

**AN ANALYSIS OF THE CONSTITUTIONALITY OF  
THE VERMONT HATE MOTIVATED CRIMES  
STATUTE IN LIGHT OF THE UNITED STATES  
SUPREME COURT'S DECISIONS IN *R.A.V. v. CITY  
OF ST. PAUL* AND *WISCONSIN v. MITCHELL***

INTRODUCTION

On August 15, 1990, Sal Inglima was viciously assaulted shortly after he left a Burlington, Vermont bar that was frequently patronized by members of the local gay community. Two men denigrated him with homosexual slurs and then pulled him into the bushes of a nearby park, where they repeatedly struck and choked him. Later that night, a Burlington police officer found Mr. Inglima near the park, his face covered with blood. Based upon the description of his assailants that Mr. Inglima provided, the two men who assaulted him were subsequently apprehended by the police.<sup>1</sup>

The State charged, inter alia, that the crime was maliciously motivated by Mr. Inglima's actual or perceived sexual orientation and therefore violated the Vermont Hate Motivated Crimes Statute.<sup>2</sup> Passed by the Vermont Legislature in 1990, the statute provides enhanced criminal penalties for persons who commit crimes that are motivated by the victim's actual or perceived race, color, religion, national origin, sex, ancestry, age, service in the armed forces, handicap, or sexual orientation.<sup>3</sup> One of the

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1. *State v. Ladue*, No. 4088-8-90, slip op. at 1-3 (Vt. Dist. Ct. Chittenden County Apr. 18, 1991).

2. *Id.* at 1.

3. VT. STAT. ANN. tit. 13, § 1455 (Supp. 1993). The statute provides:

A person who commits, causes to be committed or attempts to commit any crime and whose conduct is maliciously motivated by the victim's actual or perceived race, color, religion, national origin, sex, ancestry, age, service in the armed forces of the United States, handicap . . . , or sexual orientation shall be subject to the following penalties:

(1) If the maximum penalty for the underlying crime is one year or less, the penalty for a violation of this section shall be imprisonment for not more than two years or a fine of not more than \$2,000.00, or both.

(2) If the maximum penalty for the underlying crime is more than one year but less than five years, the penalty for a violation of this section shall be imprisonment for not more than five years or a fine of not more than \$10,000.00, or both.

*Id.* The statute goes on to state:

Any person who intentionally and maliciously sets fire to, or burns, causes to be burned, or aids or procures the burning of a cross or a religious symbol, with the intention of terrorizing or harassing a particular person or persons,

defendants, Dominic Ladue, challenged the constitutionality of the Vermont statute on the grounds that it violated his right to freedom of expression under the First Amendment.<sup>4</sup> The trial court found that the Vermont statute punished conduct rather than speech, and that it therefore raised no issue under the First Amendment, either on its face or as applied to the facts of the case.<sup>5</sup> The decision was subsequently appealed to the Vermont Supreme Court. Before the court could issue a decision, however, a series of other events would intervene.

Less than two months before Mr. Ladue attacked Mr. Inglima, several teenagers assembled a cross by taping together broken chair legs and burned it in the front yard of an African-American family in St. Paul, Minnesota.<sup>6</sup> The teenagers were arrested and charged with violating the city's Bias Motivated Crime Ordinance, which prohibited the display of any symbol that would arouse anger or resentment in others on the basis of race, color, creed, religion, or gender.<sup>7</sup> The defendants challenged the constitutionality of the St. Paul ordinance, alleging that it violated the First Amendment, and the case ultimately reached the United States Supreme Court. There, on June 22, 1992, the Court ruled that the St. Paul ordinance was unconstitutional.<sup>8</sup> Writing for the majority, Justice Antonin Scalia held that the ordinance violated the First Amendment's protection against government regulation of speech and expressive conduct.<sup>9</sup> Justice Scalia

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shall be subject to a term of imprisonment of not more than two years or a fine of not more than \$5,000.00, or both.

*Id.* § 1456.

4. Motion to Dismiss Hate Crime Prosecution at 1, *Ladue* (No. 4088-8-90).

5. *Ladue*, No. 4088-8-90, slip op. at 5. The trial court noted that, even if the statute impinged on an individual's right to free expression, it would nevertheless be found constitutional. Based on *United States v. O'Brien*, 391 U.S. 367 (1968), discussed in part I of this note, the court found that any incidental limitations the statute placed on First Amendment freedoms were sufficiently justified by the state's interest in preserving the peace. *Id.* at 5-6.

6. *R.A.V. v. City of St. Paul*, 112 S. Ct. 2538, 2541 (1992).

7. ST. PAUL, MINN., CODE § 292.02 (1990). The St. Paul ordinance provided:

Whoever places on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor.

*Id.*

8. *R.A.V.*, 112 S. Ct. at 2542.

9. *Id.*

found that the ordinance's prohibitions amounted to nothing more than a governmental attempt to silence speech on the basis of its content.<sup>10</sup> "[T]he only interest distinctively served by the content limitation," Justice Scalia wrote, "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."<sup>11</sup>

The Supreme Court's decision in *R.A.V.* raised serious questions as to the constitutionality of hate crimes laws such as the statute in Vermont.<sup>12</sup> Some observers argued that these laws, known as penalty-enhancement statutes, only punished conduct and were therefore beyond the scope of *R.A.V.* and the First Amendment.<sup>13</sup> Others suggested that penalty-enhancement statutes were unconstitutional under *R.A.V.* because they punished the criminal defendant's thoughts by basing the increased penalty exclusively on the state's special hostility towards the particular biases singled out in the statute.<sup>14</sup> Six months after *R.A.V.*, the United States Supreme Court settled this debate. In *Wisconsin v. Mitchell*, the Court upheld the constitutionality of Wisconsin's penalty-enhancement provision, ruling that the statute punished conduct rather than belief and therefore did not implicate the First Amendment.<sup>15</sup>

Although *Mitchell* effectively disposed of Dominic Ladue's challenge to the constitutionality of the Vermont Hate Motivated Crimes Statute, this note argues that the Supreme Court's reasoning in that case is highly questionable. Part I summarizes the pertinent freedom of speech jurisprudence under the First Amendment to the United States Constitution. Part II examines

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10. *Id.* at 2548.

11. *Id.* at 2550.

12. The debate over hate crimes statutes and hate speech has produced substantial literature. See, e.g., Susan Gellman, *Sticks and Stones Can Put You in Jail, But Can Words Increase Your Sentence? Constitutional and Policy Dilemmas of Ethnic Intimidation Laws*, 39 UCLA L. REV. 333 (1991); Frederick M. Lawrence, *Resolving the Hate Crimes/Hate Speech Paradox: Punishing Bias Crimes and Protecting Racist Speech*, 68 NOTRE DAME L. REV. 673 (1993); Symposium, *Hate Speech After R.A.V.*, 18 WM. MITCHELL L. REV. 889 (1992); Eric J. Grannis, Note, *Fighting Words and Fighting Freestyle: The Constitutionality of Penalty Enhancement for Bias Crimes*, 93 COLUM. L. REV. 178 (1993); Note, *Hate Is Not Speech: A Constitutional Defense of Penalty Enhancement for Hate Crimes*, 106 HARV. L. REV. 1314 (1993).

13. See *infra* notes 159-62, 215 and accompanying text.

14. See *infra* notes 163-66, 211-12 and accompanying text.

15. *Wisconsin v. Mitchell*, 113 S. Ct. 2194, 2199-2202 (1993).

the current status of hate crimes legislation in the United States, including a description of the circumstances that led over forty states to pass such laws during the 1980s. Part III describes the enactment of the Vermont Hate Motivated Crimes Statute and its subsequent challenge by Dominic Ladue. Parts IV.A and IV.B provide a detailed explanation of the Court's decisions in *R.A.V.* and *Mitchell*. Part IV.C argues that the Court's reasoning in *Mitchell* is flawed because it does not recognize that penalty-enhancement statutes punish a defendant's constitutionally protected beliefs, it is inconsistent with the principles of *R.A.V.*, and it fails to protect sufficiently the freedom of thought that lies at the heart of the First Amendment. Finally, using *Ladue* and the Vermont Hate Motivated Crimes Statute as analytical models, this note suggests that the Court could have avoided the flaws of *Mitchell* while still upholding the constitutionality of the Wisconsin penalty-enhancement statute by analyzing the law under the strict scrutiny standard of review mandated by *R.A.V.*

## I. THE FREEDOM OF SPEECH

The First Amendment states that "Congress shall make no law . . . abridging the freedom of speech . . ." <sup>16</sup> Thus, the First Amendment "appears to speak in absolutist terms," <sup>17</sup> placing the freedom of speech in a preferred position relative to the majority of rights in the Constitution, which are not expressed in absolute terms. <sup>18</sup> As the Supreme Court has stated, "[t]he First Amendment generally prevents government from proscribing speech, . . . or even expressive conduct, . . . because of disapproval of the ideas expressed." <sup>19</sup> This means, at least in the usual circumstances, that the "government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." <sup>20</sup>

There are theoretical underpinnings, as well as constitutional authority, for the vigilant protection of free speech in American society. As Justice Oliver Wendell Holmes stated in a famous dissent:

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16. U.S. CONST. amend. I.

17. JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 16.7(b), at 942 (4th ed. 1991).

18. *Id.*

19. *R.A.V. v. City of St. Paul*, 112 S. Ct. 2538, 2542 (1992).

20. *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95 (1972).

Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises . . . and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition . . . . But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution.<sup>21</sup>

Justice Louis D. Brandeis, in a similarly well-known concurring opinion, expressed a theory of free speech closely akin to Justice Holmes's "marketplace of ideas":

Those who won our independence by revolution . . . did not fear political change. They did not exalt order at the cost of liberty. To courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the processes of popular government, no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through

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21. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., joined by Brandeis, J., dissenting).

The "marketplace of ideas" theory of Justice Holmes has not been without its critics. See, e.g., Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1; Steven Shiffrin, *The First Amendment and Economic Regulation: Away from a General Theory of the First Amendment*, 78 NW. U. L. REV. 1212 (1983). As Professor Tribe has queried, "when the wealthy have more access to the most potent media of communication than the poor, how sure can we be that 'free trade in ideas' is likely to generate truth?" LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 12-1, at 786 (2d ed. 1988).

But see MELVILLE B. NIMMER, *NIMMER ON FREEDOM OF SPEECH* § 1.02[B] (Student ed. 1984).

If acceptance of an idea in the competition of the market is not the 'best test' . . . what is the alternative? It can only be acceptance of an idea by some individual or group narrower than that of the public at large. Thus, the alternative to competition in the market must be some form of elitism. It seems hardly necessary to enlarge on the dangers of that path.

discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is *more speech*, not enforced silence.<sup>22</sup>

Taken together, the principles articulated by Justices Holmes and Brandeis may be viewed as instrumentalist ones, protecting free speech in order to achieve a societally beneficial end such as social stability or the discovery and dissemination of truth.<sup>23</sup> Additionally, Brandeis recognized the value of liberty "both as an end *and* as a means."<sup>24</sup> Brandeis's belief "that the fitting remedy for evil counsels is good ones,"<sup>25</sup> embraces the concept that the counsel and the speech themselves are valuable in their own right. This lends further support to the theory that the protection of freedom of speech is "in part also an end in itself, an expression of the sort of society we wish to become."<sup>26</sup>

Despite the apparently categorical protection afforded to freedom of speech by the First Amendment, a majority of the Supreme Court has never accepted an absolutist view of free speech.<sup>27</sup> Rather, the Court has permitted restrictions on the content of speech in several limited categories.<sup>28</sup> If government regulation is aimed at the communicative impact of expression, the law is unconstitutional unless the government shows that the message being regulated "falls on the unprotected side of one of the lines the Court has drawn to distinguish those expressive acts privileged by the first amendment from those open to government regulation."<sup>29</sup> It is to where those lines have been drawn, at least as some of them pertain to hate crimes statutes, that this note now turns.<sup>30</sup>

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22. *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., joined by Holmes, J., concurring) (emphasis added).

23. See *TRIBE*, *supra* note 21, § 12-1, at 785.

24. *Whitney*, 274 U.S. at 375 (emphasis added).

25. *Id.*

26. *TRIBE*, *supra* note 21, § 12-1, at 785.

27. *NOWAK & ROTUNDA*, *supra* note 17, § 16.7(b), at 943.

28. *R.A.V.*, 112 S. Ct. at 2543.

29. *TRIBE*, *supra* note 21, § 12-2, at 792.

30. The author recognizes that freedom of speech jurisprudence encompasses several categories of exceptions, such as libel, obscenity, and commercial speech, that are not included here. These areas of law, as well as the numerous volumes which could be written concerning the general principles of the First Amendment, are beyond the scope of this note.

### A. The "Fighting Words" Exception

The Supreme Court first recognized the exception for "fighting words" in the case of *Chaplinsky v. New Hampshire*.<sup>31</sup> The Court upheld a statute which had been construed by the Supreme Court of New Hampshire to ban "face-to-face words plainly likely to cause a breach of the peace by the addressee,"<sup>32</sup> and which "have a direct tendency to cause acts of violence by the persons to whom, individually, the remark is addressed."<sup>33</sup> Justice Frank Murphy stated that the First Amendment did not protect "fighting words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace."<sup>34</sup> The Court reached the conclusion that fighting words were not protected by the Constitution because "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 and morality."<sup>35</sup>

Justice Murphy's theory of the regulation of fighting words is not necessarily at odds with the theories of Justices Holmes and Brandeis pertaining to the marketplace of ideas.<sup>36</sup> This is so because, at least in theory, fighting words convey no intellectual content to the listener; they trigger an "automatic, unthinking reaction, rather than a consideration of an idea."<sup>37</sup> Therefore, "it is reasonable to distinguish between contexts in which talk leaves room for reply and those in which talk triggers action or causes harm without the time or opportunity for response."<sup>38</sup> Since the response will by definition tend to be immediate, there is no time for rational discourse or for good speech to remedy bad speech.<sup>39</sup> Therefore, fighting words may be regulated consistent with the First Amendment without undermining the notion of a marketplace of ideas.

