SMU | Dedman School of Law

SMU Law Review

Volume 47 | Issue 1 Article 5

January 1994

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Recommended Citation
Ronald D. Rotunda, *A Brief Comment on Politically Incorrect Speech in the Wake of R.A.V.*, 47 SMU L. Rev. 9 (1994)
https://scholar.smu.edu/smulr/vol47/iss1/5

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A BRIEF COMMENT ON POLITICALLY INCORRECT SPEECH IN THE WAKE OF R.A.V.

*Ronald D. Rotunda**

I. INTRODUCTION

SHAWN Brown is a sophomore at the University of Michigan. For his assignment in Political Science 111 he wrote a term paper on possible inherent flaws in political polling data. It contained the following passage:

> Another problem with sampling polls is that some people desire their privacy and don't want to be bothered by a pollster. Let's say Dave Stud is entertaining three beautiful ladies in his penthouse when the phone rings. A pollster on the other end wants to know if we should eliminate the capital gains tax. Now Dave is a knowledgeable businessperson who cares a lot about this issue. But since Dave is "tied up" at the moment, he tells the pollster to "bother" someone else. Now this is perhaps a ludicrous example, but there is simply a segment of the population who wish to be left alone. They have more important things to be concerned about—jobs, family, school, etc. If this segment of the population is never actually polled, then the results of the poll could be skewed.[1]

Mr. Brown's teacher, Ms. Debbie Meizlish, may have been pleased to see the sex-neutral term, "businessperson," but was otherwise appalled. She interpreted Mr. Brown's term paper as sexual harassment directed against her. She wrote the following to Mr. Brown:

> You are right. This is ludicrous & inappropriate & OFFENSIVE. This is completely inappropriate for a serious political science paper. It completely violates the standard of non-sexist writing. Professor Rosenstone has encouraged me to interpret this comment as an example of sexual harassment and to take the appropriate formal steps. I have chosen not to do so in this instance. However, any future comments in a paper, in a class or in any dealings w/ me will be interpreted as sexual harassment and formal steps *will* be taken. Professor Rosenstone is aware of these comments—& is prepared to intervene. You are forewarned![2]

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* Albert E. Jenner, Jr., Professor of Law, University of Illinois College of Law. I am indebted to Professor Jules B. Gerard for his helpful comments.

1. *Language Censors*, WALL ST. J., Jan. 5, 1993, at A14. *The Michigan Review*, the student-run newspaper, originally reported this incident.

2. *Id.*

Mr. Brown did not need another warning. He dropped the course.

The University of Michigan is a state institution, and Professors Meizlish and Rosenstone are state actors, governed by the First Amendment, as applied to the states through the Fourteenth Amendment.[3] Aside from such constitutional niceties, a university is supposed not only to tolerate but encourage free speech. The Supreme Court recognized the obvious when it emphasized that there are special protections for speech within a university setting because "the university is a traditional sphere of free expression [that is] fundamental to the functioning of our society . . . ."[4] But Mr. Brown's speech was not "pc."

Until a few years ago, I would have thought that "pc" stood for "personal computer." Now it stands for "politically correct," a relatively new term added to our lexicon. In the old days, we would have labeled as "thought control" any effort to control what we say or think. Now it is an effort to ban certain language considered improper, inappropriate, or offensive to people who are politically correct. To be politically incorrect is a sin.

Thus, the Governor of Washington recently ordered that he will no longer call his "Chief of Staff" the "Chief of Staff" because some members of the Swinomish tribe objected to the term "chief" as insensitive.[5] Hence, the new title of "Staff Director."[6] Although "chief" is derived from Latin and not from any Native American word,[7] some people have decided that its use is no longer politically correct. There is no report of what might be in store for those in the Governor's office who use the wrong term in referring to the Staff Director.

Consider what was in store for Professor Judith Kleinfeld, a Professor of Education at the University of Alaska, in Fairbanks, when she made a politically incorrect statement. Her troubles began after she spoke before the education subcommittee of the Fairbanks Chamber of Commerce. In response to a question, she complained that the University was not doing its job of educating Alaskan Native Americans; to cover up its failure, it then pressured teachers to graduate Native Americans unprepared to assume careers as educators. The employers, in turn, were reluctant to hire these graduates. When the Office of Civil Rights (OCR) of the U.S. Department of Education learned of her remark, it began a thorough investigation. The OCR's four-month probe sought to determine if her language constituted illegal discrimination.[8]

Because the Office of Education charged Professor Kleinfeld with what

3. Gitlow v. New York, 268 U.S. 652 (1925); *see* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 12.1-.4 (4th ed. 1991).

