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R.A.V v. City of St. Paul: How the Supreme Court Missed the Writing on the Wall

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NOTES

R.A.V. v. CITY OF ST. PAUL: HOW THE SUPREME COURT MISSED THE WRITING ON THE WALL

On June 21, 1990, a group of young white men fashioned a cross out of chair legs, attached it to a propane tank, and set it on fire in the yard of the African-American family who lived across the street.[1] When the police arrived at the scene, the young men ran inside a house belonging to one of the group members and began making another cross to burn.[2] All of the individuals involved in making and setting the cross on fire knew that this family was African-American.[3] There is a name for this type of activity other than arson, trespass or disorderly conduct.[4] According to the United States Congress, these young men committed a hate crime.[5]

It is estimated that the number of hate crimes in the United States increased by 24.4% from 1991 to 1992.[6] Forty-six states and the District

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[1] Brief for Respondent at 1–2, R.A.V. v. City of St. Paul, 112 S. Ct. 2538 (1992) (No. 90-7675).

[2] *Id.* at 3.

[3] *Id.* at 2. The young men were prosecuted under a St. Paul, Minnesota ordinance and ultimately challenged its constitutionality. *See R.A.V. v. City of St. Paul*, 112 S. Ct. 2538, 2538 (1992). For a full discussion of the *R.A.V.* case see *infra* notes 195–276 and accompanying text.

[4] The ordinance under which these young men were prosecuted provided that:

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

ST. PAUL, MINN., LEGIS. CODE § 292.02 (1990). *See R.A.V.*, 112 S. Ct. at 2541.

[5] *See* Hate Crime Statistics Act, Pub. L. No. 101-275, § (b)(1), 104 Stat. 140 (1990). The statute defines a hate crime as: "[C]rimes that manifest evidence of prejudice based on race, religion, sexual orientation, or ethnicity, including where appropriate the crimes of murder, non-negligent manslaughter; forcible rape; aggravated assault, simple assault, intimidation; arson; and destruction, damage or vandalism of property." *Id.*

This statute was passed in response to an increase in hate crimes throughout the country and requires the Attorney General to maintain annual statistics on hate crimes. T. Alexander Aleinikoff, *The Constitution in Context: The Continuing Significance of Racism*, 63 U. COLO. L. REV. 325, 344–45 (1992).

[6] *Leading Law Firm Releases First National Law Enforcement Survey for 1992 Revealing Sig-*

of Columbia have enacted some type of hate crime legislation intended to punish perpetrators motivated by bias.[7] The increase in hate crimes is particularly relevant in light of the fact that psychologists who have studied the effects of racism and commentators on hate crimes suggest that there are negative physical and emotional effects tied to hate speech.[8]

In 1992, in *R.A.V. v. City of St. Paul,* the United States Supreme Court considered the constitutionality of a St. Paul ordinance designed to punish hate crimes.[9] In *R.A.V.*, the Court held that the St. Paul ordinance was facially unconstitutional because it regulated speech on the basis of its content.[10] Although the Minnesota Supreme Court had interpreted the St. Paul ordinance to proscribe only "fighting words," an area of speech that had been considered to be outside the realm of First Amendment protection,[11] the Supreme Court determined that the alleged conduct was constitutionally protected.[12]

This Note examines the *R.A.V.* decision in light of previously existing First Amendment jurisprudence and the growing problem of hate crimes in the United States. Section I examines the area of hate crimes generally and the psychological ramifications of racially prejudiced speech and conduct.[13] Section II reviews the state of First Amendment law prior to the *R.A.V.* decision.[14] In particular, this section focuses on the areas of speech and conduct in which the Supreme Court has permitted regulation with a particular emphasis on the area of child pornography.[15] Section III sets out the details of *R.A.V. v. City*

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nificant Increases in Hate Crimes, P.R. Newswire Ass'n, Jan. 14, 1993 (LEXIS, Nexis Library, Current file) [hereinafter *National Law Enforcement Survey*]. The survey was compiled by the national law firm of Stroock & Stroock & Lavan, and estimated national statistics were based on information from ten jurisdictions. *Id.*

[7] *See* ANTI-DEFAMATION LEAGUE OF B'NAI BRITH LAW REPORT: HATE CRIMES STATUTES: A 1991 STATUS REPORT 21 (1991) [hereinafter ADL LAW REPORT].

[8] *See* KENNETH B. CLARK, DARK GHETTO DILEMMAS OF SOCIAL POWER 63–67 (2d ed. 1989); Richard Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133, 143 (1982); Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2336 (1989).

[9] *See R.A.V. v. City of St. Paul*, 112 S. Ct. 2538, 2542 (1992). See *supra* note 4 for the full text of the St. Paul ordinance.

[10] *R.A.V.*, 112 S. Ct. at 2542.

[11] *In re* Welfare of R.A.V., 464 N.W.2d 507, 510 (Minn. 1991).

[12] *See R.A.V.*, 112 S. Ct. at 2542.

[13] *See infra* notes 18–74 and accompanying text. This Note focuses on the effects of racially motivated hate speech, particularly speech directed at African-Americans. Although this author understands the damaging effects of all bias-motivated speech, this Note's focus is a function of both the available psychological data dealing with prejudice against African-Americans and the nature of the crime in *R.A.V.*

[14] *See infra* notes 75–192 and accompanying text.

[15] *See infra* notes 99–192 and accompanying text.

of St. Paul.[16] Finally, section IV analyzes the compelling state interest in protecting racial minorities from hate speech and proposes that the Court abandon the *R.A.V.* reasoning and apply a victim-centered approach to hate crime legislation.[17]

I. HATE CRIMES

Hate crimes in the United States have increased dramatically in recent years.[18] Members of minority groups have been harassed, beaten and even killed as a result of bias-motivated crimes.[19] In an attempt to punish those motivated by bias who commit these crimes, legislators around the country have passed hate crime statutes.[20]

One recent survey estimated that hate crimes in the United States increased a total of 24.4% from 1991 to 1992.[21] For example, in Boston, the number of hate crimes increased by 15.6% from 218 in 1991 to 252 in 1992.[22] Hate crimes in New York City increased by 20%—in 1991 there were 525 hate crimes reported and in 1992 there were 630.[23] In 1992, in Florida alone, the number of bias motivated crimes increased over 66% from 125 to 208.[24]

Hate crimes are alarming not only because of their statistical increase, but also because of their violent nature.[25] For example, on New Year's Day 1993, Christopher Wilson, a thirty-one year-old black man, was abducted by three white men, doused with gasoline and set on fire while vacationing in Tampa, Florida.[26] Near the site where

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[16] *See infra* notes 193–275 and accompanying text.

[17] *See infra* notes 276–94 and accompanying text.

[18] *See National Law Enforcement Survey, supra* note 6; Larry Tye, *Hate Crimes Increase, May Hit Record in '91*, BOSTON GLOBE, Apr. 14, 1991, at 1.

[19] *See* ADL LAW REPORT, *supra* note 7, at 12–13. The ADL's report describes incidents of hate crimes throughout the United States. *Id.* In California, a man was convicted under California's religious terrorism statute for engaging in a campaign of harassment against a family he mistakenly believed was Jewish. *Id.* at 12. In Florida, five racist skinheads attacked and beat another skinhead after finding out he was Jewish. *Id.* In New York, a Jewish student from Australia was attacked and killed by a mob angry over what they thought was racist treatment favoring Jews over blacks by the local ambulance unit. *Id.* at 13.

[20] *See id.* at 6–11. *See, e.g.*, MINN. STAT. ANN. 609.2231, .28, .5531, .595, .605, .735.795 (West 1987 & Supp. 1991); N.H. REV. STAT. ANN. 651.6 (1986 & Supp. 1990); OR. REV. STAT. 181.550 (1991); St. Paul Bias-Motivated Crime Ordinance § 292.02, *supra* note 4.

[21] *National Law Enforcement Survey, supra* note 6.

[22] *Id.*

[23] *Id.*

[24] *Id.*

[25] *See A Shocking Hate Crime; In Orange County, an Incident of Gay-Bashing at Its Worst*, L.A. TIMES, Jan. 12, 1992, at 6 [hereinafter *Shocking Hate Crime*]; *3 Whites Charged in Burning of a Black*, N.Y. TIMES, June 15, 1993, at 13.

[26] *3 Whites Charged in Burning of a Black, supra* note 25, at 13. Wilson suffered second and third degree burns on forty percent of his body. *Id.*

Wilson was burned police found a note signed "KKK" that read "[o]ne less nigger and one more to go."[27] In Laguna Beach, California, a fifty-five year-old gay man was beaten unconscious by a teenager witnesses claim yelled, "[l]et's go down to Mountain Street to get some . . . fags."[28]

Many states have enacted statutes that punish individuals for committing crimes such as those discussed above.[29] There have been at least two types of hate crime statutes enacted.[30] One type of statute punishes crimes motivated by bias.[31] Another type, the type the majority of states have adopted, acts to enhance an individual's sentence if it is found that the defendant was motivated by animosity toward the victim's race, gender, ethnicity, religion or sexual orientation.[32] As of 1991, forty-six states and the District of Columbia had enacted some type of hate crime legislation.[33]

Many commentators on hate speech have pointed out that to fully understand the necessity for hate crime legislation it is important to consider the damaging effect that hate speech has both on its victims and on other members of their minority group.[34] One commentator has examined the damage done to minority groups as a result of a history of bias against that particular group.[35] Others have focused on the physical and psychological effects of hate speech on its individual victims.[36] Studies of the effect of racism and racist speech indicate that

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[27] *Id.* One of the suspects in this case was known to have a Nazi swastika tattooed on his arm. *Id.*

[28] *Shocking Hate Crime*, *supra* note 25, at 6.

