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# R.A.V. v. St. Paul: The Debate over the Constitutionality of Hate Crime Laws Ends; Or Is This Just the Beginning

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## **R.A.V. v. ST. PAUL: THE DEBATE OVER THE CONSTITUTIONALITY OF HATE CRIME LAWS ENDS; OR IS THIS JUST THE BEGINNING?**

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## I. INTRODUCTION

In our civilized America, the incidence of crime and violence committed against our fellow citizens simply on account of their race, religion, gender, or sexual orientation<sup>1</sup> has been increasing at an alarming rate. Statistics gathered by the National Gay and Lesbian Task Force reported a sixty percent increase in crime motivated by sexual orientation between the years 1985 and 1986.<sup>2</sup> The American Jewish Congress (AJC), in a 1987 report, noted that the incidence of violence against Jews has dramatically increased.<sup>3</sup> The United States Congress responded to the growing concern over the rising incidence of hate crime by passing the Hate Crimes Statistics Act of 1990.<sup>4</sup>

The Hate Crimes Statistics Act represents a nationwide effort to compile statistics in an attempt to ascertain the prevalence of hate crimes in America.<sup>5</sup> On January 4, 1993, the Federal Bureau of Investigation released its first full report pursuant to this act.<sup>6</sup> The results show that out of 4,755 hate crimes *reported*<sup>7</sup> over sixty-two percent

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1. These are just a few of the bases for committing what is termed a "hate crime." As used in the proposed Hate Crime Sentencing Enhancement Act of 1992, H.R. 4797, 102d Cong., 2d Sess. (1992), a hate crime is "a crime in which the defendant's conduct [is] motivated by hatred, bias, or prejudice, based on the actual or perceived race, color, religion, national origin, ethnicity, gender, or sexual orientation of another individual or group of individuals."

2. *U.S. House Votes Landslide Victory for Gays, Lesbians on Hate Crimes Bill*, PRNewswire, May 19, 1988, available in WESTLAW, NEWS-ASAP Database.

3. *AJCongress Hails House Passage of Hate Crimes Statistics Act*, PRNewswire, May 18, 1988, available in WESTLAW, NEWS-ASAP Database.

4. The Hate Crimes Statistics Act, 28 U.S.C. § 534 (1992).

5. *60 Percent of Hate Crimes Tied to Race*, CHI. TRIB., Jan. 5, 1993, at 6.

6. The Hate Crimes Statistics Act delegated the duty to collect data on hate crimes to the FBI because of its expertise in gathering crime statistics.

7. "Reported" is emphasized here because many incidents are simply never reported to law enforcement authorities. Also, participation with data collection by police and law enforcement agencies across the nation is presently voluntary under the Act. Thus, only 2,771 law enforcement agencies took part in the study out of a possible 16,000 agencies that annually report crime statistics to the FBI for its Uniform Crime Reports. See Jerry Seper, *Data Hailed as First Step in Fighting Bias Offenses*, WASH. TIMES, Jan. 5, 1993, at A3.

were racially motivated.<sup>8</sup> Out of these, anti-black sentiment resulted in an astounding 1,689 incidents.<sup>9</sup>

While the most prevalent hate crime was intimidation,<sup>10</sup> hate crimes may occur in many different forms and contexts. They range from the most violent crimes, such as physical abuse and murder, to literally obnoxious and provocative verbal insults.<sup>11</sup> For example, a twenty-seven year old homosexual from Vermont was placed into a coma when his head was beaten to a bloody pulp outside a gay bar.<sup>12</sup> His attacker admitted targeting him because he was a "fag."<sup>13</sup> In a less violent occurrence, an African American family was forced to leave their new home because of race motivated harassment.<sup>14</sup> Within one week after moving in, hate mongers had thrown rocks through their windows, set their porch afire with gasoline, shattered their front door, and harassed them with threatening phone calls and hate mail.<sup>15</sup> Despite the character or magnitude of these or any hate crime, hate crimes in general have the effect of polarizing our society by inciting hate, suspicion, distrust, and prejudice. Consequently, forty-six states<sup>16</sup> and over two-hundred colleges and universities<sup>17</sup> throughout the nation have enacted laws aimed at battling such antisocial behavior.

8. *60 Percent of Hate Crimes Tied to Race*, CHI. TRIB., Jan. 5, 1993, at 6.

9. *Id.* In comparison, 888 were caused by anti-white feelings. *See id.*

10. Intimidation accounted for 1,614 incidents, or 33.9% of the total reported. *See Seper, supra* note 7, at A3.

11. According to the FBI report, out of the 4,755 hate crimes committed in 1991, 773 were aggravated assaults, 796 were simple assaults, 12 people lost their lives and 7 were forcibly raped. In addition, there were 1,301 incidents of vandalism. Finally, there were also a few incidents of burglary, larceny, theft, motor vehicle theft, and arson, each accounting for less than one percent of the total. *See Seper, supra* note 7, at A3.

12. Rorie Sherman, *Hate Crimes Statutes Abound; Newest, in VT, Among the Toughest*, NAT'L L.J., May 21, 1990, at 3.

13. *Id.*

14. 138 CONG. REC. S8317 (daily ed. June 16, 1992) (statement of Sen. Simon).

15. *Id.*

16. David G. Savage, *Hate Crime Law is Struck Down; Supreme Court: Justices Rule that a Minnesota Statute Infringes on Free Speech by Punishing Those Who Burn Crosses, Paint Swastikas or Otherwise Display Bigotry*, L.A. TIMES, June 23, 1992, at A1. The only states that have not enacted some form of hate crime law to date are Utah, Wyoming, Nebraska, and Alaska. *Justices Declare "Hate Crime" Laws Unconstitutional*, N.Y. L.J., June 23, 1992, at 1.

17. Savage, *supra* note 16, at A1.

Hate-crime laws, while certainly well-intentioned, present special problems to a society based on liberty and equality of rights. Justice Jackson best articulated this in his widely cited passage from *West Virginia State Board of Education v. Barnette*<sup>18</sup>:

Struggles to coerce uniformity of sentiment in support of some end thought essential to their time and country have been waged by many good as well as by evil men. Nationalism is a relatively recent phenomenon but at other times and places the ends have been racial or territorial security, support of a dynasty or regime, and particular plans for saving souls. As first and moderate methods to attain unity have failed, those bent on its accomplishment must resort to an ever-increasing severity. As governmental pressure toward unity becomes greater, so strife becomes more bitter as to whose unity it shall be . . . . Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard.<sup>19</sup>

Within this competition between the individual rights of freedom of speech and expression and society's interest in living free from bias motivated crime, the United States Supreme Court decided *R.A.V. v. St. Paul*.<sup>20</sup> In *R.A.V.*, the Court held that although burning a cross in someone's yard is repulsive behavior, the St. Paul statute banning such behavior<sup>21</sup> presented a facially unconstitutional restriction on free expression.<sup>22</sup>

This Comment discusses the *R.A.V.* case and the broad implications it may have on current law. First, it will discuss the First Amendment principles used for deciding similar constitutional challenges to free speech restrictions. Second, it will present an in depth analy-

18. 319 U.S. 624 (1943).

19. *Id.* at 640.

20. 112 S. Ct. 2538 (1992). While all the Justices agreed that the ordinance was unconstitutional, their analysis and reasoning varied greatly.

21. ST. PAUL MINN. LEG. CODE § 292.02 (1990).

22. Justice Scalia delivered the opinion of the Court, in which Chief Justice Rehnquist and Justices Kennedy, Souter, and Thomas joined. Justice White filed a blistering opinion concurring in the judgment in which Justices Blackmun and O'Connor joined. Justice Stevens also joined, except as to Part I(A). Justice Stevens wrote an opinion concurring in the judgment only, in which Justices White and Blackmun joined as to Part I. Finally, Justice Blackmun filed an opinion concurring in the judgment.

sis of the Court's majority opinion as well as a summary of the concurrences. Finally, it will argue that the extreme breadth of the decision provides little guidance for future hate crime legislation and casts doubt upon the validity of many similar laws enacted in almost every state and university nationwide.

## II. STATEMENT OF THE CASE

The City of St. Paul alleged that in the early morning hours of June 21, 1990, Robert A. Viktora<sup>23</sup> and several of his acquaintances made a cross out of legs from an old chair.<sup>24</sup> The group then placed the cross within the fenced yard of an African American family's home and set it on fire.<sup>25</sup> Although St. Paul could have prosecuted this conduct under several different laws,<sup>26</sup> it chose to prosecute Mr. Viktora for violating the City's Bias-Motivated Crime ordinance.<sup>27</sup> This ordinance provided:

Whoever places on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm, or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor.<sup>28</sup>

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23. At the time of the commencement of the case, Robert A. Viktora was a juvenile. Upon obtaining the age of 18, his name was released to the public. See James Walsh, *Cross Burning Victim, Suspect Discuss Feelings*, THE STAR TRIBUNE, June 24, 1992, at 2B. Viktora calls himself a "white separatist;" one that thinks that blacks and whites should live apart. *Id.*

24. R.A.V. v. St. Paul, 112 S. Ct. 2538, 2541 (1992).

25. *Id.*

26. *Id.* n.1 (citing MINN. STAT. § 609.713(1) (1987) (providing for up to five years in prison for terroristic threats); MINN. STAT. § 609.563 (1987) (providing for up to five years and a \$10,000 fine for arson, depending on the value of the property to be damaged); MINN. STAT. § 609.595 (Supp. 1992) (providing for up to one year in prison and a \$3,000 fine for criminal damage to property, depending upon the extent of the damage to the property)).

