HATE SPEECH AND THE CONSTITUTION

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On June 22, 1992, the United States Supreme Court unanimously struck down a bias-motivated crime ordinance in *R.A.V. v. St. Paul, Minnesota*,[1] and then on June 11, 1993 it unanimously upheld a penalty enhancement provision for bias-motivated crimes in *Wisconsin v. Mitchell*.[2] These two different decisions in otherwise similar cases appear to be explicable on the basis of the difference between speech, or expression, which is protected by the First Amendment, and conduct, which is not, as the Supreme Court maintained.[3] In the first case, petitioner R.A.V. was charged with burning a cross on a black family's lawn; the Court regarded such conduct as protected symbolic expression. In the second case, Mitchell was convicted of aggravated battery and then had his sentence enhanced, from two years to four, when the jury determined that he had selected his victim on the basis of race. Mitchell, who is black, directed three of his friends to beat up a white boy, after they had all seen the movie *Mississippi Burning*, in which "a white man beat up a black boy who was praying."[4]

The cases are complicated and worthy of careful study for two reasons. First, the Supreme Court divided five to four on the grounds of the decision in the *R.A.V.* case. In his court opinion, Justice Scalia complicated first amendment law by extending some protection to forms of expression, such as "fighting words," that had previously been viewed as categories of simply unprotected speech; the four concurring Justices took issue with that, claiming both that it was unnecessary since the law was overbroad in the first place, and also that if the law had not been overbroad the substantial harm of the prohibited symbolic expression justified the prohibition. Second, the *Mitchell* case was

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1. — U.S. —; 112 S. Ct. 2538 (1992).

2. — U.S. —; 113 S. Ct. 2194 (1993).

3. "But whereas the ordinance struck down in R.A.V. was explicitly directed at expression . . . the statute in this case is aimed at conduct unprotected by the First Amendment." Id. at 2201.

4. Id. at 2196.

closer to the *R.A.V.* case—and more difficult—than the Supreme Court acknowledged. The Wisconsin Supreme Court treated the issues more fully, as we shall see. In addition, Professor Cass Sunstein, who supported the *Mitchell* decision, nonetheless wrote the following:

> But consider the fact that the government imposes the additional penalty because it thinks that hate crimes create distinctive subjective and objective harm. The distinctive harm is produced in part because of the symbolic or expressive nature of hate crimes. This justification is the same as that in the cross-burning case. This does not mean that it is impossible to draw distinctions between enhanced penalty statutes and 'hate speech' laws. But it does mean that if the justification for the hate crimes measures is sufficiently neutral, the same should be said for narrow restrictions on hate speech.[5]

The two cases, then, may be said to deal with one topic, hate speech, or as the late Harry Kalven called it, "ideological fighting words."[6] In some respects, these cases offer a replay of the constitutional controversies that gave rise to some of our current first amendment doctrines: "fighting words," in *Chaplinsky v. New Hamsphire* (1942), what Kalven called "ideological fighting words" in *Terminiello v. Chicago* (1949), and "group libel" in *Beauharnais v. Illinois* (1953). The replay, however, takes place against a backdrop of the more speech protective cases of the 1960s and 1970s: *New York Times v. Sullivan* (1964), *Brandenburg v. Ohio* (1969), and *Cohen v. California* (1971), as well as the flag burning cases of 1989 and 1990. It also takes place at a time when there is both a widespread concern about and a controversy over the distinctive harms resulting from speech or conduct which singles out individuals or groups on the basis of race or gender, sexual preference, religion, or national origin.

The origin of this hate speech controversy is the movement for "hate speech" codes on college and university campuses, notably at Michigan and Stanford in 1989-1990. In the Michigan case, a federal district court overturned Michigan's speech code and the university did not appeal the decision.[7] The Stanford case did not get into the courts as Stanford is a private school, but it was debated on campus in terms of the first amendment

5. Cass Sunstein, *Words, Conduct, Caste*, 60 U. Chi. L. Rev. 795, 826 (1993).

6. Harry Kalven Jr., *A Worthy Tradition: Freedom of Speech in America* 80-81 (Jamie Kalven, ed., Harper Row, 1988).

7. *Doe v. University of Michigan*, 721 F. Supp. 852 (E.D. Mich. 1989).

standard and that debate has been widely publicized.[8] Many other colleges and universities followed with their own versions of a harassment or hate speech code, and I think it will become clear that the intensity of disagreement among the Justices in the *R.A.V.* case was due at least in part to the effect of that decision on speech codes at public colleges and universities.

