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Foreword: Hate Speech after R.A.V.

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The problem of hate speech has given rise to an extensive body of scholarly commentary. Some scholars have argued for far-reaching changes in First Amendment doctrine in order to expunge racist speech from our society. Others have linked bans on hate speech to the "political correctness" movement on campus. Still others have viewed the problem as genuine but have argued for narrower responses that require less change in First Amendment doctrine. As several of the articles in this Symposium illustrate, the *R.A.V.* decision itself is likely to spark another round of scholarly debate about the proper relationship between free speech and racial equality.

It is impossible, within the confines of this Foreword, to do justice to this rich body of scholarship. For readers who wish to pursue these broader issues beyond the articles in this Symposium, I have included an Appendix suggesting some entry points into the literature. But rather than attempt to lay out my own views on these difficult issues in a few brief pages, I have set a much more modest goal for myself. I will focus on a narrowly doctrinal question: what room does *R.A.V.* leave for regulations targeting racist hate speech?1

After giving some background about hate speech regulation, I will consider three possible types of regulation: bans based on the racist content of the speech, penalty enhancements based on discriminatory intent, and anti-harassment rules based on the discriminatory effect of the speech.2 In my judg-

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1. Hate speech regulations typically cover gender and other types of bias. It seems to me, however, that racist speech is the core concern of most advocates of regulation, and I will focus on that subject in this Foreword. Much of the discussion, however, may apply equally to other forms of hate speech.

ment, R.A.V. invalidates only the first type of regulation, leaving room for regulations based on the latter two grounds.³

THE DEBATE ABOUT HATE SPEECH

The articles in this Symposium attest to the widespread concern about the growing problem of racial hate speech in our society.⁴ University campuses in particular have witnessed a disturbing "upsurge in the number and intensity of reported incidents of racist, homophobic, and sexist abuse."⁵ A notable example is provided by an incident at the University of Wisconsin in which white male students followed a black woman student across campus shouting "We've never tried a nigger."⁶

Several universities responded with far-reaching efforts to regulate hate speech. One of the first, and broadest, regulations of hate speech was implemented by the University of Michigan. The regulation banned any behavior that "stigmatizes or victimizes an individual on the basis of race" or other factors, and that also involves any threat to or foreseeable in-

³ R.A.V. also leaves room for regulations that do not focus on racist fighting words at all. Many incidents of hate speech can be reached under content-neutral regulations. For example, hate speech may result in damage to university property, or it may violate rules regulating noise levels in or around libraries, sleeping areas, or classrooms. By analogy to residential picketing, the university could also ban speech activities adjacent to a dorm room and targeted at the residents of the room.

Some content-based regulation may also be possible under the public forum doctrine. Under that doctrine, government property is divided into three categories: (1) traditional public forums such as sidewalks, streets, and parks, (2) limited public forums that are intentionally opened by the government to free communication, and (3) everything else. The first two categories include sidewalks, streets, quads, student speaker programs, use of university classrooms for student meetings, the college newspaper, etc. In these areas, a university would have no special regulatory powers. Other areas, such as dormitories, fall into the third category. Here, government regulation need only be reasonable and not based on viewpoint. A ban on all personal insults in dormitory dining rooms would seem to meet that test. Obviously, some real drafting problems exist if overbreadth and vagueness are to be avoided.


⁶ Id.
interferes with an individual's academic efforts. An interpretative guide\(^7\) listed the following as violations of the policy:

A flyer containing racist threats distributed in a residence hall.

A male student makes remarks in class like "Women just aren't as good in this field as men," thus creating a hostile learning atmosphere for female classmates.

The guide also contained a section entitled "You are a harasser when . . . ," which gives as examples:

- You exclude someone from a study group because that person is of a different race, sex, or ethnic origin than you are.
- You tell jokes about gay men and lesbians.
- You make obscene telephone calls or send racist notes or computer messages.

