IT DARE NOT SPEAK ITS NAME: THE BURNING CROSS, SYMBOLIC SPEECH AND THE BIAS-RELATED DISORDERLY CONDUCT STATUTE OF *R.A.V. v. ST. PAUL*

INTRODUCTION

In the early morning hours of June 21, 1990, a small burning cross made of broken chair legs wrapped in toweling was planted inside the fenced yard of an African American family's home in St. Paul, Minnesota.[1] A juvenile was arrested and charged under the city's 1982 bias-motivated disorderly conduct statute, which outlaws certain instances of racist, sexist and religion-based symbolic speech. The statute provides:

> [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.[2]

At trial, the court dismissed the charge, holding the statute violated the First Amendment by censoring protected expressive conduct. The City of St. Paul appealed, maintaining the statute could be narrowed through judicial interpretation so that it only prohibited constitutionally unprotected conduct. The Minnesota Supreme Court reviewed the statute and agreed with the city in *In re R.A.V.*[3] The case was argued before the United States Supreme Court on December 4, 1991.[4]

In reaching its decision, the Minnesota Supreme Court applied the "fighting words" doctrine to symbolic speech. The court's interpretation of the statute and its use of the fighting words doctrine, which allows the prohibition of "words . . . by which their very utterance inflict in-

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[1] Rogers Worthington, *High Cost to Decide if Freedom of Speech Shields Cross Burning*, CHI. TRIB., Dec. 4, 191, at C10 [hereinafter Worthington].

[2] ST. PAUL, MINN.LEG.CODE §292.02 (1990).

[3] 464 N.W.2d 507 (Minn. 1991).

[4] R.A.V. v. St. Paul, No. 90-7675 (1991).

jury or tend to incite an immediate breach of the peace,"[5] has caused a split in the civil rights community. Groups which support the statute, such as the NAACP, the Anti-Defamation League of B'nai B'rith and People for the American Way have found themselves opposing the American Civil Liberties Union, the Center for Individual Rights and the Association of American Publishers.[6]

In re R.A.V. is remarkable because it bears directly on the current legal controversies over the prohibition of racist speech and the constitutional status of "hate crimes."[7] The case raises a number of First Amendment questions. Is the Minnesota Supreme Court's interpretation of the law legitimate? What is the standard involved, and can it survive Supreme Court review? Conceivably, the law could stretch to all sorts of symbols. Would it apply to pro-life demonstrators' use of bloody plastic dolls to depict abortion? Would the law ban the display of Palestinian flags in Jewish neighborhoods? The display of a Playboy centerfold in the work area? The satirical use of a swastika in a theatrical production?

Two doctrines which figure prominently in First Amendment cases may be important in the Supreme Court's analysis. The Court will have to decide if the ordinance violates either the "void for vagueness" or the "overbreadth" doctrines of First Amendment jurisprudence. The Court will also have to determine if the Minnesota State Supreme Court's "narrowing construction" saves the statute by bringing it within constitutional guidelines. This paper examines the statute, the holding and the narrowing construction in the case of *In re R.A.V.*, and concludes that Minnesota's bias-motivated disorderly conduct statute is unconstitutional.

I. OVERVIEW — THE VOID FOR VAGUENESS AND OVERBREADTH DOCTRINES

The First Amendment is so highly valued in our society that laws may be struck down for even indirectly affecting the confidence with which people exercise free speech. The Supreme Court explained,

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[5] Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942).

[6] Worthington, *supra* note 1.

[7] For a discussion of the movement to ban racist speech *see* David Rosenberg, *Racist Speech, The First Amendment, and Public Universities: Taking a Stand on Neutrality*, 76 CORNELL L. REV. 549 (1991).

"[t]hese freedoms are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions."[8] Two commonly used doctrines for invalidation of laws infringing upon First Amendment rights are the overbreadth and void for vagueness doctrines.

A. Vagueness

In *Grayned v. City of Rockford*,[9] the Supreme Court explained the three rationales by which a law may be declared void for vagueness. The first rationale involves the due process concept of "fair notice." The law must "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly."[10] The second justification aims at preventing arbitrary and discriminatory enforcement, and forbids laws which leave an undue amount of discretion to policemen, judges and juries to enforce the law on a subjective basis. The third rationale for invalidating a vague law is that it infringes upon First Amendment rights so that a "chilling effect" is created. Judge Powell summarized the void for vagueness doctrine in *Smith v. Gougen*:

> [it] incorporates the notions of fair notice or warning . . . . [I]t requires legislatures to set reasonably clear guidelines for law enforcement officials and triers of fact in order to prevent "arbitrary and discriminatory enforcement." Where a statute's literal scope, unaided by a narrowing state court interpretation, is capable of reaching expression sheltered by the First Amendment, the doctrine demands a greater degree of specificity than in other contexts.[11]

Absent the narrowing construction of the Minnesota State Supreme Court, the statute at issue in *In re R.A.V.* could be held impermissibly vague under all three of the *Grayned* rationales. Under the first rationale, the statute fails to give fair notice. Although the statute avoids one type of fair notice problem by clearly identifying the prohibited conduct, it uses a completely subjective standard for the public to gauge its behavior. The statute punishes speech if it causes "anger,

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[8] NAACP v. Button, 371 U.S. 415, 433 (1963)(footnotes omitted).
[9] 408 U.S. 104 (1972).
[10] *Id.* at 108.
[11] 415 U.S. 566, 572-573 (1974).

alarm, or resentment in others on the basis of race, color, creed, religion, or gender."[12] Such a highly subjective standard violates the fair notice requirement. In *Coates v. Cincinnati*,[13] the Supreme Court invalidated a statute similar to the one in *In re R.A.V.* The *Coates* standard used an "annoyance" standard[14] instead of the "anger, alarm, or resentment" standard of the St. Paul statute. The Court struck down the statute, stating "it subjects the exercise of the right of assembly to an unascertainable standard . . . . Conduct that annoys some people does not annoy others."[15] In its unnarrowed state, St. Paul's statute suffers from the same defect. What causes anger, alarm, or resentment in some people will not bother others at all.