4. Rust v. Sullivan, 111 S. Ct. 1759, 1776 (1991).

5. Mike Lowry, *The Coming PC Crackup*, WALL ST. J., Jan. 21, 1993, at A14.

6. *Id.*

7. "Chief" or "chieftain" is derived from "achieve," which is a contraction of the French phrase, "venir à chief," meaning, to come to a head. JOSEPH T. SHIPLEY, DICTIONARY OF WORD ORIGINS 7, 79 (1955). This French expression, in turn, comes from the Latin expression, "ad caput venire," to come to a peak or to an end. *Id.* at 7. The term "captain," like "chieftain," shares the same word origin from the Latin noun, "caput," or head. *Id.*

8. Michael S. Greve & Joseph A. Shea, *When the Feds Weigh In on P.C.*, LEGAL TIMES,

she said, not with what she did (there were no allegations of any discriminatory acts), it asked her to submit her writings and research so that the Office of Education could officially examine them. The Office of Education also asked Professor Kleinfeld's colleagues to supply examples of allegedly racist "speech or thought" in her past. For four months the Government engaged in a thorough investigation of what Professor Kleinfeld said, what she wrote, what she thought.[9]

Though it finally dropped the investigation, we should not underestimate the chilling effects of this assault on her mind. She and her colleagues now know that any spurious complaints by disgruntled colleagues or students may set in motion a lengthy investigation of what they say, read, or think, what kind of books they borrow from the library, what videos they rent, which magazines they subscribe to, what they say to their friends, and how they react when others say something to them. All this information is fair game and relevant for this type of investigation.

These examples are not unique. Nat Hentoff, in his beautifully written book, *Free Speech for Me—But Not for Thee: How the American Left and Right Relentlessly Censor Each Other*,[10] chronicles many others. The danger to free speech and free thought is real.

Make no mistake. I am not defending those who practice race or sex discrimination. Such people are morally wrong and live in an antediluvian world.[11] Nor do I think that words or labels lack power. On the contrary, words both reflect and mold the way we think.[12] Words are important, and some words cause offense. Indeed, that is often the reason why people use them. For those who believe that words lack power, let them read Marc Antony's Funeral Oration and the actions that flowed from that speech.[13]

Jan. 25, 1993, at 38. The complaint received by the Department of Education's Office of Civil Rights read, in its entirety, as follows:

> On September 5, 1991, Dr. Judith Kleinfeld alleged before an education subcommittee of the Fairbanks Chamber of Commerce that Native students of the University of Alaska were simply being "passed along," apparently without regard to academic achievement. Many people have disagreed but she is a reputed expert on Native education and many people have supported her even though she has never provided any evidence in support of her allegation.

Id.

The assertion in the last clause—that "she has never provided any evidence in support of her allegation"—apparently assumes that her eye-witness testimony is not evidence. It would be analogous to the police telling the victim of an attempted murder, "You have no evidence to support your charge—other than your eye-witness identification."

9. *Id.* at 39.

10. NAT HENTOFF, FREE SPEECH FOR ME—BUT NOT FOR THEE: HOW THE AMERICAN LEFT AND RIGHT RELENTLESSLY CENSOR EACH OTHER (1992); *see also* Edward J. Cleary, *Symposium: Hate Speech After R.A.V.: More Conflict Between Free Speech and Equality?*, 18 WM. MITCHELL L. REV. 889 (1992); Jules B. Gerard, *The First Amendment in a Hostile Environment: A Primer on Free Speech and Sexual Harassment*, NOTRE DAME L. REV. (forthcoming 1993); Robert A. Sedler, *The Unconstitutionality of Campus Bans on "Racist Speech": The View from Without and Within*, 53 U. PITT. L. REV. 631 (1992).

11. It is a small sign of progress that even bigots who practice discrimination seldom do so openly, because hypocrisy is the tribute that vice pays to virtue.

12. *See* RONALD D. ROTUNDA, THE POLITICS OF LANGUAGE: LIBERALISM AS WORD AND SYMBOL (1986).

13. WILLIAM SHAKESPEARE, JULIUS CAESAR act 3, sc. 2.

Words also can wound. A "verbal assault" is not an oxymoron.

It is because words have such enormous force that we have the First Amendment. If words did not have potency, we would be less concerned when the government seeks to restrict speech. A "function of free speech under our system of government is to invite dispute."[14] The First Amendment offers protection to words because of, not in spite of, the fact that "words are often chosen as much for their emotive as their cognitive force."[15] It is because words have such influence that the Court constantly reminds us that the remedy for the speech with which we disagree is more speech, not less.[16] The new Jacobins deny this.

II. CONTENT BASED RESTRICTIONS ON SPEECH

In a long line of cases the Court has made clear that content-based restrictions on speech are presumptively unconstitutional.[17] When the Court has allowed content-based or viewpoint-based restrictions on speech, it has done so only under very limited circumstances. We know that the government can make it illegal to incite a lynch mob to riot. When the speaker objectively and subjectively intends to produce imminent disorder and the circumstances are such that imminent disorder is likely to result, the law can intervene.[18] When the speech intends to incite a riot (like yelling "fire" in a crowded theater) there is no opportunity for others to seek to persuade the crowd to accept a contrary position; there is no opportunity to rely on the marketplace of ideas for reasoned debate, because the intent of the speaker and the circumstances in which he or she harangues the crowd amount to incitement, and time is of the essence.

This governmental power to restrict speech that incites riots or other serious unlawful conduct is a very narrow one. It is no coincidence that, in modern times, when the Court has applied this test to particular cases, it has always found that the government has not met its burden and that the speech was constitutionally protected, even though it was offensive and even racist.[19] Thus, in *Brandenburg v. Ohio*[20] the Court reversed the conviction

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14. Terminiello v. Chicago, 337 U.S. 1, 4 (1949).