The Michigan regulation was struck down by a federal district court.\(^8\)

The University of Wisconsin also adopted a broad regulation. The regulation prohibited racist remarks directed at an individual that intentionally demean that individual's race or create an intimidating environment. As an example, the rule states that a student would be guilty of a violation if "she intentionally made demeaning remarks to an individual based on that person's ethnicity, such as name calling, racial slurs, or 'jokes'" , with the purpose of creating a hostile environment. On the other hand, a derogatory opinion about a racial group during a class discussion would not be a violation. This regulation was also struck down by a federal district court.\(^9\)

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7. Much of the material in the guide would probably have been useful if presented in a non-coercive, educational setting. Unfortunately, the authors attempted their "consciousness raising" in the setting of a regulatory code, where it did not belong.


As reported by Tom Grey, a more limited regulation was adopted at Stanford. It differs from the Wisconsin regulation primarily in that it applies only if the speaker makes use of "insulting or 'fighting' words or non-verbal symbols." These are defined to be those "which by their very utterance inflict injury or tend to incite an immediate breach of the peace," and which are commonly understood to convey direct and visceral hatred or contempt for human beings" on the basis of race or other listed factors. See Grey, supra note 5, at 91. Since Stanford is a private university
When St. Paul passed its hate speech ordinance, it was acting in the context of an ongoing national debate on the subject. As the convening of this Symposium indicated, observers believed that much more than the fate of a single city ordinance was at stake in *R.A.V.* As expected by many of the Symposium participants, the Court's decision has broad implications for future regulation of hate speech.

**R.A.V. and Message-Based Regulation**

"R.A.V.," a juvenile, was charged with burning a cross in a black family's yard in violation of St. Paul’s “hate speech” ordinance. In terms of the three-part classification described earlier, the ordinance fell into the first category because it regulated speech on the basis of the racism of the message. In broad fashion, the ordinance made it a misdemeanor to "place on public or private property a symbol . . . including but not limited to, a burning cross or Nazi swastika," if "one knows or has reasonable grounds to know" that it "arouses anger, alarm or resentment in others on the basis of race . . . ."11

As written, the ordinance suffered from obvious overbreadth and vagueness. In order to save the ordinance from constitutional attack, however, the Minnesota Supreme Court performed fairly radical surgery on the ordinance, drastically reducing its scope. Rather than applying whenever a symbol aroused anger or fear, the Minnesota Supreme Court held that the ordinance was limited to "fighting words" or "incitement of imminent lawless action." Thus, the only question still remaining in the case was the constitutionality of prosecuting the defendant under this narrowed reading of the statute.13

Justice Scalia's opinion for the Court struck down the ordinance for drawing a content-based distinction between various

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(although heavily dependent on federal funding), the First Amendment does not apply.

10. See *supra* text accompanying note 3.
11. ST. PAUL, MINN., LEG. CODE § 292.02 (1990).
forms of hate speech. He began by rejecting the view that "fighting words" are wholly outside the concern of the First Amendment. Instead, he said, although fighting words have unprotected features, the government still cannot regulate their use "based on hostility—or favoritism—towards the underlying message expressed." He found precisely this motivation behind the St. Paul ordinance.

Doctrinally, the most innovative aspect of Justice Scalia's opinion is his recasting of the "categorical" theory of free speech. Under that theory, certain categories of expression—such as "fighting words," libel, obscenity, and commercial advertising—were completely denied First Amendment protection. As Justice White's dissent in R.A.V. points out, the Court had repeatedly stated that these forms of expression were not truly "speech" within the meaning of the First Amendment.