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

32. *Id.* at 573.

33. *Id.* *Chaplinsky* had referred to a City Marshall as a "God damned racketeer" and "a damned fascist." *Id.* at 569.

34. *Id.* at 572.

35. *Id.*

36. NOWAK & ROTUNDA, *supra* note 17, § 16.37, at 1058.

37. *Id.*

38. TRIBE, *supra* note 21, § 12-8, at 837.

39. *Id.*

Nevertheless, the decisions following *Chaplinsky* have reflected the Supreme Court's desire to limit its broad implications and to recognize the potential societal value of expressions that might fall under Justice Murphy's definition of fighting words.<sup>40</sup> Instead, favoring the New Hampshire court's construction of the statute in *Chaplinsky*, later United States Supreme Court decisions have defined fighting words as those that have a direct tendency to cause acts of violence by the persons to whom, individually, the remark is addressed.<sup>41</sup> Thus, in *Cohen v. California*, the Court refused to classify the expression "Fuck the Draft" as fighting words when lettered on the back of a jacket worn by a spectator in a Los Angeles courthouse.<sup>42</sup> Noting that "one man's vulgarity is another's lyric,"<sup>43</sup> Justice John Marshall Harlan found it particularly relevant that the offensive words were not a personal insult specifically directed at the hearer.<sup>44</sup> Later, in *Gooding v. Wilson*, the Supreme Court more explicitly defined fighting words on the basis of the New Hampshire court's construction of the statute at issue in *Chaplinsky*.<sup>45</sup> Although noting that a narrowly drawn statute could be upheld under the *Chaplinsky* standard,<sup>46</sup> the Court found the particular statute at issue vague and overbroad because it had not been limited "to words that 'have a direct tendency to cause acts of violence by the person to whom, individually, the remark is addressed.'"<sup>47</sup>

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40. NOWAK & ROTUNDA, *supra* note 17, § 16.39, at 1059.

41. TRIBE, *supra* note 21, § 12-10, at 850 n.3 (citing *Gooding v. Wilson*, 405 U.S. 518, 523 (1972)). This formulation of fighting words deemphasizes (if it does not ignore completely) the first half of the definition of fighting words provided by Justice Murphy in *Chaplinsky*, words "which by their very utterance inflict injury." *Chaplinsky*, 315 U.S. at 572. Arguably, then, the Supreme Court has limited the scope of fighting words to the second half of the *Chaplinsky* definition—and at least one federal court has interpreted the later Supreme Court fighting words cases in precisely this manner. *UWM Post, Inc. v. Board of Regents of Univ. of Wis.*, 774 F. Supp. 1163, 1170 (E.D. Wis. 1991). Several commentators have reached the same conclusion. See, e.g., Gellman, *supra* note 12, at 369; Nadine Strossen, *Regulating Racist Speech on Campus: A Modest Proposal?* 1990 DUKE L.J. 484, 508-09; Note, *The Demise of the Chaplinsky Fighting Words Doctrine: An Argument for Its Internment*, 106 HARV. L. REV. 1129, 1137 (1993).

42. *Cohen v. California*, 403 U.S. 15, 20 (1971).

43. *Id.* at 25.

44. *Id.* at 20.

45. *Gooding v. Wilson*, 405 U.S. 518 (1972). The defendant had addressed a policeman with the words, "You son of a bitch, I'll choke you to death." *Id.* at 519 n.1.

46. *Id.* at 523.

47. *Id.* at 524 (citing *Chaplinsky*, 315 U.S. at 573).

The more recent Supreme Court decisions have, then, made clear that the fighting words exception to the First Amendment's protection of free speech is a narrow one.<sup>48</sup> The fighting words exception applies only to expression that tends to incite an immediate breach of the peace and that has a direct tendency to cause acts of violence by the person to whom, individually, it is addressed.

### B. Expressive Conduct

The Supreme Court has long recognized that the protection of freedom of speech by the First Amendment "does not end at the spoken or written word."<sup>49</sup> As early as 1931, it was held that speech may be nonverbal and that the First Amendment afforded protection to certain forms of symbolic expression.<sup>50</sup>

The Supreme Court announced the standard for government regulation of expressive conduct in *United States v. O'Brien*.<sup>51</sup> It established that when 'speech' and 'nonspeech' elements are parts of the same course of conduct, a "sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms."<sup>52</sup> In clarifying its position, the Court held that a government regulation of expressive conduct is sufficiently justified if it is within the constitutional power of the government, if it furthers an important or substantial governmental interest, if the governmental interest is unrelated to the suppression of free expression, and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.<sup>53</sup>

Perhaps the most difficult issue in applying the four-part *O'Brien* test is the preliminary matter of whether a given action is expressive conduct at all.<sup>54</sup> To resolve this threshold question, the Court inquires whether "[a]n intent to convey a particularized

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48. *TRIBE*, *supra* note 21, § 12-10, at 850.

49. *Texas v. Johnson*, 491 U.S. 397, 404 (1989).

50. *Stromberg v. California*, 283 U.S. 359, 364-68 (1931) (display of red flag as opposition to the government was given First Amendment protection).

51. *United States v. O'Brien*, 391 U.S. 367 (1968). The defendant had burned his draft card in violation of a federal law prohibiting its destruction. *Id.* at 369-70.

52. *Id.* at 376.

53. *Id.* at 377.

54. See *NOWAK & ROTUNDA*, *supra* note 17, § 16.49, at 1116.

message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it."<sup>55</sup> If the act does not constitute expressive conduct, the First Amendment offers no protection.<sup>56</sup> If the act is deemed expressive conduct, the next issue is whether the state's regulation is related to the suppression of free expression.<sup>57</sup> If it is not, the *O'Brien* standard applies.<sup>58</sup>

If, however, the challenged state action is a content-based regulation of expression, the Court subjects the regulation to "the most exacting scrutiny."<sup>59</sup> Under this rigorous standard, the regulation will survive First Amendment review only if it "is necessary to serve a compelling state interest and is narrowly drawn to achieve that end."<sup>60</sup>

Thus, if state action is aimed at the content and communicative impact of expressive activity, it must be invalidated unless it fits one of the categorical exceptions (e.g., "fighting words") or unless it satisfies the strict scrutiny standard of review.<sup>61</sup> The burden is on the State to show that its action fits into one of the categorical exceptions, or that it is justified by a compelling interest and is narrowly and precisely drawn to serve that interest.<sup>62</sup> It was into this legal context that state legislatures ventured when they began enacting hate crimes statutes in the 1980s.

## II. HATE CRIMES LEGISLATION

The organizations that collect data on the subject have uniformly reported a substantial increase in hate crimes during the past decade.<sup>63</sup> As the number of incidents grew, states

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55. *Johnson*, 491 U.S. at 404 (citing *Spence v. Washington*, 418 U.S. 405, 410-11 (1974)).

56. *Id.* at 403.

57. *Id.*

58. *Id.*

59. *Id.* at 412 (citing *Boos v. Barry*, 485 U.S. 312, 321 (1988)).

60. *R.A.V. v. City of St. Paul*, 112 S. Ct. 2538, 2554 (1992) (White, J., concurring) (citing *Simon & Schuster, Inc. v. New York State Crime Victims Bd.*, 112 S. Ct. 501, 509 (1991)). The majority opinion in *R.A.V.* arguably made this standard of review less certain. See *infra* note 350.

61. *TRIBE*, *supra* note 21, § 12-8, at 833.

62. *Id.*

63. *Crime and Punishment*, *NEW REPUBLIC*, Oct. 12, 1992, at 7, 7.

multiplied their efforts to address hate crimes legislatively.<sup>64</sup> After analyzing hate crimes in further detail, this section will discuss the growth of such incidents in recent years and the legislative responses to them.

### A. Hate Crimes Generally

In general, a hate crime is a violent assault motivated by bigotry.<sup>65</sup> More specifically, a hate crime is defined as "any act to cause physical injury, emotional suffering, or property damage, which appears to be motivated, all or in part, by race, ethnicity, religion or sexual orientation."<sup>66</sup> A 1987 report by the U.S. Department of Justice stated that "the most frequent victims of hate violence today are Blacks, Hispanics, Southeast Asians, Jews, and gays and lesbians."<sup>67</sup> The Department noted that the most commonly reported forms of hate violence are verbal intimidation, assault, and vandalism.<sup>68</sup> According to the U.S. Commission on Civil Rights, reported hate crimes have included cross burnings, defacement of religious property, infliction of personal injury, and murder.<sup>69</sup>

Generalizing about hate crimes is difficult, at least in part because they are often random and unprovoked.<sup>70</sup> Nevertheless, recent studies by attorneys, sociologists, and psychologists have yielded some insights. Perhaps the most striking point is the viciousness of hate crimes.<sup>71</sup> A recent study of hate crimes in the Boston area indicated that over 50% of the incidents were assaults.<sup>72</sup> In those cases 74% of the victims suffered physical injury, while the national average for injury to an assault victim

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64. ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH, HATE CRIMES STATUTES: A 1991 STATUS REPORT 1 (1991) [hereinafter STATUS REPORT].

65. *Crime and Punishment*, *supra* note 63, at 7.

66. ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH, HATE CRIME STATUTES: A RESPONSE TO ANTI-SEMITISM, VANDALISM AND VIOLENT BIGOTRY 1 (1988) [hereinafter RESPONSE].

67. *Id.*

68. *Id.*

69. U.S. COMM'N ON CIVIL RIGHTS, INTIMIDATION AND VIOLENCE: RACIAL AND RELIGIOUS BIGOTRY IN AMERICA 1 (1990) [hereinafter INTIMIDATION].

70. 1990: A Year of WAR in the Courtroom and Young Brutality in the Streets, KLANWATCH INTELLIGENCE REP., Feb. 1991, at 1, 3 [hereinafter KLANWATCH].

71. *Id.*

72. Daniel Goleman, *As Bias Crime Seems to Rise, Scientists Study Roots of Racism*, N.Y. TIMES, May 29, 1990, at C1, C5.

is 29%.<sup>73</sup> Victims required hospitalization in 30% of bias motivated assaults, while for other types of assaults the average rate of injuries that severe is only 7%.<sup>74</sup>

Hate crimes are primarily committed by young males.<sup>75</sup> In 1988, 90% of those arrested in connection with anti-Semitic harassments, threats, and assaults were under twenty-one years of age.<sup>76</sup> In the Boston study, 66% of the perpetrators were twenty-nine or younger.<sup>77</sup> Virtually none of the perpetrators were women, but women constituted 29% of the victims.<sup>78</sup>

According to the Boston study, perpetrators of hate crimes usually act in groups of four or more people.<sup>79</sup> The most common number of victims in each incident, however, is one.<sup>80</sup> This fact is related to the level of brutality displayed in bias crimes. Psychologists suggest that groups draw out a viciousness that individuals would not display on their own because there is a diffusion of responsibility.<sup>81</sup> In these situations, individuals are relieved of accountability for the results of their actions; anonymity therefore plays a role in increasing the level of violence.<sup>82</sup>

The psychology of group behavior notwithstanding, a fundamental cause of hate crimes is the persistence of racism and bigotry in the United States.<sup>83</sup> Hate crimes are hardly a new phenomenon. The transportation of Africans to this country as slaves and the rise of Ku Klux Klan activities during the Reconstruction Era might be seen as hate crimes.<sup>84</sup> Nevertheless, the activities of hate groups and the commission of hate crimes have persisted despite efforts at eradication.<sup>85</sup> The

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73. *Id.*

74. *Id.*

75. *Id.*

76. INTIMIDATION, *supra* note 69, at 5.

77. Goleman, *supra* note 72, at C5.

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.* A psychologist at the University of North Carolina who has studied the dynamics of Ku Klux Klan violence has concluded that anonymity is a significant reason for such Klan practices as holding night meetings and wearing hoods. *Id.*

83. RESPONSE, *supra* note 66, at 4.

84. Laurie Pantell, *A Pathfinder on Bias Crimes and the Fight Against Hate Groups*, 11 LEGAL REFERENCE SERVICES Q. 39, 39 (1991).

85. INTIMIDATION, *supra* note 69, at 9.

U.S. Commission on Civil Rights strongly condemned this "rigid, . . . blind, unreasoned [intolerance of] differences,"<sup>86</sup> and expressed its concern that this attitude could lead to a nightmare of hatred and divisiveness in a society that envisioned itself as democratic and pluralistic.<sup>87</sup> Similar concerns were echoed around the country as hate crimes increased during the 1980s.

### B. *The Growth of Hate Crimes During the Past Decade*

The prevailing view among organizations that study the issue is that the number of hate crimes is growing.<sup>88</sup> This increase has been referred to as "a widespread problem which is increasing steadily,"<sup>89</sup> "an epidemic of hatred and violence,"<sup>90</sup> and "a blaze of American bigotry."<sup>91</sup> At least part of this trend is due to increased official sensitivity and care in classifying such crimes.<sup>92</sup> But even those organizations that have factored the improvement in reporting into their figures, such as the Los Angeles County Human Rights Commission, have generally concluded that the number of hate crimes is actually increasing.<sup>93</sup> Given the compelling and consistent nature of the available statistics, the Southern Poverty Law Center may not have been exaggerating when it stated that "America enters the 1990s with a consciousness laced with intolerance."<sup>94</sup>

Information collected by independent organizations that study the issue shows a dramatic increase in the number of hate crimes over the past twelve years. The Anti-Defamation League of B'nai B'rith ("ADL") has published an annual *Audit of Anti-Semitic Incidents* since 1979.<sup>95</sup> Its statistics show a steady growth in

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86. *Id.* at 3.

