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## The Death Knell for Hate-Crime Laws? The Supreme Court Protects Unpopular Speech in *R.A.V. v. City of St. Paul*

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## The Death Knell for Hate-Crime Laws? The Supreme Court Protects Unpopular Speech in *R.A.V. v. City of St. Paul*

Roper: So now you'd give the Devil the benefit of law!  
Thomas More: Yes. What would you do? Cut a great road through the law to get after the Devil?  
Roper: I'd cut down every law in England to do that!  
Thomas More: Oh? And when the last law was down, and the Devil turned round on you—where would you hide, the laws all being flat? . . . [I]f you cut them down . . . d'you really think you could stand upright in the winds that would blow then? Yes, I'd give the Devil benefit of law, for my own safety's sake.<sup>1</sup>

### I. INTRODUCTION

Crime experts and statisticians agree that the incidence of ethnic intimidation is increasing.<sup>2</sup> This alarming trend indicates the growing readiness of individuals to voice ethnic intolerance through the use of violence. The recent Los Angeles riots provide sobering evidence that racial antagonism and violence are as prevalent now as ever.<sup>3</sup> Even Congress has noted the severity of this problem, enacting the Hate Crime Statistics Act of 1990 to create a national data collection system for the documentation and study of bias-related crimes.<sup>4</sup>

In an attempt to curtail hate crimes, many states have enacted ethnic-intimidation laws. These laws take primarily two approaches: The first makes it illegal for persons to interfere with the

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1. Brief for Petitioner at 6, *R.A.V. v. City of St. Paul*, 112 S. Ct. 2538 (1992) (No. 90-7675) (quoting ROBERT BOLT, *A MAN FOR ALL SEASONS* 37-38 (1960)).

2. See, e.g., *State v. Mitchell*, 485 N.W.2d 807, 810 (Wis. 1992) (documenting the increase in bias-motivated crime over the past decade); see also Tanya Kateri Hernández, *Bias Crimes: Unconscious Racism in the Prosecution of "Racially Motivated Violence"*, 99 *YALE L.J.* 845, 846 (1990) (emphasizing the important role that hate-crime laws will play in reducing the incidence of ethnic intimidation); Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 *DUKE L.J.* 431, 431-34 [hereinafter Lawrence] (detailing incidents of racial violence and intimidation on university campuses).

3. *Mitchell*, 485 N.W.2d at 817.

4. Pub. L. No. 101-275, 104 Stat. 140 (codified at 28 U.S.C. § 534 (Supp. II 1990)).

constitutional rights of others;<sup>5</sup> the second proscribes those acts of intimidation that result in physical injury.<sup>6</sup> Similarly, in an effort to reduce racial stigmatization on college campuses, several universities have promulgated student conduct codes.<sup>7</sup>

Though most commentators agree that the prevention of hate crime is a compelling rationale for these enactments, fierce disagreement exists as to whether ethnic-intimidation laws are constitutionally sound.<sup>8</sup> Critics argue that the laws criminalize speech

5. See, e.g., CAL. PENAL CODE § 422.6 (West 1988):

No person, whether or not acting under the color of law, shall by force or threat of force, willfully injure, intimidate, or interfere with, oppress, or threaten any other person in the free exercise or enjoyment of any right or privilege secured to him or her by the Constitution or laws of this state or by the Constitution or laws of the United States because of the other person's race, color, religion, ancestry, national origin, or sexual orientation . . . .

*Id.*; CONN. GEN. STAT. ANN. § 46a-58 (West 1986); MASS. GEN. LAWS ANN. ch. 265, § 37 (Law. Co-op. 1992); N.D. CENT. CODE § 12.1-14-04 (1985); W. VA. CODE § 61-6-21 (1988).

6. See ILL. REV. STAT. ch. 38, para. 12-7.1 (1991):

A person commits hate crime when, by reason of the race, color, creed, religion, ancestry, gender, sexual orientation, physical or mental disability, or national origin of another individual or group of individuals, he commits assault, battery, aggravated assault, misdemeanor theft, criminal trespass to residence, misdemeanor criminal damage to property, criminal trespass to vehicle, criminal trespass to real property or mob action as these crimes are defined in . . . this Code . . . .

*Id.*; see also IDAHO CODE §§ 18-7901 to 7903 (1987); N.Y. PENAL LAW § 240.30 (Consol. 1984); OKLA. STAT. ANN. tit. 21, § 850 (West Supp. 1992-93); OR. REV. STAT. § 166.155 (1990); R.I. GEN. LAWS § 11-42-3 (Supp. 1988); WASH. REV. CODE ANN. § 9A.36.080 (West 1988).

7. The most noteworthy of these student codes were those of the University of Michigan and Stanford University. The Michigan code, entitled "Policy on Discrimination and Discriminatory Harassment of Students in the University Environment," authorized punishment for student behavior that stigmatized or victimized another individual on the basis of, among other things, race, ethnicity, religion, sex, sexual orientation, age, handicap, or Vietnam-era veteran status. *Doe v. University of Michigan*, 721 F. Supp. 852, 856 (E.D. Mich. 1989). Penalties for violating the policy ranged from formal reprimand to expulsion. *Id.* at 857. The Michigan regulation was held unconstitutional by the United States District Court for the Eastern District of Michigan. *Id.* at 866. The text of the regulation as well as a discussion of the court's opinion can be found at *infra* notes 137-41 and accompanying text. The text of the code adopted by Stanford, which is entitled the "Fundamental Standard Interpretation: Free Expression and Discriminatory Harassment," can be found in Lawrence, *supra* note 2, at 450-51. Similar student expression codes have been enacted by Purdue University, the University of North Carolina at Charlotte, the University of Pennsylvania, and the University of Wisconsin. Robin M. Hilshizer, *Securing Freedom from Harassment without Reducing Freedom of Speech*, 76 IOWA L. REV. 383, 393 (1991) [hereinafter Hilshizer].

8. Susan Gellman, *Sticks and Stones Can Put You in Jail, But Can Words Increase Your Sentence? Constitutional and Policy Dilemmas of Ethnic Intimidation Laws*, 39 UCLA L. REV. 333, 334 (1991) [hereinafter Gellman]; Nadine Strossen, *Regulating Ra-*

and thought that are protected by the First Amendment.<sup>9</sup> They contend that the viewpoints expressed by bigots, though deplorable, nevertheless deserve constitutional protection.<sup>10</sup> The First Amendment prevents states from regulating speech on the basis of the content or viewpoint expressed except in extreme circumstances.<sup>11</sup>

Supporters of hate-crime statutes find support for their position in the "fighting-words" doctrine, which was the basis for the Supreme Court's decision in *Chaplinsky v. New Hampshire*.<sup>12</sup> In *Chaplinsky*, the Supreme Court exempted from First Amendment protection "those [words] which by their very utterance inflict injury or tend to incite an immediate breach of the peace."<sup>13</sup> Proponents of hate-crime laws argue that because hate crimes involve speech that inflicts injury and often elicits a violent response, a government may, under *Chaplinsky*, constitutionally proscribe that speech. Additionally, advocates of hate-crime legislation assert that these laws are valid content-based regulations of speech because of the government's compelling interest in preventing hate crimes.<sup>14</sup>

The debate over hate-crime laws intensified during the past year

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*cist Speech on Campus: A Modest Proposal?*, 1990 DUKE L.J. 484, 489 [hereinafter Strossen].

9. See Gellman, *supra* note 8, at 334; Strossen, *supra* note 8, at 489.

10. See *Houchins v. KQED, Inc.*, 438 U.S. 1, 13 (1978) (stating that "[w]e must not confuse what is good, desirable, or expedient with what is constitutionally commanded by the First Amendment"); *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971) (holding that "so long as the means are peaceful, the communication need not meet standards of acceptability"); *Cohen v. California*, 403 U.S. 15, 25 (1971). The Court in *Cohen* stated:

That the air may at times seem filled with verbal cacophony is, in this sense, not a sign of weakness but of strength. We cannot lose sight of the fact that, in what otherwise might seem a trifling and annoying instance of individual distasteful abuse of a privilege, these fundamental societal values are truly implicated.

*Id.*

11. *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 96 (1972). The prohibition against content discrimination is the general rule except in the rare instance in which the state has a sufficient regulatory interest that justifies selective speech exclusions. *Id.* at 98. An example of a sufficient state regulatory interest might be a state's interest in preventing a breach of the peace. *Id.* States may also protect substantial governmental interests by placing reasonable restrictions on the time, place, and manner in which speech is expressed. *Id.* For a discussion of content-based discriminations, see *infra* notes 76-108 and accompanying text.

12. 315 U.S. 568 (1942).

13. *Id.* at 572.

14. Content-based prohibitions of speech will survive constitutional scrutiny if the government demonstrates that it has a compelling interest in regulating the speech and that the statute at issue is narrowly tailored to meet that end. See, e.g., *Burson v. Free-*

when the Supreme Court considered the constitutionality of a St. Paul, Minnesota, ethnic intimidation ordinance in *R.A.V. v. City of St. Paul*.<sup>15</sup> The St. Paul Bias-Motivated Crime Ordinance had made it a crime for a person to place any symbol, object, or graffiti on public or private property with the knowledge that it would arouse anger or resentment in others on the basis of race, color, religion, or gender.<sup>16</sup> The ordinance expressly prohibited the display of Nazi swastikas and burning crosses.<sup>17</sup>

In a decision that has been seen as a test case for the constitutionality of hate-crime laws,<sup>18</sup> the Supreme Court held that the St. Paul ordinance was an unconstitutional content-based prohibition of speech.<sup>19</sup> Though the *R.A.V.* majority noted that *Chaplinsky* permitted a government to regulate fighting words, the Court held that the fighting-words doctrine cannot be used to regulate speech when the regulation is rooted in either hostility or favoritism toward the viewpoint expressed.<sup>20</sup> Because the St. Paul ordinance prohibited the expression of certain disfavored views, the Court held that the law was an impermissible content-based regulation of speech.<sup>21</sup> In addition, the Court applied strict scrutiny analysis to this content-based ordinance and concluded that the ordinance was not reasonably necessary to achieve the city's interests.<sup>22</sup>

This Note analyzes *R.A.V. v. City of St. Paul*, its impact on hate-crime laws, and its probable effect on First Amendment jurisprudence. The Note begins by reviewing the relationship between the

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man, 112 S. Ct. 1846 (1992) (plurality opinion). For a discussion of the Court's scrutiny of content-based statutes, see *infra* notes 76-108 and accompanying text.

15. 112 S. Ct. 2538 (1992).