Although Justice Scalia's position is a deviation from prior law, on this point I think he is correct. For example, in an earlier era, it made sense to say that an obscene book was not really "speech." Under current law, however, obscenity depends on local community standards, so the same book may be obscene in Memphis and constitutionally protected in Minneapolis. It seems bizarre to say that the book is somehow "speech" in some parts of the country but not others. Similarly, at one point, perhaps all uses of the "F-word" would have been considered fighting words, so possibly that word could have been classified as "non-speech." But after Cohen v. California, some uses of the word are clearly protected, and it's hard to see how the same word can sometimes be speech and sometimes not. The same expression might be considered fighting words in a face-to-face confrontation but not in a public speech. Again, it is hard to see how the physical setting converts the same phrase from speech to mere conduct.

Justice Scalia is less successful, in my view, in explaining when content-based regulation of fighting words is allowable.

15. R.A.V., 112 S. Ct. at 2545.
16. Id. at 2547-50.
17. Id. at 2551-54 (White, J., concurring).
19. 403 U.S. 15 (1971) (reversing conviction for wearing a jacket with the inscription "Fuck the Draft").
After establishing a general presumption against such content-based regulation, he lists a number of exceptions, and proceeds to argue that none of the exceptions apply in this setting. Like Justice Stevens, I find this approach highly artificial. I share Justice Stevens' view that the Court's rigid attitude toward content discrimination should be replaced by a more pragmatic approach, but one that still upholds the core prohibition against banning speech because the government disagrees with the ideas expressed.\textsuperscript{20} I would also be inclined to agree with Justice Stevens' assessment of the St. Paul ordinance as a limited ban on a "subcategory of the already narrow category of fighting words":

Such a limited ordinance leaves open and protected a vast range of expression on the subjects of racial, religious, and gender equality. As construed by the Court today, the ordinance certainly does not "'raise the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace.'" Petitioner is free to burn a cross to announce a rally or to express his views about racial supremacy, he may do so on private property or public land, at day or at night, so long as the burning is not so threatening and so directed at an individual as to "'by its very [execution] inflict injury.'" Such a limited proscription scarcely offends the First Amendment.\textsuperscript{21}

Although Justice Stevens' views are appealing, they did not command a majority. Conceivably, one of the majority Justices might change his mind or leave the Court.\textsuperscript{22} On the other


\textsuperscript{21} \textit{R.A.V.}, 112 S. Ct. at 2571 (Stevens, J., concurring) (citation omitted). I am also inclined to agree with Justice Stevens regarding the race-based distinction in the ordinance:

One 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. Just as the statute prohibiting threats against the President is justifiable because of the place of the President in our social and political order, so a statute prohibiting race-based threats is justifiable because of the place of race in our social and political order. Although it is regrettable that race occupies such a place and is so incendiary an issue, until the Nation matures beyond that condition, laws such as St. Paul's ordinance will remain reasonable and justifiable.

\textit{Id.} at 2570 n.9 (Stevens, J., concurring).

\textsuperscript{22} Apart from Chief Justice Rehnquist, however, the majority was composed of the most recent appointees to the Court, which seems to make a change in the law due to personnel changes unlikely in the near future.
hand, given the strong pleas for stare decisis in the Casey decision, it is going to be difficult to argue for an overruling of R.A.V. anytime in the near future. In any event, from the point of view of lawyers and lower court judges, R.A.V. is "the law." Any future efforts at regulating hate speech must contend with that fact.

There is little doubt that much of the impetus to regulate hate speech stems from a desire to combat racist ideology. Justice Scalia could hardly have made it more clear that this desire is not in his view a permissible basis for regulating expression, perhaps most pointedly in the following passage:

St. Paul's brief asserts that a general "fighting words" law would not meet the city's needs because only a content-specific measure can communicate to minority groups that the "group hatred" aspect of such speech "is not condoned by the majority." The point of the First Amendment is that majority preferences must be expressed in some other fashion than silencing speech on the basis of its content.

Within the category of fighting words, the St. Paul ordinance targeted speech on the basis of its racist content. R.A.V. makes it clear that such content-based distinctions are impermissible. To pass muster under current law, attacks on hate speech must be formulated differently. The remainder of this essay discusses some alternative formulations.

