



2007

The Doubtful Validity of Victim-Specific Libel Laws

Nat Stern

Follow this and additional works at: <https://digitalcommons.law.villanova.edu/vlr>



Part of the [Constitutional Law Commons](#), and the [Torts Commons](#)

Recommended Citation

Nat Stern, *The Doubtful Validity of Victim-Specific Libel Laws*, 52 Vill. L. Rev. 533 (2007).

Available at: <https://digitalcommons.law.villanova.edu/vlr/vol52/iss3/4>

This Article is brought to you for free and open access by Villanova University Charles Widger School of Law Digital Repository. It has been accepted for inclusion in Villanova Law Review by an authorized editor of Villanova University Charles Widger School of Law Digital Repository.

2007]

THE DOUBTFUL VALIDITY OF VICTIM-SPECIFIC LIBEL LAWS

NAT STERN*

FIFTEEN years after the Supreme Court's decision in *R.A.V. v. City of St. Paul*,¹ the logic and meaning of the Court's opinion continues to stir dispute. The Court's invalidation of St. Paul's Bias-Motivated Crime Ordinance has left a long trail of scholarly debate over the significance of the Court's holding. The Court itself has contributed to the controversy by issuing two decisions that repudiated what some regarded as presumptive implications of *R.A.V.*²

Curiously, the actual impact of *R.A.V.* in the courts has not been substantial. While *R.A.V.* and its principal sequels have generated ongoing commentary, relatively few statutes have fallen victim to the authority of *R.A.V.*'s general proscription of selective bans within unprotected categories of speech. In particular, the application of *R.A.V.*'s potentially expansive principle to targeted defamation laws has gained little notice among courts or even otherwise voluble commentators. This lack of attention has occurred notwithstanding the *R.A.V.* Court's reliance on a hypothetical libel law for a prominent illustration of its central principle.³

This article addresses how *R.A.V.* might be invoked to overturn laws that single out for adverse treatment defamation of certain classes of persons. After describing *R.A.V.*'s reasoning and the grounds on which it was distinguished in subsequent cases, part I reviews reaction to *R.A.V.* in the academy and the courts.⁴ Part II then examines, against the backdrop of the Court's defamation jurisprudence, the general nature of the limitations that *R.A.V.* might impose on libel laws.⁵ Part III explores the susceptibility of particular libel statutes to challenges under *R.A.V.*⁶

* John W. and Ashley E. Frost Professor of Law, Florida State University College of Law. Research for this Article was supported by a grant from Florida State University. Shannon Doheny and Rachele-Marie Gentner provided valuable research assistance.

1. 505 U.S. 377 (1992).

2. See generally *Virginia v. Black*, 538 U.S. 343 (2003); *Wisconsin v. Mitchell*, 508 U.S. 476 (1993). For a further discussion of these two cases, see *infra* notes 37-50 and accompanying text.

3. See *R.A.V.*, 505 U.S. at 384 (using hypothetical to show flaw in "all-or-nothing-at-all approach to first amendment protection").

4. For a further discussion of the Court's reaction to *R.A.V.*, see *infra* notes 7-79 and accompanying text.

5. For a further discussion of the limitations of libel laws, see *infra* notes 80-152 and accompanying text.

6. For a further discussion of the susceptibility of libel statutes, see *infra* notes 153-233 and accompanying text.

I. THE CLOUDY LEGACY OF *R.A.V.*

R.A.V. represents the modification of one longstanding First Amendment doctrine by an even more fundamental principle of free speech. On the one hand, the Court has traditionally regarded certain categories of speech, like obscenity,⁷ as undeserving of ordinary First Amendment protection because they have scant value and can inflict various harms.⁸ On the other hand, the Court's insistence on the state's obligation of neutrality under the Free Speech Clause has led it repeatedly to strike down laws deemed improperly discriminatory.⁹ The *R.A.V.* Court addressed this tension by extending the prohibition on content-based restrictions to regulation of unprotected categories that it considers overly partisan. The qualified and ambiguous nature of the Court's opinion, however, did not comprehensively resolve the scope of government power to selectively regulate proscribable speech. Moreover, the Court's later decisions in *Wisconsin v. Mitchell*¹⁰ and *Virginia v. Black*¹¹ only partly clarified the extent to which *R.A.V.*'s conception of the First Amendment bars restriction of subclasses of unprotected expression.

A. *R.A.V.*'s Ban on Underinclusiveness and Its Limits

The unprotected speech addressed in *R.A.V.* fell into the category that gave rise to the Court's original formulation of the "two-level" the-

7. See *Miller v. California*, 413 U.S. 15, 23 (1973) (finding obscene material unprotected by First Amendment).

8. The classic articulation of this approach to "low-value" speech appears in *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942), where the Court explained that such categories lie outside the aegis of the First Amendment because they are "no 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 572; see also Cass R. Sunstein, *Words, Conduct, Caste*, 60 U. CHI. L. REV. 795, 803 (1993) (distinguishing between low-value and high-value speech). *Chaplinsky* itself involved the proscribable category of "fighting words." See *Chaplinsky*, 315 U.S. at 573 (describing category of speech proscribed by statute). Since *Chaplinsky*, the Court has specifically determined that the danger and meager societal value of, *inter alia*, defamation, incitement to imminent illegal action, false or misleading commercial speech and child pornography make them susceptible to restrictions from which more highly valued speech is immune. See *New York v. Ferber*, 458 U.S. 747, 756-63 (1982) (child pornography); *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 770-73 (1976) (false or misleading commercial speech); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974) (defamation); *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (incitement).

9. See, e.g., *Texas v. Johnson*, 491 U.S. 397, 409 (1989) (finding state statute overly discriminatory because every flag burning does not necessarily have potential to cause breach of peace); *Police Dep't of Chi. v. Mosley*, 408 U.S. 92, 95-98 (1972) (explaining ordinance's viewpoint discrimination problem); *Cohen v. California*, 403 U.S. 15, 24 (1971) (discussing constitutional background of Free Speech Clause).

10. 508 U.S. 476 (1993).

11. 538 U.S. 343 (2003).

ory¹² of speech in *Chaplinsky v. New Hampshire*.¹³ *viz.*, “fighting words.” The defendant had been convicted of violating St. Paul’s Bias-Motivated Crime Ordinance by burning a cross on the lawn of an African-American family.¹⁴ Under the ordinance, the display of a burning cross or other symbol constituted a misdemeanor where its predictable effect was to “[arouse] anger, alarm, or resentment in others on the basis of race, color, creed, religion or gender. . . .”¹⁵ While the scope of the ordinance made it susceptible to challenge on overbreadth grounds,¹⁶ the Court avoided that issue by accepting the Minnesota Supreme Court’s construction that the ordinance reached only expression qualifying as “fighting words” under *Chaplinsky*.¹⁷

Nevertheless, Justice Scalia’s opinion for the majority found that the ordinance ran afoul of the First Amendment principle that “[c]ontent-based regulations are presumptively invalid.”¹⁸ Justice Scalia acknowledged that since *Chaplinsky*, the Court had condoned restrictions on the content of certain classes of speech under a “limited categorical approach.”¹⁹ Still, he disavowed any literal reading of earlier Court pronouncements to the effect that such classes enjoy no recognition at all under the First Amendment.²⁰ Properly understood, those passages meant that these areas of speech could be regulated “because of their constitutionally proscribable content;”²¹ conversely, the state cannot make them “vehicles for content discrimination unrelated to their distinctively proscribable content.”²²

In the eyes of the Court, St. Paul’s ordinance represented just such a vehicle. Rather than forbid “fighting words” whatever their nature, St. Paul had confined its ban to fighting words directed to “one of the speci-

12. See Tom Hentoff, *Speech, Harm, and Self-Government: Understanding the Ambit of the Clear and Present Danger Test*, 91 COLUM. L. REV. 1453, 1462-63 (1991) (discussing development of two-level theory); Harry Kalven, Jr., *The Metaphysics of the Law of Obscenity*, 1960 SUP. CT. REV. 1, 10-12 (1960) (discussing complexity of two-level theory).

13. 315 U.S. 568 (1942).

14. See *R.A.V. v. City of St. Paul*, 505 U.S. 377, 379-80 (1992) (stating facts of case).

15. *Id.* at 380.

16. See *id.* at 397, 411-14 (White, J., concurring) (arguing that statute could be invalidated on overbreadth grounds).

17. See *id.* at 381 (accepting Minnesota Supreme Court’s finding that ordinance reaches only “fighting words”).

18. See *id.* at 382 (discussing parameters of government’s power to proscribe speech under First Amendment).

19. See *id.* at 382-83 (explaining Court’s categorical approach to First Amendment cases).

20. See *id.* at 383 (stating that earlier Court pronouncements limiting First Amendment protection for certain categories of speech must be “taken in context”).

21. *Id.* at 383.

22. *Id.* at 383-84.

fied disfavored topics.”²³ The First Amendment, however, did not allow the city to single out for punishment those speakers who “express views on disfavored subjects.”²⁴ Furthermore, in addition to its facial content discrimination, the ordinance was characterized as functionally discriminatory by viewpoint as well.²⁵ As a practical matter, the Court asserted, the ordinance deprived bigots of a natural part of their verbal arsenal while allowing opposing champions of tolerance and equality their full complement.²⁶ By targeting fighting words that “communicate messages of racial, gender, or religious intolerance,” the city had raised the unacceptable possibility that it sought to “handicap the expression of particular ideas.”²⁷

While objecting to St. Paul’s ordinance, the Court did not condemn all content discrimination within categories of proscribable speech. Rather, the Court identified three exceptions to its suspicion that content discrimination may represent an attempt to exclude certain viewpoints from the marketplace of ideas. First, the Court would exempt content discrimination whose justification “consists entirely of the very reason that the entire class of speech is proscribable. . . .”²⁸ For example, the Court expressed approval of the federal statute criminalizing threats of violence against the President, because the reasons for withholding First Amendment protection from threats of violence “have special force” in the case of the President.²⁹ In addition, the Court placed its imprimatur on laws aimed at the content of proscribable speech whose goal is to curb the “secondary effects” peculiarly associated with that content: *e.g.*, a ban only on obscene live performances that involve minors.³⁰ Finally, the Court recognized what is frequently referred to as the catch-all exception.³¹ This

23. *See id.* at 391 (finding that St. Paul ordinance violated First Amendment because it discriminated against disfavored topics).

24. *See id.* (invalidating ordinance for impermissible content discrimination).

25. *See id.* at 391 (invalidating ordinance for impermissible viewpoint discrimination).

26. *See id.* at 391-92 (finding that St. Paul could not enact rule favoring one side of debate over another). As an example, the Court contrasted the immunity under the ordinance of “a sign saying . . . that all ‘anti-Catholic bigots’ are misbegotten” with the prohibition of a similar sign about “‘papists’”; only the latter would “insult and provoke violence ‘on the basis of religion.’” *Id.*

27. *Id.* at 393-94.

28. *Id.* at 388.

29. *See id.* (discussing prohibition on threats of violence to the President); Steven G. Gey, *What if Wisconsin v. Mitchell Had Involved Martin Luther King, Jr.? The Constitutional Flaws of Hate Crime Enhancement Statutes*, 65 GEO. WASH. L. REV. 1014, 1032 (1997) (explaining how threats to President “are accompanied by graver consequences and generate far more social costs than ordinary threats”).

30. *See R.A.V.*, 505 U.S. at 389.

31. *See id.* at 390 (explaining catch-all exception); *see, e.g.*, Gey, *supra* note 29, at 1033 (discussing hate crime enhancement statutes); Heidi Kitrosser, *Containing Unprotected Speech*, 57 FLA. L. REV. 843, 889 (2005) (examining Court’s analysis of catch-all exception).

exception permits content discrimination whose nature “is such that there is no realistic possibility that official suppression of ideas is afoot.”³²

Having qualified for none of these exceptions, St. Paul’s ordinance was subject to the strict scrutiny triggered by “the ‘danger of censorship’ presented by a facially content-based statute.”³³ The Court rejected the argument that the ordinance’s targeted prohibitions were necessary to achieve a compelling interest, since the city could accomplish any permissible purpose by a wholesale ban on fighting words.³⁴ By contrast, the only distinctive interest embodied in the challenged ordinance was “displaying the city council’s special hostility towards the particular biases thus singled out.”³⁵ Pursuing this goal through content discrimination against exponents of these biases, the Court ruled, is “precisely what the First Amendment forbids.”³⁶

The emphatic dismissal of St. Paul’s ordinance generated immediate concern that *R.A.V.*’s rationale could be invoked to strike down “hate crime” laws.³⁷ The Court soon dispelled this concern in *Wisconsin v. Mitchell*,³⁸ however, by sustaining a statute that enhanced the penalty for certain offenses when the defendant “[i]ntentionally selects the person against whom the crime. . . is committed. . . because of the race, religion, color, disability, sexual orientation, national origin or ancestry of that person. . . .”³⁹ In a notably brief and unanimous opinion, the Court distinguished St. Paul’s restriction of speech governed by First Amendment principles from Wisconsin’s regulation of conduct.⁴⁰ Unlike St. Paul’s perceived attempt to hinder the expression of an unpopular view, Wisconsin was credited with seeking to respond to the heightened individual and societal harms thought to result from hate crimes.⁴¹ Nor did introducing evidence of a defendant’s beliefs to show the bigotry that inspired his

32. *R.A.V.*, 505 U.S. at 390.

33. *Id.* at 395.

