FIRST AMENDMENT—FREE SPEECH—FIRST AMENDMENT PROHIBITS HATE CRIME LAWS THAT PUNISH ONLY FIGHTING WORDS BASED ON RACIAL, RELIGIOUS OR GENDER ANIMUS—*R.A.V. v. City of St. Paul*, 112 S. Ct. 2538 (1992).

Responding to a significant increase in reported crimes motivated by racism and other bias,[1] many legislatures and public universities have enacted anti-hate laws and speech codes proscribing bias-motivated violence and intimidation.[2] Many of

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[1] *See Hate Crime Statistics Act of 1988: Hearing on S. 702, 797, and S. 2000 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 100th Cong., 2d Sess. 20 (1988) (statement of Sen. Howard Metzenbaum) (noting that the Anti-Defamation League of B'Nai B'rith conducted a study on the growing number of hate crimes and found 3000 such crimes between 1980 and 1986, and that the number of hate crimes in the three year period 1985-1988 exceeded the number of crimes committed between 1968-1985); Brief for Amicus Curiae, The Anti-Defamation League of B'nai B'rith at 4, R.A.V. v. City of St. Paul, 112 S. Ct. 2538 (1992) (No. 90-7675) [hereinafter Brief for Anti-Defamation League] (reporting a significant increase in anti-semitic incidents, from 377 in 1980 to 1,685 in 1990); *An Outbreak of Bigotry*, TIME, May 28, 1990, at 35 (reporting the rise of bigotry throughout the world); MICHAEL NEWTON & JUDY A. NEWTON, RACIAL & RELIGIOUS VIOLENCE IN AMERICA xiii (1991) ("The past two decades have been characterized by some analysts as the era of the 'crazies,' typified by the explosion of random homicidal violence, serial and mass murderers, the emergence of bizarre political splinter groups and murderous cults.").

Bias-motivated violence has been defined as:

> "[A]n act or a threatened or attempted act of intimidation, harassment or physical force directed against any person, or group, or their property or advocate, motivated either in whole or in part by hostility to their real or perceived race, ethnic background, national origin, religious belief, sex, age, disability, or sexual orientation, with the intention of deterring the free exercise or enjoyment of any rights or privileges secured by the Constitution or the laws of the United States or the State of New York whether or not performed under color of law."

Virginia N. Lee, *Legislative Responses to Hate-Motivated Violence: The Massachusetts Experience and Beyond*, 25 HARV. C.R.-C.L. L. REV. 287, 288 (1990) (quoting Governor's Task Force on Bias-Related Violence, State of New York, Final Report 2 (1988)).

For an excellent analysis of the physical and psychological effects of hate crimes see Richard Delgado, *Words That Wound: A Tort Action For Racial Insults, Epithets, And Name Calling*, 17 HARV. C.R.-C.L. L. REV. 133, 135-49 (1982) (documenting the harmful effects of bias-motivated violence and the need for a tort remedy for such conduct).

Recently, commentators have argued that racist speech should not be a category of expression protected by the First Amendment. *See, e.g.*, Mari J. Matsuda, *Public Response To Racist Speech: Considering The Victim's Story*, 87 MICH. L. REV. 2320, 2380-81 (1989) (advocating the regulation of racist speech); Charles R. Lawrence, III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431, 436-37 (1990) (proposing the regulation of hateful speech on university campuses).

[2] *See* Brief for Anti-Defamation League, *supra* note 1, at 4 & App. A (offering a detailed list of various government hate crime statutes). An estimated 46 states

these enactments raise serious First Amendment[3] concerns because they attempt to regulate speech and non-verbal expression based on content.[4]

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have adopted some form of anti-hate legislation. *Id.* A variety of measures addressing racial violence have been adopted by these states. *See* Brief for Amici Curiae, The States of Minnesota, Alabama, Arizona, Connecticut, Idaho, Illinois, Kansas, Maryland, Massachusetts, Michigan, New Jersey, Ohio, Oklahoma, South Carolina, Tennessee, Virginia and Utah at 3, R.A.V. v. City of St. Paul, 112 S. Ct. 2538 (1992) (No. 90-7675) (noting that anti-hate laws address this problem in various ways, including prohibiting threatening speech, enhancing penalties for bias-motivated criminal activity, punishing bias-related vandalism, and criminalizing behavior that is inimical to the free exercise of civil rights). In enacting anti-hate laws, states have expounded compelling reasons to justify such legislation. *See, e.g.*, R.I. GEN. LAWS § 11-53-1 (Supp. 1992) (stating "it is the right of every person regardless of race, color, creed, religion, ideological persuasion, or national origin, to be secure and protected from fear, intimidation and physical harm caused by the activities of violent groups and individuals").

In response to the increase in bias-motivated violence, Congress also recently passed the Hate Crime Statistics Act, which requires the Justice Department to collect and report nationwide data on hate crimes. Pub. L. No. 101-275, 104 Stat. 140 (1990) (codified as 28 U.S.C. § 534 (1990 Supp.)).

Similarly, many universities have adopted conduct codes prohibiting or censuring particular forms of expression in response to a resurgence in racial tensions on college campuses. *See* Steve France, *Hate Goes To College*, A.B.A. J., July 1990, at 44; Lawrence, *supra* note 1, at 434. Currently, speech codes are in effect at about 350 colleges and universities. Carol Innerst, *Senate Silence Expected on Proposal Defending Free Speech on Campus*, WASHINGTON TIMES, Sept. 11, 1992, at A10. Some commentators, however, question the constitutionality of such codes because they attempt to regulate the content of expression. *See, e.g.*, Nadine Strossen, *Regulating Racist Speech On Campus: A Modest Proposal?*, 1990 DUKE L.J. 484, 569-70 (1990) (criticizing the regulation of speech on American campuses); DINESH D'SOUZA, ILLIBERAL EDUCATION: THE POLITICS OF RACE AND SEX ON CAMPUS 156 (1992) (noting that "the efforts of . . . schools 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 sure footing for equality").

[3] U.S. CONST. amend. I. The First Amendment to the United States Constitution provides:

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

Since 1925, the Supreme Court has declared that the Fourteenth Amendment protected freedom of expression from state infringement. *See* Gitlow v. New York, 268 U.S. 652, 666 (1925). For an analysis of the political and social reasons behind the right of free speech, see COMMISSION ON THE BICENTENNIAL OF THE UNITED STATES CONSTITUTION, 1791-1991: THE BILL OF RIGHTS AND BEYOND 17 (Herbert M. Atherton & J. Jackson Barlow eds., 1991) (proclaiming the populous must have the right of free speech because only "informed and involved citizens" can ensure the survival of the American democratic system); Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 884-85 (1963) (positing that the suppression of speech prevents healthy action and change).

[4] *See, e.g.*, Texas v. Johnson, 491 U.S. 397, 414 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not pro-

The United States Supreme Court has historically disdained laws that regulate expression on the basis of content.[5] The Court's bias against content-based regulations, however, has not been absolute.[6] Essentially, the Court has developed a number of categorical exceptions to the general principle of governmental neutrality toward regulating expression.[7] These exceptions—obscenity,[8] libel,[9] incitement to riot,[10] fighting words[11] and com-

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hibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."). The Supreme Court has held that various types of non-verbal expression constitute protected speech. *See, e.g.*, United States v. Eichman, 110 S. Ct. 2404, 2407-08, 2410 (1990) (holding that burning the flag was protected symbolic expression); Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 505-06 (1969) (deciding that wearing black arm bands in protest of the Vietnam War was protected by the First Amendment); Brown v. Louisiana, 383 U.S. 131, 141-42 (1966) (declaring that First Amendment protections "are not confined to verbal expression. They embrace appropriate types of action which certainly include the right in a peaceable and orderly manner to protest by silent and reproachful presence, in a place where the protestant has every right to be . . . ."). For an excellent discussion of symbolic speech, see Carmen J. DiMaria, Note, *State's Prohibition Against Nude Dancing Is Constitutional Because its Interest in Preserving Societal Orders and Morals is Both Sufficiently Substantial and Content Neutral*, 22 SETON HALL L. REV. 943, 943-44 (1992) (noting that the Court has long held that not all forms of expression are safeguarded).

[5] *See* Regan v. Time, Inc., 468 U.S. 641, 648-49 (1984) (asserting that "[r]egulations which permit the government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment"); Consolidated Edison Co. v. Public Service Comm'n, 447 U.S. 530, 537 (1980) (noting that the "First Amendment's hostility to content-based regulations extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic"); Police Dep't. of Chicago v. Mosley, 408 U.S. 92, 95 (1972) (declaring that "above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content"). For a discussion of content-based regulations see Kenneth L. Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20, 22 (1975).

[6] *See, e.g.*, Food Employees v. Logan Plaza, 391 U.S. 308, 320-21 (1968) (holding that "the exercise of First Amendment rights may be regulated where such exercise will unduly interfere with the normal use of the public property by other members of the public with an equal right of access to it"); Cox v. Louisiana, 379 U.S. 559, 563-64 (1965) (ruling that not all expression is protected under the First Amendment). *See generally* MELVILLE B. NIMMER, NIMMER ON FREEDOM OF SPEECH § 2.01, at 2-3 (1984) (stating that [the] absolutist position, whereby any law which for any reason and in any degree punishes or restricts speech is said to be unconstitutional, has never been accepted by the Supreme Court").

[7] *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942) ("There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problems."). See *infra* notes 8-13 and accompanying text for further discussion of these categorical exceptions.

[8] *See, e.g.*, Miller v. California, 413 U.S. 15, 23 (1973) (reaffirming that obscene materials are outside First Amendment protections); Roth v. United States, 354 U.S. 476, 485 (1957) (holding that obscenity was not constitutionally protected). For a further discussion of other obscenity cases see Mark J. Oberstaedt, Note,

mercial speech[12]—have been excluded from First Amendment protection or afforded a lesser degree of protection than other forms of expression, such as political discourse.[13]

Outside these narrowly-limited categories of speech the Court has reviewed content-based restrictions with strict scrutiny.[14] Regulations based upon content will not be permitted under this standard unless the government demonstrates that the law in question has been narrowly tailored to meet an overriding

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States May Proscribe Possession of Non-Obscene Child Pornography, 21 SETON HALL L. REV. 410 (1991).

