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## ***YOU'VE GOT MAIL: HARASSING EMAILS AND THE FIRST AMENDMENT IN STATE V. DRAHOTA***

By Daniel J. Hassing\*

Currently pending before the Nebraska Supreme Court is a case that seeks to balance two very important rights—the right to be left alone and the right to free speech. This indeed requires a delicate balance. On one hand, an error in one direction will force Nebraskans to endure demeaning, harassing, and offensive speech, even in their own home. But on the other hand, an error in the other direction will impede on free speech, one of our society's most cherished rights.

This commentary seeks to help the court find the right balance when it decides *State v. Drahota*,<sup>1</sup> a case in which nasty emails became the basis for a charge of disturbing the peace. It argues that while the Nebraska Court of Appeals misapplied the law of the First Amendment, the Nebraska Supreme Court could uphold the conviction without violating the First Amendment by relying on a different line of cases. This article contains four sections. First, the underlying facts of the case will be put forward. Next, the decision of the court of appeals will be discussed. A brief overview of the relevant First Amendment principles will then follow. This overview will show how the court of appeals got it wrong and how the supreme court can get it right. This commentary concludes with a brief section exploring what a Nebraska statute criminalizing the type of conduct at issue in *Drahota* may look like.

### **The Facts**

The story of *State v. Drahota* begins in a political science class on the campus of the University of Nebraska in Lincoln. Darren Drahota was a student in one of William Avery's<sup>2</sup>

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<sup>1</sup> 17 Neb. App. 678, 772 N.W.2d 96 (2009).

<sup>2</sup> Since the exchange of emails at issue in this case, William Avery has been elected to the Nebraska Legislature. *Id.* at 679, 772 N.W.2d at 98.

political science classes. Although the two shared an interest in political science, they clearly found themselves on opposite ends of the political spectrum.<sup>3</sup>

Drahota began emailing Avery in the winter of 2006. The emails dealt with political issues such as the Bush presidency, the Clinton impeachment, the “war on terror,” military service, the war in Iraq, and other topics.<sup>4</sup> Drahota’s emails were typically longer than those of Avery; the court of appeals characterized them as “rants.”<sup>5</sup> Further, Drahota’s emails were often laced with profanity and insulting language. Avery’s emails, while expressing disagreement with Drahota, were generally shorter.

The exchange came to a head on February 9, 2006. Drahota wrote an email to Avery stating that the Nebraska Cornhuskers football team would be good in a couple years if America is not first destroyed by al-Qaeda and its liberal aides and abettors.<sup>6</sup> Drahota went on to express admiration for Avery even though he was a “liberal bum.”<sup>7</sup> Avery responded to this email by stating that he would not engage in a debate on Drahota’s terms because his emails were insulting, vile, and extreme.<sup>8</sup> Drahota then responded with an invitation to Avery to “go drink and discuss [Avery’s] campaign [for a seat in Nebraska’s legislature].”<sup>9</sup> Avery responded that he was “tired of this shit.”<sup>10</sup> He told Drahota that he found some of his previous comments offensive and no longer wished to engage in a debate with Drahota.<sup>11</sup> Avery then implied Drahota was cowardly for not having served in the military.<sup>12</sup> Drahota’s response included the following:

Fuck you! You don’t know me one bit. You are a liberal American coward. If it were up to you, you would imprison Bush before bin Laden . . . . I’d kick your ass had you said that right in front of me, but YOU don’t have the guts to say that. If you think you do, just try me . . . . We call you people turncoats and I’ll be damned if I’m going to take that

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<sup>3</sup> *Id.* at 679–80, 772 N.W.2d at 98–99.

<sup>4</sup> *Id.* at 680, 772 N.W.2d at 99.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* at 680–81, 772 N.W.2d at 99.