87. *Id.*

88. See STATUS REPORT, *supra* note 64, at 11.

89. *Id.* at 1.

90. Kevin T. Berrill, *The Second Epidemic: Violence Against Lesbians and Gay Men*, NAT'L INST. AGAINST PREJUDICE & VIOLENCE F., June 1990, at 1, 1.

91. KLANWATCH, *supra* note 70, at 1.

92. Iver Peterson, *County by County, A Fight Against Bias*, N.Y. TIMES, Jan. 5, 1993, at B1, B5.

93. INTIMIDATION, *supra* note 69, at 2 n.7.

94. KLANWATCH, *supra* note 70, at 3.

95. Steven M. Freeman, *Hate Crimes, They're Still Against the Law: What the Supreme Court Did—and Did Not—Do*, ANTI-DEFAMATION LEAGUE L. ENFORCEMENT BULL., Fall 1992, at 1, 1. The author is the Director of the ADL's Legal Affairs Department. *Id.*

such incidents since that time, and a marked increase since 1987.<sup>96</sup> The number of anti-Semitic incidents in 1980 (vandalism, harassments, threats, and assaults) was 489.<sup>97</sup> This figure grew to 1018 in 1987,<sup>98</sup> and to 1281 in 1988.<sup>99</sup> By 1990, the number of incidents had reached 1685, the highest total ever reported in the history of the *Audit*.<sup>100</sup> The ADL reported 950 anti-Semitic assaults in 1991 alone.<sup>101</sup>

The National Institute Against Prejudice and Violence ("the Institute") observed a consensus among organizations in reporting a steady increase in hate crimes.<sup>102</sup> In particular, the Institute observed a striking rise in violence against lesbians and gay men.<sup>103</sup> This finding was corroborated by the U.S. Department of Justice, which identified homosexuals as the most frequent victims of hate violence.<sup>104</sup> The Institute also noted an increase in bias incidents on college campuses in the United States.<sup>105</sup> Additionally, the Southern Poverty Law Center noted a "frightening increase in hate violence."<sup>106</sup> Its statistics show that there had been twenty murders motivated by race in 1990, up from seven in 1989.<sup>107</sup> Cross burnings underwent a similar increase, from thirty-five in 1989 to fifty in 1990.<sup>108</sup> Finally, vandalism of religious institutions rose over 20% between 1989 and 1990.<sup>109</sup>

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96. *Id.* at 1, 4.

97. INTIMIDATION, *supra* note 69, at 4.

98. RESPONSE, *supra* note 66, at 1.

99. INTIMIDATION, *supra* note 69, 4.

100. STATUS REPORT, *supra* note 64, at 1.

101. *Crime and Punishment*, *supra* note 63, at 7.

102. Goleman, *supra* note 72, at C1.

103. Berrill, *supra* note 90, at 1.

104. *Id.* at 1-2.

105. Linda P. Campbell, *College Debate: Free Speech vs. Freedom from Bigotry*, CHI. TRIB., Mar. 18, 1991, § 1, at 1, 2. Information gathered by the ADL also supports this conclusion. Goleman, *supra* note 72, at C5. ADL statistics show that in 1989 racial or ethnic incidents were reported on 115 American campuses, 52 of which were colleges where such incidents had never before been reported. *Id.*

The author recognizes that the debate over college speech codes has engendered a voluminous amount of scholarly literature. While the philosophical nature of this debate is in part relevant to the debate over hate crimes statutes discussed in part II.C, a comprehensive analysis of college speech codes is beyond the scope of this note.

106. KLANWATCH, *supra* note 70, at 1.

107. *Id.*

108. *Id.*

109. *Id.* at 2.

Data collected by federal and state law enforcement agencies have also demonstrated that the number of hate crimes has risen in recent years. The Civil Rights Unit of the Federal Bureau of Investigation reported a record number of hate crimes cases in 1989.<sup>110</sup> The Community Relations Service, the arm of the Justice Department responsible for handling hate crimes, responded to 44 racial incidents in 1979, 166 in 1982, and 276 in 1986.<sup>111</sup> At the state and local level, the picture is virtually identical. The number of hate crimes reported to the Chicago Police Department rose from 185 in 1989 to 242 in 1991.<sup>112</sup> The Boston Police Department recorded about 150 bias crimes annually between 1986 and 1988, but reported an increase to 202 in 1989.<sup>113</sup> The statistics of the New Jersey Attorney General's Office show that bias motivated incidents jumped from 824 in 1990 to 976 in 1991.<sup>114</sup> In 1988, the Los Angeles County Human Rights Commission concluded that hate crimes which were directed mostly at blacks and Jews had reached their highest level since the agency had begun collecting data in 1980.<sup>115</sup>

The causes of this disturbing trend are varied. Most clearly, the persistence of hate crimes reflects the "continuing presence and tenacious survival of deep-seated racism, anti-Semitism, and other kinds of . . . bigotry."<sup>116</sup> In addition to the historical roots of prejudice, there has been some agreement on the particular reasons that hate crimes have increased so dramatically during the past decade.

Many experts believe that the increase in bias crimes has been caused at least in part by the economic difficulties of recent years.<sup>117</sup> Weak economic periods heighten intergroup tensions.<sup>118</sup> This occurs because in times of insecurity people need to reaffirm a sense of personal value. Such reaffirmation is

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110. Goleman, *supra* note 72, at C1. A Bureau spokesperson stated that hate crimes "are certainly on the increase." *Id.*

111. INTIMIDATION, *supra* note 69, at 6 n.7.

112. Patrick T. Reardon, *Hate Crimes Touch Raw Nerve in City*, CHI. TRIB., July 8, 1992, § 2, at 1, 10.

113. Goleman, *supra* note 72, at C1.

114. Peterson, *supra* note 92, at B5.

115. INTIMIDATION, *supra* note 69, at 2.

116. *Id.* at 12.

117. *Id.* at 14-15.

118. Peterson, *supra* note 92, at B5.

often accomplished by finding security through identification with a group. Inherent in such identification, however, is enmity toward other groups.<sup>119</sup> These conditions can give rise to scapegoating, "wherein negative and retaliatory feelings toward those perceived as causing economic difficulties are heightened."<sup>120</sup>

Under such circumstances, some whites severely affected by economic hardships believe that their hard times result from "reverse discrimination" in employment and a tax burden imposed upon them to support government programs that in their view provide undeserved advantages to minorities. Immigrants may also be perceived as threatening the economic well-being of such persons.<sup>121</sup>

From this point, states a psychologist, "it [is] a short step to ethnic violence."<sup>122</sup>

Other organizations cite the retrenchment in civil rights enforcement as a factor in the growth of hate crimes. "There is a widespread perception that the Federal Government in recent years relaxed its enforcement posture in the area of civil rights and cut back on social programs that have benefited [sic] many Americans."<sup>123</sup> Persons harboring prejudicial attitudes have interpreted these policies as indicative of a lack of government concern for minorities and of a tacit approval of discrimination.<sup>124</sup> According to one state civil rights official, the message being sent by the Republican administrations was that crimes against minorities would not be prosecuted.<sup>125</sup>

Irrespective of the reasons for the increase in hate crimes, it has been recognized that such crimes have a unique emotional

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119. Goleman, *supra* note 72, at C5.

120. INTIMIDATION, *supra* note 69, at 14-15.

121. *Id.* at 15.

122. Goleman, *supra* note 72, at C5.

123. INTIMIDATION, *supra* note 69, at 17.

124. *Id.*

125. Interview with Robert Appel, Vermont Assistant Attorney General for Civil Rights, in Montpelier, Vt. (Jan. 21, 1992).

and psychological impact on communities.<sup>126</sup> The American Bar Association Section of Criminal Justice concluded that bias crimes "have a far more pervasive impact than comparable crimes that do not involve prejudice *because they are intended to intimidate an entire group.*"<sup>127</sup> Bias crimes can lead to the intimidation of "others in the victim's community, causing them to feel isolated, vulnerable, and unprotected by the law."<sup>128</sup> In this fashion, isolated incidents can create widespread community tension and lead to an escalating cycle of reprisals and counterattacks.<sup>129</sup> By "making members of minority groups fearful, angry, and suspicious,"<sup>130</sup> hate crimes can polarize communities and damage the fabric of society.<sup>131</sup>

In light of the increasing frequency of hate crimes and their potentially destructive impact on communities, it is not surprising that states have responded with a variety of legislative initiatives intended to combat them.

### C. Hate Crimes Statutes

In 1978, New Jersey became the first state to introduce legislation that recognized hate crimes as a distinct criminal offense.<sup>132</sup> Since that time, states have employed a variety of means, of which legislation was only a part, to try to stem the growing tide of bias-motivated violence.

Many of the steps taken to fight hate crimes involved the creation of separate units within state government and law enforcement agencies. For example, a statewide task force on violence and extremism was established by the Governor of Maryland in 1981.<sup>133</sup> The New York City Police Department

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126. RESPONSE, *supra* note 66, at 1. Commentators have also described the unique psychological and emotional harms caused by bias-motivated crimes and stigmatization. See, e.g., Richard Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133, 136-39 (1982); Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2336-38 (1989).

127. Peter Finn, *Bias Crime: Difficult to Define, Difficult to Prosecute*, CRIM. JUST., Summer 1988, at 19, 20.

128. RESPONSE, *supra* note 66, at 1.

129. *Id.*

130. *Id.*

131. *Id.*

132. Freeman, *supra* note 95, at 6.

133. INTIMIDATION, *supra* note 69, at 20.

established a Bias Unit to investigate hate crimes and a Bias Review Panel to make a final determination about classifying a crime as bias-related.<sup>134</sup> In Providence, Rhode Island, the mayor and the chief of police created the Terrorist-Extremist Suppression Team, an undercover police unit charged with investigating all complaints of discriminatory harassment.<sup>135</sup>

Other approaches have been instituted at the legislative level. New Jersey announced a program of mandatory education classes for youths (and their parents) who commit hate crimes.<sup>136</sup> The New York City Council passed a measure that allows victims of bias-motivated violence or harassment to sue in state court for punitive damages.<sup>137</sup> And as of 1991, seventeen states had passed statutes requiring the collection and reporting of hate crimes data.<sup>138</sup>

At the federal level, Congress passed the Hate Crimes Statistics Act on April 23, 1990.<sup>139</sup> The Act requires the Attorney General to acquire and publish data "about crimes that manifest evidence of prejudice based on race, religion, sexual orientation, or ethnicity."<sup>140</sup> The two major criticisms of the Act were that it appropriated no funds for data collection and that state participation was voluntary rather than mandatory.<sup>141</sup>

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134. Jane Fritsch, *Police Dept. Vows a New Caution in Labeling Crimes as Bias Cases*, N.Y. TIMES, Dec. 22, 1992, at A1, B4.

135. INTIMIDATION, *supra* note 69, at 22.

136. Peterson, *supra* note 92, at B5.

137. James C. McKinley Jr., *Council Bill Permits Bias Awards*, N.Y. TIMES, Jan. 7, 1993, at B4.

138. STATUS REPORT, *supra* note 64, at 22-23. This figure includes New Jersey, in which data collection of hate crimes is an executive mandate from the New Jersey Attorney General. *Id.* at 23.

139. Hate Crimes Statistics Act, Pub. L. No. 101-275, 104 Stat. 140 (1990) (codified as amended at 28 U.S.C. § 534 (Supp. IV 1993)).

140. Hate Crimes Statistics Act § 1(b)(1), 104 Stat. at 140 (codified as amended at 28 U.S.C. § 534). This was the first time that "sexual orientation" was included in a federal civil rights statute. Berrill, *supra* note 90, at 5. Perhaps reflecting the difficulty that President Bush and the Congress had with this inclusion, the final clause of the Act provided that "[n]othing in this Act shall be construed, nor shall any funds appropriated to carry out the purpose of the Act be used, to promote or encourage homosexuality." Hate Crimes Statistics Act § 2(b), 104 Stat. at 141 (codified as amended at 28 U.S.C. § 534).

141. KLANWATCH, *supra* note 70, at 10. These concerns ultimately proved valid. When the first statistics were released by the federal government in January 1993, FBI officials acknowledged that its shortcomings were due primarily to the lack of budgeting and to its voluntary nature. Stephen Labaton, *Poor Cooperation Deflates F.B.I. Report on Hate Crime*, N.Y. TIMES, Jan. 6, 1993, at A10. Law enforcement officials and civil rights groups said that these flaws made the results virtually useless. *Id.* Despite these problems, many

Nevertheless, law enforcement agencies and public interest groups hailed the Act as a crucial step in the effort to combat hate crimes.<sup>142</sup> They felt that the Act would provide data for the development of effective policies and legislation, that it would send a message of increased government sensitivity toward bias-motivated crimes, and that it would allow law enforcement agencies to monitor trends and intervene in troubled communities.<sup>143</sup>

One of the most commonly used legislative tactics in this comprehensive attempt to reduce hate crimes has been the penalty-enhancer statute. In 1981, the Legal Affairs Department of the ADL drafted a model penalty-enhancer statute for introduction into state legislatures.<sup>144</sup> The statute provided for increased penalties for certain crimes when they were committed by reason of the victim's actual or perceived race, color, religion, sexual orientation, or national origin.<sup>145</sup> The ADL's statute has proven extremely influential; the majority of states that enacted such legislation have based their statutes on the ADL's model.<sup>146</sup>

In drafting the model legislation, the ADL concluded that the stepped up penalties would make it more worthwhile for prosecutors to pursue convictions under the statute.<sup>147</sup> The enhanced penalty is intended to serve as a strong deterrent

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civil rights group leaders remained optimistic and lauded the FBI's efforts as an important first step. *Id.*

142. Labaton, *supra* note 141, at A10.

143. Berrill, *supra* note 90, at 5.

144. RESPONSE, *supra* note 66, at 1.

145. *Id.* The ADL Model Statute provides in pertinent part:

A. A person commits the crime of intimidation if, by reason of the actual or perceived race, color, religion, national origin or sexual orientation of another individual or group of individuals, he violates Section \_\_\_\_\_ of the Penal Code (insert code provision for criminal trespass, criminal mischief, harassment, menacing, assault and/or other appropriate statutorily proscribed criminal conduct).

