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R.A.V. v. City of St. Paul: The Right Decision, Flawed Reasoning

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I. INTRODUCTION

In *R.A.V. v. City of St. Paul*,[1] the United States Supreme Court struck a St. Paul, Minnesota ordinance prohibiting bias-motivated disorderly conduct, holding that the ordinance was facially invalid under the First Amendment to the United States Constitution.[2] Police arrested Petitioner R.A.V., then a juvenile, and charged him with violating a city ordinance, which provided:

> [w]hoever places on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor.[3]

The trial court granted R.A.V.'s motion to dismiss this count on the ground that the "ordinance was substantially overbroad and impermissibly content-based and therefore facially invalid under the First Amendment."[4]

On appeal, the Supreme Court of Minnesota reversed, rejecting R.A.V.'s overbreadth claim, and construing the phrase " 'arouses anger, alarm or resentment in others' "[5] to limit the reach of the ordinance to "fighting words," which are not protected by the First Amendment.[6] The court also noted that the ordinance, if so interpreted, was narrowly tailored to accomplish the compelling governmental goal of " 'protecting the

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1. 112 S. Ct. 2538 (1992).

2. *Id.* at 2542. The First Amendment 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." U.S. CONST. amend. I.

3. 112 S. Ct. at 2541 (quoting ST. PAUL, MINN. LEGIS. CODE § 292.02 (1990)).

4. *Id.*

5. *Id.* at 2541 (quoting ST. PAUL, MINN. LEGIS. CODE § 292.02).

6. *Id.*

community against bias-motivated threats to public safety and order.' "[7] The United States Supreme Court granted certiorari on June 10, 1991.[8]

This Casenote will first describe the United States Supreme Court's reasoning in reaching its decision and will then analyze this reasoning in light of First Amendment precedent.

II. FACTUAL STATEMENT

On the morning of June 21, 1990, Petitioner R.A.V., a juvenile, and several other teenagers allegedly assembled a cross from broken chair legs and burned it in a neighboring black family's fenced yard.[9] Respondent City of St. Paul charged Petitioner with violating the St. Paul Bias-Motivated Crime Ordinance.[10]

III. THE COURT'S OPINION

In an opinion written by Justice Scalia, the Court reversed the decision of the Minnesota Supreme Court and held the St. Paul ordinance facially violative of the First Amendment.[11] The Court accepted the Minnesota Supreme Court's narrow construction of the ordinance as reaching only fighting words[12] within the meaning of *Chaplinsky v. New Hampshire*.[13] In *Chaplinsky* the Court defined fighting words as "those which by their very utterance inflict injury or tend to incite an immediate breach of the peace."[14]

The Court recognized that restrictions upon the content of speech in certain limited categories such as obscenity, defamation, and fighting words are "an important part of our First Amendment jurisprudence."[15] Such restrictions are allowable in these areas because they 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.' "[16] However, the Court went on to refute the idea that these areas of speech are "entirely invisible to the Constitution."[17]

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7. *Id.* at 2541-42 (quoting *In re* Welfare of R.A.V., 464 N.W.2d 507, 511 (Minn. 1991)).
8. R.A.V. v. St. Paul, Minn., 111 S. Ct. 2795 (1991).
9. *R.A.V.*, 112 S. Ct. at 2541.
10. *Id. See supra* text accompanying note 3.
11. 112 S. Ct. at 2542.
12. *Id.*
13. 315 U.S. 568 (1942).
14. *Id.* at 572.
15. 112 S. Ct. at 2543 (citing Roth v. United States, 354 U.S. 476 (1957); Beauharnais v. Illinois, 343 U.S. 250 (1952); and *Chaplinsky*, 315 U.S. 568).
16. 112 S. Ct. at 2543 (quoting *Chaplinsky*, 315 U.S. at 572).
17. *Id.*

Instead, the Court reasoned that fighting words are analogous to a noisy sound truck,[18] each being a " 'mode of speech,' "[19] but neither having, "in and of itself, a claim upon the First Amendment."[20] The Court noted that the power to proscribe particular speech on the basis of one element, such as obscenity or fighting words, does not also give the power to proscribe speech on the basis of other content elements.[21]

To illustrate, the Court offered the example that a state may choose to prohibit only that obscenity concerning "the most lascivious displays of sexual activity."[22] However, a state may not prohibit only that obscenity including offensive political messages.[23] The Court based its differentiation on the reasoning that in the first instance the basis for the content discrimination (obscenity concerning lascivious sexual activity) consisted of the very reason the entire category of obscenity is proscribable.[24] If the reason is considered "neutral enough to support exclusion of the entire class of speech from First Amendment protection, [it] is also neutral enough to form the basis of distinction within the class."[25]