15. Cohen v. California, 403 U.S. 15, 26 (1971).

16. Ronald D. Rotunda, *The Best Response to Speech We Don't Like Is More Speech*, CHI. SUN TIMES, May 16, 1992, at 14.

17. *See, e.g.*, Texas v. Johnson, 491 U.S. 397, 406 (1989); United States v. Eichman, 496 U.S. 310 (1990). *See generally* Peter Maggs & Ronald D. Rotunda, *Meanwhile, Back in Mother Russia*, LEGAL TIMES, Oct. 2, 1989, at 35 (Soviet congress repealed legislation making it a crime to "discredit" a public official).

18. Hess v. Indiana, 414 U.S. 105 (1973) (per curiam); Brandenburg v. Ohio, 395 U.S. 444 (1969) (per curiam). *See generally* 4 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 20.15 (2d ed. 1992).

19. *See* Hess v. Indiana, 414 U.S. 105 (1973) (antiwar demonstration; conviction overturned); Brandenburg v. Ohio, 395 U.S. 444 (1969) (per curiam) (racist speech of Ku Klux Klan leader; conviction overturned); Watts v. United States, 394 U.S. 705 (1969) (per curiam) (threatening the life of the President; conviction overturned); Bond v. Floyd, 385 U.S. 116 (1966) (opposing draft laws; conviction overturned); *see also* 4 ROTUNDA & NOWAK, *supra* note 18, § 20.15.

20. 395 U.S. 444 (1969) (per curiam), *overruling* Whitney v. California, 274 U.S. 357 (1927).

of a Ku Klux Klan leader who advocated violence. The violence, said the Court, did not involve imminent action.[21] The key is "incitement." Similarly, in *Hess v. Indiana*[22] the Court overturned a disorderly conduct conviction of Hess, who, during an antiwar demonstration, shouted that the crowd should take the streets "later" or "again." As a matter of law, said the Court, the state had not proved that Hess' words amounted to advocacy of incitement, of "*imminent* lawless action."[23] The Court held that Hess's shouting "could be taken as counsel for present moderation; at worst, it amounted to nothing more than advocacy of illegal action at some indefinite future time."[24]

Speech that promotes hate is a terrible thing, and thus various people, particularly in recent times, have tried to prohibit or punish such speech.[25] Hate speech, however, usually does not meet the strict test of speech to incite imminent lawless action. The speaker, by hurling degrading racial or sexual epithets, intends to insult or verbally wound his listeners, not to persuade them to commit violence. Such language does not fit within the narrow contours of the *Brandenburg/Hess* line of cases. Thus, opponents of hate speech have tried to ban it using a different theory, claiming that racial slurs, insensitive language, and sexist speech all amount to speech that constitutes "fighting words;" that is, speech calculated to create an automatic, unthinking, violent reaction in the listener, rather than the consideration of an idea.[26]

The Supreme Court created what it called the "fighting words doctrine" over a half century ago in *Chaplinsky v. New Hampshire*.[27] Fighting words are those uttered with the intention to "incite an immediate breach of the peace"[28] when directed to a particular individual.[29] Words become fighting words when they are an offer to exchange fisticuffs on an individualized, face-to-face level rather than a mob level. The speaker does not incite a crowd, as in the *Brandenburg/Hess* situation, but seeks to provoke a particular individual. The fighting words principle is really a specific, retail application of the incitement cases. Fighting words are "directed against individuals to provoke violence or to inflict injury."[30]

Offensive, scatological, racist, or sexist statements, even if accompanied by a call to fight, are not within the fighting words doctrine if the object of the speaker's hate is not a particular individual whom the speaker challenges on a face-to-face basis. Thus, in *Terminiello v. Chicago*[31] the Court invalidated

21. *Id.* at 447.
22. 414 U.S. 105 (1973).
23. *Id.* at 108 (quoting Brandenburg v. Ohio, 395 U.S. 444, 447 (1969)).
24. *Id.*
25. *See supra* text accompanying notes 1-9.
26. *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942).
27. *Id.*
28. *Id.* at 572.
29. *Id.* at 573-74.
30. R.A.V. v. City of St. Paul, 112 S. Ct. 2538, 2553 (1992) (White, J., joined by Blackmun, J. & O'Connor, J., concurring).
31. 337 U.S. 1 (1949).

a breach of the peace conviction for Terminiello, who was denouncing Jews, as well as other groups, including members of the turbulent and angry crowd before whom he was speaking.[32] *Collin v. Smith*[33] offers a more recent example. There, the Seventh Circuit held that members of the American Nazi Party had a right to march in front of the Village Hall in Skokie, a Chicago suburb with a large Jewish population, including several thousand survivors of the Nazi holocaust. Even though such speech was offensive, the court overturned the Village's ordinance that banned the dissemination of any materials promoting and inciting racial hatred.[34]

If the fighting words doctrine does not prevent Nazis from marching in Skokie, it should be clear that the Court never intended it to be used as a justification to root out politically incorrect speech. The prohibition against fighting words is not a restriction on the thought or idea itself but on the manner or mode of expressing it, in connection with a face-to-face call to fisticuffs. One can be a hatemonger without falling within the narrow fighting words doctrine. The fighting words rule only allows the state to prohibit an intolerable technique or manner of expressing an idea (a personal call to fisticuffs), but does not authorize the state to ban the idea itself.[35]