B. Intimidation is a \_\_\_\_\_ misdemeanor/felony (the degree of criminal liability should be made contingent upon the severity of the injury incurred or property lost or damaged).

*Id.* app. A.

146. STATUS REPORT, *supra* note 64, at 2. The Vermont statute at issue in *Ladue* was drafted with ADL assistance and with the ADL's model statute as a guide. *Id.* at 6. Additionally, the Wisconsin penalty-enhancer statute challenged in *Mitchell* was based on the ADL model. Freeman, *supra* note 95, at 4.

147. RESPONSE, *supra* note 66, at 2.

against bias-motivated crimes.<sup>148</sup> It was critical, the ADL noted, that the increased penalties be sufficiently severe to achieve the statute's desired deterrent impact.<sup>149</sup> Furthermore, the ADL believed that the statute would be most effective when it increased the penalties for the broadest possible range of criminal conduct.<sup>150</sup>

Those critical of hate crimes legislation, however, have questioned whether such measures would necessarily strengthen civic order. It has been suggested that the increase in hate crimes over the past decade is evidence that penalty-enhancement statutes do not achieve their stated goal of deterrence.<sup>151</sup> Since labels themselves have consequences, it is also possible that simply labeling a violent incident as a hate crime can itself fan the flames of violence.<sup>152</sup> Finally, there is a concern that hate crimes laws might not be neutrally applied instruments in the hands of prosecutors<sup>153</sup> or legislators. Once on the slippery slope of hate crimes legislation, it may be a short step toward imposing more severe penalties for crimes motivated by such sentiments as opposition to U.S. foreign policy.<sup>154</sup>

The rancorous debate over the advisability and legality of hate crimes legislation has transcended traditional liberal and conservative political divisions. In opposing hate crimes legislation, for example, the American Civil Liberties Union ("ACLU") has found itself aligned with the conservative representative from Illinois, Henry Hyde.<sup>155</sup> Other civil rights groups, such as the ADL and the People for the American Way, firmly support such statutes.<sup>156</sup> This split in the civil rights community is reflected in the ACLU itself: the Oregon chapter of

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148. *Id.*

149. *Id.*

150. STATUS REPORT, *supra* note 64, at 2.

151. *Crime and Punishment*, *supra* note 63, at 7.

152. Linda Greenhouse, *Defining the Freedom to Hate While Punching*, N.Y. TIMES, Dec. 20, 1992, § 4, at 5.

153. *Id.*

154. See Lynn Adelman, *Bigotry, Though hateful, Is Protected*, N.Y. TIMES, Jan. 3, 1993, § 4, at 10. The author was an attorney for Todd Mitchell, the defendant in *Wisconsin v. Mitchell*. *Id.*

155. Elaine S. Povich, *ACLU Joins Hyde in Free-Speech Fight*, CHI. TRIB., Mar. 12, 1991, § 1, at 6.

156. Don Terry, *Rights Advocates Uncertain About Ruling's Impact*, N.Y. TIMES, June 23, 1992, at A16.

the ACLU supported that state's penalty-enhancer statute,<sup>157</sup> but the Vermont ACLU chapter opposed the law in Vermont.<sup>158</sup>

Supporters of hate crimes legislation have made their interpretation of penalty-enhancers clear: the statutes punish conduct, not belief.<sup>159</sup> Free expression is not impinged because the law does not affect the right of any person to hold or espouse any viewpoint.<sup>160</sup> Punishment is meted out only when people engage in criminal activity motivated by that viewpoint.<sup>161</sup> Underlying this proposition is a belief that particular viewpoints are so heinous that increased punishment is warranted when the specified views form the impetus for illegal conduct.<sup>162</sup>

Those opposed to penalty-enhancement statutes have argued that the harsher punishment is imposed not for conduct but out of government antipathy for the opinions that motivated the crime.<sup>163</sup> In order to prove bias the state must show that the defendant held offensive opinions, made offensive statements, or associated with offensive people.<sup>164</sup> This amounts to a government "inquisition into a criminal's thoughts and beliefs."<sup>165</sup> Since these thoughts and beliefs, regardless of how heinous they may be, are constitutionally protected, they may not be used as the basis for increased punishment by the state.<sup>166</sup>

This ideological debate did not deter state legislatures. By 1991, forty-six states had some form of hate crimes law, thirty-one of which were based on or similar to ADL models.<sup>167</sup> By the end of 1992, thirty-one states, including Vermont, had enacted

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157. *High Court Upholds Rights Law*, OREGONIAN, Aug. 28, 1992, at D1.

158. Brief for Amicus Curiae American Civil Liberties Foundation of Vermont, Inc. at 4-12, *State v. Ladue*, 4 Vt. L. Wk. 238, 631 A.2d 236 (1993) (No. 91-313). Additionally, the national office of the ACLU filed a brief supporting the Wisconsin statute in *Mitchell*, while the Ohio ACLU chapter filed a brief arguing that the law was unconstitutional. Dennis Cauchon, *Debate Over Competing Principles*, USA TODAY, Mar. 31, 1993, at 1A, 2A.

159. STATUS REPORT, *supra* note 64, at 2.

160. *Id.*

161. *Id.*

162. See Melvin Salberg & Abraham H. Foxman, *Shape Laws Against Hate Crimes: The Supreme Court's Ruling on Bias Related Violence Is Not the Last Word*, NEWSDAY, Aug. 31, 1992, at 29. The authors are the National Chairman and the National Director, respectively, of the ADL; both are attorneys. *Id.*

163. *Crime and Punishment*, *supra* note 63, at 7.

164. Adelman, *supra* note 154, § 4, at 10.

165. *Crime and Punishment*, *supra* note 63, at 7.

166. See *id.*

167. STATUS REPORT, *supra* note 64, at 21.

penalty-enhancer statutes.<sup>168</sup> Congress followed suit: in April 1992, a federal penalty-enhancement measure was introduced into the House by Democrat Charles Schumer of New York and into the Senate by Democrat Paul Simon of Illinois.<sup>169</sup> The bill passed in the House but died in the Senate, and Schumer planned to reintroduce it in 1993.<sup>170</sup>

Meanwhile, legal challenges to penalty-enhancement statutes had begun across the nation. ADL attorneys were firm in their conclusion that such measures were constitutional.<sup>171</sup> The validity of this assessment would soon be tested in Vermont.

### III. THE VERMONT CHALLENGE

#### A. *History of the Vermont Hate Motivated Crimes Statute*

Between June 26 and November 13, 1989, the Vermont Human Rights Commission held four public hearings in various Vermont towns to gather testimony for a proposed hate crimes statute.<sup>172</sup> The Commission heard testimony that a biracial couple in Brattleboro had found a lynched woodchuck hanging from their mailbox, that beer cans were thrown at an African-American man jogging in Rutland, and that a gay man was severely beaten in Burlington.<sup>173</sup> Buttressing these personal stories was the Commission's 1989 Annual Report, which indicated that hate crimes and related acts of discrimination were increasing in Vermont.<sup>174</sup> The state Attorney General also

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168. See Betsy Liley, *High Court Ruling May Affect Vt. Hate Crimes Law*, BURLINGTON FREE PRESS, Nov. 10, 1992, at A1.

169. Freeman, *supra* note 95, at 3. Governor Bill Clinton, at the time a candidate for President, expressed his support for the bill in September 1992. *Crime and Punishment*, *supra* note 63, at 7. President Clinton reaffirmed his support for penalty-enhancer statutes when his Acting Solicitor General filed a brief supporting the State of Wisconsin's position in *Mitchell*. See Brief for the United States as Amicus Curiae Supporting Petitioner, *Wisconsin v. Mitchell*, 113 S. Ct. 2194 (1993) (No. 92-515).

170. Labaton, *supra* note 141, at A10.

171. Salberg & Foxman, *supra* note 162, at 29.

172. Theresa M. Maggio, *New Commission Hears Individual Stories of Harassment*, BRATTLEBORO REFORMER, June 27, 1989, at 9; *Hate in the Green Mountains*, VERMONT VANGUARD, Nov. 9, 1989, at 5. The Commission was established by the Vermont Legislature during its 1988 session as a response to a cross burning on the lawn of an African-American man in Putney. Maggio, *supra*, at 9.

173. Lori Campbell, *Panel: Hate Crimes Grow Worse in Vt.*, BURLINGTON FREE PRESS, Jan. 11, 1990, at 1A, 12A.

174. *Id.* at 1A.

reported that bias-motivated violence had increased 40% between 1987 and 1989.<sup>176</sup>

Armed with these statistics, the Human Rights Commission and the Attorney General's Office cooperated in drafting hate crimes legislation during November and December of 1989.<sup>176</sup> Numerous drafts of the bill were exchanged between the two offices,<sup>177</sup> and with the Vermont chapter of the ACLU.<sup>178</sup> Although the ACLU supported an approach that gave a private right of action to victims of bias-motivated violence, the group voiced strong negative feelings toward a penalty-enhancement statute.<sup>179</sup> The ACLU feared that under such an approach constitutionally protected "pure and/or symbolic speech would be affected."<sup>180</sup> Ultimately, the ACLU's Board of Directors adopted a resolution expressing its "reservations about statutory enhancement of penalties for offenses motivated by hatred towards members of a protected class."<sup>181</sup>

The Attorney General's Office, however, felt unable to compromise with the ACLU on the penalty-enhancement approach.<sup>182</sup> The Attorney General regarded the hate crimes bill as one of his top priorities for the 1990 legislative session, and believed that the penalty-enhancement approach afforded criminal prosecutors a much needed weapon to aggressively pursue hate

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175. *Id.*

176. Memorandum from Robert Appel, Vermont Assistant Attorney General for Civil Rights, to Jeffrey L. Amestoy, Vermont Attorney General 1 (Dec. 8, 1989) (on file with author); Memorandum from Robert Appel, Vermont Assistant Attorney General for Civil Rights, to Jeffrey L. Amestoy, Vermont Attorney General 1 (Dec. 21, 1989) (on file with author).

177. *See, e.g.*, Memorandum from Susan Sussman, Executive Director, Vermont Human Rights Commission, to Jeffrey L. Amestoy, Vermont Attorney General et al. 1 (Dec. 29, 1989) (on file with author).

178. *See, e.g.*, Memorandum from Robert Appel, Vermont Assistant Attorney General for Civil Rights, to Jeffrey L. Amestoy, Vermont Attorney General 1 (Dec. 6, 1989) (on file with author); Letter from Robert Appel, Vermont Assistant Attorney General for Civil Rights, to Leslie Williams and Tim Mazur, American Civil Liberties Union of Vermont 1 (Jan. 10, 1990) (on file with author).

179. Memorandum from Robert Appel to Jeffrey L. Amestoy (Dec. 6, 1989), *supra* note 178, at 1.

180. *Id.*

181. Memorandum from Robert Appel, Vermont Assistant Attorney General for Civil Rights, to Jeffrey L. Amestoy, Vermont Attorney General 1 (Jan. 16, 1990) (on file with author).

182. Memorandum from Robert Appel to Jeffrey L. Amestoy (Dec. 6, 1989), *supra* note 178, at 1.

crimes.<sup>183</sup> The Attorney General's Office also believed that enhanced criminal penalties were justified in light of the broad manner in which hate crimes impacted a community by instilling fear and anger in entire groups of minorities.<sup>184</sup> Additionally, the Human Rights Commission concluded that the statute was necessary to extend to minority groups the protection from discrimination that, under Vermont law, was then limited to situations involving housing, public accommodation, and employment.<sup>185</sup>

These arguments, coupled with several highly publicized incidents of hate crimes, were persuasive in winning a wide range of support for the proposed statute. The chief of police in one of Vermont's largest cities expressed his full support for the measure,<sup>186</sup> as did Vermont District Judge Frank Mahady.<sup>187</sup> Two of Vermont's largest newspapers also urged the legislature to pass the bill.<sup>188</sup> When the legislature did so, however, it was not without substantial debate.

The hate crimes bill was introduced in the Vermont House of Representatives in January 1990, and referred to the House Judiciary Committee. Appearing before the committee, the Executive Director of the Human Rights Commission summarized the testimony that the Commission had received at its four hearings in the previous year.<sup>189</sup> The Assistant Attorney General for Civil Rights then outlined each provision of the bill to the committee.<sup>190</sup> While there was some concern expressed over the type of evidence that would be necessary to prove hate

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183. Memorandum from Robert Appel, Vermont Assistant Attorney General for Civil Rights, to Senator John Bloomer, Chairperson, Vermont Senate Judiciary Committee 1 (Mar. 28, 1990) (on file with author).

184. *Id.* at 2.

185. *Hate in the Green Mountains*, *supra* note 172, at 6.

186. Letter from Brian R. Searles, Chief of Police, South Burlington Police Dept., to Representative Amy Davenport, Chairperson, Vermont House Judiciary Committee 1 (Feb. 1, 1990) (on file with author).

187. Letter from Judge Frank G. Mahady, Vermont District Court Judge, to Susan Sussman, Executive Director, Vermont Human Rights Commission 1 (Nov. 14, 1989) (on file with author).