The second danger of vague laws is the fear of arbitrary enforcement by police and the courts.[16] The St. Paul statute is arguably constitutional on the arbitrary enforcement question if only non-police victims are considered. Since any arrest for a violation of the statute requires a complainant, the amount of discretion police have may be within constitutional bounds. The necessary probable cause for an arrest in violation of the statute is provided by the anger, alarm or resentment of someone other than the officer. In such cases the danger of arbitrary enforcement is curtailed.

If police officers are considered as victims, arbitrary enforcement becomes a much greater danger. The Minnesota statute's anger, alarm, or resentment standard is highly subjective, and the majority of fighting words cases involve police officers.[17] The potential problem of discretionary enforcement is further aggravated by state courts' "consistent misapplication of the doctrine to inappropriate and trivial cases."[18] While the Supreme Court has not entertained a fighting words case since *Chaplinsky*[19] was decided in 1942, such cases are often prose-

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[12] ST. PAUL. MINN.LEG.CODE §292.02 (1990).

[13] 402 U.S. 611 (1971).

[14] Section 901-L6, Code of Ordinances of the City of Cinncinati (1956) reads: "It shall be unlawful for three or more persons to assemble, except at a public meeting of citizens . . . and there conduct themselves in a manner annoying to persons passing by . . . ."

[15] *Coates*, 402 U.S. at 614.

[16] *See* Lewis v. New Orleans, 415 U.S. 130 (1974). In *Lewis*, the Court struck down a Louisiana ordinance which gave police "a virtually unrestrained power to arrest." *Id.* at 135.

[17] *See* Stephen W. Gard, *Fighting Words as Free Speech*, 58 WASH. U.L.Q. 531, 566 (1980)[hereinafter Gard].

[18] *Id.*

[19] Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

cuted in state and local courts. The seemingly irresistible tendency of states to misuse the fighting words doctrine has been noted by the Supreme Court[20] and lower courts.[21] The dangers of arbitrary enforcement of fighting words statutes are therefore substantial and put the Minnesota statute's constitutionality in further doubt.

The third danger of vague laws regulating expressive conduct is that they may inhibit constitutionally protected speech. In this respect the void for vagueness doctrine most noticeably overlaps the overbreadth doctrine (discussed below in I.B.).[22] Vague laws do not adequately specify what they prohibit. The result is that the more unwilling a citizen is to risk breaking the law, the more he or she will refrain from certain constitutionally protected speech. This chilling effect is what the courts attempt to measure. The subjective standards of the *In re R.A.V.* statute give it an enormous potential for chilling protected speech.

Without a narrowing interpretation, the Minnesota statute cannot survive the void for vagueness test in *Grayned*. The anger, alarm, or resentment standard is entirely subjective and therefore fails to meet the due process requirement of fair notice under *Coates*. It is also similar to the "dignity standard" the Court rejected in *Boos v. Barry*.[23] In *Boos*, the Court held the display clause of a Washington, D.C., statute prohibiting picketing near embassies was unconstitutional. The Court said the statute's dignity standard was "so inherently subjective that it would be inconsistent with our long standing refusal to [punish speech] because the speech in question may have an adverse emotional impact on the audience."[24]

B. *Overbreadth*

Distinguishing the overbreadth and void for vagueness doctrines

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[20] *See* Karlan v. Cincinnati, 416 U.S. 924 (1974).

[21] People v. Dietze, 549 N.E. 1166, 1169 (N.Y. 1989).

[22] Bhavana Sontakay, *College and University Regulation of Racist Speech: Does Regulation Violate the First Amendment?*, 95 DICK. L. REV. 235 (1990)[hereinafter Sontakay].

[23] 485 U.S. 312 (1988).

[24] *Id.* at 322 (quoting Hustler Magazine v. Falwell, 485 U.S. 46 (1988)). D.C. Code Ann. §22-115 (1938), *repealed by* D.C. Law 7-105, §2, 35 D.C.R. 728 (1988) read in part:

> It shall be unlawful to display any flag, banner, placard, or device designed or adapted to intimidate, coerce, or bring into public odium any foreign government . . . or to bring into public disrepute political, social, or economic acts, views, or purposes of any foreign government.

can be difficult, since courts often use them together.[25] Both overbroad and vague statutes may prohibit a substantial amount of protected speech. The difference is most easily illustrated in the context of fair notice and the difference between an express and an implied infringement upon protected speech.

Compared to a vague statute, an overbroad statute more precisely identifies and prohibits what is normally protected speech. The resulting chilling effect flows directly from this prohibition of protected speech, and not from a lack of notice or certainty as to what is prohibited. In contrast, a vague statute fails to adequately define its scope. The targeted behavior is ambiguously defined and may be interpreted to include protected speech by citizens who fear breaking the law. Thus, the chilling effect is created when the public curtails its speech out of uncertainty.

While both overbreadth and vagueness rulings tend to focus on the suppression of protected speech, vagueness cases are more likely to question the state's interest in prohibiting the speech.[26] In addition to First Amendment issues, vagueness cases often focus on due process concerns such as fair notice and arbitrary enforcement. An overbroad statute, on the other hand, "assumes the validity of the state's goal"[27] but prohibits the law because it unacceptably infringes upon protected speech. The overbreadth doctrine prohibits a law which "offends the constitutional principle that 'a governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms.' "[28]

The essential function of the overbreadth doctrine, then, is "to determine whether a valid statutory goal can be achieved by means less invasive of free speech interests."[29] To achieve its purpose, the overbreadth doctrine allows standing for a defendant whose speech is other-

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[25] *See* Dombrowski v. Pfister, 380 U.S. 479, 486 (1965); Lewis v. City of New Orleans, 415 U.S. 130 (1974).