9 *See, e.g.*, Milkovich v. Lorain Journal Co., 110 S. Ct. 2695, 2706-07 (1990) (holding that only defamatory remarks which can be proven false are subject to state libel law); Gertz v. Robert Welch, Inc., 418 U.S. 323, 347 (1974) (holding that states could punish false statements about non-public figures); New York Times v. Sullivan, 376 U.S. 254, 283 (1964) (holding that public figures must prove that a defendant acted with "actual malice" to prevail in a defamation suit); Beauharnais v. Illinois, 343 U.S. 250, 263 (1952) (upholding the constitutionality of a state statute prohibiting libel of a class of citizens). For a thorough discussion of defamation and the First Amendment see W. Page Keeton, *Defamation and Freedom of the Press*, 54 TEX. L. REV. 1221 (1976).

10 *See, e.g.*, Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (restating the principle that a state may not "forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action"); Feiner v. New York, 340 U.S. 315, 321 (1951) (ruling that when a "speaker passes the bounds of argument or persuasion and undertakes incitement to riot," such speech was unprotected by the First Amendment). For a defense of the modern clear and present danger test see Martin H. Redish, *Advocacy of Unlawful Conduct and the First Amendment: In Defense of Clear and Present Danger*, 70 CAL. L. REV. 1159, 1161 (1982) (stating that the clear and present danger test is subject to abuse but is still the best method for regulating "unlawful advocacy").

11 *See, e.g.*, *Chaplinsky*, 315 U.S. at 573 (holding that the First Amendment does not protect words which by their very utterance tend to incite a violent reaction in the person to whom they are addressed). *See generally* JEROME A. BARRON & C. THOMAS DIENES, HANDBOOK OF FREE SPEECH AND FREE PRESS § 3:2 (1979) (recounting the sources and grounds for the fighting words doctrine). For an in-depth study of *Chaplinsky* and the fighting words doctrine see *infra* notes 43-49 and accompanying text.

12 *See, e.g.*, Posadas de Puerto Rico Assocs. v. Tourism Co., 478 U.S. 328, 340 (1986) (noting that the First Amendment provided limited protection to commercial speech that addressed a lawful activity and was neither fraudulent nor misleading); Virginia Pharmacy Bd. v. Virginia Consumer Council, 425 U.S. 748, 771 (1976) (declaring that misleading commercial speech is unprotected by the First Amendment). For a discussion of commercial speech and the First Amendment, see JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 16.30 (4th ed. 1991); Daniel A. Farber, *Commercial Speech and the First Amendment Theory*, 74 NW. U. L. REV. 372 (1979).

13 *See Chaplinsky*, 315 U.S. at 572 (asserting that some expressions are "of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality"). See also *supra* notes 7-12 and accompanying text for a discussion of these unprotected categories.

14 Texas v. Johnson, 491 U.S. 397, 403 (1989) (holding that regulations aimed at

or compelling governmental interest.[15] Given the difficulty of meeting this exacting standard,[16] many legislators of hate laws and speech codes have attempted to fit their restrictions within the fighting words exception.[17]

Fighting words have been defined as those individually

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inhibiting expression are subject to a more exacting standard of review than regulations related to the suppression of "noncommunicative conduct").

As an alternative to content-based regulation, governmental proscription of expression may be content neutral and inflict only an indirect burden on free speech. *See* Konisberg v. State Bar of California, 366 U.S. 36, 50-51 (1961) (holding that "general regulatory statutes, not intended to control the content of speech but incidentally limiting its unfettered exercise, have not been regarded as the type of law the First or Fourteenth Amendments forbade Congress or the States to pass . . . .").

In United States v. O'Brien, the Supreme Court fashioned the most frequently used test for evaluating the constitutionality of a statute which imposed indirect burdens on expression. 391 U.S. 367, 376-77 (1968). The Court submitted that a government regulation was sufficiently justified "if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *Id.* at 377. *Cf.* MARTIN H. REDISH, FREEDOM OF EXPRESSION: A CRITICAL ANALYSIS 125-26 (1984) (recommending abolishing the content-based/content-neutral distinction in favor of a "compelling [governmental] interest" analysis each time the government proscribes expression).

15 United States v. Grace, 461 U.S. 171, 177 (1983) (stating that "an absolute prohibition on a particular type of expression will be upheld only if narrowly drawn to accomplish a compelling governmental interest"). See generally LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-8, at 833 (1988), wherein Professor Tribe declares:

> In order to establish that particular expressive activities are not protected by the [F]irst [A]mendment, the defenders of a regulation which is aimed at the communicative impact of the expression have the burden of either coming within one of the narrow categorical exceptions or showing that the regulation is necessary to further a "compelling interest."

Id.

16 *See Johnson*, 491 U.S. at 411-12, 420 (holding that a flag burning statute designed to prosecute only those acts which are likely to offend an observer was invalid under strict scrutiny); Boos v. Barry, 485 U.S. 312, 315, 321, 329 (1988) (declaring that a statute proscribing the display of disrespectful signs in front of a foreign embassy failed "the most exacting scrutiny").

17 *See* Lawrence, *supra* note 1, at 451 (citing a university speech code regulating speech and asserting that "[w]hen racist speech takes the form of face-to-face insults, catcalls, or other assaultive speech aimed at an individual or small groups of persons, then it falls within the 'fighting words' exception to [F]irst [A]mendment protection"). *See also* Thomas A. Cinti, *"Freedom is Slavery": The Thought Police Have Come to America's Campuses*, 1 SETON HALL CONST. L.J. 383, 391 (1991) (noting "the only way for student conduct codes to withstand constitutional attack is to limit their restrictions to that speech encompassed within either the traditional libel or fighting words exceptions"). For further discussion of *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942), and the origin of the fighting words doctrine see *supra* note 11 and *infra* notes 18-20, 43-49 and accompanying text.

targeted insults that are apt to evoke retaliation from the addressee.[18] Under this definition, fighting words maintain a formal neutrality because regulation is not determined by the particular message expressed but according to the likelihood of retaliation by the addressee.[19]

By contrast, anti-hate legislation based upon the fighting words exception seeks to protect particular groups by outlawing certain types of expression but not other types.[20] This selectivity raises First Amendment concerns.[21] Specifically at issue is

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[18] *See Chaplinsky*, 315 U.S. at 573 (citing State v. Brown, 38 A. 731, 731-32 (1895)). The *Chaplinsky* Court specifically defined fighting words as those that "by their very utterance inflict injury or tend to incite an immediate breach of the peace." *Id.* at 572 (citation omitted). One commentator has suggested that, according to *Chaplinsky*, four elements must be present in order to regulate speech under the fighting words doctrine; these elements are established if the speech

> (1) constitutes a personally abusive epithet; (2) [is] addressed in a face-to-face manner; (3) to a specific individual; and (4) uttered under such circumstances that the words have a direct tendency to cause an immediate violent response by the ordinary, reasonable recipient.

Stephen W. Gard, *Fighting Words And Free Speech*, 58 WASH. U. L.Q. 531, 580 (1980). That same commentator questioned the validity of the fighting words doctrine. *Id.* at 536 (suggesting that the fighting words doctrine has become "nothing more than a quaint remnant of an earlier morality that has no place in a democratic society dedicated to the principle of free expression"). *See also* Thomas F. Shea, *"Don't Bother to Smile When You Call Me That"—Fighting Words and the First Amendment*, 63 KY. L.J. 1, 1-2 (1975) (asserting that the "majority of the United States Supreme Court has gradually concluded that fighting words, no matter how narrowly defined, are a protected form of speech").

[19] *See* R.A.V. v. City of St. Paul, 112 S. Ct. 2538, 2548-49 (1992) (declaring that "the reason why fighting words are categorically excluded from the protection of the First Amendment is not that their content communicates any particular idea, but that their content embodies a particularly intolerable (and socially unnecessary) *mode* of expressing *whatever* idea the speaker wishes to convey"). *See also* David Cole, *'Hate Speech' is Protected*, N.J.L.J., Aug. 24, 1992, supp. at 30 (noting that the obscenity, libel and fighting words classifications "maintain a formal neutrality among the citizenry, while regulation of racist speech pointedly does not").

[20] *R.A.V.*, 112 S. Ct. at 2549. The Court noted that the St. Paul regulation had "not singled out an especially offensive mode of expression. . . . Rather it has proscribed fighting words of whatever manner that communicate messages of racial, gender, or religious intolerance. Selectivity of this sort creates the possibility that the city is seeking to handicap the expression of particular ideas." *Id.* Moreover, selectivity in regulating fighting words may be regarded as evidence of the government's hostility towards the specific biases proscribed, as well as an effort to send a message to bigots that such views are disfavored. *See id.* at 2550 (noting that "the only interest distinctively served by the content limitation is that of displaying the city council's special hostility towards the particular biases they singled out.").

[21] *Id.* The selectivity of the St. Paul statute and the government's declaration of hostility against bigotry was "precisely what the First Amendment" prohibited. *Id.* The government's hostility could be expressed, according to the majority, but not in a manner that limited the speech of those disagreeing with the government. *Id.* See *supra* notes 3-4 for discussion of the First Amendment's specific concerns.

whether a law can constitutionally prohibit a particular subset of fighting words while leaving others unregulated.[22]

Recently, in *R.A.V. v. City of St. Paul*,[23] the United States Supreme Court considered the legitimacy of regulating racist expression alleged to be encompassed within the traditional fighting words exception.[24] The *R.A.V.* Court held that while the government can proscribe fighting words generally, it cannot punish certain fighting words according to their racist content.[25]

In the early morning hours of June 21, 1990, petitioner R.A.V.,[26] a 17-year old white male,[27] and several other youths, allegedly burned a wooden cross[28] in the front yard of an African-American family's home.[29] Upon his arrest, the City of St. Paul charged R.A.V. with violating the St. Paul Bias-Motivated Crime Ordinance,[30] which prohibited the display of symbols likely to incite anger or alarm on the basis of a person's race,

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22 *See* Cole, *supra* note 19, at 15 (posing the question: "If the state may prohibit all fighting words because they are unprotected, may it prohibit a subset of fighting words that poses a particularly serious social problem?").

23 112 S. Ct. 2538 (1992).

24 *Id.* at 2541-42.

25 *Id.* at 2547-48.

26 Minnesota law protects from disclosure the identity of a juvenile involved in a crime. *See* MINN. STAT. § 260.161 (1992). A recent news article identified R.A.V. as Robert A. Viktora, an alleged skinhead. John Leo, *A Sensible Judgment on Hate*, U.S. NEWS & WORLD REP., July 6, 1992, at 25.