In part one, then, I will discuss the *R.A.V.* case. I will focus on three things: the concurring Justices' argument for decision by way of overbreadth; the majority opinion's application of two related requirements—content neutrality and viewpoint neutrality—to speech hitherto regarded as categorically not protected and hence subject to prohibition; and Justice Stevens' argument concerning the inadequacy of the categorical approach and nature of the harm of hate speech.

In part two, I will discuss *Wisconsin v. Mitchell*, beginning with the opinions of the Wisconsin Supreme Court. As already noted, the main issue concerns the extent to which protected speech is indirectly but nonetheless significantly punished. A related topic concerns the relationship between a penalty-enhancing statute and anti-discrimination laws.

Finally, in conclusion, I will bring the two cases together by considering the conflict between, on the one hand, the neutrality requirement, with respect to content and especially "viewpoint," and, on the other, the harm of hate speech and the case for enhanced penalties for hate crimes as a way of getting around the first amendment barrier.

I

The city of St. Paul prosecuted "R.A.V." (the names of juveniles are withheld for confidentiality), under a Bias Motivated Crime Ordinance for allegedly constructing a crudely-made cross and burning it inside the fenced yard of a black family. The authorities apparently chose to prosecute under the ordinance, rather than under more specific felony statutes[9] to

8. Gerald Gunther, *Constitutional Law* 1134-37 (Foundation Press, 12th ed. 1991). Professor Gunther, who was himself actively engaged in opposing a speech code at Stanford, provides important information about the regulation (at 1135 n.2), to which I will return.

9. Justice Scalia identifies the following statutes which covered R.A.V.'s criminal conduct: one providing for up to five years imprisonment for terrorist threats; one providing for up to five years for arson; and one providing for up to one year and a $3,000 fine for damage to property. 112 S. Ct. at 2541 n.1.

highlight the city's condemnation of "hate crimes."[10] The ordinance made it a misdemeanor for anyone to place "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. . . ."[11] The state district court found the ordinance in violation of the First Amendment, but Minnesota's Supreme Court reversed, upholding the ordinance by interpreting it to reach no more than unprotected expression under the "fighting words" doctrine. According to that doctrine, "fighting words are those which by their very utterance inflict injury or tend to incite an immediate breach of the peace."[12] The Minnesota court said: "the ordinance censors only those displays that one knows or should know will create anger, alarm, or resentment based on racial, ethnic, gender, or religious bias."[13]

The United States Supreme Court unanimously reversed, holding the ordinance unconstitutional. Justice White's preferred basis for deciding this case, with which Justices Blackmun, O'Connor and Stevens agreed, was to hold that the state supreme court had not narrowed the ordinance sufficiently, because it still criminalized protected speech: "expressive conduct that causes only hurt feelings, offense, or resentment."[14] Even if

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10. I learned this from a telephone conversation, placed in the summer of 1992, with city attorney Natalie Hudson. I also learned that petitioner probably could not be charged under any of the other statutes, such as racially motivated assault, since after the Supreme Court decision he was no longer a minor. After having finished this article, I came across Edward J. Cleary's recently published book, *Beyond the Burning Cross: The First Amendment and the Landmark R.A.V. Case* (Random House, 1994). Mr. Cleary, an attorney who practices in St. Paul, Minn., was assigned to represent "R.A.V.," Robert Anthony Viktora, on June 25, 1990, along with every other juvenile who appeared in court that morning. He subsequently represented "R.A.V." all the way to the U.S. Supreme Court. Id. at 112. Mr. Cleary reports that

> [s]everal juveniles involved in the June 21, 1990 incident (including R.A.V.) were convicted in January 1993 of violating 18 U.S.C. § 241 and 42 U.S.C. § 3631 by a federal judge sitting without a jury. Both of these provisions punish all threats aimed at the exercise of federally guaranteed rights or privileges, unlike the St. Paul ordinance which prohibited the mere expression of an unpopular opinion. The individuals were referred for probable commitment to state juvenile facilities. Further details were withheld by federal authorities. Then on April 26, 1994, a three-judge panel from the Eighth Circuit denied the appeals of all the juveniles. R.A.V., whose constitutional right to a bigoted *viewpoint* had been upheld after a two-year struggle, had eventually been punished for his *conduct* in the early morning hours of June 21, 1990.

Id. at 256 n.223.

