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REFLECTIONS ON R.A.V.

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"All great truths begin as blasphemies."1

"My definition of a free society is a society where it is safe to be unpopular."2

The same year that George Bernard Shaw reflected on truth, seventy-eight-year-old Justice Oliver Wendell Holmes, Jr., laid the groundwork for the beginning of modern First Amendment3 doctrine with his opinion in Schenck v. United States4 and his dissent in Abrams v. United States.5 Both cases involved defendants who distributed pamphlets in opposition to World War I. In warning of the necessity to be "eternally vigilant against attempts to check the expression of opinions that we loathe,"6 Justice Holmes revealed a great truth that to many must have appeared to be blasphemy. At the time Schenck and Abrams were decided, the doctrine of free expression about which Shaw and Justice Holmes wrote was not universally accepted. By 1952, while Adlai Stevenson reflected on the right of an American citizen to be "unpopular" in a free society,7 other national figures were engaged in systematic repression of the right of political association that contributed to the erosion


Mr. Cleary has represented the petitioner in R.A.V. v. City of St. Paul throughout all proceedings in the case.

1. GEORGE BERNARD SHAW, ANN AjANsKA 262 (1917).
3. The First Amendment to the Constitution of the United States reads: 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 peaceable to assemble, and to petition the Government for a redress of grievances.
U.S. Const. amend. I.
4. 249 U.S. 47 (1919) (holding that words and actions which ordinarily would be within the freedom of speech protected by the First Amendment are not protected in situations, like war, where they would cause a clear and present danger which Congress has a right to avoid).
5. 250 U.S. 616 (1919).
6. Id. at 630.
7. See supra note 2.

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of human liberty in the United States.\(^8\)

In the seventy-three years since the Abrams dissent, Americans have consistently espoused their individual rights to express themselves and to dissent from the majority. Unfortunately, many Americans do not see a contradiction in believing in the right of free expression only when they agree with the expression involved. Consequently, when Americans have been confronted by expression which is offensive or unacceptable to the majority, they have supported, and succeeded in passing, repressive laws with an aim to silencing unpopular movements and ideas,\(^9\) all the while ignoring the underlying causes for such expression.\(^10\)

As American citizens we defend all types of unpopular expressions, not because of their value as ideas, but because of the believer's right to believe them and express them. As a result, many landmark First Amendment cases involve "blasphemous" acts.\(^11\) Such cases and various factual situations force us to constantly reassess our commitment to First Amendment freedoms. \textit{R.A.V. v. City of St. Paul}\(^12\) is a classic example of such a case.

\textit{R.A.V.} contrasts an unsympathetic white defendant, R.A.V., who holds unsympathetic and unpopular beliefs with an articulate, attractive African-American family seeking only to lay claim to their share of the American Dream. A cross was burned in the yard of this family. Clearly, they had a right not to have their property trespassed and not to be threatened or terrorized.

R.A.V. could have been prosecuted under a number of Minnesota laws which would have addressed trespassing or the conduct of threatening or intimidating someone without having more than an incidental effect on R.A.V.'s First Amend-

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\(^8\) This movement was commonly referred to as McCarthyism after Senator Joseph McCarthy (Rep., Wis.).


\(^10\) A few examples of underlying causes are economic depression, unpopular wars, and a lack of education.


HATE SPEECH AFTER R.A.V.

ment freedom of expression.\textsuperscript{13}

Instead, he was charged under St. Paul Legislative Code section 292.02,\textsuperscript{14} a provision which is, by agreement of both sides, unconstitutional as written,\textsuperscript{15} although the Minnesota Supreme Court attempted to preserve the ordinance with a narrowing construction in its decision in \textit{In re Welfare of R.A.V.}.\textsuperscript{16} Presumably, the government went ahead with the law to outline what they considered to be acceptable political expression. The statement the government should have made is that any attempt to target a threat, an expression of hatred, or an act of terror would be met with the full force of the law. However, when a prosecuting authority uses a law that punishes the expression itself and does so to make a political statement for a community, the First Amendment is not only invoked, its very premise is threatened.

The government has argued on several occasions that the First Amendment was never intended to protect the burning of a cross in the middle of the night in the yard of an African-American family.\textsuperscript{17} While the factual allegations in this case clearly reflect ugly and offensive behavior, this observation by the prosecuting authority is a \textit{non sequitur}. If the individual involved is charged under a law that is constitutionally sound and results only in an incidental impact on the individual's

\textsuperscript{13} See, e.g., \textsc{Minn. Stat. Ann.} § 609.713(1) (1987) (providing for up to five years in prison for terrorist threats); \textsc{Minn. Stat. Ann.} § 609.595 (Supp. 1992) (making damage to property punishable by up to five years imprisonment or a $10,000 fine); \textsc{Minn. Stat. Ann.} § 609.563 (1990) (providing for up to five years imprisonment or a $10,000 fine for arson). \textit{See infra} note 19 and accompanying text.

