

BRAND RENEGADES REDUX

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I. INTRODUCTION

In my 2011 article *Brand Renegades*,² I outlined a new frontier of trademark enforcement. Noting that purchasers often consume branded products as a way to communicate their identities and aspirations to a social audience, and that sellers accordingly often try to cultivate socially expressive connotations for their brands through marketing, I defined the brand renegade as “a consumer who uses branded products out of affiliation with some aspects of the image cultivated by the brand owner, but whose conspicuous consumption of the brand generates social meanings that are inconsistent with that image.” Through several examples—the adoption of cognac by hip-hop nightlife culture, the fashion choices of reality television stars, and the selective looting of sportswear brands by rioting young Britons—I noted that brand owners’ responses to the brand renegade had reflected diverse strategies—of co-opting the renegade, playing both sides, or denouncing

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² Jeremy N. Sheff, *Brand Renegades*, 1 N.Y.U. J. INTELL. PROP. & ENT. L. 128 (2011).

the renegade, respectively.³ I further explored how brand renegades represented the logical limit of the historical expansion of trademark owners' legal rights, but concluded, tentatively, that the social expression inherent in the renegade's consumption put that consumption beyond the reach of trademark rights.⁴

Since *Brand Renegades* was published seven years ago, expressive consumption and its reflections on brand owners have taken a darker turn. The ascendancy of right-wing political movements in the world's advanced consumer economies—most clearly embodied in the UK's 2016 referendum vote to exit the European Union and the consolidation since then of the capture of the Republican Party in the United States by white-supremacist authoritarians—has predictably manifested in the types of expressive consumption I described in *Brand Renegades*. But now, brands have become tokens of affiliation and identity in a fraught ideological moment. And that moment appears to have revealed the dividing line between socially (or politically) expressive uses that may give rise to trademark liability, and those that will not. That line is drawn between consumption that affiliates the consumer with the brand itself, and those that adopt the brand as an indicator of a new *source*. This line has implications for other, less politically fraught aspects of trademark law, particularly the “parody brand” phenomenon familiar from some high-profile cases (and scholarship commenting on them. This essay will describe the emergence of the political brand renegade in our current moment and trace the implications for trademark law.

³ *Id.* at 134–44.

⁴ *Id.* at 144–58.

II. NAZIS BUY SNEAKERS TOO

On the evening of August 11, 2017, an organized group of about 250 Nazis and white supremacists dressed in khakis and white button-down shirts converged on the University of Virginia campus in Charlottesville, bearing torches and chanting racist and anti-Semitic slogans. They surrounded a group of about 30 counter-protestors who had gathered around a statue of Thomas Jefferson and started fights that had to be broken up by police. (At a larger rally of Nazis and white supremacists the following day, more violence ensued, including the murder of Heather Heyer, and the injury of dozens of others by James Alex Fields Jr., a white supremacist who drove his car at high speed into a crowd of counter-protestors).⁵

By the end of the rally, trash cans around the campus were stuffed full of discarded torches, and news services were disseminating pictures of angry young white men screaming into the torchlight. Both points of evidence drew attention to a curious fact: the Nazis appeared to have overwhelmingly used home-store TIKI brand torches to stage their violent demonstration. The attempt to inspire racial terror with cheap faux-Polynesian garden furnishings

⁵ Paul Duggan, *Charge Upgraded to First-Degree Murder for Driver Accused of Ramming Charlottesville Crowd*, WASH POST (Dec. 14, 2017), https://www.washingtonpost.com/local/crime/driver-accused-of-plowing-into-charlottesville-crowd-killing-heather-heyer-due-in-court/2017/12/13/6cbb4ce8-e029-11e7-89e8-edec16379010_story.html; Joe Heim, *Recounting a Day of Rage, Hate, Violence and Death*, WASH POST (Aug. 14, 2017), <https://www.washingtonpost.com/graphics/2017/local/charlottesville-timeline/>; Joe Heim et al., *One Dead as Car Strikes Crowds amid Protests of White Nationalist Gathering in Charlottesville; Two Police Die in Helicopter Crash*, WASH POST (Aug. 13, 2017), https://www.washingtonpost.com/local/fights-in-advance-of-saturday-protest-in-charlottesville/2017/08/12/155fb636-7f13-11e7-83c7-5bd5460f0d7e_story.html.