11. *R.A.V.*, 112 S. Ct. at 2541.

12. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

13. *In re R.A.V.*, 464 N.W.2d 507, 510 (1991).

14. *R.A.V.*, 112 S. Ct. at 2560 (White, J., concurring).

petitioner's conduct would have been punishable under a narrowly drawn ordinance, given the importance of freedom of speech, he is permitted to challenge the ordinance in the name of those whose expression is unconstitutionally "chilled." What is left of the "fighting words," if we follow Justice White's approach? In the original formulation, there were two "strands" to the doctrine: words "which by their very utterance inflict injury," and those which "tend to incite an immediate breach of the peace." Given the subsequent decisions involving libel and "offensive speech," the latter of which include all kinds of profane speech, it is not clear what remains of the first strand of the doctrine. The second strand might be reducible to speech "directed to inciting or producing imminent lawless action and . . . likely to incite or produce such action," which can be prohibited under *Brandenburg v. Ohio*.[15] In that case, a more candid treatment of the overbreadth issue would have required Justice White to acknowledge that the "fighting words" doctrine has been reduced to the *Brandenburg* "incitement" test.

If a majority had formed behind Justice White's "overbreadth" analysis, tighter hate speech codes would not have become presumptively unconstitutional, which may account for the majority opinion of Justice Scalia, which Justices Rehnquist, Kennedy, Souter, and Thomas joined. Accepting the state's interpretation of the ordinance as limited to "fighting words," Justice Scalia applied the "content-neutrality" rule to strike it down. The doctrine of "content-neutrality" means that government cannot regulate or prohibit speech or expression on the basis of "its message, its ideas, its subject matter, or its content."[16] The doctrine is complicated—sometimes it is presented in a narrower version as "viewpoint neutrality"—but it had always been applied to speech that could be indirectly regulated but could not be prohibited. For example, an otherwise legitimate regulation of speech on the basis of time, place, or manner (i.e., no picketing near a school when it is in session) would be invalidated if it discriminated on the basis of the content of the message (i.e., no picketing near a school, except for labor unions). For the first time, the Court majority applied the content neutrality requirement to categories of proscribable speech, such as obscenity or "fighting words." This novelty is revealed by examining Justice Scalia's reinterpretation of the Court's earlier account of its categorical approach. Under the earlier account, such unprotected

15. 395 U.S. 444, 447 (1969).
16. *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95 (1972).

categories were " 'not within the area of constitutionally protected speech'." Justice Scalia interpreted this to mean "that these areas of speech can, consistently with the First Amendment, be regulated because of their constitutionally proscribable content (obscenity, defamation, etc.)—not that they are categories of speech entirely invisible to the Constitution, so that they may be made the vehicles for content discrimination unrelated to their distinctively proscribable content."[17] Justice Scalia cited *New York v. Ferber*,[18] where the Court upheld the state's prohibition on child pornography, since there was no question of censoring a particular literary theme (which is to say no content discrimination was involved).[19] But that case involved protected speech—non-obscene pornography—where an otherwise impermissible prohibition was upheld on the grounds of the special harm associated with the use of minors in making such protected pornography. As Justice Scalia remarked, no content discrimination was involved. *R.A.V.* was the first time the Court held that categorically unprotected speech was subject to the protection of the content-neutrality rule. Thus, it is now impermissible to pick out certain "fighting words" for punishment on the basis of content.

Justice White criticized this position by saying it introduced a prohibition on "under-inclusiveness," and that the Court was insisting on an "all or nothing" approach to proscribable speech. And Justice Stevens criticized Justice Scalia for relying on content neutrality in the first place. Drawing on his plurality opinions in *Young v. American Mini Theatres Inc.*[20] and *FCC v. Pacifica*,[21] in which he introduced the concept of levels of protected speech to justify restrictions on "adult entertainment" and crude words on the radio, as well as his concurring opinions in the child pornography case and certain commercial speech cases, Justice Stevens argued that the Court has not always followed content neutrality and that it should not.[22]

Justice Scalia tried to defend his position by holding onto the categorical approach and by responding to Justice White. Justice Scalia responded first by arguing that a content neutrality requirement is narrower than under-inclusiveness. Then he argued that content discrimination is permissible when "the basis for [it]

17. 112 S. Ct. at 2543.
18. 458 U.S. 747 (1982).
19. Id. at 763.
20. 427 U.S. 50 (1976).
21. 438 U.S. 726 (1978).
22. *R.A.V.*, 112 S. Ct. at 2564, 2566-68 (Stevens, J., concurring in the judgment).