[29] *See* ADL LAW REPORT, *supra* note 7, at 22–23.

[30] *See id.* at 21.

[31] The St. Paul Bias-Motivated Crime Ordinance is this type of statute because it makes it a misdemeanor to engage in certain activity based on racial, ethnic, religious or gender bias. *See* St. Paul Bias-Motivated Crime Ordinance § 292.02, *supra* note 4.

[32] The ADL has designed a model sentence enhancing hate crimes statute:

> 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 individual or group of individuals, he violates Section ___ of the Penal Code (insert code provision for criminal trespass, criminal mischief, harassment, menacing, assault and/or other appropriate statutorily proscribed criminal conduct).
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> B. Intimidation is a ___ misdemeanor/felony (the degree of the criminal liability should be at least one degree more serious than that imposed for commission of the offense).

ADL LAW REPORT, *supra* note 7, at 4. The majority of states have enacted this type of statute. *See Hate Redux*, NAT'L L.J., Nov. 23, 1992, at 7.

[33] ADL LAW REPORT, *supra* note 7, at 21; *see also* DERRICK BELL, RACE, RACISM & AMERICAN LAW 479 n.29 (3d ed. 1992).

[34] *See, e.g.*, Delgado, *supra* note 8, at 134; Matsuda, *supra* note 8, at 2321–22.

[35] *See* CLARK, *supra* note 8, at 63–67.

[36] *See* Delgado, *supra* note 8, at 143; Matsuda, *supra* note 8, at 2336.

hate speech has real, long-lasting negative effects on minority adults and children.[37]

Kenneth Clark, a noted professor of psychology, has examined the damaging effects of racism on the psyche of African-Americans both as individuals and as a collective race.[38] In the early 1950s, Clark prepared a report for the White House Conference on Children and Youth examining black children's perceptions of race.[39] In his study, Clark evaluated the racial preferences and awareness of children ages three to seven.[40] Clark asked a group of children the following questions about two dolls, one black and one white: 1) "[g]ive me the doll you like best"; 2) "[g]ive me the doll that is the nice doll"; 3) "[g]ive me the doll that looks bad" and 4) "[g]ive me the doll that is a nice color."[41] The majority of black children at every age indicated a clear preference for the white doll and rejection of the black doll.[42] Clark concluded that the fact that black children expressed a preference for the white doll reflected their perception that society prefers white people.[43]

Clark explained that children's first awareness of racial distinctions is accompanied by an evaluation of these racial distinctions.[44] Children learn to evaluate racial differences according to society's standards while at the same time identifying themselves with one or the other racial group.[45] In other words, a black child simultaneously learns that he or she is black and that society does not value black people as much as white people.[46] Clark asserted that the most damaging effect of this realization is the burden placed on minority children who may, as a result, suffer from a distorted or damaged individual

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[37] *See* KENNETH B. CLARK, PREJUDICE AND YOUR CHILD 24, 37 (2d ed. 1955); Delgado, *supra* note 8, at 137–39.

[38] *See generally* CLARK, *supra* note 37, at 17–37; CLARK, *supra* note 8, at 63–67.

[39] CLARK, *supra* note 37, at x–xi. PREJUDICE AND YOUR CHILD is a reprint of Clark's study prepared in conjunction with the White House Conference on Children and Youth. *Id.* This study was cited in *Brown v. Board of Education* in support of the Court's conclusion that segregation in schools had negative effects on black children. *See* Brown v. Board of Education, 347 U.S. 483, 494–95 & n.11 (1955). Clark's study indicated to the Court that the self-esteem of black children was severely impaired as a result of their sensing a societal preference for whites. CLARK, *supra* note 37, at 37. *See also* Delgado, *supra* note 8, at 142–43 (arguing Clark's study indicates necessity for creation of tort action for racist speech). The *Brown* Court used Clark's study of black children as evidence of the absolute necessity for desegregation in public education. *Id.* at x–xi.

[40] CLARK, *supra* note 37, at 19.

[41] *Id.* at 22–23.

[42] *Id.* at 23.

[43] *Id.* at 24.

[44] *Id.* at 23.

[45] CLARK, *supra* note 37, at 23.

[46] *See id.* at 23–24.

personality.[47] For example, some black children go so far as to deny their racial identification as a result of society's preference for whites.[48]

In 1965, Clark further examined the damaging effects of racism in *Dark Ghetto Dilemmas of Social Power*.[49] In this work, Clark argued that the experiences of African-Americans as a race shape their perceptions of themselves and their place in society.[50] As children, many African-Americans were consistently rejected and experienced the overwhelming perception that they were less important than their Caucasian counterparts.[51] This sense of worthlessness carried over into their adult lives, resulting in the belief that minorities do not deserve anything more than this rejection from society as an individual or as a group.[52] The constant reinforcement of the idea that as an African-American an individual is less important, attractive or likely to succeed often results in self and group hatred.[53] Clark concluded, in *Dark Ghetto*, that this sense of inferiority is never truly lost and manifests itself in a lack of motivation to succeed in the workplace, a fear of competing with Caucasians, and a sense of hopelessness in changing or contributing to the community.[54]

A more recent study, conducted in 1985, evaluated the effect of racist speech on the perceptions of listeners.[55] The study revealed that racial slurs invigorate negative feelings about racial minorities in those who hear them.[56] Two psychologists staged debates between two students, one black and one white.[57] The debate topic was the value of nuclear energy, and was scripted word for word so that the student opposing nuclear energy always had the stronger arguments.[58] The black students argued each side an equal number of times.[59] During some of the debates the psychologists placed a student in the audience who made a "clearly audible" racial remark about the performance of the black debaters.[60] When asked who won the debate, the audience

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[47] *Id.* at 37.

[48] *See id.* at 37. Clark told of a young boy who tried to convince his psychologist that his skin color was the result of spending the summer at the beach. *Id.*

[49] *See* CLARK, *supra* note 8, at 63–67.

[50] *See id.* at 63–64.

[51] *See id.* at 64.

[52] *See id.*

[53] *See id.*

[54] *See* CLARK, *supra* note 8, at 67.

[55] *See* Jeff Meer, *Slurred Speech*, PSYCH. TODAY, July 1985, at 8–9.

[56] *Id.* at 9.

[57] *Id.* at 8.

[58] *Id.*

[59] *See id.*

[60] Meer, *supra* note 55, at 8. The planted student would comment at the close of the debate

showed a preference for the white debaters, even when they argued the weaker position.[61] The researchers concluded that because both the white and the black students argued from identical scripts the preference for white debaters showed racial prejudice.[62] In the instances where a racial comment was made, the students rated the black debaters' skills lower than they did when no comment was made.[63] The psychologists concluded that the racial slur tapped negative beliefs about the black debaters that influenced the students' impression of the black debaters' skills.[64]

Hate speech also has been shown to cause physical and psychological distress in its individual victims.[65] Especially when directed at a member of a class that has been the historical recipient of discrimination, hate speech can cause immediate psychological and emotional distress.[66] Furthermore, victims of hate speech suffer from nightmares, psychosis and even suicidal tendencies.[67] In addition to the psychological ramifications of hate speech, victims also experience physiological effects such as increased pulse rates, difficulty in breathing and post-traumatic stress disorder.[68]

In *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling,* Professor Richard Delgado argued for the creation of a cause of action for injuries sustained as a result of hate speech.[69] Professor Delgado argued that the emotional and physical effects of racist speech are severe enough to warrant civil liability against the perpetrators.[70] Although courts have yet to recognize such a cause of action, many perpetrators of hate speech have been held liable under other civil statutes and causes of action.[71]

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that "there's no way that nigger won the debate." *Id.* In the rest of the debates either no comment was made regarding either team or a racially neutral comment was made about the black team, such as, "there is no way the pro (con) debater won the debate." *Id.*

[61] *See id.* Most of the students thought the anti-nuclear position won in most of the debates; however, more students thought the anti-nuclear position prevailed when argued by the white students. *Id.*

[62] *Id.*, at 9.

[63] *Id.*

[64] *Id.*

[65] Matsuda, *supra* note 8, at 2336. Derrick Bell has compared the damage to victim's of hate speech to that experienced by women as a result of pornography. BELL, *supra* note 33, at 522 n.19.

[66] Delgado, *supra* note 8, at 134.

[67] *See* Matsuda, *supra* note 8, at 2336.

[68] *Id.*

[69] Delgado, *supra* note 8, at 134.

[70] *See id.* at 143, 149.

[71] *See, e.g.*, Vance v. Southern Bell Tel. & Tel. Co., 863 F.2d 1503, 1511 (11th Cir. 1989). In *Vance*, the United States Court of Appeals for the Eleventh Circuit held that a reasonable jury

In sum, the overall increase in hate speech in recent years and the response of legislators to this increase has been substantial.[72] The need for such a legislative response is illustrated by the well-documented effects of racism and racist speech on both its victims and society as a whole.[73] Racist speech and attitudes have been shown to cause physiological effects as well as lowered self-esteem, lack of self-worth and lack of motivation.[74]

II. First Amendment Law Prior to *R.A.V. v. City of St. Paul*

Hate crime legislation has been challenged as a violation of the First Amendment to the United States Constitution.[75] The First Amendment guarantees that neither Congress nor any state may make a law abridging the freedom of speech.[76] The United States Supreme Court has, however, recognized that states may restrict speech in certain circumstances without violating the First Amendment.[77] In some circumstances, the Court has held that certain types of speech or conduct do not warrant First Amendment protection.[78] These exceptions to First Amendment protection have been predicated on the lack of value inherent in certain speech or the danger associated with the speech.[79]

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could conclude that a black female who suffered a nervous breakdown allegedly caused by racial harassment on the job was a victim of racial discrimination in violation of 42 U.S.C. § 1981. *Id.* In *Vance*, the plaintiff, a black female, accused Southern Bell of racial harassment in violation of § 1981. *Id.* at 1505.