attracted a fair amount of ridicule on social media, but it also attracted the attention of the brand owner.⁶ As news spread about the deadly violence in Charlottesville on the afternoon of August 12, TIKI took to its Facebook page to distance itself from the perpetrators:

TIKI Brand is not associated in any way with the events that took place in Charlottesville and are deeply saddened and disappointed. We do not support their message or the use of our products in this way. Our products are designed to enhance backyard gatherings and to help family and friends connect with each other at home in their yard.⁷

The response of TIKI to Charlottesville was of the same kind as the response of Adidas to the UK Riots I documented in *Brand Renegades*; it abandoned the brand renegades in favor of the rest of its customer base. The company focused on what makes the brand renegades different from its ordinary customers, and explicitly attacked them on that basis.

This dynamic has played out several times as white supremacists, misogynists, and chauvinists gained momentum in the 2016 election cycle and have attempted to build on it since. When a recording emerged of Donald Trump boasting that he habitually keeps TIC TAC mints handy to freshen his breath in case he decides to engage in unwanted kissing or other sexual assaults of women,⁸ the

⁶ Julia Reinstein, *People Are Mocking White Nationalists for Marching With Literal Tiki Torches*, BUZZFEED (Aug. 12, 2017, 10:32 AM), <https://www.buzzfeed.com/juliareinstein/citronazi-candles>.

⁷ *TIKI Brand Products - Posts*, FACEBOOK (Aug. 12, 2017), <https://www.facebook.com/TIKIBrand/posts/10154458849046324>.

⁸ David A. Fahrenthold, *Trump Recorded Having Extremely Lewd Conversation About Women in 2005*, WASH. POST (Oct. 8, 2016), https://www.washingtonpost.com/politics/trump-recorded-having-extremely-lewd-conversation-about-women-in-2005/2016/10/07/3b9ce776-8cb4-11e6-bf8a-3d26847eed4_story.html.

brand responded that it “respects all women” and “find the recent statements and behavior completely inappropriate and unacceptable.”⁹ When Donald Trump, Jr. compared refugees fleeing the civil war in Syria to a bowl of SKITTLES candies containing a poison pill, Wrigley (the maker of the candy) pushed back on its brand being drawn into Republican race-baiting politics:

Skittles are candy. Refugees are people. We don't feel it's an appropriate analogy. We will respectfully refrain from further commentary as anything we say could be misinterpreted as marketing.¹⁰

Similarly, as Andrew Anglin of the Neo-Nazi *Daily Stormer* website touted every perceived instance of a brand supporting Donald Trump or his racial grievance politics as a vindication of the so-called “alt-right,” multiple brands from PAPA JOHN'S pizza to NEW BALANCE footwear to WENDY'S fast-food chain felt the need to publicly disavow any affiliation with white supremacists. In such situations the brand renegade uses consumption as a form of *political* as well as social expression, “by endorsing brands the neo-Nazis succeed in giving the impression that they have mainstream allies who share their vision of an all-white world.”¹¹

⁹ Lauren Johnson, *Tic Tac Calls Donald Trump's Behavior “Completely Inappropriate and Unacceptable,”* ADWEEK (Oct. 8, 2016), <https://www.adweek.com/brand-marketing/tic-tac-calls-donald-trump-s-behavior-completely-inappropriate-and-unacceptable-173966/>.

¹⁰ Christine Hauser, *Donald Trump Jr. Compares Syrian Refugees to Skittles That ‘Would Kill You,’* N.Y. TIMES (Sept. 20, 2016), <https://www.nytimes.com/2016/09/21/us/politics/donald-trump-jr-faces-backlash-after-comparing-syrian-refugees-to-skittles-that-can-kill.html>.

¹¹ Cristina Maza, *Why Neo-Nazis Love Papa John's Pizza — And Other “Official” Alt-Right Companies,* NEWSWEEK (Nov. 10, 2017, 5:02 PM), <https://www.newsweek.com/white-supremacists-nazis-alt-right-pizza-papa-johns-taylor-swift-wendys-brands-708722>.