[26] *See* Papachristou v. City of Jacksonville, 405 U.S. 156 (1972)("Here the net cast is large . . . to increase the arsenal of the police."). *Id.* at 165.

[27] Martin H. Redish, *The Warren Court, the Burger Court and the First Amendment Overbreadth Doctrine*, 78 NW. U.L. REV. 1031, 1035 (1983)[hereinafter Redish].

[28] Zwickler v. Koota, 389 U.S. 241, 250 (1967)(citing NAACP v. Alabama, 377 U.S. 288, 307 (1964)).

[29] Redish, *supra* note 27, at 1066.

wise clearly unprotected.[30] Because of the standing allowance in the overbreadth doctrine, R.A.V. may challenge the St. Paul statute for overbreadth even if his conduct is held to be unprotected.

To be overbroad, a statute regulating expressive conduct must do two things: it must infringe upon protected speech,[31] and the degree of overbreadth must be "real and substantial."[32] In *Broadrick*, the Supreme Court refused to apply the overbreadth doctrine to an Oklahoma statute which prevented civil servants from engaging in certain political activities. In upholding the statute, Justice White reasoned the overbreadth doctrine loses its force as the type of speech restricted "moves from 'pure speech' toward conduct."[33] The Court noted the state had a legitimate interest implicated on the facts, and that the appellant's actions were clearly a violation of what was otherwise an ordinary criminal law.

The question of what constitutes "substantial overbreadth" can be difficult to answer. As defined in *Broadrick*, substantiality is a relative measure of two things: the amount of constitutionally protected speech chilled by the statute as measured against the amount of unprotected speech prohibited.[34] When the amount of protected speech which is chilled is too large in relation to the amount of unprotected speech, the statute will be struck down. The determination of substantiality therefore requires a separation of the statute's legitimate and illegitimate restrictions on speech.[35] The courts have a great deal of discretion in determining substantiality because the process is one of "judicial balancing" and "has an irreducible component of policy."[36] If the speech is protected but the statute is not substantially overbroad, the final requirement is a sufficiently pressing state interest.

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[30] *See* Schad v. Borough of Mount Ephrain, 452 U.S. 61, 66 (1981)("Because appellants' claims are rooted in the First Amendment, they are entitled to rely on the impact of the ordinance on the expressive activities of others as well as their own."). *See also* Houston v. Hill, 482 U.S. 451, 462 n.11 (1987).

[31] Grayned v. City of Rockford, 408 U.S. 104, 115 (1972).

[32] Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973).

[33] *Id.* at 615.

[34] *Id.* (substantiality of overbreadth should be "judged in relation to the statute's plainly legitimate sweep.").

[35] *See* Gooding v. Wilson, 405 U.S. 518, 528 (1972)(Concluding " '[t]he separation of legitimate from illegitimate speech calls for more sensitive tools than [Georgia] has supplied.' ")(quoting Speiser v. Randall, 357 U.S. 513, 525 (1958)).

[36] Richard H. Fallon, Jr., *Making Sense of Overbreadth*, 100 YALE L.J. 853, 894 (1991)[hereinafter Fallon].

II. AN ANALYSIS UNDER *TEXAS v. JOHNSON*

In this section the constitutionality of the *In re R.A.V.* statute in its unnarrowed state will be discussed by applying the standards and tests used in the latest Supreme Court ruling on symbolic speech, *Texas v. Johnson*.[37] While *Johnson* was not an overbreadth case, it was applied by the *In re R.A.V.* court because they found it "instructive as to the scope of Constitutionally protected expressive conduct."[38] In *Johnson*, the respondent was arrested for burning an American flag in front of the 1984 Republican National Convention in Dallas. The defendant was cited for a violation of a Texas statute which prohibited the desecration of a venerated object.[39] The Court answered three questions before holding the statute unconstitutional: Is the conduct at issue expressive? Does the state have an interest implicated on the facts? Does the state's interest involve the suppression of free expression?

The *Johnson* court described the expressive conduct test as an inquiry to see if "[a]n intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it."[40] In determining whether the defendant's conduct was expressive, the Court looked at the entire context of the event, including the defendant's motive.[41] The Court concluded the defendant's flag burning was expressive conduct,[42] basing its decision on the historic "communicative nature" of flags,[43] as well as precedent.[44]

Apart from arguing the expressive conduct issue, the government had to show that its interest was implicated on the facts. Texas maintained it had two interests in embracing its statute: preventing breaches

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[37] 491 U.S. 397 (1989).

[38] Matter of Welfare of R.A.V., 464 N.W.2d 507, 510 (Minn. 1991).

[39] Tex. Penal Code Ann. §42.09 (1989), titled "Desecration of Venerated Object" provides in part:

(a) A person commits an offense if he intentionally or knowingly desecrates: (1) a public monument; (2) a place of worship or burial; or (3) a state or national flag.

(b) For purposes of this section, "desecrate" means deface, damage, or otherwise physically mistreat in a way that the actor knows will seriously offend one or more persons likely to observe or discover his action.

[40] *Johnson*, 491 U.S. at 404 (citing Spence v. Washington, 418 U.S. 405, 410-411 (1974)).

[41] *Johnson*, 491 U.S. at 406.

[42] *Id.* at 405-06.

[43] *Id.* at 405.

