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R.A.V. v. City of St. Paul: A Curious Way to Protect Free Speech

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R.A.V. v. City of St. Paul: A Curious Way to Protect Free Speech

To combat the continuing evils of racism, some legal advocates have urged new remedies.[1] The worst discriminatory expressions should be outlawed, these scholars assert, to help purge racism.[2] They argue that such expressions—both spoken and written slurs, as well as acts such as cross burnings—are outside the scope of the First Amendment[3] because they perpetuate a divided society and keep minorities from being empowered.[4] As one writer noted:

> When the Klan burns a cross on the lawn of a black person who joined the NAACP or exercised his right to move to a formerly all-white neighborhood, the effect of this speech does not result from the persuasive power of an idea operating freely in the market. It is a threat, a threat made in the context of a history of lynchings, beatings and economic reprisals that made good on earlier threats, a threat that silences a potential speaker.[5]

With racially motivated hate crimes on the increase,[6] states,[7] munic-

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1. *See, e.g.*, Richard Delgado, *Words that Wound: A Tort Action for Racial Insults*, 17 HARV. C.R.-C.L. L. REV. 133, 143-47, 179 (1982) (suggesting a civil remedy in tort for racial slurs); Charles R. Lawrence III, *If He Hollers Let Him Go, Regulating Racist Speech On Campus*, 1990 DUKE L.J. 430, 457-66 (arguing that racist speech uttered in face-to-face encounters is not protected by the First Amendment); Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2335-41 (1989) (detailing the negative effects of racist hate messages). Matsuda argued in favor of "criminalization of a narrow, explicitly defined class of racist hate speech, to provide public redress for the most serious harm, while leaving many forms of racist speech to private remedies." *Id.* at 2380. She also contended that the criminalization of some hate speech would guarantee all United States citizens the "life of dignity" that they have been denied by racism. *Id.* at 2381. For an argument against criminalization of racist expression, see Nadine Strossen, *Regulating Racist Speech on Campus: A Modest Proposal?*, 1990 DUKE L.J. 484, 549-61. Strossen noted that laws curbing racist speech only criminalize the most blatant forms of racist expression and, thus, do not eliminate racism. *Id.* at 559.

2. Lawrence, *supra* note 1, at 471-72; Matsuda, *supra* note 1, at 2380-81.

3. The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech." U.S. CONST. amend. I. The Supreme Court has interpreted the First Amendment's protection of speech as applying not only to verbal and written expression, but to symbolic expression as well. *See, e.g.*, Texas v. Johnson, 491 U.S. 397, 414 (1989) (holding that protected symbolic speech includes the burning of the United States flag during a protest). Despite the wording of the First Amendment, the Supreme Court has determined that certain forms of expression are outside the First Amendment's scope and can be regulated by the state. *See infra* notes 106-13 and accompanying text.

4. Lawrence, *supra* note 1, at 471-72; Matsuda, *supra* note 1, at 2380-81.

5. Lawrence, *supra* note 1, at 471-72.

6. KlanWatch, an Alabama-based group monitoring bias-crimes across the United States, reported 25 hate-motivated murders in 1991, the most since the group began its annual

ipalities,[8] and even universities[9] have implemented some measures championed by the advocates. Many states and municipalities have enacted laws criminalizing attacks motivated by prejudice,[10] with some of these laws specifically outlawing cross burnings and other tactics associated with organized bigot groups.[11] Some states also have adopted enhanced

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report in 1981. Bernd Debusmann, *Hate Crimes In U.S. Reported on Rise, Recession Blamed*, Reuter, Feb. 24, 1992, *available in* LEXIS, Nexis Library, Reuter File. Other bias crimes also increased during 1991, *id.*, continuing the trend of the 1980s. Tanya K. Hernandez, Note, *Bias Crimes: Unconscious Racism in the Prosecution of Racially Motivated Violence*, 99 YALE L.J. 845, 845-46 (1990). Between 1980 and 1986, 3000 incidents of bias-related violence were documented across the nation. *Id.* To help monitor the number of crimes motivated by racist, religious, political, sexual, or other types of biases, Congress passed the Hate Crimes Statistics Act of 1990, Pub. L. No. 101-275, 104 Stat. 140 (codified at 28 U.S.C. § 534 (1991)), which requires the Federal Bureau of Investigation (FBI) to include hate crimes in its annual *Uniform Crime Report*, a listing of major crimes occurring in the United States. Russell Snyder, *Reviews Mixed on Justice Department's 'Hate Crime' Effort*, UPI, Oct. 29, 1990, *available in* LEXIS, Nexis Library, UPI File. The first FBI hate crimes report, released in January, 1993, indicated that in 1991, African Americans and Jews were most frequently the targets of hate crime, although the decision by eighteen states, including North Carolina, not to supply data to the FBI flawed the report. Stephen Labaton, *Poor Cooperation Deflates F.B.I. Report on Hate Crimes*, N.Y. TIMES, Jan. 6, 1993, at A8.

7. Forty-six states enacted hate crimes laws; Maryland became the first state to do so in 1980. Rorie Sherman, *Hate Crimes Statutes Abound; Newest, in Vt., Among Toughest*, NAT'L. L.J., May 21, 1990, at 3, 28. Only Arkansas, Nebraska, Utah, and Wyoming have not enacted hate crimes laws. *Id.* at 28. North Carolina's statute provides that:

> If a person shall, because of race, color, religion, nationality, or country of origin, assault another person, or damage or deface the property of another person, or threaten to do any such act, he shall be guilty of a misdemeanor punishable by imprisonment up to two years, or a fine, or both.

N.C. GEN. STAT. § 14-401.14 (Supp. 1991).

8. *See, e.g.*, ST. PAUL, MINN., LEG. CODE § 292.01 (1990); *see infra* note 32.

9. Universities that have adopted policies prohibiting racist and other harassing speech include the University of California, Emory University, the University of Michigan, the University of North Carolina at Chapel Hill, and the University of Wisconsin. DINESH D'SOUZA, ILLIBERAL EDUCATION 146 (1992) (listing some of the universities that have enacted measures to censor racist and sexist speech). The Stanford University policy prevents discriminatory harassment by conveying direct hatred or contempt for students, faculty, or university employees on " 'the basis of their sex, race, color, handicap, religion, sexual orientation, or national or ethnic origin.' " *See, e.g.*, Lawrence, *supra* note 1, at 450-51 (quoting Stanford University Policy on Free Expression and Discriminatory Harassment (1990)).

10. *See* N.C. GEN. STAT. § 14-401.14; Sherman, *supra* note 7, at 3.

11. Sherman, *supra* note 7, at 28. For example, New Jersey's statute provides that:

> A person is guilty of crime of the third degree if he purposely, knowingly or recklessly puts or attempts to put another in fear of bodily violence by placing on public or private property a symbol, an object, a characterization, an appellation or graffiti that exposes another to threats of violence, contempt or hatred on the basis of race, color, creed or religion, including, but not limited to a burning cross or Nazi swastika. A person shall not be guilty of an attempt unless his actions cause a serious and imminent likelihood of causing fear of unlawful bodily violence.

N.J. STAT. ANN. § 2C:33-10 (West 1991). Other states enacted statutes criminalizing cross burnings decades ago, in attempts to outlaw the Ku Klux Klan. *See, e.g.*, Act of Apr. 30,

sentencing laws, allowing harsher sentences for assaults and other crimes committed against minority groups.[12] Many universities added speech codes, making it an honor code violation to harass another student because of race or gender.[13] The measures enacted by states, municipalities, and universities to combat hate crimes have prompted a vocal debate in society at large.[14] Some found the measures unacceptable tac-

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1953, ch. 1193, 1953 N.C. Sess. Laws 1142-45 (codified as amended at N.C. GEN. STAT. § 14-12-12 (1986)). The statute provides, in pertinent part, that:

> It shall be unlawful for any person or persons to place or cause to be placed on the property of another in this State or on a public street or highway, a burning or flaming cross or any manner of exhibit in which a burning or flaming cross real or simulated, is a whole or a part, with the intention of intimidating any person or persons or of preventing them from doing any act which is lawful, or causing them to do any act which is unlawful.

Id.

12. *See* Sherman, *supra* note 7, at 28 (pointing out that all of the states that have enacted hate crimes laws in the last decade also have enacted laws providing for enhanced sentences for felonies motivated by bias). For an example of such sentencing laws, see the California statute which provides: "[A] person who commits a felony or attempts to commit a felony because of a victim's race, color, religion, nationality, country of origin, ancestry, or sexual orientation shall receive an additional term of one, two, or three years in state prison at the court's discretion." CAL. PENAL CODE § 422.75(a) (West Supp. 1992). Several states' enhanced-sentencing laws are based on a model statute drafted by the Anti-Defamation League of B'nai B'rith. Susan Gellman, *Sticks and Stones Can Put You In Jail, But Can Words Increase Your Sentence? Constitutional and Policy Dilemmas of Ethnic Intimidation Laws*, 39 UCLA L. REV. 333, 335 (1991). This model statute provides that:

> 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 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 damaged].

Id. at 344 (quoting CIVIL RIGHTS DIV. ADL LEGAL AFFAIRS DEP'T, ADL LAW REPORT: HATE CRIMES STATUTES: A RESPONSE TO ANTI-SEMITISM, VANDALISM, AND VIOLENT BIGOTRY 1 (1988 & Supp. 1990)).

13. *See, e.g.*, Lawrence, *supra* note 1, at 449-57; *see also* D'SOUZA, *supra* note 9, at 144-47 (describing the rise of speech codes on university campuses).

14. Most of the attention focused on the political correctness movement on college and university campuses, which is designed to promote tolerance of diverse lifestyles on campus and multicultural teaching in the classroom. *See, e.g.*, Jerry Adler, *Taking Offense: Is This the New Enlightenment on Campus or the New McCarthyism?*, NEWSWEEK, Dec. 24, 1990, at 48 ("The goal is to eliminate prejudice, not just of the petty sort that shows up on sophomore dorm walls, but the grand prejudice that has ruled American universities since their founding: that the intellectual tradition of Western Europe occupies the central place in the history of civilization."); Richard Bernstein, *The Rising Hegemony of the Politically Correct*, N.Y. TIMES, Oct. 28, 1990, § 4, at 1 (describing how the political correctness movement on campus encourages tolerance for minorities, but discourages viewpoint differences); *see also* D'SOUZA, *supra* note 9, at 124-56 (asserting that campus speech restrictions only inflame racial tensions);

tics designed to silence dissenting political views.[15] Others found the measures necessary to protect minorities from intimidation.[16] The debate has been conducted largely in the popular press, but recently the United States Supreme Court stepped in as referee in the case of *R.A.V. v. City of St. Paul*.[17] Many commentators have seen the Court's decision as putting an end to all hate-crime legislation.[18]

In light of the Supreme Court's decision in *R.A.V.*, this Note exam-

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Breaking The Codes, NEW REPUBLIC, July 8, 1991, at 7 (arguing that campus speech restrictions and hate-crimes legislation infringe upon the First Amendment).