This is new territory for major brands, and there has been variation in their responses. The playing-both-sides approach has long been the norm at the intersection of politics and branding. As goes the saying infamously (and perhaps apocryphally) attributed to Michael Jordan, “Republicans buy sneakers too,” and brands are extremely wary about opposing affectively-laden identity commitments of their customers (such as their political affiliations).¹² PAPA JOHN’S attempted to combine this time-tested make-no-enemies strategy with the new imperative of clearly reassuring customers that the firm does not adhere to viewpoints that would be unacceptable to many of them. The company had won neo-Nazis’ attention and praise when its founder and CEO John Schnatter—a notable supporter of Donald Trump’s campaign—attempted to blame the firm’s poor performance on its advertising relationship with the National Football League, which has been dogged by the persistent controversy surrounding Colin Kaepernick’s high-profile kneeling protests of police brutality against black communities during the playing of the national anthem at football games.¹³ The company’s response to being named a favorite brand of white supremacists attempted to combine disavowal of *admitted* neo-Nazis with a playing-both-sides approach to the racialized chauvinism of the league’s conservative flag-fetishizing base and the aroused anti-racism on the left that has consolidated behind Kaepernick’s protests:

We believe in the right to protest inequality and support the players’ movement to create a new

¹² Laura Wagner, “*Republicans Buy Sneakers, Too*,” SLATE (July 28, 2016, 4:59PM), http://www.slate.com/articles/sports/sports_nut/2016/07/did_michael_jordan_really_say_republicans_buy_sneakers_to_o.html.

¹³ Tim Forster, *Papa John’s Blames NFL Protests for Falling Sales*, EATER (Nov. 1, 2017, 2:16 PM), <https://www.eater.com/2017/11/1/16592474/papa-johns-nfl-sales-john-schnatter-shares>.

platform for change. We also believe together, as Americans, we should honor our anthem. There is a way to do both. ... We will work with the players and league to find a positive way forward. Open to ideas

from all. Except neo-nazis —  those guys.¹⁴

At the other extreme, one brand owner has explicitly indicated a willingness to proceed to the type of litigation I predicted in *Brand Renegades*. One group of participants in the violent rallies in Charlottesville—a neo-Nazi organization calling itself the “Detroit Right Wings”—adopted a simulacrum of the Detroit Red Wings hockey franchise’s logo as their own (after embellishing it with a reference to the logo of the Nazi SS). When photos of this usage on signs in Charlottesville made its way on to social media, the hockey club not only took the step of disavowing the white supremacists who had carried its brand into a highly visible racist rally, but also announced, “We are exploring every possible legal action as it pertains to the misuse of our logo in this disturbing demonstration.”¹⁵ The “Detroit Right Wings” seem to have disappeared soon after their logo became an item of news interest, and the threatened litigation has not materialized. But the

¹⁴ Bloomberg, ‘*Maybe They Shouldn’t Be in the Country.*’ *Trump Says New NFL Policy to Stop Players Kneeling Isn’t Tough Enough*, FORTUNE (May 24, 2018), <http://fortune.com/2018/05/24/trump-nfl-kneeling-policy/>; Greg Morabito, *Papa John’s Flips Off Neo-Nazis in Twitter Apology*, EATER (Nov. 15, 2017, 12:06 PM), <https://www.eater.com/2017/11/15/16654974/papa-johns-neo-nazis-nfl-apology-twitter> (implying the league’s strategy has been largely unsuccessful mainly because their pandering to right-wing chauvinists at the expense of anti-racism protestors and their allies has not satisfied those chauvinists, whose priority is not a policy outcome but rather the opportunity to assert dominance).

¹⁵ Helen St. James et al., *Detroit Red Wings Consider Legal Action for Team Logo Use at White Nationalist Rally*, DETROIT FREE PRESS (Aug. 12, 2017), <https://www.freep.com/story/sports/nhl/red-wings/2017/08/12/detroit-red-wings-alt-right-protest-charlottesville/562000001/>.

comparison of the Red Wings’ response with other firms that have disavowed the adoption of their brands by politically-motivated brand renegades suggests the limits on legal recourse against brand renegades are not limited to the expression-protective doctrines I identified in my first examination of the topic.