In the same manner, one can be a bigot—that is, believe in bigotry, intolerance, and prejudice—without practicing discrimination. And one can practice discrimination without believing in bigotry. For example, Employer *# 1* may be personally opposed to all forms of sex discrimination, but pays the most recently hired female employee less than the most recently hired male employee. Employer # 1 may be personally very upset at the pay differential, but still engages in the discrimination because the alternative is bankruptcy for his small business. Employer *# 1* does not believe in bigotry, but he is practicing sexual discrimination, an illegal *act* that the state may ban.[36] Employer *# 2*, in contrast, may be a bigot and a chauvinist, but he treats all employees alike, without regard to their sex, because he fears civil or criminal penalties. Under the First Amendment, the law cannot punish Employer # 2 because he has committed no discriminatory act, even though he is a bigot.[37]

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32. *Id.* at 5-6.

33. 578 F.2d 1197 (7th Cir.), *cert. denied*, 439 U.S. 916 (1978).

34. *Id.* at 1207. "[A]busive language, tending to cause a breach of the peace," is not within the fighting words doctrine if the jury may determine guilt as "measured by common understanding and practice." Gooding v. Wilson, 405 U.S. 518, 519, 528 (1972). In *Gooding* the Court invalidated a breach of the peace conviction. *Id.* at 528. The defendant said to a policeman who was attempting to restore access to a public building, "White son of a bitch, I'll kill you." *Id.* at 534. To another, the defendant said: "You son of a bitch, if you ever put your hands on me again, I'll cut you all to pieces." *Id.*

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

36. Susan Gellman, *Sticks and Stones Can Put You in Jail, But Can Words Increase Your Sentence?—Constitutional Law and Policy Dilemmas of Ethnic Intimidation Laws*, 39 UCLA L. REV. 333, 367-68 (1991).

37. *See* Wisconsin v. Mitchell, 113 S. Ct. 2194 (1993). In *Mitchell* Chief Justice Rehnquist, for a unanimous Court, upheld the constitutionality of a Wisconsin state law that authorized the defendant's sentence for aggravated battery to be enhanced when he intentionally selects his victim on the basis of race, religion, or other protected status. *Id.* at 2202. The

Challenging someone to a fight can fall within the fighting words doctrine, but simply to engage in speech expressing hate, racial or otherwise, does not fall into this category—even if the listeners (who could simply walk away) are motivated to fight the hatemonger. The Court has emphasized that it does not favor prosecutions for fighting words, which it treats as a narrow exception. As in the incitement line of cases, the Supreme Court, while not overruling *Chaplinsky*, has refused to uphold such convictions in recent years.[38]

The government may not use the fighting words doctrine to punish a speaker because others, who do not like the message conveyed, are motivated to engage in violence against the speaker. The fighting words doctrine does not allow the state to punish people simply because they express unpopular or even erroneous views. Words or symbols do not become fighting words merely because the speaker deeply offends the listeners. As Zechariah Chafee, the great First Amendment advocate, warned over a half century ago:

> The *reductio ad absurdum* of this theory was the imprisonment of Joseph Palmer, one of Bronson Alcott's fellow-settlers at "Fruitlands," not because he was a communist, but because he persisted in wearing such a long beard that people kept mobbing him, until law and order were maintained by shutting him up. A man does not become a criminal because someone else assaults him, unless his own conduct is in itself illegal or may be reasonably considered a direct provocation to violence.[39]

As the examples that began this article illustrate, the politically correct zealot does not appreciate the wisdom of a Zechariah Chafee and rejects this interpretation of the fighting words doctrine. That is why the recent opinion of *R.A.V. v. City of St. Paul*[40] is so significant. It makes clear that the Court—albeit in a split decision—rejects political correctness as a gloss limiting the First Amendment.

Wisconsin law, the Court explained, is not explicitly directed at speech but is aimed at conduct unprotected by the First Amendment. *Id.* at 2201; *see also infra* note 72.

38. *See* 4 ROTUNDA & NOWAK, *supra* note 18, § 20.40.

39. ZECHARIAH CHAFEE, JR., FREE SPEECH IN THE UNITED STATES 151-52 (1942) (citations omitted); *accord* Cohen v. California, 403 U.S. 15, 21 (1971). In *Cohen* Justice Harlan, for the Court, ruled that even though some people might respond to a speech by physically assaulting the speaker,

> that is an insufficient base upon which to erect, consistently with constitutional values, a governmental power to force persons who wish to ventilate their dissident views into avoiding particular forms of expression. The argument amounts to little more than the self-defeating proposition that to avoid physical censorship of one who has not sought to provoke such a response by a hypothetical coterie of the violent and lawless, the States may more appropriately effectuate that censorship themselves.

Id. at 23.

40. 112 S. Ct. 2538 (1992). Scalia, J., delivered the opinion of the Court, joined by Rehnquist, C.J., and Kennedy, Souter, and Thomas, JJ. White, J., filed an opinion concurring in the judgment, in which Blackmun and O'Connor, JJ., joined, and in which Stevens, J., joined except as to Part I-A. Blackmun, J., filed an opinion concurring in the judgment. Stevens, J., also filed an opinion concurring in the judgment, of which White and Blackmun, JJ., joined as to Part I.