16. ST. PAUL, MINN., LEGIS. CODE § 609.02 (1990). For the text of the St. Paul ordinance, see *infra* note 144.

17. *Id.*

18. See Gellman *supra* note 8, at 353 (commenting that *R.A.V.* "will likely affect future analysis of penalty-enhancement type ethnic intimidation statutes"). In fact, on December 14, 1992, the Supreme Court agreed to hear a case involving a constitutional challenge to penalty-enhancement ethnic-intimidation statutes in light of *R.A.V.* Wisconsin v. Mitchell, No. 92-515, 1992 WL 266329 (U.S. Dec. 14, 1992); see also Daniel W. Homstad, Casenote, *Of Burning Crosses and Chilled Expression: Minnesota and the Eighth Circuit Moderate First Amendment Mandates in "Hate Speech" Prosecutions: In re R.A.V. and United States v. Lee*, 15 HAMLIN L. REV. 167, 190 (1991) (outlining the potential effect of *R.A.V.* on the fighting-words doctrine); Ruth Marcus, *Supreme Court Overturns Law Barring Hate Crimes; Free Speech Ruling Seen as Far-Reaching*, WASH. POST, June 23, 1992, at A1 (stating that *R.A.V.* casts "doubt on the constitutionality of scores of other state and local laws and on campus speech codes that punish students for offensive remarks").

19. *R.A.V.*, 112 S. Ct. at 2542.

20. *Id.* at 2543.

21. *Id.* at 2547.

22. *Id.* at 2549-50.

First Amendment and the fighting-words doctrine.<sup>23</sup> It then examines the strict scrutiny standard, which the Court uses to assess the constitutionality of content-based prohibitions of speech,<sup>24</sup> and discusses the standard as it has been applied to hate-crime laws.<sup>25</sup> Finally, this Note analyzes *R.A.V. v. City of St. Paul* and concludes that although the *R.A.V.* Court reached the correct result, the Court needlessly muddied First Amendment jurisprudence in the process.<sup>26</sup>

## II. BACKGROUND

### A. The Chaplinsky "Fighting-Words" Doctrine

The First Amendment guarantees the right of a person to express his or her views.<sup>27</sup> For this reason, only in exceptional circumstances may the government regulate the content or subject matter of speech.<sup>28</sup> One permissible exception exists when the government demonstrates that its regulation serves a compelling governmental interest and that the regulation has been narrowly tailored to achieve that interest.<sup>29</sup> Additionally, the government may regulate those categories of speech that the Court has determined have too little social value<sup>30</sup> to merit First Amendment pro-

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23. See *infra* part II.A.

24. See *infra* part II.B.

25. See *infra* part II.C.

26. See *infra* parts III-V.

27. The First Amendment provides:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. CONST. amend. I.

The Supreme Court has held that the First Amendment protects symbolic or nonverbal conduct that communicates an idea or a belief. See *Spence v. Washington*, 418 U.S. 405, 409-11 (1974); *United States v. O'Brien*, 391 U.S. 367, 376 (1968).

28. See *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 96 (1972).

29. See *infra* part II.B.

30. The Court first attempted to identify categories of speech that have little social value in *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942). The *Chaplinsky* decision outlined two broad classes of speech: (1) speech that enjoyed absolute protection under the First Amendment; and (2) speech that received no protection. *Id.* at 572-73. The *Chaplinsky* Court stated that words "which by their very utterance inflict injury or tend to incite an immediate breach of the peace" may be regulated if the "benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Id.*

Recently, the Court used this kind of balancing approach to determine the degree of protection that certain types of speech should enjoy. See *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976). In *American Mini Theatres*, Justice Stevens stated in a plurality opinion that pornographic films deserve less protection than political speech:

tection.<sup>31</sup> Examples of such categories include defamation<sup>32</sup> and obscenity.<sup>33</sup>

Fighting words, as defined by the Court in *Chaplinsky v. New Hampshire*,<sup>34</sup> form another category of speech that is not protected under the First Amendment. In *Chaplinsky*, a Jehovah's Witness who regularly preached on the street was convicted of violating a New Hampshire law that banned the use of offensive or annoying words in a public place.<sup>35</sup> Chaplinsky allegedly told the city marshal, "You are a God damned racketeer" and "the whole government of Rochester are [sic] Fascists or agents of Fascists."<sup>36</sup>

The Court affirmed the conviction, holding that there is no constitutional right to express words that cause personal injury or threaten an immediate violent response.<sup>37</sup> The Court noted that

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[E]ven though we recognize that the First Amendment will not tolerate the total suppression of erotic materials that have some arguable artistic value, it is manifest that society's interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interest in untrammelled political debate.

*Id.* at 70; see generally LAWRENCE TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 12-18 (1st ed. 1978) [hereinafter TRIBE].

31. *Chaplinsky*, 315 U.S. at 572.

32. See *Beauharnais v. Illinois*, 343 U.S. 250, 266-67 (1952) (upholding conviction of a defendant who had distributed racist leaflets in violation of an Illinois defamation law because libelous utterances were not within the area of constitutionally protected speech). Since *Beauharnais*, however, the Court has held that not all defamatory speech falls outside the protection of the First Amendment. See, e.g., *New York Times v. Sullivan*, 376 U.S. 254, 270-72 (1964) (holding that defamatory speech is constitutionally protected unless the statements are made with a reckless disregard for the truth).

33. See *Roth v. United States*, 354 U.S. 476, 485 (1957) (holding that "obscenity is not within the area of constitutionally protected speech or press").

34. 315 U.S. 568 (1942).

35. *Id.* at 569. The New Hampshire law provided:

No person shall address any offensive, derisive or annoying word to any other person who is lawfully in any street or other public place, nor call him by any offensive or derisive name, nor make any noise or exclamation in his presence and hearing with intent to deride, offend or annoy him, or to prevent him from pursuing his lawful business or occupation.

*Id.*

36. *Id.*

37. *Id.* at 572. The Court explained:

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, the profane, 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 [not an] essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.

*Id.* at 571-72 (footnotes omitted).

the New Hampshire law served a compelling interest by preserving the public peace.<sup>38</sup> Because the statute prohibited only fighting words, which receive no First Amendment protection, the Court concluded that the law was constitutional.<sup>39</sup>

The *Chaplinsky* decision identified two categories of fighting words: (1) words that trigger an immediate violent response, and (2) words that cause personal emotional injury.<sup>40</sup> Under *Chaplinsky*, a state could regulate fighting words in either category. Since *Chaplinsky*, however, the Court has so chipped away at the fighting words doctrine that some commentators question its validity today.<sup>41</sup> Though it continued to mention the doctrine favorably in various opinions,<sup>42</sup> in the forty years after *Chaplinsky*, the Court had not once invoked the doctrine to uphold a conviction for breach of the peace.<sup>43</sup> Additionally, the personal injury prong of *Chaplinsky*, which never enjoyed strong support by the Court, is now essentially dead.<sup>44</sup>

One of the first decisions to modify *Chaplinsky* was *Terminiello v. Chicago*.<sup>45</sup> The petitioner in *Terminiello* had been arrested after he had delivered a speech inside a Chicago auditorium that caused an angry crowd outside the auditorium to riot.<sup>46</sup> He was convicted of breaching the peace.<sup>47</sup> The *Terminiello* Court reversed that conviction, holding that the city ordinance at issue impermissibly reg-

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38. *Id.* at 573.

39. *Chaplinsky*, 315 U.S. at 573-74.

40. See *TRIBE*, *supra* note 30, at 617-23.

41. See, e.g., *Gooding v. Wilson*, 405 U.S. 518, 537 (1972) (Blackmun, J., dissenting) (stating that "the Court, despite its protestations to the contrary, is merely paying lip service to *Chaplinsky*"); see also *Strossen*, *supra* note 8, at 510-11 (noting that constitutional scholars have urged that the fighting-words doctrine should no longer be used because it does not further the asserted governmental interest in preventing a breach of the peace).

42. See, e.g., *R.A.V.*, 112 S. Ct. at 2543-45 (noting that the government may regulate certain fighting words, but may not base its regulation on hostility or favoritism toward the underlying message expressed); *Gooding*, 405 U.S. at 523 (reaffirming state power to constitutionally punish fighting words under carefully drawn statutes that are not also susceptible of application to protected expression); *Cohen v. California*, 403 U.S. 15, 20 (1971) (recognizing that states may ban the simple use of fighting words, but noting that the words would have to be of a nature that would provoke immediate violence).

43. See Stephen W. Gard, *Fighting Words as Free Speech*, 58 WASH. U. L.Q. 531, 534 (1980) [hereinafter Gard].

44. Although it has never expressly discarded the personal injury prong of *Chaplinsky*, the Court has repeatedly ignored it. See *infra* notes 50-74 and accompanying text.

45. 337 U.S. 1 (1949).

46. *Id.* at 2-3. During his speech, *Terminiello* condemned the conduct of the crowd outside and viciously criticized certain political and racial groups whose activities he deplored. *Id.* at 3.

47. *Id.*



ulated protected speech.<sup>48</sup> Though noting that freedom of speech is not absolute under *Chaplinsky*, the Court stated that a government may not regulate speech solely because that speech causes public inconvenience, anger, or unrest.<sup>49</sup> To fall within the fighting-words exception, speech must create the likelihood of immediate, violent, and reflexive response.<sup>50</sup>

The Court reinforced this theme in *Cohen v. California*,<sup>51</sup> holding that speech cannot be prohibited simply because the ideas expressed offend or insult.<sup>52</sup> In *Cohen*, the defendant was convicted of disturbing the peace after he wore a jacket into the corridor of the Los Angeles County Courthouse with the words "Fuck the Draft" printed on the back.<sup>53</sup> Affirming Cohen's conviction, the California Court of Appeals held that wearing the jacket constituted offensive conduct that could foreseeably provoke others to respond violently.<sup>54</sup>

Refusing to apply the *Chaplinsky* fighting-words doctrine, the Supreme Court reversed Cohen's conviction.<sup>55</sup> Justice Harlan, writing for the Court, explained that certain inflammatory words are not protected by the First Amendment when they are "personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction."<sup>56</sup> Therefore, to fall into the unprotected

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48. *Id.* at 4-5. It is important to note that *Terminiello* was analyzed under the Court's hostile-audience doctrine. *Id.* at 4-6. Under the hostile-audience doctrine, the Court weighs the freedom of the individual to speak against the possibility that the speech will incite riots and create angry mobs, resulting in violence and injury. See GERALD GÜNTHER, CONSTITUTIONAL LAW at 1272-73 n.1 (12th ed. 1991). The major difference between the fighting-words and hostile-audience analyses is that the former involves a face-to-face utterance that results in violence, while the latter involves the threat of reactions by an audience hostile to the speaker. *Id.* The *Terminiello* Court's discussion of fighting words is vital for an understanding of the evolution of the doctrine since *Chaplinsky*.

49. *Terminiello*, 337 U.S. at 4 (stating that "freedom of speech, though not absolute . . . is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest") (citations omitted).

50. See *Gard, supra* note 43, at 551. *Terminiello* marked the beginning of the Court's rejection of *Chaplinsky*'s personal injury prong. The Court refused to consider the emotional harm caused to the recipient of the verbal abuse, insisting that speech, in order to constitute fighting words, must result in immediate violence. *Id.* at 551-53.