III. THE LEGAL LIMITS OF POLITICIZED BRANDS

Seven years ago, I argued in favor of an intuition that the modes of consumption I had identified were not the types of behaviors that a brand owner ought to be able to control through trademark enforcement. I identified the doctrinal embodiment of that intuition with the protection of expressive uses of trademarks under the permissive infringement test of *Rogers v. Grimaldi*.¹⁶ I still believe that the *Rogers* test has a role to play in regulating the relationship between the brand owner and the brand renegade—even where the renegade is as odious as the Nazis who descended on Charlottesville. It is telling that in responding to their renegades with statements of disdain and disavowal rather than lawsuits, brands like TIKI and SKITTLES isolated their renegades and made them targets for approbation and ridicule in a way that defeated the renegades’ purpose of aligning their fringe politics with mainstream culture and commerce. But the distinction among the forms of response described in the previous part—and particularly, the fact that only the “Detroit Right Wings” attracted a threat of litigation—suggests that another doctrinal issue is likely to be at work in this dynamic: the concept of trademark use.

In 2011, I wrote that the trademark use doctrine was no longer relevant to infringement claims, based on the Second Circuit’s then-recent ruling in *Rescuecom Corp. v.*

¹⁶ *Rogers v. Grimaldi*, 875 F.2d 994 (2d Cir. 1989); Sheff, *supra* note 2, at 153–58.

Google, Inc.,¹⁷ though it remained relevant to dilution claims.¹⁸ But as brands play an increasing role on social media, and as social media feeds back into marketing, the trademark use has re-emerged as an important doctrinal concept. On the registration side, recent efforts of the Patent and Trademark Office to stem the tide of applications for “meme marks” have relied increasingly on the notion that use as a mark does significant work in the establishment of trademark rights.¹⁹ And a year after *Brand Renegades*, in the case of *Naked Cowboy v. CBS*, Judge Jones of the Southern District of New York demonstrated how the notion of trademark use could still do significant work in infringement cases—not as part of the plaintiff’s burden to show use in commerce, but through the analysis of a descriptive fair use defense and the evaluation of likelihood of confusion.²⁰

Naked Cowboy demonstrates that the use of another’s name or trade dress need not be infringing if the use does not invoke those features *for purposes of source identification*. On the descriptive-fair-use side of the analysis, such uses invoke the name and trade dress for purposes “other than as a mark”—that is, other than as an identifier of a good or service of the user.²¹ And on the likelihood of confusion side, confusion is less likely if the defendant’s use does not purport to say anything about source, affiliation, sponsorship, or approval. In *Naked Cowboy*, the court held that a CBS soap opera used the words “naked cowboy” descriptively to refer to a scene in their

¹⁷ *Rescuecom Corp. v. Google, Inc.*, 562 F.3d 123, 127–40 (2d Cir. 2009).

¹⁸ Sheff, *supra* note 2, at 150–51.

¹⁹ TMEP § 1202 (5th ed. Sept. 2007); *see also* Alexandra J. Roberts, *Trademark Failure to Function*, IOWA L. REV. 11–39 (forthcoming). *See generally* Alexandra J. Roberts, *Tagmarks*, 105 CALIF. L. REV. 599 (2017).

²⁰ *Naked Cowboy v. CBS*, 844 F. Supp. 2d 510 (S.D.N.Y. 2012).

²¹ 15 U.S.C. § 1115(b)(4) (2012).

dramatic work rather than to refer to the plaintiff, a Times Square entertainer, and that the obvious difference in contexts between the plaintiff’s and the defendant’s uses made confusion based on features of the plaintiff’s unregistered trade dress unlikely. A similar logic explains why Nazis buying TIKI torches to *use as torches* drew only sharply worded disavowal from the brand owner, while Nazis using the Red Wings logo *as the symbol of their organization* drew a threat of legal action.

While the role of trademark use in fair use defenses and likelihood of confusion analysis offers some guide as to when a brand renegade might cross the line between protected expression and infringement liability, that line also recalls an area of trademark litigation that has been the subject of some academic attention: parody brands. From CHEWY VUITTON dog toys²² to CHARBUCKS coffee,²³ parodies of well-known brands used as source identifiers for real-world products that poke fun at those brands have seen mixed success fending off trademark dilution claims, because the categorical defense built into the dilution statute does not extend to trademark uses.²⁴ The most extensive analysis of such litigation by Stacey Dogan and Mark Lemley, notes that one of the difficulties in dealing with parody brands is that “courts seem to struggle over their own intuitions about whether a defendant’s commercial objectives undermine its speech interest in the parody.”²⁵ In the political brand renegade context, the problem is reversed: the defendant’s *political speech* objectives may undermine

²² *Louis Vuitton Malletier S.A. v. Haute Diggity Dog, LLC.*, 507 F.3d 252, 256 (4th Cir. 2007).