III. DECIPHERING *R.A.V.*

In *R.A.V.*, the City of St. Paul enacted an ordinance that provided:

> Whoever places on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor.[41]

The City alleged that R.A.V. and several other teenagers burned a cross inside the privately owned, fenced yard of a black family, who lived across the street from where R.A.V. was staying. R.A.V., of course, intended to terrorize the black family, but the State did not charge him with trespass or a similar offense.[42] The only question before the Court was the constitutionality of this hate ordinance, not other charges that the City could have brought against R.A.V.

The state supreme court had ruled that the ordinance only reached expressions that were fighting words, within the meaning of *Chaplinsky*, and that it was a "narrowly tailored means toward accomplishing the compelling governmental interest in protecting the community against bias-motivated threats to public safety and order . . . ."[43] Thus, in the view of the state court, the ordinance was constitutional. The U.S. Supreme Court disagreed.[44]

Justice Scalia, for the majority, accepted the state court's interpretation of its law, but concluded that the ordinance was still unconstitutional on its face.[45] Its fatal flaw was that it "prohibits otherwise permitted speech solely on the basis of the subjects the speech addresses."[46] The significance of *R.A.V.* is that the Court applied the general rule against content-based regulation of speech to the fighting words doctrine: the government may not regulate even fighting words if the restriction is "based on hostility—or favoritism—towards the underlying message expressed."[47]

R.A.V. can be a confusing case. It is best understood by turning to a hy-

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41. *Id.* at 2541.

42. The state also had charged R.A.V. with violation of a state law that prohibited racially motivated assault, but there was no constitutional challenge to that count. R.A.V. also engaged in trespass, a charge that raises no First Amendment issues. *See id.* at 2541 n.2 (citing MINN. STAT. ANN. § 609.2231(4) (West Supp. 1990)); *see also id.* at 2541 n.1 (citing to other applicable laws under which R.A.V. could have been charged, such as terroristic threats, arson, and criminal damage to property).

43. *In re* Welfare of R.A.V., 464 N.W.2d 505, 511 (Minn. 1991), *rev'd sub nom.*, R.A.V. v. City of St. Paul, 112 S. Ct. 2538 (1992).

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

45. *Id.*

46. *Id.* at 2542 (footnote omitted).

47. *Id.* at 2545. Thus, for example, a content-neutral ban on targeted residential picketing is constitutionally valid, on its face. *See* Frisby v. Schultz, 487 U.S. 474, 482 (1988). But a ban that exempts labor picketing is not content-neutral, because it exempts picketing that refers to labor issues and hence violates the First Amendment. *See* Carey v. Brown, 447 U.S. 455, 462-63 (1980).

pothetical that Justice Scalia used to explain the Court's ruling. The problem with the St. Paul ordinance is that, under its provisions,

> [o]ne could hold up a sign saying, for example, that all "anti-Catholic bigots" are misbegotten; but not that all "papists" are, for that would insult and provoke violence "on the basis of religion." St. Paul has no such authority to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensbury Rules.[48]

Justice Stevens, in his separate concurring opinion, sought to distinguish this hypothetical example. However, in order to distinguish the hypothetical fact situation, he first had to change it! He recited exactly the above quotation, and then stated the following, including the bracketed language: "This may be true, but it hardly proves the Court's point. The Court's reasoning is asymmetrical. The response is a sign saying that 'all [religious] bigots are misbegotten' is a sign saying that 'all advocates of religious tolerance are misbegotten.' "[49]

The problem with Stevens's reasoning[50] is that the hypothetical ordinance, in fact, does make it a crime for someone to state that "all papists are misbegotten," but does not make it a crime to state that "all anti-Catholic bigots are misbegotten." The ordinance, by its own terms, only seeks to ban certain types of fighting words: it seeks to ban words that would insult and provoke on the basis of religion, but not similar words that do not fit within that category, even though they are fighting words. In order for Stevens to reject this crucial hypothetical, he first had to alter it. He then criticized this strawman of his own creation, a hypothetical that Scalia had not advanced.

That this ordinance is content-based was not in dispute. The Minnesota Supreme Court, in upholding the ordinance, emphasized that the ordinance was directed against "bias-motivated" hatred, and messages "based on virulent notions of racial supremacy."[51] The brief of St. Paul, filed in the juvenile court, explicitly stated that the "burning of a cross does express a message . . . which the St. Paul Ordinance attempts to legislate."[52]

The fighting words doctrine only allows the state to prohibit, in certain narrowly defined circumstances, an intolerable technique or manner of expressing an idea. It never authorizes the state to ban the idea itself. As the Court explained, "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

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48. *R.A.V.*, 112 S. Ct. at 2548.

49. *Id.* at 2571. Stevens also stated that it "seems to me" to be "extremely unlikely" that such signs "could be fighting words." *Id.* However, if Justice Scalia had substituted a more vernacular, vulgar, or colloquial term than the polysyllabic word, "misbegotten"—often fighting words are monosyllabic and the people who speak them do not speak the King's English—it should not be difficult to conceive of the expression being placed in the category of fighting words.