27. *Id.*

28. *Id.* (citing ST. PAUL, MINN. LEG. CODE § 292.02 (1990)).

Mr. Viktora moved to dismiss this count arguing that the ordinance was substantially overbroad and content-based.<sup>29</sup> Therefore, it clearly reached conduct and expression protected by the First Amendment.<sup>30</sup> The trial court agreed and granted his motion to dismiss.<sup>31</sup> St. Paul appealed, arguing that the ordinance can be limited in its interpretation to reach only conduct that is not constitutionally protected.<sup>32</sup> Justice Tomljanovich, writing for the Minnesota Supreme Court en banc, agreed.<sup>33</sup> The state supreme court held that the phrase "arouses anger, alarm, or resentment in others" reached only fighting words within the meaning established by *Chaplinsky v. New Hampshire*.<sup>34</sup> This placed the ordinance's proscribed expression beyond the protective arm of the First Amendment.<sup>35</sup> The court also concluded that the ordinance was not unconstitutionally content-based because it was "a narrowly tailored means toward accomplishing the compelling governmental interest in protecting the community against bias-motivated threats to public safety and order."<sup>36</sup> The United States Supreme Court ultimately granted certiorari<sup>37</sup> and overturned the state supreme court's decision.<sup>38</sup> Justice Scalia, writing for the majority, held that the ordinance was facially unconstitutional because it was impermissibly content-based and not a necessary means of achieving St. Paul's asserted compelling interest.<sup>39</sup>

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29. Robert Viktora was also charged with committing racially motivated assaults under MINN. STAT. § 609.2231(4) (Supp. 1990), but did not challenge this count. See *R.A.V.*, 112 S. Ct. at 2541 & n.2.

30. *Id.*

31. *Id.*

32. *In re R.A.V.*, 464 N.W.2d 507 (Minn. 1991), *rev'd sub nom. R.A.V. v. St. Paul*, 112 S. Ct. 2538 (1992).

33. *In re R.A.V.*, 464 N.W.2d at 507.

34. *R.A.V.*, 112 S. Ct. at 2542 (citing *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942)).

35. *Id.* at 2541 (citing *In re R.A.V.*, 464 N.W.2d 507 (Minn. 1991)).

36. *Id.* For an analysis of the case at the state supreme court level, see Daniel W. Homstad, Note, *Of Burning Crosses and Chilled Expression: Minnesota and the Eighth Circuit Moderate First Amendment Mandates in "Hate Speech" Prosecutions: In Re R.A.V. and United States v. Lee*, 15 *HAMLIN L. REV.* 167 (1991).

37. 111 S. Ct. 2795 (1991).

38. *R.A.V. v. St. Paul*, 112 S. Ct. 2538 (1992).

39. *Id.* at 2547-50.

### III. REVIEW AND BACKGROUND OF THE LAW

The First Amendment of the United States Constitution provides each individual with the right of freedom of speech as well as other guarantees.<sup>40</sup> It has been argued that these First Amendment rights enjoy a preferred position when compared to other constitutional rights and guarantees.<sup>41</sup> While other amendments do not appear to be as strict in their terms,<sup>42</sup> the First Amendment seemingly speaks in absolute terms: "Congress shall make *no* law . . . abridging the freedom of speech . . . ."<sup>43</sup> Nevertheless, the notion has evolved that the First Amendment protections are not always absolute. This conflict has produced an overwhelming amount of First Amendment theory and structural development.<sup>44</sup>

The First Amendment is less exact in what encompasses the right of free "speech." On numerous occasions, the Supreme Court has defined the terms "speech" and "expression" as constituting basically the same right under the First Amendment. In *R.A.V.*, it is clear that the Minnesota courts and the Supreme Court of the United States accepted Robert Viktora's cross burning as a form of "symbolic expression."<sup>45</sup> They therefore tested the constitutional validity of the St. Paul ordinance by using First Amendment principles. To fully understand the Supreme Court's analysis in *R.A.V.*, it is necessary to examine the development of symbolic expression as a recognized form of expression, as well as the evolution of the categories of permissible

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40. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise of speech thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances." U.S. CONST. amend. I.

41. 3 RONALD D. ROTUNDA ET AL., *TREATISE ON CONSTITUTIONAL LAW SUBSTANCE AND PROCEDURE* § 20.7, at 18 (1986).

42. In comparison, the Fourth Amendment prohibits the state from conducting "*unreasonable* searches and seizures." U.S. CONST. amend. IV (emphasis added).

43. U.S. CONST. amend. I (emphasis added).

44. Frederick Schauer, *Categories of the First Amendment: A Play in Three Acts*, 34 VAND. L. REV. 265, 266 n.5 (1981).

45. *R.A.V.*, 112 S. Ct. at 2541. See *infra* discussion at part III.A.



speech restrictions, and finally the overbreadth and void-for-vagueness challenges to these First Amendment regulations.

#### A. *The Development of Symbols as Speech: Nonverbal Communication*

In 1931, the Supreme Court recognized for the first time that speech may be nonverbal.<sup>46</sup> In *Stromberg v. California*,<sup>47</sup> the Supreme Court struck down a statute which prohibited the display of a red flag "as a sign, symbol, or emblem of opposition to organized government."<sup>48</sup> The Court ruled that the statute was so vague that it allowed punishment for the fair use of "the opportunity for free political discussion."<sup>49</sup> Thirty-five years later, in *Brown v. Louisiana*,<sup>50</sup> the Court reemphasized its position that the First Amendment right of free speech included nonverbal expression. There, the Court found that a peaceful sit-in at a segregated library was protected by the First Amendment.<sup>51</sup>

While nonverbal, symbolic speech plays an important role in everyday life,<sup>52</sup> the Court in *United States v. O'Brien*<sup>53</sup> began to place limits on what could be considered protected symbolic expression. The case presented the issue of whether section 462(b) of the Universal Military Training and Service Act of 1948<sup>54</sup> was unconstitutional as applied to O'Brien.<sup>55</sup> The Court answered negatively and upheld

46. See ROTUNDA ET AL., *supra* note 41, § 20.48, at 262.

47. 283 U.S. 359 (1931).

48. *Id.*

49. *Id.* at 369 (emphasis added).

50. 383 U.S. 131 (1966).

51. Justice Fortas wrote in his opinion, that First Amendment rights "are not confined to verbal expression [but] embrace appropriate types of action which certainly include the right in a peaceable and orderly manner to protest . . . unconstitutional segregation of public facilities." *Brown*, 383 U.S. at 142.

52. For example, waving good-bye, nodding one's head, or making obscene gestures.

53. 391 U.S. 367 (1968).

54. This section of the Act punished those who burned or otherwise mutilated their draft cards.

55. O'Brien burned his draft card to express his protest of the Vietnam War. Therefore, he argued that the Act as applied to him unconstitutionally restricted his freedom of expression.

O'Brien's conviction.<sup>56</sup> It recognized that not all conduct can be labeled as expression simply because the actor intends to convey a message.<sup>57</sup> The Court then devised a four-part test for deciding when a content-neutral speech restriction<sup>58</sup> is sufficiently justified by a governmental interest to withstand a First Amendment challenge.<sup>59</sup>

Finally, in *Spence v. Washington*,<sup>60</sup> the Court presented two guidelines for deciding when particular conduct contained sufficient expressive content to warrant free speech analysis. The court held that symbols constitute a form of expression when: (1) the actor intends on conveying a particular message, and (2) the likelihood is great that the message will be understood by those viewing it.<sup>61</sup> This rule is currently still used by the courts.

Most recently the Court has addressed the issue of whether burning the American Flag may be considered protected expression. In *United States v. Eichman*,<sup>62</sup> Eichman and several other defendants burned the American flag in protest of American policies. They were prosecuted for violating the Flag Protection Act of 1989 (Act).<sup>63</sup> This

56. *O'Brien*, 391 U.S. at 382.

57. *Id.* at 376.

58. *Id.* at 377. See *infra* note 69.

59. The Court articulated the following four factors:

[A] government regulation is sufficiently justified [1] if it is within the constitutional power of the Government; [2] if it furthers an important or substantial governmental interest; [3] if the governmental interest is unrelated to the suppression of free expression; and [4] if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

*United States v. O'Brien*, 391 U.S. 367, 377 (1968).

60. 418 U.S. 405 (1974) (affixing a peace sign made from removable tape to one's own American flag hanging in a private window is a form of speech).

61. *Id.* at 411.

62. 496 U.S. 310 (1990) (The case was a series of consolidated appeals).