**Penalty Enhancement Based on Discriminatory Intent**

Often, examples of hate speech involve conduct that is otherwise subject to sanction, such as destruction of property or disturbing the peace. An alternative to the St. Paul approach, advocated by some participants at the Symposium, is to enhance the penalty when an offense is motivated by racial animosity toward the victim.

This approach is so obviously sensible that I am tempted to stop here. After all, if an employer decides to fire a worker because of a discriminatory intent, what was otherwise a perfectly legal action becomes unlawful. If the employer decides
instead to assault a worker because of discriminatory intent, it seems equally reasonable to say that the attack becomes more culpable.

Despite this seemingly unassailable logic, the Wisconsin Supreme Court has held that sentence enhancements based on racial motivation are unconstitutional.\(^\text{26}\) After seeing a movie called *Mississippi Burning*, in which a white man attacked a black youth, the defendant asked a group of other young black men: "Do you all feel hyped up to move on some white people?" When a white youth walked by, the defendant said: "There goes a white boy; go get him." The white youth was severely beaten, and the defendant received an enhanced sentence because the victim was selected on the basis of race.\(^\text{27}\)

The Wisconsin Supreme Court held that the enhanced sentence was unconstitutional because it was punishment based on the "thoughts and ideas that propelled the actor to act."\(^\text{28}\) Quite oddly, the court argued that anti-discrimination laws punish only objective acts, while "[s]election [of victims], quite simply, is a mental process, not an objective act."\(^\text{29}\) As Justice Bablitch argued in dissent, the distinction between the antidiscrimination laws and hate crime laws seems an exercise in sophistry: "Laws forbidding discrimination in the marketplace and laws forbidding discrimination in criminal activity have a common denominator: they are triggered when a person acts 'because of' the victim's protected status."\(^\text{30}\) More recently, the Oregon Supreme Court has rejected the Wisconsin position, including the Wisconsin court's reliance on *R.A.V.*\(^\text{31}\)

Superficially, the St. Paul ordinance struck down in *R.A.V.* might appear similar to a hate crime ordinance: within a class of conduct that could otherwise be made illegal (fighting words), St. Paul singled out racist acts for punishment. There


\(^{27}\) Mitchell, 485 N.W.2d at 809.

\(^{28}\) Id. at 812.

\(^{29}\) Id. at 817.

\(^{30}\) Id. at 820 (Bablitch, J., dissenting). Admittedly, in implementing hate crimes statutes, it is important to be careful in using constitutionally protected activity as evidence of intent. Cf. Dawson v. Delaware, 112 S. Ct. 1093 (1992) (holding that defendant's membership in Aryan Brotherhood is inadmissible at sentencing hearing).

are two key differences. First, St. Paul’s ordinance covered only expressive acts; hate crime laws cover conduct that is already criminal. *R.A.V.* is clearly based on the expressive nature of the prescribed conduct; otherwise, Justice Scalia would not have been at such pains to establish that even “proscribable speech” like fighting words is not “invisible to the First Amendment.” Unlike fighting words, physical assaults are wholly outside the First Amendment.

Second, even when they apply to the same conduct, the two approaches make different aspects of that conduct the basis for punishment. Under the St. Paul approach, R.A.V. would not have been subject to punishment if he had made death threats without any overt racial references, even if he had chosen his victims for racial reasons. That conduct would be covered, however, by a hate crime statute. Conversely, despite the overtly racial character of R.A.V.’s message, R.A.V. would not have been guilty of a “hate crime” if the victim was chosen for nonracial reasons and the racist message was then simply selected as being most upsetting to that particular victim. Thus, under the hate crime approach, even where expressive (but unlawful) conduct is at issue, application of the regulation is based on the discriminatory intent of the speaker, not on the content of the speech. At most, the content of the speech serves only as evidence of intent. Perhaps this difference seems somewhat formalistic, but the author of the *R.A.V.* opinion is, after all, a leading judicial advocate of formalism.