34. *See id.* at 395-96 (finding that St. Paul did not have compelling interest to justify content discrimination).

35. *Id.* at 396.

36. *Id.*

37. *See, e.g.*, Frederick M. Lawrence, *Resolving the Hate Crimes/Hate Speech Paradox: Punishing Bias Crimes and Protecting Racist Speech*, 68 NOTRE DAME L. REV. 673, 680 (1993) (arguing that *R.A.V.*’s potential to halt prosecution of hate crimes is “not constitutionally mandated”); Eric David Rosenberg, *Hate Crimes, Hate Speech and Free Speech—Florida’s Bias-Intended Crime Statute*, 17 NOVA L. REV. 597, 611-13 (1992) (discussing “hate crime—free speech trap” that became widespread after *R.A.V.*); Philip Weinberg, *R.A.V. and Mitchell: Making Hate Crime a Trivial Pursuit*, 25 CONN. L. REV. 299, 306-07 (1993) (arguing that *R.A.V.* “will disarm any state attempts to deal with racist violence”).

38. 508 U.S. 476 (1993).

39. *See id.* at 480-81, 490 (stating holding of Court).

40. *See id.* at 487-88 (finding that Wisconsin’s statute was “aimed at conduct unprotected by the First Amendment”).

41. *See id.* (discussing individual and societal harm that results from bias-motivated crimes).

crime violate the First Amendment; rather, the Court observed that criminal offenses commonly include motive as an element that the state must demonstrate.⁴²

A decade later, in *Virginia v. Black*,⁴³ the Court had occasion to interpret one of the exceptions that *R.A.V.* had carved out from its general prohibition of content discrimination. *Black* involved a Virginia statute making it illegal for someone “with the intent of intimidating any person. . . to burn. . . a cross on the property of another, a highway or other public place.”⁴⁴ A patchwork of opinions⁴⁵ resulted in the invalidation of the statute, but only because seven justices objected to its provision deeming cross burning in these venues as prima facie evidence of an intent to intimidate.⁴⁶ A separate coalition comprising a majority of justices, however, found that absent the problematic evidentiary provision, the statute would constitute a valid restriction under *R.A.V.*’s exception for laws in which “the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable. . . .”⁴⁷ The relevant class in this instance was intimidation, which the Court identified as a species of the proscribable category of “true threats.”⁴⁸ The Court held that Virginia could forbid cross burnings done with intent to intimidate in light of cross burning’s long and pernicious history of impending violence.⁴⁹ Thus, the state was entitled to outlaw this type of intimidation, rather than all intimidating messages, because burning a cross is a “particularly virulent form of intimidation.”⁵⁰

B. *The R.A.V. Trilogy: Reaction and Continued Authority*

Commentary on *R.A.V.* and the two major decisions testing its reach has focused principally on three questions: (1) the cogency of the *R.A.V.* Court’s reasoning, (2) the degree to which *Mitchell* and *Black* can be reconciled with *R.A.V.*, and (3) *R.A.V.*’s potential effect on other regulatory re-

42. See *id.* at 489-90 (explaining that speech can be used to establish motive and intent).

43. See generally 538 U.S. 343 (2003).

44. *Id.* at 348.

45. See W. Wat Hopkins, *Cross Burning Revisited: What the Supreme Court Should Have Done in Virginia v. Black and Why It Didn’t*, 26 HASTINGS COMM. & ENT. L.J. 269, 301-03 (2004) (providing synopsis of individual opinions).

46. See *Black*, 538 U.S. at 363-68 (finding that prima facie evidence provision of statute had potential to prosecute and chill protected conduct); *id.* at 384-87 (Souter, J., concurring in part) (stating that prima facie evidence provision prevented statute from satisfying requirement that no official suppression of ideas was afoot).

47. *Id.* at 361 (quoting *R.A.V. v. City of St. Paul*, 505 U.S. 377, 388 (1992)); see *id.* at 368-70 (Scalia, J., concurring in part) (describing effect of prima facie evidence provision).

48. See *id.* at 359-60 (discussing true threats).

49. See *id.* at 363 (finding cross burning with intent to intimidate is proscribable under First Amendment).

50. See *id.* (explaining history of cross burning).

gimes. The literature has been marked largely by criticism of the Court's opinions and uncertainty about their extension. Still, the Court has displayed no willingness to retreat from its approach to this area.

In a sense, *R.A.V.*'s imposition of limits on the ability to regulate proscribable speech was not startling. Even prior to the decision, the orthodox version of the two-level theory of speech had undergone considerable erosion. Commercial speech, once on the roster of categories ineligible for First Amendment recognition,⁵¹ had been granted substantial protection.⁵² Defamation, though still afforded no constitutional protection,⁵³ had been accorded a significant measure of "strategic protection" in order to protect "speech that matters."⁵⁴ Even the concept of fighting words, though still outside the cloak of First Amendment protection, had been interpreted so narrowly as to raise doubts about its vitality as a meaningful concept.⁵⁵

Nevertheless, the *R.A.V.* Court's disapproval of content discrimination within proscribable categories, like fighting words, provoked widespread scholarly criticism. While Professor Tribe⁵⁶ and others⁵⁷ have

51. See *Valentine v. Chrestensen*, 316 U.S. 52, 54 (1942) (finding that First Amendment protections do not apply to commercial speech), *overruled by Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976).

52. See, e.g., *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 646-47 (1985) (permitting attorney to "[solicit] legal business through printed advertising containing truthful and nondeceptive information and advice regarding the legal rights of potential clients"); *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 566 n.9 (1980) (noting that Court "review[s] with special care regulations that entirely suppress commercial speech in order to pursue a nonspeech-related policy"); *Va. State Bd. of Pharmacy*, 425 U.S. at 764-70 (analyzing benefits and drawbacks of banning pharmacists from advertising price of prescription drugs and concluding that "commercial speech, like other varieties, is protected").

53. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974) (noting that "there is no constitutional value in false statements of fact").

54. See *id.* at 341-42 (explaining that "to define the proper accommodation between [freedom of speech and press and protection of those victims of defamation], [the Court has] been especially anxious to assure to the freedoms of speech and press that 'breathing space' essential to their fruitful exercise" (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963))). For an overview of the Court's libel jurisprudence, see *infra* notes 80-122 and accompanying text.

55. See Donald A. Downs, *Skokie Revisited: Hate Group Speech and the First Amendment*, 60 NOTRE DAME L. REV. 629, 632-37 (1985) (discussing Supreme Court's alteration of fighting words doctrine in 1960s and 1970s); Nadine Strossen, *Regulating Racist Speech on Campus: A Modest Proposal?*, 1990 DUKE L.J. 484, 509-11 (1990) (surveying Supreme Court's development of fighting words doctrine).

56. See Laurence H. Tribe, *The Mystery of Motive, Private and Public: Some Notes Inspired by the Problems of Hate Crime and Animal Sacrifice*, 1993 SUP. CT. REV. 1, 8-11 (1993) (distinguishing statute in *Mitchell* from ordinance in *R.A.V.*).

57. See, e.g., Ronald D. Rotunda, *A Brief Comment on Politically Incorrect Speech in the Wake of R.A.V.*, 47 SMU L. REV. 9, 21-22, 22 n.73 (1993) ("R.A.V. teaches us that the government may not regulate fighting words based on hostility toward the underlying message expressed."); George G. Size & Glenn R. Britton, *Is There Hate Speech? R.A.V. and Mitchell in the Context of First Amendment Jurisprudence*, 21 OHIO N.U. L. REV. 913, 913, 924-26 (1995) (arguing that "R.A.V. [is an] example[] of a

written approvingly on the decision, many have attacked the Court's approach to hate speech laws harshly.⁵⁸ Even a recent sympathetic observer offered an alternative to the *R.A.V.* Court's rationale for scrutinizing content-based regulations of unprotected speech.⁵⁹ By contrast, numerous commentators applauded *Mitchell*,⁶⁰ indeed, persons other than legal academics expressed the relatively little criticism.⁶¹ Critics and supporters

larger genera of First Amendment analysis"); Ronald Turner, *Hate Speech and the First Amendment: The Supreme Court's R.A.V. Decision*, 61 TENN. L. REV. 197, 222 (1993) ("[E]ven under *R.A.V.*, the government may constitutionally draw a line banning fighting words for purportedly neutral and reasonable justifications.").

58. See, e.g., Akhil Reed Amar, *The Case of the Missing Amendments: R.A.V. v. City of St. Paul*, 106 HARV. L. REV. 124, 124 (1992) (questioning Supreme Court's constitutional analysis in *R.A.V.*); G. Sidney Buchanan, *The Hate Speech Case: A Pyrrhic Victory for Freedom of Speech?*, 21 HOFSTRA L. REV. 285, 296-98 (1992) (criticizing Justice Scalia's opinion in *R.A.V.*); Guy-Uriel E. Charles, *Colored Speech: Cross Burnings, Epistemics, and the Triumph of the Critics?*, 93 GEO. L.J. 575, 575-78 (2005) (discussing inconsistencies between *R.A.V.* and *Virginia v. Black*); David Goldberger, *Hate Crime Laws and Their Impact on the First Amendment*, 1992 ANN. SURV. AM. L. 569, 573-79 (1992) (characterizing *R.A.V.* as "abandon[ing] a firmly established judicial view that there are two categories of speech. . ."); Charles R. Lawrence III, *Cross-burning and the Sound of Silence: Antisubordination Theory and the First Amendment*, 37 VILL. L. REV. 787, 787-804 (1993) (calling Justice Scalia's opinion in *R.A.V.* "deeply troubling"); Jerome O'Callaghan, *Free Speech by the Light of a Burning Cross*, 42 CLEV. ST. L. REV. 215, 228-37 (1994) (discussing fundamental flaws of *R.A.V.*); Steven H. Shiffrin, *Racist Speech, Outsider Jurisprudence, and the Meaning of America*, 80 CORNELL L. REV. 43, 56-64 (1994) (explaining that "Justice Scalia's framework provides neither a cogent explanation of the doctrinal framework of first amendment law, nor a sturdy basis for justifying *R.A.V.*'s result"); Sunstein, *supra* note 8, at 825-28 (comparing *R.A.V.* to other First Amendment decisions); Richard J. Williams, Jr., *Burning Crosses and Blazing Words: Hate Speech and the Supreme Court's Free Speech Jurisprudence*, 5 SETON HALL CONST. L.J. 609, 678-79 (1995) (concluding that after *R.A.V.*, "it is extremely difficult, if not impossible, to predict where the Court will move next"); see also Edward J. Eberle, *Hate Speech, Offensive Speech, and Public Disclosure in America*, 29 WAKE FOREST L. REV. 1135, 1159-70 (1994) ("Notwithstanding *R.A.V.*'s potential for progress in First Amendment law, it also presents substantial potential for pitfall.").

59. See Kitrosser, *supra* note 31, at 869-86 (proposing "[n]ew [a]pproach for [a]ssessing [c]ontent-[b]ased [r]egulations of [u]nprotected [s]peech").

60. See, e.g., Kathleen M. Sullivan, *Resurrecting Free Speech*, 63 FORDHAM L. REV. 971, 986 (1995) (approving Supreme Court's reasoning in *Mitchell*); Sunstein, *supra* note 8, at 828 (opining that *Mitchell*'s conclusions were correct); Andrew E. Taslitz, *Condemning the Racist Personality: Why the Critics of Hate Crime Legislation Are Wrong*, 40 B.C. L. REV. 739, 763-64 n.141 (1999) (discussing beneficial applicability of *Mitchell* to "the intentional infliction of bodily harm motivated by, and involving the expression of, racial prejudice"); Lu-in Wang, *The Transforming Power of "Hate": Social Cognition Theory and the Harms of Bias-Related Crimes*, 71 S. CAL. L. REV. 47, 55 n.38 (1997) (noting constitutional congruence of *Mitchell* which "enhanced punishment where the defendant 'intentionally selected' the victim based on race or other enumerated group status").

61. See, e.g., Thomas D. Brooks, Note, *First Amendment-Penalty Enhancement for Hate Crimes: Content Regulation, Questionable State Interests and Non-Traditional Sentencing*, 84 J. CRIM. L. & CRIMINOLOGY 703, 723-37 (1994) (arguing, for example, that "Mitchell's conduct fell within the bounds of conduct regarded as expressive under the First Amendment"); Gey, *supra* note 29, at 1014 n.5 (citing critical commentary by Mitchell's lawyers, political scientists and students); Lisa M. Stozek,

alike, however, question whether the decisions in *R.A.V.* and *Mitchell* can be reasonably harmonized.⁶² Similarly, while *Black* encountered a decidedly mixed reaction,⁶³ commentators of various stripes view the outcomes in *Black* and *R.A.V.* as contradictory.⁶⁴

Whatever their views on the merits and consistency of the *R.A.V.* trilogy, authors have explored the implications of these holdings for a spectrum of issues. Commentary has addressed, but has not been confined to,

Note, *Wisconsin v. Mitchell: The End of Hate Crimes or Just the End of the First Amendment?*, 14 N. ILL. U. L. REV. 861, 862 (1994) (concluding that in *Mitchell*, “the Court treads dangerously close to criminalizing speech and thought”). *But see* Alan E. Brownstein, *Alternative Maps for Navigating the First Amendment Maze*, 16 CONST. COMMENT. 101, 141 (1991) (reviewing DANIEL FARBER, *THE FIRST AMENDMENT* (1998)) (suggesting that *Mitchell* poses danger that allowing state to cite speaker’s words as evidence of punishable intent will undermine protection of expression); Gey, *supra* note 29, at 1014 (calling outcome in *Mitchell* “deeply and irrevocably flawed”).