During her employ at Southern Bell, Vance alleged that a noose was hung at her work station on two separate occasions. *Id.* at 1506. Subsequent to these incidents, Vance suffered from an anxiety attack on the job. *Id.* at 1507. As a result of the attack, Vance consulted a clinical psychologist who determined that Vance should be reassigned to a new department because of the stress she was experiencing on the job. *Vance*, 863 F.2d at 1508. The appellate court reasoned that the district court erred in its application of the hostile environment standard and held that a reasonable jury could have concluded that Vance was the victim of racial harassment in violation of § 1981. *Id.* at 1511.

[72] *See National Law Enforcement Survey*, *supra* note 6.

[73] *See id.*; ADL Law Report, *supra* note 7, at 1.

[74] Delgado, *supra* note 8, at 143; Matsuda, *supra* note 8, at 2336.

[75] *See, e.g.*, R.A.V. v. City of St. Paul, 112 S. Ct. 2538, 2541 (1992).

[76] U.S. Const. amend. I. The text of the First Amendment reads: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." *Id.*

[77] *See* New York v. Ferber, 458 U.S. 747, 764–65 (1982) (statute regulating child pornography is constitutional); Miller v. California, 413 U.S. 15, 36–37 (1973) (states may constitutionally regulate obscene material); Chaplinsky v. New Hampshire, 315 U.S. 568, 573 (1942) (state may constitutionally regulate fighting words).

[78] *See Ferber*, 458 U.S. at 764–65 (child pornography); *Miller*, 413 U.S. at 36–37 (obscene material); *Chaplinsky*, 315 U.S. at 573 (fighting words).

[79] *See Ferber*, 458 U.S. at 765 (child pornography has dangerous effects on its child victims);

A. *General First Amendment Guarantees*

The freedom to speak and express oneself embodied in the First Amendment has been celebrated as the best way to ensure the spread of political truth and encourage the discourse of important and controversial issues.[80] Justice Holmes asserted that the First Amendment must protect against governmental suppression of speech because the truth of statements can only be tested in the marketplace of ideas.[81] Inherent in the guarantee of the First Amendment is the notion that free discussion of ideas, even repugnant ideas, leads to truth.[82]

In addition to protecting the written and spoken word, the guarantees of the First Amendment have been held to apply to expressive conduct.[83] The United States Supreme Court has recognized that some conduct may be sufficiently communicative to warrant First Amendment protection.[84] The Court has stated that in determining whether conduct will be considered speech, it will consider whether the actor intended to convey a specific message, and whether there was a likelihood that the expressive message would be understood by those who saw it.[85] If the actor intended to—and did—convey a message that would be understood by those who saw it, that conduct will be considered speech for purposes of the First Amendment.[86] The Court has, however, historically afforded conduct less protection than pure speech.[87]

Speech and conduct have long been recognized as rights that are not absolute and are subject to governmental regulation in certain circumstances.[88] For example, states may regulate certain types of speech or conduct in order to preserve peace, order and morality.[89] In

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Miller, 413 U.S. at 36–37 (obscene material is devoid of redeeming social value); *Chaplinsky*, 315 U.S. at 573 (fighting words may be regulated because they incite violence).

[80] *See, e.g.*, Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

[81] *See* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

[82] *See id.*

[83] Spence v. Washington, 418 U.S. 405, 408, 415 (1974) (hanging flag out window with peace symbol affixed to it was expressive conduct protected by First Amendment).

[84] *See id.*

[85] *See id.* at 410–11.

[86] *See id.* at 415.

[87] *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 826 (2d ed. 1988). *See, e.g.*, Teamsters Local 695 v. Vogt, 354 U.S. 284, 291–92 (1957) (law banning peaceful labor picketing for illegal purposes is constitutional) (quoting Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 503 (1949)).

[88] *E.g., Whitney v. California*, 274 U.S. 357, 373 (1927).

[89] *See* Barnes v. Glen Theatre, 111 S. Ct. 2456, 2462 (1991) (state may regulate nude dancing because regulation serves to protect societal order and morality); Chaplinsky v. New Hampshire,

addition, speech or conduct that may incite riots or immediate illegal action can be proscribed consistently with the First Amendment.[90] The government may also regulate speech or conduct that is without redeeming social value or is immoral.[91]

There are two ways that a state can restrict speech: 1) the government may impose restrictions aimed at the specific message or the effects produced by the awareness of the message or 2) the government, to pursue other goals, may constrict the flow of information by limiting the activity through which the information is transmitted or by enforcing rules that discourage the communication of ideas.[92] Any government regulation aimed at the communicative impact (the message) of speech is presumptively inconsistent with the First Amendment.[93] The general guarantee of the First Amendment is that a state cannot restrict expression because of its message, ideas, subject matter or content.[94] A regulation aimed at restricting expression because of its content will be unconstitutional unless the government can show that the message falls into one of the areas of expression the Court has determined are open to regulation or furthers a compelling state interest.[95]

A regulation aimed at the noncommunicative impact of speech is constitutional so long as it does not overburden the flow of information.[96] In determining whether a restriction overburdens the flow of information the Court applies a balancing test.[97] The value of the speech or conduct is weighed against the governmental interest in restricting it.[98]

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315 U.S. 568, 573 (1942) (state may regulate fighting words to protect society from breach of peace).

[90] *See* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (speech that incites "imminent lawless action" may be constitutionally proscribed); *Chaplinsky*, 315 U.S. at 573 (words that tend to incite breach of peace may be constitutionally proscribed).

[91] *See Barnes*, 111 S. Ct. at 2462 (state may regulate nude dancing because regulation serves to protect societal order and morality); Roth v. United States, 354 U.S. 476, 479, 484 (1957) (obscenity is without redeeming social value and may be constitutionally proscribed).

[92] TRIBE, *supra* note 87, at 789–90. Tribe asserts that the Supreme Court has broken its analysis into two "tracks." *Id.* at 791. Track one analysis deals with government regulation aimed at the communicative impact of the speech. *Id.* at 791. For example, a regulation providing punishment for publications critical of the state or a ban on the teaching of a foreign language would be subject to track one analysis. *See id.* at 789, 791–92. Governmental regulation aimed at the noncommunicative impact of speech, for example, a prohibition against the use of loud speakers in residential areas, would be subject to track two analysis. *See id.* at 790, 792.

[93] *Id.* at 790. For the purposes of this Note a "track one" regulation will be referred to as a "content-based" regulation.

[94] *Id.* at 790.

[95] *Id.* at 791–92.

[96] *Id.* at 792.

[97] TRIBE, *supra* note 87, at 792.

[98] *Id.*

B. *Areas Where Content-Based Regulations Have Been Upheld*

The United States Supreme Court has upheld regulation of speech based on its content in certain areas.[99] In some cases, the Court has concluded that a content-based regulation is constitutional because the type of speech is devoid of value.[100] In other instances, the Court has allowed content-based regulations because the effect of the speech is such that regulation serves a substantial governmental interest.[101] In both of these instances, the Court weighs the value of the speech against the interest in regulating it in order to determine if First Amendment rights can be abridged.[102]

In 1942, in *Chaplinsky v. New Hampshire*, the United States Supreme Court held that New Hampshire could constitutionally proscribe conduct likely to cause a breach of the peace.[103] *Chaplinsky* involved a Jehovah's Witness who was convicted under a New Hampshire statute for addressing another citizen in the street as "a God damned racketeer" and "a damned Fascist."[104] The Court reasoned that the speech at issue in this case was likely to provoke the average person to retaliate and cause a breach of the peace.[105] The Court upheld the statute as a constitutional regulation of "fighting words"—words likely to cause a breach of the peace.[106]

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[99] *See, e.g.*, New York v. Ferber, 458 U.S. 747, 764–65 (1982) (statute regulating child pornography is constitutional); Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 563 (1980) (states may regulate commercial speech based on content because states have interest in protecting consumers from deceptive commercial messages); Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974) (libelous speech not constitutionally protected); Miller v. California, 413 U.S. 15, 36 (1973) (states may constitutionally regulate obscene material); Chaplinsky v. New Hampshire, 315 U.S. 568, 573 (1942) (state may constitutionally regulate fighting words).

[100] *See* Roth v. United States, 354 U.S. 476, 484–85 (1957) (obscenity is without redeeming social value and can be constitutionally proscribed); *Chaplinsky*, 315 U.S. at 572–73 (fighting words tend to incite breach of peace and lend little to search for truth).

[101] *See Barnes*, 111 S. Ct. at 2460–61 (state may regulate nude dancing because regulation protects societal order and morality); *Ferber*, 458 U.S. at 758 (use of children in pornography is harmful to their physical and emotional health).

[102] *See, e.g.*, *Ferber*, 458 U.S. at 757–58, 762 (value in pornographic depictions of children is "*de minimis*" and harm caused to children is substantial); *Chaplinsky*, 315 U.S. at 572–73 (fighting words tend to incite violence).

[103] *Chaplinsky*, 315 U.S. at 573.

[104] *Id.* at 569. The statute in *Chaplinsky* provided that:

> [n]o person shall address any offensive, derisive or annoying word to any other person who is lawfully in any street or other place, nor call him by any offensive or derisive name, nor make any noise or exclamation in his presence and hearing with intent to deride, offend or annoy him, or to prevent him from pursuing his lawful business or occupation.