[44] *Id.* at 404 (citing findings of intent to convey messages in cases involving black armbands, military uniforms, sit-ins, and picketing).

of the peace and preserving the flag as a symbol of national unity. The state asserted that both interests were implicated by the flag burning. The Supreme Court disagreed. First, the Court said no disturbance of the peace had occurred or been imminent. Second, the Court found the state's asserted interest in protecting a symbol of national unity amounted to an unconstitutional discretion to "prescribe what shall be orthodox."[45]

Finally, the Court had to decide if the government's interest was related to the suppression of free expression.[46] If the interest is unrelated to the expression of free expression, the statute is "content neutral," and the Court will apply a relatively lenient time, place and manner test formulated in *U.S. v. O'Brien*.[47] However, when the state's interest is related to the suppression of free expression it is "content-based,"[48] and the court will apply a more stringent test, as set forth in *Spence v. Washington*.[49] The *Spence* test requires that the state's interest be scrutinized with a "heavy presumption that regulation is impermissible."[50] In *Johnson*, the Court found the statute was related to the expression of free expression because, "[t]he Texas law is . . . not aimed at protecting the physical integrity of the flag in all circumstances, but is designed instead to protect it only against impairments that would cause serious offense to others."[51]

The unnarrowed Minnesota statute in *In re R.A.V.* cannot withstand the *Johnson* analysis. First, R.A.V.'s cross burning passes the *Johnson* test for expressive conduct. In assessing protected conduct, the Court will look at the facts of the case for two things. The symbolic speech must have been intended to be communicative, and it must be likely to have been understood by the public.[52] The City of St. Paul has argued the threatening nature of a burning cross distinguishes it in principle from other types of symbolic speech as an implicit threat.[53]

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[45] *Id.* at 415.

[46] Wayne R. Allen, Note, *Klan, Cloth and Constitutions Anti-Mask Laws and the First Amendment*, 25 GA. L. REV. 819 (1991).

[47] 391 U.S. 367 (1968).

[48] *Johnson*, 491 U.S. at 411-12 (citing Boos v. Barry, 485 U.S. 312, 318 (1988)).

[49] 418 U.S. 405 (1968).

[50] Fallon, *supra* note 36, at 869.

[51] *Johnson*, 491 U.S. at 411.

[52] *Id.* at 404.

[53] *See* Linda P. Campbell, *Cross Burning Case: Two Very Different Views*, CHI. TRIB., Dec. 5, 1991, at 14 zone C. The county attorney representing St. Paul before the Supreme Court called

This "implicit threat" argument has several disadvantages. First, it concedes the communicative nature of a R.A.V.'s act, since there can be no threat without communication. Second, the assumption that a cross burning is an "intent to threaten" as opposed to an "intent to convey a political message" is not likely to mesh with the strict scrutiny applied to laws regulating speech.[54] Nor would the idea that speech may be prohibited on the basis of its inherent threat square with the Court's rejection of similar arguments that unprotected speech may not be regulated solely because of its inherent tendency to cause violence.[55] Since the values and high standards surrounding First Amendment cases put a heavy burden on the state to justify the necessity of its statute,[56] it seems unlikely the Court will accept the inherent threat rationale.

Once the expressive nature of the conduct is established, the Court will test the idea expressed to see if it was likely to be understood by the public.[57] R.A.V.'s conduct satisfies this requirement. Were cross burnings not likely to be understood, R.A.V. probably would not have been charged with violating the statute. Nor can there be anger, alarm or resentment without communication and understanding. As stated previously, in addressing the question of exactly *what* it is that is understood, a threat or a political statement, the Court will not presume a threat.[58] Conduct similar to cross burnings, such as the display of the swastika, has been held to be of a political nature.[59]

Once the question of expressive conduct is settled, the second line

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the "historic content" of the burning cross an "unmistakable threat" and "terroristic conduct."

[54] A similar argument was advanced by the state and rejected in Cohen v. California, 403 U.S. 15 (1971). California claimed the "inherent likeliness of a violent reaction to the defendant's jacket, which bore the phrase "Fuck the Draft," justified its prohibition.

[55] *Id.*; *see also* Gooding v. Wilson, 405 U.S. 518 (1972); Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969).

[56] *See* Boos v. Barry, 485 U.S. 312 (1988)(rejecting a Washington, D.C., content-based restriction on picketing near embassies because the statute neither served a "compelling state interest" nor was it "narrowly drawn").

[57] Texas v. Johnson, 491 U.S. 397, 410 (citing Spence v. Washington, 418 U.S. 405, 410-11 (1974)).

[58] *Johnson*, 491 U.S. at 409. The Court said the burning of an American flag does not constitute fighting words and added "we have not permitted the Government to assume that every expression of a provocative idea will incite a riot." *Id.*

[59] *See* Collin v. Smith, 447 F. Supp. 676, 680 (N.D. Ill. 1978), *aff'd*, 578 F.2d 1197 (7th Cir. 1978), *cert. denied*, 439 U.S. 916 (1978); Village of Skokie v. National Socialist Party of Am., 373 N.E.2d 21 (Ill. 1978).

of inquiry under *Johnson* asks whether the government has a legitimate interest at stake which is implicated on the facts. The government's interest in regulating symbolic speech was stated as "protecting the community against bias-motivated threats to public safety and order."[60] Since the state has a legitimate interest in protecting its citizens from breaches of the peace, the final question becomes whether the City's interests are implicated on the facts. It is doubtful that the City would prevail on this issue. St. Paul has said the statute is justified by its interest in preventing breaches of the peace; but there is nothing on the record to indicate that R.A.V.'s conduct ever threatened a breach of the peace, or that R.A.V. was even present while the cross burned.

The final determination the Court will make under the *Johnson* analysis for protected conduct is whether or not the law is related to the suppression of free expression (*i.e.* content-based). The Minnesota statute is content-based since it prohibits writings (graffiti) and symbols which arouse anger, alarm or resentment on the basis of subject matter (specifically, race, color, creed, religion or gender). The content-based nature of the statute is also evident from its explicit mention of the display of swastikas and burning crosses.

Two of the three requirements of the *Johnson* test are satisfied under the facts in *In re R.A.V.*: the challenged conduct is expressive and the statute being enforced is content-based. For the third element, St. Paul must convince the Court its legitimate interests are implicated on the facts. The search for a "compelling interest" will be undertaken with a "heavy presumption" that the statute is impermissible.[61] The statute in *In re R.A.V.* cannot survive this search. As an initial matter, significant quantitative evidence of the compelling interest may be required.[62] Yet even if this evidence is produced, the state's compelling interest is in doubt because the St. Paul statute is under-inclusive[63] in

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[60] In re R.A.V., 464 N.W.2d 507, 511 (Minn. 1991)(citing Schaumburg v. Citizens for a Better Env't, 444 U.S. 620, 637 (1980)).