51. 403 U.S. 15 (1971).

52. *Id.* at 23.

53. *Id.* at 16-17.

54. *Id.* at 17.

55. *Id.* at 20.

56. *Cohen*, 302 U.S. at 20 (citing *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942)).

fighting-words category, speech must be directed at individuals, rather than the public at large, and must cause an immediate violent response.<sup>57</sup> Personal offense or emotional trauma is not a sufficient rationale for censoring certain types of expression.<sup>58</sup> Since California had made no showing that any citizen was ready to physically strike out in response to Cohen's jacket, *Chaplinsky* could not be used to abridge the First Amendment guarantee of free speech.<sup>59</sup>

Perhaps the best statement of the current fighting-words doctrine is the Court's decision in *Gooding v. Wilson*.<sup>60</sup> In *Gooding*, the Court held unconstitutional a Georgia breach-of-the-peace statute containing language similar to that of the New Hampshire law at issue in *Chaplinsky*.<sup>61</sup> The defendant was an anti-war protester who had blocked the access of inductees to a U.S. Army building.<sup>62</sup> When requested by police to desist, the defendant told an officer, "White son of a bitch, I'll kill you" and, "You son of a bitch, if you ever put your hands on me again, I'll cut you all to pieces."<sup>63</sup>

The *Gooding* Court acknowledged that states may regulate fight-

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57. *Id.* The requirement that expression must be likely to result in immediate violence and lawless action before it can be regulated is rooted in the "clear and present danger" doctrine of *Schenck v. United States*, 249 U.S. 47 (1919). The best contemporary description of the clear and present danger test is found in *Brandenburg v. Ohio*, 395 U.S. 444 (1969). In *Brandenburg*, a Ku Klux Klan group was charged with violation of the Ohio Criminal Syndicalism statute for advocating criminal activity, violence, and unlawful methods of terrorism to achieve political reform. *Id.* at 444-45. The Court held the Ohio law unconstitutional because the law banned activity that did not automatically lead to violence. *Id.* at 448-49.

58. *Cohen*, 403 U.S. at 24-25. *Cohen's* holding illustrates the Court's evolving view that personal injury or offense is not enough to classify speech as fighting words. The Court's continuing demand that immediate violence must result from the speech signals the dormancy, if not death, of the personal injury prong of *Chaplinsky*.

59. *Id.* at 23. Besides considering the fighting-words argument in *Cohen*, the Court also considered whether certain "scurrilous epithets" such as *fuck* deserve any First Amendment protection at all. *Id.* at 22-26. The Court's analysis of this issue has become known as the offensive-words doctrine. The doctrine holds that states do not have the power to remove offensive words from the public vocabulary in the interests of social morality. *Id.* at 25-26. Justice Harlan explained that offensive utterances are a necessary side effect of free expression and are therefore protected unless they intrude into the privacy of the home or into situations in which the audience is captive. *Id.* at 21-25.

60. 405 U.S. 518 (1972).

61. *Id.* at 528. The Georgia statute provided in part: "Any person who shall, without provocation, use to or of another, and in his presence . . . opprobrious words or abusive language, tending to cause a breach of the peace . . . shall be guilty of a misdemeanor." *Id.* at 519.

62. *Id.* at 519 n.1.

63. *Id.* at 520 n.1.

ing words that are likely to result in a breach of the peace.<sup>64</sup> However, the Court reversed the conviction, refusing to accept Georgia's argument that its courts had narrowly construed the statute to apply only to fighting words.<sup>65</sup> On the basis of its language alone, the majority concluded that the law was overbroad<sup>66</sup> because it could be applied to protected expression.<sup>67</sup> Justice Blackmun, joined by Chief Justice Burger, dissented, claiming that the majority had effectively overturned *Chaplinsky*.<sup>68</sup>

Since *Gooding*, the Court has continued to construe *Chaplinsky* narrowly, limiting its application to cases in which a violent response to the speech is likely to result.<sup>69</sup> After tracking the Court's fighting-words cases, one commentator has outlined a minimum of four elements that the Court will likely require before allowing a fighting-words conviction to stand:<sup>70</sup> the speech must be (1) an extremely provocative insult;<sup>71</sup> (2) likely to incite the average listener to an immediate violent response;<sup>72</sup> (3) uttered face-to-face to the addressee;<sup>73</sup> and (4) directed at an individual rather than a group audience.<sup>74</sup>

Hate-crime laws may only proscribe speech that falls within the fighting-words category if the laws are to survive constitutional attack. Given the Court's narrow interpretation of fighting words, however, states have had a difficult time drafting ethnic-intimidation laws that fit within constitutionally acceptable parameters. Consequently, many hate-crime laws and university speech policies have been struck down by lower courts as overbroad; not only do

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64. *Id.* at 523.

65. *Gooding*, 405 U.S. at 524-27.

66. For a discussion of the overbreadth doctrine in First Amendment adjudication, see *infra* notes 215-21, 234-38 and accompanying text.

67. *Gooding*, 405 U.S. at 524-27. Besides looking to the statute's language, the *Gooding* Court examined several Georgia cases that had interpreted the law and concluded that the Georgia Appellate Court had not satisfactorily limited its application to fighting words under *Chaplinsky*. *Id.*

68. *Id.* at 537 (Blackmun, J., dissenting).

69. For example, in *Rosenfeld v. New Jersey*, 408 U.S. 901 (1972), Justice Powell criticized the Court for its one-sided view of *Chaplinsky*: "[T]he exception to First Amendment protection recognized in *Chaplinsky* is not limited to words whose mere utterance entails a high probability of an outbreak of physical violence. It also extends to the willful use of scurrilous language calculated to offend the sensibilities of an unwilling audience." *Id.* at 905 (Powell, J., dissenting); see also *TRIBE, supra* note 30, at 618.

70. See Gard, *supra* note 43, at 536.

71. See, e.g., *Norwell v. City of Cincinnati*, 414 U.S. 14, 16 (1973); *Cohen*, 403 U.S. at 22-26.

72. See, e.g., *Street v. New York*, 394 U.S. 576, 592 (1969).

73. See, e.g., *Cohen*, 403 U.S. at 20-21.

74. See, e.g., *Gooding*, 405 U.S. at 523.

these laws and policies restrict speech within the fighting-words category, but they also prohibit speech that is protected under the First Amendment.<sup>75</sup>

### *B. Content-Based Regulation of Speech*

Besides having the power to regulate expression that falls within one of the unprotected-speech categories,<sup>76</sup> the government also has the power to impose content-based regulations on constitutionally protected speech if the regulation can survive the strict scrutiny of the Court.<sup>77</sup> For a regulation to survive a strict scrutiny analysis, the government must show that the content-based regulation serves a compelling interest and that it is narrowly tailored to meet that end.<sup>78</sup> Though few restrictions can survive strict scrutiny analysis, the analysis remains a vital part of the Court's First Amendment jurisprudence.<sup>79</sup>

The Court's distaste for content-based speech discrimination is exemplified by its decision in *Police Department of Chicago v. Mosley*.<sup>80</sup> Chicago had enacted an ordinance that prohibited all picketing within 150 feet of any school building while classes were in session.<sup>81</sup> However, the ordinance exempted from its general prohibition the peaceful picketing of any school involved in a labor dispute.<sup>82</sup> Because the city treated different types of picketing differently, the Court declared the ordinance unconstitutional.<sup>83</sup>

The *Mosley* Court recognized that a state might in some instances have a legitimate state interest that would justify a content-based prohibition on speech.<sup>84</sup> However, the Court stressed that these prohibitions must be subjected to the strictest judicial scrutiny, and will survive only upon an adequate showing that the prohibition was narrowly tailored to serve a substantial government interest.<sup>85</sup>

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75. See *infra* part II.C.

76. *R.A.V.*, 112 S. Ct. at 2543.

77. See *Burson v. Freeman*, 112 S. Ct. 1846 (1992); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983); *Carey v. Brown*, 447 U.S. 455, 461-62 (1980).

78. *R.A.V.*, 112 S. Ct. at 2549.

79. See *Burson*, 112 S. Ct. at 1857-58. *Burson* is a rare example of a speech prohibition that survived strict scrutiny. See *infra* notes 86-92 and accompanying text.

80. 408 U.S. 92 (1972).

81. *Id.* at 92-93.

82. *Id.*

83. *Id.* at 95. The Court stated: "[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Id.*

84. *Id.* at 98-99.

85. *Mosley*, 408 U.S. at 98-99.

Though the use of strict scrutiny usually results in the invalidation of a content-based statute, rare exceptions do exist. In *Burson v. Freeman*,<sup>86</sup> for example, the Court recently upheld a content-based regulation. In *Burson*, a candidate for political office challenged a Tennessee law that prohibited campaigning or placing campaign material within 100 feet of a polling place.<sup>87</sup> The candidate complained that the statute unconstitutionally restricted her speech on the basis of its content.<sup>88</sup>

The Court rejected the candidate's argument and upheld the law as a constitutionally permissible content-based regulation of speech.<sup>89</sup> Writing for the majority, Justice Blackmun began by acknowledging that political expression is a category of speech that deserves the most steadfast protection.<sup>90</sup> He noted, however, that Tennessee had a compelling interest in fair elections and that the law's imposition of a 100 foot campaign-free zone was narrowly tailored to meet that goal.<sup>91</sup> While admitting that it is rare for a content-based regulation to survive the rigors of strict scrutiny, the Court in *Burson* upheld the regulation.<sup>92</sup>

An exception exists to the general application of a strict scrutiny analysis to First Amendment claims.<sup>93</sup> In instances in which the content-based prohibition has a neutral effect on speech, the Court will employ a lower level of scrutiny.<sup>94</sup> A regulation is content neutral when it primarily limits the noncommunicative or secondary effects of speech.<sup>95</sup> Government must still show a substantial

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86. 112 S. Ct. 1846 (1992).

87. *Id.* at 1849.

88. *Id.*

89. *Id.* at 1857.

90. *Id.* at 1850.

91. *Burson*, 112 S. Ct. at 1856-57.

92. Justice Blackmun commented:

In conclusion, we reaffirm that it is the rare case in which we have held that a law survives strict scrutiny. This, however, is such a rare case. Here, the State, as recognized administrator of elections, has asserted that the exercise of free speech rights conflicts with another fundamental right, the right to cast a ballot in an election free from the taint of intimidation and fraud. . . . Given the conflict between these two rights, we hold that requiring solicitors to stand 100 feet from entrances to polling places does not constitute an unconstitutional compromise.

*Id.* at 1857-58.

93. See generally, Susan H. Williams, *Content Discrimination and the First Amendment*, 139 U. PA. L. REV. 615 (1991) (comparing the Court's approach to content-based regulations with its approach to those that are content neutral).