188. *Standing Up to Bigotry*, BURLINGTON FREE PRESS, Mar. 24, 1990, at 10A; *Pass the Hate Crimes Bill*, RUTLAND DAILY HERALD, Apr. 17, 1990, at 12.

189. *Hearings on H. 504 Before the Vermont House Judiciary Committee*, 60th Leg. Biennial, 2d Sess. 2-3 (Jan. 18, 1990) (testimony of Susan Sussman, Executive Director, Vermont Human Rights Commission) (on file with author).

190. Memorandum from Robert Appel, Vermont Assistant Attorney General for Civil Rights, to Hate Crimes File 1 (Jan. 23, 1990) (on file with author).

motivation, the committee was generally receptive to the bill.<sup>191</sup> It spent only two to three hours hearing testimony<sup>192</sup> and recommended passage of the proposal by a nine to two vote.<sup>193</sup>

The proposed hate crimes statute met greater resistance during open debate in the Vermont House. The primary point of contention was the inclusion of sexual orientation as a protected category.<sup>194</sup> Some House members viewed this as an attempt to pass gay rights legislation, which had failed during the 1989 legislative session.<sup>195</sup> The bill's most visible opponent, Democratic Representative John Murphy of Ludlow, made openly derogatory remarks about gays and lesbians during the floor debate.<sup>196</sup> The tide turned, however, when House Democratic leader Francis Brooks, an African-American schoolteacher from Montpelier, rose to describe his own experience as a minority in the predominantly white state of Vermont.<sup>197</sup> Brooks described how his self-confidence had been shaken by the knowledge that he was sometimes judged by his skin color rather than his character and his ability.<sup>198</sup> When Brooks finished, Murphy leapt to his feet to regain the floor, saying "I've searched my soul and . . . I guess I've been wrong. Today, I hope to do what is right. I'm going to support this bill."<sup>199</sup> The opposition's pointman had been persuaded to jump ship, and the bill then passed by an eighty to fifty-one vote on March 22, 1990.<sup>200</sup> One commentator described the events as a "shining moment" for the Vermont legislature.<sup>201</sup>

The primary stumbling block for passage of the hate crimes statute by the Senate was political rather than ideological.<sup>202</sup>

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191. *Id.*

192. Memorandum from Robert Appel, Vermont Assistant Attorney General for Civil Rights, to Jeffrey L. Amestoy, Vermont Attorney General 1 (Mar. 28, 1990) (on file with author).

193. Memorandum from Robert Appel to John Bloomer, *supra* note 183, at 1.

194. Betsy Liley, *Beating Fuels Support for Hate-Crimes Measure*, BURLINGTON FREE PRESS, Apr. 18, 1990, at 1B, 5B.

195. *Id.*

196. *Standing Up to Bigotry*, *supra* note 188, at 10A.

197. *Id.*

198. *Id.*

199. *Id.*

200. *Id.*

201. *Id.*

202. *Pass the Hate Crimes Bill*, *supra* note 188, at 12.

The Senate Judiciary Committee briefly stalled the bill in an effort to gain leverage for the passage of other legislation.<sup>203</sup> The delay was a short one, however, and the Senate passed the legislation into law on May 12, 1990.<sup>204</sup>

As passed, the Vermont Hate Motivated Crimes Statute provided that:

A person who commits, causes to be committed or attempts to commit any crime and whose conduct is maliciously motivated by the victim's actual or perceived race, color, religion, national origin, sex, ancestry, age, service in the armed forces of the United States, handicap . . . , or sexual orientation shall be subject to the following penalties:

(1) If the maximum penalty for the underlying crime is one year or less, the penalty for a violation of this section shall be imprisonment for not more than two years or a fine of not more than \$2,000.00, or both.

(2) If the maximum penalty for the underlying crime is more than one year but less than five years, the penalty for a violation of this section shall be imprisonment for not more than five years or a fine of not more than \$10,000.00, or both.<sup>205</sup>

The Attorney General's Office was "fairly confident" that the penalty-enhancement approach would withstand the anticipated constitutional challenge.<sup>206</sup> Less than a year later, the Vermont District Court would agree.

#### B. State of Vermont v. Ladue

The circumstances which gave rise to the constitutional challenge to the Vermont Hate Motivated Crimes Statute took place on August 15, 1990, only three months after the statute was passed. That night, Dominic Ladue severely beat a man who had just left a Burlington bar that was frequently patronized by

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203. *See id.*

204. VT. STAT. ANN. tit. 13, § 1455 (Supp. 1993).

205. *Id.*

206. Memorandum from Robert Appel to Jeffrey L. Amestoy (Dec. 6, 1989), *supra* note 178, at 2.

members of the local gay community.<sup>207</sup> Based on Ladue's use of homosexual epithets during the crime, the State sought to enhance the penalty for the assault by charging a violation of the hate crimes statute.<sup>208</sup> The State alleged that Ladue was subject to increased punishment because the assault was maliciously motivated by the victim's actual or perceived sexual orientation.<sup>209</sup>

The defendant made a pretrial motion to dismiss the hate crimes charge on the grounds that the statute violated the First Amendment.<sup>210</sup> The defendant claimed that the only way the State could prove whether a crime was "maliciously motivated" was through an analysis of the perpetrator's speech, writing, association, and other forms of self-expression.<sup>211</sup> Consequently, the hate crimes law was an attempt to examine and punish a criminal's constitutionally protected thought, speech, and expression.<sup>212</sup> Since the State had no compelling interest in punishing a criminal for the content of his or her speech, the defendant concluded, the First Amendment required that the hate crimes statute be declared invalid.<sup>213</sup>

The defendant's argument did not persuade Vermont District Court Judge Alden T. Bryan. Judge Bryan found that the hate crimes statute did not criminalize expressions of hatred directed toward members of a protected group.<sup>214</sup> Rather, the statute merely regulated violent conduct that was motivated by hatred.<sup>215</sup> Statements made by the perpetrator did not constitute the act being punished, but were "merely circumstantial evidence of the defendant's motivation and intent."<sup>216</sup> Judge Bryan noted that individuals were free to express their hatred in many ways, but they were not at liberty to act on that hatred by committing crimes against members of a

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207. *State v. Ladue*, No. 4088-8-90, slip op. at 1 (Vt. Dist. Ct. Chittenden County Apr. 18, 1991).

208. *State's Opposition to Defendant's Motion to Dismiss* at 1-2, *Ladue* (No. 4088-8-90).

209. *Id.*

210. *Motion to Dismiss Hate Crime Prosecution* at 1, *Ladue* (No. 4088-8-90).

211. *Id.* at 3.

212. *Id.*

213. *Id.* at 6-7.

214. *Ladue*, No. 4088-8-90, slip op. at 5.

215. *Id.* at 4.

216. *Id.*

protected group.<sup>217</sup> Since the hate crimes statute punished criminal conduct rather than speech, Judge Bryan concluded that it "raise[d] no issue under the First Amendment."<sup>218</sup> He therefore denied the defendant's motion to dismiss the charge.<sup>219</sup>

On June 3, 1991, Dominic Ladue pled guilty to charges of aggravated assault and to a violation of the Hate Motivated Crimes Statute.<sup>220</sup> He agreed to a sentence of two and a half to six years in prison for the assault and to a consecutive one to four year sentence for the hate crime.<sup>221</sup> In his plea agreement, however, Ladue specifically preserved the right to appeal the validity of the hate crimes statute.<sup>222</sup>

Notice of the defendant's appeal of the hate crimes sentence was filed in the Vermont Supreme Court on June 26, 1991.<sup>223</sup> The only issue before the court was the validity of Vermont's Hate Motivated Crimes Statute.<sup>224</sup> Before the Vermont high court issued a ruling, however, the United States Supreme Court entered the debate over hate crimes legislation.

#### IV. THE UNITED STATES SUPREME COURT STEPS IN

The constitutional validity of hate crimes and hate speech regulations first became a national issue during the late 1980s. In 1988, the Criminal Court of the City of New York upheld an aggravated harassment statute which prohibited physical assault motivated by the race, color, religion, or national origin of the victim.<sup>225</sup> The court found that the statute regulated only conduct and therefore raised no issue under the First Amendment.<sup>226</sup> The following year, a federal district court in Michigan found that the University of Michigan's Policy on Discrimination and Discriminatory Harassment of Students in the

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217. *Id.* at 5.

218. *Id.*

219. *Id.* at 9.

220. Notice of Plea Agreement at 1, *Ladue* (No. 4088-8-90).

221. *Id.*

222. Stipulation for Appeal on Conditional Plea of Guilty on the Hate Crimes Law at 1, *Ladue* (No. 4088-8-90).

223. Vermont Supreme Court Docketing Statement, *State v. Ladue*, 4 Vt. L. Wk. 238, 631 A.2d 236 (1993) (No. 91-313).

224. *Id.*

225. *People v. Grupe*, 532 N.Y.S.2d 815, 820 (Crim. Ct. N.Y. County 1988).

226. *Id.* at 818.

University Environment violated the First Amendment.<sup>227</sup> The policy had prohibited stigmatizing or victimizing individuals or groups on the basis of race, ethnicity, religion, sex, sexual orientation, creed, national origin, ancestry, age, marital status, handicap, or Vietnam-era veteran status.<sup>228</sup> The court found the policy fatally overbroad because it had been consistently applied to reach speech protected by the First Amendment.<sup>229</sup> In 1991, a federal district court in Wisconsin used a virtually identical analysis to find that the University of Wisconsin's policy against hate speech failed First Amendment scrutiny.<sup>230</sup> While the regulations at issue in these cases and in *Ladue* varied in scope, they all shared a common element: they were directed, at least in part, at bias-motivated activity. As the cases indicated, it was apparent that lower courts were divided over the constitutionality of hate crimes and hate speech regulations before the Supreme Court weighed in on the issue.

#### A. R.A.V. v. City of St. Paul

This case began on June 21, 1990, when R.A.V., a juvenile, burned a cross inside the fenced yard of an African-American family's home in St. Paul, Minnesota.<sup>231</sup> R.A.V. was prosecuted under the St. Paul Bias-Motivated Crime Ordinance, which provided that:

Whoever places on public or private property a symbol, object, appellation, characterization or graffiti, including but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the

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227. *Doe v. University of Mich.*, 721 F. Supp. 852, 853 (E.D. Mich. 1989).

228. *Id.*

229. *Id.* at 864-66. A comprehensive analysis of the overbreadth doctrine is beyond the scope of this note. Briefly stated, a law regulating speech is deemed overbroad if it sweeps within its ambit a substantial amount of protected speech along with speech that it may legitimately regulate. *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973).

230. *UWM Post, Inc. v. Board of Regents of Univ. of Wis.*, 774 F. Supp. 1163 (E.D. Wis. 1991). Following the court's ruling, the University modified its policy, limiting its reach to situations involving direct confrontations between students. *U. of Wisconsin Repeals Ban on 'Hate Speech'*, N.Y. TIMES, Sept. 14, 1992, at A10. However, the University repealed the policy entirely after the Supreme Court's decision in *R.A.V. Id.*

231. *In re Welfare of R.A.V.*, 464 N.W.2d 507, 508 (Minn. 1991), *rev'd sub nom. R.A.V. v. City of St. Paul*, 112 S. Ct. 2538 (1992).

basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor.<sup>232</sup>

The trial court sustained R.A.V.'s challenge to the constitutionality of the ordinance, finding that it impermissibly censored expressive conduct.<sup>233</sup>

The Minnesota Supreme Court disagreed. That court construed the ordinance to prohibit only expressive conduct that itself inflicted injury or tended to incite immediate violence, thus limiting the reach of the ordinance to "fighting words" within the meaning of *Chaplinsky*.<sup>234</sup> So construed, the Minnesota court concluded that the ordinance did not offend the First Amendment because it was narrowly tailored to serve the compelling government interest of "protecting the community against bias-motivated threats to public safety and order."<sup>235</sup>

The United States Supreme Court reversed.<sup>236</sup> Although accepting the Minnesota Supreme Court's construction of the ordinance as reaching only fighting words within the meaning of *Chaplinsky*, the Court held that the ordinance contravened the First Amendment's protection of speech and expressive conduct.<sup>237</sup> However, the Court was sharply divided on the rationale for this conclusion.

Writing for a majority of five, Justice Scalia first declared that content-based regulations are "presumptively invalid."<sup>238</sup> Justice Scalia acknowledged that the Court had permitted content restrictions in limited areas such as fighting words, and that the Court had stated that the protection of the First Amendment does not extend to these categories.<sup>239</sup> Such statements, according to Justice Scalia, simply meant that these categories of speech may be regulated consistently with the First Amendment "because of their constitutionally proscribable content."<sup>240</sup> These statements

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232. ST. PAUL, MINN., CODE § 292.02 (1990).

233. *R.A.V.*, 464 N.W.2d at 508.

234. *Id.* at 510.

235. *Id.* at 511.

236. *R.A.V. v. City of St. Paul*, 112 S. Ct. 2538, 2550 (1992).

237. *Id.* at 2542.

238. *Id.*

239. *Id.* at 2543 (citing *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 504 (1984); *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 124 (1989)).

240. *Id.* (emphasis omitted).

did not mean that such categories of speech are "entirely invisible to the Constitution, so that they may be made the vehicles for content discrimination unrelated to their distinctively proscribable content."<sup>241</sup> Justice Scalia squarely rejected the notion, advanced by Justice Byron White in his concurring opinion, that government may freely regulate proscribable expression.<sup>242</sup> Rather, the First Amendment imposed a content discrimination limitation on a state's prohibition of proscribable speech: the government may not regulate proscribable elements of speech "based on hostility—or favoritism—towards the underlying message expressed."<sup>243</sup> In other words, content-based restrictions are presumptively invalid even when the government is regulating a category of speech, like fighting words, that does not enjoy the full protection of the First Amendment.