62. *See, e.g.*, Lynn Adelman & Pamela Moorshead, *Bad Laws Make Hard Cases: Hate Crime Laws and the Supreme Court’s Opinion in Wisconsin v. Mitchell*, 30 GONZ. L. REV. 1, 16 (1994) (asserting that “[i]t is impossible to reconcile *R.A.V.* and *Mitchell* in a principled way”); Susan Gellman, *Hate Crime Laws Are Thought Crime Laws*, 1992 ANN. SURV. AM. L. 509, 516-18 (1992-93); Gey, *supra* note 29, at 1019 (focusing on “oddly contradictory outcomes” of *R.A.V.* and *Mitchell*); Cedric Merlin Powell, *The Mythological Marketplace of Ideas: R.A.V., Mitchell, and Beyond*, 12 HARV. BLACKLETTER L.J. 1, 13, 35-36 (1995) (noting that “the Court strains to distinguish” *R.A.V.* and *Mitchell*). *But see* Eberle, *supra* note 58, at 1169-70 (“In *R.A.V.* and *Wisconsin v. Mitchell*, the chosen remedy was reliance on conventional First Amendment principles of punishing conduct, not speech, and fighting offensive speech with counter speech and education, rather than excepting such hate speech from free debate.”); Size & Britton, *supra* note 57, at 930-31 (explaining that “the [*Mitchell*] Court engages in an analysis in terms of expressive conduct with only a nod to *R.A.V.*, a case which it in fact distinguishes”).

63. *Compare* Steven G. Gey, *A Few Questions about Cross Burning, Intimidation, and Free Speech*, 80 NOTRE DAME L. REV. 1287, 1306 (2005) (characterizing Justice O’Connor’s opinion as “factually disingenuous and legally incoherent”), and Roger C. Hartley, *Cross Burning-Hate Speech as Free Speech: A Comment on Virginia v. Black*, 54 CATH. U. L. REV. 1, 17 (2004) (criticizing Court’s decision for “adding yet another level of uncertainty to First Amendment theory”), with Jeannine Bell, *O Say, Can You See: Free Expression by the Light of Fiery Crosses*, 39 HARV. C.R.-C.L. L. REV. 335, 372-86 (2004) (approving bans on cross burning but offering “victim-centered” conception of cross burning as alternative to Court’s approach in *Black*), and Edward J. Eberle, *Cross Burning, Hate Speech, and Free Speech in America*, 36 ARIZ. ST. L.J. 953, 979-80 (2004) (stating that “*Black* seems to illuminate a way in which hate speech could be regulated”).

64. *See* Charles, *supra* note 58, at 603-07 (concluding that “*Black* cannot be squared with *R.A.V.*”); Frederick Schauer, *Intentions, Conventions, and the First Amendment: The Case of Cross-Burning*, 2003 SUP. CT. REV. 197, 209 (2003) (characterizing *Black* and *R.A.V.* as “two mutually exclusive precedents”); James L. Swanson, *Unholy Fire: Cross Burning, Symbolic Speech, and the First Amendment Virginia v. Black*, 2003 CATO SUP. CT. REV. 81, 102 (2003) (discussing contradictions between *Black* and *R.A.V.*).

obviously relevant areas like hate speech,⁶⁵ fighting words⁶⁶ and hate crimes.⁶⁷ Some have considered how *R.A.V.* threw campus speech codes—which Justice Blackmun appeared to intimate were an ulterior target of the majority⁶⁸—into question.⁶⁹ Others ranged further afield to examine the potential impact of *R.A.V.* on sexual harassment laws,⁷⁰ regulation of pornography⁷¹ and broadcast indecency,⁷² exemptions from ob-

65. See Eberle, *supra* note 58 (addressing relation of *R.A.V.* to hate speech); Elena Kagan, *Regulation of Hate Speech and Pornography after R.A.V.*, 60 U. CHI. L. REV. 873, 901-02 (1993) (relating *R.A.V.* to hate speech).

66. See Linda Friedlieb, Comment, *The Epitome of an Insult: A Constitutional Approach to Designated Fighting Words*, 72 U. CHI. L. REV. 385 (2005) (discussing relation of *R.A.V.* to fighting words); Aviva O. Wertheimer, Note, *The First Amendment Distinction Between Conduct and Content: A Conceptual Framework for Understanding Fighting Words Jurisprudence*, 63 FORDHAM L. REV. 793 (1994) (relating *R.A.V.* to fighting words).

67. See Alicia Y. Cox, Note, *The Constitutionality of State Hate-Crime Legislation After R.A.V. v. City of St. Paul and Wisconsin v. Mitchell*, 33 U. MEM. L. REV. 603 (2003) (addressing relation of *R.A.V.* to hate crimes).

68. See *R.A.V. v. City of St. Paul*, 505 U.S. 377, 415-16 (1992) (Blackmun, J., concurring) (expressing fear that Court had succumbed to temptation to decide issue presented in case over “‘politically correct speech’ and ‘cultural diversity’”).

69. See Alan E. Brownstein, *Hate Speech and Harassment: The Constitutionality of Campus Codes that Prohibit Racial Insults*, 3 WM. & MARY BILL RTS. J. 179 (1994) (discussing effect of *R.A.V.* on campus codes that prohibit racial insults); Jeanne M. Craddock, Comment, *Constitutional Law—“Words that Injure; Laws that Silence:” Campus Hate Speech Codes and the Threat to American Education*, 22 FLA. ST. U. L. REV. 1047, 1060-73 (1995) (same); Thomas C. Grey, *How to Write a Speech Code Without Really Trying: Reflections on the Stanford Experience*, 29 U.C. DAVIS L. REV. 891, 910-31 (1995) (same); Rhonda G. Hartman, *Hateful Expression and First Amendment Values: Toward a Theory of Constitutional Constraint on Hate Speech at Colleges and University after R.A.V. v. St. Paul*, 19 J.C. & U.L. 343 (1993) (same); Turner, *supra* note 57, at 225-35 (same).

70. See Charles R. Calleros, *Title VII and Free Speech: The First Amendment Is Not Hostile to a Content-Neutral Hostile-Environment Theory*, 1996 UTAH L. REV. 227 (1997) (addressing effect of *R.A.V.* on sexual harassment laws); Cynthia L. Estlund, *Freedom of Expression in the Workplace and the Problem of Discriminatory Harassment*, 75 TEX. L. REV. 687, 702-707 (1997) (same); Andrea Maryl Kirshenbaum, *Hostile Environment Sexual Harassment Law and the First Amendment: Can the Two Peacefully Coexist?*, 12 TEX. J. WOMEN & L. 67 (2002) (same); Robert G. Schwemm & Rigel C. Oliveri, *A New Look at Sexual Harassment Under the Fair Housing Act: The Forgotten Role of § 3604(c)*, 2002 WIS. L. REV. 771, 825-31 (2002) (same).

71. See Kagan, *supra* note 65, at 876-83 (discussing effect of *R.A.V.* on regulation of pornography); Brennan Neville, *Anti-Pornography Legislation as Content Discrimination Under R.A.V.*, 5 KAN. J.L. & PUB. POL’Y 121 (1995) (same).

72. See Lili Levi, *The Hard Case of Broadcast Indecency*, 20 N.Y.U. REV. L. & SOC. CHANGE 49, 151-54 (1993) (addressing effect of *R.A.V.* on broadcast indecency).

scenity statutes,⁷³ anti-begging ordinances⁷⁴ and the Access to Clinics Act.⁷⁵

While this varied speculation underscores uncertainty about the precise contours of *R.A.V.*, its authority in the courts appears secure, if sparingly invoked. The Court's decisions in *Mitchell* and *Black*, while distinguishing *R.A.V.*, obviously assumed its precedential value. In decisions where the Court has cited *R.A.V.* in connection with striking down laws, *R.A.V.* has tended not to play a major role in the Court's analysis, bolstering conclusions that could be derived from other authority.⁷⁶ In the lower courts as well, no trend of reliance on *R.A.V.* to invalidate statutes has materialized. With one exception,⁷⁷ such decisions have emerged as occasional isolated instances.⁷⁸ Otherwise, as with the Supreme Court, courts' references to *R.A.V.* tend to appear as supplemental rather than central authority.⁷⁹

73. See Ian L. Saffer, Note, *Obscenity Law and the Equal Protection Clause: May States Exempt Schools, Libraries, and Museums from Obscenity Statutes?*, 70 N.Y.U. L. REV. 397, 427-38 (1995) (discussing effect of *R.A.V.* on exemptions from obscenity statutes).

74. See Nancy A. Millich, *Compassion Fatigue and the First Amendment: Are the Homeless Constitutional Castaways?*, 27 U.C. DAVIS L. REV. 255 (1994) (addressing effect of *R.A.V.* on anti-begging ordinances).

75. See Alan E. Brownstein, *Rules of Engagement for Cultural Wars: Regulating Conduct, Unprotected Speech, and Protected Expression in Anti-Abortion Protests*, 29 U.C. DAVIS L. REV. 553 (1996) (discussing effect of *R.A.V.* on Access to Clinics Act); Leslie Gielow Jacobs, *Supplementing the Assumed Definitions: A Commentary on Professor Brownstein's Analysis of Abortion Protest Restrictions*, 29 U.C. DAVIS L. REV. 639, 640-46 (1996) (same); Jill W. Rose & Chris Osborn, Note, *Facial Neutrality: A Free Speech Challenge to the Freedom of Access to Clinic Entrances Act*, 81 VA. L. REV. 1505, 1521-26 (1995) (same).

76. See, e.g., *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47 (2006) (citing *R.A.V.* only once); *Ashcroft v. ACLU*, 542 U.S. 656, 660 (2004) (same); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 573-77 (2001) (Thomas, J., concurring) (discussing *R.A.V.* only in concurring opinion); *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 817 (2000) (citing *R.A.V.* only once); *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 582-83 (1998) (contrasting *R.A.V.* as involving statute with constitutional concerns "more evident and more substantial" than case at hand).

77. For a further discussion of the pitfalls under *R.A.V.* of victim-specific libel laws, specifically, false allegations of police misconduct, see *infra* notes 153-90 and accompanying text.

78. See, e.g., *Hornell Brewing Co. v. Minn. Dep't of Pub. Safety, Liquor Control Div.*, 553 N.W.2d 713, 716-18 (Minn. Ct. App. 1996) (following *R.A.V.* in striking down state statute barring registration of malt liquor brand label if label states or misleadingly implies connection with actual living or dead American Indian leaders).

79. See, e.g., *Quetgles v. State*, 884 So. 2d 911, 918 (Ala. Crim. App. 2003) (citing *R.A.V.* once); *Neufeld v. State Bd. of Equalization*, 22 Cal. Rptr. 3d 423, 428 (Cal. Ct. App. 2004) (same); *People v. Hsu*, 99 Cal. Rptr. 2d 184, 192 (Cal. Ct. App. 2000) (same); *People v. Baer*, 973 P.2d 1225, 1232 (Colo. 1999) (same).

II. CHALLENGING VICTIM-SPECIFIC LIBEL LAWS UNDER *R.A.V.*

The *R.A.V.* Court undoubtedly contemplated that its holding would apply to defamation. To illustrate its underlying principle, the Court noted that while the government has the power to prohibit libel, it “may not make the further content discrimination of proscribing *only* libel critical of the government.”⁸⁰ In a sense, the inherent ideological neutrality of conventional libel law forms a crucial part of the justification for allowing restrictions on this category of speech.⁸¹ This does not mean that the state must treat uniformly all defamatory statements. On the contrary, the Court devised a series of permutations for determining the barriers that different plaintiffs must surmount to recover for a defamatory falsehood. None of these distinctions, however, suggests an exemption from *R.A.V.*’s disapproval of content-based discrimination.

A. *Defamation Under the First Amendment*

While acknowledging that false statements of fact lack any constitutional value,⁸² the Court has refused to grant libel “talismatic immunity” from First Amendment scrutiny.⁸³ Modern constitutional doctrine has accordingly sought to strike a “proper accommodation”⁸⁴ between freedoms of speech and press and the state interest in redressing harm to reputation.⁸⁵ This balancing exercise has spawned a complex, if not bewildering

80. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 384 (1992).

81. See, e.g., Shima Baradaran-Robison, *Viewpoint Neutral Zoning of Adult Entertainment Businesses*, 31 HASTINGS CONST. L.Q. 447, 482 (2004) (discussing “viewpoint neutral, but content-based, regulation”); Shiffrin, *supra* note 58, at 63-64 (1994) (discussing content neutrality with respect to defamation and discrimination).

82. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974) (noting that “there is no constitutional value in false statements of fact”).

83. See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964) (“[L]ibel can claim no talismatic immunity from constitutional limitations.”). Prior to *N.Y. Times*, the Court regarded defamation as wholly outside First Amendment protection. See *Beauharnais v. Illinois*, 343 U.S. 250, 256-57, 266 (1952) (rejecting First Amendment protection for defamatory statements); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942) (commenting that defamation offers “no essential part of any exposition of ideas, and [is] of such slight social value as a step to truth that any benefit that may be derived from [it] is clearly outweighed by the social interest in order and morality”).

84. See *Gertz*, 418 U.S. at 325 (attempting to strike balance between freedoms of speech and press and redressing harm caused to reputation).