94. See *TRIBE*, *supra* note 30, at 580-82 (noting that in these situations, the Court has applied a balancing test).

95. *Id.*

interest before it can regulate speech in this way.<sup>96</sup> Additionally, a content-neutral prohibition must provide alternative opportunities for the expression of the regulated speech.<sup>97</sup> In general, however, when this standard of scrutiny is imposed on a content-neutral prohibition, the Court is much more likely to uphold the statute.<sup>98</sup>

The decision in *U.S. v. O'Brien*<sup>99</sup> is a classic illustration of how the Court deals with content-neutral prohibitions. In *O'Brien*, the defendant had been convicted of burning his draft card in violation of the Universal Military Training and Service Act of 1948.<sup>100</sup> O'Brien argued that the Act was an unconstitutional content-based regulation, which deprived him of his First Amendment right to express certain viewpoints symbolically.<sup>101</sup> While acknowledging that the law did infringe on O'Brien's right to express his views, the Court nevertheless rejected his challenge, holding that the government had a substantial administrative interest in protecting the draft cards.<sup>102</sup> The Court stated that the purpose of the law was not to regulate speech but to allow for this administrative ease.<sup>103</sup> The Court concluded that the incidental restriction on the defendant's First Amendment freedom was no greater than necessary to accomplish the goals of the law.<sup>104</sup>

Another example of a permissible content-neutral regulation is a law that seeks only to limit the time, place, and manner in which the speech takes place.<sup>105</sup> For example, a community may forbid adult movie theaters from locating within a certain distance of residential areas.<sup>106</sup> The Court would allow this type of regulation if

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96. *Id.* at 682-88. The constitutional analysis of content-neutral statutes is frequently referred to as track two analysis. *Id.* Though the scrutiny of such prohibitions is not as strict as pure content-based discriminations (track one analysis), the Court will still balance the speech interests at stake against the substantial state interest. *Id.* This balancing is conducted on a case-by-case basis. Though content-neutral prohibitions are often upheld, track two analysis does not ensure this result. *Id.*

97. *Id.*

98. See *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976).

99. 391 U.S. 367 (1968).

100. *Id.* at 369-70.

101. *Id.* at 376.

102. *Id.* at 377.

103. *Id.* at 378.

104. *O'Brien*, 391 U.S. at 377.

105. See *Mosley*, 408 U.S. at 98; *Cox v. Louisiana*, 379 U.S. 536, 554-55 (1965); *Adlerley v. Florida*, 385 U.S. 39, 46-48 (1966).

106. In *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), the Court upheld a Renton, Washington ordinance that prohibited adult motion picture theaters from locating within 1,000 feet of any residential zone, single- or multiple-family dwelling, church, park, or school. The Court held that since the ordinance did not completely ban the theaters, it should be reviewed using the less strict time, place, and manner analy-

its sole purpose was to regulate against the secondary effects of the targeted expression.<sup>107</sup> For such a content-neutral prohibition to survive, however, communities are still required to provide other locations for the theaters to operate.<sup>108</sup>

### C. Recent Hate-Crime Decisions

The *R.A.V.* opinion was the first definitive statement by the Supreme Court on the constitutionality of contemporary hate-crime laws. Prior to *R.A.V.*, however, numerous state and federal court opinions had addressed the validity of both hate-crime laws and university student codes of conduct.

Several constitutional challenges have been made to state statutes that increase the severity of criminal sentences in instances in which a crime has been found to be racially motivated.<sup>109</sup> The results of these challenges have varied. In Oregon and New York,<sup>110</sup> for example, courts have rejected constitutional challenges to state ethnic-intimidation laws.

In *People v. Grupe*, a New York court upheld a law providing that "[a] person is guilty of aggravated harassment in the second degree when . . . he [s]trikes, shoves, [or] kicks [another] . . . because of the race[,] color, religion or national origin of such person."<sup>111</sup> The defendant, who was charged with violation of the statute,<sup>112</sup> argued that the law was unconstitutional on both equal protection and First Amendment grounds. In particular, the de-

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sis. *Id.* at 46-47. The Renton ordinance was found to serve a compelling government interest by "preserv[ing] the quality of urban life." *Id.* at 50. Additionally, the ordinance left open 520 acres to be used for theater sites; therefore, alternative opportunities for expression were provided. *Id.* at 53. The Court concluded that because the ordinance was narrowly tailored to regulate the harmful secondary effects of speech, it therefore did not violate the First Amendment. *Id.* at 54.

107. *Id.* at 49. The legitimate secondary effects that Renton sought to prevent were urban decay, crime, economic decline, falling property values, and a diminishing quality of urban life. *Id.* at 48-49.

108. *Id.*

109. See John R. Berg, Comment, *State Legislators Battle Bigotry: Is The Ethnic Intimidation Law a Constitutionally Infirm and Ineffectual Weapon?*, 20 CAP. U. L. REV. 971 (1991).

110. See, e.g., *State v. Beebe*, 680 P.2d 11 (Or. Ct. App. 1984), *appeal denied*, 683 P.2d 1372 (Or. 1984) (upholding, against constitutional challenge, a conviction under an Oregon law that provides: "A person commits the crime of intimidation in the second degree if, by reason of the race, color, religion or national origin of another person, the person violates [the harassment statute]"); *People v. Grupe*, 532 N.Y.S.2d 815 (N.Y. Crim. Ct. 1988).

111. 532 N.Y.S.2d at 817.

112. *Grupe* was accused of hitting a Jewish man in the face and chest while shouting such insults as, "Is that the best you can do? I'll show you Jew bastard." *Id.*

fendant claimed that the statute sought to punish racist statements.<sup>113</sup> The *Grupe* court rejected these challenges, holding that the statute regulated conduct rather than bigotry and therefore did not impermissibly regulate speech.<sup>114</sup> The court stated that the speech prohibited by the statute fell within the fighting-words exception.<sup>115</sup> Additionally, the *Grupe* court noted, even if it did regulate protected First Amendment speech, the statute was still valid under a strict scrutiny analysis, since it was narrowly tailored to meet the compelling state interest of promoting racial harmony.<sup>116</sup>

Conversely, Michigan<sup>117</sup> and Ohio have invalidated similar hate-crime laws. In *State v. Van Gundy*,<sup>118</sup> the Ohio Court of Appeals invalidated an ethnic-intimidation law that enhanced criminal penalties for crimes motivated by ethnic hostility.<sup>119</sup> Among the reasons the *Van Gundy* court held the Ohio statute unconstitutional was the chilling effect that the statute had on First Amendment speech.<sup>120</sup> The *Van Gundy* trial court<sup>121</sup> had noted that the statute could not survive strict scrutiny because it was not sufficiently related to the policy purpose; the law allowed sentences to be enhanced for threatening to commit violent acts but not for actually carrying them out.<sup>122</sup>

Perhaps one of the most famous hate-speech decisions was that

113. Grupe argued that the statute was discriminatory in effect because, although his potential punishment was over a year in jail, the same conduct unaccompanied by slurs could only be punished by 15 days in jail. *Id.*

114. *Id.* at 817-18.

115. *Id.* at 818.

116. *Grupe*, 532 N.Y.S.2d at 819-20.

117. For a discussion of the treatment by Michigan courts of hate-crime laws, see Gellman, *supra* note 8, at 348-49 (discussing a case invalidating the Michigan hate-crime law as violative of the First Amendment because it punished both the spoken and written word, as well as speech that was not directly spoken in the face of the victim).

118. No. 90AP-473, 1991 WL 60686 (Ohio Ct. App. Apr. 16, 1991).

119. The Ohio statute provided:

Ethnic Intimidation

(A) No person shall violate [sections of the Ohio Revised Code defining offenses of menacing, criminal mischief, etc.] by reason of the race, color, religion, or national origin of another person or group of persons.

(B) Whoever violates this section is guilty of ethnic intimidation. Ethnic intimidation is an offense of the next higher degree than the offense the commission of which is a necessary element of ethnic intimidation.

OHIO REV. CODE ANN. § 2927.12 (Baldwin 1990).

120. *Van Gundy*, 1991 WL 60686 at \*5. The *Van Gundy* court commented: "The statute makes a crime out of what, under the constitution, cannot be a crime since it is aimed directly at activity protected by the constitution." *Id.*

121. *State v. Van Gundy*, No. 89-CR-11-5166, slip op. at 2 (Franklin Co. C.P. Mar. 28, 1990).

122. *Id.*



of the U.S. Court of Appeals for the Seventh Circuit in *Collin v. Smith*.<sup>123</sup> Though the case did not directly deal with hate crime, the *Collin* analysis illustrates how far communities can go in attempting to curb hate speech. The *Collin* litigation arose from a Nazi group's plans to demonstrate in front of the village hall in Skokie, Illinois.<sup>124</sup> The Village of Skokie was home to a large Jewish community, including several thousand residents who had survived the Nazi concentration camps.<sup>125</sup> In an effort to thwart the demonstration, Skokie attempted to get an injunction in state court.<sup>126</sup> Skokie argued that the expressive aspect of the demonstration constituted fighting words—it was “dedicated to the incitation of racial and religious hatred”—and would result in severe emotional injury to its citizens.<sup>127</sup> The Illinois Supreme Court denied the injunction request after concluding that the proposed demonstration would not fall into the fighting-words category.<sup>128</sup> The court noted that even the most insulting speech, no matter how unpalatable, deserved First Amendment protection.<sup>129</sup>

In response to the court's decision, Skokie enacted several ordinances in an attempt to prevent the demonstration.<sup>130</sup> Among the ordinances was one that prohibited the promulgation of any materials that promoted racial or religious hatred.<sup>131</sup> The Nazis challenged the ordinances as unconstitutional restrictions on their right to free political expression.<sup>132</sup> In *Collin v. Smith*, the Seventh Circuit invalidated the Skokie ordinances.<sup>133</sup> Relying on such cases as *Cohen* and *Terminiello*, the court held that the Nazi demonstration did not fit into the fighting-words category, since the village could

123. 578 F.2d 1197 (7th Cir. 1978).

124. *Village of Skokie v. National Socialist Party*, 373 N.E.2d 21 (Ill. 1978).

125. *Id.* at 22.

126. *Id.*

127. *Id.*

128. *Id.* at 22-25.

129. *Village of Skokie*, 373 N.E.2d at 24. The Illinois Supreme Court explained: The display of the swastika, as offensive to the principles of a free nation as the memories it recalls may be, is symbolic political speech intended to convey to the public the beliefs of those who display it. It does not, in our opinion, fall within the definition of ‘fighting words . . . .’

*Id.*

This statement is a good example of how courts have ignored the personal injury prong of *Chaplinsky*. Emotional trauma alone is not enough to classify speech as fighting words; rather, courts insist on a showing that immediate violence will result. See *Terminiello*, 337 U.S. at 4; *Cohen*, 403 U.S. at 20.

130. *Collin*, 578 F.2d at 1199.

131. *Id.*

132. *Id.* at 1200.