63. Flag Protection Act of 1989, 18 U.S.C. § 700 (Supp. 1990). Congress passed this act as a result of strong public opposition to the Court's decision in *Texas v. Johnson*, 491 U.S. 397 (1989). In *Johnson*, the Court overturned a flag burning conviction under a Texas flag anti-desecration statute. This statute made it a crime to mistreat the American flag in a way that would "seriously offend one or more persons likely to observe or discover [the act]." The Court held that Johnson was prosecuted solely for the expression of a particular idea: his dissatisfaction with American policies. Concluding that the statute was content-based, the Supreme Court used strict scrutiny analysis and found the Texas statute to be an

Act criminalized a person's conduct if the person "knowingly mutilate[d], deface[d], physically defile[d], burn[ed], maintain[ed] on the floor or ground, or trample[d] upon" a United States flag.<sup>64</sup> However, the Act permitted such conduct if the conduct was related to the disposal of a "worn or soiled" flag.<sup>65</sup> Congress purported that the Act was content neutral since it targeted those who mistreated the flag without reference to the actor's motive. However, the Supreme Court found that the Act suffered from the same fatal flaw as the one present in the Texas statute the Court found unconstitutional the year before: "[I]t suppress[ed] expression out of concern for its likely communicative impact."<sup>66</sup>

In *Eichman*, the Court held that the government's asserted interest in protecting the "physical integrity" of the flag as a national symbol was directly related to the suppression of free expression.<sup>67</sup> It also held that while the Act contained no explicit content-based limitations, the Act was nevertheless "concerned with the content of such expression."<sup>68</sup> Justice Brennan, writing for the majority, reasoned that the government's interest would be implicated only if a person treated the flag in a way that communicated a message inconsistent with the ideals set out by Congress in the Act.<sup>69</sup> Consequently, the Act could not be justified without reference to the content of the actor's message.<sup>70</sup> Using strict scrutiny review, the Court held that the government's asserted interest failed to justify an infringement on First Amendment rights and declared the Act unconstitutional.<sup>71</sup>

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unconstitutional regulation of protected speech.

64. *Eichman*, 496 U.S. at 314.

65. *Id.*

66. *Id.* at 317 (citing *Texas v. Johnson*, 491 U.S. 397 (1989)). See *supra* note 63.

67. *Eichman*, 496 U.S. at 315 (citing *Texas v. Johnson*, 491 U.S. 397, 410 (1989)).

68. *Id.*

69. *Id.* at 316-17.

70. *Id.* at 317-18.

71. *Id.* at 318-19. The Court also declined to reassess its decision in *Johnson*. The United States argued that the Act was passed in recognition of national opposition to flag burning. But the Court said that the government cannot, consistent with the First Amendment, suppress speech because the majority of the population finds it deeply offensive or disagreeable. *Id.*

### B. Governmental Restrictions on Free Speech

Controversies over what speech the government may or may not permissively regulate has led to the development of a confusing and ever changing body of law. For the purposes of this Comment, Laurence H. Tribe's "two track" method<sup>72</sup> provides the simplest and most useful analysis. Since "track two" deals exclusively with content-neutral regulations of speech, a thorough analysis of it is beyond the scope of this Comment.<sup>73</sup> Under Tribe's *Track One* category, the legislation involved restricts speech because of its content.<sup>74</sup> Such restrictions are facially unconstitutional and are subject to the most exacting scrutiny.<sup>75</sup> Content based distinctions that also discriminate on the basis of viewpoint are subject to the highest degree of scrutiny.<sup>76</sup> These requirements have the purpose and effect of almost completely barring the government<sup>77</sup> from restricting speech because of its content or viewpoint. To defend such a regulation, the government must show that the expression or speech involved falls into one of the narrowly defined categories of unprotected speech.<sup>78</sup> If the government is

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72. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* ch. 12 (2d ed. 1988) [hereinafter *TRIBE, CONSTITUTIONAL LAW*].

73. Briefly, regulations falling under this approach seek goals independent of the content of the message involved. However, the indirect result of the regulation is that the flow of information or ideas is significantly restrained. Such content-neutral regulations must meet the four-part test set out in *United States v. O'Brien*, 391 U.S. 367 (1968), and are subjected to a lessened degree of scrutiny as compared with its *Track One* counterpart. See *supra* note 59. The Court usually employs a "balancing test" where the extent to which the communicative activity is inhibited is balanced against the values, interests, and rights served by the regulation's enforcement.

74. See *TRIBE, CONSTITUTIONAL LAW, supra* note 72, § 12-2, at 789. Tribe argues that the two ways in which this can be done is where the government singles out such actions either "(a) because of the specific message or viewpoint such action expresses, or (b) because of the effects produced by awareness of the information or ideas such actions impart." *Id.*

75. *Id.* § 12-3, at 798-99 (citing *Widmar v. Vincent*, 454 U.S. 263 (1981) and *Police Dep't v. Mosley*, 408 U.S. 92 (1972)).

76. *Id.* at 800.

77. The word "government" is used in this section of this Comment to mean government at any level be it federal, state, county, local, etc.

78. See *TRIBE, CONSTITUTIONAL LAW, supra* note 72, § 12-3, at 836. See *infra* part III.B.1.

unsuccessful at demonstrating this, it must prove that the regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve the asserted interest in order for it to be sustained.<sup>79</sup>

### 1. The Categorical Approach to Proscribable Speech

Court decisions in the 1800's and early 1900's concerning First Amendment issues repeatedly ended in defeat for the challenger. *American School of Magnetic Healing v. McAnnulty*<sup>80</sup> was the only prewar case in which the Court ruled in favor of the claimant on First Amendment grounds.<sup>81</sup> The American School of Magnetic Healing was an organization that believed that the human mind was responsible for sickness and that it could be used to treat, cure, and remedy such sickness.<sup>82</sup> The school solicited customers by sending advertisements through the mail. In turn, the customers mailed their payments to the school.

The postmaster felt that the School's practice was fraudulent and refused to deliver any of its mail.<sup>83</sup> Consequently, the school brought suit. The Supreme Court held that the postmaster's actions were unconstitutional.<sup>84</sup> It reasoned that the mind's effect on treating illnesses was indeterminable.<sup>85</sup> Consequently, the postmaster did not have the right to declare such belief fraudulent on the basis of a differing opinion.<sup>86</sup>

Shortly thereafter, the Court began to take a more protective posture toward free speech.<sup>87</sup> The result was a categorical distinction be-

79. *Id.* (citing *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983)).

80. 187 U.S. 94 (1902).

81. *See generally* LAURENCE H. TRIBE, *CONSTITUTIONAL CHOICES* (1985) [hereinafter TRIBE, *CONSTITUTIONAL CHOICES*].

82. *McAnnulty*, 187 U.S. at 94.

83. *Id.* at 98.

84. *Id.* at 110 (holding that it was unconstitutional to deprive the School of its property on the basis of a belief that its opinions as to the effectiveness of mind healing were fraudulent).

85. *Id.* at 104.

86. *Id.* at 110.

87. *See generally* TRIBE, *CONSTITUTIONAL CHOICES*, *supra* note 81, at 190-92.

tween classes of protected and unprotected speech, the latter of which the government may regulate freely. Discussions of these different categories follow.

(a) Dangerous Speech: The Clear and Present Danger Doctrine

During the period just before World War I, Congress enacted the Espionage Act of 1917<sup>88</sup> and the Sedition Act of 1918.<sup>89</sup> Both enactments were in response to the domestic political unrest surrounding the war.<sup>90</sup> The enactments gave the Supreme Court an opportunity to develop standards for approaching First Amendment issues at a time when a more restrictive reading of the free speech guarantee was warranted.<sup>91</sup> In *Schenck v. United States*<sup>92</sup> and *Abrams v. United States*,<sup>93</sup> the Court accepted this opportunity and introduced the “clear and present danger” test.<sup>94</sup>

In both cases, the Court upheld espionage convictions based on Justice Holmes’ new theory. “The question in every case,” he wrote, “is whether the words used are used in such circumstances and are of such nature as to create a clear and present danger that they will bring about the substantive evils that Congress has the right to prevent.”<sup>95</sup> In Holmes’ classic dissent in *Abrams*, he warned of the dangers of restricting free speech even in times of war.<sup>96</sup> He wrote that free trade of ideas is essential to our open society because all speech competes for acceptance into the “marketplace of ideas.”<sup>97</sup>

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88. Espionage Act of June 15, 1917, ch. 30, 40 Stat. 217.

89. Sedition Act of May 16, 1918, ch. 75, 40 Stat. 553.

90. JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 1613, at 958 (4th ed. 1991).

91. *Id.*

92. 249 U.S. 47 (1919).

93. 250 U.S. 616 (1919).

94. See NOWAK & ROTUNDA, *supra* note 90, § 16.13, at 958.

95. 249 U.S. at 52. It was also in this case where Holmes gave his classic example of unprotected speech: “The most stringent protection of free speech would not protect a man in falsely shouting fire in a theater and causing a panic.” *Id.*

96. 250 U.S. at 630.

97. *Id.*

Holmes' theory went through many modifications during the next several decades.<sup>98</sup> In *Dennis v. United States*,<sup>99</sup> the petitioners were convicted for conspiring to overthrow the government.<sup>100</sup> Chief Justice Vinson, writing for himself and three other Justices, used a clear and present danger test decidedly different from Holmes' theory. He refined the test by holding that as the seriousness of the danger increased, the amount of clear and present danger needed to justify government restriction on speech decreased.<sup>101</sup> The clear and present danger test was therefore transformed into a balancing test. It balanced the seriousness of the danger against the competing interest in free speech.