The Court reasoned that since the ordinance, even as narrowly construed by the Minnesota Supreme Court, applied only to " 'fighting words' that insult or provoke violence, 'on the basis of race, color, creed, religion or gender,' "[26] it did not come within this exception to the First Amendment prohibition.[27] Fighting words are proscribable given "that their content embodies a particularly intolerable (and socially unnecessary) *mode* of expressing *whatever* idea the speaker wishes to convey."[28] However, the City of St. Paul did not single out an especially offensive mode of expression.[29] Instead, St. Paul proscribed fighting words of racial, gender, or religious intolerance, regardless of the manner in which they were communicated.[30]

The Court also discussed the exception to the First Amendment prohibition allowed when content discrimination is aimed only at the "second-

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18. *Id.* at 2545. Sound trucks are trucks equipped with loudspeakers that in the past were often used for advertising purposes and political campaigns. *See generally* Kovacs v. Cooper, 336 U.S. 77 (1949).

19. 112 S. Ct. at 2545 (quoting Niemotko v. Maryland, 340 U.S. 268, 282 (1951) (Frankfurter, J. concurring)).

20. *Id.*

21. *Id.* at 2544.

22. *Id.* at 2546.

23. *Id.*

24. *Id.*

25. *Id.* at 2545-46.

26. *Id.* at 2547 (quoting ST. PAUL, MINN. LEGIS. CODE § 292.02).

27. *Id.* at 2548.

28. *Id.* at 2549.

29. *Id.*

30. *Id.*

ary effects" of the speech.[31] For example, a state could permit all obscene live performances except those involving minors because this law is justifiable without reference to the content of the speech due to the secondary effects associated with allowing minors to participate.[32]

The City of St. Paul argued the ordinance came within the secondary effects exception because the ordinance aimed not to take away the accused's right of free expression, but to protect from victimization persons who historically have suffered discrimination.[33] The Court in rejecting this argument noted that the audience's reaction to the speech has been held not to be a secondary effect.[34]

The Court found that the ordinance went beyond content discrimination to viewpoint discrimination.[35] The ordinance allowed persons arguing in favor of racial, religious, or gender tolerance to use fighting words while their opponents could not.[36] This permitted the City of St. Paul to impose special prohibitions on persons expressing disfavored views in violation of the First Amendment.[37]

The Court also rejected the City of St. Paul's argument that the ordinance was justified because it served a compelling state interest, even if it did regulate "expression based on hostility toward its protected content."[38] The compelling state interest advanced by the city was to protect the basic human rights of persons belonging to groups historically subjected to discrimination.[39] While acknowledging that this interest was compelling, the Court required that the discrimination also be necessary to serve the compelling interest.[40] The Court held that because adequate content-neutral alternatives existed, such as "[a]n ordinance not limited to the favored topics," the discrimination therefore was not necessary.[41]

The third exception to the First Amendment prohibition discussed by the Court was a "general exception for content discrimination that does

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31. *Id.* at 2546 (citing Renton v. Playtime Theatres, Inc. 475 U.S. 41, 48 (1986) (quoting with emphasis, Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 771 (1976))).

32. *Id.*

33. *Id.* at 2549.

34. *Id.* (citing Boos v. Barry, 485 U.S. 312, 321 (1988)).

35. *Id.* at 2547.

36. *Id.* at 2548.

37. *Id.*

38. *Id.* at 2549.

39. *Id.*

40. *Id.* at 2549-50 (citing Burson v. Freeman, 112 S. Ct. 1846, 1852 (1992) (plurality opinion)).

41. *Id.* at 2550.

not threaten censorship of ideas."[42] The Court dismissed this exception as inapplicable without discussion.[43]

IV. Concurring Opinions

Justice White, joined by Justices Blackmun and O'Connor, and joined in part by Justice Stevens, concurred in the judgment.[44] Justice White noted that the Supreme Court of Minnesota's judgment should have been reversed because the ordinance was overbroad in that it "criminalizes a substantial amount of expression that—however repugnant—is shielded by the First Amendment."[45] The concurring justices viewed the majority opinion as an abandonment of the categorical approach, "a firmly entrenched part of our First Amendment jurisprudence,"[46] and as a renunciation of strict scrutiny review.[47] The concurring opinion also criticized the majority's exceptions to the First Amendment prohibition as confusing the law for future courts.[48]

Justice Blackmun also wrote a concurring opinion.[49] He predicted the reasoning of the majority opinion will either relax the level of scrutiny applicable to content-based laws or will be seen as "an aberration—a case where the Court manipulated doctrine to strike down an ordinance whose premise it opposed."[50] However, Justice Blackmun agreed with the other concurrences that the ordinance was unconstitutionally overbroad.[51]

Justice Stevens, with whom Justices White and Blackmun joined in part, also concurred in the judgment.[52] Justice Stevens agreed that the ordinance was overbroad, but, unlike the other concurrences, he expressed the view that the categorical approach to the First Amendment was not necessarily the best analysis.[53] The better analysis, according to Justice Stevens, would consider "the content and context of the regulated speech, and the nature and scope of the restriction on speech."[54]

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42. *Id.* at 2548.
43. *Id.* at 2549.
44. 112 S. Ct. at 2550 (White, J. concurring).
45. *Id.* at 2559.
46. *Id.* at 2552.
47. *Id.* at 2554.
48. *Id.* at 2558.
49. *Id.* at 2560 (Blackmun, J. concurring).
50. *Id.*
51. *Id.* at 2561.
52. *Id.* at 2561 (Stevens, J. concurring).
53. *Id.* at 2566.
54. *Id.* at 2567.