15. *See, e.g.*, D'SOUZA, *supra* note 9, at 156. D'Souza, a conservative, argued that speech codes have helped keep racism alive on university campuses.

> The efforts of the administration . . . [at several universities] to regulate and enforce a social etiquette have created an enormous artificiality of discourse among peers, and thus have become an obstacle to that true openness that seems to be the only sure footing for equality. For when sentiments are outlawed, they tend to go beneath the surface, where they fester and emerge in the form of rebellious humor and other sometimes ugly gestures which can lead to 'racial incidents.' The consequences of such policies, therefore, is to promote rebellion in the name of harmony, to exacerbate bigotry while claiming to fight it, and ultimately to undermine the norms of fairness and exchange which are central both to the university and to minority hopes for racial understanding and social justice.

Id. While D'Souza's book was the first major journalistic account of the politically correct movement, many critics viewed it as overly biased. *See, e.g.*, Michael Kinsley, *TRB From Washington: P.C. B.S.*, NEW REPUBLIC, May 20, 1991, at 8 ("In earlier phases of his young life, at Dartmouth and Princeton, D'Souza was a right-wing killer not known for his love of toleration and respect for the other guy's point of view."). While conservatives have been among the most vocal critics of the political correctness movement and hate-crimes legislation, some traditional liberal civil libertarians also have joined the chorus. *See, e.g.*, Strossen, *supra* note 1, at 559-60; *see also* Gellman, *supra* note 12, at 334 ("[T]he debate over these laws is occurring not merely between traditional allies, but between one side and itself . . . . It is as if everyone involved in the debate over the permissibility and desirability of ethnic intimidation laws were actually on *both* sides at once.").

16. Lawrence, *supra* note 1, at 470-71. Lawrence, who characterized himself as a long-time civil libertarian, argued that:

> Whenever we decide that racist hate speech must be tolerated because of the importance of tolerating unpopular speech we ask blacks and other subordinated groups to bear a burden for the good of society—to pay the price for the societal benefit of creating more room for speech. And we assign this burden to them without seeking their advice, or consent. This amounts to white domination, pure and simple.

Id. at 472-73; *see also* Hernandez, *supra* note 6, at 845 (noting that racism and other biases prompt assaults and other physical crimes); Matsuda, *supra* note 1, at 2380 (arguing that the failure to provide legal redress for racist speech furthers the subordination of minorities and "perpetuates racism").

17. 112 S. Ct. 2538 (1992).

18. *See, e.g.*, Nat Hentoff, *Scalia Outdoes the ACLU*, WASH. POST, June 30, 1992, at A19. Hentoff sees the Court's decision as bringing an end to all college speech codes and all hate-crime laws, even those allowing enhanced penalties for bias crimes. *Id.*; *see also Speech Therapy*, NEW REPUBLIC, July 13, 1992, at 7 ("[T]he Court has exposed the unconstitutionality of many state bias laws and virtually all campus hate speech codes. In a stroke, it has repelled the most serious threat to open debate that the current generation of students has experienced.").

ines previous Court decisions involving fighting words.[19] It explores the Court's reasoning for invalidating the St. Paul hate-crimes ordinance,[20] contrasting the majority opinion with those of the concurring Justices. This Note examines potential problems with the content neutrality test the Court employed to invalidate the St. Paul ordinance[21] and determines that the commentators' conclusion that the *R.A.V.* decision stamps out all hate-crime laws is not necessarily correct.[22]

Early on June 21, 1990, Russ and Laura Jones, an African-American couple with five children who had recently moved to a predominantly white, working-class neighborhood in St. Paul, Minnesota, awoke to the sound of voices in their front yard.[23] Looking outside, the Jones family saw in their fenced-in yard a small burning cross,[24] a device long associated with the racist tactics of the Ku Klux Klan.[25] Fearing for their safety, the family called the police.[26] Officers arrived, but left after failing to locate any suspects.[27] Shortly thereafter, vandals ignited a second cross across the street from the Jones' home and a third cross outside a neighborhood apartment complex where several black families re-

19. The Court has held that fighting words—words that incite the average recipient into a fighting rage upon their utterance—may be proscribed because they are outside the protection of the First Amendment. Chaplinsky v. New Hampshire, 315 U.S. 568, 573 (1942). For a detailed discussion of the fighting-words doctrine, see notes *infra* 114-80 and accompanying text.

20. See *infra* note 33 and accompanying text for the text of St. Paul's ordinance.

21. *See infra* notes 194-215 and accompanying text.

22. *See infra* notes 230-34 and accompanying text.

23. *R.A.V.*, 112 S. Ct. at 2541.

24. *Id.* The two-foot tall cross was made out of parts of a wooden chair and was equipped with a burning propane torch. Tom Hamburger, *Court Hears St. Paul Hate-Crimes Case; Cross Burner Has Challenged Law's Constitutionality*, MINNEAPOLIS STAR TRIB., Dec. 5, 1991, at A7, A8. The Jones family had been the target of several acts of harassment since moving into the neighborhood three months earlier, including vandalism to one of the Jones' cars and an incident where several neighborhood youths called one of the Jones children a racially derogatory name. Bill McAuliffe, *Man Fears Ruling May Encourage Bigots; Victim of Cross-Burning Says The People Who Did It Will Think of Decision As Victory*, MINNEAPOLIS STAR TRIB., June 23, 1992, at B1.

25. The burning cross has become the Ku Klux Klan's signature act, a message that future violent acts may be committed toward the victim. Matsuda, *supra* note 1, at 2365-66. Surprisingly, the original Klan, formed to intimidate Southern blacks during the Reconstruction era, did not burn crosses. WYN C. CRAIG, THE FIERY CROSS 144-46 (1987). The tactic originated with novelist Thomas Dixon, whose 1905 novel about the post-bellum South, *The Clansman: An Historic Romance of the Ku Klux Klan*, includes descriptions of KKK members burning crosses. *Id.* at 123, 146. Director D.W. Griffith depicted the cross burnings in his popular film version of Dixon's novel, *The Birth Of A Nation*. *Id.* at 131. The film inspired the creation of the so-called modern Klan, which burned a cross at its initial meeting at Stone Mountain, Georgia in November, 1915. *Id.* at 146. Thereafter, cross burnings became a routine part of Klan activities. *Id.*

26. Brief for Respondent at 3, *R.A.V.* (No. 90-7675).

27. *Id.*

sided.[28] Following a four-day investigation, police arrested seventeen-year-old Robert A. Viktora and another young man.[29] Authorities alleged that the two were the ring-leaders of a small band of "skinheads"[30] who ignited the crosses to intimidate the Jones family.[31] Police charged Viktora and the other young man with assault for causing fear of immediate bodily harm or death[32] and with violating St. Paul's hate-crimes ordinance. The ordinance provided that

> [w]hoever 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.[33]

A juvenile court judge in a pre-trial ruling dismissed the hate-crimes charge against Viktora, finding the St. Paul hate-crimes ordinance unconstitutional.[34] The judge determined that the ordinance was over-

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28. *Id.*

29. *Id.* at 4 ("Petitioner admitted—indeed in one instance, bragged about—his involvement in the cross burning to two separate witnesses on the following day."). Because he was a juvenile at the time of his arrest, the court cases did not refer to Viktora by name, but instead used his initials. Newspaper reports, however, did reveal Viktora's name, in part because he was no longer considered a juvenile legally when his case went to the Supreme Court. *See, e.g.*, Ruth Marcus, *Supreme Court to Rule on 'Hate Crime' Laws; Teenager Challenges Charge in Cross Burning*, WASH. POST, June 11, 1991, at B4. Viktora's confederate was Arthur Miller, III, then eighteen. Hamburger, *supra* note 24, at A8. At the time of the cross burning, Viktora resided with Miller's family, who lived across the street from the Jones family. *R.A.V.*, 112 S. Ct. at 2541.

30. The term "skinheads" refers to right-wing youth groups, who often have close-shaved heads and believe in white supremacy.

31. Brief for Respondent at 4, *R.A.V.* (No. 90-7675).

32. ST. PAUL, MINN. LEG. CODE § 292.01 (1990). The statute reads:

> Whoever, intentionally or with reckless disregard of so doing, puts another in fear of immediate bodily harm or death by placing on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which is reasonably understood as communicating threats of harm, violence, contempt or hatred on the basis of race, color, creed, or religion, or gender commits an assault and shall be guilty of a misdemeanor.

Id.

33. *Id.* § 292.02, *quoted in R.A.V.*, 112 S. Ct. at 2541. Viktora and Miller were the first people ever to be charged with violating the St. Paul hate-crimes ordinance. Hamburger, *supra* note 24, at A7.

34. *In re* Welfare of R.A.V., 464 N.W.2d 507, 508 (Minn. 1991). The juvenile court opinion itself is unreported. While Viktora contested the charges, Miller pleaded guilty to both counts and received a thirty-day jail sentence. Hamburger, *supra* note 24, at A8. Following the Supreme Court's decision in *R.A.V.*, Viktora continued to deny that he participated in the cross burning outside the Jones' home. James Walsh, *100 Feet, 2 Worlds: Cross-Burning Suspect and Victim Discuss Feelings Now*, MINNEAPOLIS STAR TRIB., June 24, 1992, at B1.

broad[35] and outlawed expressions protected by the First[36] and Fourteenth Amendments.[37] The city appealed the court's ruling to the Minnesota Supreme Court, arguing that the hate-crimes ordinance could be narrowly construed to reach only conduct that falls outside First Amendment protection.[38] The Minnesota Supreme Court agreed,[39] concluding that the ordinance could withstand a constitutional challenge if construed to apply only to conduct unprotected by the First Amendment: conduct constituting "fighting words"[40] or "incit[ement to] imminent lawless action."[41] "So interpreted," the court noted, "the ordinance is a narrowly tailored means toward accomplishing the compelling government interest in protecting the community against bias-motivated threats to public safety and order and therefore is not prohibited by the First Amendment."[42]

The Supreme Court granted certiorari to determine the ordinance's

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Viktora told the interviewer that he was a white separatist, but did not "believe burning crosses on other people's lawns is right." *Id.* at B2. He explained that he challenged the St. Paul hate-crimes law because it was "a bad law." *Id.* Viktora, however, declined to discuss the case at length because of fears that he might still be tried for the cross burning. *Id.* at B1.