²³ *Starbucks Corp. v. Wolfe’s Borough Coffee, Inc.*, 736 F.3d 198 (2d Cir. 2013).

²⁴ 15 U.S.C. § 1125(c)(3)(A) (2012) (excluding from dilution liability fair uses “other than as a designation of source”); Stacey L. Dogan & Mark A. Lemley, *Parody as Brand*, 47 U.C. DAVIS L. REV. 473, 484–85 (2013) (collecting examples of litigated parody brands).

²⁵ Dogan & Lemley, *supra* note 24, at 492.

trademark law's interest in enforcing what would otherwise appear to be an entirely pedestrian trademark infringement claim.

To take the Detroit Right Wings as an example, the renegade group clearly seems to be signaling affiliation with the DETROIT RED WINGS hockey franchise—a core concern of trademark law.²⁶ But it is not clear that the Detroit Right Wings are *selling anything*: their desire for affiliation is a *political* one, to “giv[e] the impression that they have mainstream allies who share their vision of an all-white world.”²⁷ The political brand renegade thus engages in trademark use, but not use *in commerce*, even under the expansive understanding of “use in commerce” embraced in *Rescuecom*.²⁸ When a member of the Detroit RightWings marches through the streets of Charlottesville holding a sign displaying the group’s copycat logo, and wearing a lapel pin of the same logo, they clearly “use [and] display” that mark, but do not do so “in the sale or advertising of services.”²⁹

The political and social expression of identity through branding and consumption challenges the doctrinal categories that regulate the interface between trademark law and the First Amendment. Most recently in *Matal v. Tam*,³⁰ the Supreme Court invalidated the disparagement clause of

²⁶ See, e.g., 15 U.S.C. § 1125(a)(1) (2012) (making actionable the use of a mark “on or in connection with any goods or services” that “is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person. . .”).

²⁷ Maza, *supra* note 11.

²⁸ *Rescuecom Corp.*, 562 F.3d at 127–31 (2d Cir. 2009) (keying the result that Google was actually selling something: advertising services).

²⁹ *Rescuecom*, 562 F.3d at 128–29 (quoting 1-800 Contacts, Inc. v. WhenU.Com, Inc., 414 F.3d 400, 408-09 (2d Cir. 2005)); Daily Detroit Staff, *White Supremacists in Charlottesville are Using a Nazified Detroit Red Wings Logo as Their Own*, DAILY DETROIT (Aug. 12, 2017), <http://www.dailydetroit.com/2017/08/12/white-supremacists-charlottesville-using-nazified-detroit-red-wings-logo/>.

³⁰ *Matal v. Tam*, 137 S. Ct. 1744 (2017).

Section 2 of the Lanham Act in a case involving an application to “reappropriate” a racial slur by registering it as a trademark for a musical group that identified with the targeted race. The majority in *Tam* decided the disparagement bar as a “happy-talk clause”;³¹ the concurring Justices more thoroughly analyzed the way the disparagement bar discriminated against speech that some might view as expressing a negative opinion of identified persons or groups, but not speech that expressed a positive opinion.³² But when applied to the political brand renegade—in light of the most common justification for excluding parody brands from trademark liability—viewpoint discrimination is a whipsaw. To the extent that parody brands are defended on grounds that their implicit critique says something socially valuable about the parodied brand itself (and about the phenomenon of branding), it would be viewpoint-discriminatory to enforce trademark liability against those who adopt a variation on a well-known brand as their own to send a *supportive* (as opposed to a *critical*) message. This is exactly what the white-supremacist brand renegades discussed in the previous part have done. Their message regarding the brands they have adopted as their own is a positive one: a message of *affiliation*.

Ordinarily in the trademark context, such a message of affiliation or association in the absence of the consent of the brand owner would be clearly actionable as either infringement or dilution.³³ But that is because the ordinary

³¹ *Id.* at 1765; *see also id.* at 1763 (“[Section 2] denies registration to any mark that is offensive to a substantial percentage of the members of any group. Yet in the sense relevant here, that is viewpoint discrimination since giving offense is a viewpoint.”).