<sup>8</sup> *Id.* at 681, 772 N.W.2d at 99.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

kind of disrespect from someone who is so clueless as to my military background . . . . You've really pissed me off.<sup>13</sup>

Before Avery had a chance to respond, Drahota sent an email apologizing. Avery apparently found the apology insufficient and soon wrote:

Please consider this email a request that you not contact me again for the purpose of spilling more vile. Also, I think you should know that I have saved ALL of your ranting and threatening emails and will not hesitate to turn them over to the police if I hear anything more of this nature from you. Have a nice day.<sup>14</sup>

After receiving this email, Drahota sent a response expressing regret at how he had acted and apologizing to Avery. This was the last email that Drahota sent to Avery until a few months later.

On June 14, 2006, Avery received an email from a person using the address of "averylovesalqueda@yahoo.com." Two days later, he received a second email from this address. The first of these emails related to the death of Abu Musab al-Zarqawi. The author asked, "[d]oes that make you sad that the al-queda [sic] leader in Iraq will not be around to behead people and undermine our efforts in Iraq? . . . You . . . and the ACLU should have a token funeral to say goodbye to a dear friend of your anti-american [sic] sentiments."<sup>15</sup> In the second email, the author referred to Avery as a "Benedict Arnold."<sup>16</sup> The author also expressed a desire to "puke all over [Avery]."<sup>17</sup> Finally, the author told Avery that, "[l]ibs like yourself are the lowest form of life on this planet."<sup>18</sup>

Avery contacted the police about the emails. The police traced them back to a computer owned by a woman with whom Drahota was living. Drahota ultimately admitted that he authored the emails. He was charged with, and convicted of, disturbing the peace.<sup>19</sup> He appealed his conviction to the Nebraska Court of Appeals.

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<sup>13</sup> *Id.* at 681, 772 N.W.2d at 99–100.

<sup>14</sup> *Id.* at 682, 772 N.W.2d at 100.

<sup>15</sup> *Id.* at 684–85, 772 N.W.2d at 101–02.

<sup>16</sup> *Id.* at 685, 772 N.W.2d at 102.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 683, 772 N.W.2d at 100. *See also* NEB. REV. STAT. § 28-1322 (Reissue 2008) (Nebraska's disturbing the peace statute).

### What the Nebraska Court of Appeals Did

The Nebraska Court of Appeals affirmed Drahota's conviction. Although Drahota argued that his conviction could not stand because his e-mails were protected speech, the court disagreed. In its brief analysis of the constitutional issue, the court relied on language found in the United States Supreme Court case of *Chaplinsky v. New Hampshire*.<sup>20</sup> *Chaplinsky* was cited for the proposition that "fighting words" are not protected speech. Citing *Chaplinsky*, the court of appeals said that fighting words are

those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order or morality. Resort to epithets or personal abuse is not in any sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument.<sup>21</sup>

The court stated that "[i]t would be difficult to author a more apt description of Drahota's actions in sending [the emails]."<sup>22</sup> Since Drahota's speech was not protected speech, his conviction for disturbing the peace of William Avery was upheld.

### What the Nebraska Supreme Court Should Do

On September 30, 2009, the Nebraska Supreme Court granted Drahota's petition to hear the case. The court granted the petition after University of California, Los Angeles (UCLA) law professor Eugene Volokh got wind of the case and filed a petition on Drahota's behalf.<sup>23</sup> Volokh, who has taken the case pro bono, argues that the conviction impermissibly limits the First Amendment rights of Drahota. While the First Amendment concerns are not to be lightly dismissed, upholding the conviction would not necessarily run afoul of First Amendment

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<sup>20</sup> 315 U.S. 568 (1942).

<sup>21</sup> *Drahota*, 17 Neb. App. at 686, 772 N.W.2d 102–03 (internal footnotes, quotations, and citations omitted).

<sup>22</sup> *Id.* at 686, 772 N.W.2d at 103.

<sup>23</sup> Cory Matteson, *Neb. Supreme Court Will Hear Student-Professor E-Mail Case*, LINCOLN JOURNAL STAR, Oct. 2, 2009, [http://www.journalstar.com/news/local/crime-and-courts/article\\_1802c1dc-afb2-11de-bbfb-001cc4c002e0.html](http://www.journalstar.com/news/local/crime-and-courts/article_1802c1dc-afb2-11de-bbfb-001cc4c002e0.html) (last visited Nov. 13, 2009).

principles.<sup>24</sup> While the court could find Drahota's speech to be unprotected, it must do so for different reasons than those put forward by the court of appeals.