consists entirely of the very reason the entire class of speech at issue is proscribable."[23] His illustration is a state choosing to prohibit only the most patently offensive of obscenity, when it could prohibit it all; that is constitutional, but a state choosing to prohibit "only that obscenity which includes offensive *political* messages" would not be permitted.[24] Another example draws on *Watts v. United States*,[25] where the Court upheld a federal law criminalizing threats of violence directed against the President; this is legitimate "under inclusiveness," for Justice Scalia, whereas criminalizing only those threats "that mention his policy on aid to inner cities" would be invalid.[26] Justice Scalia also suggested that content-based classifications are permissible where they are associated with "particular 'secondary effects' of the speech" which produce harms that can be prohibited.[27]

Justice Scalia's clearest and best statement is that content discrimination may be allowed as long as "there is no realistic possibility that official suppression of ideas is afoot."[28] The worst form of content discrimination, in other words, is viewpoint discrimination, and that cannot be allowed at any time.[29] As Justice Scalia put it, if the Bias Motivated Crime ordinance were upheld, "[o]ne could hold up a sign saying, for example, that all 'anti-Catholic bigots' are misbegotten; but not that all 'papists' are, for that would insult and provoke violence 'on the basis of religion'. St. Paul has no such authority to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensbury Rules."[30]

On a first reading this hypothetical appears so bizarre, as well as perhaps difficult to follow, that one might conclude that a law student has worked too hard to manufacture a difference. When is the last time we saw a sign which said that "all anti-Catholic bigots are misbegotten"? I think Justice Scalia has a point here, but it takes some working through.

Justice Stevens, in reply, claims that

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23. Id. at 2545.
24. Id. at 2546 (emphasis in original).
25. 394 U.S. 705 (1969).
26. *R.A.V.*, 112 S. Ct. at 2546.
27. Id.
28. Id. at 2547.
29. The Supreme Court has recently accepted certiorari in the case of *Rosenberger v. Rector, University of Virginia*. The question presented is: "Does Establishment Clause compel state university to exclude otherwise eligible student publication from participation in student activities fund, solely on basis of its religious viewpoint, when such exclusion would violate Speech and Press Clauses if viewpoint of publication were non-religious?" 63 U.S.L.W. 3276 (U.S. Oct. 4, 1994) (No. 94-329).
30. R.A.V., 112 S. Ct. at 2548.

> the Court's reasoning is asymmetrical. The response to a sign saying that "all [religious] bigots are misbegotten" is a sign saying that "all advocates of religious tolerance are misbegotten." Assuming such signs could be fighting words (which seems to me extremely unlikely), neither sign would be banned by the ordinance for the attacks were not "based on . . . religion" but rather on one's beliefs about tolerance.[31]

Justice Stevens' revision did not so much make the arguments symmetrical as it shifted the grounds from particularity to generality. One can imagine an argument on the pros and cons of religious tolerance, but street talk gets down to particulars, and at that level Justice Scalia's description is accurate.

Another way to consider the issue is to think of profane words (Justice Scalia's "misbegotten" is a euphemism for one of them) addressed to an individual in such a way as likely to incite to violence and then combine those words with the proscribed categories of the ordinance: race, color, creed, religion, or gender. According to Justice Stevens, the ordinance, assuming that it is not fatally overbroad, "regulates speech not on the basis of its subject matter or the viewpoint expressed, but rather on the basis of the *harm* the speech causes."[32] The ordinance regulates "only a subcategory of expression that causes *injuries based on* 'race, color, creed, religion, or gender,' not a subcategory that involves *discussions* that concern those characteristics."[33] But according to Justice Scalia, the effect is a viewpoint based ordinance: there were many content and viewpoint neutral alternatives available to St. Paul—the laws were on the books available for use—but "the only interest distinctively served by the content limitation [we might say the content emphasis] is that of displaying the city council's special hostility towards the particular biases thus singled out. That is precisely what the First Amendment forbids."[34] Justice Scalia seems to be right that the ordinance, as it has been interpreted to keep it constitutional, singles out for special prohibition those fighting words which convey hostility and are likely to incite to violence on the basis of certain categories only, not others.

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31. Id. at 2571 (Stevens, J., concurring in the judgment).