After the *Dennis* decision, the "clear and present danger" test remained essentially dormant.<sup>102</sup> It was not revived until the Court began to focus on protecting the unpopular advocacy of ideas.<sup>103</sup> *Brandenburg v. Ohio*<sup>104</sup> established the current test for dangerous speech cases. In *Brandenburg*, the Ku Klux Klan held a rally which was televised on local and national news programs.<sup>105</sup> The rally consisted of burning crosses, displaying weaponry, and speaking in a derogatory manner about Jewish Americans and African Americans.<sup>106</sup> *Brandenburg*, the leader of the Ku Klux Klan, was quoted as saying, "Personally, I believe the nigger should be returned to Africa,

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98. See, e.g., *Dennis v. United States*, 341 U.S. 494 (1951); *Herndon v. Lowry*, 301 U.S. 242 (1937) (the first time the "clear and present danger" test was relied on in a majority opinion); *Whitney v. California*, 274 U.S. 357 (1927); *Gitlow v. New York*, 268 U.S. 652 (1925).

99. 341 U.S. 494 (1951). A similar line of cases which modified the clear and present danger test includes *Scales v. United States*, 367 U.S. 203 (1961) (convictions for violating the Smith Act were affirmed because the party's teachings advocated the speedy overthrow of the government) and *Yates v. United States*, 354 U.S. 298 (1957) (convictions of communist party officials for conspiring to violently overthrow of the government were overturned).

100. *Dennis v. United States*, 341 U.S. 494 (1951).

101. *Id.* at 510.

102. See NOWAK & ROTUNDA, *supra* note 90, § 16.14, at 966.

103. *Id.*

104. 395 U.S. 444 (1969).

105. *Id.* at 445.

106. *Id.* at 445-46.

the Jew returned to Israel.”<sup>107</sup> He was charged and convicted under Ohio’s Criminal Syndicalism statute for “[a]dvocating . . . the duty, necessity, or propriety of a crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform” and for “voluntarily [assembling] with any society, group, or assemblage of persons formed to teach or advocate the doctrines of criminal syndicalism.”<sup>108</sup>

The Court ultimately struck down the statute.<sup>109</sup> In doing so it changed the “clear and present danger” doctrine substantially. The Court held that advocacy of violence is protected by the First Amendment, as long as it does not incite people to *imminent* action.<sup>110</sup> *Brandenburg’s* new “clear and present danger test” thus requires states to fulfill three elements before speech can be constitutionally abridged: “(1) the speaker must have *subjectively intended* incitement; (2) in context, the words used must have been *likely to produce* imminent lawless action; and (3) the words used by the speaker must have *objectively encouraged* and urged incitement.”<sup>111</sup>

#### (b) *Chaplinsky* and the “Fighting Words” Doctrine

Fighting words represent another category of speech that the government may constitutionally restrict. The doctrine was originally introduced by the Supreme Court in *Chaplinsky v. New Hampshire*.<sup>112</sup>

In *Chaplinsky*, the Court upheld the conviction of a Jehovah’s Witness who had called a city marshall a “goddamned racketeer” and a “damned fascist” during an altercation in the street.<sup>113</sup> These words were termed “fighting words.”<sup>114</sup> The Court defined fighting words as words “which by their very utterance inflict injury or tend to incite

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107. *Id.* at 447.

108. *Id.* at 444.

109. *Id.* at 449.

110. *Id.* at 448.

111. See NOWAK & ROTUNDA, *supra* note 90, § 16.15, at 968.

112. 315 U.S. 568 (1942).

113. *Id.* at 569.

114. *Id.*



an immediate breach of the peace."<sup>115</sup> Words of this type were deemed readily punishable because they involve "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[s] in order and morality."<sup>116</sup> The Court assumed that such words would produce an uncontrollable impulse to violence.<sup>117</sup>

The fighting words doctrine has been consistently narrowed since its inception in *Chaplinsky*. In *Terminiello v. Chicago*,<sup>118</sup> the Court retreated from the *Chaplinsky* "uncontrollable impulse" test by ruling that a statute which prohibited conduct that "stirs the public to anger, invites dispute, brings about a condition of unrest, or creates a disturbance" was unconstitutional.<sup>119</sup> The retreat is evident by the Court's willingness to recognize that a certain amount of provocative and challenging speech is protected.<sup>120</sup> *Terminiello's* reasoning thus indicated a shift from concentrating solely on the words themselves to including an appraisal of the surrounding context.

*Cohen v. California*<sup>121</sup> represents an even narrower interpretation of the fighting words doctrine. Cohen was prosecuted for entering a courthouse wearing a jacket with the words "Fuck the Draft" emblazoned on the back.<sup>122</sup> Justice Harlan, recognizing that "one man's

115. *Id.* at 572.

116. *Id.*

117. See generally Mark C. Rutzick, *Offensive Language and the Evolution of the First Amendment Protection*, 9 HARV. C.R.-C.L. L. REV. 1, 8 n.36 (1974).

118. 337 U.S. 1 (1949).

119. *Id.* at 3. The case involved *Terminiello's* address inside an auditorium where he denounced Jews and Blacks.

120. The Court stated:

A function of free speech . . . is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea . . . the alternative would lead to standardization of ideas either by legislatures, courts, or dominant political or community groups.

*Id.* at 4-5.

121. 403 U.S. 15 (1971).

122. *Id.* at 16.

vulgarity is another's lyric"<sup>123</sup> overturned the conviction.<sup>124</sup> So ruling, the Court effectively limited the fighting words doctrine to instances that involve direct personal insults.

Since the *Cohen* ruling, the viability of the *Chaplinsky* formula has been left uncertain. Recent cases demonstrate that the Court does not look favorably on prosecutions for fighting words violations.<sup>125</sup> In fact, the Court often overturns fighting words convictions on overbreadth and vagueness grounds seemingly to avoid directly overruling *Chaplinsky*.<sup>126</sup> This is not to say that the fighting words doctrine is essentially dead. It just means that the Court will carefully scrutinize convictions under it.<sup>127</sup>

### (c) Obscenity, Libel, and Other Unprotected Expression

Obscenity and libel represent two additional categories of speech which are not afforded complete constitutional protection. The Supreme Court placed libelous speech outside the circle of constitutional protection in *Beauharnais v. Illinois*,<sup>128</sup> while the Court determined that obscenity was not fully protected speech in *Miller v. California*.<sup>129</sup>

123. *Id.* at 25.

124. *Id.*

125. See ROTUNDA ET AL., *supra* note 41, § 20.40, at 198.

126. *Id.* See also *Lewis v. New Orleans*, 415 U.S. 518 (1974) (conviction for addressing policeman, "You goddamn motherfucking police" overturned because the statute was overbroad and vague); *Gooding v. Wilson*, 405 U.S. 518 (1972) (conviction for addressing policeman, "You son of a bitch I'll choke you to death," overturned because statute was overbroad and vague). Justice Blackmun even complained in his dissent in *Gooding* that "the Court, despite its protestations to the contrary, is merely playing lip service to *Chaplinsky*." *Gooding*, 405 U.S. at 537.

127. ROTUNDA ET AL., *supra* note 41, § 20.40, at 198.

128. 343 U.S. 988 (1952) (for the defense of a criminal prosecution for libel to prevail, the defendant must show not only that the utterance is true, but also that the publication was made with good motive and for justifiable ends). *But see New York Times v. Sullivan*, 376 U.S. 254 (1964) (held that, to recover for any alleged defamatory falsehood relating to a public official's conduct, the defamatory statement must relate to the individual plaintiff-government official. Criticism of the government in general could not be punished, for that would constitute a seditious action; the plaintiff-government official has the burden of proving the statement was false; the plaintiff-government official must also prove that the defendant had made the false statements with malice).

129. 413 U.S. 15 (1973) (prurient, patently offensive depiction or description of sexual

Since the *R.A.V.* decision did not involve either classification, they are beyond the scope of this Comment.

### C. *Overbreadth and Vagueness Challenges to Speech Restrictions*

The overbreadth and vagueness doctrines provide courts with two ways of testing the validity of speech restrictions. These doctrines are designed to ensure that a statute, while reaching unprotected speech, does not also trample on protected speech.<sup>130</sup> In addition, they guard against arbitrary and capricious enforcement of broadly-worded and vague statutes.<sup>131</sup> This ensures that the due process requirement of notice is fulfilled.<sup>132</sup>

A peculiar aspect of the overbreadth doctrine is that it provides an exception to the ordinary requirement of standing.<sup>133</sup> While a statute in question may be constitutional as applied, it may nevertheless be challenged it on the grounds that it has the *potential* for violating the constitutional rights of another. The reason for this exception is that if an overbroad statute is left unchallenged, it may chill free speech by deterring people from engaging in protected speech.<sup>134</sup>

#### 1. The Overbreadth Doctrine

The Court first addressed the overbreadth doctrine in *Thornhill v. Alabama*.<sup>135</sup> In *Thornhill*, the petitioner was convicted under an Alabama statute which prohibited loitering and picketing a place of busi-

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conduct must have serious literary, artistic, political, or scientific value to merit First Amendment protection).