133. *Id.* at 1210.

not prove that the demonstration would provoke an imminent violent response.<sup>134</sup> Instead, the ordinances were found to be impermissible content-based restrictions.<sup>135</sup> The Seventh Circuit warned that the Constitution forbids making "criminal the peaceful expression of unpopular views."<sup>136</sup>

Similarly, the University of Michigan student code of conduct was invalidated as being unconstitutionally overbroad. In 1988, the university enacted a code that disciplined students for any behavior that victimized another on the basis of his or her ethnicity.<sup>137</sup> The rationale behind the code was the desire that all students be free and safe to pursue their academic interests.<sup>138</sup> A federal district court in Michigan struck down the antidiscrimination policy as being overbroad and impermissibly vague, both on its face and as applied.<sup>139</sup> The court recognized that certain speech covered by the statute fell within the *Chaplinsky* exception; however, the statute also swept "within its ambit a substantial amount of protected speech."<sup>140</sup> Commentators have argued that this decision has made it very difficult, if not impossible, for universities to regulate hate speech in any meaningful way.<sup>141</sup>

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134. *Id.* at 1203.

135. *Collin*, 578 F.2d at 1206.

136. *Id.* at 1206 (citing *Edwards v. South Carolina*, 372 U.S. 229, 237 (1963)). Like the *Cohen* Court, *see* 403 U.S. at 21, the *Collin* court suggested that residents could simply avoid witnessing the offensive conduct. 578 F.2d at 1207.

137. The regulation specifically authorized discipline for:

Any behavior, verbal or physical, that stigmatizes or victimizes an individual on the basis of race, ethnicity, religion, sex, sexual orientation, creed, national origin, ancestry, age, marital status, handicap or Vietnam-era veteran status, and that . . . [i]nvolves an express or implied threat to [or] . . . [h]as the purpose or reasonably foreseeable effect of interfering with an individual's academic efforts, employment, participation in University sponsored extra-curricular activities or personal safety.

*Doe v. University of Michigan*, 721 F. Supp. 852, 856 (E.D. Mich. 1989); *see also supra* note 7.

138. 721 F. Supp. at 856.

139. *Id.* at 866. For a general discussion of the *Doe* decision, see Timothy B. Zollinger, Casenote, *Doe v. University of Michigan, District Court Strikes Down University Policy Against Racial Harassment on Grounds of Vagueness and Overbreadth*, 12 N. ILL. U. L. REV. 159 (1991).

140. *Doe*, 721 F. Supp. at 864.

141. *See* Carol W. Napier, *Can Universities Regulate Hate-Speech After Doe v. University of Michigan?*, 69 WASH. U. L.Q. 991, 998 (1991); Hilshizer, *supra* note 7, at 393.

### III. *R.A.V. v. CITY OF ST. PAUL*

#### A. *The Facts*

In *R.A.V. v. City of St. Paul*,<sup>142</sup> the defendant allegedly burned a cross inside the fenced yard of a black family that lived across the street from the house where the defendant was visiting.<sup>143</sup> The City of St. Paul charged R.A.V. with violation of the St. Paul Bias-Motivated Crime Ordinance.<sup>144</sup> The defendant moved to dismiss that count on the ground that the ordinance was overbroad and impermissibly content based in violation of the First Amendment.<sup>145</sup> The trial court granted the dismissal, finding that the ordinance censored constitutionally protected expressive conduct.<sup>146</sup>

On appeal, the Minnesota Supreme Court reversed the trial court's dismissal,<sup>147</sup> holding that the ordinance did not censor the peaceful expression of ideas but prohibited only displays of ethnic bias that caused anger, alarm, or resentment in others.<sup>148</sup> Therefore, according to the Minnesota Supreme Court, the application of the ordinance was limited to fighting words or "conduct that itself inflicts injury or tends to incite immediate violence."<sup>149</sup> Primarily for this reason, the court rejected R.A.V.'s overbreadth challenge to the ordinance.<sup>150</sup>

In addition, the supreme court concluded that the ordinance was not impermissibly content based because it was "a narrowly tailored means toward accomplishing the compelling governmental interest in protecting the community against bias-motivated threats to public safety and order."<sup>151</sup> The United States Supreme Court

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142. *R.A.V.*, 112 S. Ct. 2538 (1992).

143. *Id.* at 2541. The defendant, who had apparently consumed drugs and a substantial amount of alcohol before this incident, taped broken chair legs together to create the cross. *Id.* This particular event was just one of three cross burnings performed by the defendant on the night of June 21, 1990. Brief for Respondent at 6, *R.A.V. v. City of St. Paul*, 112 S. Ct. 2538 (1992) (No. 90-7675).

144. The ordinance provides:

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.

ST. PAUL, MINN., LEGIS. CODE § 292.02 (1990).

145. *In re Welfare of R.A.V.*, 464 N.W.2d 507, 508-09 (Minn. 1991).

146. *Id.*

147. *Id.* at 511.

148. *Id.*

149. *Id.*

150. *In re R.A.V.*, 464 N.W.2d at 511.

151. *Id.* For a discussion of the Minnesota *R.A.V.* decision, see Victoria L. Handler,

granted certiorari<sup>152</sup> to consider whether the content-based ordinance could be upheld under either the strict scrutiny test or the fighting-words doctrine.<sup>153</sup>

### B. *The United States Supreme Court Decision*

A unanimous Court held that the St. Paul ordinance was facially invalid.<sup>154</sup> However, the Justices sharply disagreed on the rationale for the decision.<sup>155</sup> The majority opinion began by reiterating the Court's distaste for content-based statutes, noting that they are subject to the strictest judicial scrutiny.<sup>156</sup> It acknowledged, however, that states can impose content-based restrictions on speech in the narrowly defined categories—such as fighting words—that receive no constitutional protection.<sup>157</sup> The Court noted that “a limited categorical approach has remained an important part of our First Amendment jurisprudence.”<sup>158</sup>

Nevertheless, the majority warned that these categories were not entirely invisible to the Constitution.<sup>159</sup> States cannot regulate speech within the unprotected categories if their sole motive for

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*Current Public Law and Policy Issues, Legislating Social Tolerance: Hate Crimes and the First Amendment*, 13 *HAMLIN J. PUB. L. & POL'Y* 137 (1992) [hereinafter Handler]; Daniel W. Homstad, Casenote, *Of Burning Crosses and Chilled Expression: Minnesota and the Eighth Circuit Moderate First Amendment Mandates in “Hate Speech” Prosecutions: In re R.A.V. and United States v. Lee*, 15 *HAMLIN L. REV.* 167 (1991) [hereinafter Homstad]; Shari L. Johnson, *Development, II. Constitutional Law*, 18 *WM. MITCHELL L. REV.* 199 (1992); Ernest A. Young, Recent Developments, *Regulation of Racist Speech: In re Welfare of R.A.V.*, 14 *HARV. J.L. & PUB. POL'Y* 903 (1991).

152. *R.A.V. v. City of St. Paul*, 111 S. Ct. 2795 (1991).

153. *R.A.V.*, 112 S. Ct. at 2550-51 n.1 (White, J., concurring).

154. *Id.* at 2542.

155. Though the decision was unanimously approved by the Justices, there were four separate opinions. Justice Scalia, joined by Chief Justice Rehnquist, Justices Thomas, Souter, and Kennedy, delivered the opinion of the Court. *Id.* at 2541. Justice White's concurrence was joined in full by Justices Blackmun and O'Connor and in part by Justice Stevens. *Id.* at 2550. Justice Stevens's concurrence was joined in part by Justices White and Blackmun. *Id.* at 2561. Justice Blackmun also filed a separate concurrence. *Id.* at 2560.

156. *Id.* at 2542.

157. *Id.* at 2543; see also *supra* notes 27-75 and accompanying text.

158. *R.A.V.*, 112 S. Ct. at 2543. In particular, Justice Scalia acknowledged fighting words, obscenity, and defamation as categories in which content-based statutes are permitted. *Id.*

159. *Id.* The Court commented:

[T]hese areas of speech can, consistently with the First Amendment, be regulated because of their constitutionally proscribable content (obscenity, defamation, etc.)—not that they are categories of speech entirely invisible to the Constitution, so that they may be made the vehicles for content discrimination unrelated to their distinctively proscribable content.

*Id.*

doing so is to eliminate certain viewpoints.<sup>160</sup> For example, while the government may proscribe libel, it may not take the additional step of prohibiting only libel critical of the government.<sup>161</sup> Similarly, while a community may forbid all legally obscene works, it may not prohibit only those obscene works containing a particular political viewpoint.<sup>162</sup> Viewpoint discrimination is never permissible, even when regulating unprotected speech, unless the prohibition survives the strict scrutiny of the Court.

As support for this position, Justice Scalia, writing for the Court, pointed to precedent permitting only content-neutral prohibitions of nonverbal expression. He noted that the Court had upheld only those prohibitions that sought to eliminate the action that the speech entailed rather than the idea that it expressed.<sup>163</sup> The reason the Court had frequently upheld reasonable time, place, or manner restrictions was because the need for the law was unrelated to the content of the speech being regulated.<sup>164</sup> Scalia concluded that government could regulate the category of fighting words because "the unprotected features of the words are, despite their verbal character, essentially a 'nonspeech' element of communication."<sup>165</sup> Government therefore oversteps its constitutional authority when it uses the fighting-words doctrine as a means of regulating the content of the viewpoint expressed.<sup>166</sup>

The Court announced three exceptions to the ban on content-based statutes within unprotected-speech categories. First, the Court stated that it would allow communities to enact content-based statutes if the rationale for doing so was the same as that

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160. *Id.*

161. *Id.*

162. *Id.*

163. *R.A.V.*, 112 S. Ct. at 2544. Scalia pointed to *Texas v. Johnson*, 491 U.S. 397 (1989), as an example. In *Johnson*, the Court invalidated a Texas ordinance that prohibited the burning of the American flag. The *Johnson* Court held that communities could punish flag burning through an ordinance against outdoor fires but could not outlaw flag burning through an ordinance that made it a crime to dishonor the flag. 491 U.S. at 406-07. The *R.A.V.* majority also cited *United States v. O'Brien* for this proposition. *R.A.V.*, 112 S. Ct. at 2544; see also *supra* notes 99-104 and accompanying text.

164. *R.A.V.*, 112 S. Ct. at 2544 (citing *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989); *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 298 (1984)).

165. *Id.* at 2545.

166. *Id.* Justice Scalia compared fighting words to a sound truck:

Fighting words are thus analogous to a noisy sound truck: Each is . . . a mode of speech; both can be used to convey an idea; but neither has, in and of itself, a claim upon the First Amendment. As with the sound truck, however, so also with fighting words: The government may not regulate use based on hostility—or favoritism—towards the underlying message expressed.

