized that certain limited types of

speech, such as obscenity, ["fighting words," "true threats"], and defamation, 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." Second, the manner, time, and the place in which certain type of speech is expressed can be regulated so long as the regulation is unrelated to content. For example, prohibiting the burning of a flag in a national forest or using a loudspeaker to convey a political message at 2:00 a.m. in a crowded city is generally impermissible.

However, applying these principles to Ordinance, the Supreme Court concluded:

> [T]he ordinance is facially unconstitutional [because it is only applicable "on the basis of race, color, creed" and thereby has a discriminatory effect on content]…Displays containing abusive invective, no matter how vicious or severe, are permissible unless they are addressed to one of the specified disfavored topics. Those who wish to ["arouse anger, alarm or resentment"] in connection with other ideas – to express hostility, for example, on the basis of political affiliation, union membership, or homosexuality – are not covered. The First Amendment does not permit St. Paul to impose special prohibitions on those speakers who express views on disfavored subjects.

In *Organization for a Better Austin v. Keefe*, the United States Supreme Court ruled that handing out pamphlets expressing critical and offensive views is protected by the First Amendment. In *Keefe*, a real estate broker, obtained a civil order enjoining the Organization for a Better Austin (OBA) from distributing racially charged literature critical of his real estate practices. The stated purpose of the OBA was to "stabilize" the racial ratio in the Austin area. The OBA believed that the real estate broker in question was engaging in "panic peddling" type tactics wherein he would arouse fears of the local white residents that African-Americans were coming into the area and then, exploiting the reactions and emotions so aroused, would secure listings and sell homes to African-Americans. The OBA created and distributed leaflets in the community disparaging of the real estate broker. One pamphlet quoted the real estate agent as saying, "I only sell to Negroes." The United States Supreme Court overturned the injunction, recognizing that the activity of peaceful pamphleteering is a form of communication protected by the First Amendment. While the court recognized that the information in the pamphlets may be offensive to others, it constitutes a restraint on free expression and is, therefore, "heavily presumed" to be unconstitutional.

Turning now to Illinois cases addressing the First Amendment as it applies to disorderly conduct and hate crimes, the two most instructive cases are *People v. Nitz* and *People v. Rokicki*.

In *Nitz*, the defendant was arrested and convicted of disorderly conduct and a hate crime after he engaged in a verbal altercation with African-American neighbors. The defendant began screaming abhorrent racial epithets and verbal abuse from outside his own home at the neighbors' home for approximately 15 minutes and defendant allegedly threw items at the neighbors' home. On appeal, the court reaffirmed that the First Amendment would not permit the disorderly conduct statute from punishing a person "for peacefully expressing unpopular views." In this case and in view of the entirety of the defendant's conduct, the court concluded that the conviction for disorderly conduct and a hate crime did not trench upon the defendant's First Amendment rights "because the disorderly conduct conviction was not based solely on unpopular or bigoted speech."

In *Rokicki*, the defendant was convicted of a hate crime premised upon disorderly conduct after a verbal confrontation at Pizza Hut with one of the servers. After the victim took the defendant's order, the defendant refused to pay the victim, prompting the manager to complete the transaction. The defendant, referring the victim, informed the manager that he did not want that "f- [homosexual slur]" touching his food. After the pizza came out of the oven, the defendant saw that the victim was slicing the pizza. He approached the counter, began yelling a number of homophobic insults at the victim and pounding his fist on the counter. The defendant continued yelling for 10 minutes despite the manager telling him to leave and threatening to call the police. In upholding the defendant's conviction, the appellate court observed that in this case, he is not being punished "merely because he holds an unpopular view on homosexuality or because he expressed those views loudly or in a passionate manner." The court stated further that the defendant remains free to believe what he will…, but he may not force his opinions on others by shouting, pounding on a counter, and disrupting a lawful business."

These cases establish that it is unconstitutional for any law to intrinsically or in application restrict the content of speech, as opposed to the manner in which it is expressed. In other words, the government may not regulate based on hostility or favoritism towards the underlying message expressed, but may regulate how that message is being expressed.