85. See *Rosenblatt v. Baer*, 383 U.S. 75, 92 (1966) (Stewart, J., concurring) (stating that actions for damages from defamatory falsehoods reflect “no more than our basic concept of the essential dignity and worth of every human being”).

ing,⁸⁶ body of doctrine.⁸⁷ Though intricate, the standards developed by the Court can be viewed as falling along four broad axes. Consistent with *R.A.V.*, each of these groupings assumes an evenhanded approach toward the content of defendants' speech.

1. *Status of Plaintiff*

The centerpiece of constitutional libel law has been the designation of a plaintiff's status. Under *New York Times Co. v. Sullivan*,⁸⁸ a public official can recover damages for a defamatory falsehood relating to official conduct only upon a showing of actual malice: *i.e.*, either the defendant knows that the statement is false or acts with reckless disregard of the statement's falsity.⁸⁹ The Court's decision in *Curtis Publishing Co. v. Butts*⁹⁰ extended the actual malice rule to speech about non-governmental plaintiffs characterized as "public figures."⁹¹ Later, in *Gertz v. Robert Welch, Inc.*,⁹² the Court ruled that plaintiffs designated as private figures could recover damages upon a showing of negligence.⁹³ The *Gertz* Court also elaborated on the ways in which public figures attain their identity. *Gertz* recognized

86. The Court's treatment of defamation has frequently been criticized as overly fragmented and unnecessarily confusing. *See, e.g.*, LAWRENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 865 (2d ed. 1988) (describing defamation doctrine as "a frustrating tangle for all concerned—a mysterious labyrinth"); Robert M. Ackerman, *Bringing Coherence to Defamation Law Through Uniform Legislation: The Search for an Elegant Solution*, 72 N.C. L. REV. 291, 293 (1994) (asserting that First Amendment jurisprudence contributes to "disarray" and "chaotic nature" of defamation law); Sheldon W. Halpern, *Of Libel, Language, and Law: New York Times v. Sullivan at Twenty-Five*, 68 N.C. L. REV. 273, 276 (1990) (describing current status of defamation as "[a] fragmented, confusing and unsatisfying array of criteria and requirements").

87. *See* Deean M. Taylor, Dun & Bradstreet, Hepps and Milkovich: *The Lingering Confusion in Defamation Law*, 1992 ANN. SURV. AM. L. 153, 158-65 (1993) (providing an overview of evolution of Court's defamation jurisprudence).

88. 376 U.S. at 254.

89. *See id.* at 279-80 (discussing standards plaintiff must meet to recover for defamation). While *N.Y. Times* involved a civil action, the actual malice standard was also held to apply to criminal sanctions. *See* *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964) ("What we said of Alabama's civil libel law in [*N.Y. Times*] applies equally to the Louisiana criminal libel rule. . . .").

90. 388 U.S. 130 (1967). The Court also issued a decision in the companion case of *Associated Press v. Walker*. *See id.* at 130, 140 (noting companion case of *Walker* and discussing facts of *Walker*).

91. *See id.* at 164-65 (Warren, C.J., concurring) (stating that actual malice standard should apply to "public figures"); *see also* Harry Kalven, Jr., *The Reasonable Man and the First Amendment: Hill, Butts, and Walker*, 1967 SUP. CT. REV. 267, 275-78 (1967) (providing explanation of unusual combination of opinions that forged Butts' holding on public figures).

92. 418 U.S. 323 (1974).

93. *See id.* at 347, 350 (stating that "the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual," including negligence). For a further discussion of the broader set of rules governing liability to private figures, *see infra* notes 107-08.

three categories: all-purpose public figures, limited public figures and involuntary public figures.⁹⁴ Voluntary limited public figures, who “have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved,”⁹⁵ are by far the most common.⁹⁶ Because the actual malice standard presents such a formidable hurdle to plaintiffs,⁹⁷ and the question of limited public figure status is so often ambiguous,⁹⁸ dispute over whether the plaintiff qualifies for this status has been the focal point of legions of cases.

Still, the Court’s willingness to grant private figures more potent means of combating defamatory falsehoods does not imply a general tolerance of content-based disparities in libel law. The *R.A.V.* Court objected that St. Paul’s hate speech ordinance in effect “license[d] one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules.”⁹⁹ Admittedly, those who defame public officials or public figures are also permitted to take broader verbal punches because of the near-immunity conferred by the actual malice requirement. The difference in burdens borne by public and private plaintiffs, however, does not represent the tilting of the debate arena that troubled the Court in *R.A.V.* Unlike the apostles of tolerance and proponents of bigotry who confronted each other in *R.A.V.*,¹⁰⁰ private figures do not systematically clash with public officials and public figures in defamatory exchanges. Moreover, the rationales for treating public and private plaintiffs differently are consistent with the principle of ideological neutrality. Libel of public officials triggers the actual malice barrier not because of a bias in favor of private figures, but because “[c]riticism of government is at the very center of the constitutionally protected area of free discussion.”¹⁰¹ Similarly, the Court’s reference to private individuals as “more deserving

94. See *id.* at 344-45 (discussing classifications and respective capabilities of each classification to remedy personal harm caused by defamatory statements).

95. *Id.* at 345.

96. See RODNEY A. SMOLLA, *LAW OF DEFAMATION* §§ 2:15-2:77 (2d ed. 1999) (discussing voluntary limited public figures).

97. See Marc A. Franklin, *Winners and Losers and Why: A Study of Defamation Litigation*, 1980 AM. B. FOUND. RES. J. 455, 471, 489, 498 (pointing to “plaintiffs notable lack of success” in study of defamation decisions).

98. See *Rosanova v. Playboy Entm’t, Inc.*, 411 F. Supp. 440, 443 (S.D. Ga. 1976) (comparing identification of public figures to “trying to nail a jellyfish to the wall”), *aff’d*, 580 F.2d 859 (5th Cir. 1978); Alexander D. Del Russo, *Freedom of the Press and Defamation: Attacking the Bastion of New York Times Co. v. Sullivan*, 25 ST. LOUIS U. L.J. 501, 518-25 (1981) (canvassing decisions applying *Gertz* criteria for distinguishing public and private figures and finding “a maze of seemingly irreconcilable cases”).

99. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 392 (1992) (commenting on selective speech limitations).

100. For a further discussion of the Court’s determination that the St. Paul ordinance amounted to viewpoint discrimination, see *supra* note 26 and accompanying text.

101. See *Rosenblatt v. Baer*, 383 U.S. 75, 85 (1966) (discussing scope of “public official” designation for purpose of defamation analysis).

of recovery” than public officials and public figures¹⁰² does not reflect a judicial predilection for the former. Rather, in balancing free speech and reputational interests, the Court has taken into account the assumption that private figures do not share public individuals’ voluntary exposure to heightened risk of harm from defamatory falsehood.¹⁰³

2. *Subject Matter of Defamatory Statement*

A libel plaintiff’s burden also depends on the subject matter of the defamatory statement; again, however, the Court’s classification scheme does not embody ideological preferences. In the case of public officials, the actual malice standard applies when the statement is regarded as “relating to [the plaintiff’s] official conduct.”¹⁰⁴ The category arises from the Court’s understanding of “the central meaning of the First Amendment,”¹⁰⁵ and obviously has no partisan slant. Likewise, libel of a limited public figure should pertain to the controversy in which the plaintiff is involved to qualify for the actual malice standard.¹⁰⁶ This requirement, too, favors no particular cause. Finally, a private figure who complains of a falsehood involving a matter of public concern must show actual malice to recover punitive or presumed damages.¹⁰⁷ No such showing is required

102. *See* *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345 (1974) (contrasting public figures and private plaintiffs interests in reputation).

103. *See id.* (making generalizations with respect to classes of plaintiffs). As an additional consideration, the *Gertz* Court also noted that private individuals are more vulnerable to injury because they lack the access to channels of public communication generally enjoyed by public officials and public figures. *See id.* at 344 (same). This rationale also should not be viewed as aligning the Court with a particular ideological camp.

104. *See* *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279 (1964) (setting forth actual malice standard as limitation on recovery of public officials). In practice, this criterion has not proved to be a strict limitation on the range of comment on public officials subject to the actual malice standard. *See* Nat Stern, *Private Concerns of Private Plaintiffs: Revisiting a Problematic Defamation Category*, 65 MO. L. REV. 597, 606 n.57 (2000) (noting broad interpretation of requirement that actionable statement must be relevant to public official’s performance or capacity).

105. *See* *N.Y. Times*, 376 U.S. at 273 (stating that reputational concerns and factual error do not warrant removing constitutional protection for criticism of public officials).

106. *See* Charles A. Armgardt, *Libel and Slander*, Sept. 21, 1998, http://www.modrall.com/articles/article_12_1.html (stating that limited public figures are subject to actual malice standard only “when they are defamed in connection with the issues in which they are a public figure”); *see also* James C. Mitchell, *The Accidental Purist: Reclaiming the Gertz All Purpose Public Figure Doctrine in the Age of “Celebrity Journalism”*, 22 LOY. L.A. ENT. L. REV. 559, 574 (2002) (proposing two-step analysis for determining whether public figures are required to prove actual malice).

107. *See* *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 756-57 (1985) (plurality opinion) (summarizing burden of proof on private figure plaintiff where defamatory statement involves matter of public concern); *Gertz*, 418 U.S. at 349 (setting forth limitation on recovery of damages under state defamation law).

where the libel does not pertain to a matter of public concern.¹⁰⁸ While this distinction has elicited considerable criticism, the attacks have focused on the alleged inconsistency with prior pronouncements,¹⁰⁹ vagueness,¹¹⁰ aggravation of complexity,¹¹¹ and inherent futility.¹¹² Whatever its other defects, the dichotomy does not appear to lack neutrality.

3. *Interpretive Principles*

Another set of rulings addresses the threshold question of whether a libel defendant's statement can validly be understood as asserting a defamatory falsehood about the plaintiff. The requirement that the statement be "of and concerning" the plaintiff precludes recovery based on dubious references.¹¹³ Likewise, accusations that realistically represent rhetorical hyperbole are spared the consequences of more literal interpretations.¹¹⁴ More broadly, the Court in *Milkovich v. Lorain Journal Co.*,¹¹⁵ while rejecting a wholesale dichotomy between actionable statements of fact and privileged statements of opinion,¹¹⁶ affirmed that statements must be sus-

108. See *Dun & Bradstreet*, 472 U.S. at 763 (plurality opinion) (concluding that private figure plaintiffs may recover punitive and presumed damages without proving actual malice where defamatory statement does not involve matter of public concern).

109. See, e.g., Robert C. Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and Hustler Magazine v. Falwell*, 103 HARV. L. REV. 601, 667 n.327 (1990); Rodney A. Smolla, *Dun & Bradstreet, Hepps, and Liberty Lobby: A New Analytic Primer on the Future Course of Defamation*, 75 GEO. L.J. 1519, 1541 (1987).

110. See, e.g., Arlen W. Langvardt, *Public Concern Revisited: A New Role for an Old Doctrine in the Constitutional Law of Defamation*, 21 VAL. U. L. REV. 241, 266 (1987); Andrew Jay McClurg, *Bringing Privacy Law Out of the Closet: A Tort Theory of Liability for Intrusions in Public Places*, 73 N.C. L. REV. 989, 1082 (1995); Eugene Volokh, *Freedom of Speech and Information Privacy: The Troubling Implications of a Right to Stop People from Speaking About You*, 52 STAN. L. REV. 1049, 1097-98 (2000).

111. See, e.g., JOHN E. NOWAK & RONALD D. ROTUNDA, *CONSTITUTIONAL LAW* 1274 (7th ed. 2004); Don Lewis, *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., Phila. Newspapers, Inc. v. Hepps, and Speech on Matters of Public Concern: New Directions in First Amendment Defamation Law*, 20 IND. L. REV. 767, 782 (1987); *The Supreme Court, 1984 Term—Constitutional Law*, 99 HARV. L. REV. 120, 217-18 (1985).

112. See, e.g., Daniel O. Conkle, *The Indiana Supreme Court's Emerging Free Speech Doctrine*, 69 IND. L.J. 857, 861 n.36 (1994); Lawrence Rosenthal, *Permissible Content Discrimination Under the First Amendment: The Strange Case of the Public Employee*, 25 HASTINGS CONST. L.Q. 529, 551 n.114 (1998).

113. See *Rosenblatt v. Baer*, 383 U.S. 75, 82-83 (1966) (finding "indiscriminate suspicion" cast on small group constitutionally insufficient for recovery by any group member).

114. See *Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers v. Austin*, 418 U.S. 264, 285-86 (1974) (referring to plaintiffs as "traitors"); *Greenbelt Coop. Publ'g Ass'n v. Bresler*, 398 U.S. 6, 13 (1970) (accusing plaintiffs of "blackmail").

115. 497 U.S. 1 (1990).

116. See *id.* at 18, 21 (rejecting constitutional privilege for statements of opinion). Prior to *Milkovich*, the existence of this type of distinction had been widely accepted in the courts. E.g., *Price v. Viking Penguin, Inc.*, 881 F.2d 1426, 1431-32 (8th Cir. 1989); *Ollman v. Evans*, 750 F.2d 970, 974-75 (D.C. Cir. 1984).

ceptible to being proved false to trigger liability.¹¹⁷ Finally, a defendant can be held accountable for deliberately misattributing words to a plaintiff only if the alteration materially changed the meaning conveyed by the plaintiff's original statement.¹¹⁸

These interpretive rules are couched in terms of sufficient generality to avoid any taint of ideological slant. The requirement that the offending passage unequivocally refer to the plaintiff does not depend on the plaintiff's political or social views. Whether a plaintiff can recover for being called a "liar" hinges on a reasonable audience's view that the defendant's statement makes a provably false assertion,¹¹⁹ not its views of either party's beliefs. Similarly, liberals and conservatives alike have equal opportunity to demonstrate that misquotations of their words amount to actionable distortions.