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

28 *See* Matsuda, *supra* note 1, at 2365-66. Professor Matsuda explained that "[t]here are certain symbols and regalia that in the context of history carry a clear message of racial supremacy, hatred, persecution, and degradation of certain groups. The swastika, the Klan robes, the burning cross are examples . . . ." *Id.*

29 R.A.V. v. City of St. Paul, 112 S. Ct. 2538, 2541 (1992). The victims, Russell and Laura Jones and their five children, were the only African-American family living in R.A.V.'s immediate neighborhood. *See* Respondent's Brief, *supra* note 27, at 3; Tom Hamburger, *Court Hears St. Paul Hate-Crimes Case; Cross Burner Has Challenged Law's Constitutionality*, STAR TRIBUNE, Dec. 5, 1991, at 7A. Prior to the cross burning, the Joneses had suffered other forms of harassment that included vandalism and name-calling. Respondent's Brief, *supra* note 27, at 3. According to the respondent's brief, R.A.V. was one of the central instigators in the cross burning. *Id.* at 2. The next day, R.A.V. allegedly admitted and bragged about his involvement in the incident. *Id.* at 4.

30 *See R.A.V.*, 112 S. Ct. at 2541 (citing ST. PAUL, MINN. LEGIS. CODE § 292.02 (1990)). R.A.V. was one of the first people to be charged under the law. *See* Hamburger, *supra* note 29, at 7A. R.A.V. was also charged with racially motivated assault under MINN. STAT. § 609.2231(4) (Supp. 1993). *R.A.V.*, 112 S. Ct. at 2541 n.2. Additionally, petitioner's conduct may have violated other Minnesota statutes. *Id.* at 2541 n.1 (citing MINN. STAT. § 609.595 (1987 & Supp. 1993) (criminal damage to property); MINN. STAT. § 609.713(1) (1987 & Supp. 1993) (terroristic threats); MINN. STAT. § 609.563 (1987) (arson)).

religion or gender.[31]

R.A.V. moved to dismiss the charge on the grounds that the ordinance violated the First Amendment, as it was overbroad[32] and impermissibly content-based.[33] The trial court granted R.A.V.'s motion.[34] St. Paul appealed, arguing that the ordinance could be narrowly interpreted to reach only conduct not protected by the First Amendment.[35] The Minnesota Supreme Court agreed and unanimously upheld the ordinance, stating that the ordinance prohibited only expressive conduct that constitutes fighting words.[36]

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[31] *R.A.V.*, 112 S. Ct. at 2541 (citing ST. PAUL, MINN. LEGIS. CODE § 292.02 (1990)). The St. Paul ordinance specifically stated:

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

Id. (quoting ST. PAUL, MINN. LEGIS. CODE § 292.02 (1990)). The ordinance carried a maximum penalty of 90 days in jail. *See* Linda Greenhouse, *Justices Weigh Ban on Voicing Hate*, N.Y. TIMES, Dec. 5, 1991, at B19, col. 1. The St. Paul ordinance is similar to legislation in an estimated forty-six states. Marcia Coyle, *Hate Laws Scrutinized by Justices; Are Social Goals and the Constitution at Odds?*, NAT'L L.J., Dec. 2, 1991, at 1.

[32] *R.A.V.*, 112 S. Ct. at 2541. A statute regulating speech is overbroad when it applies to both protected and unprotected expression. Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 503-04 (1985). Under the First Amendment overbreadth doctrine, a party may attack the validity of an overbroad law even if that party's own conduct is not protected by the First Amendment. *Id.* at 503. This is allowed because an overbroad statute "also threatens others not before the court—those who desire to engage in legally protected expression but who may refrain from doing so rather than risk prosecution or undertake to have the law declared partially invalid." *Id. See also* Grayned v. City of Rockford, 408 U.S. 104, 114-15 (1972) (asserting that "the crucial question . . . is whether the ordinance sweeps within its prohibitions what may not be punished under the First and Fourteenth Amendments"). An overbroad statute will not be voided unless the statute's overbreadth is substantial and the statute cannot be narrowed to reach only unprotected speech. *See* Broadrick v. Oklahoma, 413 U.S. 601, 613 (1973) (noting that invalidation under the overbreadth doctrine is "strong medicine," to be applied "sparingly and only as a last resort").

For an additional discussion of the overbreadth doctrine, see Comment, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844 (1970).

[33] *R.A.V.*, 112 S. Ct. at 2541. In reply papers and at argument St. Paul conceded that the ordinance regulated expressive conduct. Brief for Petitioner at 3, R.A.V. v. City of St. Paul, 112 S. Ct. 2538 (1992) (No. 90-7675) [hereinafter Petitioner's Brief].

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

[35] *In re* R.A.V., 464 N.W.2d 507, 508 (Minn. 1991), *rev'd sub nom.*, R.A.V. v. City of St. Paul, 112 S. Ct. 2538 (1992).

[36] *Id.* at 510-11. Alternatively, the Minnesota Supreme Court construed the statute as limited to conduct that tended to incite "imminent lawless action." *Id.* at 510

The United States Supreme Court granted certiorari[37] to determine whether the ordinance censored expressive conduct in violation of the First Amendment.[38] Despite the judiciary's traditional refusal to protect fighting words, the majority held that the First Amendment prohibited laws that selectively proscribe fighting words based upon their racist content.[39] Accordingly, the majority declared the St. Paul ordinance unconstitutional because it prohibited only fighting words that communicated racial, religious or gender animus, while leaving other invective unregulated.[40]

Although the First Amendment prevents the government from abridging the freedom of speech,[41] the Court has often recognized that the right of free speech is not absolute.[42] In *Chaplin-*

(quoting Brandenburg v. Ohio, 395 U.S. 444, 447 (1969)). The Minnesota high court also decided that "the ordinance is a narrowly tailored means towards accomplishing the compelling governmental interest in protecting the community against bias-motivated threats to public safety and order . . . and therefore is not prohibited by the [F]irst [A]mendment." *Id.* at 511 (citing Schaumberg v. Citizens for a Better Environment, 444 U.S. 620, 637 (1980)).

For a discussion of the history and application of the clear and present danger doctrine, see DAVID S. BOGEN, BULWARK OF LIBERTY: THE COURT AND THE FIRST AMENDMENT 31-42 (1984). *See also supra* note 10.

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

38 *R.A.V.*, 112 S. Ct. 2538, 2541-42 (1992).

39 *Id.* at 2542-43, 2545, 2547, 2550. Justice Scalia delivered the opinion of the Court and was joined by Chief Justice Rehnquist, and Justices Kennedy, Souter and Thomas. *Id.* at 2541. Historically, the Supreme Court has viewed content-based regulations as presumptively invalid. *See* Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 112 S. Ct. 501, 508 (1991) (declaring that the First Amendment forbade the government from imposing a financial burden on speakers on the basis of the content of their message); Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530, 544 (1980) (holding that government could not suppress the discussion of controversial issues by a government utility, unless the suppression was necessary to advance an overriding policy interest); Police Dept. of Chicago v. Mosley, 408 U.S. 92, 95 (1972) (holding that the First Amendment prohibited the government from regulating picketing on the basis of content).

40 *Id.* at 2547. The Court noted that the "unmodified terms" of the statute, prohibiting expression "on the basis of race, color, creed, religion or gender," indicated that the law prohibited only fighting words that were based on racial, religious or other biases. *Id.* at 2547. The Court added that the language permitted "[d]isplays containing abusive invective, no matter how vicious or severe . . . unless they [were] addressed to one of the specified disfavored topics." *Id.* Therefore, according to the Court, the law allowed hate crimes or fighting words aimed at, for example, homosexuals. *Id.*

41 See *supra* note 3 for the text of and commentary on the First Amendment.

42 NIMMER, *supra* note 6, § 2.01, at 2-3 (noting that absolute protection of speech has never been adopted by the courts). See Cal M. Logue, *Free Speech: The Philosophical Poles, in* PERSPECTIVES ON FREEDOM OF SPEECH: SELECTED ESSAYS FROM THE JOURNALS OF THE SPEECH COMMUNICATION ASSOCIATION 70 (Thomas L. Tedford et al. eds., 1987), for a philosophical perspective on the scope of the First Amend-

sky v. New Hampshire,[43] the Supreme Court declared that "certain well-defined and narrowly limited classes of speech" were outside constitutional protection.[44] Chaplinsky was convicted of violating a state statute that prohibited offensive or derisive name-calling in a public place.[45] Chaplinsky was arrested after he became abusive and called the city marshall a "God damned racketeer" and a "damned fascist."[46]

Writing for a unanimous Court, Justice Murphy held that Chaplinsky's utterances constituted fighting words, one of several categories of speech unprotected by the First Amendment.[47] The Justice singled out fighting words as unprotected for their failure to promote ideas and their tendency to cause injury and evoke violence.[48] Applying this principle to the New Hampshire

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ment. *See also* United States v. O'Brien, 391 U.S. 367, 376 (1968) (articulating that "[w]e cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' "). *See also supra* note 6 and accompanying text (discussing content-based regulation of speech permitted by the Court).

[43] 315 U.S. 568 (1942).

[44] *Id.* at 571-72. The Court enumerated that these unprotected categories included "the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words — those by which their very utterance inflict injury or tend to incite an immediate breach of the peace." *Id.* at 572. *See also supra* notes 7-13 (discussing these exceptions to speech protection).

[45] *Id.* The New Hampshire statute specifically stated:

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

Id. at 569 (citation omitted).

[46] *Id.* at 569-70. Chaplinsky had been addressing a crowd on a public street when a disturbance occurred. *Id.* Upon being led away by a traffic officer, Chaplinsky hurled insults at the city marshall. *Id.* at 570.

[47] *Id.* at 572. See also *supra* notes 7-13, 44 and accompanying text for a discussion of these categories. The New Hampshire Supreme Court interpreted the statute as prohibiting only expression that has a "direct tendency to cause acts of violence by the persons to whom, individually, the remark is addressed." *Id.* at 573 (citation omitted). The United States Supreme Court agreed, noting that the statute was "narrowly drawn and limited to define and punish specific conduct lying within the domain of state power, the use in a public place of words likely to cause a breach of the peace." *Id.* Thus, the statute required only a danger that the addressee would be incited to violence, not proof of actual violence between Chaplinsky and the marshall. *See id.* For a further discussion of *Chaplinsky*, see Gard, *supra* note 18, at 531-34 and Shea, *supra* note 18, at 8-10.