130. See *Cantwell v. Connecticut*, 310 U.S. 296, 304 (1940) (even if the state has the power to regulate an area, the regulation "must be so exercised as not, in attaining a permissible end, unduly infringe the protected freedom.").

131. See *Papachristou v. Jacksonville*, 405 U.S. 156 (1972) (overbroad statute failed to give a person of ordinary intelligence fair warning that the contemplated conduct was prohibited; its broad wording may apply to innocent conduct; it encourages arbitrary arrests and unlimited police discretion).

132. *Id.*

133. See, e.g., *NAACP v. Button*, 371 U.S. 415 (1963).

134. *TRIBE, CONSTITUTIONAL LAW*, *supra* note 72, § 12-27, at 1022-24.

135. 310 U.S. 88 (1940).

ness with the intention of “impeding, interfering with, or injuring such business.”<sup>136</sup> On appeal to the Supreme Court of the United States, the petitioner challenged the statute as violative of his rights to freedom of speech and freedom of the press.<sup>137</sup> The Court found the statute facially overbroad and overturned the conviction.<sup>138</sup> Justice Murphy, writing for the Court, explained that while the statute banned unprotected expression, it also reached peaceful picketing and other potential activities protected by the First Amendment.<sup>139</sup>

Recognizing the overbreadth doctrine as “strong medicine,” the Supreme Court placed qualifications on the doctrine in *Broadrick v. Oklahoma*.<sup>140</sup> In *Broadrick*, the petitioners were charged by Oklahoma State Personnel Board for violating a statute which prohibited civil service employees from engaging in political activity.<sup>141</sup> The petitioners challenged their convictions on the grounds that the Oklahoma statute was unconstitutionally vague and overbroad.<sup>142</sup> The Court upheld the statute, holding that when a statute is aimed at regulating conduct as opposed to pure speech and the conduct has expressive content, the statute’s challenged overbreadth “must not only be real, but substantial as well, judged in relation to the statute’s plainly legitimate sweep.”<sup>143</sup>

The Supreme Court further limited the potency of the overbreadth doctrine by applying the “substantial overbreadth” requirement to statutes affecting “pure speech” as well. In *New York v. Ferber*,<sup>144</sup> the owner of an adult bookstore was convicted under a New York statute which prohibited the distribution of materials containing sexual depictions of children under the age of sixteen.<sup>145</sup> The Court applied the

136. *Id.* at 92.

137. *Id.* at 93-95.

138. *Id.* at 97-98.

139. *Id.*

140. 413 U.S. 601 (1973).

141. *Id.* at 602. Civil service employees were not, however, prohibited from expressing their opinions or voting. *Id.* at 602-04 n.1.

142. *Id.* at 602.

143. *Id.* at 615.

144. 458 U.S. 747 (1982).

145. *Id.* at 749. In particular, the petitioner was arrested when he sold two films depicting young boys masturbating to an undercover police officer. *Id.* at 751-52.

*Broadrick* rule<sup>146</sup> and held that the statute's "legitimate reach dwarf[ed] its arguably impermissible applications,"<sup>147</sup> and was therefore not "substantially overbroad."<sup>148</sup>

## 2. The Void for Vagueness Doctrine

While the vagueness doctrine has many similarities to the overbreadth doctrine,<sup>149</sup> it is really quite distinct. A vague law does not have to reach constitutionally protected speech to be declared void for vagueness.<sup>150</sup> In contrast, an overbroad law does not have to lack clarity or precision to be declared overbroad.<sup>151</sup> A statute will be declared void for vagueness when, as a matter of due process, persons "of common intelligence must necessarily guess at [the statute's] meaning and differ as to its application."<sup>152</sup>

The above principles have been used on thousands of occasions to decide an equal number of different free speech issues. One of the many issues left unanswered, however, was how these principles applied to laws punishing hate motivated crime. *R.A.V. v. St. Paul* supplied the long-awaited answer.

## IV. THE MAJORITY OPINION IN *R.A.V.*

After briefly reciting the case's facts and history, Justice Scalia, writing for the majority, reminded the Court that it was bound by the Minnesota Supreme Court's interpretation of the ordinance at issue.<sup>153</sup> Accordingly, the Court accepted the state supreme court's interpretation that the ordinance reached only fighting words within the meaning of *Chaplinsky v. New Hampshire*.<sup>154</sup>

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146. *Id.* at 766-74.

147. *Id.* at 773.

148. *Id.*

149. *See infra* part III.C.1.

150. *See* TRIBE, CONSTITUTIONAL LAW, *supra* note 72, § 12-31, at 1033.

151. *Id.*

152. *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926).

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

154. *Id.*

With that in mind, the Court proceeded to review the grounds on which R.A.V., the petitioner, challenged the ordinance.<sup>155</sup> The petitioner and his amici<sup>156</sup> urged the Court to modify the *Chaplinsky* formula and declare the ordinance invalid for being “substantially overbroad” within the meaning of *Broadrick v. Oklahoma*.<sup>157</sup> In an unusual move, however, the Court found it unnecessary to reach this question presented.<sup>158</sup> While assuming that the narrowed interpretation was sufficient, the Court nonetheless found that the statute discriminated against speech solely on the basis of the subjects the speech addressed, and was therefore facially unconstitutional.<sup>159</sup>

### A. *Analysis of the Reasoning*

Justice Scalia began his analysis by reviewing the First Amendment principles at issue.<sup>160</sup> He said that the First Amendment generally prohibited the government from restricting speech because the government happens to disagree with the speaker’s message.<sup>161</sup> In a statement strongly attacked by Justice Stevens, Scalia asserted that

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155. *Id.*

156. Amicus Curiae briefs filed in support of R.A.V. include: Brief of Amicus Curiae Patriot’s Defense Foundation, Inc. In Support of the Appellant, R.A.V., R.A.V. v. St. Paul, 464 N.W.2d 507 (Minn. 1991), *rev’d*, 112 S. Ct. 2538 (1992); Brief of Center for Individual Rights as Amicus Curiae in Support of Petitioner, R.A.V. v. St. Paul, 464 N.W.2d 507 (Minn. 1991), *rev’d*, 112 S. Ct. 2538 (1992); Brief of Amicus Curiae of the American Civil Liberties Union, Minnesota Civil Liberties Union, and American Jewish Congress In Support of Petitioner, R.A.V. v. St. Paul, 464 N.W.2d 507 (Minn. 1991), *rev’d*, 112 S. Ct. 2538 (1992).

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

158. *Id.* According to Justice White, the Court’s move was unprecedented because the ground on which the case was decided “was never presented to the Minnesota Supreme Court . . . has not been briefed by the parties before this Court . . . [and] requires serious departures from the teaching of prior cases.” *Id.* at 2550-51. Justice White therefore felt that the Court lacked jurisdiction to decide the case on the majority rationale. *Id.* In his opinion, Justice Scalia countered Justice White’s assertion by arguing that the ground on which the majority decided the case “fairly included” within the questions presented in the petition. *Id.* at 2542.

159. *Id.*

160. *Id.*

161. *Id.*

such content based regulations of speech are *presumptively invalid*.<sup>162</sup> He quickly acceded, however, that there exists certain narrowly-defined categories of speech in which the content may be regulated.<sup>163</sup> These categories contain messages that are of slight social value that any benefit they may confer on society will be clearly outweighed by the social interest in order and morality.<sup>164</sup> But he maintained that this categorical approach exists only in limited form, citing as authority those cases since the 1960's that have consistently narrowed its scope.<sup>165</sup>

Scalia then advanced a novel theory which is arguably unsupported by applicable precedent. He agreed that past decisions have stated that the limited categories of constitutionally proscribable speech are not afforded any First Amendment protection.<sup>166</sup> But he argued that these decisions were not considered to be absolute and that the categories of proscribable speech are not completely invisible to the Constitution.<sup>167</sup> Instead, those past decisions must be read in context, and "are no more literally true than is the occasionally repeated shorthand characterizing obscenity 'as not being speech at all'."<sup>168</sup> He contended that implicit within the meaning of those decisions is the principle that the government may freely regulate the limited categories of speech, but only on the basis of their *constitutionally proscribable* content.<sup>169</sup> However, the government cannot regulate these categories if the restriction is based on a factor generally not permitted by the First Amendment.<sup>170</sup>

As an illustration, the government may make the constitutionally permitted content distinction and ban libelous speech.<sup>171</sup> But the government is prohibited from making a further determination and pro-

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162. *Id.* at 2542 (emphasis added).

163. *Id.* at 2543.

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.* (emphasis added).

170. *Id.*

171. *Id.*

scribing only that libel which is critical of the government.<sup>172</sup> Such a regulation would be impermissibly content based. This is because the basis for making the further content distinction between permitted and unpermitted libel (unpermitted being made up only of messages critical of the government), is not constitutionally recognized as a basis for which libel may be regulated.<sup>173</sup>

The majority feared that if the otherwise impermissible content distinctions were allowed, it would be acceptable for the government to use the categories of proscribable speech freely as vehicles for impermissible content discrimination.<sup>174</sup> Thus, the government would be capable of restricting speech it disagrees with simply by hiding the content discrimination within one of the limited categories. The result would be a permissible but realistically unconstitutional restriction on free speech:<sup>175</sup> “but for” the category, the restriction would be unconstitutional.