50. Note that White and Blackmun only joined part I of Stevens's separate opinion, not this part.

51. *In re* Welfare of R.A.V., 464 N.W.2d at 508, 511.

52. *R.A.V.*, 112 S. Ct. at 2548 (quoting Brief for Respondent).

speaker wishes to convey."[53] Yet Minnesota sought to restrict only particular ideas and not others, even though all fell within the fighting words category.

The fighting words doctrine is analogous to the principle that allows the state to ban a noisy sound truck. The state can ban a noisy truck because it interferes with peace and quiet; it is an improper means of expressing an idea.[54] Though the state can ban the noise, it cannot ban the message. For example, the state has no power to ban noisy sound trucks expressing Republican ideas. The state can prohibit the sound truck only because it is noisy, not because of the ideas that it is promoting.

Similarly, the state can ban setting fires in the public streets, but it cannot prohibit someone from burning the flag as a means of protest.[55] If a person decided to burn the flag on a public street, the state could punish the act of burning (no matter what it was that the defendant was burning), because it would be justified by a neutral statute that prohibited only an act without regard to what a person was seeking to express. A law that made it a crime to disgrace the flag by burning it, however, would be improper, because it requires the state to prove a certain mental attitude in connection with the burning.[56]

In short, when the Court holds that fighting words are a category of speech excluded from the protection of the First Amendment, it really means that the state may ban a call to exchange fisticuffs, no matter what idea the speaker wishes to express. This doctrine does not give the state power to ban speech solely on the basis of the subjects that the speaker addresses. *R.A.V.* does not impose an underinclusiveness requirement on the fighting words doctrine. Rather, it imposes the familiar requirement that the state prohibition on proscribable speech not be based on the content of speech. Selective regulation of speech is presumptively unconstitutional.[57]

The state can prohibit some speech because of its content, so we must look at the content of speech to see if it falls within a category where the state has special powers to ban speech. For example, should the speech at issue be treated as fighting words or obscenity? That does not mean, however, that the state has carte blanche to do as it wishes and engage in viewpoint discrimination merely because speech falls in the category of fighting words or obscenity.

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53. *Id.* at 2548-49.

54. *Compare* Kovacs v. Cooper, 336 U.S. 77 (1949) *with* Ward v. Rock Against Racism, 491 U.S. 781 (1989). *See also* Niemotko v. Maryland, 340 U.S. 268, 280-82 (1951) (Frankfurter, J., concurring).

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

56. *See* 4 ROTUNDA & NOWAK, *supra* note 18, §§ 20.48-.49 (discussing symbolic speech).

57. The presumption of invalidity may, in unusual circumstances, be overcome. Thus, *Burson v. Freeman*, 112 S. Ct. 1846 (1992), with no majority opinion, upheld a Tennessee law, typical of the law of many jurisdictions, that prohibited the solicitation of votes and the display or distribution of campaign materials within 100 feet of a polling place. There was substantial history that supported the conclusion that the state had a compelling interest in preventing voter intimidation and election fraud. *Id.* at 1851-52. History supported the conclusion that the best way to preserve the secrecy of the ballot and safeguard the integrity of the election process is to limit access to the area around the voter. *Id.* at 1852-55.

Thus, the state could ban all obscene speech because it is all proscribable or able to be forbidden, in spite of the First Amendment. In addition, the state could ban all obscene speech in a certain media or market, such as all obscene speech on the telephone, because obscene speech in that particular market is thought to be more troubling.[58] The latter prohibition is not based on any viewpoint expressed by the speech, so it is not prohibited by any principle found in *R.A.V.* There is no danger that the state is really interested in suppressing particular ideas. It is only suppressing prurience in a particular market. Yet it would be improper for the state to ban only obscenity that includes an offensive political message.[59] The power of the government to ban obscenity or fighting words does not give it the power to drive certain ideas or viewpoints from the marketplace of ideas.

Under the principle of *R.A.V.*, the state can forbid fraud in one type of industry but not another, simply because the state believes that the risk of fraud is greater in one industry than another. There is no danger that the state is really seeking to ban the content of certain types of speech or suppress certain viewpoints in such circumstances. However, *R.A.V.* teaches that the state "may not prohibit only that commercial advertising that depicts men in a demeaning fashion."[60] That would fail the requirement that there must be "no realistic possibility that official suppression of ideas is afoot."[61] Advertising that depicts men or women in a demeaning fashion is not to be admired, but it is protected by the First Amendment nonetheless. The Government cannot seek to drive out or disfavor this particular viewpoint, even though it is offensive.

Consistent with *R.A.V.*, the Federal Government has a narrow power to ban speech that threatens the President.[62] The reason why the First Amendment, in some circumstances, does not protect threats of violence is that such threats engender fear, disrupt activities, and cause apprehension; all these reasons apply with special force when the Federal Government prohibits threats that specify the President. Yet even here, "the Federal Government may not criminalize only those threats against the President that mention his policy on aid to inner cities."[63] Law forbidding threats against the President does not discriminate based on the viewpoint of the speaker.

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58. Sable Communications of Cal., Inc. v. Federal Communications Comm'n, 492 U.S. 115 (1989).