*Id.* (citation omitted).

which renders that category of speech unprotected in the first place.<sup>167</sup> For example, a state may choose to ban a subset of obscenity that it deems most prurient because the ban would rest on the very reason that obscenity is prohibited.<sup>168</sup> However, a community may not ban obscenity solely because it contains a political message because the distinction is irrelevant to the rationale for leaving obscenity unprotected.<sup>169</sup>

Second, a community may use a content-based statute when the purpose of the law is to avoid harmful "secondary effects" that are unrelated to the content of the speech.<sup>170</sup> To illustrate this exception, Justice Scalia cited the *Renton*<sup>171</sup> and *American Mini Theaters*<sup>172</sup> decisions in which communities were allowed to prohibit adult movie theaters from locating in certain parts of the city to avoid the harmful secondary effects of increased crime, lower property values, and general urban decay. As an additional example, Justice Scalia noted Title VII prohibitions against sexual discrimination in the workplace, which constitutionally bar the harmful secondary effects of sexually derogatory fighting words.<sup>173</sup>

Third, communities may use content-based discrimination within unprotected speech categories when there "is no realistic possibility that official suppression of ideas is afoot."<sup>174</sup> When a prohibition falls into this exception, there need not be any showing that the prohibition rests on some neutral basis.<sup>175</sup>

Scalia then applied this analysis to the St. Paul ordinance.<sup>176</sup>

167. *Id.* at 2545-46 (stating that "[s]uch a reason, having been adjudged neutral enough to support exclusion of the entire class of speech from First Amendment protection, is also neutral enough to form the basis of distinction within the class").

168. *Id.* at 2546.

169. *R.A.V.*, 112 S. Ct. at 2546.

170. *Id.* This exception is basically a restatement of the *O'Brien* rationale. *See supra* notes 99-104 and accompanying text.

171. *See supra* note 106.

172. *See Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976).

173. *R.A.V.*, 112 S. Ct. at 2546.

174. *Id.* at 2547. Justice Scalia explained:

There may be other such bases as well. Indeed, to validate such selectivity (where totally proscribable speech is at issue) it may not even be necessary to identify any particular 'neutral' basis, so long as the nature of the content discrimination is such that there is no realistic possibility that official suppression of ideas is afoot. . . . Save for that limitation, the regulation of 'fighting words,' like the regulation of noisy speech, may address some offensive instances and leave other, equally offensive, instances alone.

*Id.*

175. *Id.* As an example of this exception, Scalia explained that a state could constitutionally prohibit only those obscene motion pictures with blue-eyed actresses. *Id.*

176. *Id.*

Although he accepted the Minnesota Supreme Court's construction of the ordinance as applying only to fighting words, Scalia nonetheless invalidated the law because it advocated viewpoint discrimination.<sup>177</sup> Scalia noted that the ordinance prohibited only those fighting words that addressed certain disfavored topics while permitting others that expressed viewpoints pertaining to such topics as political affiliation, union membership, and sexual orientation.<sup>178</sup> Therefore, the ordinance had unconstitutionally used the fighting-words category as a "vehicle" to prohibit certain types of expression while allowing other, equally damaging speech to stand.<sup>179</sup>

Scalia concluded that the St. Paul ordinance did not fall within any of the exceptions.<sup>180</sup> First, it did not fall within the exception that allows for the creation of content-based subsets within a category of unprotected speech.<sup>181</sup> Scalia explained that fighting words do not receive First Amendment protection because their content "embodies a particularly intolerable . . . *mode* of expressing *whatever* idea the speaker wishes to convey."<sup>182</sup> Since it was aimed at the views expressed rather than the mode of expression, the St. Paul ordinance was not grounded in the same rationale that leaves fighting words generally unprotected.<sup>183</sup>

Second, the ordinance did not fall within the exception of "secondary speech."<sup>184</sup> St. Paul had argued that the ordinance prevented the harmful secondary effects of hate speech.<sup>185</sup> The alleged

177. *Id.* Justice Scalia stated:

Although the phrase in the ordinance, 'arouses anger, alarm or resentment in others,' has been limited by the Minnesota Supreme Court's construction to reach only those symbols or displays that amount to 'fighting words,' the remaining, unmodified terms make clear that the ordinance applies only to 'fighting words' that insult, or provoke violence, 'on the basis of race, color, creed, religion or gender.' Displays containing abusive invective, no matter how vicious or severe, are permissible unless they are addressed to one of the specified disfavored topics.

*Id.*

178. *R.A.V.*, 112 S. Ct. at 2547.

179. *Id.*

180. *Id.* at 2548.

181. *Id.*; see also *supra* notes 167-68 and accompanying text.

182. *R.A.V.*, 112 S. Ct. at 2549 (emphasis added).

183. *Id.* Justice Scalia stated:

St. Paul has not singled out an especially offensive mode of expression—it has not, for example, selected for prohibition only those fighting words that communicate ideas in a threatening . . . manner. Rather, it has proscribed fighting words of whatever manner that communicate messages of racial, gender, or religious intolerance.

184. *Id.*

185. *Id.*

secondary effect was the emotional trauma suffered by those individuals who had been victimized.<sup>186</sup> The Court rejected this contention, stating that a listener's reaction has never been considered a legitimate secondary effect.<sup>187</sup>

Third, Scalia summarily dismissed the issue of whether the ordinance fell within the exception permitting content-based prohibitions that do not officially suppress ideas.<sup>188</sup> He felt that St. Paul's statements during the case illustrated its desire to eliminate certain viewpoints from its community's dialogue.<sup>189</sup>

Finally, the majority, applying the strict scrutiny analysis for content-based statutes, refused to validate the ordinance.<sup>190</sup> While acknowledging that St. Paul had a compelling interest in ensuring the basic human rights of its residents, the majority found that sufficient content-neutral alternatives could achieve these goals.<sup>191</sup> Therefore, the ordinance was invalid, since it was not tailored narrowly enough to forward only that compelling government interest.<sup>192</sup>

### C. Justice White's Concurrence<sup>193</sup>

In an incisive concurrence, Justice White agreed with the majority's conclusion but disagreed with its rationale, claiming that the majority cast aside "long-established First Amendment doctrine."<sup>194</sup> White maintained that the ordinance should have been invalidated because it was facially overbroad, since it criminalized not only fighting words, but also expression protected by the First Amendment.<sup>195</sup>

186. *Id.*

187. *R.A.V.*, 112 S. Ct. at 2549. The majority explained:

Even assuming that an ordinance that completely proscribes, rather than merely regulates, a specified category of speech can ever be considered to be directed only to the secondary effects of such speech, it is clear that the St. Paul ordinance is not directed to secondary effects within the meaning of *Renton*. As we said in *Boos v. Barry*, "[l]isteners' reactions to speech are not the type of secondary effects we referred to in *Renton*. The emotive impact of speech on its audience is not a secondary effect."

*Id.* (citations omitted).

188. *Id.*

189. *Id.*

190. *Id.* at 2550.

191. *Id.*

192. *R.A.V.*, 112 S. Ct. at 2550.

193. Justices Blackmun and O'Connor joined in Justice White's concurring opinion. Justice Stevens joined in part. *Id.*

194. *Id.* (White, J., concurring).

195. *Id.* (White, J., concurring).



White disagreed with the majority's decision to tinker with a state's ability to regulate speech that falls into unprotected categories.<sup>196</sup> Unlike the majority, he argued that fighting words are not used as a means of exchanging views but are "directed against individuals to provoke violence and inflict injury."<sup>197</sup> Therefore, it is the *content* of the fighting words themselves, rather than the manner in which they are communicated, that is constitutionally proscribable.<sup>198</sup>

Because it is the content of fighting words that communities like St. Paul have attempted to regulate, White argued that it was futile to distinguish between all fighting words and a subset of them; since none of these expressions receive constitutional protection, states may ban all of them or just a few.<sup>199</sup> He argued that the majority's new categorical approach legitimized hate speech as a form of public discussion, blurring the line between expression that may be regulated solely because of its categorical content—such as fighting words—and protected speech that may "be regulated on the basis of content only upon the showing of a compelling state interest."<sup>200</sup>

In addition, Justice White criticized the majority's strict scrutiny analysis.<sup>201</sup> White argued that St. Paul has a legitimate interest in ensuring the safety and civil rights of its residents and that the

196. White presented several examples of content-based regulations within unprotected speech categories, including *Schenck v. United States*, 249 U.S. 47, 52 (1919) (holding that an individual who falsely shouts "fire" in a theater may not claim the protection of the First Amendment) and *New York v. Ferber*, 458 U.S. 747, 764 (1982) (holding that neither child pornography nor obscenity is protected by the First Amendment). *R.A.V.*, 112 S. Ct. at 2552 (White, J., concurring).

197. *Id.* at 2553 (White, J., concurring).

198. *Id.* (White, J., concurring). Justice White argued:

It is inconsistent to hold that the government may proscribe an entire category of speech because the content of that speech is evil; but that the government may not treat a subset of that category differently without violating the First Amendment; the content of the subset is by definition worthless and undeserving of constitutional protection.

*Id.* (citation omitted).

This notion that the evil of fighting words lies in their content rather than in their mode of expression can be traced back to *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942). In *Chaplinsky*, the Court was concerned with speech that had so little societal value that it did not deserve protection. *Id.* at 571. It was the content of fighting words, obscenity, and defamation that identified these categories as adding nothing to the societal dialogue. *Id.*; see also *supra* notes 30-39 and accompanying text.

199. *R.A.V.*, 112 S. Ct. at 2553 (White, J., concurring) ("[A] ban on all fighting words or on a subset of the fighting words category would restrict only the social evil of hate speech, without creating the danger of driving viewpoints from the marketplace.").

200. *Id.* at 2554 (White, J., concurring).

201. *Id.* (White, J., concurring).

ordinance was narrowly tailored to accomplish this goal.<sup>202</sup> Had the ordinance not been fatally overbroad, White believed that it would have been a permissible content-based prohibition that should have survived a strict scrutiny analysis.<sup>203</sup> Since a month earlier in *Burson*,<sup>204</sup> the Court had used strict scrutiny to affirm the Tennessee election law, White was confounded by what he deemed to be the majority's abandonment of strict scrutiny in *R.A.V.*<sup>205</sup>

White argued that the majority's articulation of exceptions to its new categorical approach was merely an attempt to "confine the effects of its decision to the facts of this case" and "an effort to anticipate some of the questions that will arise from its radical revision of First Amendment law."<sup>206</sup> Nonetheless, White noted that the St. Paul ordinance did fall within the exceptions mentioned by the Court.<sup>207</sup>

White believed that the ordinance satisfied the first exception because it proscribed certain fighting words for the very reason those words may be proscribed in the first place—to prevent personal injury and imminent violence.<sup>208</sup> The reason that St. Paul sought to prohibit cross burning and displays of Nazi swastikas *was* to prevent the violence, public disorder, and emotional trauma that would result if this type of expression were allowed to go unregulated.<sup>209</sup> It is for precisely this reason, White maintained, that fighting words receive no First Amendment protection. Therefore, White questioned why the ordinance did not fall within the majority's first exception.