35. *In re R.A.V.*, 464 N.W.2d at 508. The overbreadth doctrine invalidates sweeping legislation that outlaws constitutionally protected rights of free speech, press, or assembly along with allowable proscriptions. *See, e.g.*, Gooding v. Wilson, 405 U.S. 518, 526-28 (1972) (holding that a breach of peace statute was overbroad because it outlawed protected expression as well as fighting words). The overbreadth doctrine requires that legislation be invalidated if it is fairly capable of being applied to punish people for constitutionally protected expression. *Id.* at 520-22. Nevertheless, the Court has described the overbreadth doctrine as "strong medicine" to be "employed by [courts] sparingly and only as a last resort." Broadrick v. Oklahoma, 413 U.S. 601, 613 (1973). The Court has allowed lower courts to construe statutes narrowly to avoid striking down legislation as overbroad. *Id.*

36. *See supra* note 3 and accompanying text.

37. The Supreme Court has determined that the protections of the First Amendment are incorporated into the Due Process Clause of the Fourteenth Amendment, thereby protecting freedom of expression against infringement by the states. Gitlow v. New York, 268 U.S. 652, 666 (1925).

38. *In re R.A.V.*, 464 N.W.2d at 508.

39. *Id.* at 507. See Ernest A. Young, Note, *Regulation of Racist Speech: In re Welfare of R.A.V.*, 14 HARV. J.L. & PUB. POL'Y 903, 905-07 (1991), for a detailed analysis of the Minnesota Supreme Court's decision.

40. *In re R.A.V.*, 464 N.W.2d at 510 (citing Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942)). The *Chaplinsky* Court held that fighting words are not protected by the First Amendment because such words are worthless speech. *Chaplinsky*, 315 U.S. at 572-73. It defined fighting words as those words that enrage the average person to fight. *Id.*

41. *In re R.A.V.*, 464 N.W.2d at 510 (citing Brandenburg v. Ohio, 395 U.S. 444 (1969)). The *Brandenburg* Court held that a state can regulate expression designed to incite riots and other imminent lawless actions and the advocacy likely to produce such action. *Brandenburg*, 395 U.S. at 447. The Court in *R.A.V.* did not consider whether the St. Paul hate-crimes ordinance was constitutional under this standard. *R.A.V.*, 112 S. Ct. at 2542.

42. *In re R.A.V.*, 464 N.W.2d at 511 (citations omitted).

validity under the First Amendment.[43] The Court ultimately determined that, even as narrowly construed by the Minnesota Supreme Court, the ordinance still violated the First Amendment.[44] All nine members of the Court agreed that the St. Paul ordinance was facially invalid,[45] but four members reached that conclusion for reasons different than the majority.[46]

The majority accepted the Minnesota court's construction of the ordinance as pertaining only to fighting words.[47] Nevertheless, the Court determined that the language of the ordinance violated the First Amendment because it did not meet the content-neutrality standard;[48] the ordi-

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

44. *Id.* at 2550.

45. *Id.*

46. *Id.* Justice Scalia wrote the majority opinion in which Chief Justice Rehnquist and Justices Kennedy, Souter, and Thomas joined. *Id.* at 2541. Justice White filed an opinion concurring in the judgment, in which Justices Blackmun and O'Connor joined and in which Justice Stevens joined in part. *Id.* at 2550 (White, J., concurring in the judgment). Justice Blackmun filed a separate opinion concurring in the judgment. *Id.* at 2560 (Blackmun, J., concurring in the judgment). Justice Stevens also filed a separate opinion. *Id.* at 2561 (Stevens, J., concurring in the judgment).

47. *Id.* at 2542; *see also infra* notes 114-80 (analyzing the fighting-words exception).

48. *R.A.V.*, 112 S. Ct. at 2547. The Court had never before applied the content-neutrality rule to invalidate a regulation aimed at criminalizing a subset of fighting words or another category of fully proscribable speech. *See infra* notes 181-93 and accompanying text. The Court, however, has previously applied a content-neutral standard to invalidate statutes aimed at regulating protected expression in a public forum. *See, e.g.*, Boos v. Barry, 485 U.S. 312, 319-22 (1988) (holding that a law may not prohibit only those picket signs outside a foreign embassy that are critical of the foreign government); Widmar v. Vincent, 454 U.S. 263, 267-77 (1981) (holding that a university with an open forum policy toward student groups may not exclude a religious group without showing a compelling state interest); Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 498-521 (1981) (holding that a city may not allow billboards with noncommercial messages, while prohibiting billboards with commercial messages); Erznoznik v. City of Jacksonville, 422 U.S. 205, 208-17 (1975) (holding that a law may not single out nudity in regulating films shown by drive-in theaters with screens visible from the highway). Petitioner had argued only that the St. Paul ordinance should be rejected as facially overbroad. Brief for Petitioner at 8-15, *R.A.V.* (No. 90-7675). Nevertheless, the Court determined that petitioner's arguments implied that the ordinance should be deemed unconstitutional for violating the content-neutral standard.

> In his briefs in this Court, petitioner argued that a narrowing construction [by the Minnesota Supreme Court] was ineffective because (1) its boundaries were vague and because (2) denominating particular expression a "fighting word" because of the impact of its ideological content upon the audience is inconsistent with the First Amendment. At oral argument, counsel for Petitioner reiterated this second point: "It is . . . one of my positions, that in [punishing only some fighting words and not others], even though it is a subcategory, technically, of unprotected conduct, [the ordinance] still is picking out an opinion, a disfavored message, and making that clear through the State." In resting our judgment upon this contention, we have not departed from our criteria of what is "fairly included" within the petition.

R.A.V., 112 S. Ct. at 2542 n.3 (citations omitted).

nance, instead of banning all fighting words,[49] prohibited only a select group of fighting words: insults aimed at race, color, creed, religion, or gender.[50] The Court had never before applied the content-neutrality rule to invalidate a regulation aimed at criminalizing fully proscribable speech. Writing for the Court, Justice Scalia noted that "[s]electivity of this sort creates the possibility that the city is seeking to handicap the expression of particular ideas."[51] "The point of the First Amendment is that majority preferences must be expressed in some fashion other than silencing speech on the basis of its content."[52] The Court pointed out that the St. Paul ordinance permitted fighting words, as long as they did not fall into one of the five prohibited categories.[53] Thus, those wishing to use fighting words in connection with ideas other than those expressly precluded—such as "to express hostility . . . on the basis of political affiliation, union membership, or homosexuality"—could do so freely because such fighting words were not categories listed in the ordinance.[54]

The Court reasoned that the ordinance amounted to even more than content discrimination—it extended to actual viewpoint discrimination.[55] While insults against race, color, creed, religion, or gender were barred by the St. Paul ordinance, statements in favor of race, color, creed, religion, or gender were not.[56] Thus, those arguing in favor of tolerance and equality could use the most vicious fighting words imaginable to make their case, as long as they did not stray outside the ordinance's guidelines.[57] The Court noted that the First Amendment does not allow St. Paul "to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensbury rules."[58]

The Court also determined that the St. Paul ordinance was unconstitutional because it did not single out "an especially offensive mode of expression," such as only those fighting words that communicate ideas in

49. *See infra* notes 114-80 and accompanying text.

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

51. *Id.* at 2549.

52. *Id.* at 2548.

53. *Id.* at 2547-48. The hate-crimes ordinance outlawed expression and conduct aimed at harassing a person because of her race, color, creed, religion, or gender. *See supra* notes 32-33 and accompanying text.

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

55. *Id.*

56. *Id.* at 2548.

57. *Id.* See *infra* notes 114-80 and accompanying text for an analysis of the fighting-words doctrine, which states that fighting words are not protected by the First Amendment.

58. *R.A.V.*, 112 S. Ct. at 2548. The Marquis of Queensbury rules were a boxing code of fair play developed in the 19th century by the eighth Marquis of Queensbury to govern boxing matches. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 1384 (1976).

an especially threatening manner.[59] Instead, the ordinance prohibited all fighting words that "communicate messages of racial, gender, or religious intolerance."[60]

The Court also rejected the city's contention that the ordinance as narrowly construed should be upheld because it served the compelling state interest of protecting the "basic human rights of members of groups that have been subjected historically to discrimination."[61] The Court agreed that there may be a compelling state interest in protecting such groups, but it recognized that the goal could be achieved with a content-neutral ordinance prohibiting all fighting words.[62] Such an ordinance would protect all citizens equally, not just select groups of citizens, from being subjected to speech designed to provoke a fight.[63] "[T]he only interest distinctively served by the content limitation [in the St. Paul ordinance] is that of displaying the city council's special hostility toward the particular biases thus singled out," the Court noted.[64] "That is precisely what the First Amendment forbids."[65]

The Court, however, noted several exceptions to its holding barring content discrimination.[66] The Court asserted that "[w]hen the basis for the content discrimination consists entirely of the very reason the entire class of speech is proscribable, no significant danger of idea or viewpoint discrimination exists."[67] If the reason for proscription is deemed neutral enough to support exclusion of the entire class of expression from First Amendment protection, the reason "is also neutral enough to form the basis of distinction within the class."[68] To illustrate its point, the Court noted that while a state can prohibit only obscenity that is the most patently offensive in its prurience, it may not prohibit only obscenity that includes offensive political messages.[69] The Court also noted that the federal government can criminalize threats of violence against the President, but may not criminalize only those threats against the President

59. *R.A.V.*, 112 S. Ct. at 2549. The city argued that the ordinance was constitutional because it had been narrowly construed by the Minnesota Supreme Court to outlaw only fighting words and because the government has a compelling state interest in outlawing bias crimes. *Id.*; *see supra* notes 39-42 and accompanying text.

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

61. *Id.*

62. *Id.* at 2549-50.

63. *Id.*

64. *Id.* at 2550.

65. *Id.*

66. *Id.* at 2545-46.

67. *Id.* at 2545.

68. *Id.* at 2545-46.