32. Id. at 2570 (emphasis in original).

33. Id.

34. Id. at 2550.

II

In *Wisconsin v. Mitchell*, decided one year after *R.A.V. v. St. Paul*, the Supreme Court unanimously reversed the Wisconsin Supreme Court and sustained a Wisconsin statute, similar to that of many other states, which provides for penalty enhancements for hate crimes, where the victim was intentionally selected because of his or her race, religion, color, disability, sexual orientation, national origin or ancestry.[35] The Wisconsin Supreme Court had found two first amendment violations in the "because of" character of the selection: it impermissibly punished "what the legislature has deemed to be offensive thought," and it had an indirect "chilling effect" on free speech as well.[36] On the first point, the court argued that "[m]erely because the statute refers in a literal sense to the intentional 'conduct' of selecting, [it] does not mean the court must turn a blind eye to the intent and practical effect of the law—punishment of offensive motive or thought."[37] To confirm that the statute punished "bigoted thought," which involves "the actor's motive or reason for singling out the particular person against whom he or she commits a crime,"[38] not merely "conduct," the Wisconsin Supreme Court quoted from an amended version of the law, which clarified that the ground of selection "*in whole or in part* because of *the actor's belief or perception regarding* the race . . . *whether or not the actor's belief or perception was correct.*"[39]

The "chilling effect," or "overbreadth" argument is that under this statute a misdemeanor is converted into a felony

> merely because of the spoken word. For example, if A strikes B in the face he commits a criminal battery. However, should A add a word such as "nigger," "honkey," "jew," "mick," "kraut," "spic," or "queer," the crime becomes a felony, and A will be punished not for his conduct alone—a misdemeanor—but for using the spoken word. Obviously, the state would respond that the speech is merely an indication that A

35. The statute at the time of Mitchell's crime is reproduced in full in Chief Justice Rehnquist's opinion in *Wisconsin v. Mitchell*, 113 S. Ct. at 2197 n.1.

36. 485 N.W.2d 807, 811 (Wis. 1992). This opinion frequently quotes from Susan Gellman's excellent law review article: *Sticks and Stones Can Put You In Jail, But Can Words Increase Your Sentence? Constitutional and Policy Dilemmas of Ethnic Intimidation Laws*, 39 U.C.L.A. L. Rev. 333 (1991).

37. 485 N.W.2d at 813.

38. Id.

39. Id. at 813 n.12. The italicized portion is new. While the amended statute postdated Mitchell's trial, the majority evidently took it to clarify the original intention, not to change anything. "Thus the legislature has removed any doubt that the aim of the statute is the actor's subjective motivation." Id.

> intentionally selected B because of his particular race or ethnicity, but the fact remains that the necessity to use speech to prove this intentional selection threatens to chill free speech. Opprobrious though the speech may be, an individual must be allowed to utter it without fear of punishment by the state.[40]

Two Justices on the Wisconsin high court dissented. One, acknowledging that she would not have supported such a statute, wrote that "the tight nexus between the selection of the victim and the underlying crime . . . saves this statute."[41] The other regarded the law as an "anti-discrimination" law more than anything else: "both [traditional anti-discrimination laws and this "hate crimes" type] involve discrimination, both involve victims, both involve actions 'because of' the victim's status."[42]

In his majority opinion, Chief Justice Rehnquist acknowledged that the statute enhances the maximum penalty "for conduct motivated by a discriminatory point of view," thereby punishing it "more severely than the same conduct engaged in for some other reason or for no reason at all."[43] The Court then solved this seemingly difficult first amendment issue with reference to the traditional leeway given to sentencing judges on the one hand and the primary responsibility of legislatures "for fixing criminal penalties" on the other.[44] The Court also likened what Wisconsin's legislature did to what juries do in death penalty cases, when they consider aggravating and extenuating circumstances in the penalty phase of their deliberations.[45] But this statute singles out for special enhanced punishment only one factor from among many. A sentencing judge given discretion is required to take into account the "totality of circumstances" in setting the proper punishment. A sentencing jury in a capital case is required to take account of any and all aggravating or mitigating circumstances, and it must find at least one aggravating circumstance to decide on the death penalty. Similarly, the Federal Sentencing Guidelines reflect a congressionally authorized and approved ranking of degrees of severity of crimes and corresponding punishments.