In finding that Drahota's speech was not protected by the First Amendment, the court of appeals relied on language from *Chaplinsky v. New Hampshire*.<sup>25</sup> *Chaplinsky* is considered by commentators to be the case upon which the "fighting words" exception is based.<sup>26</sup> The policy rationale for the fighting words exception is based on the public's interest in order. Fighting words are those that, when spoken face-to-face, are likely to cause the recipient to immediately breach the peace.<sup>27</sup> In the nearly seven decades following *Chaplinsky*, the Court has continued to recognize the fighting words exception to free speech.<sup>28</sup> There is little doubt that *Chaplinsky* and the "fighting words" exception remain good law.<sup>29</sup>

However, the exception is not applicable to the facts of *Drahota*. Neither the language of the cases applying the fighting words exception nor the underlying policy rationale of the exception would support its application in a case like *Drahota*. Case after case has limited the exception to circumstances in which the words are "inherently likely to provoke violent reaction"<sup>30</sup> and those that "by their very utterance inflict injury or tend to incite an *immediate* breach of the peace."<sup>31</sup> Further, *Chaplinsky* itself upheld a statute that banned only words spoken "face-to-face."<sup>32</sup> These brief quotes illustrate that the motivation behind exempting these words from First Amendment protection is to prevent a heated conversation from erupting into violent confrontation.

But the emails involved in this case posed no such danger; they were unlikely to provoke an "immediate breach of the peace." Keeping in mind the facts of the case, it is nearly

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<sup>24</sup> Drahota's brief before the Nebraska Supreme Court also argues that Drahota's conviction cannot stand because he did not have notice that what he was doing was illegal. This commentary, however, limits itself to discussing the issue of whether or not Drahota's speech was protected and expresses no opinion on the notice question.

<sup>25</sup> *Chaplinsky*, 315 U.S. at 568.

<sup>26</sup> See 1 RODNEY A. SMOLLA, SMOLLA & NIMMER ON FREEDOM OF SPEECH § 10.32 (2009).

<sup>27</sup> See *Chaplinsky*, 315 U.S. at 573.

<sup>28</sup> See, e.g., *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992); *City of Houston v. Hill*, 482 U.S. 451 (1987); *Gooding v. Wilson*, 405 U.S. 518, (1972); *Cohen v. California*, 403 U.S. 15 (1971); *Edwards v. South Carolina*, 372 U.S. 229 (1963); *Terminiello v. City of Chicago*, 337 U.S. 1 (1949).

<sup>29</sup> SMOLLA, *supra* note 26, at § 10.33.

<sup>30</sup> *Cohen*, 403 U.S. at 20.

<sup>31</sup> *City of Houston*, 482 U.S. at 461–62 (quoting *Lewis v. City of New Orleans*, 415 U.S. 130, 133 (1974)) (emphasis added).

<sup>32</sup> *Chaplinsky*, 315 U.S. at 573.

impossible to argue that they would. These emails were sent anonymously from an email address that gave no clues as to the identity of the sender. They certainly were not the type of face-to-face communication the fighting words exception applies to. To discover who was behind the emails, Avery had to report the incident to the police, who were then able to trace the emails back. The process necessary to find out who was behind the emails prevents the reaction from being the immediate violence that *Chaplinsky* was concerned with.

Further, even if Drahota had clearly indicated that he was behind the emails by including his name, the case still would not have come within the fighting words exception. It still was not face-to-face and even if it had provoked Avery to the point where he would become violent, it would not have been immediate. Avery would have to take the time to transport himself to a location where he could confront Drahota. This necessarily transforms Avery's act from an emotional gut response—the thing that *Chaplinsky* sought to prevent—into a deliberate, calculated action. As such, it cannot be contended that Drahota's emails fell within the fighting words exception.