Unlike *Nitz* and *Rokicki*, the minor suspect here was not communicating his bigoted opinions in a raucous, threatening, or interminable manner. Rather, the direct evidence against

the minor suspect is that he handed a pamphlet to a dozen or so other students before and between classes and during lunch hour. We find the situation here more analogous to the protected activity in *Keefe*.

Broadening the focus, one should ask, what about the minor suspect's conduct can be deemed "unreasonable," "alarming and disturbing," or "having provoked a breach of the peace"? It was not the time or manner of his speech. It was the disgraceful nature of the pamphlet itself – i.e. strictly the content.

It is hard to imagine a form of expression more worthy of contempt and outrage as the contents of the pamphlet in question. We pray that the minor suspect in this case, on account of his youth and the fact that he is clearly in the infancy of his character development, did not fully comprehend the vast, abiding, and bitter pain of racial degradation this pamphlet roused.

While we recognize and hope members of our community appreciate the disproportionate misery the content of hate speech may inflict, courts have yet to recognize criminalizing these grossly offensive forms of speech as the lesser evil. In fact, as stated by Justice Brennan, "[i]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." Courts have recognized further that the solution to noxious forms of speech is not less, but more speech. As stated by Justice Brandeis, "[i]f there be time to expose through discussion the falsehood and fallacies, to avert the evil by the process of education, the remedy to be applied is more speech, not enforced silence."

The next question is whether the defendant's speech should be afforded reduced First Amendment protection because it falls within the category of speech that is constitutionally considered "low value" or was expressed on school grounds.

The United States Supreme Court has recognized:

> There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, ["true threats"], the libelous, and the insulting or "fighting" words –those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are 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.

Fighting words are personally abusive epithets which, when addressed to an ordinary citizen, as a matter of common knowledge, inflict injury or are inherently likely to provoke an immediate breach of the peace.

In *Cohen v. California*, the United States Supreme Court held that fighting words must be directed "at the person of the addressee." Cohen involved a defendant who was convicted under a California statute for disturbing the peace for wearing a jacket bearing the words "Fuck the Draft" in the corridor of the Los Angeles Courthouse. The Court held that Mr. Cohen's conduct did not fall within the fighting words doctrine because his statement "was clearly not 'directed to the person of the hearer.'" The court reasoned further that fighting words were not merely offensive words that may cause a person to react violently, but are more properly viewed as a threat or invitation to engage in violence.

In *People v. Redwood*, an Illinois appellate court addressed the issue of "fighting words." In *Redwood,* a Caucasian defendant was charged with disorderly conduct after yelling to an African-American man across the street, "how long are you going to be a shoe-shine boy." The trial court dismissed the case on the grounds that the defendant's words did not amount to "fighting words" and, therefore, were protected under the First Amendment. The appellate court affirmed, finding that in order to constitute "fighting words," the speech must contain an explicit or implied threat. The appellate court noted that while the defendants' words were offensive, "this alone is not enough."

In this case, the evidence is insufficient to establish that handing out the pamphlet in question to several other students, none of whom were African-American or reasonably deemed by the minor suspect because of special circumstances to be provoked to react violently, constituted "fighting words." The pamphlet itself seems to be a dismally poor attempt at humor and debasement of African-Americans as a class. There is no explicit or implicit threat to any specific person that could reasonably be deemed impending or probable.

In addition to "fighting words," courts have recognized "true threats" as a category of speech that is largely unprotected by the First Amendment. "True threats" encompass forms of intimidating statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals. A prohibition on "true threats" protects individuals from the "fear of violence." It is immaterial whether the speaker subjectively intends to carry out the threat.

While generally courts have upheld as constitutionally protected speech the use of the N-word, peacefully sharing racist or bigoted views, displaying historically racist symbols, and speech referencing violence (e.g. "[y]ou can hang him from a tree," "the capitalists will be the first ones up against the wall when the revolution comes"), in *Virginia v. Black*, the Supreme Court ruled that a statute criminalizing the burning of crosses was constitutional so long as a defendant "intends" a "true threat" by putting another or a group of individuals in fear of "bodily harm or death." The Supreme Court ruled, however, that criminalizing "cross burning" in an absence of proof of intent to intimidate would not pass constitutional muster. The Supreme Court stated:

> …sometimes the cross burning is a statement of ideology, a symbol of group solidarity. It is a ritual used a Klan gatherings, and it is used to represent the Klan itself. Thus, "burning a cross at a political rally would almost certainly be protected expression."