[61] Spence v. Washington, 418 U.S. 405, 418 (1968).

[62] *See, e.g.*, New York v. Ferber, 458 U.S. 747 (1982)(giving extensive quantitative and qualitative proof of the magnitude of the child pornography industry, the psychological damage to the victims, and of the use of similar statutes in other states which regulate the industry); Aryan v. Mackey, 462 F. Supp. 90 (N.D. Tex. 1978)(specific evidence required when state's interest implicated in anti-mask provision); Ghafari v. Municipal Court, 150 Ca. Rptr. 813 (Ca. Ct. App. 1978)(lack of evidence to support state's interest a significant factor in holding statute overbroad).

[63] *See, e.g.*, First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765 (1978)(statute is both under-inclusive and over-inclusive with respect to state's interest in protecting rights of corporate

two ways. First, St. Paul already had a comprehensive disorderly conduct statute in effect.[64] This statute outlaws all breaches of the peace. If the St. Paul statute is narrowed to include only breaches of the peace based on race, creed, color, religion or gender, it does not outlaw anything not already illegal and there is a questionable need for it.[65]

Second, the Court will question why the statute only prohibits certain types of bias-related speech which causes a breach of the peace while leaving other equally harmful bias-related speech alone. The statute stands for the proposition that symbolic speech may be a crime if it causes a breach of the peace on the basis of race, color, creed, religion or gender. However, the statute does not outlaw a burning cross or a swastika if they appear with signs saying "Illegal aliens out!" or a swastika bearing the slogan "Jail AIDS Carriers!" If St. Paul cannot prove a compelling state interest, the statute cannot pass the test in *Texas v. Johnson.*[66]

In its unnarrowed state the St. Paul statute cannot survive constitutional scrutiny. However, the *In re R.A.V.* court decided it could "save" the statute by interpreting it so as to avoid a constitutional question. In order to remedy the statute's overbreadth, the *In re R.A.V.* court declared the statute only applied to an unprotected class of expressive conduct, known as "fighting words." However, the use of the fighting words doctrine only created another problem. Whenever courts narrowly construe a statute, there is a danger of creating an unconstitutional "gap" between the plain meaning of the statute and the way it is enforced. An analysis of the gap between the St. Paul statute and fighting words requires a return to the void for vagueness doctrine.

III. NARROWING CONSTRUCTION AND THE VOID FOR VAGUENESS DOCTRINE

If a statute may be read so as to include constitutionally protected expressive conduct, it is entirely legitimate for a court to narrow it by

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[64] Minn. Stat. §609.72 (Supp. 1991).

[65] *See also* Boos v. Barry, 485 U.S. 312 (1988)(availability of a less restrictive alternative statute indicates the statute is not narrowly tailored to withstand strict scrutiny); Texas v. Johnson, 491 U.S. 397, 410 (1989)(the fact that Texas already has a breach of the peace statute "tends to confirm that Texas need not punish this flag desecration in order to keep the peace"); Houston v. Hill, 482 U.S. 451, 462 n.10 (1987).

[66] 491 U.S. 397 (1989).

interpreting it so it does not apply to protected speech, subject only to constitutional restrictions. The Supreme Court may examine the statute only as written or as authoritatively construed by the state courts,[67] as the Court "lack[s] jurisdiction authoritatively to construe state legislation."[68] Hence, a state court's narrowing construction will survive Supreme Court review if two conditions are met.[69] First, as authoritatively construed, it cannot punish protected speech, and second, it "may not be susceptible of application to protected expression."[70] In this section the constitutionality of the Minnesota statute as narrowed by the *In re R.A.V.* court will be examined.

The *In re R.A.V.* court made two arguments in holding that the narrowly construed statute was constitutional. First, the court held the statute as construed only applied to speech constituting "fighting words"[71] (as defined in *Chaplinsky v. New Hampshire*)[72] or expressive conduct likely to provoke "imminent lawless action"[73] (as defined in *Brandenburg v. Ohio*).[74] Neither type of conduct is afforded constitutional protection. Second, the court reasoned the statute was not an overbroad, flat prohibition against the specified symbolic speech because a consideration of the circumstances is required in every case prior to a conviction.[75]

In theory, the *In re R.A.V.* court's use of the concepts of fighting words and imminent lawless action is proper, since neither *Chaplinsky* nor *Brandenburg* has been overruled. The problem arises when the statute is subject to the vagueness and overbreadth doctrines, and prevailing First Amendment standards. Statutes regulating speech must be clear and precise.[76] The Minnesota court's narrowing of the statute cannot survive the void for vagueness doctrine under these current stan-

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[67] *See, e.g.*, Ferber v. New York, 458 U.S. 747 (1982); Gooding v. Wilson, 405 U.S. 518, 520 (1972); Saia v. New York, 334 U.S. 558, 571 (1948)(Jackson, J. dissenting).

[68] Gooding v. Wilson, 405 U.S. 518, 520 (1972).

[69] *Id.* at 522.

[70] *Id.*

[71] In re R.A.V., 464 N.W.2d 507, 510 (Minn. 1991)(citing Chaplinsky v. New Hampshire, 315 U.S. 568 (1942)).

[72] 315 U.S. 568 (1942).

[73] In re R.A.V., 464 N.W.2d at 510.

[74] 395 U.S. 444 (1969).

[75] In re R.A.V., 464 N.W.2d at 510.

[76] *See* NAACP v. Button, 371 U.S. 415, 432 (1963)(citations omitted) "For standards of permissible statutory vagueness are strict in the area of free expression."

dards. As its first rationale, the *In re R.A.V.* court reasoned the statute did not regulate protected speech because it only regulated symbolic speech which fit within the definition of fighting words or imminent lawless action.