Id. at 569.

[105] *Id.* at 574.

[106] *Id.* at 573.

The New Hampshire statute prohibited individuals from addressing others in a public place with offensive, derisive or annoying words with intent to offend or annoy.[107] Chaplinsky challenged the statute as a violation of the First Amendment.[108] The United States Supreme Court upheld the statute as a narrowly tailored attempt at punishing speech that was likely to cause a breach of the peace.[109] In addition, the Court asserted that there were certain areas of speech that did not deserve constitutional protection, including fighting words.[110] Thus, the Court held that the New Hampshire statute restricting Chaplinsky's speech was constitutional.[111]

The overriding idea in *Chaplinsky* has been identified as the singling out of that speech that is of little or no social value and therefore does not contribute to any search for truth.[112] The *Chaplinsky* Court distinguished words used to provoke action from words that tend to inspire dialogue.[113] The statements made in *Chaplinsky* were labeled fighting words because they tended to provoke acts of violence rather than human discourse.[114] The First Amendment protects speech but does not protect every possible way of expressing an idea.[115]

In addition to fighting words, the United States Supreme Court has addressed whether states may constitutionally regulate obscene material.[116] In 1957, in *Roth v. United States,* the Court held that obscenity is not within the area of constitutionally protected speech.[117] In *Roth,* an individual was convicted under the federal obscenity statute for mailing obscene materials.[118] In its reasoning, the Court first addressed the general proposition that the First Amendment does not provide protection for all speech.[119] The Court explained that histori-

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[107] *Id.* at 569.

[108] *See Chaplinsky,* 315 U.S. at 571.

[109] *Id.* at 573.

[110] *Id.* at 571–72.

[111] *Id.* at 573.

[112] TRIBE, *supra* note 87, at 839.

[113] *See Chaplinsky,* 315 U.S. at 572.

[114] *See id.*

[115] *See* TRIBE, *supra* note 87, at 839.

[116] *E.g.,* Miller v. California, 413 U.S. 15, 18 (1972) (Court considered constitutionality of California obscenity statute); Roth v. United States, 354 U.S. 476, 479 (1957) (Court considered constitutionality of federal obscenity statute).

[117] *Roth,* 354 U.S. at 485.

[118] *Id.* at 480. The statute in *Roth* provided that: "[e]very obscene, lewd, lascivious, or filthy book, pamphlet, picture, paper, letter, writing, print, or other publication of an indecent character . . . [i]s declared to be nonmailable matter . . . . Whoever knowingly deposits for mailing . . . anything declared by this section to be nonmailable . . . shall be fined . . . ." 18 U.S.C. § 1461.

[119] *See Roth,* 354 U.S. at 482.

cally states had constitutionally prosecuted certain types of speech.[120] The Court went on to reason that obscene material, material defined as "dealing with sex in a manner appealing to prurient interests,"[121] has historically been considered without redeeming social value.[122] The Court relied on the fact that over fifty nations and forty-eight states and the United States Congress had enacted obscenity laws.[123] Thus, the Court held that obscenity is not an area of speech that falls under constitutional protection.[124]

Sixteen years later, in *Miller v. California,* the Court reaffirmed its holding in *Roth* and clarified the appropriate standards for determining if material was in fact obscene.[125] In *Miller,* an individual had been convicted of sending unsolicited obscene material in violation of a California statute.[126] The material, which depicted groups of people engaged in various sexual activities, was sent unsolicited to a restaurant where it was opened by the owner and his mother.[127] In upholding the California statute, the Supreme Court reasoned that California has an interest in prohibiting the dissemination of obscene material when it was likely that the material will offend unwilling recipients.[128] The Court held that California's statute did not violate the First Amendment.[129]

In so holding, the Court articulated a new standard for determining whether or not material is in fact obscene.[130] Rather than requiring that the material at issue be determined to be "without redeeming social value," the Court held that material must be evaluated under contemporary community standards as applied by the average person.[131] Under this standard, material would be considered obscene if it appealed to the prurient interests, depicted or described sex in an obviously offensive way, and lacked serious literary, artistic, political or scientific value.[132] The Court rejected the idea that in order for material to be obscene it must be completely without redeeming social value

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[120] *Id.* at 482–83. For example, the Court cited the fact that states had legislated against libel, blasphemy and even obscenity. *Id.*

[121] *Id.* at 487.

[122] *Id.* at 484.

[123] *Id.* at 485.

[124] *Roth,* 354 U.S. at 485.

[125] *See* Miller v. California, 413 U.S. 15, 36–37 (1973).

[126] *Id.* at 17–18.

[127] *Id.* at 18.

[128] *Id.*

[129] *Id.* at 36–37.

[130] *Miller,* 413 U.S. at 24.

[131] *Id.*

[132] *Id.*

and instead concluded that obscenity could be determined on the basis of community standards.[133]

In *Roth* and *Miller*, the United States Supreme Court carved out an exception to First Amendment protection for obscene material.[134] In upholding the obscenity statute in *Roth*, the Court relied on the historical perception that obscene material is undeserving of First Amendment protection because it is without redeeming social value.[135] In *Miller*, the Court relied on the fact that obscene material may offend unwilling viewers to uphold the constitutionality of California's statute.[136] Thus, obscenity, like fighting words, fell outside the parameters of First Amendment protection.[137]

In addition to allowing regulation of obscenity, the Court, as recently as 1991, held that states may constitutionally proscribe nude dancing in public places.[138] In *Barnes v. Glen Theatre*, the United States Supreme Court upheld the constitutionality of an Indiana indecency law that required nude dancers to wear a certain of amount of clothing while performing in public.[139] In *Barnes*, two South Bend, Indiana establishments, the Kitty Kat Lounge and Glen Theatre, challenged the constitutionality of the Indiana indecency law.[140] The Court reasoned that prohibitions on public nudity protect societal morality and order.[141] The Court concluded that the protection of morality is a substantial state interest and held that Indiana could constitutionally prohibit nude dancing.[142]

Initially, the United States District Court for the Northern District of Indiana granted an injunction after finding that the Indiana Public Indecency statute was unconstitutionally overbroad.[143] On appeal, the United States Court of Appeals for the Seventh Circuit remanded the case to the trial court after finding that a previous interpretation of the statute by the Indiana Supreme Court precluded a finding of overbreadth.[144] On remand, the trial court held that nude dancing was

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[133] *Id.*

[134] *See id.* at 36; *Roth* at 485.

[135] *Roth*, 354 U.S. at 485.

[136] *Miller*, 413 U.S. at 36–37.

[137] *Compare Roth*, 354 U.S. at 485 (obscenity not constitutionally protected speech) *with Chaplinsky*, 315 U.S. at 573 (fighting words may be constitutionally proscribed).

[138] *See* Barnes v. Glen Theatre, 111 S. Ct. 2456, 2460, 2463 (1991).

[139] *See id.* at 2460. The Indiana Public Indecency Statute required dancers to wear "pasties" and a "G-String" while performing. *Id.*

[140] *Id.* at 2458–59.

[141] *Id.* at 2461.

[142] *Id.* at 2460, 2462.

[143] *Barnes*, 111 S.Ct. at 2459.

[144] *Id.*

not expressive conduct deserving of First Amendment protection.[145] A panel of the Seventh Circuit reversed, holding that nude dancing was expressive conduct and therefore deserved First Amendment protection.[146] The court of appeals then reheard the case en banc and held that nonobscene nude dancing was expressive conduct protected by the First Amendment.[147]

The United States Supreme Court granted certiorari and held that the Indiana statute requiring that dancers wear "pasties" and a "G-String" did not violate the First Amendment.[148] The Court reasoned that a state could regulate expressive conduct if the regulation furthered an important governmental interest, the governmental interest was unrelated to the suppression of the expression, and the regulation was no greater than was necessary to further that governmental interest.[149] In applying this test, the *Barnes* Court inferred Indiana's interest in regulating nude dancing as an attempt to protect societal order and morality.[150] The Court reasoned that public indecency statutes, such as the Indiana ordinance, reflected public morality and a general disapproval of appearing in the nude in public places.[151] The Court examined the historical existence of public indecency statutes in Indiana designed to protect morals and public order.[152] The Court concluded that the governmental interest in preserving morality was unrelated to the suppression of free expression because the statute proscribed all public nudity, not only nude dancing.[153] The Court reasoned that the application of the statute to nude dancing was not a prohibition of the erotic message but rather a general prohibition of public nudity.[154] Finally, the Court found that the statute was narrowly tailored to pro-

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[145] *Id.*

[146] *Id.* at 2459–60.

[147] *Id.* at 2460.

[148] *Barnes*, 111 S. Ct. at 2460.

[149] *Id.* at 2460–61. The *Barnes* Court relied on United States v. O'Brien, in which the Court held that a congressional amendment to the Universal Military Training and Service Act that prohibited the knowing destruction of a draft card was constitutional. *O'Brien*, 391 U.S. 367, 367, 370 (1968). *O'Brien* involved an individual who burned his draft card on the steps of a Boston courthouse to protest the Vietnam war. *Id.* at 369. The Court reasoned that where speech and nonspeech are combined in expressive conduct, governmental interest in regulating the nonspeech element can justify incidental infringements on the First Amendment. *Id.* at 376. In *Barnes*, the Court reiterated the test enunciated in *O'Brien* to determine when governmental regulation can infringe incidentally on expressive conduct. *Barnes*, 111 S. Ct. at 2460–61.