[48] Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942). The Court explained that "[i]t has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Id.*

statute, the Court upheld the statute, finding that it prohibited only expression likely to cause a breach of the peace and not other protected speech.[49]

The Court subsequently modified the fighting words exception in *Terminiello v. Chicago*.[50] Terminiello was convicted of breaching the peace following a race-baiting speech he delivered before a large crowd.[51] Justice Douglas, writing for the Court, reversed Terminiello's conviction on the ground that the ordinance under which he was convicted was unconstitutionally overbroad.[52] The Justice explained that the trial court's interpretation of the ordinance permitted convictions not only for fighting words, but also for speech that antagonized the audience or created strife.[53] Justice Douglas asserted that, absent a "clear and present danger" of violence, the First Amendment protected speech arousing anger in listeners.[54]

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[49] *Id.* at 573. Justice Murphy argued that Chaplinsky's utterances were without communicative value because "[a]rgument is unnecessary to demonstrate that the appellations 'damned racketeer' and 'damned Fascist' are epithets likely to provoke the average person to retaliation, and thereby cause a breach of the peace." *Id.* at 574. Some commentators have suggested that the fighting words doctrine is no longer good law. *See supra* note 18.

[50] 337 U.S. 1 (1949).

[51] *Id.* at 3. In response to the speech, a protest group outside grew rowdy, *id.*, and Terminiello proceeded to denounce them as "snakes" and "slimy scum." *Id.* at 26 (Jackson, J., dissenting).

[52] *Id.* at 5. Terminiello was charged with violating a Chicago city ordinance which stated:

> All persons who shall make, aid, countenance, or assist in making any improper noise, riot, disturbance, breach of the peace, or diversion tending to a breach of the peace, within the limits of the city . . . shall be deemed guilty of disorderly conduct, and upon conviction thereof, shall be severally fined not less than one dollar nor more than two hundred dollars for each offense.

Id. at 2 n.1 (citation omitted).

Adopting the rationale of an earlier Supreme Court opinion, Justice Douglas explained the fatal flaw of an overbroad statute: "For all anyone knows [Terminiello] was convicted under the parts of the ordinance (as construed) which, for example, make it an offense merely to invite dispute or to bring about a condition of unrest." *Id.* at 5-6 (citing Stromberg v. California, 283 U.S. 359 (1931)). Justice Douglas reasoned that it was improper to sustain a conviction where "one part of the statute was unconstitutional and it could not be determined that the defendant was not convicted under that part." *Id.*

[53] *Terminiello*, 337 U.S. at 4. The Court declared the statute overbroad, opining that:

> [A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.

Id.

[54] *Id.* at 4-5. Acknowledging that a certain level of provocative speech was con-

Employing this principle to uphold a conviction, the Court, in *Feiner v. New York*,[55] held that a speaker inciting his audience to violence could be punished if a "clear and present danger" of violence existed.[56] Irving Feiner, a college student, was arrested after delivering a street-corner speech in which he denounced President Truman as a "bum" and called on African-Americans to "rise up in arms and fight for their rights."[57] Justice Vinson, writing for the Court, found that Feiner's conduct incited a riot.[58] The Justice asserted that Feiner's arrest was not motivated by a desire to censor his speech, but was a legitimate effort by the state to prevent violence and preserve the peace.[59] The Court

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stitutionally protected, the Court's decision indicated a retreat from the broad implications of *Chaplinsky*. *See* NOWAK & ROTUNDA, *supra* note 12, § 16.39, at 1059 ("Decisions following *Chaplinsky* reflect the Court's desire to limit the broad implications of the doctrine outlined there and the recognition of the potential social value in the statements that might come under the initial definition of 'fighting words.' "). In the wake of *Terminiello*, numerous cases indicate an effort by the Court to limit the scope of the fighting words doctrine on the basis of overbreadth or vagueness rather than reviewing the constitutionality of the speech itself. *See, e.g.*, City of Houston v. Hill, 482 U.S. 451, 466-67 (1987) (holding unconstitutionally overboard an ordinance prohibiting all speech that in any manner interrupts a police officer); Lewis v. City of New Orleans, 415 U.S. 130, 131-32 (1974) (invalidating an ordinance that sanctioned "opprobrious language" not construed by the Court to be fighting words); Gooding v. Wilson, 405 U.S. 518, 528 (1972) (holding unconstitutional a statute primarily because there was no danger of retaliation by the addressee). For an additional discussion of the overbreadth doctrine, see *supra* note 32.

Under the related void for vagueness doctrine, a statute is held to be unconstitutional if it fails to fully inform the public as to what speech or conduct is prohibited. See Kolender v. Lawson, 461 U.S. 352, 357 (1983) (holding that the First Amendment void for vagueness doctrine demanded that a criminal statute "define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage discriminatory enforcement"). For a further discussion of the void for vagueness doctrine see NOWAK & ROTUNDA, *supra* note 12, § 16.9.

55 340 U.S. 315 (1951).

56 *Id.* at 320 (quoting Cantwell v. Connecticut, 310 U.S. 296, 308 (1940)).

57 *Id.* at 330 (Douglas, J., dissenting). Feiner's words caused the crowd to grow angry, and he was subsequently arrested for disorderly conduct when he failed to heed a police officer's request to stop speaking. *Id.* at 317-18. Unlike *Chaplinsky*, *Feiner* did not involve a face-to-face confrontation likely to provoke a particular addressee to violence; thus, a pure fighting words issue was not presented. Shea, *supra* note 18, at 10-11.

58 *Feiner*, 340 U.S. at 320-21. Chief Justice Vinson articulated:

> It is one thing to say that the police cannot be used as an instrument for the suppression of unpopular views, and another to say that, when as here the speaker passes the bounds of argument or persuasion and undertakes incitement to riot, they are powerless to prevent a breach of the peace.

Id. at 321.

59 *Id.* at 320-21. In a vigorous dissent, Justice Black argued that the police must

therefore upheld Feiner's conviction.[60]

Returning to the narrow view propounded in *Terminiello*, the Supreme Court in *Street v. New York*[61] held that expression which angered an audience, without danger of violence, was protected by the First Amendment.[62] Defendant Street, upset about the shooting of a civil rights activist, burned an American flag in public while exclaiming, "We don't need no damn flag."[63] He was convicted under a statute that prohibited publicly mutilating or

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first attempt to calm a restless audience before infringing upon a speaker's First Amendment rights. *Id.* at 326-27 (Black, J., dissenting).

60 *Id.* at 320-21. One commentator has summarized the status of the fighting words doctrine in light of *Feiner* as follows:

> (1) expressions of opinion or belief, no matter how unorthodox or hateful to the speaker's audience, were constitutionally protected and could not be punished; (2) encouraging an audience to lawless action against others was also protected unless there existed a clear and present danger that the action would in fact occur; and (3) fighting words, a form of unprotected speech, could be punished under a statute narrowly interpreted to forbid face to face personal insults likely to cause the average person to react violently, whether or not the *actual* addressee was likely to so react.

Shea, *supra* note 18, at 11.

Subsequent cases have significantly undercut *Feiner*'s authority by applying the "clear and present danger" language of *Terminiello*. *See, e.g.*, Edwards v. South Carolina, 372 U.S. 229, 236 (1963) (refusing to classify as fighting words the singing of religious and patriotic songs by civil rights demonstrators). For an additional discussion of *Feiner*, see NOWAK & ROTUNDA, *supra* note 12, § 16.39.

Scholars have levied criticism against *Feiner*, arguing that the decision grants a "heckler's veto" to an audience insofar as the Court seemed to place no duty on the police to first attempt to quell an agitated crowd; if listeners do not agree with a speaker's views, they may exhibit hostility in order to have the speaker silenced by authorities. *See, e.g.*, NOWAK & ROTUNDA, *supra* note 12, § 16.39 ("By immediately acquiescing in the face of a single threat by one individual, the police had acted merely as conduits for the desires of suppression and denied the provocation value attributed to speech in *Terminiello*, regardless of the impetus that motivated the policemen.").

61 394 U.S. 576 (1969).

62 *Id.* at 592-94. For nearly fifty years, the Court has continued to reaffirm *Chaplinsky*'s validity. *See* NOWAK & ROTUNDA, *supra* note 12, § 16.40, at 1062. In *Chaplinsky*, fighting words were defined not only as those which tend to "incite an immediate breach of the peace" but also those which "inflict injury." Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942). The Court has, however, yet to uphold a conviction under the "inflicts injury" component. Victoria L. Handler, *Legislating Social Tolerance: Hate Crimes and the First Amendment*, 13 HAM. J.L. & PUB. POL'Y 137, 146 (1992) (citing Houston v. Hill, 482 U.S. 451 (1986); Lewis v. City of New Orleans, 415 U.S. 130; Gooding v. Wilson, 405 U.S. 518 (1971); Cox v. Louisiana, 379 U.S. 536 (1964); Terminiello v. Chicago, 337 U.S. 1 (1948)). In fact, the Supreme Court has not defined what type of injury is needed to satisfy this aspect of *Chaplinsky*. *Id.*

63 *Street*, 394 U.S. at 578-79.

defiling any United States flag by word or deed.[64] Justice Harlan, penning the majority opinion, reversed the conviction, positing that expressions were protected by the First Amendment even if those expressions were offensive or counter to societal values.[65] The Justice concluded that although Street's conduct was offensive, it did not constitute fighting words within the meaning of *Chaplinsky*.[66] The Court noted that unlike the conduct in *Feiner*, no danger of retaliation existed, nor did Street's conduct seek to incite others to riot.[67]

In *Cohen v. California*,[68] the Court further narrowed the fighting words doctrine by holding that offensive speech alone did not constitute fighting words.[69] In the corridor of a courthouse, where women and children were present, Cohen wore a jacket bearing the words "Fuck the Draft."[70] Cohen was convicted under a statute that prohibited disturbing the peace by offensive conduct.[71]

Reversing Cohen's conviction, the Court indicated that the state lacked the power to prosecute Cohen for the content of his message, because there was no showing of intent to incite violence or to disrupt the draft.[72] Justice Harlan posited that offensive expression had an emotive value that should not be suppressed.[73] Moreover, the Court noted that the fighting words doctrine was not applicable because Cohen's words were not di-

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64 *Id.* at 577-78 (citation omitted).

65 *Id.* at 577, 592.

66 *Id.* at 592.

67 *Id.* at 592. Justice Harlan specifically averred: "[W]e cannot say that appellant's remarks were so inherently inflammatory as to come within that small class of 'fighting words' which are 'likely to provoke the average person to retaliation, and thereby cause a breach of the peace.' " *Id.* (quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 574 (1942)).

68 403 U.S. 15 (1971). For a discussion of *Cohen* see William Cohen, *A Look Back at* Cohen v. California, 34 UCLA L. REV. 1595 (1987); Gard, *supra* note 18, at 563.