V. ANALYSIS

Although the outcome of the decision is to be applauded, the Court's reasoning is inconsistent with established First Amendment law. The Court first recognized the concept of fighting words in *Chaplinsky v. New Hampshire*.[55] In *Chaplinsky* police arrested a member of the Jehovah's Witnesses for calling the city marshal a "God damned racketeer" and a "damned Fascist."[56] The defendant was convicted under a New Jersey state statute prohibiting, in part, calling a person "any offensive, derisive or annoying word . . . with intent to deride, offend or annoy him."[57] The Court held that "[t]here are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem."[58] The Court upheld the statute as applying to fighting words—speech unprotected by the First Amendment.[59]

In *New York v. Ferber*[60] the Court emphasized that "within the confines of given classification, the evil to be restricted so overwhelmingly outweighs the expressive interests, if any, at stake, that no process of case-by-case adjudication is required."[61] As noted by Justice White in his concurring opinion in *R.A.V.*, this categorical approach, under which certain areas of speech are held to be undeserving of constitutional protection, has long been a part of our First Amendment jurisprudence.[62]

However, the majority rejected this categorical analysis and replaced it with a scheme in which certain *elements* of expression are proscribable.[63] Under this scheme, the Court reasoned that although the St. Paul ordinance applied only to fighting words, unprotected speech, the ordinance was constitutionally invalid because it imposed a content-based regulation on expressive activity. In other words, "within a particular 'proscribable' category of expression . . . a government must either proscribe *all* speech or no speech at all."[64]

The new scheme imposed by the Court is confusing and unnecessary. The case easily could have been decided on established First Amendment

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55. 315 U.S. 568 (1942).
56. *Id.* at 569.
57. *Id.*
58. *Id.* at 571-72.
59. *Id.* at 573.
60. 458 U.S. 747 (1982).
61. *Id.* at 763-64.
62. 112 S. Ct. at 2552 (White, J. concurring) (discussed in majority opinion).
63. *Id.* at 2562 (Stevens, J. concurring).
64. *Id.*

principles.[65] As suggested by the concurrences, the case should have been decided on overbreadth grounds.[66]

The St. Paul ordinance, as narrowly construed by the Minnesota Supreme Court, applies only to fighting words.[67] The Minnesota Supreme Court relied on the definition in *Chaplinsky* of fighting words—words "which by their very utterance inflict injury or tend to incite an immediate breach of the peace."[68]

However, the St. Paul ordinance prohibits expression that "arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender."[69] As noted by Justice White in his concurrence, "[o]ur fighting words cases have made clear, however, that such generalized reactions are not sufficient to strip expression of its constitutional protection. The mere fact that expressive activity causes hurt feelings, offense, or resentment does not render the expression unprotected."[70] Thus, although the ordinance reaches unprotected fighting words, it also reaches speech that is protected, speech that causes only hurt feelings, offense, or resentment.[71]

VI. CONCLUSION

Although the Court in *R.A.V.* reached the correct result, the Court's reasoning was flawed and will serve to confuse future courts in their analysis of First Amendment issues concerning fighting words. The Court would have better served First Amendment jurisprudence by following established precedent and deciding the case on overbreadth grounds.

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65. *See* Bernard James, *Decisions Clash With Precedents*, NAT'L L.J., Aug. 31, 1992, at S8, S9.

66. In Broadrick v. Oklahoma, 413 U.S. 601, 612 (1973), the Court noted that "the possible harm to society in permitting some unprotected speech to go unpunished is outweighed by the possibility that protected speech of others may be muted." *Id.*

67. 112 S. Ct. at 2542.

68. 315 U.S. 568, 572.

69. ST. PAUL, MINN. LEGIS. CODE § 292.02.

70. 112 S. Ct. at 2559-60 (White, J. concurring) (citing United States v. Eichman, 496 U.S. 310, 319 (1990); Texas v. Johnson, 491 U.S. 397, 409, 414 (1989); Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 55-56 (1988); FCC v. Pacifica Found., 438 U.S. 726, 745 (1978); Hess v. Indiana, 414 U.S. 105, 107-08 (1973); Cohen v. California, 403 U.S. 15, 20 (1971); Street v. New York, 394 U.S. 576, 592 (1969); Terminiello v. Chicago, 337 U.S. 1 (1949)).

71. *Id.* at 2560 (White, J. concurring).