Having effectively narrowed the permissive use of the categories of proscribable speech, Scalia proceeded to redefine “fighting words” concept.<sup>176</sup> He explained that, contrary to past decisions, fighting words are not totally void of expressive content.<sup>177</sup> Rather, there are instances in which these words are quite expressive.<sup>178</sup> Consequently, it cannot be held that fighting words are freely regulable and invisible to the First Amendment.<sup>179</sup> In quoting from *Chaplinsky*, Scalia remarked, “We have not said that [fighting words] constitute ‘no part of the expression of ideas,’ but only that they constitute ‘no essential part of any exposition of ideas’.”<sup>180</sup>

Scalia’s proposition is an attempt to avoid the cliché, “give him an inch and he’ll take a yard.” In the first place, just because a particular instance of speech is proscribable on the basis of a non-content

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172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.* at 2544.

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.* at 2544.



element (the inch), does not mean that the government may regulate that speech on the basis of any feature it chooses, (the yard).<sup>181</sup> For example, a person may be punished for burning a flag under an ordinance prohibiting outdoor fires. Such a regulation is divorced from any message involved.<sup>182</sup> But it is not permissible to punish that person under an ordinance against dishonoring the flag.<sup>183</sup> That type of ordinance would prohibit flag burning based on the content of the message conveyed.<sup>184</sup>

Similarly, the government's power to proscribe speech on the basis of a content element, like obscenity, does not license the government to proscribe freely that same speech on the basis of other content elements.<sup>185</sup> For example, an ordinance prohibiting obscene photographs of the most lewd and lascivious displays of sexual behavior is safe from constitutional challenge.<sup>186</sup> The government cannot, however, prohibit only that obscenity which includes offensive messages critical of the government.<sup>187</sup>

In a confusing attempt to make this clearer, Scalia maintains that the real reason why fighting words are excluded from First Amendment protection is that their unprotected features are essentially nonspeech elements of communication.<sup>188</sup> In this way, fighting words are analogous to what Scalia calls a "noisy sound truck."<sup>189</sup> Each represents a *means* of communicating an idea, or a *medium* used to express an idea.<sup>190</sup> These nonspeech elements can be regulated without the fear of possibly offending the First Amendment.<sup>191</sup> In contrast, the government cannot regulate the use of this *means* or *medium* based on hostility or favoritism toward the *content* of the underlying

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181. *Id.*

182. *Id.*

183. *Id.* (citing *Texas v. Johnson*, 491 U.S. at 406-407 (1989)).

184. *Texas v. Johnson*, 491 U.S. 397 (1989).

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

186. *Id.* at 2545.

187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.*

message conveyed.<sup>192</sup> In this view, the First Amendment imposes a “content discrimination” limitation upon a state’s ability to suppress a subclass of proscribable speech.<sup>193</sup>

### *B. The Exceptions to the Rule*

Recognizing the potentially broad applications of the “content discrimination” limitation, Justice Scalia advanced a series of exceptions to his new rule. First, he submitted that the reason for prohibiting regulations based on content is to prevent the government from driving certain viewpoints or ideas from the marketplace.<sup>194</sup> If the basis for the challenged content discrimination “consists entirely of the very reason the entire class of speech at issue is proscribable,” then there is no significant risk of this occurring.<sup>195</sup> This is because the justification for placing the entire class beyond the reach of the First Amendment has already been determined to be neutral enough to support the class’ exclusion.<sup>196</sup> Therefore, it may also form the basis for making a narrower distinction within the class.<sup>197</sup>

A second exception to the general rule against content discrimination arises in contexts where the content-defined subclass of proscribable speech “happens to be associated with particular ‘secondary effects’<sup>198</sup> of the speech, so that the regulation is ‘justified without reference to the content of the . . . speech’.”<sup>199</sup> This exception is designed to cover those instances where words may violate laws directed against conduct and not against speech.<sup>200</sup>

The best way of approaching this exception is by examining the leading authority on secondary effects theory. In *Renton v. Playtime*

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192. *Id.*

193. *Id.*

194. *Id.*

195. *Id.*

196. *Id.* at 2545-46.

197. *Id.*

198. *Id.* at 2546.

199. *Id.* (quoting *Renton v. Playtime Theatres*, 475 U.S. 41, 48 (1986)).

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

*Theatres*,<sup>201</sup> the Court upheld a zoning ordinance that prohibited adult theaters from locating within a certain distance from any residential zone, dwelling, church, or school.<sup>202</sup> This ordinance clearly discriminated on the basis of the content of the subject matter shown at the adult theater because it allowed other types of theaters free to freely locate wherever their owners chose.<sup>203</sup> The Court held, however, that the purpose of the ordinance was to help eliminate the “secondary effects” such theaters may have on the surrounding community.<sup>204</sup> These secondary effects included the possibility of increased crime, prostitution, and decreased property value.<sup>205</sup>

As a final exception to the general rule, Justice Scalia provided a “catchall” exclusion aimed at attacking other content selective speech regulations. If the government selectively regulates content within a totally proscribable category of speech, the regulation can be validated “so long as the nature of the content discrimination is such that there is no realistic possibility that official suppression of ideas is afoot.”<sup>206</sup> In other words, if there is no genuine threat that the government is attempting to censor a certain viewpoint to drive it from the marketplace, then the regulation will sustain a First Amendment challenge.<sup>207</sup>

### C. *Analysis of the Holding*

In applying these novel principles to the St. Paul ordinance, the Court ruled that, even assuming that the ordinance reached only fighting words, it was still facially unconstitutional.<sup>208</sup> The Minnesota Su-

201. 475 U.S. 41 (1986).

202. *Id.*

203. *Id.* at 47.

204. *Id.* at 52.

205. *Id.*

206. *R.A.V.* at 2547.

207. *Id.* This does not ensure that the regulation will be constitutional. Such a regulation will, at times, also have to deal with the Equal Protection Clause of the Fourteenth Amendment.

208. *Id.*

preme Court's narrowed interpretation adequately defined the terms "arouses anger, alarm, or resentment in others."<sup>209</sup> The remaining terms, however, clearly applied only to those fighting words that insulted or provoked violence "on the basis of race, color, creed, religion, or gender."<sup>210</sup> The Court maintained that the First Amendment forbids the government from imposing special prohibitions on those speakers who wish to express their views on subjects that the government chooses to label as "disfavored."<sup>211</sup>

The statute was also fatally flawed in that it went beyond content discrimination and discriminated on the basis of the speaker's viewpoint.<sup>212</sup> The ordinance had in effect licensed one side of the debate to fight freely while requiring the disfavored side to follow strict prohibitory rules.<sup>213</sup> The Court explained that while displays containing odious racial epithets were prohibited to proponents of all views, fighting words that did not in themselves invoke race, color, creed, religion, or gender would be usable at will by those arguing in favor of one of the disfavored subjects.<sup>214</sup> In other words, "One could hold up a sign saying . . . all 'anti-Catholic bigots' are misbegotten; but not that all 'papists' are, for that would insult and provoke violence 'on the basis of religion.'"<sup>215</sup>

It is important to note that St. Paul's ordinance did not prohibit fighting words that were *directed* at certain persons or groups.<sup>216</sup> This type of ordinance would be constitutional if it met the requirements of the Equal Protection Clause.<sup>217</sup> Instead, it prohibited the use of fighting words based on the content of the speaker's message. This particular content involved expressions of bias-motivated hatred.<sup>218</sup> St. Paul contended that this type of selective content restriction on speech

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209. *Id.*

210. *Id.*

211. *Id.*

212. *Id.* at 2547-48.

213. *Id.* at 2548.

214. *Id.*

215. *Id.*

216. *Id.*

217. *Id.*

218. *Id.*

was necessary because it provided reassurance to minority groups that have historically been discriminated against that such expression was not condoned by the majority.<sup>219</sup> The purpose of the First Amendment, however, is to protect divergent viewpoints from being censored by majority preferences.<sup>220</sup> After all, offensive speech is at the heart of the First Amendment because no one tries to censor nice speech. Therefore, St. Paul must attempt to meet its goal in a way that does not silence speech on the basis of the content or viewpoint of the message involved.<sup>221</sup>

After finding that the ordinance did not fit into any of the three exceptions,<sup>222</sup> the Court considered whether it could still be upheld under strict scrutiny analysis.<sup>223</sup> St. Paul argued that the ordinance was justified since it was narrowly tailored to serve a compelling state interest.<sup>224</sup> The City asserted that its interest was in securing the basic human rights of members of minority groups who have been historically the subjects of discrimination.<sup>225</sup> This interest included the right of these members to live in peace wherever they choose.<sup>226</sup>

The Court agreed that St. Paul's interests were compelling interests and that the ordinance did address them.<sup>227</sup> But it explained that a content-based regulation is a dangerous weapon only to be used where it is *reasonably necessary* to serve the asserted interest.<sup>228</sup> If adequate content-neutral alternatives are available, any defense of a content-based regulation on compelling state interest grounds is significantly undercut.<sup>229</sup> Scalia concluded that an ordinance not limited to the topics outlined by St. Paul would have essentially the same bene-

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219. *Id.*

220. *Id.*

221. *Id.*

222. *Id.*

223. *Id.* at 2549.