The fighting words concept originated in *Chaplinsky v. New Hampshire.*[77] In *Chaplinsky*, a Jehovah's Witness was arrested after calling a constable a "damned Fascist" and a "damned racketeer." He was charged with a violation of a statute which, in part, prohibited calling someone an "offensive or derisive name . . . with intent to deride, offend or annoy him."[78] The Supreme Court said the fighting words were not entitled to constitutional protection, and upheld the statute. In dicta, the *Chaplinsky* court defined fighting words as "words . . . which by their very utterance inflict injury or tend to incite an immediate breach of the peace."[79] The *Chaplinsky* court went on to state, "[r]esort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution."[80]

The concept of imminent lawless action was recognized in *Brandenburg v. Ohio.*[81] The *Brandenburg* court said that Ohio may not "proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[82] In contrast to fighting words, which deals with face-to-face insults, imminent lawless action "describes speech that in some way urges people to action."[83] Since *Chaplinsky* is the weaker justification for the *In re R.A.V.* court's holding,[84] and both concepts are premised on the need to prevent breaches of the peace, the analysis of the *In re R.A.V.* statute will be under *Chaplinsky*.

The narrowed statute suffers from vagueness in two ways. First, the discrepancy between the prohibited conduct in the statute as written and as construed by the *In re R.A.V.* court is so great that it fails

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[77] 315 U.S. 568 (1942).

[78] *Id.* at 569.

[79] *Id.* at 572.

[80] *Id.* (citing Cantwell v. Connecticut, 310 U.S. 296, 309-10 (1940)).

[81] 395 U.S. 444 (1969).

[82] *Id.* at 447.

[83] GERALD GUNTHER, CONSTITUTIONAL LAW 1066 (12th ed. 1991).

[84] Brandenburg has been affirmed in Hess v. Indiana, 414 U.S. 105 (1973).

the due process requirement of fair notice. The second type of vagueness also involves the concept of fair notice. But instead of looking at the gap between the statute as written and construed, the Court will focus on the actual standard *as applied*. In the *In re R.A.V.* case, the issue is whether the *Chaplinsky* standard is precise enough to guide the average citizen and satisfy constitutional requirements.

In assessing the amount of vagueness resulting from a narrowing interpretation, the due process concept of notice requires that for any saving construction, the statute as written must bear a reasonable relation to the statute as construed. If the language of a statute is clear and unambiguous, its constitutionality cannot "turn upon a choice between one or several alternative meanings."[85] There is no presumption of constitutionality,[86] and the narrowing cannot amount to a "substantial rewriting."[87]

In *People v. Dietze*,[88] a New York court prohibited the narrowing of a statute similar to the one in *In re R.A.V.* In *Dietze* the defendant was accused of calling a mentally ill woman a "bitch" and her son a "dog," and said she would "beat the crap out of [the complainant] some day or night on the street."[89]

The *Dietze* court refused to narrowly construe a law which prohibited abusive language with intent to harass, annoy, or alarm others to fighting words.[90] The court stated "it is basic that the very language of the statute must be fairly susceptible of such an interpretation; put otherwise, the saving construction must be one which the court 'may reasonably find implicit' in the words used by the Legislature."[91] *Chaplinsky* allows prohibitions of two types of speech: words which by their very utterance inflict injury or words which tend to incite an immediate breach of the peace. The *Dietze* court said that both *Chaplinsky* elements were too far removed from the statute's language. "[A]busive or obscene language and 'intent to harass (or) annoy' — simply does not

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[85] Baggett v. Bullitt, 377 U.S. 360, 378 (1964).

[86] *See* NAACP v. Button, 371 U.S. 415 (1963). "If the line drawn . . . is an ambiguous one, we will not presume that the statute curtails constitutionally protected activity as little as possible."

[87] Aptheker v. Secretary of State, 378 U.S. 500, 515 (1964).

[88] 549 N.E.2d 1166 (N.Y. 1989).

[89] *Id.* at 1167.

[90] N.Y. PENAL LAW §240.25(2) (McKinney 1989).

[91] People v. Dietze, 549 N.E.2d 1166, 1169 (N.Y. 1989).

even suggest a limitation to violence-provoking or substantial injury-inflicting utterances. An attempt by this court to so limit the statute would, thus, be tantamount to wholesale revision of the Legislature's enactment."[92]

The *In re R.A.V.* statute should fare no better than the statute in *Dietze*. To determine vagueness in this context the words of the statute as written must be compared with the statute as narrowed. When the phrase "arouses anger, alarm, or resentment in others on the basis of race, color, creed, religion, or gender" is compared to the phrase "words . . . by which their very utterance inflict injury or tend to incite an immediate breach of the peace" (the *Chaplinsky* definition), the discrepancy between the statute as written and as narrowed is even greater than the discrepancy in the *Dietze* case. There is not enough in the phrase "anger, alarm, or resentment in others on the basis of race, color, creed, religion or gender" to indicate the *Chaplinsky* limitations of violence-provoking or substantial injury-inflicting utterances.

The standard is whether persons of ordinary intelligence reading the statute would know what it actually meant.[93] Using this standard, the *Dietze* court held that the acts prohibited by the statute at issue could not be known by the average citizen reading it, and was thus unconstitutionally vague.[94] Since the gap between the statute as written and as construed is even greater in *In re R.A.V.* than it was in *Dietze*, it is hard to imagine how the narrowing construction could survive this vagueness analysis.