Although Drahota's speech is not rendered unprotected by the fighting words exception, there is an argument that another line of cases removes its First Amendment protection. This line of cases, beginning with *Rowan v. U.S. Post Office Dep't*,<sup>33</sup> has held that the right to be left alone in one's home trumps the First Amendment rights of others wishing to communicate with the homeowner. However, the success of this argument is not an absolute certainty, as it requires that the legal principles involved be applied to new and dynamic technology.

*Rowan* involved a First Amendment challenge to a provision of the Postal Code that allows a homeowner to essentially block certain persons from sending mail to his or her home. In upholding the statute, the Court stated, “the right of every person to be let alone must be placed in the scales with the right of others to communicate.”<sup>34</sup> In the judgment of the Court, the right to be let alone was the weightier interest. The Court stated, “no one has a right to press even ‘good’ ideas on an unwilling recipient”<sup>35</sup> and held that “a mailer's right to communicate must stop at the mailbox of an unreceptive addressee.”<sup>36</sup>

The rule of *Rowan* has since been applied to e-mail. In *Compuserve, Inc. v. Cyber Promotions, Inc.*,<sup>37</sup> the court granted a preliminary injunction to enjoin the defendant, who was repeatedly sending “spam” through the plaintiff's computer system although the plaintiff had

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<sup>33</sup> 397 U.S. 728 (1970).

<sup>34</sup> *Id.* at 736 (internal quotations omitted).

<sup>35</sup> *Id.* at 738. While *Rowan* dealt with a statute that regulated commercial speech, the rationale of *Rowan* has since been applied to political speech as well. See *Hill v. Colorado*, 530 U.S. 703, 717 (2000).

<sup>36</sup> *Rowan*, 397 U.S. at 736–37.

<sup>37</sup> 962 F. Supp. 1015 (S.D. Ohio 1997).

requested that it stop. The court, after citing *Rowan* and other cases,<sup>38</sup> ruled that the sending of the unsolicited emails constituted a trespass and that the First Amendment provided no defense. Similarly, in *Free Speech Coalition, Inc. v. Shurtleff*,<sup>39</sup> the court denied a preliminary injunction sought against enforcement of a Utah law that allowed parents to sign on to a registry in order to prevent unwanted emails from entering their home. The statute at issue in *Shurtleff* also contained a criminal provision.<sup>40</sup> In determining that the plaintiff was unlikely to succeed on its First Amendment challenges, the court stated that the “[the Supreme Court has] repeatedly held that individuals are not required to welcome unwanted speech into their own homes and that the government may protect this freedom.”<sup>41</sup>

The fact that Avery was a government employee running for public office does not limit his ability to control what enters his home. In *U.S. Postal Service v. Hustler Magazine*,<sup>42</sup> the United States District Court for the District of Columbia held that while political office holders could not bar the deliver of pornographic material to their office, they could keep it from being delivered to their home. In so holding, the court repeated the Supreme Court’s concern with protecting the privacy of the home and found that the interest was not harmed when the materials were sent to the offices of the members of Congress.<sup>43</sup>

Thus, *Rowan* and its progeny establish that a homeowner can keep messages he or she disagrees with from entering the home. It does not matter whether these come in the form of mail, telephone calls, or emails. Further, government employees, including elected congressmen, have similar rights to protect their home, although they do not have these same rights with respect to their offices.<sup>44</sup> Unfortunately, email is a technology that transcends the physical distance between the home and the office; a person can check any email address from any computer. Thus, even if one is checking an email address associated with one’s job, they might still do so within their home, implicating privacy concerns. Perhaps the best approach is to consider an email address associated with one’s state employment as an extension of their office and to consider a private email address an extension of the home. Therefore emails sent to an employee’s work account would be constitutionally protected speech while sending emails to a personal account would not be. Unfortunately, neither the opinion of the court of appeals nor

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<sup>38</sup> *E.g.*, *Breard v. City of Alexandria*, 341 U.S. 622 (1951); *Tillman v. Distribution Sys. of Am., Inc.*, 648 N.Y.S.2d 630 (1996).

<sup>39</sup> 2007 WL 922247 (D. Utah 2007).

<sup>40</sup> *Id.* at \*1–2.