Justice Scalia then found that the ordinance was impermissibly content-based because it applied only to fighting words that insulted or provoked violence on the basis of race, color, creed, religion, or gender.<sup>244</sup> The ordinance singled out

241. *Id.* As an example, Justice Scalia noted that the government could proscribe libel, "but it may not make the further content discrimination of proscribing *only* libel critical of the government." *Id.*

242. *Id.*

243. *Id.* at 2545. Justice Scalia set forth several exceptions to his categorical rule that government may not impose content-based regulations on proscribable speech. First, state action of this nature is acceptable if "the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable." *Id.* Second, content-defined regulation of a particular subclass of proscribable speech is allowed when the subclass is "associated with particular 'secondary effects' of the speech, so that the regulation is 'justified without reference to the content of the . . . speech.'" *Id.* at 2546 (citation omitted). In a related exception, a particular "class of speech can be swept up incidentally within the reach of a statute directed at conduct rather than speech." *Id.* Finally, content discrimination may be justified provided "there is no realistic possibility that official suppression of ideas is afoot." *Id.* at 2547.

In response to these exceptions, Justice White stated:

The Court has patched up its argument with an apparently nonexhaustive list of ad hoc exceptions, in what can be viewed either as an attempt to confine the effects of its decision to the facts of this case, . . . or as an effort to anticipate some of the questions that will arise from its radical revision of First Amendment law.

*Id.* at 2556 (White, J., concurring).

It is worthy of note that this is not the first time that Justice Scalia revised First Amendment jurisprudence without overruling precedent and crafted a complex series of exceptions onto his new rule. See *Employment Div., Or. Dep't of Human Resources v. Smith*, 494 U.S. 872, 878-85 (1990) (rejecting traditional strict scrutiny standard of review under the Free Exercise Clause for neutral state action that substantially burdens religious conduct, but setting forth several detailed exceptions).

244. *R.A.V.*, 112 S. Ct. at 2547.

the specified subjects for prohibition, leaving unregulated fighting words that involved other content areas such as political affiliation, union membership, or homosexuality.<sup>245</sup> "The First Amendment," Justice Scalia stated, "does not permit St. Paul to impose special prohibitions on those speakers who express views on disfavored subjects."<sup>246</sup> Because it selectively proscribed fighting words on the basis of their content, the ordinance was presumptively invalid.<sup>247</sup>

However, Justice Scalia readily conceded "that presumptive invalidity does not mean invariable invalidity."<sup>248</sup> He then analyzed the ordinance under the strict scrutiny standard of review traditionally employed for content-based regulations. Justice Scalia agreed that St. Paul had a compelling interest in ensuring "the basic human rights of members of groups that have historically been subjected to discrimination."<sup>249</sup> The dispositive question, therefore, was whether content discrimination was "reasonably necessary to achieve St. Paul's compelling interests."<sup>250</sup> Justice Scalia concluded that it was not. He reasoned that the existence of adequate content-neutral alternatives significantly undercut the necessity of employing content-based regulation.<sup>251</sup> An ordinance that was not limited to the specified topics, he noted, would have precisely the same beneficial effect.<sup>252</sup> "In fact," Justice Scalia concluded, "the only interest distinctively served by the content limitation 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."<sup>253</sup>

In a strongly worded concurrence, Justice White characterized the majority opinion as "folly."<sup>254</sup> The decision was "an arid, doctrinaire interpretation, driven by the frequently irresistible

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245. *Id.*

246. *Id.*

247. *Id.* at 2549.

248. *Id.* at 2547 n.6.

249. *Id.* at 2549.

250. *Id.* at 2550.

251. *Id.*

252. *Id.*

253. *Id.*

254. *Id.* at 2560 (White, J., concurring).

impulse of judges to tinker with the First Amendment."<sup>255</sup> He criticized the majority for mischaracterizing the fighting words cases and for claiming that "earlier Courts did not mean their repeated statements that certain categories of expression are 'not within the area of constitutionally protected speech.'"<sup>256</sup> To the contrary, wrote Justice White, those courts meant precisely what they said: "that expression falling within certain limited categories so lacks the values the First Amendment was designed to protect that the Constitution affords no protection to that expression."<sup>257</sup> As the Court's decisions had clearly illustrated, concluded Justice White, "the First Amendment does not apply to categories of unprotected speech, such as fighting words."<sup>258</sup> Therefore, had it *only* reached fighting words within the meaning of *Chaplinsky*, Justice White would have upheld the ordinance.<sup>259</sup>

The St. Paul ordinance, however, was not so limited in its scope. Justice White understood the Minnesota court to have ruled that the ordinance constitutionally prohibited expression that, by its very utterance, caused "anger, alarm or resentment."<sup>260</sup> The fighting words cases, however, made clear that such generalized reactions are "not sufficient to strip expression of its constitutional protection."<sup>261</sup> Justice White reasoned that although the ordinance reached conduct that is unprotected, it also reached expression that caused only "hurt feelings, offense, or resentment, and is protected by the First Amendment."<sup>262</sup> Because the ordinance swept up such protected expression within its criminal prohibitions, Justice White concluded that it was "fatally overbroad and invalid on its face."<sup>263</sup>

To assign the labels "conservative" or "liberal" to either Justice Scalia's or Justice White's opinion is problematic. Justice Scalia's opinion suggests a libertarian approach, "reaffirm[ing] a

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255. *Id.* (White, J., concurring). Justice White is not above tinkering with the First Amendment himself. He joined Justice Scalia's opinion in *Smith*, 494 U.S. at 873.

256. *R.A.V.*, 112 S. Ct. at 2552 (White, J., concurring) (citation omitted).

257. *Id.* at 2551 (White, J., concurring).

258. *Id.* at 2555 (White, J., concurring).

259. *Id.* at 2555-56 (White, J., concurring).

260. *Id.* at 2559 (White, J., concurring).

261. *Id.* (White, J., concurring).

262. *Id.* at 2560 (White, J., concurring).

263. *Id.* (White, J., concurring).

rule against government orthodoxy, a rule that government may not pick and choose among ideas.<sup>264</sup> Justice White's opinion evoked an egalitarian perspective, leaving states more leeway to redistribute speaking power in what has been referred to as "a kind of First Amendment 'affirmative action' doctrine."<sup>265</sup> Justice Scalia's opinion recalled a liberal First Amendment tradition with respect to the principle of government neutrality.<sup>266</sup> Ironically, a Justice perceived as conservative had invoked liberal traditions to defend the First Amendment against calls for state speech regulation that had come, for the most part, from the political left. As one commentator put it, "If free speech libertarianism is migrating rightward and advocacy of at least some kinds of speech restriction is migrating leftward[] nowadays, to be a free speech libertarian striking down hate speech regulations is to be a conservative after all."<sup>267</sup>

The ideological divisions with respect to state regulation of hate speech and hate crimes resurfaced following *R.A.V.* The ACLU lauded the decision,<sup>268</sup> while the ADL feared that it might be a "cause for celebration by bigots across the country."<sup>269</sup> There was similar disagreement over the status of penalty-enhancement statutes in the wake of *R.A.V.* The ACLU thought the decision left penalty-enhancers in legal trouble,<sup>270</sup> but the ADL steadfastly maintained that the statutes were still constitutional.<sup>271</sup> In the aftermath of *R.A.V.*, penalty-enhancement statutes stood at a "constitutional frontier."<sup>272</sup> As state courts began to render decisions, it became apparent that they were not unanimous as to that frontier's precise location.

One day after *R.A.V.*, the Wisconsin Supreme Court held that Wisconsin's penalty-enhancement statute violated the First

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264. Kathleen M. Sullivan, *Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 44 (1992).

265. *Id.* at 42, 44; see also *Doe v. University of Mich.*, 721 F. Supp. 852, 853 (E.D. Mich. 1989) ("It is an unfortunate fact of our constitutional system that the ideals of freedom and equality are often in conflict. The difficult and sometimes painful task of our political and legal institutions is to mediate the appropriate balance between these two competing values.").

266. Sullivan, *supra* note 264, at 103.

267. *Id.* at 104.

268. See Terry, *supra* note 156, at A16.

269. Salberg & Foxman, *supra* note 162, at 29.

270. Terry, *supra* note 156, at A16.

271. Salberg & Foxman, *supra* note 162, at 29.

272. Greenhouse, *supra* note 152, at 5.

Amendment.<sup>273</sup> Since it criminalized the reason for a defendant's selection of a particular victim, the court held that the statute unconstitutionally punished what the legislature deemed to be offensive thought.<sup>274</sup> Two months later, the Supreme Court of Ohio ruled that Ohio's Ethnic Intimidation Statute (which operated as a penalty-enhancer) was unconstitutional.<sup>275</sup> Noting the agreement of *R.A.V.* and *Mitchell*, the court held that by enhancing criminal punishment based on the defendant's motive, the statute created a thought crime based on state hostility toward the actor's viewpoint and therefore violated the First Amendment.<sup>276</sup> The next day, the Oregon Supreme Court upheld the constitutionality of that state's penalty-enhancement statute.<sup>277</sup> Distinguishing *R.A.V.* on the grounds that the St.

273. *State v. Mitchell*, 485 N.W.2d 807, 809 (Wis. 1992), *rev'd sub nom. Wisconsin v. Mitchell*, 113 S. Ct. 2194 (1993). The *Mitchell* case is discussed in further detail in part IV.B.

274. *Mitchell*, 485 N.W.2d at 811-13.

275. *State v. Wyant*, 597 N.E.2d 450, 459 (Ohio 1992), *sub. nom. vacated*, *Ohio v. Wyant*, 113 S. Ct. 2954 (1993). The statute provided:

(A) No person shall violate section 2903.21, 2903.22, 2909.06, or 2909.07, or division (A)(3), (4), or (5) of section 2917.21 of the Revised Code by reason of the race, color, religion, or national origin of another person or group of persons.

(B) Whoever violates this section is guilty of ethnic intimidation. Ethnic intimidation is an offense of the next higher degree than the offense the commission of which is a necessary element of ethnic intimidation.

OHIO REV. CODE ANN. § 2927.12 (Anderson 1987). The predicate offenses referred to are aggravated menacing, menacing, criminal damaging or endangering, criminal mischief, and certain types of telephone harassment. *Wyant*, 597 N.E.2d at 452-53. The defendant had been charged with aggravated menacing for using racial slurs while threatening an African-American man in an Ohio State Park. *Id.* at 454-55. The Ohio aggravated menacing statute provided in relevant part:

(A) No person shall knowingly cause another to believe that the offender will cause serious physical harm to the person or property of such other person or member of his immediate family.

OHIO REV. CODE ANN. § 2903.21 (Anderson 1987).

276. *Wyant*, 597 N.E.2d at 458-59.

277. *State v. Plowman*, 838 P.2d 558, 565 (Or. 1992). The statute provided in relevant part:

(1) Two or more persons acting together commit the crime of intimidation in the first degree, if the persons:

(a) (A) Intentionally, knowingly, or recklessly cause physical injury to another because of their perception of that person's race, color, religion, national origin, or sexual orientation.

OR. REV. STAT. Ann. § 166.165 (Butterworth 1990). The defendant had been charged under the statute for brutally assaulting two Mexican-Americans in front of a Portland store while shouting "[t]alk in English, motherfucker," "[t]hey're just fucking wetbacks," and "white power." *Plowman*, 838 P.2d at 560.

Paul ordinance proscribed speech and expressive conduct,<sup>278</sup> and expressly declining to follow the reasoning of *Mitchell*,<sup>279</sup> the court held that the Oregon statute did not violate the First Amendment because it was directed only against conduct, and it did not "proscribe speech or target conduct on the basis of its expressive content."<sup>280</sup>

As the decisions of the state supreme courts indicated, *R.A.V.* had not produced a definitive statement on the constitutionality of hate crimes statutes. The United States Supreme Court recognized the need to resolve this conflict of authority.<sup>281</sup> Consequently, on December 14, 1992, only six months after the *R.A.V.* decision, the Court granted certiorari in the *Mitchell* case to resolve the constitutionality of penalty-enhancement statutes.<sup>282</sup>

### B. *State v. Mitchell*

On October 7, 1989, defendant Todd Mitchell, a nineteen-year old African-American man, led a group of young African-American men in an attack on Gregory Reddick, a fourteen-year old white male.<sup>283</sup> As Reddick passed by the group, Mitchell allegedly said, "You all want to fuck somebody up? There goes a white boy; go get him."<sup>284</sup> The group ran toward Reddick, beat him severely, and stole his tennis shoes. The police found Reddick unconscious a short while later.<sup>285</sup>

Mitchell was charged with, inter alia, violating the Wisconsin penalty-enhancer statute, which increased the potential penalty for criminal conduct if the State proved that the actor intentionally selected the victim because of the victim's race, religion, color, disability, sexual orientation, national origin, or

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278. *Plowman*, 838 P.2d at 565.

279. *Id.*

280. *Id.*

281. *Wisconsin v. Mitchell*, 113 S. Ct. 2194, 2198 (1993).

282. *Wisconsin v. Mitchell*, 113 S. Ct. 810 (1992) (petition for writ of certiorari granted to the Supreme Court of Wisconsin).

283. *State v. Mitchell*, 485 N.W.2d 807, 809 (Wis. 1992), *rev'd sub nom.* *Wisconsin v. Mitchell*, 113 S. Ct. 2194 (1993).