69. *Id.* at 2546.

which mention his policies on aid to the inner cities.[70] The Court also pointed out that the state may choose to regulate price advertising in one industry, but not in another, because the risk of fraud is greater in the former, but a state may not prohibit only advertising that depicts men in a demeaning manner.[71]

The Court also asserted that its holding does not preclude regulations of subclasses of proscribable speech when such regulations are aimed at conduct.[72] In other words, "a particular content-based subcategory of a proscribable class of speech can be swept up incidentally within the reach of a statute aimed at conduct rather than speech."[73] To illustrate its point, the Court noted that the federal government can ban sexually derogatory fighting words under Title VII's general prohibition against sexual discrimination in the workplace since Title VII is aimed at conduct.[74]

The Court determined that the St. Paul ordinance did not fall within either of its stated exceptions to the content-neutrality rule because fighting words are essentially a "non-speech" form of communication.[75] Fighting words, the Court asserted, are analogous to a "noisy sound truck."[76] Each is a "mode of speech" and can be used to convey an idea, but neither falls within the scope of the First Amendment.[77] Still, the government cannot regulate either "based on hostility—or favoritism—towards the underlying message expressed."[78]

While striking down the St. Paul hate-crimes law, the Court asserted that it did not condone cross burning in anyone's front yard.[79] The Court, however, noted that sufficient means were available to prevent such behavior "without adding the First Amendment to the fire."[80]

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70. *Id.* (citing 18 U.S.C. § 871 (1988)); *see also* Watts v. United States, 394 U.S. 705, 708 (1969) (upholding the constitutionality of 18 U.S.C. § 871, but determining that the statute could not be used to punish someone for making a crass joke about shooting the President).

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

72. *Id.*

73. *Id.*

74. *Id.* (citing 42 U.S.C.A. § 2000e-2 (1981 & Supp. 1992) & 29 C.F.R. § 1604.11 (1991)).

75. *Id.* at 2545.

76. *Id.* (citing Niemotko v. Maryland, 340 U.S. 268, 282 (1951) (Frankfurter, J., concurring)).

77. *Id.*

78. *Id.*

79. *Id.* at 2550. The Court did not spell out the other remedies available. *Id.* Commentators in the popular press have suggested that criminal penalties such as trespassing, assault, and communicating threats are preferable remedies since they do not criminalize viewpoints as do hate-crimes laws. *See, e.g., Breaking The Codes, supra* note 14, at 8 (arguing that hate-crimes laws are not necessary because most bias crimes can be punished by other remedies).

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

Justice White, joined by Justices Blackmun and O'Connor, and Justice Stevens in part, concurred in the judgment that the St. Paul ordinance was invalid, but rejected the Court's argument that it is unconstitutional to criminalize only a select type of fighting words.[81] Instead, Justice White argued that the Minnesota court's narrowing of the statute failed to cure the overbreadth problem,[82] so that the ordinance remained facially unconstitutional because it went beyond fighting words to outlaw expression protected by the First Amendment that causes only hurt feelings, offense, or resentment.[83] Justice White faulted the Court for not deciding the case on these grounds, since this was the argument that petitioner had made before the Court.[84]

Justice White criticized the Court for abandoning the categorical approach, which he viewed as "a firmly entrenched part of our First Amendment jurisprudence."[85] The categorical approach, as defined by Justice White, provides that most speech is constitutionally protected, but "expression falling within certain limited categories so lacks the values the First Amendment was designed to protect that the Constitution affords no protection to that expression."[86] Expression deemed obscene, libelous, commercial, or fighting words is subject to regulation under the categorical approach.[87] Justice White asserted that if the St. Paul ordinance had been limited to fighting words it would have been a valid regulation of unprotected speech under the categorical approach.[88]

Justice White also criticized the Court for abandoning the overbreadth test, "a fundamental tool of First Amendment analysis," which rejects broad limits on expression in recognition that the First Amendment protects most disturbing speech.[89] Justice White charged that the

81. *Id.* (White, J., concurring in the judgment). Justice Stevens objected to Justice White's support of the categorical test for First Amendment cases.

82. *Id.* at 2559 (White, J., concurring in the judgment); *see supra* notes 39-42.

83. *R.A.V.*, 112 S. Ct. at 2559 (White, J., concurring in the judgment).

84. *Id.* at 2551 (White, J., concurring in the judgment); *see supra* note 48. However, the Libertarian Center for Individual Rights argued in its amicus brief for the petitioner that the Court should find the St. Paul ordinance unconstitutional because it did not criminalize all fighting words. Brief Amicus Curiae of the Center For Individual Rights in Support of Petitioner at 12-15, *R.A.V.* (No. 90-7675) ("In fact, the state's attempt to prohibit only a subcategory of fighting words is strikingly underinclusive.") (citations omitted).

85. *R.A.V.*, 112 S. Ct. at 2552 (White, J., concurring in the judgment).

86. *Id.* at 2551 (White, J., concurring in the judgment); *id.* at 2561 (Stevens, J., concurring in the judgment).

87. *Id.* (White, J., concurring in the judgment).

88. *Id.* at 2558-60 (White, J., concurring in the judgment).

89. *Id.* at 2553 (White, J., concurring in the judgment). In challenging a law as overbroad, a plaintiff is allowed to raise the rights of third parties not before the court, in effect arguing that the law may have a chilling effect on the First Amendment rights of others because it is overbroad. *See, e.g.*, Broadrick v. Oklahoma, 413 U.S. 601, 611-12 (1973) (stating

Court's new content-neutral standard, which he labeled an "underbreadth" test, can provide protection to expression that falls outside the perimeters of the First Amendment.[90] "[I]t permits, indeed invites, the continuation of expressive conduct that in this case is evil and worthless in First Amendment terms."[91]

Justice White also asserted that the Court's stated exceptions to its holding invalidate the content-neutrality rule.[92] He argued that the Court's first exception, which allows subsets of proscribable speech to be barred when there is little danger of infringement, is particularly problematic.[93] To illustrate his point, Justice White contended that if the federal law criminalizing threats against the President's life is not subject to the rule because the President deserves special protection, then the St. Paul ordinance also would appear to be permissible since it is designed to protect groups that have been historically subjected to discrimination.[94] Justice White asserted that the Court included its second exception, which allows a subclass of proscribable expression to be regulated if it is a secondary effect of conduct outlawed by a statute, in an attempt to protect Title VII from being deemed unconstitutional under the content-neutral rule.[95]

Justice Blackmun, in a separate opinion, reiterated Justice White's criticism of the Court's abandonment of the overbreadth test in First Amendment cases.[96] Justice Blackmun asserted that the abandonment could lead to less "protection across the board" for speech, charging that if the Court's decision means "all expressive activity must be accorded the same protection, that protection will be scant."[97] Justice Blackmun, however, also noted that the Court's wide-sweeping opinion could prove to be just an aberration: "a case where the Court manipulated doctrine to strike down an ordinance whose premise it opposed."[98]

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that overbroad regulations may cause others not before the court to refrain from constitutionally protected speech or expression).

90. *R.A.V.*, 112 S. Ct. at 2553 (White, J., concurring in the judgment).

91. *Id.* (White, J., concurring in the judgment).

92. *Id.* at 2556-58 (White, J., concurring in the judgment).

93. *Id.* at 2556 (White, J., concurring in the judgment).

94. *Id.* (White, J., concurring in the judgment).

95. *Id.* at 2557 (White, J., concurring in the judgment).

96. *Id.* at 2560 (Blackmun, J., concurring in the judgment). Justice Blackmun is a native of St. Paul, which may explain in part why he filed a separate opinion, although agreeing fully with Justice White's analysis. Paul Gustafson, *Hate-Crime Ordinance Rejected; St. Paul Measure Limited Free Speech*, MINNEAPOLIS STAR TRIB., June 23, 1992, at A1.

97. *R.A.V.*, 112 S. Ct. at 2560 (Blackmun, J., concurring in the judgment).

98. *Id.* (Blackmun, J., concurring in the judgment). Justice Blackmun charged that the Court may have tailored its opinion to attack the political correctness movement, noting that if

Justice Stevens, in a separate opinion, also agreed with Justice White that the St. Paul ordinance was overbroad,[99] but rejected the categorical approach to First Amendment cases as too simplistic in its avoidance of questions of context.[100] The categorical approach treats complex issues as "all or nothing" questions and, thus, is unsound, according to Justice Stevens' analysis.[101] Justice Stevens also found the Court's content-neutral approach problematic.[102] He noted that despite its "simplistic appeal," the Court's determination that distinctions on the basis of content are invalid "lacks support in our First Amendment jurisprudence."[103] In Justice Stevens' view, prior First Amendment decisions by the Court applied a "more complex and subtle analysis," considering "the content and context of the regulated speech, and the nature and scope of the restriction on the speech."[104] Had the St. Paul hate-crimes ordinance not been overbroad, Justice Stevens contended that it could have been upheld under this more complex test because it "regulates speech not on the basis of its subject matter or the viewpoint expressed, but rather on the basis of the harm that the speech causes."[105]

It is well accepted that the "bedrock principle underlying the First Amendment . . . is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."[106] This overriding principle notwithstanding, the Supreme Court has long recognized several areas of expression that in appropriate cases are not protected by the First Amendment's provision that "Congress shall make no law . . . abridging the freedom of speech, or of the press."[107] The areas falling outside the First Amendment are libel,[108] obscenity,[109] commercial speech,[110] and fighting words.[111] Of

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this were the case, the Court's decision was "even more regrettable." *Id.* at 2561 (Blackmun, J., concurring in the judgment).

99. *Id.* (Stevens, J., concurring in the judgment). Justice Stevens agreed with Justice White that, despite the Minnesota court's narrowing, the ordinance remained facially overbroad—going beyond proscribing fighting words to punish protected expression that causes hurt feelings or resentment. *Id.* (Stevens, J., concurring in the judgment).

100. *Id.* at 2566 (Stevens, J., concurring in the judgment).

101. *Id.* at 2567 (Stevens, J., concurring in the judgment).

102. *Id.* at 2566 (Stevens, J., concurring in the judgment).

103. *Id.* (Stevens, J., concurring in the judgment).

104. *Id.* at 2567 (Stevens, J., concurring in the judgment).

105. *Id.* at 2570 (Stevens, J., concurring in the judgment). Justice Stevens argued that hate-crimes legislation is aimed at punishing conduct, not expression. *Id.* (Stevens, J., concurring in the judgment).