The second vagueness problem in *In re R.A.V.* also focuses on the definition of fighting words in *Chaplinsky*. In this second analysis, the definition is not scrutinized in relation to another statute. It is examined on its own to see if it is specific enough to identify unprotected conduct without chilling protected speech. The *In re R.A.V.* court avoids overbreadth by incorporating the *Chaplinsky* language verbatim so that only unprotected speech is proscribed. The problem is that there is an unavoidable trade-off between overbreadth and vagueness in this case. *Chaplinsky*'s subjective standard is simply "too vague to pass muster as a saving construction of an overbroad statute."[95] The experi-

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[92] *Id.*

[93] *Id.*

[94] *Id.*

[95] Fallon, *supra* note 36, at 906.

ence of the *Dietze* court illustrates the problem. The court in *Dietze* decided it could not limit the statute without making it overly vague. The court explained, "construing the statute as limited to certain constitutionally proscribable speech would likely result in transforming an otherwise overbroad statute into an impermissibly vague one."[96]

How does a citizen know if his words will "inflict injury or tend to incite an immediate breach of the peace?" The test is "what men of common intelligence would understand would be likely to cause an average addressee to fight."[97] This test leaves crucial questions unanswered: What is an "average addressee?" When would he or she fight? Which words are fighting words? In other areas of law the standard may be sufficient, but the *Chaplinsky* definition cannot meet the high standards required in First Amendment cases.

The problem is illustrated by the fact that the *Chaplinsky* court described fighting words in terms which have been held unconstitutionally vague, or which the Supreme Court has been unable to define. The *Chaplinsky* court said "obscene revilings" and "derisive and annoying words" come within the purview of the statute if they tend to incite a breach of the peace.[98] Yet courts have struggled with the vagueness of the obscenity standard for years, and it is therefore an insufficient basis for a law restricting speech.[99] The annoyance standard is equally vague and has been rejected. When the Court explained the fighting words rationale in *Terminiello v. Chicago*,[100] it said speech is protected unless it is likely to produce a clear and present danger "which rises far above public inconvenience, *annoyance*, or unrest."[101] Similarly, in *Coates v.*

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[96] Deitze, 549 N.E.2d at 1169. *See also* Redish, *supra* note 27, at 1053 ("When a suggested narrowing construction instead turns on a First Amendment principle that is vague in its terms . . . such a construction . . . would simply trade overbreadth for vagueness.").

[97] Gooding v. Wilson, 405 U.S. 518, 523 (1972).

[98] Chaplinsky v. New Hampshire, 315 U.S. 568, 573 (1942).

[99] *See* Miller v. California, 413 U.S. 15 (1973) (Douglas, J., dissenting). In Miller, the Court abandoned its effort to create a national obscenity standard. Instead, the Court incorporated contemporary community standards into its obscenity test. Justice Douglas objected on vagueness principles: "[N]o more vivid illustration of vague and uncertain laws could be designed than those we have fashioned." *Id.* at 41. Justice Douglas also thought the Court's standard was contrary to due process principles, "To send men to jail for violating standards they cannot understand, construe, and apply is a monstrous thing to do in a Nation dedicated to fair trials and due process." *Id.* at 44.

[100] 337 U.S. 1 (1949).

[101] *Id.* at 4 (emphasis added).

Cincinnati[102] the Supreme Court held the annoyance standard in a local statute was unconstitutionally vague because the word "annoy" failed to specify any conduct at all.[103] Also contrary to *Chaplinsky*, other courts have said that "derisive speech" is protected.[104] The very premise of *Chaplinsky*, that the term "fascist" is a fighting word, was later rejected by the Supreme Court in *Letter Carriers v. Austin*.[105]

The third basis for the court's ruling in *In re R.A.V.* was that the statute was not overbroad as construed because it took into account the circumstances of each case.[106] The court recognized that it had to avoid the overbreadth problem of the statute in *Johnson*, which "assume[d] that every expression of a provocative idea will incite a riot."[107] The *In re R.A.V.* court reasoned the St. Paul statute was not overbroad because the statute does not "assume any cross burning, irrespective of the context in which it occurs, is subject to prosecution."[108] The court reasoned that the statute only prohibited symbolic displays which amounted to fighting words if the anger, alarm or resentment cause was based on race, color, creed, religion or gender.[109] In other words, any prosecution for bias-related symbolic speech would have to meet the dual requirements of fighting words instigated upon a prohibited basis. The court also cited another case in which it held a state statute prohibiting "boisterous and noisy conduct tending reasonably to arouse anger, alarm, or resentment in others" was not overbroad since, as narrowed, it applied only to fighting words.[110]

Neither argument addresses or solves the vagueness problem when the statute is narrowed to *Chaplinsky*'s fighting words definition. The Supreme Court rejected the case-by-case approach as a cure for vagueness in *Aptheker v. Secretary of State*.[111] The Court described the dangers of such an approach:

> [A]n attempt to "construe" the statute and to probe its recesses for some core

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[102] 402 U.S. 611 (1971).
[103] *Id.* at 614.
[104] *See* People v. Dietze, 549 N.E.2d 1166, 1167 (N.Y. 1989).
[105] 418 U.S. 264, 284 (1974).
[106] In re R.A.V., 464 N.W.2d 507, 510 (Minn. 1991).
[107] *Id.* at 510.
[108] *Id.*
[109] *Id.*
[110] *Id.* (citing In re S.L.J., 263 N.W.2d 412 (Minn. 1978)).
[111] 378 U.S. 500 (1964).

> of constitutionality would inject an element of vagueness into the statute's scope and application; the plain words thus become uncertain in meaning only if courts proceeded on a case-by-case basis to separate out the constitutional from unconstitutional areas of coverage. This course would not be proper, or desirable, in dealing with a section which so severely curtails personal liberty.[112]

The case-by-case rationale in the *In re R.A.V.* court would therefore fall under the *Aptheker* approach. Laws regulating speech must be clear enough so that their boundaries are not hammered out piecemeal.[113] When a statute's language is so vague that it is standardless and void in all its applications, a court may strike it down as "facially invalid."[114] Alternatively, the court has the discretion to examine the statute "as applied." In either case, the *In re R.A.V.* statute is void for vagueness. Where the First Amendment is affected, such high standards combined with the Supreme Court's tendency to strike down laws based on subjective standards[115] make it unlikely the Court would uphold the *In re R.A.V.* statute.