4. *Procedural Requirements*

A fourth cluster of holdings directs the manner in which libel litigation proceeds through the courts. These are the types of procedural rules that appear not to advance any special agenda. For example, mandatory independent appellate review of determinations of actual malice¹²⁰ obviously helps defendants, but not defendants of any particular ilk. The same can be said of the requirement that summary judgment be granted to the defendant where a public figure's opposing affidavit does not support an inference of actual malice by clear and convincing evidence.¹²¹ Conversely, the subjection of media defendants' editorial processes to inquiry for evidence of actual malice¹²² benefits all kinds of plaintiffs.

117. See *Milkovich*, 497 U.S. at 19-20 (deeming statements that reasonably imply false assertions of defamatory fact actionable); *Phila. Newspapers, Inc. v. Hepps*, 475 U.S. 767, 777 (1986) (requiring private figure plaintiff to prove falsity in defamation action against media defendant). The Court has not addressed whether this principle applies beyond statements by media defendants on matters of public concern. See *Milkovich*, 497 U.S. at 19-20 (reviewing cases).

118. See *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 517 (1991) (concluding that meaning of statement determines falsity, rather than minor inaccuracies).

119. See *Milkovich*, 497 U.S. at 20-21 (focusing inquiry on reasonable interpretation of statement).

120. See *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 514 (1984) (reaffirming independent appellate review); see also *Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 685 (1989) (deeming question of whether evidence in defamation case supports finding of actual malice question of law).

121. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 254-55 (1986) (holding that determination of existence of genuine issue of material fact must be guided by substantive evidentiary standards of case).

122. See *Herbert v. Lando*, 441 U.S. 153, 169-76 (1979) (declining to extend privilege to editorial process).

B. *The Framework for Challenges to Victim-Specific Libel Laws Under R.A.V.*

The Court's opinion in *R.A.V.* broadly calls into question content-based regulations even within proscribable categories, not just overt viewpoint discrimination. As a category that has been accorded substantial First Amendment protection, defamation represents an especially fertile area for the application of this principle. Moreover, at least some victim-specific libel laws may cloak the kind of functional discrimination that proved fatal in *R.A.V.* Where such a law does so, it is unlikely to be salvaged by one of *R.A.V.*'s three exceptions.

R.A.V.'s principles can be readily transplanted to defamation law in general and victim-specific statutes in particular. Indeed, punishment of libel may offer a more compelling case for application of *R.A.V.*'s reasoning than the fighting words involved in *R.A.V.* itself. In contrast to fighting words, which receive no protection,¹²³ the Court has recognized the necessity of shielding much libel from liability in order to preserve "breathing space"¹²⁴ for vigorous speech and to avoid "self-censorship."¹²⁵ At the same time, defamatory speech is at least as vulnerable to restrictions as fighting words; as has been recognized, jury verdicts can readily become vehicles for majoritarian suppression of unpopular viewpoints.¹²⁶ Wariness of selective libel laws thus flows logically from the *R.A.V.* Court's declaration that "[t]he point of the First Amendment is that majority preferences must be expressed in some fashion other than silencing speech on the basis of its content."¹²⁷

Laws that particularly penalize defamation of specific segments of society should at least arouse suspicion under the Court's principle. While "content" does not have a precise and consistent meaning,¹²⁸ victim-specific libel laws appear as content-based as the subject matter restrictions disapproved in *R.A.V.* Like St. Paul's ban on only certain kinds of fighting words, victim-specific defamation laws target "those speakers who express views on disfavored subjects."¹²⁹ A victim-specific defamation law repre-

123. See Melody L. Hurdle, *R.A.V. v. City of St. Paul: The Continuing Confusion of the Fighting Words Doctrine*, 47 VAND. L. REV. 1143, 1158-60 (1994) (reviewing *R.A.V.* majority opinion).

124. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342 (1974) (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963)) (noting competing interests of freedom of speech and press and redressability of wrongful injury).

125. See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279 (1964) (finding absolute defense of truth unduly burdensome on criticism of official conduct).

126. See TRIBE, *supra* note 86, § 12-13, at 882 (stating that "where first amendment rights are at stake . . . jurors are likely to represent majoritarian attitudes toward unpopular speakers and ideas").

127. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 392 (1992).

128. See Geoffrey R. Stone, *Restrictions of Speech Because of Its Content: The Peculiar Case of Subject-Matter Restrictions*, 46 U. CHI. L. REV. 81, 83, 99 (1978) (discussing Court's inconsistent treatment of subject-matter restrictions within content-based framework).

129. See *R.A.V.*, 505 U.S. at 391 (finding that content discrimination rendered ordinance facially unconstitutional).

sents the state's judgment that libel of individuals in the designated category is especially odious. When St. Paul similarly sought to display its "special hostility towards the particular biases" specified in its ordinances, however, the Court ruled "[t]hat is precisely what the First Amendment forbids."¹³⁰

Likewise, the absence of express viewpoint discrimination does not immunize victim-specific libel laws. While the Court found that St. Paul's ordinance effected viewpoint discrimination, this conclusion was stated as additional rather than necessary grounds for invalidation.¹³¹ Moreover, even if viewpoint discrimination were considered relevant, it need not be explicit. It was the "practical operation"¹³² of St. Paul's ordinance, not its formal prohibitions, that rendered it discriminatory toward viewpoints. Laws that effectively confer heightened protection on the reputations of certain people should similarly implicate *R.A.V.*'s concern for operational viewpoint discrimination. The state's elevation of some citizens' reputations in "practical operation" skews debate in their favor. In any event, the "presumptive invalidity"¹³³ of content-based restrictions should suffice to defeat at least some victim-specific libel laws. These laws will fail to meet the requirement that they must be "*necessary* to serve the asserted [compelling] interest."¹³⁴ On the contrary, the existence of an obvious "adequate content-neutral alternative[]"¹³⁵—*viz.*, a libel law that equally protects citizens' reputations—shows that there is no need to selectively protect the reputations of some.

It is true that the *R.A.V.* opinion contains dicta that would arguably deflect challenges to victim-specific libel laws, but that reasoning ignores the differences between fighting words and libel. The opinion states that a prohibition of fighting words "that are directed at certain persons or groups. . . would be *facially* valid if it met the requirements of the Equal Protection Clause."¹³⁶ Taken literally and transported to defamation, this statement appears to make victim-specific libel laws presumptively valid. Understood in context, however, this passage does not extrapolate to approval of targeted libel laws. In the same sentence, the Court contrasted

130. *See id.* at 396 (holding that content discrimination was not reasonably necessary to achieve compelling interest).

131. *See id.* at 391 (holding ordinance facially unconstitutional for content discrimination, then stating "*moreover*, the ordinance goes even beyond mere content discrimination, to actual viewpoint discrimination") (emphasis added).

132. *See id.* (finding ordinance more problematic than "mere content discrimination").

133. *See id.* at 390 n.6 (stating presumptive invalidity leaves room for exceptions).

134. *See id.* at 395 (alterations in original) (quoting *Burson v. Freeman*, 504 U.S. 191, 199 (1992) (plurality opinion)) (stating standard of scrutiny for facially content-based statute).

135. *See id.* (finding that existence of content-neutral alternative defeated argument that ordinance was narrowly tailored).

136. *Id.* at 392.

its hypothetical valid statute with St. Paul's impermissible ban on "messages of 'bias-motivated' hatred."¹³⁷ By the same token, victim-specific libel laws inevitably suppress messages that are critical of the objects of the libel. Restrictions on fighting words aimed at certain classes of people only shield those persons from being subjected to abusive invective. In that sense, they resemble those instances in which the Court has upheld laws as restricting only the form of the speech.¹³⁸ Special restrictions on libel, on the other hand, inherently detract from the substance of criticism as well.

It should not be assumed, moreover, that an otherwise suspect victim-specific libel law would readily qualify for one of *R.A.V.*'s three exceptions. In the case of such laws, acceptance of the exception for content discrimination whose basis "consists entirely of the very reason the entire class of speech at issue is proscribable"¹³⁹ could swallow the rule. The reason that defamation is proscribable is that it inflicts injury on the reputation of its victim. In a sense, then, *any* victim-specific libel law could be justified as protecting the exceptionally fragile or important reputation of members of the designated group.¹⁴⁰ It seems unlikely that a rationale of egregious harm could be contained in a principled way. The prerogative of the state to implement this value judgment in some instances would extend logically to many, if not all, other instances as well. Victim-specific libel laws' awkward fit into this "virulence exception"¹⁴¹ is underscored by their distinction from laws found to meet the exception. To illustrate the exception, the *R.A.V.* Court pointed to a hypothetical law banning "only that obscenity which is the most patently offensive *in its prurience*."¹⁴² If this example has any counterpart in libel, it would be the availability of puni-

137. See *id.* (quoting *In re Welfare of R.A.V.*, 464 N.W.2d 507, 510 (Minn. 1991), *rev'd sub nom.*, *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992)) (describing St. Paul's disorderly conduct ordinance).

138. See, e.g., *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 308 (1984); *FCC v. Pacifica Found.*, 438 U.S. 726, 743 n.18, 746 n.22 (1978).

139. See *R.A.V.*, 505 U.S. at 388 (finding this reason sufficiently neutral to justify distinction in First Amendment protection within class of speech).

140. Arguably, this type of premise was relied upon to sustain the group libel statute at issue in *Beauharnais v. Illinois*, 343 U.S. 250 (1952). The statute prohibiting utterances promoting friction among racial and religious groups was enforced against a man who had distributed literature portraying the putative depravity and criminality of African-Americans. See *id.* at 252 (reciting charge in information). Developments since *New York Times*, [376 U.S. 254 (1964),] however, have called into serious question the continued validity of *Beauharnais*. See *Am. Booksellers Ass'n v. Hudnut*, 771 F.2d 323, 331 n.3 (7th Cir. 1985) (asserting that subsequent cases had "so washed away the foundations of *Beauharnais* that it could not be considered authoritative"), *aff'd mem.*, 471 U.S. 1001 (1986); *TRIBE*, *supra* note 86, § 12-12, at 861 n.2 ("The continuing validity of the *Beauharnais* holding is very much an open question.").

141. See *Virginia v. Black*, 538 U.S. 343, 382 (2003) (Souter, J., concurring in part and dissenting in part); see also *id.* at 363 (referring to cross burning with intent to intimidate as "[a] particularly virulent form of intimidation").

142. *R.A.V.*, 505 U.S. at 388.

tive damages for flagrant commission of a defamatory falsehood. As noted above, however, allowing states to treat libel of certain persons as flagrant per se would license unlimited discrimination in assessing the worth of their citizens' reputations. The logic of another example, criminalization of threats against the President,¹⁴³ does not extend to support of victim-specific libel laws either. It is one thing to acknowledge the singular dangers posed by threats of violence to the President;¹⁴⁴ it is quite another to deem libel of a potential plethora of groups to inflict special harms. Similarly, the willingness expressed in *Black* to uphold bans on cross burning with intent to intimidate furnishes no basis for generally sustaining victim-specific libel laws. Few, if any, forms of libel parallel the extraordinary if not unique history of cross burning as a tool of intimidation.¹⁴⁵

Attempts to justify victim-specific libel laws by their putative concern with the "secondary effects" of the targeted defamation likewise present concerns that this exception could overwhelm *R.A.V.*'s general rule. The secondary effects doctrine permits content-based restrictions on speech where the restrictions seek to curb adverse effects tending to flow from speech of certain content rather than to silence the message conveyed by that speech.¹⁴⁶ The doctrine is largely associated with regulation of sexually oriented expression and alleged harms to the community arising from its display or sale.¹⁴⁷ No comparable secondary effects could be ascribed to defamation of certain plaintiffs without depriving the exception of any limiting concept. The injuries typically caused by defamatory falsehood—"impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering"¹⁴⁸—constitute the direct effects of that speech. If any of these were somehow characterized as secondary, it is difficult to see how that label could be confined to libel's impact on only certain kinds of individuals. The state would thus be empowered to guard against the "secondary effects" of libel on any class of persons whom it thought deserving of special protection. Such unbridled authority does not match the ordinary notion of an "exception."

143. See *id.* (explaining why threats against President are outside First Amendment protection).

144. For a discussion of not providing First Amendment protection to threats against the President, see *supra* note 29 and accompanying text.

145. For a discussion of cross burning, see *supra* notes 44-50 and accompanying text.

146. See *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 48 (1986) (discussing secondary effects doctrine).

147. See, e.g., *Erie v. Pap's A.M.*, 529 U.S. 277, 290-99 (2000) (O'Connor, J., plurality opinion); *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 583 (1991) (Souter, J., concurring); see also *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 71 n.34 (1976) (Stevens, J., plurality opinion)

148. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974).