<sup>41</sup> *Id.* at \*14 (citing *Frisby v. Schultz*, 487 U.S. 474, 484–85 (1988)) (internal quotations omitted).

<sup>42</sup> 630 F. Supp. 867 (D.D.C. 1986).

<sup>43</sup> *See also* *United States v. Popa*, 187 F.3d 672 (D.C. Cir. 1999) (overturning criminal conviction for harassing phone calls when the defendant had called the *office* of a U.S. attorney).

<sup>44</sup> *See, e.g.*, *Popa*, 187 F.3d at 672; *Hustler Magazine*, 630 F.Supp. at 867.



the parties' briefs make clear at which email address Avery received the emails. Remanding the matter for further fact-finding may be best option for the court.<sup>45</sup>

### A Job for the Legislature

If the court overturns Drahota's conviction because he lacked notice that his conduct was illegal, the Nebraska legislature should pass a statute criminalizing what Drahota did. Such a statute would almost certainly pass constitutional muster, assuming it does not apply to the public email accounts of government employees. Nebraska has two possible means of doing so.

One route Nebraska could take in criminalizing conduct such as Drahota's would be to copy the statutory scheme that was at issue in *Rowan*.<sup>46</sup> Under this scheme, if a homeowner found the materials to be objectionable, he or she would alert the Postmaster General. The Postmaster General would then include the homeowner's address on a list and inform the sender that it was not to send materials to the homeowner's address.<sup>47</sup> If the mailings continued, the Postmaster General could then go to court to get them enjoined. What the Court found essential in this scheme were "[b]oth the absoluteness of the citizen's right . . . and its finality."<sup>48</sup> In other words, the discretion over what was prohibited and what was not was solely within the hands of the citizen and not the government. Thus, a Nebraska statute modeled on the *Rowan* statute is likely to pass muster so long as the discretion rests in the hands of the recipient and the government makes no determination as to what is acceptable or not.

Nebraska also has a statute that criminalizes intimidation by telephone call, upon which an "unwanted email" statute could be modeled. This is a statute that criminalizes intimidation by telephone call. Under the statute, a person is guilty of the crime "if, with intent to terrify intimidate, threaten, harass, annoy, or offend, the person: (a) Telephones another anonymously, whether or not conversation ensues, and disturbs the peace, quiet, and right of privacy of any person at the place where the calls are received."<sup>49</sup> This statute has withstood First Amendment challenges. In *State v. Kipf*,<sup>50</sup> portions of the statute were unsuccessfully challenged as vague and overbroad. Thus, a statute protecting the privacy of the home modeled on § 28-1310 would

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<sup>45</sup> Of course, as mentioned earlier, there is an issue as to whether or not Drahota had notice that his conduct was illegal. If the court finds that the law did not put Drahota on notice then further factual inquiries are irrelevant.

<sup>46</sup> See *Rowan v. U.S. Post Office Dep't*, 397 U.S. 728, 729–30 (1970).

<sup>47</sup> In a Nebraska statute, the records of who does not wish to receive emails from whom could be maintained by the Attorney General or another government office.

<sup>48</sup> *Rowan*, 397 U.S. at 737.

<sup>49</sup> NEB. REV. STAT. § 28-1310 (Reissue 2008).

<sup>50</sup> 234 Neb. 227, 450 N.W.2d 397 (1990).

likely be permissible under the First Amendment. There are, however, downsides to this approach. For one, the sender would not have any notice as to whether the recipient wanted the emails or not and would thus not know whether an email could result in criminal prosecution or not; in other words, such a statute would likely chill speech. Secondly, § 28-1310 is arguably intended to protect against the annoyance of a ringing phone. Emails do not annoy in the same way that telephone calls do and therefore criminalizing emails in the same way may be extending protection much further than necessary.

The Nebraska legislature has two options for criminalizing harassing emails. Although it could likely choose either, a statute modeled on the law at issue in *Rowan* is arguably the better approach. While the First Amendment guarantees our right to speak our mind while using even offensive speech, the idea that a man's home is his castle demands that the First Amendment rights of a speaker stop before they enter the home of an unreceptive listener.

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