106. Texas v. Johnson, 491 U.S. 397, 414 (1989).

107. U.S. CONST. amend. I.

108. *See, e.g.*, Philadelphia Newspapers Inc. v. Hepps, 475 U.S. 767, 776 (1986) (holding that plaintiffs suing newspapers for libel in matters of public concern must prove that the published statements are false); *see also* Gertz v. Robert Welch, Inc., 418 U.S. 323, 347-48

these exceptions, the fighting words exception is perhaps the narrowest;[112] the Court has applied it only once.[113]

The Court recognized the fighting-words exception more than fifty years ago in *Chaplinsky v. New Hampshire*.[114] Chaplinsky, a street preacher, had been addressing passers-by in Rochester, New Hampshire, when a disturbance occurred.[115] When a police officer started to take Chaplinsky to the police station, they met the City Marshal. Chaplinsky called the marshal a "God damned racketeer"[116] and a "damned Fascist."[117] The officer then charged Chaplinsky with violating a New Hampshire ordinance that prohibited breaches of the peace by calling another person an offensive name in a public place.[118] The trial court convicted Chaplinsky,[119] and the state appellate courts upheld his con-

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(1974) (holding that states may not enact strict liability laws for libel for private figures); New York Times Co. v. Sullivan, 376 U.S. 254, 283 (1964) (stating that a public figure must show that the statements were published with actual malice in order to prove libel).

109. *See, e.g.*, Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 506-07 (1985) (holding that a state can enact regulations outlawing pornographic movie theaters as a moral nuisance since obscenity is unprotected expression); *see also* Paris Adult Theatre I v. Slaton, 413 U.S. 49, 68-69 (1973) (holding that it is within the state's interest to control obscenity in order to maintain the quality of life and total community environment); Miller v. California, 413 U.S. 15, 24 (1973) (holding that to be deemed obscene, a work must depict sexual activity in a way that violates community standards and lacks serious literary, artistic, political, or scientific value); Roth v. United States, 354 U.S. 476, 484-85 (1957) (holding that obscenity is utterly without redeeming social importance and thus is outside the protection of the First Amendment).

110. *See, e.g.*, Board of Trustees of the State Univ. of New York v. Fox, 492 U.S. 469, 475-81 (1989) (holding that the state can restrict commercial speech if the measures are narrowly tailored to achieve the desired objective and do not regulate expression fully protected by the First Amendment); *see also* Friedman v. Rogers, 440 U.S. 1, 9-10 (1979) (stating that false, misleading, and deceptive advertising is not protected under the First Amendment); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 770-73 (1976) (stating that commercial speech does not enjoy the same degree of protection as political speech, the core First Amendment expression, because it is more easily verifiable).

111. *See infra* notes 114-80 and accompanying text; *see also* Stephen W. Gard, *Fighting Words as Free Speech*, 58 WASH. U. L.Q. 531, 580-81 (1980) (analyzing the fighting-words exception); Thomas F. Shea, *Don't Bother to Smile When You Call Me That—Fighting Words and the First Amendment*, 63 KY. L.J. 1, 21-22 (1974) (same). Shea concluded that the fighting words exception is valid, but that the Supreme Court's decisions have made it impossible to apply. *Id.* Gard argued that the fighting words exception is no longer valid in today's world and should be expressly overruled by the Supreme Court. Gard, *supra*, at 580-81.

112. Gard, *supra* note 111, at 531.

113. Brief for Petitioner at 18-19, *R.A.V.* (No. 90-7675); *see also* Strossen, *supra* note 1, at 510 (analyzing the Court's application of the fighting-words exception).

114. 315 U.S. 568, 573 (1942).

115. *Id.* at 569.

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

viction,[120] despite Chaplinsky's contention that the law was invalid under the First and Fourteenth Amendments.[121] The Supreme Court unanimously affirmed Chaplinksy's conviction.[122] The Court held that fighting words, those offensive words "which by their very utterance inflict injury or tend to incite an immediate breach of the peace," are not constitutionally protected.[123] Writing for the Court, Justice Murphy reasoned that fighting words do not deserve constitutional protection because they are not an "essential part of any exposition of ideas, and are of such slight social value . . . that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."[124] The Court, however, limited the ban on fighting words to immediate face-to-face verbal encounters.[125]

The Court narrowed the fighting-words doctrine in *Terminiello v. Chicago*,[126] which also involved a breach of the peace statute. Terminiello, a suspended priest, denounced blacks and Jews[127] during a speech in Chicago and referred to a violent mob outside as "slimy scum."[128] Police charged Terminiello with violating a city ordinance prohibiting disorderly conduct.[129] The trial court instructed the jury that the ordinance outlawed speech that "stirs the public to anger, invites dispute, brings about a condition of unrest, or creates a disturbance."[130] The Supreme Court reversed the conviction, holding that the ordinance as construed by the Illinois courts[131] was unconstitutionally overbroad.[132] The Court rejected the principle that the First Amendment permits the

120. *Id.* The New Hampshire Supreme Court's decision is reported in State v. Chaplinsky, 91 N.H. 310, 18 A.2d 754 (1941).

121. *Chaplinsky*, 315 U.S. at 569.

122. *Id.* at 574.

123. *Id.* at 572 (stating that the test for offensiveness "is not to be defined in terms of what a particular addressee thinks," but rather what a person of common intelligence would understand to be "words likely to cause an average addressee to fight").

124. *Id.*

125. *Id.*

126. 337 U.S. 1 (1949).

127. *Id.* at 3.

128. *Id.* at 26 (Jackson, J., dissenting).

129. *Id.* at 3.

130. *Id.* Terminiello did not object to the judge's instructions to the jury. *Id.*

131. *Id.* at 5. The Illinois courts had construed the ordinance to allow conviction of Terminiello "if his speech stirred people to anger, invited public dispute, or brought about a condition of unrest." *Id.* The Court noted that "[a] conviction resting on any of those grounds may not stand." *Id.* The state court decision is reported in Terminiello v. Chicago, 400 Ill. 23, 79 N.E.2d 39 (1948).

132. *Terminiello*, 337 U.S. at 4-5. See *supra* note 35 for an explanation of the overbreadth doctrine.

silencing of a speaker who provokes a hostile reaction from a crowd.[133] Instead, the Court determined that to be constitutionally unprotected fighting words, the words must create in an intended recipient, not the public in general, an immediate, uncontrolled, violent response.[134] Writing for the Court, Justice Douglas noted that it was the purpose of the First Amendment 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. That is why freedom of speech, though not absolute, . . . is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest. . . . There is no room under our Constitution for a more restrictive view. For the alternative would lead to standardization of ideas either by legislatures, courts, or dominant political or community groups.[135]

Because the ordinance, as construed by the trial court, compelled a conviction for behavior that affected a response in the public in general, it could not withstand constitutional scrutiny.[136]

In *Cohen v. California*,[137] the Court reiterated the *Terminiello* holding that fighting words must be directed not toward the general public, but toward a specific individual. Police arrested Cohen while in a Los Angeles courthouse for wearing a jacket that bore on its back the anti-Vietnam War message "Fuck the Draft."[138] The trial court convicted

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133. *Terminiello*, 337 U.S. at 4-5.

134. *Id.*

135. *Id.*

136. *Id.* Chief Justice Vinson, Justice Frankfurter, and Justice Jackson filed separate dissenting opinions. *Id.* at 6 (Vinson, C.J., dissenting); *id.* at 8 (Frankfurter, J., dissenting); *id.* at 13 (Jackson, J., dissenting). Justice Burton joined Justice Frankfurter in his dissent. *Id.* at 8 (Frankfurter, J., dissenting). Chief Justice Vinson asserted that the Court "revers[ed] . . . because it discover[ed] in the record one sentence in the trial court's instructions which permitted the jury to convict on an unconstitutional basis. The offending sentence had heretofore gone completely undetected. It apparently was not even noticed, much less excepted to, by the petitioner's counsel at the trial." *Id.* at 6-7 (Vinson, C.J., dissenting). Justice Jackson also warned that the Court's decision meant that governments could do little to curb troublesome subversives: "Terminiello's victory today certainly fulfills the most extravagant hopes of both right and left totalitarian groups, who want nothing so much as to paralyze and discredit the only democratic authority that can curb them in their battle for the streets." *Id.* at 25 (Jackson, J., dissenting).

137. 403 U.S. 15 (1971).

138. *Id.* at 16.

Cohen of violating an ordinance against breaches of the peace.[139] The California Court of Appeals affirmed Cohen's conviction under the fighting-words doctrine, holding that the offensive conduct required to constitute fighting words included "behavior which has a tendency to provoke others to acts of violence or to in turn disturb the peace."[140] The Supreme Court reversed, determining that the fighting-words exception did not apply.[141] The Court, reaffirming *Terminiello*, noted that the message on Cohen's jacket was not directed toward a specific person.[142] Moreover, Cohen had not attempted to incite imminent violent action, and no violent outburst had occurred in reaction to his jacket.[143]

Justice Blackmun, in dissent,[144] contended that because the California law prohibited conduct, not speech, Cohen's conviction should be upheld.[145] Justice Blackmun also maintained that even if the California law was directed at speech, it was constitutional under the Court's analysis in *Chaplinsky*, because Cohen's "absurd and immature antic" could prompt the average viewer into a fighting rage.[146] The Court's decision to reverse Cohen's conviction undermined the fighting-words exception, Justice Blackmun argued.[147]

In its next fighting-words case, *Gooding v. Wilson*,[148] the Court relied on the overbreadth doctrine to strike down a Georgia statute.[149] Wilson, during an anti-Vietnam War protest at a U.S. Army headquar-

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139. *Id.*

140. *Id.* at 17 (quoting People v. Cohen, 1 Cal. App. 3d 94, 99, 81 Cal. Rptr. 503, 506 (1969), *rev'd*, 403 U.S. 15 (1971)).

141. *Id.* at 19-20.

142. *Id.*

143. *Id.* After deciding the message on Cohen's jacket did not constitute fighting words, the Court then wrestled with a new issue: whether the message could be punished because it was a vulgar expression thrust upon an unwilling audience. *Id.* at 25. The Court determined that such punishment was unmerited. *Id.* Writing for the majority, Justice Harlan noted that:

> [W]hile the particular four-letter word being litigated here is perhaps more distasteful than most others of its genre, it is nevertheless often true that one man's vulgarity is another's lyric. Indeed, we think it is largely because governmental officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual.

Id.

144. *Id.* at 27 (Blackmun, J., dissenting).

145. *Id.* (Blackmun, J., dissenting). The Court has determined that the First Amendment does not protect pure conduct. *See, e.g.*, United States v. O'Brien, 391 U.S. 367, 377 (1968) (asserting that the government may regulate conduct if the governmental interest is unrelated to freedom of expression).

146. *Cohen*, 403 U.S. at 27 (Blackmun, J., dissenting).

147. *Id.* (Blackmun, J., dissenting).

148. 405 U.S. 518 (1972).