**Regulation Based on Discriminatory Effect**

One basis for concern about hate speech is its relationship with other forms of racial discrimination. In particular, racial harassment may deter access by members of minority groups to government facilities and services. This is a particular concern for universities, whose affirmative action programs are intended to broaden access. Consequently, I will focus on university regulations in this section, although much of the argument may apply to other government agencies.

One justification for banning hate speech is to counter the potential effect of racist speech in reinforcing discrimination. *R.A.V.* raises an obvious question about whether a regulation

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32. *R.A.V.*, 112 S. Ct. at 2542-44.
of this kind would fail because of a lack of content neutrality. Nevertheless, despite *R.A.V.*, the university can probably defend carefully drafted regulations under the compelling interest test.

In applying the compelling interest test, the first step is obviously to identify the relevant compelling interests. Here, the affirmative action cases provide some useful guidance about what interests might be considered compelling. The Court has recognized that a government entity has a compelling interest in remediating its own prior acts of racial discrimination and in preventing its resources from being used to further or maintain racial segregation. Notice that the key to these exceptions is intentional racial discrimination, whether by the government or private actors who are supported by the government. On the other hand, remediating societal discrimination or eliminating unintended racial imbalances have not qualified as compelling interests. Furthermore, in *Bakke*, Justice Powell indicated that achieving diversity is a compelling interest. Presumably, a state interest that is compelling enough to pass the strict scrutiny required for racial classifications is also compelling enough for First Amendment purposes.

Can hate-speech regulations be justified by the university’s compelling interest in disentangling itself from intentional racial discrimination? The predicate is at least a strong indication of such discrimination either by university employees or by students whose activities are receiving meaningful and direct university support. Presumably, this predicate could be satisfied by showing a history of pervasive intentional discrimination by the university (a position few universities are likely to take). Alternatively, the university might attempt to show that the particular speech:

1. is either made by an employee or a student whose actions are receiving significant university support (e.g., in the context of an orientation program);
2. is apparently motivated by racial animus; and
3. will reduce access to university activities.

A paradigm case might be a university library worker who con-

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34. Regents of the Univ. of California v. Bakke, 438 U.S. 265 (1978). Most universities assume that Justice Powell’s view is still “good law” even though *Richmond* is somewhat ambiguous on that score.
stantly directs racial epithets at minority students, deterring them from using the facility. Most hate speech regulations seem to require a showing of racial animus, and therefore may meet this standard, at least if the speech substantially affects the ability of minority students to make use of university programs or facilities.35

What about the compelling interest in diversity? As noted earlier, it is not altogether clear whether the present Supreme Court shares Justice Powell's view that this is a compelling government interest in the context of affirmative action. Assuming it is compelling, the question again is whether the regulation is necessary and narrowly tailored to protecting the government's interest in diversity. Thus, the regulated speech would have to be sufficiently pervasive or derogatory that it either (1) substantially limits minority-student enrollment or participation in university programs (so they are not even present to contribute their views), or (2) prevents minority students from expressing their views to the point of impairing the diversity of intellectual exchange. As with the compelling interest in preventing discrimination, the diversity interest cannot simply be asserted; the university must be prepared to make a factual demonstration that a substantial impairment of the compelling interest exists.36

In R.A.V. itself, the city made an effort to defend its ordinance under the compelling interest test. Justice Scalia agreed that the city had a compelling interest in protecting "the basic human rights of members of groups that have historically been subjected to discrimination."37 He concluded, however, that

35. Nevertheless, such regulations may still have serious problems. Even though the regulations are related to a compelling interest, the regulation may be too loose. In particular, the regulations will fail the "narrowly tailored" part of the test unless limited to speech by university employees or students whose speech receives significant university support. Moreover, the regulations will fail the "necessity" requirement unless the university can show that methods other than regulating speech would be inadequate.