59. Kucharek v. Hanaway, 902 F.2d 513, 517 (7th Cir. 1990), *cert. denied*, 498 U.S. 1041 (1991). Stevens, in his separate opinion, argued that obscene anti-government speech was "fantastical," because, by definition, it does not lack serious political value. *R.A.V.*, 112 S. Ct. at 2562 (Stevens, J., concurring). Scalia briefly responded by noting that a hard core obscene movie, with a model sporting a political tattoo, is still obscene. *Id.* at 2544 n.4. The State can decide to ban all constitutionally obscene movies, but it cannot ban only those obscene movies where the actors are clad with only Democratic, but not Republican, tattoos.

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

61. *Id.* at 2547.

62. Watts v. United States, 394 U.S. 705 (1969), upheld the facial validity of 18 U.S.C. § 871 (1988), which makes threats on the life of the President a criminal offense. On its facts, however, the Court overturned the conviction. *Watts*, 394 U.S. at 705. The defendant was a man who told a small crowd that if he were drafted into the Army and forced to carry a rifle, "the first man I want to get in my sights is [President] L.B.J." *Id.* at 706.

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

On the other hand, to forbid threats only if accompanied by racist remarks does discriminate based on the viewpoint of the speaker.

R.A.V. does not preclude the state from banning discriminatory conduct. One cannot immunize oneself from a ban on conduct merely by accompanying that conduct by speech. For example, pursuant to Title VII, Congress has banned sexually discriminatory conduct in employment practices.[64] Such *conduct* (e.g. a failure to promote a worker because of her sex) is not immune from prohibition merely because the practitioner accompanies the bad conduct with sexually disparaging statements. Similarly, a murder has no First Amendment claim simply because a murderer yells, "Sic semper tyrannis" as he pulls the trigger. Sexually derogatory fighting words, "among other words, may produce a violation of Title VII's general prohibition against sexual discrimination in employment practices," because where "the government does not target *conduct* on the basis of its expressive content, acts are not shielded from regulation merely because they express a discriminatory idea or philosophy."[65]

Thus, Justice Scalia explained that the First Amendment forbids the state from prohibiting "only that commercial advertising that depicts men in a demeaning fashion."[66] Justice White objected to this principle, complaining that "[u]nder the general rule the Court applies in this case, Title VII hostile work environment claims would suddenly be unconstitutional"[67] because the law does not prohibit workplace harassment generally, but instead focuses on the "disfavored topic" of sexual harassment.[68] *R.A.V.* teaches that the state may not forbid sexually derogatory language unless, first, the words fit within the narrow category of fighting words and, second, the state does not single out only those words for special restrictions. Just as the City of St. Paul may not single out racist fighting words for special restrictions, it may not single out sexist fighting words for special restrictions. The power to criminalize conduct is quite a bit different than the power to criminalize mere speech, even offensive speech.

IV. CONCLUSION

R.A.V. is an important case because it forbids the state from making mere words a crime when the words are politically incorrect. The fighting words doctrine, like the *Brandenburg/Hess* line of cases, does not authorize the state to drive certain ideas from the marketplace, even when the ideas are abhorrent. Even when prohibiting fighting words, the state may not engage in an effort to suppress unpopular or even offensive ideas.[69] The state may

64. *E.g.*, 42 U.S.C. §§ 1981, 1982, 2000e-2 (1988).
65. *R.A.V.*, 112 S. Ct. at 2546-47 (emphasis added).
66. *Id.* at 2546.
67. *Id.* at 2557 (White, J., concurring).
68. *Id.* at 2546. Title VII regulations forbid sexual harassment, which includes "[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature . . . ." 29 C.F.R. § 1604.11(a) (1992).
69. Blackmun concurred in the judgment but not the opinion in *R.A.V.* In Gooding v. Wilson, 405 U.S. 518 (1972), Blackmun had complained in his dissent in that "the Court,

forbid fighting words, as long as it does so in a viewpoint neutral manner. There must be, in short, no realistic possibility that the state is trying to officially suppress ideas.[70]

Moreover, the state cannot simply outlaw the use of a particular word.[71] It can prohibit the use of certain fighting words in particular contexts such as face-to-face personal insults, but even then the state cannot impose a content based restriction — it cannot ban only fighting words that reflect on a certain group. For example, the law could not forbid a white man from hurling racists anti-black fighting words at a black man, but permit a black man to hurl racist and anti-white words at a white man. The fatal flaw of the St. Paul law in *R.A.V.* was that it was content based. The reason Justice Scalia's hypothetical regarding Papists is so critical is because it illustrates that crucial basic point.

If bad motive or the belief in bigotry may be made a crime, then the state can question defendants and subpoena records as to what newspapers or magazines they read, what books are in their library, or what they have confided to their friends. All of this information is relevant because it may show the propensity to commit the crime of bad motive, the offense of being politically incorrect. In addition, if the magazine article or book that advocates the politically incorrect viewpoint is persuasive, then it may be a crime for the author to have written it.[72]

R.A.V. teaches us that the government may not regulate fighting words

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despite its protestations to the contrary, is merely paying lip service to Chaplinsky." *Id.* at 537. The decision in *R.A.V.* indicates that the Court will not allow content-based restrictions on speech, even if the restrictions are otherwise justified by the fighting words doctrine. *R.A.V.*, 112 S. Ct. at 2545.