[150] *See Barnes*, 111 S. Ct. at 2461.

[151] *Id.*

[152] *Id.* at 2461–62.

[153] *See id.* at 2462–63.

[154] *Id.* at 2462–63.

tect morality and public order because it only required the dancers to wear "pasties" and a "G-String" while performing.[155]

In his concurring opinion, Justice Scalia agreed with the majority's conclusion that the Indiana law was constitutional.[156] Justice Scalia reasoned that the Indiana indecency statute was not aimed at expression at all, but at conduct.[157] According to Justice Scalia, the statute was not enacted in order to stifle expressions of eroticism but to control public nudity.[158] Justice Scalia also asserted his belief that morality plays an important role in determining the necessity for certain regulations.[159] Justice Scalia urged that American society, and in fact all societies, have prohibited certain activities because they are considered immoral.[160] The purpose of the Indiana statute, according to Justice Scalia, was to enforce the traditional moral belief that people should not expose their naked bodies in public.[161]

In 1982, in *New York v. Ferber,* the United States Supreme Court held that a statute prohibiting the distribution and sale of child pornography was constitutional.[162] In *Ferber,* the owner of a Manhattan bookstore sold two sexually explicit films involving young boys to an undercover police officer.[163] In upholding the constitutionality of the statute, the Court reasoned that the state's compelling interest in protecting children from the negative effects of child pornography outweighed its value.[164] Thus, the Court held that the sale and distribution of child pornography is not entitled to constitutional protection.[165]

The Supreme Court in *Ferber* framed the issue as whether the New York state legislature could prohibit, for the purpose of protecting children and preventing their abuse, the distribution of material that depicts children engaged in sexual conduct regardless of whether the material is judged obscene.[166] The Court noted that there was a rela-

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[155] *Barnes,* 111 S. Ct. at 2463.

[156] *See id.*

[157] *See id.*

[158] *See id.* at 2464 (quoting Miller v. Civil City of South Bend, 904 F.2d 1081, 1120 (Easterbrook, J., dissenting)).

[159] *See id.* at 2465.

[160] *Barnes,* 111 S. Ct. at 2465.

[161] *Id.* Justice Scalia explained that he believed that Indiana's nudity law would be violated if ". . . 60,000 fully consenting adults crowded into the Hoosierdome to display their genitals to one another, even if there were not an offended innocent in the crowd . . . ." *Id.* at 2465. Thus, Justice Scalia asserted that it was not the fact that someone may be offended by nudity that makes it proscribable but rather its inherent immoral character. *Id.*

[162] New York v. Ferber, 458 U.S. 747, 764, 765 (1982).

[163] *Id.* at 751–52.

[164] *Id.* at 756, 762–63.

[165] *See id.* at 765.

[166] *Id.* at 753.

tionship between children involved in pornography and psychological problems in later life.[167] Children used in child pornography not only showed a tendency to have trouble forming intimate relationships in later life, but also were more likely to become sexual abusers themselves.[168] Also, research indicated that sexually exploited children become predisposed to self-destructive behavior including alcohol and drug abuse.[169] The Court, stating its view that New York had a compelling interest in protecting children in general, reasoned that New York also had a compelling interest in protecting children from the physical and psychological harms associated with child pornography.[170] In addition, the Court cited the fact that forty-seven states had enacted statutes to regulate the child pornography industry was indicative of the severity of the effects on children.[171]

The Court then noted that it had upheld laws that were content-based in the past where the evil to be regulated drastically outweighed the value of the speech.[172] Child pornography, according to the Court, possessed "de minimis" value because it was unlikely that pornographic material depicting children would be considered a necessary aspect of a literary, educational or scientific work.[173] In light of these factors, the Court held that the New York statute proscribed an area of speech that was not entitled to First Amendment protection.[174]

In 1990, the United States Supreme Court considered a state's ability to regulate the possession of child pornography in *Osborne v. Ohio*.[175] In *Osborne,* the Court held that Ohio could constitutionally prohibit the possession of child pornography.[176] *Osborne* involved an individual who was convicted of possessing child pornography in his home in violation of an Ohio statute.[177] The Court first explained that the child pornography industry is underground, thus allowing for the sale and distribution of such material to go unnoticed.[178] The Court

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[167] *Ferber*, 458 U.S. at 759 n.9. In a footnote, the Court expounded on the problem of child pornography in society as a whole. *Id.* at 749 n.1. As an example, the Court cited statistics showing that as many as 30,000 children had been sexually exploited in Los Angeles. *Id.*

[168] *Id.* at 758 n.9.

[169] *Id.* (citing Densen & Gerner, *Child Prostitution and Child Pornography: Medical, Legal, and Societal Aspects of the Commercial Exploitation of Children, reprinted in* U.S. DEPT. OF HEALTH AND HUMAN SERVICES, SEXUAL ABUSE OF CHILDREN: SELECTED READINGS 77, 80 (1980)).

[170] *Id.* at 758.

[171] *Id.* at 749.

[172] *Ferber*, 458 U.S. at 763–64 (referring to Chaplinsky v. New Hampshire, 315 U.S. 568 (1942)).

[173] *Id.* at 762–63.

[174] *Id.* at 765.

[175] Osborne v. Ohio, 110 S. Ct. 1691, 1695 (1990).

[176] *Id.* at 1697.

[177] *Id.* at 1695.

[178] *See id.* at 1697.

reasoned that states have taken a necessary step in the regulation of the child pornography industry by proscribing possession because the distribution industry is underground.[179] The Court further explained that states have an interest in encouraging the destruction of child pornography, which is achieved through laws proscribing possession.[180] The pornographic material produced serves as a permanent record of the child victim's abuse.[181] The Court explained that this record's permanent existence tends to haunt the children depicted therein for many years.[182] The Court concluded that bans on possession encourage destruction, thereby eradicating the record of abuse.[183] Destruction, the Court noted, is also essential to taking the material out of circulation and thus prohibiting it from being used as a tool for pedophiles to seduce other children.[184]

The Court in *Ferber* and *Osborne* focused on the negative effects of child pornography on the children involved in its making.[185] These negative effects served, according to the Court, as a compelling state interest that justified the prohibition of the sale, distribution and possession of child pornography.[186] Thus, child pornography does not fall within the realm of constitutionally protected speech.[187]

In *Chaplinsky, Roth, Barnes* and *Ferber,* the United States Supreme Court carved out exceptions to the First Amendment's protection on speech.[188] The Court in *Chaplinsky* focused on the lack of value and the inherent danger in fighting words.[189] The *Roth* Court relied on the historical regulation of obscenity to conclude that obscene material was without redeeming social value and thus not deserving of First Amendment protection.[190] In *Barnes,* the United States Supreme Court relied on the preservation of morality and societal order to uphold the regulation of public nudity.[191] Finally, in *Ferber,* the Court found regu-

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[179] *Id.*

[180] *Osborne,* 110 S. Ct. at 1697.

[181] *Id.* at 1697 & n.7.

[182] *Id.*

[183] *Id.*

[184] *Id.*

[185] *See Osborne,* 110 S. Ct. at 1697; *Ferber,* 458 U.S. at 758 & n.9.

[186] *See Osborne,* 110 S. Ct. at 1697; *Ferber,* 458 U.S. at 757–58.

[187] *Ferber,* 458 U.S. at 765; *see Osborne,* 110 S. Ct. at 1697.

[188] *Barnes,* 111 S. Ct. at 2460–61 (holding nude dancing may be constitutionally proscribed); *Ferber,* 458 U.S. at 765 (holding child pornography not constitutionally protected speech); *Roth,* 354 U.S. at 485 (holding obscenity not constitutionally protected speech); *Chaplinsky,* 315 U.S. at 573 (holding fighting words may be constitutionally proscribed).

[189] *See Chaplinsky,* 315 U.S. at 572.

[190] *See Roth,* 354 U.S. at 484.

[191] *See Barnes,* 111 S. Ct. at 2461.

lation of child pornography necessary in light of the serious effects of pornography on the children involved in its making.[192]

III. THE *R.A.V. v. CITY OF ST. PAUL* DECISION

In 1992, in *R.A.V. v. City of St. Paul,* the United States Supreme Court was faced with the question of whether the St. Paul, Minnesota Bias-Motivated Crime Ordinance violated the First Amendment.[193] As in the case of *Chaplinsky, Roth, Ferber* and *Barnes,* the Supreme Court had to decide whether it would fashion an exception to First Amendment protection.[194] The Court refused to allow St. Paul to regulate hate speech through its ordinance, holding that the Bias-Motivated Crime Ordinance was unconstitutional.[195] The majority based its holding on their assertion that the St. Paul Bias-Motivated Crime Ordinance was an impermissible content-based regulation of speech.[196] The concurring Justices, three of whom wrote separately, agreed that the ordinance was unconstitutional, but based their opinions on a finding of overbreadth.[197]

R.A.V., a minor, was charged under the St. Paul Bias-Motivated Crime Ordinance for burning a cross in the yard of an African-American family's home.[198] The ordinance made it a misdemeanor to place a symbol on public or private property that one knows arouses anger, alarm or resentment on the basis of race, color, creed, religion or gender.[199] The trial court granted R.A.V.'s motion to dismiss on the ground that the ordinance was unconstitutionally content-based and overbroad.[200]

The Minnesota Supreme Court, in *Matter of Welfare of R.A.V.,* reversed the trial court's ruling and remanded the case for trial.[201] The Minnesota Supreme Court held that the St. Paul Bias-Motivated Crime

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[192] *See Ferber,* 458 U.S. at 758.