224. *Id.*

225. *Id.*

226. *Id.*

227. *Id.*

228. *Id.*

229. *Id.* at 2549-50.

ficial result.<sup>230</sup> Therefore, the content-based version was not reasonably necessary, and the ordinance failed strict scrutiny analysis.<sup>231</sup>

The way in which Scalia applied strict scrutiny is suspect. Normally, a statute must be *narrowly tailored* to serve a legitimate compelling interest in order to survive strict scrutiny review.<sup>232</sup> Here Scalia argued that since the result reached by the content-based ordinance can also be attained by banning a wider category of content-neutral speech, the content based regulation is invalid.<sup>233</sup> At first glance, this appears to renounce strict scrutiny analysis.<sup>234</sup>

There is a novel but rational interpretation of Scalia's seemingly invalid approach to strict scrutiny. It appears that Scalia is contending that a narrowly-drawn, content-based restriction on speech could never survive a First Amendment challenge as long as adequate content-neutral alternatives are available.<sup>235</sup> This is because the danger of censorship created by a facially content-discriminatory statute is significantly greater than the danger of censorship created by a content-neutral alternative.<sup>236</sup> Therefore, it can be argued that a content-neutral alternative actually has the effect of banning less speech because the result of this alternative is not as drastic. It will not, for example, have the force of completely censoring divergent ideas or viewpoints.

If that rationale seems unlikely, there is a doctrinal explanation as well. Justice Scalia appears to treat strict scrutiny as a well-defined, multi-element test. First, the state must show a legitimate compelling interest.<sup>237</sup> Second, the state must prove that the ordinance promotes such interest.<sup>238</sup> Third, the state must show that the content-based version is reasonably necessary to promote the interest considering the availability of adequate content-neutral alternatives.<sup>239</sup> Finally, the

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230. *Id.* at 2550.

231. *Id.*

232. *Id.* at 2549-50.

233. *Id.* at 2550.

234. See *infra* note 248 and accompanying text.

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

236. *Id.* at 2549-50.

237. *Id.*

238. *Id.* at 2550.

239. *Id.*

state must prove that the statute is the least restrictive means of promoting the asserted interest. The St. Paul ordinance passed parts one and two of the test.<sup>240</sup> Its fatal flaw was that it failed part three. The content-based version was simply not necessary.<sup>241</sup>

In a concluding remark, the majority summarized their position in two simple, but quite powerful, sentences: "Let there be no mistake about our belief that burning a cross in someone's front yard is reprehensible. But St. Paul has sufficient means at its disposal to prevent such behavior without adding the First Amendment to the fire."<sup>242</sup>

## V. SUMMARY OF THE CONCURRENCES

Three of the four concurring Justices wrote blistering opinions charging the majority with disrupting settled First Amendment law. Justice Stevens even declared that Justice Scalia's unworkable theory set First Amendment law on its head. Despite their splintered approaches, the concurring Justices all agreed, however, that the St. Paul ordinance was unconstitutionally overbroad.

### A. Justice White's Concurring Opinion

Justice White, in his concurring opinion, attacked the majority for abolishing settled First Amendment principles. He argued that the theory on which the majority based its decision is unworkable and likely to do little more than confuse the lower courts.<sup>243</sup> First, Justice White criticized the majority for eliminating the *Chaplinsky* categorical approach.<sup>244</sup> He asserted that the government should be free to draw any distinction within the fighting words class because the Court has consistently held that fighting words do not deserve constitutional

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240. *Id.* at 2549.

241. *Id.* at 2550.

242. *Id.*

243. *Id.* at 2558.

244. *Id.* at 2552.

protection.<sup>245</sup> Therefore, Justice Scalia's statement that fighting words are not "entirely invisible to the Constitution"<sup>246</sup> is contrary to the weight of authority.<sup>247</sup>

Second, Justice White condemned the majority for renouncing strict scrutiny review. He argued that the St. Paul ordinance would have survived under traditional strict scrutiny because the ordinance was narrowly tailored to serve the city's compelling interest.<sup>248</sup> The majority struck the ordinance down, however, because a ban on a wider category of content-neutral speech would have had the same result.<sup>249</sup> Such a ban in effect requires states to legislate for problems that do not confront them.<sup>250</sup>

Finally, after criticizing the majority for striving to patch up its unworkable theory with a series of ad hoc exceptions,<sup>251</sup> Justice White expressed his regret that the majority chose this case to rewrite First Amendment law.<sup>252</sup> In his view, the case could have been decided using settled First Amendment principles.<sup>253</sup> He believed that even as interpreted by the Minnesota Supreme Court, the ordinance was fatally overbroad.<sup>254</sup>

Justice White submitted that the state supreme court sufficiently limited the reach of the ordinance to fighting words.<sup>255</sup> Nevertheless the state court failed to articulate the particular injuries St. Paul sought to prevent.<sup>256</sup> Drawing on the state supreme court's narrowed interpretation, Justice White understood the court to have ruled that St. Paul may prohibit expression that "by its very utterance [causes] anger,

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245. *Id.*

246. *Id.* at 2543.

247. *Id.* at 2552.

248. *Id.* at 2554.

249. *Id.*

250. *Id.* at 2555.

251. *Id.* at 2556.

252. *Id.* at 2558.

253. *Id.*

254. *Id.* at 2560.

255. *Id.* at 2559.

256. *Id.*



alarm, or resentment."<sup>257</sup> He explained that prior cases have held that expressive activity is not stripped of its constitutional protection just because it causes hurt feelings, offense, or resentment.<sup>258</sup> Since the St. Paul ordinance made such expression criminal, it was clearly overbroad on its face.<sup>259</sup>

### B. Justice Blackmun's Concurring Opinion

Justice Blackmun, while joining in Justice White's opinion, wrote a short opinion which in most respects mirrored Justice White's concerns. He also appeared to reprimand Justice Scalia for concocting a theory just to root out political correctness.<sup>260</sup> In this respect, the majority's opinion seems to have been written in the direction of attacking campus speech codes.

257. *Id.* at 2559.

258. *Id.* at 2559-60.

259. *Id.* at 2560.

260. *Id.* at 2560-61. This argument has some merit. At the oral argument in front of the Supreme Court, Justice Scalia posed the following questions to Thomas J. Foley, the Ramsey County Attorney who argued the case for the city:

Scalia: Obscenity is unprotected speech. Could an ordinance provide that you can't use obscenity to advertise the Republican Party? Or if your object is to prohibit obscenity, shouldn't you regulate obscenity?

Foley: Racial violence is especially harmful.

Scalia: That's a political judgment.

Foley: The city is attempting to fashion a response to violence that must be prohibited.

Scalia: You could just drop the "race, color, gender, creed" from the ordinance.

In another portion of the proceeding Scalia inquired:

Scalia: Suppose a cross is burned on the grounds of a home for the mentally ill, along with a sign saying "Mentally Ill Out!" It wouldn't be covered, would it? (suggesting that "it's the wrong kind of bias.")

Foley: It probably wouldn't be addressed by the hate crimes ordinance, but other laws would apply.

Scalia: But if public peace is the concern, then why is it permissible for the city to discriminate as to the content?

Foley: The city is attempting to get at as many types of relevant conduct as it can.

Scalia: It would be easy to draft a statute to do so; just drop the "race, color, creed, gender" language.

*Court Hears Argument on Limits of First Amendment's Protection of Hate-Crimes, U.S.L.W., Dec. 12, 1991 (daily ed.).*

### C. Justice Stevens' Concurring Opinion

Justice Stevens also agreed that the St. Paul ordinance was unconstitutionally overbroad.<sup>261</sup> He disagreed, however, with Justice White's support of the categorical approach to fighting words.<sup>262</sup> He asserted that past decisions have formed a more complex analysis that considers not only the content of the speech, but also the context and the nature and scope of the restriction.<sup>263</sup> But Justice Stevens' biggest difficulty was with accepting the majority's statement that content-based regulations are presumptively invalid.<sup>264</sup> He argued that the entire First Amendment jurisprudence has created a regime that is based on the content of speech.<sup>265</sup> Whether an instance of speech falls within one of the categories of unprotected speech is determined in part by its content.<sup>266</sup> Therefore, while the majority's theory "has simplistic appeal, [it] lacks support in our First Amendment jurisprudence."<sup>267</sup>

It is obvious that each of the concurring Justices feared the potential negative impact of the majority's new First Amendment theory. Surprisingly, the most conservative Justices joined in Justice Scalia's theory and were willing to take this controversial step in First Amendment jurisprudence. The decision's effect on current laws depends on whether it will serve as precedent for future cases, or whether it will be viewed as an aberration and an example of how hard cases make bad law.

## VI. EFFECTS ON CURRENT LAW

At this point, the broad wording of the *R.A.V.* opinion provides little practical guidance for the future. The splintered approaches

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261. *Id.* at 2571.

262. *Id.* at 2566.

263. *Id.*

264. *Id.* at 2562.

265. *Id.* at 2563.