While the Court's argument does not address the free speech issue directly, it seems to signal a minimalist scrutiny of

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40. Id. at 816.
41. Id. at 818 (Abrahamson, J., dissenting).
42. Id. at 820 (Bablitch, J., dissenting).
43. *Wisconsin v. Mitchell*, 113 S. Ct. at 2199.
44. Id. at 2200.
45. Id.

the statute, notwithstanding the strict scrutiny to which statutes challenged under the First Amendment are supposed to be subjected. This is confirmed by the next step in the argument, where the Court claimed that "motive plays the same role under the Wisconsin statute as it does under federal and state antidiscrimination laws, which we have previously upheld against constitutional challenge."[46] But the underlying act in the enhanced penalty for hate crimes law—the basic misdemeanor or felony—is itself unlawful, with the victim selection then identified for an enhanced penalty. The underlying act in a civil anti-discrimination case is a selection of one or more over others for employment or admission, which, in the absence of the additional illegal act—of selection or non-selection on the basis of one of the proscribed categories— is not itself illegal. Put differently, one does not ordinarily have a right to be selected for a competitive position, but given the prevalence of frequent discrimination against certain well-defined discrete minorities, government which aims to secure equal rights has no alternative but to pass and uphold traditional anti-discrimination laws.

We do have a choice when it comes to criminal law, where the ordinary expectation is that law and punishment takes account of all relevant features of culpability. Consider, for example, an alternative to our actual case, in which a few young men decide to select their victims arbitrarily and beat them to a pulp, either for money or just for the sheer pleasure of doing it. Which is the more heinous crime, and hence which should be punished the more severely? In our case, Mitchell could conceivably argue in mitigation that he was "carried away for the moment" by the images of racial injustice against blacks that he had just seen in *Mississippi Burning*.

When the Supreme Court finally addressed the free speech issue, it simply asserted that unlike the *R.A.V.* case, which "was explicitly directed at expression," "the statute in this case is aimed at conduct unprotected by the First Amendment."[47] This limp assertion is disappointing. More needs to be said, but all we get is the statement that "this [bias-inspired] conduct is thought to inflict greater individual and societal harm."[48] With a reference to Blackstone on the reasonableness of having crimes of different natures punished with different severities, a brief rejection of the "chilling effect" argument as "too speculative" when ap-

46. Id.
47. Id. at 2201.
48. Id.

plied to the bigot who must suppress his expression for fear of subsequently having it enhance a penalty, and a remark that speech is sometimes used as evidence "to establish the elements of a crime," as in treason cases, the Court concludes that the judgment of the Supreme Court of Wisconsin must be reversed.[49]

CONCLUSION

The Supreme Court's decisions in these two cases may each be justified: the former on the basis of the problem with viewpoint discrimination and the latter on the basis of the difference between a regulation which suppresses speech directly and a regulation whose purpose is to punish conduct, but which incidentally punishes expression. Each case, however, involves a constitutional challenge to a legislative attempt to "denounce" certain forms of speech which common-sensically, as Justice Stevens has written, rank very low but which our First Amendment constitutional doctrines, deriving from the political philosophy of John Stuart Mill, namely viewpoint neutrality, do not permit the Court to treat in that common-sensical manner.[50] Much of what Justice Stevens says about different levels of speech deserves to be considered, but controversies over speech codes at Michigan, Stanford, and the University of Pennsylvania reveal that in the absence of a viewpoint neutrality approach, the protected categories are subject to the partisanship of the "politically correct." Gerald Gunther includes in his recent constitutional law casebook the relevant text of Stanford's speech code. It appears to track "fighting words," but Gunther, who opposed the code, then reports that

> [a]s interpreted by the Chair of the Council which promulgated this "discriminatory harassment" regulation, it would not bar a black student from calling a white student a "honky SOB," on the ground that the white majority is not in as much need of protection from such speech as are those who have suffered discrimination.[51]

That's why Justice Scalia wrote the opinion he did in *R.A.V.* and that's why he was right.

As for *Wisconsin v. Mitchell*, I think Justice Shirley Abrahamson of the Wisconsin Supreme Court got it right when she said: "Had I been in the legislature, I do not believe I would have

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49. Id. at 2201-02.

50. In addition to his *R.A.V.* opinion, see Justice Stevens' recent essay, *The Freedom of Speech*, 102 Yale L.J. 1293 (1993).

51. Gunther, *Constitutional Law* at 1135 n.2 (cited in note 8).

supported this statute because I do not think this statute will accomplish its goal."[52] The statute introduces race and other such controversial classifications where they are not necessary and where they are likely to do more mischief than good.

52. 485 N.W.2d at 818.