[193] *See* R.A.V. v. City of St. Paul, 112 S. Ct. 2538, 2541 (1992).

[194] *See id.* at 2547; *Barnes,* 111 S. Ct. at 2460–61 (holding nude dancing may be constitutionally proscribed); *Ferber,* 458 U.S. at 765 (holding child pornography is not constitutionally protected speech); *Roth,* 354 U.S. at 485 (holding obscenity is not constitutionally protected speech); *Chaplinsky,* 315 U.S. at 573 (holding fighting words may be constitutionally proscribed).

[195] *R.A.V.,* 112 S. Ct. at 2547.

[196] *Id.* at 2542.

[197] *See id.* at 2550 (White, J., concurring); *id.* at 2561 (Blackmun, J., concurring); *id.* at 2561 (Stevens, J., concurring).

[198] *Id.* at 2541.

[199] St. Paul Bias-Motivated Crime Ordinance § 292.02. For the full text of the ordinance, see *supra* note 4.

[200] *R.A.V.,* 112 S. Ct. at 2541.

[201] *In re the Welfare of R.A.V.,* 464 N.W.2d 507, 511 (Minn. 1991).

Ordinance could be narrowly construed as applying only to fighting words, a category of speech that falls outside First Amendment protection, and, therefore, was not unconstitutionally overbroad.[202] The court prefaced its discussion and reasoning with the assertion that whenever possible the court will narrowly construe a statute so as to confine it to activities that fall outside First Amendment protection.[203] The Minnesota Supreme Court reasoned that the St. Paul ordinance did not attempt to proscribe all cross burning, but only the type that one knows would create alarm or incite anger based on racial, ethnic, gender or religious bias.[204] The court held that the ordinance, as it was construed to proscribe only fighting words, did not violate the First Amendment.[205] In so holding, the court noted that although the ordinance could have been more carefully drafted, as construed it was a narrowly tailored attempt to fulfill the compelling governmental interest in protecting the community from bias-motivated threats to public order.[206]

The United States Supreme Court granted certiorari and reversed the Minnesota Supreme Court's ruling.[207] In an opinion authored by Justice Scalia, and joined by Justices Rehnquist, Kennedy, Souter and Thomas, the Court held that the St. Paul Bias-Motivated Crime Ordinance was facially unconstitutional because it proscribed speech on the basis of its content.[208]

In presenting its case to the Supreme Court, St. Paul asserted three main arguments.[209] First, St. Paul argued that the ordinance, as construed by the Minnesota Supreme Court, applied only to fighting words and therefore was not unconstitutionally overbroad or impermissibly vague.[210] Second, St. Paul asserted that the ordinance was a content-neutral attempt to protect victims from the secondary effects of biased speech rather than an attempt to proscribe the speech itself.[211] St. Paul explained that its intention in enacting the ordinance was to protect specified groups of individuals who were particularly susceptible to victimization based on their membership in an histori-

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[202] *Id.* at 510.

[203] *Id.* at 509.

[204] *Id.* at 510.

[205] *Id.*

[206] *Matter of R.A.V.*, 464 N.W.2d at 511.

[207] *Id.* at 2542, 2550.

[208] *Id.* at 2541–42.

[209] *See* Brief for Respondent at 5, R.A.V. v. City of St. Paul, 112 S. Ct. 2538 (1992) (No. 90-7675).

[210] *Id.*

[211] *Id.*; *see R.A.V.*, 112 S. Ct. at 2549.

cally oppressed group.[212] Finally, St. Paul argued for acceptance of the Minnesota Supreme Court's interpretation of the statute as a narrowly tailored attempt to serve the compelling state interest in safeguarding the rights of individuals historically subject to discrimination.[213]

The Court, despite these arguments, held that the St. Paul Bias-Motivated Crime Ordinance was an unconstitutional content-based prohibition of speech.[214] The *R.A.V.* Court began its analysis by accepting the Minnesota Supreme Court's construction of the St. Paul ordinance as applying only to "fighting words."[215] Although the Court accepted this interpretation, it rejected the idea that because the ordinance only applied to an area of speech it had previously described as unprotected (fighting words) that area of speech was completely undeserving of First Amendment protection.[216] The Court reasoned that the government can proscribe certain *types* of speech, such as libel or obscenity, but may not constitutionally proscribe only libelous or obscene speech conveying a certain *message*.[217] For example, the Court distinguished between regulating obscenity as a category of speech and regulating only that obscenity directed at the government.[218] In so reasoning, the Court noted what it called the "commonplace" idea that speech can be regulated on the basis of one characteristic, for example, the action entailed in the speech, but not on the basis of another characteristic, such as, the idea expressed by the speech.[219] In other words, Justice Scalia explained that a "noisy sound truck" could be regulated based on the mode of the communication (the use of a loud and disturbing mechanism) but not based on disagreement (or agreement) with the underlying message.[220] Justice Scalia compared fighting words to a noisy sound truck because like the truck, fighting words could be regulated based on their mode of communication but not based on their underlying message.[221] The Court concluded that simply because the state had the authority to proscribe fighting words on the

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[212] *R.A.V.*, 112 S. Ct. at 2549.

[213] Brief for Respondent at 5, R.A.V. v. City of St. Paul, 112 S. Ct. 2538 (1992) (No. 90-7675); *R.A.V.*, 112 S. Ct. at 2549.

[214] *Compare* Brief for Respondent at 5, R.A.V. v. City of St. Paul, 112 S. Ct. 2538 (1992) (No. 90-7675) *with R.A.V.*, 112 S. Ct. at 2542.

[215] *R.A.V.*, 112 S. Ct. at 2542.

[216] *Id.* at 2543 (quoting Roth v. United States, 354 U.S. 476, 483 (1957); Beauharnais v. Illinois, 343 U.S. 250, 266 (1952); Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942)).

[217] *See id.* at 2543.

[218] *See id.*

[219] *See id.* at 2544.

[220] *See R.A.V.*, 112 S. Ct. at 2544–45.

[221] *Id.* at 2545.

basis of the unprotected features of the words—what the *R.A.V.* Court calls a "non-speech element of communication"—did not mean that the government could regulate fighting words based on an opinion or belief regarding the message expressed by the words.[222]

The *R.A.V.* Court admitted, however, that this limitation on content-based regulation was not absolute and that there were certain circumstances where content discrimination might not infringe upon First Amendment considerations.[223] The Court observed that where the foundation for the content-based distinction was the same as the foundation for proscribing the entire class of speech, the concern over censorship of ideas did not exist.[224] The Court explained by citing the proposition that a state may regulate what it considers to be the most obscene material—that which is the most sexually explicit or offensive—but may not prohibit only obscene material including a specific political message.[225] This distinction was based on the Court's claim that a neutral restriction on an entire class of speech does not invite the danger of idea or viewpoint discrimination.[226]

In applying these ideas to the Bias-Motivated Crime Ordinance, the Supreme Court concluded that the ordinance was facially unconstitutional because it only proscribed those fighting words that incited violence due to race, religion, ethnicity or gender.[227] Justice Scalia explained that the statute did not cover individuals who used fighting words in connection with the expression of other ideas, for example homophobic ideas.[228] Furthermore, the Court found fault with what it called the ordinance's "viewpoint discrimination."[229] The Court noted that the ordinance effectively barred one side of a debate by prohibiting fighting words based on notions of racial supremacy, but not those fighting words based on notions of racial equality.[230] Although the Court claimed to accept St. Paul's assertion that it was the responsibility of communities to confront issues of group hatred, the Court concluded that the community viewpoint cannot compromise First Amendment principles by regulating speech based on its content.[231]

Justice Scalia also concluded that the St. Paul Bias-Motivated Crime Ordinance did not regulate a category of fighting words that

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[222] *Id.*
[223] *Id.*
[224] *Id.*
[225] *R.A.V.*, 112 S. Ct. at 2546.
[226] *Id.* at 2545.
[227] *Id.* at 2547.
[228] *Id.*
[229] *Id.*
[230] *See R.A.V.*, 112 S. Ct. at 2548.
[231] *See id.*

was proscribable for the same reason that the entire category of fighting words is proscribable.[232] The Court explained that fighting words do not deserve constitutional protection because of their *mode* of communication rather than the *nature* of the *ideas* expressed with them.[233] In other words, fighting words, according to the Court, fall outside First Amendment protection because of the manner in which they are expressed rather than the specific message that is expressed.[234] The Bias-Motivated Crime ordinance was not, Justice Scalia explained, a general prohibition of fighting words, but was instead a prohibition of fighting words that convey bias-motivated hatred.[235] Thus, the Court concluded that the Bias-Motivated Crime Ordinance was an attempt to curb the expression of particular ideas rather than to regulate a mode of expression.[236]

The Court rejected St. Paul's assertion that although the ordinance was arguably content-based, it was narrowly tailored to serve a compelling community interest.[237] Although the Court claimed to accept the interest in securing the human rights of historically oppressed groups, it rejected the notion that the Bias-Motivated Crime Ordinance was necessary to achieve this goal.[238] The Court concluded that an ordinance that was not limited to race, religion, ethnicity and gender would have the same effect while not asserting the local government's contempt for the biases singled out in the ordinance.[239] The Court reversed the Minnesota Supreme Court's ruling and held that the St. Paul ordinance was unconstitutional.[240]

The concurring Justices agreed that the St. Paul Bias-Motivated Crime Ordinance was unconstitutional.[241] All of the concurring Justices, however, based their decisions on their conclusion that the statute was overbroad rather than on the finding that it was unconstitutionally content-based.[242] The concurring Justices harshly criticized the majority for manipulating long-accepted First Amendment analysis.[243]

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[232] *Id.*

[233] *Id.* at 2548–49.