White noted that the ordinance satisfied the second exception as

202. *Id.* at 2556 (White, J., concurring).

203. *Id.* (White, J., concurring).

204. *See supra* notes 86-92 and accompanying text.

205. Justice White commented:

Under the majority's view, a narrowly drawn, content-based ordinance could never pass constitutional muster if the object of that legislation could be accomplished by banning a wider category of speech. This appears to be a general renunciation of strict scrutiny review, a fundamental tool of First Amendment analysis.

*R.A.V.*, 112 S. Ct. at 2554 (White, J., concurring).

206. *Id.* at 2556 (White, J., concurring). White stated that the majority's holding would produce some curious results if applied to other existing laws. For example, the *R.A.V.* decision casts doubts on the constitutionality of the law that makes it illegal to threaten the President's life. *Id.* Similarly, application of *R.A.V.* to statutory labor law would make Title VII hostile work environment claims unconstitutional. *Id.* White argued that the many exceptions to *R.A.V.* were just an ad hoc attempt to avoid these and other problems. *Id.*

207. *Id.* (White, J., concurring).

208. *Id.* at 2556-57 (White, J., concurring).

209. *Id.* at 2557 (White, J., concurring).

well.<sup>210</sup> He argued that a recipient's reaction to hate crime was a legitimate secondary effect, which communities had the right to prevent.<sup>211</sup> He did not accept the majority's distinction between "legitimate" secondary effects, such as those protected by Title VII anti-harassment provisions, and personal trauma, which the St. Paul ordinance sought to prevent.<sup>212</sup>

White also criticized the Court for refusing to validate the ordinance under the third exception, which allows content-based discrimination as long as the state does not attempt to suppress particular viewpoints.<sup>213</sup> White explained that the ordinance was not intended to be an "official suppression of ideas," rather it was an attempt to ensure the safety and peace of mind of St. Paul citizens needing this reassurance.<sup>214</sup>

After detailing the problems and inconsistencies in the majority's approach, White argued that the overbreadth doctrine was the correct constitutional tool with which to invalidate the ordinance.<sup>215</sup> Though the Minnesota Supreme Court had restricted the reach of the law to fighting words, it had not clearly identified the exact injuries that the ordinance sought to prevent.<sup>216</sup> Therefore, the ordinance could foreseeably prohibit many expressions that by their very utterance caused anger, alarm, or resentment.<sup>217</sup> White

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210. *R.A.V.*, 112 S. Ct. 2557 (White, J., concurring).

211. *Id.* (White, J., concurring).

212. *Id.* (White, J., concurring). White compared the St. Paul ordinance to the draft-card-burning law in *O'Brien*. *Id.* The law was upheld in *O'Brien* because it had an incidental effect on speech and served a substantial administrative interest. *Id.* Similarly, White believed that the purpose of the St. Paul ordinance was not to discourage communication but to protect against the harmful secondary effect of emotional injury to the recipient. *Id.*

213. *Id.* at 2558 (White, J., concurring). White criticized the third exception:

As the third exception to the Court's theory for deciding this case, the majority concocts a catchall exclusion to protect against unforeseen problems, a concern that is heightened here given the lack of briefing on the majority's decisional theory. This final exception would apply in cases in which 'there is no realistic possibility that official suppression of ideas is afoot.' As I have demonstrated, this case does not concern the official suppression of ideas. The majority discards this notion out-of-hand.

*Id.* (citations omitted).

214. *Id.* (White, J., concurring).

215. *R.A.V.*, 112 S. Ct. at 2558 (White, J., concurring). For example, under *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973), a defendant being prosecuted for speech may challenge the law as unconstitutional because it conceivably prohibits protected expression, even when that particular defendant's activities would not be protected.

216. *Id.* at 2559 (White, J., concurring).

217. *Id.* (White, J., concurring).

noted, however, that under the fighting-words doctrine,<sup>218</sup> states cannot prohibit speech that results in mere personal offense or resentment.<sup>219</sup> By outlawing expression that would cause "anger, alarm, or resentment," the ordinance included within its scope not only fighting words but protected First Amendment speech as well.<sup>220</sup> For this reason, Justice White believed that the ordinance was fatally overbroad.<sup>221</sup>

#### D. Justice Stevens's Concurrence<sup>222</sup>

In his concurring opinion, Justice Stevens took a middle ground between the majority and Justice White. While disagreeing with the majority's premise that all content-based regulations are presumptively invalid, Stevens maintained that Justice White had gone too far by leaving fighting words completely unprotected.<sup>223</sup> Stevens disfavored the simple categorical approach advocated by White because it too often results in the regulation of protected speech.<sup>224</sup> Unlike the majority, however, Stevens claimed that content-based discrimination *is* permissible in certain circumstances as long as the regulations are scrutinized carefully to ensure that they are not vehicles for viewpoint discrimination.<sup>225</sup> Therefore, Stevens advocated "a more complex and subtle analysis" that considered "the content and context of the regulated speech, and the nature and scope of the restriction on speech."<sup>226</sup>

218. See *supra* part II.A.

219. *R.A.V.*, 112 S. Ct. at 2559 (White, J., concurring).

220. *Id.* (White, J., concurring).

221. *Id.* at 2558 (White, J., concurring). Justice Blackmun wrote a brief concurrence noting his agreement with Justice White. *Id.* at 2560 (Blackmun, J., concurring). Because it is so brief, the concurrence is not considered here. A summary of the concurrence can be found at text accompanying *supra* note 261.

222. Justices White and Blackmun joined Justice Stevens's concurrence in part. *R.A.V.*, 112 S. Ct. at 2561.

223. Justice Stevens commented:

Unlike the Court, I do not believe that all content-based regulations are equally infirm and presumptively invalid; unlike Justice White, I do not believe that fighting words are wholly unprotected by the First Amendment. To the contrary, I believe our decisions establish a more complex and subtle analysis, one that considers the content and context of the regulated speech, and the nature and scope of the restriction on speech.

*Id.* at 2567 (Stevens, J., concurring).

224. *Id.* (Stevens, J., concurring). After tracing the evolution of the categorical approach, Stevens concluded, "[t]his evolution, I believe, indicates that the categorical approach is unworkable and the quest for absolute categories of 'protected' and 'unprotected' speech ultimately futile." *Id.*

225. *Id.* (Stevens, J., concurring).

226. *Id.* (Stevens, J., concurring).

Analyzing the St. Paul statute in this light, Stevens concluded that the statute barred only low-value expressive conduct while leaving written and spoken words unaffected.<sup>227</sup> He concluded that since it did not regulate a particular viewpoint<sup>228</sup> or ban all hate speech,<sup>229</sup> the ordinance was a constitutional content-based regulation.<sup>230</sup> However, like Justice White, Justice Stevens believed that the ordinance was impermissibly overbroad and that it potentially prohibited protected expression.<sup>231</sup>

#### IV. ANALYSIS

In *R.A.V. v. City of St. Paul*, the majority reached the correct conclusion but for the wrong reasons. As Justice White noted in his concurrence, the majority's reevaluation of the unprotected-speech categories threatens several traditional approaches to analyzing free speech problems.<sup>232</sup> As a result, *R.A.V.* should prove to be a confusing precedent, which will only add uncertainty to First Amendment adjudication.<sup>233</sup>

By invalidating the St. Paul ordinance as overbroad, the Court

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227. *R.A.V.*, 112 S. Ct. at 2569 (Stevens, J., concurring). This analysis is similar to that used by Stevens in *American Mini Theatres* in which he advocated a sliding scale of constitutional protection, by which different types of speech receive different amounts of First Amendment protection. See *supra* note 30.

228. *Id.* at 2571 (Stevens, J., concurring). Stevens noted:

The St. Paul ordinance is evenhanded. In a battle between advocates of tolerance and advocates of intolerance, the ordinance does not prevent either side from hurling fighting words at the other on the basis of their conflicting ideas, but it does bar *both* sides from hurling such words on the basis of the target's 'race, color, creed, religion or gender.'

*Id.*

229. *Id.* (Stevens, J., concurring) ("The St. Paul ordinance does not ban all 'hate speech,' nor does it ban, say, all cross burnings or all swastika displays. Rather it only bans a subcategory of the already narrow category of fighting words.").

230. *Id.* (Stevens, J., concurring).

231. *Id.* (Stevens, J., concurring).

232. Justice White, at the conclusion of his concurrence, commented:

Today, the Court has disregarded two established principles of First Amendment law without providing a coherent replacement theory. Its decision is an arid, doctrinaire interpretation, driven by the frequently irresistible impulse of judges to tinker with the First Amendment. The decision is mischievous at best and will surely confuse the lower courts. I join the judgment, but not the folly of the opinion.

*R.A.V.*, 112 S. Ct. at 2560 (White, J., concurring); see also Bernard James, *Decisions Clash with Precedents*, NAT'L L.J., August 31, 1992, at S8 [hereinafter James] ("The route selected by the *R.A.V.* majority to invalidate the St. Paul ordinance may be viewed as hazardous, largely because it includes no legal monuments of recent doctrine to light the way.").

233. See James, *supra* note 232, at S8.

could have avoided this pitfall.<sup>234</sup> As Justice White argued, the ordinance was unconstitutional on its face because it prohibited expression that fell outside the fighting-words category.<sup>235</sup> The Court in recent years has narrowed the fighting-words doctrine: fighting words are those words which, when spoken to another person, are likely to trigger an immediate violent response.<sup>236</sup> Though the Minnesota Supreme Court had construed the ordinance to apply only to fighting words, the language of the provision clearly prohibited much more.<sup>237</sup> The ordinance prohibited expressions that caused alarm, anger, or resentment—not just lawless violence.<sup>238</sup> Obviously, there are many day-to-day communications that might provoke alarm, anger, or resentment without also eliciting an immediate violent response.

The majority's avoidance of the overbreadth doctrine in favor of a novel interpretation of unprotected speech raises significant questions. The majority conceded that St. Paul has a compelling interest in protecting the basic human rights of its citizens.<sup>239</sup> St. Paul's only error was its failure to carefully tailor the ordinance.<sup>240</sup> Instead of limiting its holding to this point, the Court took an additional step, which may make it almost impossible for communities to achieve the "compelling" end of curbing hate crime.<sup>241</sup> Contrary to its precedent, the *R.A.V.* court held that speech within unprotected categories does deserve some First Amendment protection.<sup>242</sup> Fighting words are now deemed to have expressive qualities, among which communities are not allowed to

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234. *Id.* at S8-9 ("[T]he tinkering in *R.A.V.* can be criticized as unwarranted. . . . [T]here is already an effective safeguard in place to respond to the imprecision that results when a government attempts to regulate areas that defy characterization: the overbreadth test.").

235. *R.A.V.*, 112 S. Ct. at 2559 (White, J., concurring).

236. *See supra* part II.A.

237. *See* Handler, *supra* note 151, at 158 (concluding that the scope of the St. Paul ordinance was unconstitutionally overbroad); *see also* Homstad, *supra* note 151, at 188.