Apart from its vagueness and overbreadth problems, the fighting words doctrine is not a particularly robust doctrine on which to base the regulation of symbolic speech.[116] It is a very narrow doctrine which the Supreme Court has not returned to since the case was decided.[117] The Supreme Court's tendency to avoid using the fighting words doctrine by relying upon overbreadth led Chief Justice Burger and Justice Blackmun to charge that the Court "is merely paying lip service" to *Chaplinsky*.[118] Despite these protests, the infrequency of *Chaplinsky's* application is a strong indication that the Court did not intend its expansive dicta on fighting words to carry doctrinal significance at all.[119]

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[112] *Id.* at 516 (construing Fifth Amendment right to travel).

[113] *See* Dombrowski v. Pfister, 380 U.S. 479 (1965).

[114] *See* Smith v. Gougen, 415 U.S. 566, 578 (1974)(applying void for vagueness doctrine to flag misuse statute).

[115] *See, e.g.*, Smith v. Gougen, 415 U.S. 566 (1974)("contemptuous treatment of the flag"); Gooding v. Wilson, 405 U.S. 518 (1972)("opprobrious words or abusive language"); Coates v. Cincinnati, 402 U.S. 611 (1971)("annoyance" standard).

[116] Nevertheless, it may be the only basis. *See* Sontakay, *supra* note 22, at 245 ("[t]he best argument in support of antidiscriminatory regulations relies on the 'fighting words' doctrine").

[117] *See* Gard, *supra* note 17, at 531.

[118] *Id.* at 534-35 (quoting Gooding v. Wilson, 405 U.S. 518, 537 (1972)(Blackmun, J., dissenting).

[119] *Id.* at 534.

Indeed, even the phrase "fighting words doctrine" seems to be a term of convenience more than an accurate description of a legal principle.

Subsequent cases support this conclusion. The Supreme Court retreated from the broad implications of the fighting words doctrine in *Terminiello v. Chicago*,[120] and *Cohen v. California*.[121] The Court has also struck down statutes for failing to limit their scope to fighting words in *Gooding v. Wilson*,[122] *Houston v. Hill*,[123] and *Lewis v. New Orleans*.[124]

The *In re R.A.V.* court attempts to solve the drafting problems in *Gooding*, *Hill* and *Lewis* by incorporating the *Chaplinsky* standard verbatim into its interpretation.[125] The narrowing construction acknowledges "[t]he constitutional necessity of limiting this type of statute to words which 'by their very utterance inflict injury or tend to incite an immediate breach of the peace.' "[126] But it is important to note that *Gooding*, *Hill* and *Lewis* do not suggest that if the *Chaplinsky* standard is strictly followed, states may regulate *symbolic* speech under the fighting words doctrine. Both *Gooding* and *Lewis* stressed the state's failure to confine its statute to the narrow category of fighting words, because the statutes prohibited "opprobrious" language.[127] This indicates a strict interpretation of *Chaplinsky* which puts the expansion of the fighting words doctrine to symbolic speech on shaky footing.

On a practical level, application of the fighting words doctrine to symbolic speech would require the Court to ignore one of the most basic principles of First Amendment law. To prosecute someone for fighting words, the state must prove intent and four other elements: (1) a personally abusive epithet, (2) which was directed at, and (3) limited to the individual, and (4) that the average person would be incited to violence upon hearing the words.[128] The St. Paul statute adds the require-

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[120] 337 U.S. 1 (1949)(abandoning the Chaplinsky "uncontrollable impulse" test).

[121] 403 U.S. 15 (1971)(defendant's jacket, bearing the phrase "Fuck the Draft," held not applicable to the fighting words doctrine).

[122] 405 U.S. 518 (1971).

[123] 482 U.S. 451 (1987).

[124] 415 U.S. 130 (1974).

[125] 464 N.W.2d 507, 510 (Minn. 1990).

[126] Karlan v. City of Cincinnati, 298 N.E.2d 573 (Ohio 1973), *vacated and remanded*, 416 U.S. 924, 927 (1974)(Douglas, J., dissenting)(citing Gooding v. Wilson, 405 U.S. 518, 522 (1972); Lewis v. New Orleans, 415 U.S. 130 (1974)).

[127] Lewis, 415 U.S. at 133; Gooding, 405 U.S. at 525.

[128] *See* Gard, *supra* note 17, at 536.

ment that the breach of the peace be based on race, color, creed, religion or gender.[129] Application of the fighting words test to symbolic speech therefore requires a court to accept the proposition that in certain situations a symbol satisfies these requirements. Most notably, it requires recognition that a symbol can be a personally abusive epithet. This ignores the established legal distinction between offensive *language*, which may be prohibited, and offensive *ideas*, which may not.[130] Symbols embody ideas and values, not personally abusive epithets.

CONCLUSION

The *In re R.A.V.* statute is unconstitutional on its face. It is overbroad because it was written and intended to reach protected expression. If the statute is narrowed to only include fighting words, it becomes unconstitutionally vague because it no longer bears a reasonable relation to the statute as written. But even if the written statute were identical to *Chaplinsky*'s fighting words definition, the standards are too vague to withstand First Amendment scrutiny. Since *Chaplinsky*, the Supreme Court has cut back the scope of the fighting words doctrine, and undermined its premise by recognizing that speech cannot be prohibited merely because of an inherent tendency to cause violence. The statute is also vulnerable because of its under-inclusive nature, and the fact that a more comprehensive disorderly conduct statute is already in effect.

Although the harm suffered from an epithet or a symbol of hate may be the same, the law cannot protect citizens from offensive symbols under the fighting words doctrine. In this case the line which separates protected and unprotected speech is drawn between language and ideas. This line represents choices between competing values of due process, free speech and individual rights. St. Paul's bias-motivated disorderly conduct statute has a marginal effect on unprotected speech which does not justify its chilling effect.

Stephen Eckerman

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[129] ST. PAUL, MINN.LEG.CODE §292.09 (1990); *see also* Gard, *supra* note 17, at 563.

[130] Street v. New York, 394 U.S. 576, 592 (1969); *see also* Gard, *supra* note 17, at 547.