[234] *Id.*

[235] *See R.A.V.*, 112 S. Ct. at 2549.

[236] *Id.*

[237] *Id.* at 2549–50.

[238] *Id.*

[239] *Id.* at 2550.

[240] *R.A.V.*, 112 S. Ct. at 2542, 2550.

[241] *Id.* at 2550 (White, J., concurring); *id.* at 2561 (Blackmun, J., concurring); *id.* at 2561 (Stevens, J., concurring).

[242] *Id.*

[243] *Id.* at 2551 (White, J., concurring); *id.* at 2561 (Blackmun, J., concurring); *id.* at 2561 (Stevens, J., concurring).

Justice White opened his concurring opinion by stating that his agreement with the majority extended only to the conclusion that the statute was unconstitutional.[244] Justice White argued that certain areas of speech can be permissibly proscribed because they lack the values the First Amendment intended to safeguard.[245] Justice White asserted that certain categories of speech, such as child pornography, obscenity and libel were content-based yet the First Amendment did not apply to them because their expressive content was insignificant.[246] Justice White argued that it was inconsistent to hold that certain categories of speech were not deserving of First Amendment protection, while maintaining that certain subcategories of these broad categories were deserving of First Amendment protection.[247] In other words, Justice White reasoned that a subset of a class of speech not worthy of First Amendment protection was, by definition, undeserving of constitutional protection.[248] Justice White further explained that under *Chaplinsky*, fighting words were not expressive in nature and therefore regulation of certain fighting words did not serve to suppress ideas or viewpoints.[249] Justice White called the majority's treatment of the St. Paul ordinance an "underbreadth creation" that only served to protect speech already determined to be worthless.[250]

Justice White criticized what he called the majority's "second break with precedent" by ignoring traditional strict scrutiny analysis.[251] In particular, Justice White criticized the *R.A.V.* majority's assertion that to constitutionally regulate hate speech, St. Paul should have created a statute that prohibited all fighting words.[252] Justice White concluded that although St. Paul could have constitutionally regulated fighting words that incite a breach of the peace based on race, ethnicity, gender or religion, St. Paul's ordinance was unconstitutionally overbroad because it reached expression beyond only fighting words.[253]

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[244] *Id.* at 2550 (White, J., concurring).

[245] *R.A.V.*, 112 S. Ct. at 2551.

[246] *Id.* at 2552.

[247] *Id.* at 2553.

[248] *Id.*

[249] *See id.* at 2553 (White, J., concurring).

[250] *R.A.V.*, 112 S. Ct. at 2553 (White, J., concurring).

[251] *Id.* at 2554. Justice White compared Justice Scalia's treatment of the St. Paul ordinance with the majority opinion in Burson v. Freemon, 112 S. Ct. 1846 (1992), decided one month before *R.A.V.* 112 S. Ct. at 2554. In *Burson*, the Court applied strict scrutiny to a content-based statute that prohibited the display of campaign material within one hundred feet of an election site. *See Burson*, 112 S. Ct. at 1848, 1851. Although the Court recognized that the statute was content-based in that it only prohibited political speech, the Court concluded that it was not necessary for the government to prohibit all speech at or near election sites in order for the statute to be found constitutional. *See id.* at 1850, 1855.

[252] *R.A.V.*, 112 S. Ct. at 2555 (White, J., concurring). Justice White described the majority's

In his concurring opinion, Justice Stevens argued that the *R.A.V.* Court ignored the fact that all of First Amendment jurisprudence had been based on developing categories of speech that most often were determined by the content of the speech.[254] Justice Stevens criticized the majority's use of dicta to support its assertion that the Court had articulated a near-absolute prohibition on content-based regulation.[255] In reality, Justice Stevens asserted, whether or not speech was protected was determined by the content of the speech.[256] Justice Stevens buttressed his argument by citing instances where the Court had upheld content-based restrictions, such as restrictions on certain movie theaters based on the content of the movies shown therein.[257]

Justice Stevens' opinion differed from Justice White's in that Justice Stevens concluded that the traditional categorical approach taken by the Court in the past no longer made sense.[258] Although Justice Stevens disagreed with Justice White's traditional approach, he also was unwilling to accept the majority's approach.[259] Instead, Justice Stevens argued for a more subtle and complex approach to First Amendment analysis that considered the content and context of the speech at issue.[260] In applying this approach to the St. Paul ordinance, Justice Stevens reasoned first that the ordinance, as it applied only to fighting words, regulated "low-value" speech.[261] Secondly, Justice Stevens explained that the St. Paul ordinance applied to conduct or expression rather than spoken or written words.[262] Next, Justice Stevens examined the context in which these fighting words were regulated.[263] The fighting words regulated in this case were, according to Justice Stevens, a type of physical intimidation undeserving of First Amendment protection merely because the words were embroiled with a message of racial hatred.[264]

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abandonment of traditional strict scrutiny analysis, the analysis used by eight out of nine Justices in the *Burson* case, as "misguided" and "mischievous at best." *Id.* at 2555, 2560.

[253] *Id.* at 2559–60. Because of the narrow focus of this Note, I will not discuss the overbreadth issue addressed by all of the concurring Justices.

[254] *See id.* at 2561–63 (Stevens, J., concurring).

[255] *Id.* at 2562. Justice Stevens claimed that content-based distinctions were inevitable and necessary at all levels of First Amendment jurisprudence. *Id.* at 2563.

[256] *Id.* Justice Stevens explained that the content of the material determines whether it is obscenity or child pornography. *Id.*

[257] *R.A.V.*, 112 S. Ct. at 2563 (Stevens, J., concurring).

[258] *Id.* at 2567.

[259] *Id.*

[260] *Id.*

[261] *Id.* at 2569.

[262] *R.A.V.*, 112 S. Ct. at 2569 (Stevens, J., concurring).

[263] *Id.*

[264] *Id.*

Justice Stevens clarified his position by explaining that the St. Paul ordinance regulated a category of expression that caused injury based on race, ethnicity, religion and gender.[265] The ordinance was not viewpoint discriminatory, argued Justice Stevens, because it barred both sides of the debate over tolerance or intolerance from throwing fighting words at one another based on the target's race, color, creed, religion or gender.[266] Justice Stevens concluded that were the St. Paul ordinance not overbroad, it would be constitutional.[267]

Justice Blackmun wrote a short concurrence that criticized the majority for "setting the law and logic on their heads."[268] Justice Blackmun argued that the majority, by holding that all fighting words must be regulated equally, effectively weakened the protection of all speech.[269] Justice Blackmun explained that if the Court can no longer categorize speech into that protected and that not protected by the First Amendment, protection for all speech will be weakened.[270] On the other hand, Blackmun concluded that the majority's opinion may not change First Amendment jurisprudence at all, but instead be considered an aberration.[271] Although Justice Blackmun found the St. Paul ordinance overbroad, he stated that he saw nothing unconstitutional about St. Paul specifically punishing race-based fighting words.[272]

The majority in *R.A.V.* found the St. Paul Bias-Motivated Crime Ordinance to be an unconstitutional content-based restriction on speech.[273] The concurring Justices, however, all agreed that the majority abandoned long accepted First Amendment analysis and instead concluded that the statute was unconstitutional on the basis of overbreadth.[274] Thus, according to the United States Supreme Court, states cannot constitutionally punish hate speech through bias-motivated crime statutes.[275]

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[265] *Id.* at 2570 (Stevens, J., concurring). Justice Stevens pointed out in this section of his concurring opinion the similarity between this interpretation and the interpretation of the child pornography statute in *New York v. Ferber*, an argument that became the basis of this Note. *Id.* at 2570. In *Ferber*, the Court relied on the psychological and physical injury sustained by children as a result of their involvement in the making of child pornography to uphold a prohibition on its sale and distribution. New York v. Ferber, 458 U.S. 747, 758 (1982). See *supra* notes 162–74 and accompanying text for a discussion of *Ferber*.

[266] *R.A.V.*, 112 S. Ct. at 2571 (Stevens, J., concurring).

[267] *Id.*

[268] *Id.* at 2560 (Blackmun, J., concurring).

[269] *Id.*

[270] *Id.*

[271] *R.A.V.*, 112 S. Ct. at 2560 (Blackmun, J., concurring).

[272] *Id.* at 2561.

[273] *Id.* at 2542.

[274] *Id.* at 2551 (White, J., concurring); *id.* at 2561 (Blackmun, J., concurring); *id.* at 2561 (Stevens, J., concurring).

[275] *Id.* at 2542.

IV. HATE SPEECH AS AN UNPROTECTED CATEGORY OF SPEECH

Some people's freedom hurts other people's equality.[276]

In striking down St. Paul's Bias-Motivated Crime Ordinance, the Supreme Court abandoned long accepted First Amendment doctrine to avoid opening the door for a more narrowly drawn ordinance to be considered constitutional. The Court's categorical refusal to allow states to restrict biased speech, especially when the restriction applies to biased fighting words, contravenes traditional notions of First Amendment law. Further, the *R.A.V.* decision ignores the conclusions of forty-six states that there is a compelling state interest in displaying the majorities' viewpoint that racial, ethnic, religious and gender-based fighting words will not be tolerated, and in ensuring that a huge segment of America's population is protected from the indignities and the physiological and psychological effects of bias-motivated speech. Finally, the Court's language and its treatment of the St. Paul ordinance is totally contradictory to the Court's own treatment of other areas of restricted speech because of its insensitivity to minorities and the psychological damage incurred as a result of hate crimes.