238. *R.A.V.*, 112 S. Ct. at 2559 (White, J., concurring). Justice White stated, "Our fighting words cases have made clear, however, that such generalized reactions are not sufficient to strip expression of its constitutional protection. The mere fact that expressive activity causes hurt feelings, offense, or resentment does not render the expression unprotected." *Id.*

239. *Id.* at 2549.

240. *Id.*; *see also* Nick Coleman, *The Court Sends a Message on Hate Crimes: Will Ruling Spur Bigotry?*, ATL. CONST., June 25, 1992, at A15 ("Burning crosses leads to lynchings and race war and government has a duty to oppose it. St. Paul just went about it stupidly.").

241. *See* Marcia Coyle, *New Wings Sprout on High Court*, NAT'L L.J., July 6, 1992, at 38 [hereinafter Coyle] (noting that many legal scholars believe that hate-speech laws and codes are in jeopardy as a result of *R.A.V.*).

242. *Id.* In *R.A.V.*, the Court for the first time required content-neutral regulation of

discriminate.<sup>243</sup>

The majority may have reached this result by misconstruing the rationale behind the fighting-words doctrine. Fighting words are regulated because they trigger violent reactions that breach the peace.<sup>244</sup> As Justice White argued, it is the evil content of fighting words that causes violent reaction in others, not the manner in which the fighting words are expressed.<sup>245</sup> The average person does not have a violent reaction simply because someone shouts at him or whispers something about him; the person reacts violently because of the insult that is shouted or whispered. Since it is the evil content of the speech that is unprotected, it makes little sense for the Court to demand that communities treat all fighting words equally; certain types of speech are categorized as unprotected so that the government can regulate them as it sees fit.<sup>246</sup>

By tinkering with the categorical approach, the *R.A.V.* Court blurred a once-settled area of law.<sup>247</sup> Communities once comfortable with categorical regulation are now adrift in a sea of uncertainty.<sup>248</sup> For example, instead of having a free hand to regulate an area like obscenity, communities must navigate *R.A.V.*'s complicated language in order to draft laws that do not discriminate on the basis of viewpoint. *R.A.V.* provides little guidance for communities to know how, what, and when they may regulate.<sup>249</sup>

This confusion will be further complicated by the broad exceptions carved out by the majority. As Justice White argued, these exceptions seem so broad that they engulf the very ground upon which the decision rests.<sup>250</sup> The majority stated that it would allow communities to prohibit content-based subsets within unprotected categories if the basis for the distinction between the subsets rests on the very reason that the entire category is prohibited in the first place.<sup>251</sup> However, almost every content-based discrimination within an unprotected category will satisfy this exception.<sup>252</sup> For

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speech within the unprotected categories—a change that significantly alters First Amendment law. *Id.*

243. *R.A.V.*, 112 S. Ct. at 2544.

244. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

245. *R.A.V.*, 112 S. Ct. at 2552 (White, J., concurring).

246. *Chaplinsky*, 315 U.S. at 572.

247. See James, *supra* note 232, at 88.

248. See Coyle, *supra* note 241, at 38 (indicating that the splintered *R.A.V.* opinion will result in a flood of litigation as communities struggle to understand what it is they can and cannot regulate).

249. *Id.*

250. *R.A.V.*, 112 S. Ct. at 2556 (White, J., concurring).

251. *Id.* at 2545.

252. *Id.* at 2556 (White, J., concurring).

example, communities want to prohibit certain types of obscenity *because* they are obscene. Similarly, communities seek to eliminate fighting words *because* they incite injury and imminent violence.<sup>253</sup> The multitude of possible exceptions belies the soundness of the majority's rationale.<sup>254</sup>

Perhaps the most troubling aspect of the majority opinion was the manner in which it conducted its strict scrutiny analysis. The majority acknowledged that the ordinance promoted a compelling government interest.<sup>255</sup> Instead of then merely determining whether the statute was narrowly tailored to serve this interest, the Court took the additional step of inquiring whether adequate content-neutral alternatives existed. Because it found that there were content-neutral alternatives available, the Court refused to uphold the ordinance.<sup>256</sup>

The problem with requiring St. Paul to impose a content-neutral statute to address the problem is that it would, in effect, result in a broader prohibition of expression.<sup>257</sup> As Justice White noted, the Court's advocacy for more, instead of less, speech restriction is surely at odds with the First Amendment.<sup>258</sup> The purpose of a strict scrutiny analysis is to ensure that the compelling objectives of government infringe narrowly, if at all, on the public's right to free expression.<sup>259</sup> Therefore, the ultimate irony of the majority's analysis is that while it steadfastly defends the right of all viewpoints to be expressed, the Court needlessly suppresses speech.

The flaws of the majority's approach leave little mystery about why there were such vehement concurrences from four of the justices. The *R.A.V.* opinion leaves a confusing precedent, which twists traditional principles of First Amendment law.<sup>260</sup> Justice Blackmun, in his brief concurrence, best sums up the effect of the

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253. *Id.* (White, J., concurring).

254. Especially open ended is the majority's third exception, which allows content discrimination within the unprotected categories when there is no "official suppression of ideas afoot." *Id.* at 2547. But who is to determine when there is or is not an official attempt at viewpoint suppression? How will the Court tell the difference between regulations that seek to prohibit speech because of its proscribable content and regulations that seek to limit a particular viewpoint? Indeed, the exceptions further confuse an already complicated analysis. See *id.* at 2558 (White, J., concurring) ("As I see it, the Court's theory does not work and will do nothing more than confuse the law.")

255. *R.A.V.*, 112 S. Ct. at 2549.

256. *Id.* at 2550.

257. *Id.* (White, J., concurring).

258. *Id.* (White, J., concurring).

259. See *Burson v. Freeman*, 112 S. Ct. 1846, 1851 (1992); see also *supra* notes 86-92 and accompanying text.

260. *R.A.V.*, 112 S. Ct. at 2560. (White, J., concurring).



decision: "I regret what the Court has done in this case. The majority opinion signals one of two possibilities: it will serve as precedent for future cases, or it will not. Either result is disheartening."<sup>261</sup>

## V. IMPACT

The practical impact of *R.A.V.* can be gauged by the number of hate-crime laws rendered unconstitutional by the Court's decision.<sup>262</sup> In the wake of the *R.A.V.* decision, a number of states have already invalidated ethnic-intimidation laws.<sup>263</sup> In the future, communities wishing to protect minority groups through hate-crime laws will have to be exceptionally careful when drafting them.<sup>264</sup> To survive a constitutional challenge in light of *R.A.V.*, a hate-crime law may only regulate speech that falls within the fighting-words category<sup>265</sup> while at the same time remaining viewpoint-neutral.<sup>266</sup> The difficulty of this task, when coupled with the high probability of costly litigation, may convince many communities to abandon ethnic-intimidation statutes altogether.<sup>267</sup>

How the Court's doctrinal changes in *R.A.V.* will affect First Amendment adjudication remains to be seen. If nothing else, the opinion confirms the vitality of *Chaplinsky's* fighting-words analysis.<sup>268</sup> Though the personal injury prong of *Chaplinsky* is dead, the

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261. *Id.* (Blackmun, J., concurring).

262. See Linda Greenhouse, *The Supreme Court: High Court Voids Law Singling Out Crimes of Hatred*, N.Y. TIMES, June 23, 1992, at A1 (noting that the majority's approach invalidated ordinances of the St. Paul type as well as hate-crime laws that enhance penalties upon proof of a racial motive); Ruth Marcus, *Supreme Court Overturns Law Barring Hate Crimes; Free Speech Ruling Seen as Far-Reaching*, WASH. POST, June 23, 1992, at A1 (stating that invalidation of the St. Paul ordinance casts doubts "on the constitutionality of scores of other state and local laws and on campus speech codes that punish students for offensive remarks").

263. See, e.g., *State v. Mitchell*, 485 N.W.2d 807 (Wis. 1992) (relying on *R.A.V.* to invalidate Wisconsin's penalty-enhancement statute, which permitted punishment on the basis of the defendant's motive and regulated protected areas of speech); *State v. Wyant*, 597 N.E.2d 450 (Ohio 1992) (relying on *R.A.V.* to invalidate Ohio's ethnic-intimidation law, which enhanced criminal penalties if the defendant had a racist motive); *Richards v. State*, 1992 WL 335899 (Fla. Dist. Ct. App. Nov. 17, 1992). *But see State v. Plowman*, 1992 WL 207677 (Or. Aug. 27, 1992) (refusing to invalidate state ethnic-intimidation law, distinguishing both *R.A.V.* and *Mitchell*).

264. See Coyle, *supra* note 241, at 38 (noting that *R.A.V.* does not provide much practical guidance to communities attempting to draft hate-crime laws).

265. Since the Supreme Court has not upheld a single fighting-words conviction since *Chaplinsky*, it may be impossible to write a hate-crime law narrow enough to fit into the category. See Gellman, *supra* note 8, at 369-72.

266. *R.A.V.*, 112 S. Ct. at 2547.

267. See Coyle, *supra* note 241, at 38.

268. See Bruce Fein, *Premature Hate Wake*, WASH. TIMES, June 25, 1992, at G1

*R.A.V.* majority acknowledged that communities may still seek to prohibit fighting words that incite immediate violence.<sup>269</sup>

The effect of *R.A.V.* may become clearer when the Court decides *Wisconsin v. Mitchell*.<sup>270</sup> *Mitchell* involves a constitutional challenge to Wisconsin's hate-crime law, which enhances criminal penalties for crimes motivated by racial bias.<sup>271</sup> Perhaps the Court's next pronouncement in this area will resolve some of the uncertainty caused by the *R.A.V.* decision. In the meantime, however, courts are obligated to follow a messy and imprecise decision.

## VI. CONCLUSION

The decision of the Supreme Court in *R.A.V. v. St. Paul* is significant for several reasons. First and most important, the decision casts serious doubt on the constitutionality of ethnic-intimidation laws that have been used in an attempt to curb hate crimes across the country. In addition, it alters a traditional notion of First Amendment law by announcing that formerly unprotected speech categories do receive some constitutional protection: communities may no longer enact content-based regulations within these categories. While the Court should be applauded for its aggressive protection of even the most despicable expressions of speech, the Court's decision in *R.A.V.* has unnecessarily confused and complicated First Amendment law.

GREGORY PREVES

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("Justice Scalia did not question the 'fighting words' doctrine of *Chaplinsky*. Indeed, the doctrine was the cornerstone of Justice Scalia's opinion.").

269. *Id.*

270. No. 92-515, 1992 WL 266329 (U.S. Dec. 14, 1992) (granting certiorari).

271. See Joan Biskupic, *Justices to Review 'Hate Crimes' Case; Ruling Could Affect Numerous Laws, Proposed Federal Legislation*, WASH. POST, Dec. 15, 1992, at A4; see also *supra* note 263.