69 *Cohen*, 403 U.S. at 25-26.

70 *Id.* at 16.

71 *Id.* (citation omitted).

72 *Id.* at 18.

73 *Cohen*, 403 U.S. at 24-25. The Justice stated:

> The constitutional right of free expression is powerful medicine in a society as diverse and populous as ours . . . .
>
> To many, the immediate consequence of this freedom may often appear to be only verbal tumult, discord, and even offensive utterance. These are, however, within established limits, in truth necessary side effects of the broader enduring values which the process of open debate permits us to achieve.

Id.

rected toward an individual.[74] Finally, the majority rejected the state's contention that government could prohibit offensive speech, like Cohen's, that was cast upon unwilling listeners, even though the expression neither consituted fighting words nor was likely to cause actual violence.[75] After *Cohen*, therefore, offensive speech in general was deemed to be protected expression, while fighting words remained unprotected.[76]

The Court altered the fighting words doctrine in *Gooding v. Wilson*,[77] by adopting a subjective (rather than objective) person standard to determine the likelihood of retaliation by an addressee.[78] The defendant in *Gooding* was convicted for using opprobrious and abusive language when the police tried to remove him and other anti-war demonstrators from the entrance to an army induction center.[79] Relying on the overbreadth doctrine, the Court found that the statute was not sufficiently narrow as it applied to more than fighting words likely to incite acts of violence by the actual addressee.[80] The Court's holding deviated

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74 *Id.* at 20. Additionally, the Court found Cohen's jacket did not constitute obscenity, as the expression was not erotic. *Id.*

75 *Id.* at 21-22. Justice Harlan narrowly construed what constitutes a captive audience stating " 'we are often 'captives' outside the sanctuary of the home and subject to objectionable speech.' " *Id.* at 21 (quoting Rowan v. Post Office Dept., 397 U.S. 728, 738 (1970)). The Justice maintained, nonetheless, that those in the courtroom could have avoided Cohen's display "simply by averting their eyes." *Id.* Finally, Justice Harlan suggested that offensive speech merits the same protection afforded other speech because "one man's vulgarity is another's lyric." *Id.* at 25.

76 *See id.* at 26; Shea, *supra* note 18, at 13. In reaffirming the fighting words doctrine, the *Cohen* Court asserted:

> [T]he States are free to ban the simple use, without a demonstration of additional justifying circumstances, of so-called "fighting words," those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction.

Cohen, 403 U.S. at 20. For an additional discussion of *Cohen*, see NOWAK & ROTUNDA, *supra* note 12, § 16.39, at 1061.

77 405 U.S. 518 (1972).

78 *See* Shea, *supra* note 18, at 14 (noting that "[s]urprisingly, the Court found the law overbroad because the statutory language did not go on to explain that the prohibition was limited to (a) fighting words that were (b) likely to cause acts of violence by the *actual* addressee").

79 *Gooding*, 405 U.S. at 519-20 & n.1. In response to a policeman's attempt to remove him, Wilson specifically stated " 'White son of a bitch, I'll kill you,' " and " 'You son of a bitch, I'll choke you to death.' " *Id.* at 520 n.1. To another officer he said, " 'You son of a bitch, if you ever put your hands on me again, I'll cut you all to pieces.' " *Id.*

80 *Id.* at 525. The statute under which Wilson was charged provided:

> Any person who shall, without provocation, use to or of another, and in his presence . . . opprobrious words or abusive language, tending to cause a breach of the peace . . . shall be guilty of a misdemeanor.

from the precedent set in *Chaplinsky*, where the Court had defined fighting words not in terms of what a particular addressee thought, but rather on the basis of the likelihood of retaliation by an average addressee.[81] In effect, the Court narrowed the fighting words doctrine by requiring a clear and present danger of violence by the actual addressee.[82]

Despite the continual reaffirmation of the fighting words exception,[83] the Supreme Court has declined to uphold any convictions for fighting words since *Chaplinsky*.[84] The Court has set aside convictions both by narrowing the definition of fighting words and by employing the overbreadth doctrine.[85] Although the Court could have used either of these devices to strike down a hate speech ordinance founded on the fighting words exception, the Court instead used the principle of "content neutrality" to invalidate such an ordinance in *R.A.V. v. City of St. Paul*.[86]

Id. at 519 (citation omitted). The Court determined that this "broad standard effectively 'licenses the jury to create its own standard in each case.' " *Id.* at 528 (quoting Herndon v. Lowry, 301 U.S. 242, 263 (1937)). *See also* Lewis v. City of New Orleans, 415 U.S. 130, 133 (1974) (stating that forbidding the use of " 'opprobrious language,' " proscribed language that did not "inflict injury" or "incite an immediate breach of the peace").

81 *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 573 (1942). Contrasting *Chaplinsky* with *Gooding*, one commentator has observed that "when the *Chaplinsky* Court determined that fighting words were unprotected, it held that as a result they could be punished irrespective of a clear and present danger that the actual addressee would become violent." *See* Shea, *supra* note 18, at 15.

82 Shea, *supra* note 18, at 15. Summarizing *Gooding*, Professor Shea noted that the Court "found that an essential defect in the statute, as interpreted by the Georgia courts, was a failure to require the likelihood of a violent reaction on the part of the actual addressee." *Id.* Dissenting in *Gooding*, Justice Blackmun stated that the Court was "merely paying lip service to *Chaplinsky*." *Gooding*, 405 U.S. at 537 (Blackmun, J., dissenting).

Post-*Gooding* cases continue to illustrate the Court's reluctance to affirm a prosecution for the use of fighting words. *See* NOWAK & ROTUNDA, *supra* note 12, § 16.40 (noting that courts have not "look[ed] with favor on prosecutions for 'fighting words.' "). Instead, the Court has employed the overbreadth doctrine to avoid upholding convictions. *Id.* See *supra* note 32 and accompanying text for a discussion of the overbreadth doctrine.

83 *See* NOWAK & ROTUNDA, *supra* note 12, § 16.40.

84 *See supra* note 82; *see also* David Cole, *supra* note 19, supp. at 15 ("this category [of fighting words] is so narrow as to be in truth almost academic—so narrow that the Court has not upheld a single conviction for fighting words since the category was created in 1942"). Although Feiner v. New York, 340 U.S. 315 (1951), is arguably an exception to this claim, *Feiner* did not present a pure fighting words issue. *See supra* note 57.

85 NOWAK & ROTUNDA, *supra* note 12, § 16.40. See *supra* notes 57-84 and accompanying text for a discussion of the Court's narrowing of the fighting words doctrine, and *supra* note 32 for a discussion of the overbreadth doctrine.

86 112 S. Ct. 2538, 2542 (1992). The Court explained that although petitioner R.A.V. argued in favor of the overbreadth doctrine, the Court found addressing the

The *R.A.V.* Court considered whether government has an obligation to ensure content neutrality in its regulation of fighting words or any other unprotected category of expression.[87] Justice Scalia, writing for the majority, began by accepting the Minnesota Supreme Court's interpretation of the anti-hate ordinance as regulating only expression which constituted fighting words.[88] Declining to engage in an overbreadth analysis,[89] the Justice summarily declared the ordinance facially unconstitutional because it regulated expression according to its subject matter.[90]

The majority asserted that the government generally can not proscribe speech or non-verbal expression based on its content, and that such regulations were presumptively invalid.[91] The Court nevertheless acknowledged that content-based regulations were permitted for certain categories of speech that were of " 'slight social value.' "[92] The majority rejected, however, the contention that such categories were completely outside First Amendment protection.[93] Speech within these limited areas, Justice Scalia asserted, could not be made the avenue for content discrimination even though the speech had generally been classified as unprotected.[94] Exemplifying this assertion, the Court

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doctrine to be "unnecessary" because the statute unconstitutionally prohibited otherwise protected speech based on content. *Id.*

87 *Id.* at 2544, 2547. *See* Cole, *supra* note 19, at 98-99.

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

89 *Id.* See *supra* note 32 for a discussion of the overbreadth doctrine.

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

91 *Id.* (citing Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 112 S. Ct. 501 (1991); Texas v. Johnson, 491 U.S. 397, 406 (1989); Consolidated Edison Co. of N.Y. v. Public Serv. Comm'n of N.Y., 447 U.S. 530, 536 (1980); Police Dept. of Chicago v. Mosley, 408 U.S. 92, 95 (1972); Cantwell v. Connecticut, 310 U.S. 296, 309-11 (1940)).

92 *Id.* at 2542-43 (quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942)). Although recent decisions have limited the scope of categories such as obscenity and defamation, the Court maintained that a categorical approach is still a vital part of First Amendment jurisprudence. *Id.* (citing Miller v. California, 413 U.S. 15 (1973); New York Times Co. v. Sullivan, 376 U.S. 254 (1964)). For a discussion of the obscenity and defamation categories, see *supra* notes 8-9 and accompanying text.

93 *R.A.V.*, 112 S. Ct. at 2543. Justice Scalia asserted that previous Court statements proclaiming that certain categories of speech are unprotected by the First Amendment "must be taken in context" and were not literally true. *Id.* (citations omitted). Justice White, in his concurrence, chastised the Court for this assertion, professing that "those statements meant precisely what they said: The categorical approach is a firmly entrenched part of our First Amendment jurisprudence." *Id.* at 2552 (White, J., concurring).

94 *Id.* at 2543. Specifically, the Court declared that types of speech within these limited areas may be regulated "*because of their constitutionally proscribable content* (ob-

noted that while the government could proscribe all libel, it could not proscribe only libel against the government.[95]

Justice Scalia next rejected Justice White's contention, voiced in a concurrence, that the government could freely regulate proscribable speech.[96] The Court postulated that limiting the government's ability to proscribe speech on the basis of one element and not another was common to First Amendment jurisprudence.[97] Justice Scalia averred that the Court had consistently held, for example, that some non-verbal expression could be prohibited because of the danger of the activity involved, but not because of the idea expressed.[98] The key, the majority stressed, was that the government could not regulate the underlying message or viewpoint of an expression.[99]

The majority asserted that this reasoning did not compel the government to regulate all proscribable speech, as the concurrence suggested, but required the government to utilize a con-

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scenity, defamation, etc.)—not [because] they are categories of speech entirely invisible to the Constitution, so that they may be made the vehicles for content discrimination unrelated to their distinctively proscribable content." *Id.*

95 *Id.*

96 *Id.* (citing *id.* at 2550-60 (White, J., concurring)). If Justice White's contention were true, the majority opined, government could prohibit obscenity which was unfavorable to it. *Id.* Justice Scalia declared that "[s]uch a simplistic, all-or-nothing-at-all approach to First Amendment protection is at odds with common sense and with our jurisprudence as well." *Id.* For a discussion of Justice White's concurring opinion, see *infra* notes 123-34 and accompanying text.