The majority distorted traditional First Amendment jurisprudence in *R.A.V.* Rather than applying strict scrutiny to the ordinance to determine if a compelling state interest existed for the regulation of bias-motivated fighting words, the majority decided that fighting words, words that fall outside the First Amendment, deserve constitutional protection.[277] This proposition seems contrary to logic and precedent: *Chaplinsky* held that fighting words are of so little value that they do not deserve constitutional protection.[278] Under *R.A.V.,* however, bias-motivated fighting words, a subset of a category of unprotected speech, can arguably receive more protection than neutral fighting words. The majority's refusal to allow St. Paul to punish bias-motivated fighting words contravenes First Amendment analysis as it was developed in *Chaplinsky, Roth, Barnes* and *Ferber* because St. Paul articulated a compelling state interest, the Court has recognized that certain speech has little value, and the preservation of morality in society can justify an infringement on certain speech.

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[276] Catharine A. MacKinnon, *Pornography, Civil Rights & Speech,* 20 HARV. C.R.-C.L. L. REV. 1, 8 (1985).

[277] *See R.A.V.,* 112 S. Ct. at 2543. The Court explained that statements that certain categories of speech are not within the scope of constitutionally protected expression "must be taken in context" and are not "literally true." *Id.* at 2543.

[278] *Chaplinsky v. New Hampshire,* 315 U.S. 568, 572 (1942). *See supra* notes 103–15 and accompanying text.

A. St. Paul *Articulated a Compelling State Interest*

Assuming that the St. Paul ordinance is a content-based regulation of fighting words, it must serve a compelling state interest to be considered constitutional. In refusing to accept St. Paul's asserted interests in regulating bias-motivated fighting words, the Court ignored its own precedents and revealed its lack of concern for the victims of hate speech. Although the Court allegedly accepted that St. Paul had an interest in promoting tolerance and protecting minority groups that have been historically subject to discrimination, it suggested that St. Paul could achieve the same goals by enacting a statute that proscribed all fighting words. A neutral fighting words statute, however, would not serve St. Paul's articulated interest because it would not target the most damaging aspect of bias-motivated fighting words—their message of racial hatred. The Court's assertion that a neutral statute would serve St. Paul's interests reveals that it does not find racially prejudiced speech and conduct morally culpable.

A community such as St. Paul has an interest in directly facing the issues of racial, ethnic, religious and gender inequality and combating the dangers of supremacist attacks on individuals based on their membership in a certain group. As evidenced by the research of Kenneth Clark and the more recent study involving the effect of racist speech on black debaters, hate speech has tangible effects on its victims and society as a whole.[279] Messages of inequality serve to imprint on their minority listeners a belief in their own inequality and lack of self-worth.[280] An individual who sees him or herself as less important or less valued in society will contribute less to society.[281] More importantly, the evidence that black children suffer from low self-esteem and often carry this feeling into adulthood resulting in more severe symptoms such as alcoholism, drug addiction or unemployment reinforces the need for communities to take a strong stance against racial bias.[282] St. Paul, and society as a whole, have a compelling interest in curbing the use of bias-motivated crimes as a tool for securing the social inequality of certain groups, and in voicing its intolerance for actions and words that contribute to negative characteristics in targeted groups.

The United States Supreme Court, as recently as 1991, has held that communities can prohibit some types of expression in order to

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[279] *See supra* notes 34–64 and accompanying text.

[280] *See supra* note 39 and accompanying text.

[281] *See supra* note 54 and accompanying text.

[282] *See supra* note 9 and accompanying text.

protect or promote a certain moral climate.[283] In refusing to apply this reasoning to the St. Paul ordinance, the Court has implicitly decided that racist fighting words are morally acceptable in St. Paul and the rest of the United States. The Court has also explicitly revealed its willingness to allow regulation in areas where they find the activity in controversy morally culpable, but not in the areas where they refuse to recognize the immoral nature of the activity.

For example, in *Barnes,* a case decided one year before *R.A.V.,* the Court upheld Indiana's prohibition on nude dancing on the basis of preserving morality.[284] In *Barnes,* Justice Scalia championed the promotion of morals as the basis for state regulation of certain speech.[285] The same argument exists with hate speech. *Webster's Dictionary of Modern English* defines immoral as "corrupt" or "unethical."[286] Society has long recognized that messages of racial, ethnic, religious and gender-based supremacy are corrupt messages and ones that are contradictory to the guarantees of equality and justice for all. The Court had ample opportunity to uphold the St. Paul ordinance as an expression of St. Paul's belief in the morality of equality. In fact, when compared to the prohibition in *Barnes,* involving a statute regulating public nudity, the St. Paul ordinance is even more essential for protecting the moral fabric of our society. Nudity and nude dancing are essentially victimless activities engaged in by consenting adults. On the other hand, there are real victims who suffer from crimes motivated by racial bias.

B. *An Argument for a Victim-Centered Approach*

The compelling interest in regulating hate speech, and the argument for its regulation as an expression against the immorality of hate speech, can most likely find acceptance if viewed in light of the victims of hate crimes. Child pornography is an area of regulated speech that has received this type of analysis. In *Ferber,* the Court examined the damage to children involved in child pornography.[287] The Court cited the negative effects on children who participate in child pornography,

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[283] *See* Barnes v. Glen Theatre, 111 S. Ct. 2456, 2460–61 (1991) (Indiana has substantial governmental interest in protecting societal order and morality). See *supra* notes 138–61 and accompanying text for a full discussion of *Barnes.*

[284] *Id.* at 2462. Although uncomfortable making this argument because of the inherent danger in suggesting the legislation of morality, I pose it simply to show that it was clearly available to the *R.A.V.* Court, had they decided to make it.

[285] *See id.* at 2465.

[286] WEBSTER'S DICTIONARY OF MODERN ENGLISH 269 (1987).

[287] *See New York v. Ferber,* 458 U.S. 747, 758 n.9 (1982).

including their probable sexual abuse and exploitation, the inability to develop healthy adult relationships later in life, sexual dysfunctions and the tendency to become sexual abusers.[288] In accepting the possible avoidance of these conditions as a compelling state interest that justified the prohibition of child pornography, the Court asserted that the interest in protecting the physical and psychological health and welfare of children is "beyond the need for elaboration."[289] After all, a society that does not value the psychological well-being of its children does not value the well-being of its own future.

A similar argument can be made for the regulation of hate crimes. Hate crimes are known to cause physical and emotional illness in victims.[290] In addition to causing fear and anger, hate speech perpetuates historical stereotypes that have tangible negative effects on its victims. Like children who participate in child pornography, the victims of hate crimes suffer the long-lasting effects of racial, ethnic, religious and gender bias. Child pornography statistics revealed the danger to children inherent in the industry and were used to support what most people already believed—child pornography is dangerous and of little social value. Similarly, the data set out in section I of this Note supports what psychologists and forty-six states already know—bias-motivated crimes are the ultimate form of racial prejudice and are not only immoral but result in lowered self-esteem, a sense of worthlessness, lack of motivation for success or contribution to society, and in some cases, severe emotional and physical distress in their victims.[291]

The Court should have fashioned the same argument against hate speech that it invoked against child pornography. The speech in question, bias-motivated fighting words, is of so little value that the dangerous and lasting effects of hate speech outweigh any value they might bring to society. In the case of child pornography, the fact that most people considered child pornography to be essentially devoid of artistic, social or political value, in conjunction with the overwhelming evidence that it had serious effects on the children involved in its making, allowed the Court to uphold a content-based regulation.[292] The same reasoning would apply in the case of bias-motivated fighting words (the words targeted by the St. Paul ordinance): fighting words are not considered speech for purposes of the First Amendment,[293]

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[288] *Id.*

[289] *Id.* at 756.

[290] *See supra* notes 65–71 and accompanying text.

[291] *See supra* notes 34–74 and accompanying text.

[292] *See supra* notes 158–70 and accompanying text.

[293] *See Chaplinsky v. New Hampshire*, 315 U.S. 568, 569 (1942).

therefore in conjunction with the evidence that there are substantial negative effects of racially motivated speech on targeted groups, the Court could have upheld the St. Paul ordinance.

Critics may argue that the interest in regulating child pornography stems from the damage done specifically to children. Although racist hate speech may often be targeted at adults, the overall societal prejudice conveyed transcends generations and perpetuates negative stereotypes.[294] By not allowing the regulation of racist fighting words, the United States Supreme Court allows for the damaging effects of prejudice to be passed on to future generations. Thus, as in the case of child pornography, there are innocent victims at stake.

V. CONCLUSION

> *Morally, we all recognize hate as an evil, and we have long struggled as a society to understand hate as a sickness. But legally we must increasingly confront hate as a vicious breaking of the law.*[295]

The Court's treatment of hate crime legislation in *R.A.V. v. St. Paul* signals a dangerous green light for those who want to intimidate and threaten members of racial, ethnic, religious and gender groups. The Court abandoned traditional First Amendment doctrine and virtually abolished any hope that states can effectively regulate criminal activity based on notions of supremacy. The Court can, however, abandon this interpretation and accept that states have a compelling interest in rejecting criminal messages of inequality based on common notions of morality and the need to safeguard certain individuals and minority groups from the lasting effects of hate speech. By recognizing the damage that hate speech inflicts on its victims, the Court can appreciate the need for ordinances like the St. Paul Bias-Motivated Crime Ordinance and find ample precedent for deeming them constitutional.

ANDREA L. CROWLEY

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[294] *See supra* notes 51–54 and accompanying text.

[295] Attorney General Dick Thornburgh as quoted in ADL LAW REPORT, *supra* note 7, at 20.