284. *Id.*

285. *Id.*

ancestry.<sup>286</sup> The jury found that Mitchell had intentionally selected Reddick as the victim because of his race and increased his potential maximum sentence for the aggravated battery from two to seven years.<sup>287</sup> Mitchell challenged the constitutionality of the statute, alleging that it violated his right of free speech guaranteed by the First Amendment.<sup>288</sup>

One day after *R.A.V.*, the Wisconsin Supreme Court sustained Mitchell's challenge, finding that the statute violated the First Amendment by punishing what the legislature deemed to be offensive thought.<sup>289</sup> The court rejected the State's contention that, because "selecting" the victim was the punished act, the statute reached only conduct and not belief.<sup>290</sup> The court pointed out that in any assault there is a selection of a victim.<sup>291</sup> In this case, determining the reasons behind the selection "necessarily requires a subjective examination of the actor's motive or reason for singling out the particular person against whom he or she commits a crime."<sup>292</sup> Therefore, the statute in fact punished the *motive* behind the selection.<sup>293</sup> In this way, the penalty-enhancer criminalized a subjective mental process, not an objective act.<sup>294</sup> The First Amendment, the court concluded, "will not allow the outright criminalization of subjective bigoted thought."<sup>295</sup> The Wisconsin court noted that its conclusion was supported by the Supreme Court's analysis in *R.A.V.*:

286. *Id.* At the time of Mitchell's crimes, the statute provided in pertinent part:

(1) If a person does all of the following, the penalties for the underlying crime are increased as provided in sub. (2):

(a) Commits a crime under chs. 939 to 948.

(b) Intentionally selects the person against whom the crime under par. (a) is committed or selects the property which is damaged or otherwise affected by the crime under par. (a) because of the race, color, disability, sexual orientation, national origin or ancestry of that person or the owner or occupant of that property.

WIS. STAT. ANN. § 939.645 (West Supp. 1991). Subsection (2) established different enhanced penalties that depend on whether the underlying crime was a misdemeanor or a felony. *Id.*

287. *Mitchell*, 485 N.W.2d at 809.

288. *Id.*

289. *Id.* at 811.

290. *Id.* at 812.

291. *Id.*

292. *Id.* at 813.

293. *Id.* at 812.

294. *Id.* at 817.

295. *Id.*

The ideological content of the thought targeted by the hate crimes statute is identical to that targeted by the St. Paul ordinance—racial or other discriminatory animus. And, like the United States Supreme Court, we conclude that the legislature may not single out and punish that ideological content.<sup>296</sup>

According to the Wisconsin court, penalty-enhancement statutes increase the punishment of bigoted criminals simply because they are bigoted.<sup>297</sup> In effect, the statute created a “thought crime,” an “Orwellian notion” that the court would not countenance.<sup>298</sup> Although the court agreed that hate crimes were disgraceful and deplorable, it held that “the personal prejudices of the attackers are protected by the First Amendment.”<sup>299</sup>

After granting certiorari, the United States Supreme Court reversed. In a very brief opinion on behalf of a unanimous Court, Chief Justice William H. Rehnquist held that the Wisconsin penalty-enhancement statute did not violate the First Amendment.<sup>300</sup> The Court first observed that Wisconsin’s argument—that the statute punished only conduct rather than bigoted thought—was “literally correct.”<sup>301</sup> However, the Court reasoned that this argument did not dispose of Mitchell’s First Amendment challenge because the statute enhanced a defendant’s criminal penalty solely based on the presence of discriminatory motive.<sup>302</sup> Nevertheless, the Court held that relying on biased motive to increase criminal punishment did not violate the First Amendment.<sup>303</sup>

The Court analogized to two other areas of the law to support its conclusion that Wisconsin could constitutionally rely on biased motive to enhance criminal sentences. First, the Court noted that motive was one of the many factors that sentencing judges have traditionally considered “in determining what sentence to impose

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296. *Id.* at 815.

297. *Id.* at 814.

298. *Id.* at 817 n.21.

299. *Id.* at 817.

300. *Wisconsin v. Mitchell*, 113 S. Ct. 2194, 2196 (1993).

301. *Id.* at 2199. The Court also held that *O'Brien* was not implicated because physical assault did not constitute expressive conduct. *Id.*

302. *Id.*

303. *Id.* at 2200.

on a convicted defendant."<sup>304</sup> The Court then analogized Mitchell's case to capital sentencing proceedings, in which the Court had previously allowed the sentencing judge to consider the defendant's racial animus toward the victim.<sup>305</sup> Since a death sentence was the most severe enhancement of all, the Court reasoned that the result should be the same under penalty-enhancement statutes.<sup>306</sup> Second, the Court observed that motive played the same role under the Wisconsin statute as it did under federal antidiscrimination laws, such as Title VII, which the Court had previously upheld against constitutional challenge.<sup>307</sup>

Finally, the Court relied on the distinction between speech and conduct to distinguish *R.A.V.* While the St. Paul ordinance struck down in *R.A.V.* was explicitly directed at expression, the Court explained, the Wisconsin statute was aimed at conduct, which is unprotected by the First Amendment.<sup>308</sup> Moreover, the Court noted that Wisconsin's purpose for the statute was to address the greater individual and societal harm created by hate crimes.<sup>309</sup> Because this purpose did not reflect mere disagreement with the offenders' beliefs or biases, the Court accepted as adequate the State's explanation for the necessity of the statute.<sup>310</sup> Since the statute punished conduct rather than speech or expression, and since punishment could constitutionally be enhanced because of racially biased motive, the Court concluded that the Wisconsin penalty-enhancement statute did not violate the First Amendment.<sup>311</sup>

The Supreme Court's decision in *Mitchell* effectively resolved Dominic Ladue's challenge to the constitutionality of the Vermont penalty-enhancement provision. Three weeks after *Mitchell*, the Vermont Supreme Court ruled that *Mitchell* disposed of Ladue's claim and held that Vermont's Hate Motivated Crimes Statute did not violate the First Amendment.<sup>312</sup> Although *Mitchell*

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304. *Id.* at 2199.

305. *Id.* at 2200 (citing *Dawson v. Delaware*, 112 S. Ct. 1093 (1992); *Barclay v. Florida*, 463 U.S. 939 (1983) (plurality opinion)).

306. *Id.*

307. *Id.*

308. *Id.* at 2201 (citing *R.A.V. v. City of St. Paul*, 112 S. Ct. 2538, 2547-48 (1992)).

309. *Id.*

310. *Id.*

311. *Id.* at 2202.

312. *State v. Ladue*, 4 Vt. L. Wk. 238, 238, 631 A.2d 236, 237 (1993).

controlled the Vermont court's decision in *Ladue*, the United States Supreme Court's reasoning in *Mitchell* is still subject to critical analysis.

### C. Analysis

While the United States Supreme Court reached the correct result in *Mitchell* by holding that the Wisconsin penalty-enhancement statute is constitutional, the Court's reasoning is flawed for three principle reasons. First, the Court fails to recognize that by criminalizing motive the statute penalized criminal defendants for holding unpopular thoughts. As a result, the Court mistakenly asserts that the statute punishes only conduct and not belief. Second, the Court's analysis in *Mitchell* is inconsistent with the principles that the Court set forth only six months earlier in *R.A.V.* Finally, by holding that the Wisconsin statute only implicates conduct rather than thought or belief, the Court effectively insulates penalty-enhancement statutes from First Amendment review. Consequently, *Mitchell* leaves legislatures too much power to restrict the liberty values of the First Amendment by subjecting unpopular beliefs to enhanced criminal penalties.

Part one of this analysis will examine the Court's reasoning in *Mitchell* and its lack of consistency with *R.A.V.* Then, using *Ladue* and the Vermont Hate Motivated Crimes Statute as analytical models, part two will demonstrate that the Court could have reached the same result in *Mitchell* while at the same time conceding the ramifications of punishing a defendant's motive. This analysis reconciles *Mitchell* with *R.A.V.*, and better serves the values of the First Amendment by placing clear limitations on a legislature's ability to infringe upon a defendant's right to hold unpopular beliefs.

#### 1. *Mitchell*: A Closer Look

The Court begins its opinion in *Mitchell* by asserting that the Wisconsin statute punished conduct rather than belief.<sup>313</sup> This assertion is unsatisfying, however, because the Court does not buttress it with any analytical justification. Rather, the Court

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313. See *Wisconsin v. Mitchell*, 113 S. Ct. 2194, 2199 (1993).

makes the point in one conclusory sentence without the support of any reasoning,<sup>314</sup> and then assumes the truth of the assertion throughout much of the remainder of the opinion. The Court then concedes that the statute does, in fact, punish motive<sup>315</sup> and then goes on to explain why the statute nevertheless does not offend the First Amendment.<sup>316</sup> This internal inconsistency is confusing. If the Court is correct when it states that the statute only punishes conduct,<sup>317</sup> then there should be no need to analyze the operation of motive. On the other hand, when it mysteriously describes Wisconsin's argument—that the statute punishes only conduct—as “literally correct,”<sup>318</sup> the Court may be suggesting that the *actually* correct position is the Court's subsequent concession that the statute does punish motive. It is unclear how both positions can be correct, and nowhere in the *Mitchell* opinion does the Court explain the internal inconsistency of at one moment characterizing the Wisconsin statute as punishing only conduct while at another moment characterizing it as punishing motive.

Later in the opinion, the Court returns to the distinction between conduct and belief in an attempt to distinguish its holding in *R.A.V.*<sup>319</sup> This attempt ultimately proves unsuccessful. The distinction is less clear than the Court suggests, since burning a cross seems no less an example of conduct than committing an assault.<sup>320</sup> If anything, the act of “selecting” a victim (the punishable event under the Wisconsin statute) appears to contain a lesser degree of conduct than the act of “placing” a cross on private property (the punishable event under the St. Paul ordinance at issue in *R.A.V.*). Consequently, the Court's use of the speech/conduct distinction proves unsatisfactory as the basis on which to distinguish *Mitchell* from

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314. *See id.*

315. *Id.*

316. *Id.* at 2199-2201.

317. *See id.* at 2199.

318. *Id.*

319. *Id.* at 2201.

320. *See Lawrence, supra note 12, at 694* (arguing that the defendant's actions in *R.A.V.* were as much conduct as they were speech). Some commentators have argued that a bias-motivated crime constitutes expressive conduct, thereby requiring that penalty-enhancement statutes be analyzed under the *O'Brien* standard. *See Leading Cases, 107 HARV. L. REV. 144, 243 (1993); Grannis, supra note 12, at 216-19.*

R.A.V.<sup>321</sup>

Furthermore, contrary to the Court's analysis in *Mitchell*, the statutes at issue in *Mitchell* and *R.A.V.* in fact operate in a very similar manner.<sup>322</sup> As Justice Scalia explains in *R.A.V.*, the St. Paul ordinance discriminates within an otherwise proscribable class of speech (fighting words) by singling out biased acts for punishment.<sup>323</sup> Similarly, the Wisconsin statute discriminates within an otherwise proscribable class of conduct (assaults and other violent crimes) by singling out bias-motivated acts for enhanced punishment. Because the statutes function in an analytically indistinguishable manner, they should be analyzed in a consistent fashion. In *R.A.V.*, the Court concludes that selectively punishing some fighting words based on state hostility toward the actor's viewpoint constitutes a form of content discrimination that requires strict scrutiny under the First Amendment.<sup>324</sup> Similarly, the Wisconsin penalty-enhancement statute selects some conduct for additional punishment solely because of state hostility toward the actor's biased ideas. Because the statute bases the enhanced penalty solely on the defendant's discriminatory thoughts, the Court's conclusion that the statute punishes only conduct is both incorrect and inconsistent with *R.A.V.*<sup>325</sup> To maintain consistency with *R.A.V.*, the Court in *Mitchell* should have found that the Wisconsin statute requires strict scrutiny review because it is a content-based regulation of the defendants' constitutionally-protected thought.

Although it concedes that the Wisconsin statute punished motive, the Court avoids employing strict scrutiny review by concluding that motive could be punished without implicating the First Amendment.<sup>326</sup> The Court supports this proposition by

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321. Several commentators have agreed that the distinction between speech and conduct does not sufficiently distinguish the types of statutes at issue in *Mitchell* and *R.A.V.* See *Constitutional Law Conference*, 62 U.S.L.W. 2263, 2272 (Nov. 2, 1993) (Professor Kathleen Sullivan observing that *Mitchell* cannot be reconciled with *R.A.V.*) [hereinafter *Conference*]; see also *Leading Cases*, *supra* note 320, at 241.

322. Several commentators have observed this similarity. See, e.g., *Conference*, *supra* note 321, at 2272; see also Daniel A. Farber, *Foreword: Hate Speech After R.A.V.*, 18 WM. MITCH. L. REV. 889, 896 (1992); Grannis, *supra* note 12, at 213.

323. *R.A.V. v. City of St. Paul*, 112 S. Ct. 2538, 2545-49 (1992).

324. See *id.* at 2549.

325. See Gellman, *supra* note 12, at 363-68 (arguing that penalty-enhancement statutes punish motive rather than conduct); *Leading Cases*, *supra* note 320, at 241 n.67 ("[I]t is simply untrue that penalty enhancers regulate only conduct.").

326. See *Mitchell*, 113 S. Ct. at 2199-2201.

analogizing to the traditional sentencing process and to federal antidiscrimination laws.<sup>327</sup> The Court's conclusion on this point, however, does not withstand analysis.

By relying so heavily on the use of motive in the sentencing procedure, and particularly in the capital sentencing process, the Court hides *R.A.V.*'s requirement of content-neutrality in the technicalities of criminal sentencing.<sup>328</sup> The Court cites LaFave and Scott's *Substantive Criminal Law* treatise for the principle that trial judges may consider motive when setting a defendant's sentence.<sup>329</sup> While this point is difficult to dispute, it ignores the distinctive nature of the sentencing process to which the authors were specifically referring. The Court itself has recognized this distinction, observing that "the *sentencing authority* has always been free to consider a wide range of relevant material."<sup>330</sup> Indeed, the two capital punishment cases on which the Court relies were both specifically based on the unique latitude of the sentencing judge to consider a broad variety of information when fixing a sentence.<sup>331</sup> By contrast, the judge in a penalty-enhancement statute case is not merely employing the traditional discretion that the Court correctly notes is reserved for a sentencing judge. Rather, penalty-enhancement statutes, such as that in Wisconsin, create entirely distinct substantive offenses that impose mandatory sentences for disfavored beliefs. Although the Court conspicuously declines to mention it, LaFave and Scott have also observed that a defendant's motive "is not relevant on the *substantive* side of the criminal law."<sup>332</sup> By failing to acknowledge that Wisconsin's statute criminalizes motive as a substantive element of an offense, the *Mitchell* Court overlooks the distinction that made its reliance on the role of the sentencing judge inappropriate.