97 *R.A.V.*, 112 S. Ct. at 2544. For example, the Court stated that proscribing obscenity but not governmental criticism was accepted practice. *Id.*

98 *Id.* The Court bolstered this claim by referencing Texas v. Johnson, 491 U.S. 397, 406-07 (1989), and noting that "burning a flag in violation of an ordinance against outdoor fires could be punishable, whereas burning a flag in violation of an ordinance against dishonoring the flag is not." *R.A.V.*, 112 S. Ct. at 2544. The Justice similarly observed that time, place and manner restrictions permit government regulation of particular speech on the basis of a non-content element but not on the basis of content. *Id.* (citing Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989)). For an analysis of what constitutes a reasonable time, place and manner restriction see NOWAK & ROTUNDA, *supra* note 12, § 16.47. *See also* Heffron v. International Soc'y for Krishna Consciousness, 452 U.S. 640, 654-55 (1981) (holding constitutional a state fair rule requiring all leafletting to be done from a licensed booth); Grayned v. City of Rockford, 408 U.S. 104, 120 (1972) (upholding a statute prohibiting noisy disturbances near schools that are in session); Cox v. New Hampshire, 312 U.S. 569, 576 (1941) (upholding the right of a municipality to require parade permits).

The *R.A.V.* Court also propounded that the power to regulate on the basis of a non-content element does not give the government the authority to proscribe expression on the basis of content. *R.A.V.*, 112 S. Ct. at 2544.

99 *Id.* at 2545. The Court stated: "The government may not regulate use based on hostility—or favortism—towards the underlying message expressed." *Id.*

tent-neutral approach to the regulation of such expression.[100] The Court conceded that the prohibition against content discrimination was not absolute.[101]

Justice Scalia outlined three exceptions to the government's obligation to exercise content neutrality when regulating proscribable expression.[102] The Justice first indicated that discrimination on the basis of content was permissible when the intention was to prohibit the worst kinds of unprotected speech, such as the most vulgar obscenity.[103] The Court then noted that a content-based regulation of a subclass of proscribable speech could be justified if directed at the secondary effects of proscribable speech.[104] Finally, the Court stated that totally proscribable speech could be subject to content-based discrimination in the absense of any suspicion of official suppression of ideas.[105]

Using the aforementioned principles, the majority held that the municipal ordinance was clearly unconstitutional even as nar-

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100 *Id.* The concurrences called the majority's approach one of underinclusiveness. *Id.* Addressing these assertions, Justice Scalia defined underinclusiveness "as a First Amendment 'absolutism' whereby 'within a particular 'proscribable' category of expression . . . a government must either proscribe *all* speech or no speech at all.'" *Id.* (citing *id.* at 2562 (Stevens, J., concurring in judgment)).

In support of the conclusion that government was not bound to regulate all proscribable speech, the majority posited that a state could selectively regulate proscribable expression in specific media, for example, because it would not be upon the basis of content. *Id.* Justice Scalia averred that such a regulation, although underinclusive, would be content neutral and thus constitutional. *Id.* (citing Sable Communications v. FCC, 492 U.S. 115, 124-26 (1989)). In *Sable*, the Court upheld a federal statute prohibiting only telephone communications that were obscene. *Id.*

101 *Id.* Justice Scalia also stressed that the prohibition against content discrimination applied differently to proscribable speech than to fully protected speech. *Id.*

102 *R.A.V.*, 112 S. Ct. at 2545-46.

103 *Id.* For example, the majority explained that a government could ban only "obscenity which is the most patently offensive *in its prurience*." *Id.* at 2546. The Court noted, however, that the government could not proscribe "only that obscenity which includes offensive *political* messages." *Id.* (citation omitted).

104 *Id.* at 2546 (citing Renton v. Playtime Theaters, Inc., 475 U.S. 41, 48 (1986)). In *Renton*, the Court held constitutional the regulation of the location of adult theaters by concentrating or dispersing them because such regulation was aimed at the secondary effects of such theaters. *Renton*, 475 U.S. at 47. To illustrate further valid discrimination based on content, the *R.A.V.* majority opined that a state could proscribe only obscene live performances involving minors. *R.A.V.*, 112 S. Ct. at 2546.

For a discussion of *Renton*, see Lisa Yoshida, Note, *The Role of "Secondary Effects" in First Amendment Analysis:* Renton v. Playtime Theaters, Inc., 22 U.S.F. L. REV. 161, 163 (1987) (noting that laws which regulate speech based upon non-content factors do not ordinarily raise First Amendment concerns).

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

rowly interpreted by the Minnesota high court.[106] The ordinance discriminated on the basis of content, the Court concluded, by proscribing only fighting words arising from racial, religious or gender bigotry.[107] The majority averred that the First Amendment did not permit a government to single out particular fighting words on the basis of their unpopular subject matter.[108] Furthermore, the Court found that the ordinance, in its "practical operation," went beyond content discrimination and constituted actual viewpoint discrimination.[109] The ordinance, Justice Scalia emphasized, criminalized the expression of certain invective but left unregulated other equally violent or hateful fighting words that expressed an opposing viewpoint.[110]

The majority next determined that the St. Paul ordinance did not fall within any of the three exceptions to content discrimination crafted by the Court.[111] The Court first rejected the argument that the ordinance's selective regulation was based on the very reasons that fighting words were proscribable.[112] Justice Scalia explained that fighting words could be prohibited because of the intolerable manner of their expression regardless of the ideas expressed.[113] The Court determined that St. Paul sought to regulate not an offensive mode of expression, but rather the particular ideas communicated.[114] The majority declared that this intention was enough to make the ordinance

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106 *Id.*

107 *Id.* The Justice pointed out that the ordinance left unregulated other fighting words which expressed animus towards, for example, an individual's sexual preference or political beliefs. *Id.*

108 *Id.* (citing Simon & Schuster v. N.Y. Crime Victims Bd., 112 S. Ct. 501, 508 (1991); Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221, 230 (1987)).

109 *Id.*

110 *Id.* at 2547-48. Justice Scalia charged that St. Paul had no authority to favor one side of a debate regardless of how offensive or distasteful those views may be. *Id.* at 2548. The majority, however, indicated that fighting words statutes that are designed to protect certain groups from direct provocation would be facially valid if the requirements of the Equal Protection Clause were satisfied. *Id.*

The Equal Protection Clause of the Fourteenth Amendment states that "[n]o State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. The clause requires that persons similarly situated be treated equally. *See* NOWAK & ROTUNDA, *supra* note 12, at § 14.1.

111 *R.A.V.*, 112 S. Ct. at 2548. See *supra* notes 102-05 and accompanying text for a discussion of the Court-crafted exceptions to content discrimination.

112 *R.A.V.*, 112 S. Ct. at 2548. See *supra* note 102 and accompanying text for a discussion of this exception to the prohibition against content discrimination.

113 *R.A.V.*, 112 S. Ct. at 2548-49.

114 *Id.* at 2549.

unconstitutional.[115]

The majority also dismissed St. Paul's contention that the ordinance's discrimination was aimed specifically at the secondary effects of hate speech.[116] Justice Scalia maintained that the regulation of the emotive impact of hate speech was not a secondary effect within the meaning of *Renton v. Playtime Theaters*.[117] Furthermore, because St. Paul's legislation suggested the city's suppression of ideas, the Court concluded that the ordinance did not fall within the third exception permiting discrimination if there was no impression that the government was trying to proscribe certain disfavored ideas.[118]

Finally, the majority considered whether the ordinance's content discrimination could be justified on the ground that it was narrowly tailored to serve the compelling interest of protecting the basic human rights of a group subjected to historical discrimination.[119] While conceding that this governmental interest was compelling, the Court maintained that the threat of censorship, which was presented by a statute clearly based on content, demanded that the statute be *absolutely* necessary.[120] Citing the availability of content-neutral alternatives that would achieve the compelling interest without selectively proscribing fighting words, the Court declared the ordinance's content discriminatory provisions invalid.[121] Although emphasizing the Court's distaste for bias-motivated violence, the majority nevertheless cautioned against using the First Amendment to combat hate speech.[122]

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115 *Id.*

116 *Id.* In rejecting the argument that the ordinance was not directed at hate speech's secondary effects, the Court relied on Boos v. Barry, 485 U.S. 312 (1988). *R.A.V.*, 112 S. Ct. at 2549. The Court stated that " '[l]isteners' reactions to speech are not the type of 'secondary effects' we referred to in *Renton*.' " *Id.* (quoting *Boos*, 485 U.S. at 321).

117 *Id.* (quoting *Boos*, 485 U.S. at 321). For a discussion of *Renton*, see *supra* note 104.

118 *R.A.V.*, 112 S. Ct. at 2549. The Court explained that "[t]he statements of St. Paul in this very case afford ample basis for, if not full confirmation of, that suspicion." *Id.*

119 *Id.*

120 *Id.* (citation omitted). The Court suggested that the only interest served by the ordinance was to display the city's animosity towards the specific biases targeted. *Id.* at 2550. The First Amendment, Justice Scalia postulated, forbid this type of selectivity. *Id.*

121 *Id.*

122 *Id.* In closing, the Court remarked: "Let there be no mistake about our belief that burning a cross in someone's front yard is reprehensible. But St. Paul has sufficient means at its disposal to prevent such behavior without adding the First Amendment to the fire." *Id.*

In a blistering opinion concurring solely in the judgment, Justice White also deemed the ordinance unconstitutional.[123] The concurring Justice utilized the doctrine of overbreadth, however, and asserted that the regulation was unconstitutional because it criminalized both unprotected and protected speech.[124]

Although Justice White agreed with the majority that certain categories of speech could be regulated on the basis of their content,[125] the Justice criticized the majority's finding that such categories were afforded some protection under the First Amendment.[126] Specifically, the Justice attacked the Court for abandoning the categorical approach under which fighting words were totally unprotected.[127] The Justice criticized the majority for the apparent inconsistency of holding that the government could proscribe an entire kind of speech, but not a part of that same proscribable category.[128] Under the majority's analysis, Justice White observed, a state seeking to proscribe specific fighting words would now be required to proscribe all fighting words.[129]

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[123] *R.A.V.*, 112 S. Ct. at 2550 (White, J., concurring). Justice White authored an opinion concurring in the judgment, in which Justices Blackmun and O'Connor joined and in which Justice Stevens joined in part. *Id.*

[124] *Id.* Justice White initially accused the Court of lacking jurisdiction to decide the case on the Court's chosen theory because the theory had not been briefed by the parties or raised in the question presented. *Id.* at 2550-51 (White, J., concurring). For a detailed discussion of the overbreadth doctrine see *supra* note 32.