As to the catchall exception, the vague nature of this category renders its application to victim-specific libel laws or other laws elusive.¹⁴⁹ The Court has offered little guidance as to when content discrimination “is such that there is no realistic possibility that official suppression of ideas is afoot.”¹⁵⁰ Justice Scalia’s hypothetical example sheds little light on the concept: “We cannot think of any First Amendment interest that would stand in the way of a State’s prohibiting only those obscene motion pictures with blue-eyed actresses.”¹⁵¹ In order to render *R.A.V.*’s central holding meaningful, however, the state should bear a heavy burden of demonstrating that its content-based restriction in no way promotes “official suppression of ideas.”¹⁵² In the case of victim-specific libel laws, the state’s ability to meet that burden will vary according to the type of plaintiff, the nature of the preferential treatment, and the implications of the statute at issue for broader First Amendment values. How these dynamics might play out in the context of some current laws is explored in Part III.

III. THE VULNERABILITY OF CURRENT LAWS

The pitfalls under *R.A.V.* of victim-specific libel laws can be illustrated by four types of statutes: penalties for filing false complaints against police officers, bans on defamatory statements about political candidates, prohibitions on falsely imputing unchastity to women, and civil liability for defamation of agricultural products. Indeed, challenges already mounted against the first type have been successful in some instances. All four types of statutes demonstrate the dangers of seeking to advance worthy aims through selective restrictions on speech.

A. False Allegations of Police Misconduct

One defamation statute that has already tested the reach of *R.A.V.* is California Penal Code section 148.6, which provides: “Every person who files any allegation of misconduct against any peace officer. . . knowing the allegation to be false, is guilty of a misdemeanor.”¹⁵³ Courts have split over the constitutionality of this provision; the law and its civil counter-

149. See *The Supreme Court, 2002 Term—Leading Cases*, 117 HARV. L. REV. 339, 345 (2003) (asserting that majority in *Virginia v. Black* “left the exact nature of this third *R.A.V.* ‘exception’ uncertain, which will likely perpetuate its uneven application by lower courts”).

150. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 390 (1992).

151. *Id.*

152. See *Virginia v. Black*, 538 U.S. 343, 384 (2003) (Souter, J., concurring in part and dissenting in part) (urging that content-based statute should have “high probability” of no official suppression of ideas to qualify for catchall exception).

153. CAL. PENAL CODE § 148.6(a)(1) (West 2005). The origin of the statute is recounted in Harvey Gee, *The First Amendment and Police Misconduct: Criminal Penalty for Filing Complaints Against Police Officers*, 27 HAMLINE L. REV. 225, 247-50 (2004).

part¹⁵⁴ have been struck down in federal litigation,¹⁵⁵ but have found favor in California courts.¹⁵⁶ While the federal court decisions recognize the manner in which victim-specific statutes can run afoul of *R.A.V.*'s doctrine,¹⁵⁷ the state court rulings demonstrate the hazards of an overly expansive reading of *R.A.V.*'s exceptions.

That this type of statute triggers *R.A.V.*'s scrutiny of content-based discrimination is incontestable. Thus, one court simply noted that section 148.6 "prohibits only the subclass of defamation directed at peace officers" before proceeding to determine whether the provision might qualify for one of *R.A.V.*'s exceptions.¹⁵⁸ Another spelled out the contrast between California's civil provision authorizing actions by peace officers and the absence of similar recourse for comparably vulnerable professions such as physicians and attorneys.¹⁵⁹ The discriminatory character of that provision is especially pronounced because it carves out an exception to California's general privilege for criticism of public officials.¹⁶⁰ Indeed, when Nevada criminalized the filing of false misconduct charges only against police officers, the state did not deny that its statute was content-based.¹⁶¹

154. See CAL. CIV. CODE § 47.5 (West 2006) (authorizing defamation action by peace officer for false statements made in citizen complaints regarding officer's conduct to officer's law enforcement agency employer).

155. See *Hamilton v. City of San Bernardino*, 325 F. Supp. 2d 1087, 1091 (C.D. Cal. 2004) (holding that section 148.6 "does not come within the three *R.A.V.* categories of permissible content-based subclass regulation, and is facially unconstitutional"); *Haddad v. Wall*, 107 F. Supp. 2d 1230, 1238 (C.D. Cal. 2000), *vacated*, 48 Fed. App'x 279 (9th Cir. 2002) (striking down California police libel statute); *Gritchen v. Collier*, 73 F. Supp. 2d 1148 (C.D. Cal. 1999), *rev'd on other grounds*, 254 F.3d 807 (9th Cir. 2001) (same); see also *Eakins v. Nevada*, 219 F. Supp. 2d 1113, 1121 (D. Nev. 2002) (striking down Nevada statute making it misdemeanor to knowingly file false allegations against peace officer); *State v. English*, 776 N.E.2d 1179, 1183 (Ohio Mun. 2002) (striking down similar Ohio statute).

156. See *People v. Stanistreet*, 58 P.3d 465, 474 (Cal. 2003) (upholding criminal provision); *Loshonkohl v. Kinder*, 135 Cal. Rptr. 2d 114, 120 (Cal. Ct. App. 2003) (upholding civil action). *But see Walker v. Kioussis*, 114 Cal. Rptr. 2d 69, 89 (Cal. Ct. App. 2001) (invalidating civil action).

157. For an argument that section 148.6 also violates the vagueness and overbreadth doctrines, see *Gee*, *supra* note 153, at 257-62.

158. *Hamilton*, 325 F. Supp. 2d at 1091.

159. See *Walker*, 114 Cal. Rptr. 2d at 84-85 (contrasting statute's applicability between peace officers and other professionals).

160. See CAL. CIV. CODE § 47.5 (West 2006) (allowing peace officers to bring defamation suits for false complaints); *Imig v. Ferrar*, 138 Cal. Rptr. 540, 543-45 (Cal. Ct. App. 1977) (construing privilege to encompass citizens' complaints against public officials filed with administrative agency); see also *Haddad*, 107 F. Supp. 2d at 1234 (stating that section 47.5 "creates a distinction based on the content of the statements—whether the complaints are about peace officers or other public officials"); *Gritchen*, 73 F. Supp. 2d at 1152 (describing scope of statute); *English*, 776 N.E.2d at 1183 (finding that Ohio statute making crime of filing false complaint against peace officer "singles out peace officers and places them into a special privileged category").

161. See *Eakins v. Nevada*, 219 F. Supp. 2d 1113, 1118 (D. Nev. 2002) (noting state's admission that law targeted content-based speech).

Even decisions upholding California's statutes aimed at false complaints against peace officers, by looking to an exception to *R.A.V.*'s prohibition, tacitly concede that the prohibition generally applies.¹⁶²

Furthermore, section 148.6 and the civil provision illustrate why the exception for discrimination based on the "very reason" that the class of speech is proscribable should be narrowly construed. As noted earlier, the "very reason" that defamation is proscribable is the harm that it inflicts on reputation. The state should not be able to exalt the reputations of police officers by treating libel against them as especially heinous.¹⁶³ Nor are the reputations of police officers exceptionally fragile compared to others who can be defamed with relative impunity under California law.¹⁶⁴ Even a justice who concurred in the California Supreme Court's approval of section 148.6 denied that the reason that defamation is proscribable applies with "special force" to peace officers.¹⁶⁵ On the contrary, the Supreme Court has repeatedly recognized that criticism of public officials lies at the heart of the First Amendment's protection of freedom of speech.¹⁶⁶ In-

162. See *People v. Stanistreet*, 58 P.3d 465, 470 (Cal. 2003) (accepting concept that prohibition applies); *Loshonkohl v. Kinder*, 135 Cal. Rptr. 2d 114, 118 (Cal. Ct. App. 2003) (same).

163. See *Hamilton*, 325 F. Supp. 2d at 1092 (asserting that "society's interest in protecting reputation, and discouraging dissemination of falsehoods . . . do[es] not permit a distinction in the treatment of false statements based on the fact that the statements concern law enforcement officers").

164. See *Walker*, 114 Cal. Rptr. 2d at 69. In *Walker*, the court compared the cause of action for peace officers with legal barriers imposed on physicians, attorneys and political office holders for alleged misstatements about them. The court noted that physicians "are at least as vulnerable to charges of incompetence" as peace officers, that attorneys often deal with hostile persons who have strong motivation to make false accusations harmful to their reputation, and that office holders are subject to wider scrutiny and "are required to take often controversial and unpopular public positions[.]" *Id.* at 84-85. See *Haddad*, 107 F. Supp. 2d at 1236 (denying that peace officers experience "particular vulnerability to reputational injury"); see also *Gee*, *supra* note 153, at 254 n.141 (noting administrative and legal protections available to guard peace officers against frivolous complaints).

165. See *Stanistreet*, 58 P.3d at 475 (Werdegar, J., concurring) (finding section 148.6 justified in light of secondary effects but asserting that court's majority "identifies nothing about false speech affecting peace officers that distinguishes it from false speech affecting other governmental officials *with respect to the grounds on which defamation is proscribable in the first place*").

166. See, e.g., *Butterworth v. Smith*, 494 U.S. 624, 632 (1990) (noting that publication of information regarding alleged governmental misconduct is "speech which has traditionally been recognized as lying at the core of the First Amendment"); *Rosenblatt v. Baer*, 383 U.S. 75, 85 (1966) (stating that "[c]riticism of government is at the very center of the constitutionally protected area of free discussion"); *Garrison v. Louisiana*, 379 U.S. 64, 72-73 (1964) (stating that "where the criticism is of public officials and their conduct of public business, the interest in private reputation is overborne by the larger public interest, secured by the Constitution, in the dissemination of truth"); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) (acknowledging "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials"); see also *Gertz v. Robert Welch, Inc.*, 418

deed, the Court has specifically recognized that the First Amendment “protects a significant amount of verbal criticism and challenge directed at police officers.”¹⁶⁷

The California Supreme Court’s decision upholding section 148.6 only underscores the dangers of an overly indulgent approach to *R.A.V.*’s first exception. In *People v. Stanistreet*,¹⁶⁸ the court emphasized that complaints about peace officers must be investigated and—along with any reports or findings—retained for five years. Thus, the court concluded, the “potential harm of a knowingly false statement is greater here than in other situations.”¹⁶⁹ The obligation to investigate complaints and retain records of their consequences, however, hardly distinguishes peace officers from a host of other professions. Lawyers,¹⁷⁰ physicians,¹⁷¹ and other designated public officials¹⁷² are exposed to similar processes. To find, therefore, that the reason for defamation’s proscribability applies to them with “special force” is to inflate this special exception into a major loophole. The *Stanistreet* court’s reliance on *Mitchell* to justify section 148.6¹⁷³ is also misplaced. The *Mitchell* Court heavily based its distinction of Wisconsin’s hate crime statute from St. Paul’s invalid ordinance on the Wisconsin statute’s regulation of conduct rather than speech.¹⁷⁴ Section 148.6, by contrast, squarely penalizes speech.

Similarly, the *Stanistreet* court’s contention that section 148.6 can be justified by the “secondary effects” of the speech that it penalizes¹⁷⁵ demonstrates the potentially dangerous malleability of that exception. As an example of a content-based ban that could be justified by the targeted speech’s secondary effects, the *R.A.V.* Court cited a law permitting all obscene live performances except those involving minors.¹⁷⁶ A law of this nature would obviously reflect the state’s underlying concern with the harmful impact on minors of such performances irrespective of any

U.S. 323, 345 (1974) (finding public officials less deserving of protection from defamation in part because they have “voluntarily exposed themselves to increased risk of injury from defamatory falsehood concerning them”).

167. *City of Houston v. Hill*, 482 U.S. 451, 461 (1987).

168. 58 P.3d 465 (Cal. 2003).

169. *Id.* at 472.

170. *See, e.g.*, S.C. APP. CT. R. 413, R. 19 (2005) (describing misconduct reporting regulations for lawyers); UTAH CODE JUD. ADMIN. R. 14-510 (2005) (same).

171. *See, e.g.*, ARIZ. REV. STAT. ANN. § 32-1403.01 (2005) (describing misconduct reporting regulations for doctors); ME. REV. STAT. ANN. tit. 32, § 3282-A (2005) (same).

172. *See, e.g.*, CONN. GEN. STAT. § 1-82 (2004) (describing ethics regulations for public officials); FLA. STAT. § 112.324 (2006) (same); MISS. CODE ANN. § 25-4-21 (2004) (same).

173. *See Stanistreet*, 58 P.3d at 472 (relying on *Mitchell* to support § 148.6).

174. *See Wisconsin v. Mitchell*, 508 U.S. 476, 487 (1993) (explaining holding of *Mitchell* Court).

175. *See Stanistreet*, 58 P.3d at 472.

176. *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 389 (1992) (noting example where secondary effects of speech justified ban).

messages that they may contain.¹⁷⁷ By contrast, section 148.6 is aimed at speech *about* peace officers and seeks to curb the *direct* effects of that speech. False complaints about peace officers can harm their reputations and careers. These are troubling consequences that a state would understandably try to prevent. The seriousness of these consequences, however, does not make them secondary effects if that term is to describe an exceptional circumstance rather than the impact shared by most victims of defamatory falsehoods.

Nevertheless, the *Stanistreet* court found that section 148.6 was addressed to secondary effects arising from the investigative process triggered by complaints against peace officers: the expenditure of public resources, the potential adverse effect of complaints on accused officers' careers, and the susceptibility of complaints to discovery in criminal proceedings.¹⁷⁸ This chain of causation, however, proves too much. If this reasoning is accepted, then the state can bootstrap a special cause of action for defamation out of *R.A.V.*'s general prohibition by requiring some sort of investigatory process. The secondary effects exception could thus be transformed into an easy mechanism for circumventing the ban on content-based restrictions.