149. *Id.* at 519; *see also supra* note 35 (describing the use of the overbreadth doctrine to invalidate state legislation).

ters in Georgia, blocked an entrance so that arriving inductees could not enter.[150] When two police officers attempted to remove him, Wilson told one of them, "White son of a bitch, I'll kill you."[151] He said to the other, "You son of a bitch, if you ever put your hands on me again, I'll cut you all to pieces."[152] The trial court subsequently convicted Wilson of violating the Georgia breach of peace statute,[153] and the Georgia appellate courts affirmed the conviction. The Supreme Court reversed, finding the statute facially unconstitutional because the Georgia courts had not construed it narrowly to apply only to fighting words.[154] In its decision, the Court did not answer the question whether the words uttered by Wilson constituted fighting words.[155] Instead, the Court held that the First Amendment requires that the governing statute be narrowly drawn so it does not also encompass constitutionally protected speech.[156] Under this analysis, the Georgia statute was unconstitutionally overbroad because, in addition to fighting words, it also prohibited expression that was merely offensive, vulgar, or insulting to the person to whom it was directed.[157] Writing for the majority, Justice Brennan noted that the statute as interpreted made it a " 'breach of peace' merely to speak words offensive to some who hear them, and so sweeps too broadly."[158]

Justice Blackmun, in his dissent, asserted that the Court's holding effectively overruled *Chaplinsky* and made fighting words protected speech under the First Amendment.[159] "For me, *Chaplinsky v. New Hampshire* was good law when it was decided and deserves to remain as good law now," Justice Blackmun wrote, "But I feel that by decisions such as this one . . . the Court, despite its protestations to the contrary, is merely paying lip service to *Chaplinsky*."[160]

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150. *Gooding*, 405 U.S. at 519-20 n.1.

151. *Id.*

152. *Id.*

153. *Id.* at 518-19 (citing GA. CODE ANN. § 26-6303 (1972)). The decision of the Georgia Supreme Court is reported as Wilson v. Georgia, 223 Ga. 531, 156 S.E.2d 446 (1967).

154. *Gooding*, 405 U.S. at 524-28. A court can construe a statute narrowly in order to avoid striking it down as overbroad. *See, e.g.*, Broadrick v. Oklahoma, 413 U.S. 601, 613-16 (1973) (asserting that the overbroad doctrine should be used only as a last resort); Dombrowski v. Pfister, 380 U.S. 479, 490-91 (1965) (asserting that a court can narrow an overbroad statute to cure the overbreadth problem).

155. *Gooding*, 405 U.S. at 519-20.

156. *Id.* at 520.

157. *Id.* at 525-27.

158. *Id.* at 527.

159. *Id.* at 528 (Blackmun, J., dissenting).

160. *Id.* at 536. (Blackmun, J., dissenting). Some commentators have agreed with Justice Blackmun that *Gooding* overruled *Chaplinsky*. *See, e.g.*, Shea, *supra* note 111, at 14-15 ("In arriving at these conclusions the majority adopted a definition of fighting words which, for all

The Court in subsequent decisions relied on *Gooding* to invalidate other state and local laws aimed at prohibiting offensive speech or fighting words.[161] In *Lewis v. New Orleans*,[162] for example, the Court struck down a New Orleans ordinance that criminalized "curs[ing] or revil[ing] or . . . us[ing] obscene or opprobrious language toward or with reference" to an on-duty police officer.[163] A police officer stopped Lewis and her husband while they followed another police patrol car in which their son was being carried to a police stationhouse.[164] Lewis, upset at being stopped, allegedly called the officer "a god damn m.f. police."[165] The Louisiana Supreme Court, using the *Gooding* decision as a guideline, upheld Lewis' conviction after construing the New Orleans ordinance narrowly to pertain only to fighting words.[166] Because the Louisiana court had not actually narrowed or constrained the wording of the ordinance in its decision, the Supreme Court rejected this construction.[167] Justice Brennan, writing for the Court, noted that the statute remained facially overbroad,[168] despite the Louisiana court's interpretation, because it could be used to punish "speech, although vulgar or offensive, that is protected by the First and Fourteenth Amendments."[169]

More recently, in *Houston v. Hill*,[170] the Court again used an over-

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practical purposes, removed them from unprotected status and placed them under the guardianship of the First Amendment.").

161. *See, e.g.*, Houston v. Hill, 482 U.S. 451, 462 (1987); Lewis v. New Orleans, 415 U.S. 130, 131 (1974) [hereinafter *Lewis II*]; Lewis v. New Orleans, 408 U.S. 913, 913 (1972) [hereinafter *Lewis I*].

162. 415 U.S. 130 (1974).

163. *Id.* at 132.

164. *Id.* at 131 n.1.

165. *Id.* at 131.

166. *Id. Lewis* had been remanded to the Louisiana court by the Supreme Court following *Gooding*. See *Lewis I*, 408 U.S. 913 (1972), for the Court's original decision, and Lewis v. New Orleans, 263 La. 809, 827, 269 So. 2d 450, 456 (1973), for the Louisiana court's decision following remand.

167. *Lewis II*, 415 U.S. at 132.

168. *Id.* The Court found that the Louisiana court "did not refine or narrow" the ordinance, but instead took the position that the ordinance as written "is narrowed to 'fighting words' uttered to specific persons at a specific time." *Id.* (quoting Lewis v. New Orleans, 263 La. 809, 826, 269 So. 2d 450, 456 (1973)).

169. *Id.* at 134. Justice Blackmun, joined by Chief Justice Burger and Justice Rehnquist, dissented from the Court's opinion on grounds that the Louisiana court's construction of the statute cured any overbreadth problems. *Id.* at 136 (Blackmun, J., dissenting). Justice Powell filed a concurring opinion, in which he argued that the fighting-words exception should not be used for laws punishing citizens in confrontations with police. *Id.* at 134 (Powell, J., concurring). In Justice Powell's view, police officers, because of their training, are less likely to respond to fighting words than are average citizens. *Id.* (Powell, J., concurring).

170. 482 U.S. 451 (1987).

breadth analysis to strike down a Houston, Texas ordinance.[171] The ordinance at issue prohibited the interruption of police officers during an investigation, barring anyone from "willfully or intentionally interrupting a city policeman . . . by verbal challenge during an investigation."[172] Hill, upon seeing a friend's car stopped by police officers, had shouted, "Why don't you pick on someone your own size?"[173] One of the officers then asked, "Are you interrupting me in my official capacity as a Houston police officer?"[174] Hill responded, "Yes, why don't you pick on someone my size."[175] The trial court found Hill not guilty of violating the ordinance, but he then filed suit in federal district court seeking a declaratory judgment that the ordinance was unconstitutional.[176] The district court upheld the ordinance, but an appeals court reversed.[177] The city appealed to the Supreme Court, which agreed that the ordinance was unconstitutionally overbroad. The Court found the ordinance was not limited to fighting words but prohibited expression that in any manner interrupts an officer.[178] "The Constitution does not allow such speech to be made a crime," Justice Brennan wrote in the Court's opinion. "The freedom of individuals verbally to oppose or challenge police action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state."[179] Four Justices dissented.[180]

As the preceding discussion indicates, prior to its decision in *R.A.V. v. City of St. Paul*, the Court in various fighting-words cases had identi-

171. *Id.* at 472.

172. *Id.* at 454 (quoting HOUSTON, TEX., CODE § 34-11(a) (1984)).

173. *Id.* Hill, a well-known civil and gay rights activist in Houston, had been involved in other disputes with the police. *Id.* at 453.

174. *Id.* at 454.

175. *Id.*

176. *Id.* at 455.

177. *Id.* at 455-56. The court of appeals opinion is reported as Hill v. Houston, 789 F.2d 1103, 1110-11 (5th Cir. 1986).

178. *Hill*, 482 U.S. at 472.

179. *Id.* at 462-63.

180. *Id.* at 473 (Powell, J., concurring in part, dissenting in part). Justice Powell was joined by Chief Justice Rehnquist and Justices O'Connor and Scalia. *Id.* (Powell, J., concurring in part, dissenting in part). Justice Powell concurred in the Court's decision that the Houston ordinance was unconstitutional. *Id.* (Powell, J., concurring in part, dissenting in part). He dissented, however, from the Court's determination that the ordinance was properly before it for review. *Id.* at 473-75 (Powell, J., concurring in part, dissenting in part). Powell asserted that the ordinance should be remanded to the Texas state courts for an interpretation, noting that a state statute should not be interpreted by the Court without prior state adjudication. *Id.* at 475 (Powell, J., concurring in part, dissenting in part). Chief Justice Rehnquist also wrote a separate dissent, asserting that the Court should uphold the ordinance as constitutional because no authoritative construction had been provided by the state courts. *Id.* at 481-82 (Rehnquist, C.J., dissenting).

fied five elements that must be present in order to sustain a conviction under the fighting-words doctrine.[181] One, the statute in question must punish only those expressions that constitute extremely provocative insults.[182] Two, the expressions must have a direct tendency to cause an immediate, violent response by the average recipient.[183] Three, the expressions must be made in a face-to-face encounter.[184] Four, the expressions must be directed toward a specific individual, not a group.[185] Five, the law prohibiting the fighting words must not be broadly drawn to encompass constitutionally protected expression.[186]

In *R.A.V.*, the Court introduced a sixth required element: The statute must criminalize all fighting words, not merely a special subset selected by the government.[187] According to the Court's analysis, this ensures that when fighting words are expressed, no one side will have an unfair advantage dictated by the state.[188] Laws prohibiting fighting words, thus, must be content-neutral to withstand constitutional scrutiny.[189] Singling out racist, sexist, or anti-religious expression for special punishment as fighting words, as St. Paul did in its hate-crimes ordinance, violates the Court's content-neutral standard for proscribable speech because it does not punish all fighting words equally.[190] The Court noted, as an example, that fighting words denouncing Catholics could be punished under St. Paul's ordinance, but words denouncing anti-Catholic bigots, however odious, could not.[191] Thus, the Court de-

181. *See supra* notes 114-80.

182. *See, e.g.*, Cohen v. California, 403 U.S. 15, 20 (1971).

183. *See, e.g.*, Chaplinsky v. New Hampshire, 315 U.S. 568, 573 (1942).

184. *Id.*

185. *See, e.g.*, Terminiello v. Chicago, 337 U.S. 1, 4-5 (1949).

186. *See, e.g.*, Gooding v. Wilson, 405 U.S. 518, 520-21 (1972).

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

188. *Id.*

189. *Id.*

190. *Id.* at 2547-48.