[125] *R.A.V.*, 112 S. Ct. at 2552 (White, J., concurring). See *supra* notes 7-13 and accompanying text for a discussion of the categorical approach to regulating speech.

[126] *R.A.V.*, 112 S. Ct. at 2552 (White, J., concurring). Justice White characterized the majority as holding "that earlier Courts did not mean their repeated statements that certain categories of expression are 'not within the area of constitutionally protected speech.' " *Id.* (quoting Roth v. United States, 354 U.S. 476 (1957)).

[127] *Id.* at 2553 (White, J., concurring).

[128] *Id.* at 2552-53 (White, J., concurring). Justice White reasoned:

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

Id. (citation omitted). The Justice strongly disputed the majority's contention that "government may not regulate [a mode of speech] based on hostility or favoritism towards the underlying message expressed." *Id.* at 2553 (White, J., concurring) (quoting *id.* at 2545). Justice White assailed the majority with language from the main opinion, stating that " 'such a simplistic, all-or-nothing-at-all approach to First Amendment protection is at odds with common sense and with our jurisprudence as well.' " *Id.* (White, J., concurring) (quoting *id.* at 2543).

[129] *Id.* Justice White interpreted the Court's rationale as imposing an underinclusiveness limitation upon a government's ability to regulate proscribable speech. *Id.*

In addition, Justice White asserted that the Court's holding implied that hate speech was of adequate value to outweigh society's interest in order and morality, an interest that traditionally situated fighting words outside of the First Amendment's protection.[130] Justice White also denounced the Court for granting unprotected categories of expression the same constitutional protection given to political speech, thus devaluing the latter.[131]

Justice White next reminded the Court that the St. Paul ordinance would be constitutional as a content-based regulation if narrowly drawn to achieve a compelling state interest.[132] The Justice charged the majority with renouncing strict scrutiny review by requiring a ban on a wider category of speech than necessary to achieve the city's interest.[133] Although disagreeing with the Court's reasoning, Justice White nevertheless asserted that the ordinance was unconstitutional because it impermissibly infringed upon speech protected by the First Amendment.[134]

Justice Blackmun, concurring separately, recognized the unconstitutionality of the St. Paul ordinance but also strongly criticized the majority's reasons for invalidating the law.[135] The Justice opined that the Court's decision signalled two disconcerting possibilities for future cases.[136] Justice Blackmun first

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See *supra* note 100 and accompanying text for a discussion of the underinclusiveness limitation.

130 *R.A.V.*, 112 S. Ct. at 2553 (White, J., concurring). By recognizing fighting words as a form of discourse, Justice White expressed that, under the majority's analysis, hate speech would become a legitimate vehicle for debate. *Id.* at 2553-54 (White, J., concurring).

131 *Id.* at 2554 (White, J., concurring) (citing Burson v. Freeman, 112 S. Ct. 1846, 1849-50 (1992); Eu v. San Francisco County Democratic Comm., 489 U.S. 214, 222-23 (1989)).

132 *Id.* (citing Simon & Schuster, Inc. v. New York Crime Victims Board, 112 S. Ct. 501, 509 (1991)).

133 *Id.* Justice White explained that, under the Court's holding, a "narrowly drawn, content-based ordinance could never pass constitutional muster if the object of that legislation could be accomplished by banning a wider category of speech." *Id.* Justice White bolstered this claim, stating that " 'the First Amendment does not require states to regulate for problems that do not exist.' " *Id.* (quoting *Burson*, 112 S. Ct. at 1856). The Justice next submitted that the St. Paul ordinance fell within each of the three exceptions to content discrimination crafted by the Court. *Id.* at 2556-58 (White, J., concurring). See *supra* notes 102-18 and accompanying text for a listing and discussion of these exceptions.

134 *Id.* at 2558, 2560 (White, J., concurring). Justice White ended his concurrence by pontificating that the "decision is mischievous at best and will surely confuse the lower courts. I join the judgment, but not the folly of the opinion." *Id.* at 2560 (White, J., concurring).

135 *R.A.V.*, 112 S. Ct. at 2560-61 (Blackmun, J., concurring).

136 *Id.* at 2560 (Blackmun, J., concurring).

prognosticated that the majority's ruling could weaken the categorical approach and inevitably lead to a lower standard of review for all content-based laws.[137] The Justice explained that First Amendment protections would generally deteriorate if all expression was accorded the same protection.[138] Alternatively, the Justice predicted that the Court's decision would be regarded as an anomaly carrying no precedential weight.[139] Although Justice Blackmun argued that the First Amendment did not prevent a government from prohibiting particular race-based fighting words, the Justice nevertheless found the St. Paul ordinance fatally overbroad.[140]

Justice Stevens, in a separate concurrence, also concluded that the St. Paul ordinance was unconstitutionally overbroad.[141] Justice Stevens rejected the Court's "content neutrality" approach to the St. Paul ordinance, however, and strongly disputed the Court's assertion that content-based regulations were presumptively invalid.[142] By prohibiting the content-based regula-

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137 *Id.* Justice Blackmun submitted that the "simple reality is that the Court will never provide child pornography or cigarette advertising the level of protection customarily granted political speech. If we are forbidden from categorizing, as the Court has done here, we shall reduce protection across the board." *Id.*

138 *Id.*

139 *Id.* at 2560-61 (Blackmun, J., concurring). Justice Blackmun expressed his apprehension that the majority "had been distracted from its proper mission by the temptation to decide the issue over 'politically correct speech' and 'cultural diversity,' neither of which is presented here." *Id.* at 2561 (Blackmun, J., concurring). For an explanation of "political correctness" see *Politically Correct*, WALL ST. J., Nov. 26, 1990, at 10A, col. 1 (explaining that Political Correctness requires " 'right' opinions about women, sexism, race and numerous other categories of victimology"); D'SOUZA, *supra* note 2, at 239 (discussing the trend of "political correctness" on campuses).

140 *R.A.V.*, 112 S. Ct. at 2561 (Blackmun, J., concurring). By way of epilogue, Justice Blackmun pronounced:

> I see no First Amendment values that are compromised by a law that prohibits hoodlums from driving minorities out of their homes by burning crosses on their lawns, but I see great harm in preventing the people of Saint Paul from specifically punishing the race-based fighting words that so prejudice their community.

Id. See *supra* note 32 for a discussion of the overbreadth doctrine.

141 *Id.* at 2561 (Stevens, J., concurring). Justice Stevens wrote a separate concurring opinion in which Justices White and Blackmun joined in part. *Id.*

142 *Id.* Justice Stevens initially characterized the majority's rationale as "an adventure in a doctrinal wonderland." *Id.* at 2562 (Stevens, J., concurring). Opposing the idea that content-based regulations were presumptively invalid, the Justice argued that "much of the Court's First Amendment jurisprudence is premised on the assumption that content makes a difference." *Id.* at 2563 (Stevens, J., concurring). Justice Stevens also noted that "content-based distinctions, far from being presumptively invalid, are an inevitable and indispensable aspect of a coherent understanding of the First Amendment." *Id.*

tion of traditionally unprotected categories of speech, Justice Stevens averred that the majority's decision subverted basic First Amendment principles.[143]

Justice Stevens also expressed reservations with Justice White's "categorical approach," which found fighting words to be totally unprotected by the First Amendment.[144] The categorical approach, Justice Stevens declared, sacrificed "subtlety for clarity" and was "ultimately unsound" in attempting to categorize all expression.[145] Moreover, the Justice criticized the "categorical approach" as flawed in dealing with questions of context.[146] Justice Stevens explained that this "all-or-nothing approach" afforded expression either enormous First Amendment protection or none at all.[147]

As an alternative to the approaches of the majority and Justice White, Justice Stevens proffered "a more complex and subtle analysis" that included both the "nature and scope" of the regulation and the "content and the context" of the expression.[148] Using these factors, the Justice declared that had the St. Paul ordinance not been overbroad, it would have been constitutional had it not been overbroad because it regulated expression based on the harm the speech caused rather than the subject matter or

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143 *Id.* at 2562-63 (Stevens, J., concurring). Justice Stevens bolstered this claim by referencing *Young v. American Mini-Theaters*, in which the Court validated zoning regulations placed on movie theaters "based on the content of the films shown," and *FCC v. Pacifica Foundation*, in which the Court "upheld a restriction on the broadcast of specific indecent words." *Id.* at 2563-64 (Stevens, J., concurring) (citing Young v. American Mini-Theaters, 427 U.S. 50, 66 (1976) (plurality opinion); FCC v. Pacifica Foundation, 438 U.S. 726 (1978) (plurality opinion)).

Justice Stevens additionally posited that by forbidding content-based regulation of fighting words the Court provided such expression the same protection given to "core political speech." *Id.* at 2564 n.4 (Stevens, J., concurring). The Justice further asserted that the majority's exceptions to the prohibition against content discrimination undermined its conclusion that the law was unconstitutional. *Id.* at 2565-66 (Stevens, J., concurring).

144 *Id.* at 2566 (Stevens, J., concurring).

145 *Id.* (citation omitted).

146 *R.A.V.*, 112 S. Ct. at 2566 (Stevens, J., concurring). Justice Stevens postulated that efforts at categorization lead only to "fuzzy boundaries" as illustrated by the Court's wavering over definitions of obscenity and public forum. *Id.* (citations omitted).

147 *Id.* at 2566-67 (Stevens, J., concurring). The meaning of expression and the constitutionality of its regulation, Justice Stevens stressed, may only be determined by considering both content and context. *Id.* at 2566 (Stevens, J., concurring) (citing *New York v. Ferber*, 458 U.S. 747, 778 (1982)).