70. Thus, in Wisconsin v. Mitchell, 113 S. Ct. 2194 (1993), discussed *supra* note 37, the Court noted that a statute enhancing the penalty for defendants convicted of battery when the defendants intentionally select their victims on account of their race, religion, or other protected status, has no chilling effect on speech:

> We must conjure up a vision of a Wisconsin citizen suppressing his unpopular bigoted opinions for fear that if he later commits an offense covered by the statute, these opinions will be offered at trial to establish that he selected his victim on account of the victim's protected status, thus qualifying him for penalty-enhancement. . . . This is simply too speculative a hypothesis . . . .

Id. at 2201.

71. *See* Cohen v. California, 403 U.S. 15 (1971).

72. *See* WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW § 3.6 (2d ed. 1986) (explaining why the substantive criminal law only considers the defendant's purpose or intent (e.g., breaking and entering with the intent to steal), but not the defendant's motive). For example, the defendant may break and enter with the intent to steal, accompanied by the motive of stealing in order to contribute to a worthy charity, or to pay off defendant's just debts, or to buy illegal drugs. The motive may explain why the defendant engaged in breaking and entering with the intent to steal, but it does not affect, excuse, mitigate, decrease, increase, or escalate the nature of the crime. As Professors LaFave and Scott note, "motive . . . is not relevant on the substantive side of the criminal law." *Id.* at 231. However,

> an offender's reasons for engaging in proscribed conduct are often relevant on the procedural side of the criminal law. . . . Motives are most relevant when the trial judge sets the defendant's sentence, and it is not uncommon for a defendant to receive a minimum sentence because he was active with good motives, or a rather high sentence because of his bad motives.

Id.

based on hostility toward the underlying message expressed.[73] In general, the government may punish people for what they do, but not for what they say. For example, if a person does something sexist, such as refusing to grant a merit raise because of sexism, then the government can punish that particular act. In addition, proof that the individual has uttered sexist remarks may be useful to impeach or rebut his assertion that he is not the type of person to utter such remarks, but the government cannot punish merely the uttering of such remarks.[74] The underlying message may be abhorrent, heinous, and full of hate, but the First Amendment forbids the state from punishing opinions, even detestable ones. "The motives behind the state law may have been to do good. But the same can be said about most laws making opinions punishable as crimes. History indicates that urges to do good have led to the burning of books and even the burning of 'witches.' "[75] We must resist these urges to "do good" by making exceptions to the First Amendment.

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73. *R.A.V.*, 112 S. Ct. at 2545; *see also* Dawson v. Delaware, 112 S. Ct. 1093 (1992). In *Dawson* the Court held that the First Amendment prohibited the introduction, in a capital sentencing proceeding, of the fact that the defendant was a member of an organization called the Aryan Brotherhood, because the evidence had no relevance to the issues being decided. *Id.* at 1097. The evidence showed "nothing more" than the defendant's abstract beliefs, where those beliefs had no bearing on the issue being tried. For example, the victim, like the defendant, was white, so no element of racial hatred was involved in the murder. There was also no showing that the racist organization committed any unlawful or violent acts or even endorsed those acts. The Court, however, explained that the state might have avoided this problem if it had presented more evidence. *Id.* at 1098. The prosecution claimed that its expert witness (who did not testify) would have demonstrated "that the Aryan Brotherhood is a white racist prison gang that is associated with drugs and violent escape attempts at prisons, and that advocates the murder of fellow inmates." *Id.* at 1097. Such specific evidence might have been relevant in rebutting the defendant's mitigating evidence, which consisted of testimony emphasizing his kindness to family members and the good time credits that he had earned by enrolling in various drug and alcohol programs in prison. The racial hatred evidence would be relevant in *rebutting* the question that the defendant chose to put in issue. *Dawson* did not hold that the defendant could be punished for holding bigoted views.

Justice Thomas' dissenting opinion argued that the prison gang membership was relevant and admissible because it indicated that the defendant had the character of a person who engages in prison gang activities. *Id.* at 1101. This evidence tended to establish future dangerousness and rebutted the defendant's effort to show that he was kind to others. *Id.* The majority replied that the material that the dissent advanced on the nature of prison gangs "would, if it had been presented to the jury, have made this a different case." *Id.* at 1099. But Delaware only presented evidence of Dawson's "mere abstract beliefs . . . ." *Id.* at 1098. The majority explained that the jurors should not be able to punish Dawson merely because they find his beliefs to be morally reprehensible. *Id.*

While *Dawson* teaches us that the sentencing court cannot take into account the defendant's abstract beliefs, if the beliefs are not abstract but relate to the crime, then the situation is different. Thus, Barclay v. Florida, 463 U.S. 939 (1983) (plurality opinion), allowed the sentencing judge, in deciding whether to sentence the defendant to death, to take into account the defendant's racial animus towards his victim. *Accord* Wisconsin v. Mitchell, 113 S. Ct. 2194, 2202 (1993) (upholding a state law that allows penalty enhancement when the defendant selects his victim — in this case, an assault and battery victim — on the basis of the victim's race, religion, or other protected status).

74. *See* discussion *supra* note 69.

75. Beauharnais v. Illinois, 343 U.S. 250, 274 (1952) (Black, J., dissenting).