³² *Matal*, 137 S. Ct. at 1767 (Kennedy, J., concurring).

³³ *See, e.g.*, 15 U.S.C. § 1125(a)(1) (2012) (making actionable the use of a mark “on or in connection with any goods or services” that “is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person....”); 15

trademark context is a commercial one, and the message of affiliation can be framed as a type of fraud on the consumer. In the absence of an extraction of value from, or detrimental reliance by a deceived audience, the First Amendment would seem to bar the application of legal liability to such a false message of affiliation. Indeed, the Supreme Court held as much in *United States v. Alvarez*, in which the justices struck down the Stolen Valor Act's prohibition of claims of affiliation with certain classes of military honors.³⁴ After *Alvarez* and *Tam*, parody brands that criticize a well-known mark would seem to be no more entitled to immunity from trademark liability than copycat brands that express admiration for that trademark through false claims of affiliation—particularly where those copycat brands are limited to identification of *persons and groups* rather than of *goods and services*. Indeed, the leading First Amendment and intellectual property scholar Rebecca Tushnet has argued that anti-dilution law is unconstitutional under *Tam*, even in the commercial context.³⁵

IV. CONCLUSION

We should not underestimate the ability and willingness of the federal courts to construct elaborate

U.S.C. § 1125(c) (2012) (making actionable dilution by blurring—an “association arising from the similarity between a mark or trade name and a famous mark that impairs the distinctiveness of the famous mark”—and dilution by tarnishment—an “association arising from the similarity between a mark or trade name and a famous mark that harms the reputation of the famous mark.”).

³⁴ *United States v. Alvarez*, 132 S. Ct. 2537, 2547–48 (2012) (“Were the Court to hold that the interest in truthful discourse alone is sufficient to sustain a ban on speech, absent any evidence that the speech was used to gain a material advantage, it would give government a broad censorial power unprecedented in this Court’s cases or in our constitutional tradition.”).

³⁵ Rebecca Tushnet (@rtushnet), TWITTER (June 19, 2017, 8:00AM), <https://twitter.com/rtushnet/status/876816965813379073>.

fictions to accommodate economic power and to insulate members of the country’s white Christian majority from the threat of legal sanctions. But the political brand renegade pits two favorites of the courts against each other: commercial incumbents protecting sunk investments in their schemes to influence public opinion and behavior,³⁶ and privileged sociopaths publicly demonstrating their perceived superiority over marginalized and vulnerable groups.³⁷ The continued pressure on the scope of trademark rights from

³⁶ Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 816 (1935) (“What courts are actually doing, of course, in unfair competition cases, is to create and distribute a new source of economic wealth or power. Language is socially useful apart from law, as air is socially useful, but neither language nor air is a source of economic wealth unless some people are prevented from using these resources in ways that are permitted to other people. . . . Courts, then, in establishing inequality in the commercial exploitation of language are creating economic wealth and property, creating property not, of course, *ex nihilo*, but out of the materials of social fact, commercial custom, and popular moral faiths or prejudices.”).

³⁷ *Matal*, 137 S. Ct. at 1764 (Holmes, J., dissenting) (“[T]he proudest boast of our free speech jurisprudence is that we protect the freedom to express ‘the thought that we hate,’” (quoting *United States v. Schwimmer*, 279 U.S. 644, 655 (1929))); *see also, e.g.*, *Snyder v. Phelps*, 562 U.S. 443, 454 (2011) (“While these messages may fall short of refined social or political commentary, the issues they highlight—the political and moral conduct of the United States and its citizens, the fate of our Nation, homosexuality in the military, and scandals involving the Catholic clergy—are matters of public import. The signs certainly convey Westboro’s position on those issues, in a manner designed . . . to reach as broad a public audience as possible.”); *Collin v. Smith*, 578 F.2d 1197, 1206 (7th Cir. 1978) (“It would be grossly insensitive to deny, as we do not, that the proposed demonstration would seriously disturb, emotionally and mentally, at least some, and probably many of the Village’s residents. The problem with engrafting an exception on the First Amendment for such situations is that they are indistinguishable in principle from speech that ‘invite(s) dispute . . . induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger,’” quoting *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949)).

brand renegades are likely to put the courts to a choice between these two of their darlings in the foreseeable future.