Finally, section 148.6 should not be considered an instance where "no realistic possibility" exists that the state is engaging in the suppression of ideas. A contrary conclusion would go far toward allowing a court to assert, *ipse dixit*, that it has detected no such possibility. Both the *Stanistreet* opinion and a California lower court opinion upholding the civil provision¹⁷⁹ demonstrate the potential danger of the catchall exception. The *Stanistreet* court found sufficient rebuttal to the concern that section 148.6 stifles opinion in the fact that California's legislature was "not suppressing all complaints of police misconduct, only knowingly false ones."¹⁸⁰ This approach is strikingly permissive, for it would qualify any content-based libel law for the catchall exception where the state imposed the actual malice standard. The lower court found comfort in the observation that the civil provision "does not prohibit expression of ideas, political concepts or criticisms of peace officers, specifically or in general."¹⁸¹ If it explicitly did so, of course, such egregious violation of core free speech rights would scarcely need the invocation of *R.A.V.* to be struck down. Rather, the criterion should be whether a possible effect of suppressing ideas can be safely ruled out. This is hardly the case with the peace officer

177. See *New York v. Ferber*, 458 U.S. 747, 757 (1982) ("The prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance.").

178. See *Stanistreet*, 58 P.3d at 472 (holding that "secondary effects justify [section 148.6] on neutral basis without reference to the content of the speech").

179. See generally *Loshonkohl v. Kinder*, 135 Cal. Rptr. 2d 114 (Cal. Ct. App. 2003) (upholding civil police-specific libel statute).

180. 58 P.2d at 472.

181. *Loshonkohl*, 135 Cal. Rptr. at 119 (describing application of statute).

statutes. On the contrary, as federal courts have recognized, these statutes are not analogous to a ban on obscene movies with blue-eyed actresses that *R.A.V.* cited as an example of the catchall category.¹⁸² Unlike that hypothetical law, California's statutes have the effect of discouraging a certain type of protected expression: *viz.*, valid complaints against peace officers.¹⁸³ Moreover, by singling out defamatory citizen complaints against peace officers rather than penalizing all false statements made in such proceedings, the statutes functionally enforce viewpoint discrimination as much as the St. Paul's hate speech ordinance.¹⁸⁴

Since the content-based restrictions of California's peace officer statutes do not fall into any of *R.A.V.*'s exceptions, such restrictions should survive only if they are narrowly tailored to achieve a compelling governmental interest.¹⁸⁵ It almost goes without saying that California's statutes do not meet this stern test. The notion that such measures are necessary to shield police officers from impediments to the effective performance of their duties is refuted by the widespread absence of such statutes elsewhere.¹⁸⁶ Indeed, other methods of advancing this interest come readily to mind, such as: (1) requiring citizen complaints to be made under oath so as to subject false complaints to penalties for perjury,¹⁸⁷ (2) securing the confidentiality of officers' personnel files,¹⁸⁸ and (3) removing unsubstantiated complaints from these files.¹⁸⁹ Furthermore, as with all classes that the state would specially protect with victim-specific libel laws, police officers can avail themselves of the state's general actions for defamation. California's statutes, therefore, can be analogized to St. Paul's impermissibly selective ordinance, whose legitimate aims could be attained by a broader ban on fighting words.¹⁹⁰

182. See *Haddad v. Wall*, 107 F. Supp. 2d 1230, 1237 (C.D. Cal. 2000) (distinguishing facts from *R.A.V.*); *Gritchen v. Collier*, 73 F. Supp. 2d 1148, 1152 (C.D. Cal. 1999), *rev'd on other grounds*, 254 F.3d 807 (9th Cir. 2001) (same).

183. See *Hamilton v. City of San Bernardino*, 325 F. Supp. 2d 1087, 1094 (C.D. Cal. 2004) (describing effect of statute); see also *Eakins v. Nevada*, 219 F. Supp. 2d 1113, 1120 (D. Nev. 2002) (striking down similar Nevada statute).

184. See *Gee*, *supra* note 153, at 252.

185. See *R.A.V. v. City of St. Paul*, 505 U.S. 377, 395 (1992) (noting proper test applied for content-based statute).

186. See *Gritchen*, 73 F. Supp. 2d at 1154 (reviewing state-by-state privileges for citizens' complaints against police officers).

187. See *id.* at 1153 (illustrating possible alternatives to content-based censorship); see also *Haddad*, 107 F. Supp. at 1238 (illustrating deterrent effect of perjury charges).

188. See *Walker v. Kiouisis*, 114 Cal. Rptr. 2d 69, 89 (Ct. App. 2001) (noting that "there are ways other than the content-based discrimination imposed by section 47.5 to ensure that peace officers' careers are not unduly jeopardized by unfounded citizen complaints").

189. See *id.* (illustrating alternatives to content-based discrimination).

190. See *R.A.V. v. City of St. Paul*, 505 U.S. 377, 395-96 (1992) (illustrating alternatives to content-based censorship available to city council).

B. *Political Candidates*

A more defensible but still problematic measure against the defamation of particular individuals is penalization of defamatory falsehoods about political candidates. Such statutes are common.¹⁹¹ In Florida, for example, it is illegal to make or cause to be made, with actual malice, “any statement about an opposing candidate which is false. . . .”¹⁹² A California statute makes a candidate liable for defamation by a committee that she controls if she “willfully and knowingly directs or permits” the defamatory falsehood.¹⁹³ There are numerous statutes that similarly hold candidates and others accountable for false accusations against their political opponents.¹⁹⁴

It is difficult not to sympathize with the impulse behind such statutes. In light of the sordid history of scurrilous gossip and other disinformation in political campaigns,¹⁹⁵ the goal of cleansing the process of these “smear” campaign tactics is unassailable. Such distortion of political dialogue vitiates the democratic system.¹⁹⁶ Moreover, unlike California’s peace officer statutes, these efforts to curb defamation of candidates do not effect viewpoint discrimination; presumably candidates of all ideological stripes fall under their protection. In addition, the statutes are typi-

191. See CAL. ELEC. CODE § 20501(a) (West 2006); FLA. STAT. ANN. § 104.271(1) (West 2006) (amended in Feb. 2006, to take effect July 1, 2006) (regulating libel by political candidates); MINN. STAT. ANN. § 211B.06 (1) (West 2005) (same); N.D. CENT. CODE § 16.1-10-04 (2003) (same); OHIO REV. CODE ANN. § 3517.21(B) (2-10) (West 2005) (same); OR. REV. STAT. § 260.532 (1) (2003)

192. FLA. STAT. ANN. § 104.271(1) (amended in Feb. 2006, to take effect July 1, 2006).

193. CAL. ELEC. CODE § 20501(a).

194. See, e.g., MINN. STAT. ANN. § 211B.06 (1) (designating as gross misdemeanor intentional participation in false political advertising or campaign material about candidate for public office that is “designed or tends to elect, injure, promote, or defeat a candidate . . . to a public office”); N.D. CENT. CODE § 16.1-10-04 (penalizing as misdemeanor knowing sponsorship of political advertisement or news release containing information about candidate’s prior record that sponsor “knows to be untrue, deceptive, or misleading”); OHIO REV. CODE ANN. § 3517.21(B) (2-10) (establishing crime of making various false statements about political candidate, including dissemination of false statement concerning candidate “if the statement is designed to promote the . . . defeat of the candidate”); *id.* at (B)(10); OR. REV. STAT. § 260.532 (1) (2003) (barring publication containing “false statement of material fact relating to any candidate”).

195. See generally KERWIN C. SWINT, MUDSLINGERS: THE TOP 25 NEGATIVE POLITICAL CAMPAIGNS OF ALL TIME (Praeger Publishers 2006) (identifying egregious examples of incivility in political campaigns).

196. See *Hampel v. Mitten*, 278 N.W. 431, 435 (Wis. 1938) (describing destructive effects on democratic system). According to the Supreme Court of Wisconsin, “[n]othing is more important in a democracy than the accurate recording of the untrammelled will of the electorate. Gravest danger to the state is present where this will does not find proper expression due to the fact that electors are corrupted or are misled.” *Id.*

cally crafted to meet the actual malice standard that would ordinarily apply to such actions.¹⁹⁷

For all their good intentions and ostensible neutrality, however, these laws do not entirely escape the concerns that gave rise to *R.A.V.*'s holding. St. Paul's effort to advance an appealing purpose did not preclude the Court's scrutiny of the ordinance's content-based restrictions.¹⁹⁸ Here, defamation of a particular class of persons—political candidates—is singled out for special adverse treatment by the state.¹⁹⁹ It is tempting to conclude that because false charges against candidates inflict great harm on the political process, the rationale for defamation laws applies with “special force” to this expression. Again, however, the reason for the existence of defamation laws is the protection of personal reputation. The impetus behind campaign speech laws transcends the candidate's desire to vindicate his good name. While this larger purpose may infuse the state's interest with added weight, it also triggers a different calculus than the one obtained when only private interests are at stake. The First Amendment commitment to “uninhibited, robust, and wide-open” debate on public issues²⁰⁰ that produced the actual malice rule for public officials extends to political campaigns as well. For that reason, speech in this context has been accorded broad latitude.²⁰¹ In light of this countervailing consideration, special curbs on false political speech should not be deemed to meet *R.A.V.*'s exception for restrictions rooted in the “very reason” that defamation is proscribable.

Nor can the effects produced by falsehoods about a candidate, however baleful, properly be considered “secondary.” Indeed, they are direct and primary. Unlike the increased crime and diminished property values

197. See, e.g., CAL. ELEC. CODE § 20501(a) (requiring that violator have “willfully and knowingly” engaged in prohibited expression); MINN. STAT. § 211B.06 (requiring that violator know that prohibited communication was false or acted with reckless disregard of whether communication was false).

198. See *R.A.V. v. City of St. Paul*, 505 U.S. 377, 392 (1992) (endorsing ordinance's premise that “[i]t is the responsibility, even the obligation, of diverse communities to confront such notions [of racial supremacy] in whatever form they appear”).

199. See *id.* at 379-80 (describing statute at issue).

200. See *N.Y. Times v. Sullivan*, 376 U.S. 254, 270 (1964) (emphasizing importance of First Amendment in context of political speech).

201. See *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 275 (1971) (stating that “[a] community that imposed legal liability on all statements in a political campaign deemed ‘unreasonable’ by a jury would have abandoned the First Amendment as we know it”); see also *Thomson Newspaper v. Coody*, 896 S.W.2d 897, 903 (Ark. 1995) (stating that circumstantial evidence of ill-will was insufficient alone to establish actual malice); *Desert Sun Pub. Co. v. Superior Ct.*, 158 Cal. Rptr. 519, 521 (Cal. Ct. App. 1979) (noting commitment to “uninhibited, robust, and wide-open” political comment); *Valento v. Ulrich*, 402 N.W.2d 809, 813 (Minn. Ct. App. 1987) (illustrating difficult burden of proof for “actual malice” cases); *Clark v. Allen*, 204 A.2d 42, 44 (Pa. 1964) (describing nature of political campaigns and extent of “mudslinging” between opposing campaigns); *Carr v. Brasher*, 776 S.W.2d 567, 570 (Tex. 1989) (noting standard for actual malice).

associated with the presence of “adult” theaters,²⁰² the harms inflicted by distortion of candidates’ conduct and records do more than merely correlate with this type of expression. Similar to the anger and fear generated by the fighting words that St. Paul sought to curb,²⁰³ these harms—unfairness to the targeted candidate and corruption of the political process—are the immediate consequence of that expression. Such damage may well warrant special concern by the state, but it should not qualify special penalties for this species of libel for the second exception to *R.A.V.*’s bar against selective bans on proscribable speech.

Admittedly, the non-partisan nature of laws forbidding libel of political candidates lends support to the conclusion that “there is no realistic possibility that official suppression of ideas is afoot.” The potential impact of campaign libel laws on the expression of ideas may be considered by courts, however, just as the *R.A.V.* Court explored the operational discrimination inherent in St. Paul’s ordinance.²⁰⁴ The danger that such laws might enable the “suppression of ideas” is heightened when power to enforce them is reposed with an official agency. Allowing a governmental body to act as the arbiter of truth in political speech may threaten fundamental First Amendment values. In *McKimm v. Ohio Elections Commission*,²⁰⁵ for example, the court permitted the Ohio Elections Commission to take action against a candidate for disseminating a cartoon that could have been viewed as indicating that his opponent had accepted cash in exchange for voting to award a construction contract.²⁰⁶ If this action had been brought as a private suit under general libel law, liability would have hinged on a jury’s finding that the cartoon conveyed this false assertion.²⁰⁷ Although the reprimand issued to McKimm constituted fairly mild punishment, the rationale for upholding this action would not preclude a harsher sanction.²⁰⁸

Moreover, even a statute confined to civil actions by individuals would not inevitably qualify for *R.A.V.*’s catchall exception. If the statute authorized political opponents to bring causes of action or seek remedies not available to similarly situated plaintiffs, it could still have the effect of dampening political discourse. Any signal that the machinery of the courts will respond with greater alacrity to politically inspired falsehoods can foster the suppression of ideas, even if the particular ideas are not

202. See *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47-49 (1986) (illustrating ordinance designed to pursue city’s zoning interests as opposed to “suppress the expression of unpopular views”).

203. See *R.A.V.*, 505 U.S. at 392-93 (describing statute at issue).

204. For a further discussion of the Court’s decision in *R.A.V.*, see *supra* notes 21-24 and accompanying text.

205. 729 N.E.2d 364 (Ohio 2000).