191. *Id.* at 2548. Attorneys for the American Civil Liberties Union (ACLU) made a similar argument in their amicus brief in *R.A.V.*, but reached a different conclusion. The ACLU noted that any type of speech including derogatory remarks based on race, gender, or religion would be illegal under the ordinance; thus, even the side holding up the sign denouncing anti-Catholic bigots would be subject to punishment. Brief Amicus Curiae of the American Civil Liberties Union, Minnesota Civil Liberties Union, and American Jewish Congress In Support of Petitioner at 7-8, *R.A.V.* (No. 90-7675). Unlike the *R.A.V.* Court, the ACLU attorneys' argument for striking down the ordinance was based on its overbreadth: that the ordinance regulated a significant amount of protected speech, along with expression that may be regulated legitimately under the fighting-words doctrine. *Id.* The ACLU contended that:

> The reach of this prohibition is extraordinary. . . . For example, a resident of St. Paul who erected a billboard on his own property expressing his own view that women belonged at home rather than at work could easily be subject to prosecution under the literal terms of this ordinance. Even more extraordinarily, the victims in this

termined that the St. Paul ordinance, even as narrowly construed by the lower court, must be rejected because it promotes viewpoint discrimination by prohibiting " 'fighting words' that insult, or provoke violence, 'on a basis of race, color, creed, religion or gender.' "[192] The First Amendment, as the Court correctly noted, prohibits even the possibility of viewpoint discrimination.[193]

On one level, the content-neutrality test articulated by the Court in *R.A.V.* seems clear and concise, and it underscores the importance of First Amendment protections for disturbing speech.[194] Nonetheless, certain weaknesses exist in the Court's opinion, including problems with the Court's overbreadth analysis, the uncertainty of the protections afforded by the Court's content-neutrality approach, and the effect of the Court's exceptions to its content-neutrality test on the viability of the test.

In its overbreadth discussion, the Court accepted the Minnesota court's interpretation that the St. Paul ordinance "reaches only those expressions that constitute 'fighting words' within the meaning of *Chaplinsky*."[195] It then devised its content-neutral test, failing to acknowledge that it could always reject a fighting-words statute as facially overbroad if the state court's construction failed to cure the overbreadth problem. The Court's decision in *Lewis v. New Orleans*[196] is a prior example of when it did this in a fighting-words case. As in *Lewis*, the Court could have rejected the St. Paul ordinance as overbroad on the theory that the ordinance criminalizes not only fighting words, but also speech that is protected by the First Amendment.[197] The overbreadth doctrine is a familiar test, which prevents a chilling effect on expression protected by the First Amendment.[198] The doctrine protects those expressions that fall short of being fighting words because they merely cause hurt feelings, offense, or resentment.[199] Viktora's attorneys argued that the ordinance should be rejected as facially overbroad.[200] The four Justices who con-

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case would be facing prosecution if they responded to the cross burning by placing a sign on his front lawn condemning white racism.

Id. at 8-9.

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

193. *Id.* at 2547-48.

194. *Id.* at 2547-50.

195. *Id.* at 2542.

196. 415 U.S. 130 (1974); *see supra* notes 162-69 and accompanying text.

197. *R.A.V.*, 112 S. Ct. at 2559 (White, J., concurring in the judgment); *id.* at 2560 (Blackmun, J., concurring in the judgment); *id.* at 2561 (Stevens, J., concurring in the judgment); *see also supra* notes 81-105 and accompanying text (discussing the three opinions).

198. *See supra* notes 148-80 and accompanying text.

199. *See supra* notes 148-80 and accompanying text.

200. *See supra* note 48.

curred in the judgment favored invalidating the ordinance as overbroad in part because the overbreadth doctrine has proven reliable.[201]

The Court did not demonstrate that its content-neutral doctrine, which Justice White labeled the "underbreadth doctrine," is as beneficial as the overbreadth doctrine. Indeed, the content-neutral doctrine provides protection to expression outside the scope of the First Amendment;[202] as demonstrated in *R.A.V.*, this doctrine invalidates hate-crimes laws even if they outlaw only specific unconstitutional fighting words. As Justice Stevens pointed out, the Court's decision arguably gives fighting words the same protection as political speech, the most protected form of expression under the First Amendment, and more protection than is authorized for commercial speech, a form of expression that the Court has allowed to be regulated.[203] It may be that the Court in *R.A.V.*, despite its assurances to the contrary, is paying only lip service to the fighting-words doctrine. In other words, *R.A.V.* may in effect prohibit states from banning any fighting words. Alternatively, it may be that the Court's content-neutral doctrine is a Trojan Horse of sorts. Justice Blackmun asserted that *R.A.V.* in time will serve to erode the protection provided by the First Amendment.[204] In order to ban hate crimes, the states will decide to enact wider bans that criminalize all fighting words. Only time will tell whether the Court's content-neutral test will serve to give less protection to all expressions or more protection to fighting words.

Another problem with the majority's analysis is that the Court's test is contrary to prior First Amendment cases, in which content analysis played a major role.[205] Whether expression falls into the category of protected speech or unprotected speech is largely determined by content. As Justice Stevens noted in *R.A.V.*, content analysis has always played a major role in determining "[w]hether a magazine is obscene, a gesture a fighting word, or a photograph child pornography."[206] Although the *R.A.V.* Court contended that it was not abandoning this approach to

201. *R.A.V.*, 112 S. Ct. at 2550 (White, J., concurring in the judgment); *see supra* notes 81-105 and accompanying text.

202. *See R.A.V.*, 112 S. Ct. at 2553 (White, J., concurring in the judgment); *id.* at 2563 (Stevens, J., concurring in the judgment); *supra* notes 81-105 and accompanying text.

203. *R.A.V.*, 112 S. Ct. at 2564-65 (Stevens, J., concurring in the judgment).

204. *Id.* at 2560 (Blackmun, J., concurring in the judgment); *see supra* notes 96-98 and accompanying text. Justice Blackmun implies that legislators may choose to criminalize a wide variety of expression in order to circumvent the *R.A.V.* decision and outlaw racist, sexist, and anti-religious slurs. *R.A.V.*, 112 S. Ct. at 2560 (Blackmun, J., concurring in the judgment).

205. *See supra* notes 114-86 and accompanying text.

206. *R.A.V.*, 112 S. Ct. at 2563 (Stevens, J., concurring in the judgment).

First Amendment analysis, its opinion belies this contention.[207] If the test must be content-neutral, how can content be taken into account, even in an attempt to determine whether an expression fits into one of the categories recognized as being outside the First Amendment?

A final difficulty with the Court's opinion centers on the exceptions it created to the content-neutral doctrine in an attempt to limit *R.A.V.* to only fighting words.[208] The exceptions seem to invalidate the doctrine, as Justice White adroitly pointed out.[209] The Court's first exception, which allows subsets of fully proscribable expression to be proscribed when there is little danger of viewpoint discrimination,[210] calls into question the decision that the St. Paul hate-crimes ordinance is not permissible. If all fighting words are outside the scope of the First Amendment, then a statute criminalizing only those fighting words aimed at race, color, creed, religion, or gender would appear permissible.[211] The Court's second exception to its content-neutral rule, allowing a subset of proscribable expression to be outlawed if swept up by regulations aimed at criminalizing conduct,[212] also calls into question the determination that the St. Paul hate-crimes ordinance is invalid under the content-neutral rule. The St. Paul ordinance is aimed at outlawing offensive, hateful conduct; the proscribable expression is only becoming swept up in this ban.[213] The Court, however, asserted that the St. Paul ordinance does not fall within either exception because fighting words are simply a non-speech mode of communication, rather than a content-based category, and thus cannot be regulated by subsets.[214] This misreads the Court's previous interpretation of fighting words—as a fully proscribable form of speech.[215] It undercuts the Court's rationale for finding the St. Paul hate-crimes ordinance unconstitutional under the content-neutral standard.

While the Court's reasoning for its holding and its First Amendment analysis are flawed, the Justices outside the majority do not provide a satisfactory alternative. All four concurring Justices found the St. Paul ordinance overbroad, but argued that hate-crimes laws, if they are nar-

207. *See id.* at 2545.

208. *Id.* at 2545-46; *see supra* notes 66-78 and accompanying text.

209. *R.A.V.*, 112 S. Ct. at 2556-58 (White, J., concurring in the judgment); *see supra* notes 92-95 and accompanying text.

210. *R.A.V.*, 112 S. Ct. at 2545; *see supra* notes 66-71 and accompanying text.

211. *R.A.V.*, 112 S. Ct. at 2556-58 (White, J., concurring in the judgment); *see supra* notes 92-95 and accompanying text.

212. *R.A.V.*, 112 S. Ct. at 2546-47; *see supra* notes 72-74 and accompanying text.

213. *See supra* note 33 and accompanying text.

214. *R.A.V.*, 112 S. Ct. at 2545.

215. *See supra* notes 114-80 and accompanying text.

rowly gauged, do not violate the First Amendment, a conclusion less appealing than the majority's. The First Amendment tests formulated by Justice White and Justice Stevens are arguably even more problematic than the Court's content-neutral test. Justice White's categorical test—either an expression is protected by the First Amendment or it is not—is clear-cut, but still troublesome because of its broadness. The test does not allow for fine-line distinctions in determining whether an expression is protected by the First Amendment because it ignores the aspect of context, which has played an important role in prior First Amendment decisions by the Court.[216] Justice Stevens, who rejected Justice White's test, correctly noted that to determine whether an expression is protected by the First Amendment, it must be judged in the context of its setting, use, and audience.[217] All three factors noted by Justice Stevens played a major role in the Court's fighting-words cases prior to *R.A.V.*;[218] none of these cases were decided on the pure categorical basis endorsed by Justice White. Because the overly simplistic categorical test ignores context, it sweeps too broadly and could erode First Amendment protections if used by courts.

Justice Stevens' test, however, is not much better. He suggested that a court view the expression in light of its content, context, and the nature and scope of the restriction.[219] Such a test seems too vague; it could lead to widely different results in different courts because it allows for subjective interpretation. Justice Stevens found that hate-crimes ordinances would be deemed valid under his test, as long as these laws are not overbroad.[220] Because Justice Stevens' test is not clearly and narrowly defined, a court could use it to reach the same conclusion as the Court in *R.A.V.*: hate-crimes laws are invalid because they restrict only certain viewpoints. A review of content and context, without more specific

216. *R.A.V.*, 112 S. Ct. at 2566 (Stevens, J., concurring in the judgment). Justice Stevens rejected Justice White's categorical test because it did not consider the context in which an expression is made. *See supra* notes 99-105 and accompanying text.