36. As Richmond illustrates in the affirmative action context, meeting the compelling interest test requires a strong factual basis and carefully focused drafting. The factual showing must include evidence of a significant deterrent effect on minority students' activities and of the inadequacy of less intrusive measures. Most advocates of hate speech regulation have not attempted to make this kind of case. Instead, they have relied on the psychic harm of hate speech to minority students or its role in reinforcing racist thought among white students. R.A.V. clearly prohibits reliance on these factors as justifications for singling out hate speech.

content discrimination was unnecessary to protect this interest, since the city could have achieved its goals by a ban on all fighting words, rather than focusing on hate speech. This arguably suggests that a university could not single out racist hate speech, but instead would have to ban all speech that impaired anyone's access to university facilities or limited the expression of diverse views. There are three reasons, however, to believe that more selective regulations would survive attack under R.A.V.

First, and perhaps most comforting for university counsel, R.A.V. specifically recognizes the validity of some selective bans on harassment:

[F]or example, sexually derogatory "fighting words," among other words, may produce a violation of Title VII's general prohibition against sexual discrimination in employment practices. 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.

To the extent that a harassment ban is ancillary to a general university prohibition on racial discrimination, the ban may be said to target behavior on the basis of its discriminatory effect rather than because of its "discriminatory idea or philosophy." Moreover, the fact that a code on racial discrimination singles out verbal racial harassment hardly seems to indicate that "official suppression of ideas is afoot." The fact that a discrimination code covers only discrimination-related speech seems no more suspicious than the fact that the National Labor Relations Act regulates only labor-related speech by employees.

Second, R.A.V. also states that a "prohibition of fighting words that are directed at certain persons or groups" would be "facially valid if it met the requirements of the Equal Protection Clause." The analysis earlier in this section precisely tracks the applicable equal protection rules. Thus, it would seem that a rule singling out harassment against members of ethnic groups would pass scrutiny under R.A.V., given the proper factual foundation. It should be noted that anti-harassment rules are not based directly on the content of the speech,

38. Id. at 2550.
39. Id. at 2546-47 (citations omitted).
40. Id. at 2547.
41. Id. at 2548.
but rather on its intent and effect. A library clerk who hurls racial epithets at members of an ethnic group would be covered, but so would the clerk who singles out members of an ethnic group for any other form of abuse. Thus, anti-harassment regulations are probably valid under the *R.A.V.* exception for "target-based" regulations.

Third, *R.A.V.* seems factually distinguishable because Justice Scalia's preference for broader regulation makes less sense in the setting of university harassment regulations. Universities (and other government agencies) have a special interest—indeed, a duty of constitutional stature—in ensuring that they do not become instruments of racial discrimination. This special duty is recognized by a plethora of federal and state statutes, administrative rulings, and court decisions. A broader regulation would carry additional costs, both in the use of scarce university enforcement resources and in any residual chilling effect on speech. These costs might or might not make a broader regulation infeasible or unconstitutional. But it seems appropriate for the university to weigh the balance differently when the countervailing benefit is the direct prevention of racial discrimination. In contrast, the incremental costs of a broader fighting words ban for the city of St. Paul were minimal: the incremental load on enforcement resources was infinitesimal, and the likelihood of chilling any potentially significant speech was slight. Thus, despite *R.A.V.*, carefully drafted bans on verbal harassment probably remain valid.

**CONCLUSION**

As we have seen, *R.A.V.* leaves open several possible methods of regulating racist hate speech. We should not overestimate the efficacy of such regulations in controlling destructive forms of speech, let alone their ability to change the underlying forces of racism. But, within the limits of the First Amendment, we should do what we can to discourage racist verbal assaults. On that point, I believe, all of the Symposium participants agree.

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42. See Bob Jones Univ. v. United States, 461 U.S. 574 (1983).
APPENDIX: ADDITIONAL READINGS