206. See *id.* at 368.

207. See generally *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990).

208. See *McKimm*, 729 N.E.2d at 368 (receiving letter of reprimand as opposed to prosecution).

identified in advance.²⁰⁹ Moreover, the ability to bring or credibly threaten suit may enhance the already formidable arsenal of better financed candidates.

It can be plausibly argued, of course, that even when subjected to strict scrutiny, statutes that single out libel of political candidates for heightened penalty pass muster because they are narrowly tailored to achieve the state's compelling interest in promoting an accurately informed electorate. This position derives some support from the Supreme Court's decision in *McConnell v. FEC*²¹⁰ upholding restrictions on certain types of campaign advertisements. Specifically, the Court sustained a ban on the contribution of non-federal funds to state and local party committees for "any 'public communication' that 'refers to a clearly identified candidate for Federal office' and 'promotes,' 'supports,' 'attacks,' or 'opposes' a candidate for that office."²¹¹ Still, the two cases are not identical. The BCRA ban on funding for "sham issue advertising"²¹² was based on extensive experience with the corrosive effects of such advertising on the political process.²¹³ Moreover, because the restriction was framed as a limitation on campaign contributions, the Court applied only "closely drawn" scrutiny rather than strict scrutiny.²¹⁴ Thus, even if some version of a special libel law for political candidates could survive strict scrutiny, it must be grounded in ample findings and more finely crafted than current categorical provisions to fall under *McConnell*'s rationale.²¹⁵

C. *Impugning Women's Chastity*

One type of statute that almost certainly fails constitutional scrutiny is a law singling out for punishment or liability falsehoods that impugn the chastity of women. Such statutes survive in a number of states.²¹⁶ Yet, they fall squarely within *R.A.V.*'s ban on content-based discrimination

209. *Cf.* *United Pub. Workers v. Mitchell*, 330 U.S. 75, 110 (1947) ("Popular government, to be effective, must permit and encourage much wider political activity by all the people. Real popular government means 'that men may speak as they think on matters vital to them and that falsehoods may be exposed through the processes of education and discussion.'") (citation omitted).

210. 540 U.S. 93 (2003).

211. *Id.* at 162 (citation omitted).

212. *See id.* at 185.

213. *See id.* at 126-29, 185.

214. *See id.* at 134-42.

215. A legislature might document, for example, that certain kinds of misrepresentations about a candidate made close to an election tend to have such heightened credibility that normal means of responding cannot redress their deleterious impact on the campaign.

216. *E.g.*, FLA. STAT. § 836.04 (2007); OKLA. STAT. tit. 21, § 779 (2006) (describing crime of "falsely and maliciously or falsely and wantonly imput[ing] to any female . . . a want of chastity"); S.C. CODE ANN. § 15-75-10 (2006); UTAH CODE ANN. § 76-9-507 (2006); VA. CODE ANN. § 18.2-417 (2004) (treating as misdemeanor false statements "derogatory of [a chaste] female's character for virtue and chastity").

within a proscribable category. Nor can they be rationalized as falling within one of *R.A.V.*'s exceptions. An argument that the reason for defamation's ineligibility for First Amendment protection applies with special force to falsely accusing women of unchastity would make that exception virtually circular and limitless. Likewise, characterizing the adverse impact of such expression as a secondary effect would vastly enlarge this exception, for the harms that flow from false charges of female unchastity are indistinguishable in kind from the consequences of other derogatory falsehoods. Finally, these laws cannot plausibly be said to meet the catchall exception. On the contrary, by enforcing the notion that women's virtue is more precious than men's, they fly in the face of *R.A.V.*'s prohibition of laws that effectively discriminate by viewpoint.²¹⁷

Indeed, given these statutes' express reference to gender, they probably also violate equal protection because of the heightened scrutiny that the Court applies to this type of classification.²¹⁸ Under the Court's analysis, the fact that a law confers an advantage on women rather than men is irrelevant.²¹⁹ Thus, one state supreme court has already found its state's chastity law in violation of the Equal Protection Clause.²²⁰ The likely invalidity under equal protection of statutes safeguarding only women's reputation for chastity, however, does not render First Amendment consideration of these laws irrelevant. Rather, it sheds light on the more broadly suspect nature of victim-specific defamation laws. Selective libel laws can distort communication by their disparate treatment of different classes of persons just as restrictions on access to a limited public forum can implicate principles at the intersection of equal protection and free speech.²²¹ In the case of laws forbidding false accusations of female un-

217. See Calvin R. Massey, *Hate Speech, Cultural Diversity, and the Foundational Paradigms of Free Expression*, 40 UCLA L. REV. 103, 179 (1992) (stating that *R.A.V.* "mak[es] it plain that, even within the traditional categories, content-based regulation that has as its object the suppression of ideas is impermissible").

218. See *United States v. Virginia*, 518 U.S. 515, 532-34 (1996) (establishing intermediate scrutiny for gender-based classifications).

219. See generally *Miss. Univ. for Women v. Hogan*, 458 U.S. 718 (1982) (invalidating exclusion of men from state-supported co-educational nursing program); *Orr v. Orr*, 440 U.S. 268 (1979) (striking down law authorizing imposition of alimony obligation only on husbands); *Craig v. Boren*, 429 U.S. 190, 190 (1976) (finding law allowing females, but not males, between ages eighteen and twenty to purchase "nonintoxicating" beer violative of equal protection).

220. See *Butler v. Town of Argo*, 871 So. 2d 1, 17 (Ala. 2003) (holding that chastity statute violated Constitution); *Ivey v. State*, 821 So. 2d 937, 945 (Ala. 2001). Another court has upheld its state's statute authorizing suits for falsely imputing unchastity to a woman. See generally *Wardlaw v. Peck*, 318 S.E.2d 270 (S.C. Ct. App. 1984). The court's decision, however, was expressly premised on the defendant's failure to show that a cause of action would not also be available for a false imputation of unchastity to a man. See *id.* at 278.

221. See *Police Dep't of Chi. v. Mosley*, 408 U.S. 92, 95, 99-102 (1972) (striking down ban on limitation on picketing near schools to picketing involving labor issues under Equal Protection Clause while also invoking First Amendment principle that "government has no power to restrict expression because of its message, its ideas, its subject matter, or its content").

chastity, a twofold effect can be discerned. On the one hand, making aspersions on only female virtue worthy of penalty restricts speech in the service of the idea of women's superior character.²²² On the other hand, such laws tend to promote confining stereotypes by limiting the range of appropriate behavior for women.²²³ Equal protection doctrine has acknowledged that laws that classify by gender may "in practical effect, put women, not on a pedestal, but in a cage."²²⁴ For example, Mississippi's policy of admitting only women to a state university nursing school obviously discriminated against men.²²⁵ In striking down this policy, however, the Court also recognized that the policy harmed women by "perpetuat[ing] the stereotyped view of nursing as an exclusively woman's job" to the detriment of nurses' wages.²²⁶

While victim-specific libel laws not involving suspect or quasi-suspect classifications will rarely violate the Equal Protection Clause, such laws may present some of the same problems highlighted by statutes concerning female unchastity. The premise that one group's reputation is especially vulnerable or important often implies that a comparable group's is less so. At the same time, even the ostensibly protected class may suffer from the tacit premise that its members are expected to adhere to a higher standard of conduct. In the context of an action on behalf of the favored group, the justice of vindicating the besmirched reputation of the victim may obscure the injustice of the disparity in protection. The lapse in evenhandedness may thus seem innocuous in the immediate case, but *R.A.V.* warns against the dangers of selectivity. Whatever the merits of such laws under equal protection analysis, then, *R.A.V.* counsels searching scrutiny for subtler versions of the egregious flaws that mar statutes on female unchastity.

D. *Defamation of Agricultural Producers*

A final type of troubling victim-specific statute is illustrated by North Dakota's provision for civil liability for defamation of agricultural products. Under this statute, someone who "willfully or purposefully disseminates a false and defamatory statement. . . regarding an agricultural producer or an agricultural product under circumstances in which. . . the agricultural producer is [foreseeably] damaged as a result" may be as-

222. See *R.A.V. v. City of St. Paul*, 505 U.S. 377, 392 (1992) (rejecting as justification for St. Paul's hate speech ordinance purpose of combating "messages . . . 'based on virulent notions of racial supremacy'").

223. Cf. Kenneth L. Karst, *Woman's Constitution*, 1984 DUKE L.J. 447, 458 (1984) (pointing to statutory rape laws as example of how "[e]ven laws with a protective appearance might serve the ends of male control over female sexuality").

224. See *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973) (Brennan, J., plurality opinion).

225. See generally *Miss. Univ. for Women v. Hogan*, 458 U.S. 718 (1982) (holding Mississippi's policy unconstitutional).

226. See *id.* at 729-30, 730 n.15 (noting negative aspects towards women of sex classification that discriminated against men).

essed both compensatory and exemplary damages.²²⁷ In addition, if the defendant is found to have “maliciously disseminated” such a statement, the plaintiff “may recover. . . three times the actual damages proven” and is further entitled to “recover costs, disbursements, and actual reasonable attorney’s fees incurred” in the suit.²²⁸ Admittedly, the state has an obvious interest in curbing false statements about agricultural products. Indeed, a broader cause of action for false or misleading disparagement of products is well-established in state and federal law.²²⁹

Nevertheless, this kind of law raises some of the concerns that other victim-specific defamation laws should arouse. The statute’s frankly heightened solicitude for a particular type of commercial plaintiff evokes suspicion that libel law is being exploited to advance an economic agenda. It is understandable that most North Dakotans would object to the dissemination of false information about an important industry, but “[t]he point of the First Amendment is that majority preferences must be expressed in some fashion other than silencing speech on its content.”²³⁰ While the preference in this case presumably springs from economic rather than ideological motives, its embodiment in libel law nevertheless threatens to skew the landscape of expression. The class of “agricultural producer” that can recover special damages and costs under the statute potentially encompasses a significant category of persons and businesses. Laws of this sort can dampen criticism of the favored group without imposing comparable inhibitions on the group’s own participation in public debate. It is not difficult to envision the proliferation of special-interest libel laws that deter criticism of influential industries by consumer advocates and others, while leaving those industries a relatively free hand to present their case. Yet, under *R.A.V.*, government is not permitted “to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensbury rules.”²³¹

227. N.D. CENT. CODE § 32-44-02 (2005).

228. *Id.*

229. See 15 U.S.C. § 1125(a) (2000) (commonly referred to as section 43(a) of Lanham Act); *Skil Corp. v. Rockwell Int’l Corp.*, 375 F. Supp. 777, 783-85 (N.D. Ill. 1974) (explaining elements of cause of action under section 43(a)). See generally Paul T. Hayden, *A Goodly Apple Rotten at the Heart: Commercial Disparagement in Comparative Advertising as Common-Law Tortious Unfair Competition*, 76 IOWA L. REV. 67 (1990).

230. See *R.A.V. v. City of St. Paul*, 505 U.S. 377, 392 (1992) (emphasizing that, although St. Paul desired to communicate message to minority groups that “group hatred” aspect of certain “fighting words” was not condoned by majority of citizens, such goal could not be accomplished simply by silencing unpopular speech).

231. See *id.* at 391-92 (noting that St. Paul’s statute allowed side favoring “racial, color, etc., tolerance and equality” the ability to display such position, but forbade opposing side to do so). A glimpse of the danger posed by economically partisan libel laws like North Dakota’s can be found in a suit brought by Texas cattlemen a few years ago against the talk-show host Oprah Winfrey. The suit was brought under Texas’s False Disparagement of Perishable Food Products Act, which created liability for disseminating information that falsely “states or implies that the perishable food product is not safe for consumption by the public.” See

IV. CONCLUSION

It would be hyperbole to contend that victim-specific libel laws currently pose a major threat to free expression. Still, the Court has recognized that apparently small encroachments on speech can implicate important First Amendment principles.²³² One of those principles, reaffirmed in *R.A.V.*, is that disparate treatment even of otherwise unprotected speech endangers goals and values embodied by the free speech guarantee. Laws that single out and penalize the defamation of certain individuals undermine the idea that government may not discriminate within a category of expression. These laws should be subjected to close scrutiny so they do not flourish into a patchwork of preferred causes of action for favored groups. *R.A.V.*'s warning against "selective limitations upon speech,"²³³ invoked to strike down an ordinance addressed to the narrow category of fighting words, should apply at least as vigorously to the robust area of libel.

Tex. Beef Group v. Winfrey, 11 F. Supp. 2d 858, 862 (N.D. Tex. 1998), *aff'd*, 201 F.3d 680 (5th Cir. 2000) (citation omitted). The suit arose from a broadcast of *The Oprah Winfrey Show* examining the link between the consumption of beef and Bovine Spongiform Encephalopathy (BSE, or "Mad Cow Disease"). *See id.* at 861. The plaintiffs charged that the program was "nothing more than a 'scary story,' " falsely suggesting that U.S. beef is highly dangerous because of Mad Cow Disease and that a horrible epidemic worse than Aids [sic] could occur from eating U.S. beef." *See id.* at 862. The allegations against Winfrey and her guest were ultimately dismissed because the guest was found not to have made any provably false assertions. *See id.* at 863. Still, such suits and their potential chilling effect can only be encouraged by the existence of statutes like North Dakota's § 32-44-02.

232. *See, e.g.,* Cohen v. California, 403 U.S. 15, 15 (1971) (noting that case involving display of profanity on jacket "may seem at first blush too inconsequential to find its way into our books, but the issue it presents is of no small constitutional significance").

233. *See R.A.V.*, 505 U.S. at 392.