Even accepting that using the N-word and evoking slavery have a pernicious history of inducing intimidation, there is no persuasive evidence that the minor suspect intended to place an individual or group of individuals in fear of "bodily harm or death." While we find it dangerous to speculate at the motives of a 17 year-old youth, we find nothing in his conduct that would reasonably evidence an intent to intimidate. There is no evidence that the minor suspect attempted to direct the pamphlet to African-Americans or openly publicize the contents of the pamphlet to create a pervasive environment of racial fear and hostility. The evidence indicates that he shared the pamphlet with a dozen or so other students, none of whom could reasonably have taken it as a threat. While it is true that the existence and message of the pamphlet spread quickly among the students, this appears to be more a reflection how quickly scandal can spread in a high school than intent.

Lastly, courts have also recognized that public school officials have broad authority to limit student speech that creates a "disruption or substantial interference with the school's work." The United States Supreme Court has reasoned that a school…

> …need not tolerate student speech that is inconsistent with its "basic education mission," even though the government could not censor similar speech outside of the school…We recognize that "the determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board," rather than with the…courts.

Pursuant to these principles, courts have upheld school prohibitions of students wearing a T-shirt with "redneck" jokes, displaying religious messages that condemned homosexuality, displaying the confederate flag or other racially divisive symbols, and using racial or derogatory slurs.

Illinois courts have yet to address whether the power to limit speech in schools to control "disruption and substantial interference to school work" extends beyond school officials to the State. However, there is reason to believe that it does not. The Supreme Court has explicitly identified the "school board" with agency to limit speech to promote the administration of school business. Further, federal courts have recognized that the enactment of pervasive legislation and policy granting school officials wide latitude in determining which practices will best serve education and disciplinary goals affords secondary and elementary school administrators with "more leeway than public colleges and universities or legislative bodies, e.g. municipalities, states and Congress", to restrict speech.

The Wisconsin Supreme Court case, *State v. Douglas D.*, forges a legal path in a somewhat similar case that we find instructive here. In *Douglas D.,* the minor defendant was charged with Wisconsin's version of disorderly conduct after turning in a writing assignment impliedly threatening a teacher. Specifically, after receiving a creative writing assignment in class, the defendant was asked to complete the assignment in the hall after becoming disruptive. He, thereafter, turned in a story wherein a student who had been kicked out of class decapitates the teacher with a machete and stores the severed head in a desk door. The defendant was convicted of disorderly conduct and appealed. The supreme court, though finding that the story was offensive and distasteful, ruled that did not amount to a "true threat." It, therefore, ruled that the story was protected speech under the First Amendment and reversed the minor defendant's conviction.

When addressing whether the defendant's presence on school grounds at the time of the speech modified its legal analysis, the supreme court stated:

> By no means should schools interpret this holding as undermining their authority to utilize their internal disciplinary procedures to punish speech such as Douglas's story. Although the First Amendment prohibits law enforcement officials from prosecuting protected speech, it does not necessarily follow that schools may not discipline students for such speech….Unlike other instruments of the State, schools are entrusted with a unique role in our society to mold our children into responsible and wise adult citizens….Pursuant to these

> responsibilities, educators must inculcate in our children "the habits and manners of civility"…Hence, under some circumstances, schools may discipline conduct even where law enforcement officials may not...Thus, we hold that Douglas's story in not a true threat and, therefore, cannot be punished [as disorderly conduct], we nonetheless believe that the school properly disciplined Douglas. This case reinforces our belief that while some student conduct may warrant punishment by both law enforcement officials and school authorities, school discipline generally should remain the prerogative of our schools, not our juvenile justice system.

By our judgment in this case, neither do we mean to suggest that the minor suspect's conduct on February 3, 2017 cannot be severely redressed by his parents, school officials, and through social sanction. Indeed, it ought to be. We find the minor suspect's decision to share this pamphlet to be appalling. Sadly, a troubled teenager conniving personal attention by eliciting a strong reaction may very well have been the point. However and in view of the overriding and resolute demands of the First Amendment, we find the specific facts as currently alleged cannot sustain criminal charges.