217. *R.A.V.*, 112 S. Ct. at 2566 (Stevens, J., concurring in the judgment). For fighting-words cases in which context was a factor in the Court's decision, see *supra* notes 126-34 and accompanying text (discussing Terminiello v. Chicago, 337 U.S. 1 (1949)) and notes 137-47 and accompanying text (discussing Cohen v. California, 403 U.S. 15 (1971)). Justice Stevens, however, did not rely on these cases to make his point. *R.A.V.*, 112 S. Ct. at 2566 (Stevens, J., concurring in the judgment). Instead, he cited his concurring opinion in New York v. Ferber, 458 U.S. 747 (1982), in which he argued that the state can freely regulate most nonobscene child pornography, but that such pornography may be protected by the First Amendment if it is part of a serious work of art or part of legitimate sociological or scientific study. *Id.* at 778 (Stevens, J., concurring).

218. *See supra* notes 114-86 and accompanying text.

219. *R.A.V.*, 112 S. Ct. at 2567 (Stevens, J., concurring in the judgment).

220. *Id.* at 2569-71 (Stevens, J., concurring in the judgment).

guidelines, invites court manipulation to achieve a desired result, rather than a fair decision.

Thus, despite its flaws, the Court's opinion in *R.A.V.* remains the most persuasive. The Court recognized that all hate-crimes laws conflict with the First Amendment, while the concurring Justices did not. Still, the Court would have provided more protection for offensive speech if it had specifically provided that all fighting words are protected by the First Amendment. As one commentator noted, the fighting-words exception "is, at best, a quaint remnant of a bygone morality."[221] Today, it is hard to argue realistically that any personally abusive expressions made in a face-to-face encounter are enough to prompt the average person into an uncontrollable fighting rage.[222] Besides being an antiquated doctrine, the fighting-words exception is problematic because it invites misuse; it provides the state an opportunity to silence opinions that are offensive to those in power.[223] The Court in *R.A.V.* made it more difficult, but not impossible, to use the fighting-words exception for these means.

The Court noted in *R.A.V.* that measures that do not jeopardize the First Amendment exist to punish cross burning and other bias crimes,[224] but it still did not address in a straightforward manner why hate-crimes legislation is unnecessary. Advocates of such legislation have argued that when it comes to racist speech, First Amendment values cannot be considered in the abstract "by presupposing a world characterized by equal opportunity and the absence of societally created and culturally ingrained racism."[225] In the real world of racial polarity, according to these advocates, the content-neutral doctrine is immoral because it serves only to keep racism alive.[226] The free marketplace of ideas advanced by the First Amendment can be realized only when minorities are encouraged to participate fully in that marketplace, these advocates contend, and that participation can be achieved only by outlawing racist speech.[227] This view of the marketplace of ideas concept is misguided,

221. Gard, *supra* note 111, at 580.

222. *Id.*

223. Commentators also have argued that the fighting-words exception should be overruled because it often has been used to create laws that restrict people from criticizing police officers. *See, e.g., id.* at 580. ("[I]t is almost uniformly invoked in a selective and discriminatory manner by law enforcement officials to punish trivial violations of a constitutionally impermissible interest in preventing criticism of official conduct.").

224. *See supra* notes 79-80 and accompanying text.

225. *See* Lawrence, *supra* note 1, at 437, 470-71.

226. *Id.* at 470-71.

227. *Id.* at 470-72. Lawrence argued that civil libertarians, by supporting free speech, have helped make minorities second-class citizens. "[I] am troubled that we have not listened to the

however. As first stated by Justice Holmes: "The ultimate good desired is better reached by free trade in ideas . . . the best test of truth is the power of the thought to get itself accepted in the competition of the market."[228] A ban on racist, sexist, and other discriminatory speech not only is contrary to Holmes' free marketplace of ideas, it also turns Ku Klux Klansmen, skinheads, and other racists into First Amendment martyrs in a society that greatly values free speech. Moreover, what guarantees would there be that the state would not use its power also to curb objectionable speech by minorities? The remedy for racist speech, as well as all other forms of intolerant speech, is to answer it with better arguments, not to suppress it with laws that will invoke sympathy for the hate-mongers. As Justice Brandeis stated: "If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression."[229]

Without clear-cut maxims denouncing curbs on speech and without expressly declaring fighting words to be protected speech, the full implications of the Court's decision in *R.A.V.* are unclear. First, while the Court clearly invalidated hate-crimes laws such as St. Paul's, it did not necessarily strike down all hate-crimes legislation.[230] An artfully worded ordinance may pass the *R.A.V.* test if it criminalizes all fighting words as defined by *Chaplinsky*. The difficulty arises, however, if the Court's decision is read to require a court reviewing such a statute also to apply the overbreadth test. If the answer is yes, as the Supreme Court implied in *R.A.V.*, then courts must use a possibly circular test of both content-neutrality and overbreadth when reviewing hate-crimes laws. The diffi-

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real victims, that we have shown so little empathy or understanding for their injury, and that we have abandoned those individuals whose race, gender, or sexual orientation provokes others to regard them as second class citizens." *Id.* at 436. For a direct response to Lawrence, see Strossen, *supra* note 1, at 559.

228. Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). Justice Holmes' dissent has been called "the root of modern First Amendment protections" and as such "has become as much a precedent as if it were a holding of the Court." SHELDON M. NOVICK, HONORABLE JUSTICE: THE LIFE OF OLIVER WENDELL HOLMES 473 n.87 (1989). The free-marketplace concept is rooted in John Milton's 1644 anti-censorship tract *Areopagiticia*, in which Milton argued against English censorship laws since truth will win out in any open encounter, and in John Stuart Mill's 1859 essay, *On Liberty*, which opined that the public benefitted from freedom of expression because it encourages enlightenment. JOHN E. NOWAK ET AL., CONSTITUTIONAL LAW § 16.6 (3d ed. 1986).

229. Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).

230. Most commentators in the popular press, however, have read the decision this way. *See* Hentoff, *supra* note 18, at A19. A few, however, have analyzed *R.A.V.* more carefully. *See, e.g., Fighting Words*, THE NATION, July 13, 1992, at 39 ("Justice Scalia's majority opinion is nearly as poorly drafted as the St. Paul ordinance itself.").

culties of devising and applying such a test may lead to conflicting results in the lower courts.

Also unanswered by the *R.A.V.* decision is whether campus speech codes, which some universities have adopted to outlaw racist and sexist expression, are unconstitutional. In some instances, the Court has given freer rein to schools to circumvent the First Amendment.[231] These decisions have been in the context of secondary education, however. Thus, it is unclear whether the Court's content-neutrality rule applies on the university campus.[232]

A further area of uncertainty involves the decision's effect, if any, on enhanced sentencing. *R.A.V.* arguably does not invalidate enhanced sentencing in crimes that are racially motivated. One state court, however, already has read *R.A.V.* as outlawing increased penalties for biased crimes.[233] Since the Court in *R.A.V.* distinguished between prohibiting conduct merely because of its expressive content (as in the St. Paul hate-crimes ordinance) and prohibiting conduct because of nonexpressive reasons (as in Title VII's ban on sexual harassment in the workplace), it

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231. *See, e.g.*, Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988). The Court in *Kuhlmeier* held that the public school administration's censorship of the student newspaper did not infringe upon the student newspaper editors' First Amendment rights. *Id.* at 266-67. The Court determined that students' First Amendment rights are not automatically coextensive with those of adults. *Id.* The *Kuhlmeier* Court also determined that the First Amendment rights of students must be applied in light of the special characteristics of the school environment. *Id.* The Court, however, left open the question whether its decision meant that university and college students do not enjoy full First Amendment protection for on-campus activities. *Id.* at 273 n.7. ("We need not now decide whether the same degree of deference is appropriate with respect to school-sponsored expressive activities at the college and university level."). Because this remains an open question, it is unclear whether *R.A.V.* strikes down campus speech codes, even if those codes violate *R.A.V.*'s content-neutrality requirement.

232. Nevertheless, at least one major university has read *R.A.V.* as prohibiting speech codes barring only racist and sexist speech. The University of Wisconsin repealed its speech code because of the Court's decision in *R.A.V.* Mary Jordan, *College Repeals Speech Code as National Backlash Grows*, WASH. POST, Sept. 12, 1992, at A1.

233. The Wisconsin Supreme Court struck down its state's enhanced sentencing law, which allowed for increased penalties for bias crimes, determining that the *R.A.V.* Court's content-neutral guidelines made such laws unconstitutional. State v. Mitchell, 169 Wis. 2d 153, 171-72, 485 N.W.2d 807, 815 (1992). The Supreme Court granted certiorari to determine whether the Wisconsin court correctly interpreted *R.A.V.* *Wisconsin v. Mitchell*, 113 S. Ct. 810 (1992). The Wisconsin court explained:

> While the St. Paul ordinance invalidated in *R.A.V.* is clearly distinguishable from the hate crimes statute in that it regulates fighting words rather than merely the actor's biased motive, the Court's analysis lends support to our conclusion that the Wisconsin legislature cannot criminalize bigoted thought with which it disagrees.
>
> . . . .
>
> Thus, the hate crimes statute is facially invalid because it directly punishes a defendant's constitutionally protected thought.

Mitchell, 169 Wis. 2d at 171-72, 485 N.W.2d at 815.

would appear that enhanced penalties for racially motivated crimes are permissible. Such penalties do not punish expression, but acts of discrimination.[234] Although the state court appears to have misinterpreted the *R.A.V.* content-neutrality test, its decision is evidence of the confusion arising from the *R.A.V.* holding.

Because the Court did not provide clear-cut answers in *R.A.V.*, it may have to settle this debate in a later case. In addition, the question whether campus speech codes are outlawed and whether all hate-crimes laws are void still awaits final determination. Although *R.A.V.* was the first hate-crimes case decided by the Court, it promises not to be the last since its ambiguity invites conflicting lower court decisions on statutes outlawing bias-crimes, as well as uncertainty among legislators on how to handle hate-crimes legislation.

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234. The Florida Supreme Court read *R.A.V.* this way, and affirmed its state's enhanced sentencing law. Dobbins v. Florida, No. 91-1953, 1992 Fla. App. LEXIS 10062, at *3-4 (Fla. Dist. Ct. App. Sept. 24, 1992). The court explained:

> *R.A.V.* dealt with an ordinance that expressly made criminal . . . the public expression of an intolerant opinion. We agree that the First Amendment prohibits intrusion into the rights of one to freely hold and express unpopular, even intolerant, opinions.
>
> But [Florida's enhanced sentencing law] does not punish intolerant opinions. Nor does it punish the oral or written expression of those opinions. It is only when one acts on such opinion to the injury of another that the statute permits enhancement.

Id. at *4-5.