148 *Id.* at 2567 (Stevens, J., concurring). Justice Stevens concluded that the categorical approach presented an inadequate response to the majority's novel content neutrality analysis. *Id.*

viewpoint it addressed.[149] Justice Stevens reasoned that the St. Paul ordinance proscribed only a subclass of expression that caused injury based on racial, religious or gender bigotry, not expression discussing those characteristics.[150]

In *R.A.V.*, the majority aptly preserved the sanctity of the First Amendment by holding the government to a standard of neutrality when regulating hateful expression.[151] In so doing, the majority properly demonstrated a predilection towards protecting the greatest amount of expression, even expression discomforting to the addressee.[152] Although the Court's decision eviscerates the strict categorical application of the First Amendment, the fighting words doctrine retains its validity, provided that a statute is content neutral and does not impinge upon constitutionally protected speech.[153]

The majority's opinion, however, is not without flaw.[154]

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149 *Id.* In reviewing the constitutionality of content-based regulations, Justice Stevens noted that the Court has considered a number of factors including: (1) the content and character of the expressive activity; (2) context; (3) "the nature of a contested restriction of speech;" and (4) the scope of the regulations. *Id.* at 2567-69 (Stevens, J., concurring).

150 *Id.* at 2570 (Stevens, J., concurring). Justice Stevens concluded by reiterating that the ordinance's regulation of hate speech was based on the different harms caused by such expression and not because of its particular subject matter or viewpoint. *Id.* In support, Justice Stevens referred to the Los Angeles riots lamenting that "[o]ne need look no further than the recent social unrest in the Nation's cities to see that race-based threats may cause more harm to society and to individuals than other threats." *Id.* at 2570 n.9 (Stevens, J., concurring). Justice Stevens maintained that "until the Nation matures beyond that condition, laws such as St. Paul's ordinance will remain reasonable and justifiable." *Id.*

151 See *supra* note 4 and accompanying text for an explanation of content neutrality. *See also* Leo, *supra* note 26, at 25.

152 *See* Linda Greenhouse, *The Court's 2 Visions of Free Speech*, N.Y. TIMES, June 24, 1992, at A13 (stating that the *R.A.V.* decision was a "declaration in favor of more speech rather than less, even if the speech sometimes carries a painfully high price"). Historically, the Court has contended that free speech often served its highest function when it "induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger." Terminiello v. Chicago, 337 U.S. 1, 4 (1949).

153 *See* Gard, *supra* note 18, at 564 (noting that at the state level "one finds an extraordinary number of cases invoking the [fighting words] doctrine").

154 For the concurring Justices' critique of the majority's opinion, see *supra* notes 123-50 and accompanying text. *See also* Greenhouse, *supra* note 152, at A13 ("In expanding the freedom of speech, this decision, in its tone of arid absolutism, may have made freedom more painful to bear.").

One scholar has criticized the Court for failing to consider the possible application of the reconstruction amendments to hate crimes. Akhil R. Amar, *The Case of the Missing Amendments:* R.A.V. v. City of St. Paul, 106 HARV. L. REV. 124, 126 (1992). Professor Amar argues that

> none of the Justices forcefully framed and engaged in the most diffi-

R.A.V. has left many more questions than answers with regard to the decision's future scope.[155] While the majority's decision directly deals with a statute that made certain expression itself a crime, it also calls into doubt the constitutionality of statutes that increase sentences for physical attacks that are prompted by race, religion, gender or other motives.[156] The *R.A.V.* decision similarly casts doubt upon the constitutionality of campus speech codes,[157] as well as hostile work environment laws which, like

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> cult question hiding behind *R.A.V.*: whether, and under what circumstances, words such as "nigger" and symbols such as burning crosses cease to be part of the freedom of speech protected by the First and Fourteenth Amendments, and instead constitute badges of servitude that may be prohibited under the Thirteenth and Fourteenth Amendments.

Id.

155 *See, e.g.*, Terry Tang, *Muddying the Legal Waters—At Odds: The U.S. and Its Court—As Positions Shift, Ideological Balance Remains Uneasy*, SEATTLE TIMES, July 5, 1992, at A11 ("Whether *R.A.V. v. City of St. Paul* will become an important case in First Amendment interpretation is unknown. Its implications are so broad and difficult to reconcile with earlier cases involving 'fighting words' that it may be regarded by future courts as an aberration.").

156 *See* Leo, *supra* note 26, at 25. Following the *R.A.V.* decision, "the law cannot single out any special categories of potential victims for special attention. . . . This could mean wider uncertainty about what constitutes an offense and perhaps more power for the courts, which may end up making the content-based decisions that legislators are now forbidden to make." *Id.* Moreover, the *R.A.V.* decision could also challenge the validity of bias crime laws with "enhanced" penalties "if it seems that thought or expression, and not just action, is being punished." *Id.*

Recently, the Oregon and Wisconsin Supreme Courts considered the constitutionality of their states' anti-hate legislation in light of the *R.A.V.* decision. *See* Oregon v. Plowman, 838 P.2d 558, 560 (Or. 1992) (declaring a statute making it a crime for two or more persons to injure another "because of their perception of that person's race, color, religion, national origin or sexual orientation" did not violate the First Amendment); State v. Mitchell, 485 N.W.2d 807, 811, 814 (Wis.) (holding that a statute that enhanced punishment for certain crimes if the victim was selected because of race violated the First Amendment), *cert. granted sub nom.* Wisconsin v. Mitchell, 113 S. Ct. 810 (1992).

Similarly, the New Jersey Superior Court has recently issued conflicting opinions regarding the constitutionality of New Jersey's anti-hate law that imposes stronger penalties for bias-motivated crimes. Russ Bleemer, *Bias Crime Law Survives First Challenge*, N.J.L.J., Dec. 28, 1992, at 14 (citing State v. Mortimer (Indictment No. I-1869-11-91) (holding unconstitutional New Jersey's hate crime statute that increases sentences for bias-motivated crimes); State v. Sharkey (Indictment No. 91-11-1230) (upholding as constitutional New Jersey statute which imposes stiffer penalties for bias-motivated crimes)). *See generally* Iver Peterson, *Hate Law is Rejected by a Court*, N.Y. TIMES, Sept. 26, 1992, at B26 ("the [*Mortimer*] ruling makes New Jersey the latest state to run into trouble because of efforts to construe hate speech as a form of illegal conduct").

157 *See* Leo, *supra* note 26, at 25 ("Since most college speech codes depend on a similar laundry list of offense categories, they are presumably in as much trouble as ordinances like St. Paul's."). For an additional discussion of college speech codes, see *supra* notes 1-2 and accompanying text.

the St. Paul ordinance, proscribe only certain forms of harassment.[158]

The positions taken by Justices White and Stevens are, however, even more troubling.[159] Justice White's declaration that the types of speech within the categorical exceptions to the First Amendment were totally unprotected inadequately considers the complex nature of speech.[160] Expression varies greatly and efforts to categorize it have produced ad hoc results and murky classifications of speech.[161]

While Justice Stevens properly recognized the categorical approach's inherent problems, the "complex and subtle" analysis based on the content, context, nature and scope of the regulated speech is no more satisfying. Under this nebulous standard, governments would be uncertain as to what expression they could constitutionally proscribe. In practical operation, Justice Stevens's approach would merely transfer the power to decide what expression is protected from the legislature to the judiciary.[162]

Understandably, the concurring Justices were emotionally moved by the harmful effects of racism and the worthy goals of the St. Paul ordinance. The Justices, however, overlooked the importance of protecting even unpopular or offensive speech.[163] The majority's emphasis on content neutrality affords greater protection against improper government regulation of expression than do the concurring opinions.[164] Under the content neu-

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158 *See* Cole, *supra* note 19, at 30. Justice Scalia, however, maintained that these regulations were constitutional because they were directed more at conduct than expression. *R.A.V.*, 112 S. Ct. at 2546-47.

159 *See* Michael W. McConnell, *The PC Left Makes a Right*, N.J.L.J., Aug. 24, 1992, at supp. 26 (stating that "the two concurrences do a much better job of exposing weaknesses in the majority and in each other than they do in making an affirmative case of their preferred approach").

160 *See R.A.V.*, 112 S. Ct. at 2566 (Stevens, J., concurring) (noting that "[f]ew dividing lines in First Amendment law are straight and unwavering, and efforts at categorization inevitably give rise only to fuzzy boundaries").

161 *See id.*

162 *See* McConnell, *supra* note 159, supp. at 26.

163 *See supra* notes 4-5. Justice Brandeis in his concurring opinion in Whitney v. California, 274 U.S. 357, (1927), cautioned that:

> [The founders] knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable governments; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones.

Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

164 *See* McConnell, *supra* note 159, supp. at 26 (positing that "the majority opin-

trality rule, government may not selectively proscribe even a subclass of a wholly proscribable category of speech on the basis of content. This approach should provide governments with a reasonably clear constitutional standard for regulating expression and lead to more predictable results.[165]

Nevertheless, government should not be in the business of prohibiting hate speech. Besides violating the First Amendment, hate crime laws raise other legal and moral problems. Anti-hate laws seek legislative solutions to fundamental, albeit unattractive, human emotions.[166] Proponents of these laws fail to recognize that government lacks the ability to eliminate racist or hateful beliefs.[167]

Hate and racism are sins, not crimes.[168] States that impose anti-hate laws unfortunately will fare no better in eradicating these retrograde views from our midst than have our centuries-old theological doctrines. Nevertheless, it is imperative that bigots not view the majority's decision as protecting or condoning racist or hateful acts. Although R.A.V. may not be prosecuted under the St. Paul hate crime ordinance, he and bigots like him should be tried under other existing criminal laws.[169]

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ion seems to offer the most comprehensive and coherent protection for freedom of speech against the dangers of official orthodoxy").

165 A general fighting words statute which includes racial, religious, or gender-based epithets would probably meet First Amendment review, if content neutral. *See R.A.V.*, 112 S. Ct. at 2545. Under the majority rationale, a government may proscribe fighting words directed at specific groups if the regulations are content neutral and pass equal protection scrutiny. *Id.* at 2548.

166 *See* William Murchinson, *Society Shouldn't Try to Outlaw Hatred*, TEX. LAW. July 13, 1992, at 12. Murchinson commented:

> What is worst maybe about "hate crime" statutes is that they attempt too much. We imagine that every problem has a legislative or juridical solution, when the reality is that only a few, highly basic human problems can be addressed in this way. Laws, thoughtlessly considered, carelessly applied, only inflame the winner to vaunt his winnings, the loser to nourish his resentments.

Id.

167 *See id.* ("We have assigned the law a task too big for it—the reconciliation of social conflicts. Courts, legislatures, city councils and college administrations (which have enacted similar codes) are in way over their heads.").

168 *See id.* (opining that "you don't need better laws" regulating hate expression but "better theology").

169 See *supra* note 30 and accompanying text for other laws already existing which can punish the actor in a hate crime.