\textsuperscript{14} \textsc{R.A.V.} was prosecuted under \textsc{St. Paul, Minn., Leg. Code} § 292.02 (1990) which reads as follows:

\begin{quote}
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.
\end{quote}

\textsuperscript{15} The government acknowledged to the United States Supreme Court in oral argument that it had charged \textsc{R.A.V.} under an unconstitutional law, but it maintained that the Minnesota Supreme Court had succeeded in narrowly construing the law.

\textsuperscript{16} The Minnesota Supreme Court stated that § 292.02 “can be narrowly interpreted to reach only unprotected conduct, thereby sufficiently decreasing the possibility that those who wish to engage in protected expressive conduct will be dissuaded from doing so by the potential of prosecution and sparing that ordinance from the complete invalidation \textsc{R.A.V.} requests.” \textsc{R.A.V.}, 464 N.W.2d at 509.

\textsuperscript{17} The government made this assertion in oral argument before the United States Supreme Court.
First Amendment rights, then clearly that individual cannot rely on the First Amendment for protection. However, if that person is charged under an unconstitutional law, the First Amendment was intended to protect that individual, as it protects all American citizens, unless and until the law is cured of defects either by legislative or judicial action.\(^{18}\)

Although no one in the United States has a right to commit a crime, every citizen in the United States who is charged with committing a crime does have a right to be charged under a constitutionally valid provision. The irony in \(R.A.V\) is that the prosecuting authority had more severe sanction available, than the sanction provided by section 292.02.\(^{19}\) Other provisions would not have implicated the First Amendment and would have addressed these despicable facts. Instead, the government charged R.A.V. under an unconstitutional provision while repeatedly arguing the ugly factual allegations as though the offensiveness of R.A.V.'s alleged actions changed the constitutional framework of the case.

The City of St. Paul did not prosecute R.A.V. under section 292.02 solely to punish R.A.V.'s offensive behavior. It would appear the government had other motives in utilizing this provision since, as we have seen, other laws not implicating the First Amendment were available to prosecute such allegations.\(^{20}\) Instead, section 292.02 was used to establish a political climate where expression that is felt to be offensive by a group can be prosecuted. Indeed, certain individuals would welcome a return to the group libel concept of \(Beauharnais v. Illinois\).\(^{21}\) While also seeking an extension of the "fighting


\(^{19}\) See, e.g., MINN. STAT. ANN. § 609.713(1) (1987). This statute states that anyone who threatens to commit a crime of violence with the purpose of terrorizing another may be sentenced to imprisonment for up to five years. \(Id.\)

\(^{20}\) See supra note 19.

\(^{21}\) 343 U.S. 250 (1951). In \(Beauharnais\), an individual stood on a public sidewalk in Chicago, Illinois, and distributed anti-Negro leaflets. He was convicted of violating a Chicago ordinance which prohibited "the exhibition in any public place of any publication which portray[ed] depravity, criminality, unchastity, or lack of virtue of a class of citizens, of any race, color, creed or religion" or exposes any of the above listed groups to "contempt, derision or obloquy." \(Id.\) at 251. The individual challenged the ordinance under the overbreadth doctrine. The Court held that the ordinance was not overbroad and that the First Amendment did not protect libelous speech. \(Id.\) at 253.
words" doctrine of Chaplinsky v. New Hampshire, such advocates fail to see any danger in allowing the censoring of expression if the expression in question results in emotional harm to a group. In a nation that prides itself on individual freedom, including the freedom to think what you wish and to say what you think, such a prospect is frightening indeed and brings to mind Justice Black's dissent in Beauharnais:

State experimentation in curbing freedom of expression is startling and frightening doctrine in a country dedicated to self-government by its people. . . . If there be minority groups who hail this holding as their victory, they might consider the possible relevance of this ancient remark: "Another such victory and I am undone."

Many observers also have made the claim that expressions of hatred do not add to Justice Holmes' "marketplace of ideas" concept. What these observers ignore when they profess this belief is that such an observation is a political judgment in itself as it rejects the expression and its message. Further, such a claim ignores the basic liberty interest involved, as though one's right to express oneself is lost if one's "idea" is considered unacceptable by the majority and thus not worthy of entry to the marketplace.

Yet the First Amendment is a counter-majoritarian principle that is essential to the American form of self-government. It exists to counteract the majority's claim to acceptable expression. The history of symbolic speech bears out this counter-

22. 315 U.S. 568 (1942). In Chaplinsky, a Jehovah's Witness stood on a public sidewalk distributing leaflets of his faith. Id. at 569. While distributing the leaflets, Chaplinsky denounced all religion as "rackets." Id. at 570. A disturbance ensued. Chaplinsky was led to the police department and on the way insulted the City Marshal by calling him a fascist and stating that the entire government was fascist. Id. The Court held that some speech which is "lewd and obscene" and insulting or "fighting" words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace" are not protected by the First Amendment. Id. at 572.