266. *Id.*

267. *Id.* at 2566.

among the Justices are likely to spur more lawsuits over hate crime laws, over campus speech codes, and probably over the other categories of proscribable speech.<sup>268</sup> It is quite possible that no hate crime legislation will be capable of surviving a First Amendment challenge.

The Anti Defamation League of B'nai B'rith (ADL) has developed a model hate crime code.<sup>269</sup> Its model code punishes bias motivated criminal activity more severely than ordinary criminal activity.<sup>270</sup> For example, an assault proven to have been motivated by bias would receive a stiffer sentence than an ordinary assault. Therefore, bigoted talk becomes evidence of a biased motive only after the assault is committed. The ADL feels confident that despite the Court's ruling in *R.A.V.*, its model code will survive a First Amendment challenge.<sup>271</sup> This is because the aim of the code is not to punish the bigoted thought, but to deter the commission of hate crimes.<sup>272</sup> This confidence, however, has recently been eroded. At least two of the twenty-nine states<sup>273</sup> that currently have hate crime legislation based on the ADL model have declared their hate laws unconstitutional.<sup>274</sup>

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268. See, e.g., *Citizens United for Free Speech II v. Long Beach Township Bd. of Comm'rs*, 802 F. Supp. 1223 (D.N.J. 1992) (injunction against enforcement of a statute was granted because *R.A.V.* "demonstrates that commercial speech cannot be subjected to a content-based restrictions unless the restrictions are necessary to serve a compelling governmental interest.").

269. The ADL model statute provides:

A. A person commits the crime of intimidation if, by reason of the actual or perceived race, color, religion, national origin or sexual orientation of another or group of individuals, he violates Section [ ] of the Penal Code [insert code provision for criminal trespass, criminal mischief, harassment, menacing, assault and/or any other appropriate statutorily proscribed criminal conduct].

B. Intimidation is a [ ] misdemeanor/felony [the degree of criminal liability should be made contingent upon the severity of the injury incurred or the property lost or damaged].

Susan Gellman, *Sticks and Stones Can Put You in Jail, but Words Can Increase Your Sentence? Constitutional and Policy Dilemmas of Ethnic Intimidation Laws*, 39 UCLA L. REV. 333, 344 (1991).

270. William Grady, *Hate-Crime Laws Collide Head-on with Free Speech*, CHI. TRIB., July 5, 1992, at C1.

271. *Id.*

272. *Id.*

273. *Id.*

274. *But see Oregon v. Plowman*, 858 P.2d 558 (Or.1992) (Oregon Supreme Court refused to find unconstitutional a statute based on the ADL model. The statute made it a

In *Wisconsin v. Mitchell*,<sup>275</sup> a group of African Americans brutally beat a white youth after viewing the movie "Mississippi Burning."<sup>276</sup> They were prosecuted under a hate crime law which was based on the ADL model.<sup>277</sup> The Wisconsin statute provided enhanced sentences for ordinary criminal conduct if that conduct was motivated by racial, religious, ethnic, gender, or other bias.<sup>278</sup> The Wisconsin Supreme Court struck down the statute the day after the United States Supreme Court released its decision in *R.A.V.*<sup>279</sup> It held that the statute violated the First Amendment by directly punishing more severely what the legislature believed to be offensive thought.<sup>280</sup> It also offended the First Amendment indirectly by chilling free speech.<sup>281</sup>

The Ohio Supreme Court was faced with a similar issue in *Ohio v. Wyant*.<sup>282</sup> *Wyant* represented a consolidation of several cases involving convictions for violations of the Ohio ethnic intimidation law.<sup>283</sup> This law was also based on the ADL model.<sup>284</sup> The court explained that a law which increases the penalty for bias motivated crimes penalizes more than the crime itself.<sup>285</sup> The only difference between a bias motivated assault and an ordinary assault is the bigoted thought involved. Therefore, the statute's effect is to create "thought crime," which clearly violates the First Amendment.<sup>286</sup>

On the federal level, similar hate crime legislation has been introduced by the United States Congress. On April 7, 1992, Representative

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crime for two or more people to injure another "because of their perception of that person's race, color, religion, national origin, or sexual orientation. The court expressly disagreed with the Wisconsin Supreme Court's decision in *Wisconsin v. Mitchell*, and agreed with ADL's rationale for the constitutionality of its model code).

275. 485 N.W.2d 807 (Wis. 1992).

276. *Id.* at 809.

277. *Id.* at 812.

278. *Id.* at 809.

279. *Id.* at 811.

280. *Id.* at 812-15.

281. *Id.* at 815.

282. 597 N.E.2d 450 (Ohio 1992).

283. *Id.* at 450-51.

284. *Id.* at 452-53.

285. *Id.* at 453.

286. *Id.* at 459.

Charles E. Schumer from New York unveiled the Hate Crimes Sentencing Enhancement Act of 1992.<sup>287</sup> This bill directs the United States Sentencing Commission to enhance the sentences for federal hate crimes by at least three offense levels.<sup>288</sup> Currently, the bill is being debated before the House Judiciary Subcommittee.<sup>289</sup>

The *R.A.V.* decision has also had its effect on campus speech codes. At least one university, the University of Wisconsin, has reported repealing its code as a result of the increased litigation concerning hate crime.<sup>290</sup> The University of Wisconsin's speech code permitted the university to discipline students who made comments that were demeaning to an individual's race, religion, or sexual orientation.<sup>291</sup> The code also subjected a student to discipline for creating an intimidating, hostile, or demeaning environment for education.<sup>292</sup> The Board of Regents repealed the code because it feared the code violated students' freedom of speech.<sup>293</sup>

The above illustrations show that after only a few short months since the Supreme Court's decision in *R.A.V.*, the new theory has already had an adverse impact on attempts to punish hate crime. While the *R.A.V.* case dealt primarily with the fighting words category of proscribable speech, it seems almost inevitable that the courts will stretch the decision to reach other areas of proscribable speech as well.

## VII. CONCLUSION

The dramatically differing opinions represented by the majority and concurrences in *R.A.V.* are symptomatic of a court wrestling with an issue over which public opinion is extremely divided. The ruling in *R.A.V.* even prompted an unusual split between organizations that are

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287. H.R. 4797, 102d Cong., 2d Sess. (1992).

288. *Id.*

289. *Congress Considers Hate Crime Punishments*, States News Service, July 29, 1992, available in LEXIS, Nexis Library, Wires File.

290. *Regents Repeal Hate Speech Rule*, Proprietary to the United Press Int'l, Sept. 11, 1992, available in LEXIS, Nexis Library, Omni File.

291. *Id.*

292. *Id.*

293. *Id.*

normally allies.<sup>294</sup> For example, the American Jewish Congress was delighted with the ruling, while the ADL called it troubling.<sup>295</sup> In addition, the American Civil Liberties Union (ACLU) represented Robert A. Viktora in challenging the St. Paul ordinance. However, the American Way, a usual ACLU ally, believed that the hate crime law should be upheld.<sup>296</sup>

The Justices were obviously split over an issue which plagues the debate over hate crime legislation in general. That issue is whether it is constitutionally permissible for a legislature to make an essentially political judgment and declare that some insults are worse than others and therefore deserve special punishment. It is difficult to draw a line between instances where individual rights supersede societal interests and those instances where individual rights should be subordinated. The dramatic increase in hate crime and its effect on society as a whole should have placed this line closer to the latter.

Whether the decision is welcomed depends on which side of the controversy a person belongs. Some civil libertarians were pleased that the First Amendment finally received a "breath of fresh air."<sup>297</sup> Others believed that the ruling provided a substantial roadblock to current efforts at ridding the nation of bias-motivated hatred.<sup>298</sup> The decision's exact breath and precedential value is forthcoming. The Supreme Court recently granted certiorari to review the Wisconsin Supreme Court's decision in *Wisconsin v. Mitchell*.<sup>299</sup> This case will provide the answer to at least one important question Justice Scalia left unanswered in *R.A.V.*: whether laws that provide enhanced sentences for bias-motivated laws are also unconstitutional in light of Court's decision in *R.A.V.* The answer will give states and universities across the nation helpful guidelines to use in battling hate crime. Until then,

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294. David G. Savage, *Hate Crime Law is Struck Down; Supreme Court: Justices Rule that a Minnesota Statute Infringes on Free Speech by Punishing Those Who Burn Crosses, Paint Swastikas or otherwise Display Bigotry*, L.A. TIMES, June 23, 1992, at A5.

295. *Id.*

296. *Id.*

297. *St. Paul Family Puzzled by Ruling; Many States' Laws May Remain Valid*, THE ATLANTA JOURNAL AND CONSTITUTION, June 23, 1992, at A4.

298. Grady, *supra* note 270, at C1.

299. 61 U.S.L.W. 3431 (Dec. 15, 1992).

the expansive and ambiguous decision in *R.A.V. v. St. Paul* is the only available standard.

In conclusion, it is important to remember that the Supreme Court did not lose its morality and sense of decency when it decided *R.A.V.* It cannot be stressed enough that the Court *did not* declare it legal to burn a cross in an African American family's yard, or anyone else's yard for that matter. Nor did it condone such reprehensible behavior. The Supreme Court simply said that in governmental attempts to rid the United States of bias-motivated crime, it is unconstitutional to use censorship as the means of silencing the savage beast.

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