The following excerpt from Holmes' dissent in Abrams is commonly referred to as the "marketplace of ideas" concept:

But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.

Id.
majoritarian principle. We saw it in the 1930s with *Stromberg v. California*.\textsuperscript{25} We saw it in the 1960s with *Tinker v. United States*.\textsuperscript{26} We saw it the 1980s and 1990s with *Texas v. Johnson*\textsuperscript{27} and *United States v. Eichman*.\textsuperscript{28} To say that a “burning cross” or a “Nazi swastika” is an inherently different type of symbol than a red communist flag, a black arm band or the burning of the U.S. flag is to betray a political bias as to what is offensive and what is not. All of these symbols were unacceptably offensive to a majority of the American public at the time of their display. Today, they remain unpopular as ugly reminders of Communism, anarchy, Nazism and the Ku Klux Klan.

“Bias motivated” laws are a recent development.\textsuperscript{29} Most of these laws proscribe illegal conduct and enhance the severity of the punishment for a crime committed with a bias motivation. While such laws raise issues of serious constitutional concern, and may well be unconstitutional, they are at least aimed initially at underlying conduct and not expression. When the St. Paul City Council enacted section 292.02, it went a step beyond the vast majority of the bias motivated criminal laws, by punishing the expression itself rather than the underlying conduct that had bias as its motivation.

Section 292.02 is a classic example of a paternalistic law passed by a community acting out of fear. Lawmakers who pass such laws evidence mistrust of the public’s judgment. Such a law betrays state neutrality as the government becomes the arbiter of the “worthiness” of the ideas expressed. While directly threatening the First Amendment right of free expression, the law does not even accomplish its purported goal. By outlawing any expression that would upset others on the basis of race or religion, it does not eliminate racial and religious intolerance but simply attempts to silence the debate, at great cost to all races and religions.

\textsuperscript{25} 283 U.S. 359 (1931) (holding that a California statute which forbade the displaying of a red flag if it was displayed to show sympathy for communism was unconstitutional).

\textsuperscript{26} 396 U.S. 864 (1969) (holding that it was a violation of students’ First Amendment rights for the Des Moines, Iowa, school system to suspend the students for wearing black arm bands in protest of the Vietnam War).

\textsuperscript{27} 491 U.S. 397 (1989) (holding that individuals have a First Amendment right to burn the American flag in protest of the U.S. government).

\textsuperscript{28} 496 U.S. 310 (1990) (affirming its earlier decision in *Texas v. Johnson*).

\textsuperscript{29} ST. PAUL, MINN., LEG. CODE § 292.02 (1990) is an example of a bias-motivated law.
If we are truly confident in our beliefs, then we should be able to tolerate dissent and deviant expression unless and until the expression becomes criminal conduct in the classic sense. When that happens, as in *R.A.V.*, the perpetrators of the criminal conduct should be prosecuted under criminal laws. If we cannot tolerate dissent and if we continue to act out of fear by attempting to suppress such dissent, our actions will indicate that we are not confident in our views and that we believe the government should dictate each individual's beliefs.

Section 292.02 does not address discrimination in our society and in the end it is a dangerous and empty gesture, a misguided political statement, and a politically acceptable "feel-good" law. It is a hollow example of the flexing of majoritarian muscle at the expense of First Amendment freedoms. The ordinance gives the appearance of dealing with racial and religious intolerance but only aggravates such intolerance. The ordinance actually slows the process of winning the hearts and minds of the public, by outlining a government-imposed set of standards which define what are acceptable opinions in the areas of race, religion or gender. We may address individual intolerance or we may address the larger question of societal intolerance of dissenting viewpoints. Societal intolerance is a much greater threat to freedom.

*R.A.V.* v. *City of St. Paul* is a further extension of modern First Amendment doctrine as it demonstrates that individual liberty may be threatened just as readily by well-meaning liberals as it has been by reactionary conservatives. It is tempting to accept the short-term political satisfaction of silencing ugly and offensive expression while ignoring the long-term cost of setting a precedent for the censoring of unpopular expression. Yet for two centuries, the freedom of speech clause of the First Amendment has been the one individual right that has distinguished this nation from all others. Freedom of expression is the cornerstone of our form of government and it has withstood attacks from all sides of the political spectrum. As the Bill of Rights enters its third century, we must have the
courage and the vision to prevent the power of the First Amendment from being diminished in this manner. This challenge is the enduring legacy of *R.A.V. v. City of St. Paul.*

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30. On June 22, 1992, the United States Supreme Court unanimously reversed the decision of the Minnesota Supreme Court in *R.A.V. v. City of St. Paul,* 112 S. Ct. 2538 (1992). In writing for the majority, Justice Scalia noted: "Let there be no mistake about our belief that burning a cross in someone's front yard is reprehensible. But St. Paul has sufficient means at its disposal to prevent such behavior without adding the First Amendment to the fire." *Id.* at 2550.