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327. *Id.*

328. Morton J. Horowitz, *The Supreme Court, 1992 Term—Foreword: The Constitution of Change: Legal Fundamentalism Without Fundamentalism*, 107 HARV. L. REV. 30, 115 (1993).

329. *Mitchell*, 113 S. Ct. at 2199 (citing 1 WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., *SUBSTANTIVE CRIMINAL LAW* § 3.6(b) (1986)).

330. *Payne v. Tennessee*, 111 S. Ct. 2597, 2606 (1991) (emphasis added). Commentators have pointed out this distinction as well. See, e.g., Gellman, *supra* note 12, at 378 n.199; Grannis, *supra* note 12, at 194.

331. *Dawson v. Delaware*, 112 S. Ct. 1093, 1097 (1992); *Barclay v. Florida*, 463 U.S. 939, 950 (1983).

332. WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., *CRIMINAL LAW* § 3.6, at 227 (2d ed. 1986) (emphasis added).

The Court's use of antidiscrimination laws such as Title VII to support its contention that motive may be punished without implicating the First Amendment is also unavailing. The Court bases this analogy on the assertion that "motive plays the same role under the Wisconsin statute as it does under federal and state antidiscrimination laws,"<sup>333</sup> but closer scrutiny reveals that this is not the case. Under the Wisconsin statute, the underlying act (the assault or other prohibited behavior) is already criminalized. The penalty-enhancement provision applies only to punish the actor's bigoted motive and thoughts. Conversely, with respect to antidiscrimination laws, the underlying act (such as denying a person housing or a job) is not criminalized. Punishment is based on the combination of the underlying legal conduct and the illegal discriminatory intent, which in conjunction constitute a discriminatory act. Therefore, antidiscrimination statutes punish conduct, which as the *Mitchell* Court observes is beyond the protection of the First Amendment.<sup>334</sup> Since antidiscrimination laws punish discriminatory conduct and the Wisconsin statute punishes bigoted thought and motive, the two types of statutes are analytically distinct for purposes of First Amendment review.<sup>335</sup> Consequently, the *Mitchell* Court errs when it asserts that the constitutionality of antidiscrimination laws provided support for the criminalization of motive in penalty-enhancement statutes.<sup>336</sup>

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333. *Mitchell*, 113 S. Ct. at 2200.

334. *See id.* at 2200-01.

335. As Professor Susan Gellman observes:

[T]he civil provisions of federal civil rights law dealing with discrimination in employment, housing and so forth . . . do not provide a precedent for criminally penalizing motive. Discrimination and bigotry are not the same thing: the former is an illegal act, the latter is a constitutionally protected (albeit odious) attitude. Just as bigotry can exist without being acted upon, discrimination can occur without racist motivation. It is the discriminatory action, and not the racial motive, that Congress intended to prohibit in those statutes.

Gellman, *supra* note 12, at 367-68; *see also* *State v. Wyant*, 597 N.E.2d 450, 456 (Ohio 1992) (maintaining that anti-discrimination laws target the illegal act of discrimination while penalty-enhancement statutes target biased motive, which is protected speech). *But see* Grannis, *supra* note 12, at 194-98 (rejecting distinction between penalty-enhancement statutes and antidiscrimination laws); *Hate Is Not Speech*, *supra* note 12, at 1323-24.

336. Professor Susan Gellman also distinguishes federal criminal antidiscrimination laws from penalty-enhancement statutes:

For example, 18 U.S.C. § 242 (1988), imposes penalties for deprivation of another's civil rights "by reason of his color, or race." That statute is irrelevant

Finally, the Court's opinion in *Mitchell* is flawed because it fails to provide sufficient protection for the values of freedom of thought and expression which are at the heart of the First Amendment. Observing that "the primary responsibility for fixing criminal penalties lies with the legislature,"<sup>337</sup> the Court accepts as adequate Wisconsin's explanation that the statute was not motivated by a mere disagreement with the offenders' beliefs or biases, but was instead intended to address the greater individual and societal harm caused by hate crimes.<sup>338</sup> The Court's deference to the legislature on this point illustrates precisely the danger to the First Amendment of the Court's holding in *Mitchell*. Because the Court characterizes the Wisconsin statute as punishing only conduct and concludes that punishing motive raises no constitutional issue, penalty-enhancement statutes are effectively outside the protections of the First Amendment. As a result, the legislature is free to impose harsher sentences for whatever bias it chooses, limited only by the prevailing political whims of the moment and by its own vision of what beliefs are "bad" and ought to be punished. In effect, this "places the state

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to the analysis of the constitutionality of [penalty-enhancement statutes] because section 242 prohibits only action taken *under color of law*; that is, it is directed solely toward state action, not private action. See also 18 U.S.C. § 243. This state action requirement is central, not peripheral, to sections 242 and 243. These statutes were enacted specifically to enforce the Fourteenth Amendment, which speaks solely to deprivation of rights by *government*. Moreover, the Supreme Court has specified that the "by reason of" language of Section 242 does not relate to the offender's motive. Section 241 does not require state action, but it does not include any "by reason of . . ." motive element, and refers to specific purposes and effects. Section 245 prohibits specifically enumerated acts of discrimination; under that section, as in the civil antidiscrimination laws, the conduct involved is not prohibited without the discriminatory purpose.

Gellman, *supra* note 12, at 367-68 n.161 (citations omitted).

It has been suggested, however, that the constitutionality of antidiscrimination statutes which prohibit discriminatory verbal harassment may have been called into question by the principles set forth in *R.A.V. v. Abner S. Greene, The Political Balance of the Religion Clauses*, 102 YALE L.J. 1611, 1628 n.58 (1993). On the other hand, in *R.A.V.* the Court provided an exception to the rule against content-discrimination for statutes that are aimed not at speech but at conduct that may incidentally sweep in some speech. *R.A.V.*, 112 S. Ct. at 2546. For example, a law against treason is violated by telling the enemy national defense secrets. *Id.* It has been argued that verbal harassment statutes could be covered by this exception, since the speech at issue "may be seen as sexually derogatory fighting words that could be proscribed as an incident to Title VII's prohibition on discriminatory conduct." *Conference, supra* note 321, at 2272.

337. *Mitchell*, 113 S. Ct. at 2200.

338. *Id.* at 2201.

in the position of arbiter of worthiness of ideas . . . [and] raises the specter of 'Big Brother.'<sup>339</sup> While it is beyond dispute that racist beliefs are heinous and deplorable, under the Court's theory it is a short step from punishment for those beliefs to punishment for one's views about reproductive rights or for one's opposition to the government.<sup>340</sup> As this analysis suggests, *Mitchell* allows the legislature to intrude at its discretion into the freedom of thought that the Supreme Court has held is protected by the First Amendment.<sup>341</sup> Therefore, while the Court reaches the correct result in *Mitchell*, it fails to adequately limit the legislature's ability to undermine the First Amendment by punishing unpopular beliefs. If the Court had adhered more closely to the principles of *R.A.V.*, it would have found that the strict scrutiny standard of review provided precisely the limitation on legislative discretion that was lacking in *Mitchell*.

## 2. Toward a Better Approach

The Court in *Mitchell* should have analyzed the Wisconsin statute under the strict scrutiny standard of review because, like other penalty-enhancement statutes, by punishing motive it punishes belief and speech rather than conduct. Under close examination, it is evident that the statute operates to punish motive. In fact, the State of Vermont conceded this point in its pre-trial motion in *Ladue*,<sup>342</sup> just as the Supreme Court

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339. Gellman, *supra* note 12, at 382. Professor Gellman also observes that penalty-enhancement statutes assume "that the government has an accurate understanding of what ideas and expression are in fact intolerably harmful and will enact laws conforming closely to that understanding—a bold assumption to say the least." *Id.*

340. See *Wyant*, 597 N.E.2d at 457 ("If the legislature can enhance a penalty for crimes committed 'by reason of' racial bigotry, why not 'by reason of' opposition to abortion, war, the elderly (or any other political or moral viewpoint)?"); see also *supra* notes 153-54 and accompanying text.

341. See *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 234-35 (1977) ("[A]t the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State."); *Stanley v. Georgia*, 394 U.S. 557, 565-66 (1969) ("Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds. . . . [The state] cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts.").

342. See *State's Opposition to Defendant's Motion to Dismiss* at 3, *State v. Ladue*, No. 4088-8-90 (Vt. Dist. Ct. Chittenden County Apr. 18, 1991).

conceded it in *Mitchell*.<sup>343</sup> Motive refers to the reasons behind one's actions, or the thoughts that cause one to act.<sup>344</sup> Punishing motive, therefore, amounts to punishing the criminal's thoughts and beliefs.<sup>345</sup> The *Ladue* case illustrates this point. If Dominic Ladue had engaged in precisely the same conduct, committed an identical assault with no apparent motive, he would not be subject to an enhanced penalty. Therefore, his increased sentence was based solely on the thoughts and beliefs which caused him to commit the assault. By punishing motive, the state is in effect meting out enhanced criminal penalties solely for the thoughts and beliefs of the defendant. The Supreme Court has made clear that an individual's thoughts and beliefs are protected by the First Amendment.<sup>346</sup> Therefore, the penalty-enhancement statutes, such as those enacted in Vermont and Wisconsin, do raise a First Amendment issue.

Further, under *R.A.V.* it is clear that penalty-enhancement statutes are not content-neutral. The increased penalty is based exclusively on the content of the actor's thoughts. Certain content categories, such as sexual orientation, are subject to enhanced punishment when they motivate the actor's criminal conduct. Other content areas, such as immigration status or political affiliation, are not subject to the statute even if they do maliciously motivate a criminal act. As Justice Scalia pointed out, such categorization amounts to an expression of state hostility toward the enumerated biases, and a regulation of speech based on state antipathy toward the underlying message expressed.<sup>347</sup> The hate crimes statute is content-based because

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343. *Wisconsin v. Mitchell*, 113 S. Ct. 2194, 2199 (1993). Analogizing to capital sentencing proceedings and antidiscrimination laws, the Court concluded that punishing motive did not offend the First Amendment. *Id.* at 2199-2200. The Court's argument, however, was not persuasive. See *supra* notes 327-36 and accompanying text.

344. *Black's Law Dictionary* defines "motive" as a "[c]ause or reason that moves the will and induces action. An idea, belief or emotion that impels or incites one to act in accordance with his state of mind or emotion." BLACK'S LAW DICTIONARY 1014 (6th ed. 1990).

As the dictionary's editors point out, "[i]ntent and motive should not be confused. Motive is what prompts a person to act, or fail to act. Intent refers only to the state of mind with which the act is done or omitted." *Id.* at 810.

345. See *supra* notes 315-40 and accompanying text.

346. See, e.g., *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 234-35 (1977) (First Amendment protects an individual's beliefs from coercion by the state); *Stanley v. Georgia*, 394 U.S. 557, 565-66 (1969) (Constitution prevents states from legislatively attempting to control a person's thoughts).

347. *R.A.V. v. City of St. Paul*, 112 S. Ct. 2538, 2550 (1992).

it selectively enhances criminal punishment on the basis of the content of the criminal's motivating thoughts and beliefs. Therefore, according to the *R.A.V.* majority, penalty-enhancement statutes are presumptively invalid.<sup>348</sup>

As Justice Scalia noted, however, presumptively invalid does not mean invariably invalid.<sup>349</sup> A content-based regulation may still survive if it meets the strict scrutiny standard of review.<sup>350</sup> As the Vermont Hate Motivated Crimes Statute illustrates, penalty-enhancement laws meet this standard because they are narrowly tailored to serve a compelling state interest. As Justice Scalia stated in *R.A.V.*, states have a compelling interest in "ensur[ing] the basic human rights of members of groups that have historically been subjected to discrimination, including the right of such group members to live in peace where they wish."<sup>351</sup> Similarly, the Vermont legislature declared that the purpose of the Hate Motivated Crimes Statute was to ensure "the right of every person to enjoy the public peace and that sense of security and tranquility afforded by the protection of the law."<sup>352</sup> The state's interest in ensuring the rights of members of the protected classes to live peacefully in Vermont is particularly compelling in light of the unusually violent nature of hate crimes and the destructive impact which they have on communities and

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348. *Id.* at 2542 (holding that content-based regulations are presumptively invalid).

349. *Id.* at 2547 n.6.

350. *Id.* at 2554 (White, J., concurring). Justice Scalia inserts the word "reasonably" before the word "necessary" in the majority opinion. *Id.* at 2550. It seems unlikely that such a change in wording was accidental. While this modification in language arguably relaxes the standard of review, this analysis proceeds on the assumption that strict scrutiny requires a necessary and narrowly tailored regulation.

The state supreme courts in *Mitchell* and *Wyant* did not analyze the challenged penalty-enhancement statutes under the strict scrutiny standard of review. In both cases the courts proceeded directly from the finding that the statutes were content-based regulations of thought and speech to the conclusion that the statutes violated the First Amendment. *State v. Mitchell*, 485 N.W.2d 807, 815 (Wis. 1992); *State v. Wyant*, 597 N.E.2d 450, 459 (Ohio 1991). The opinions offer no explanation for the omission of strict scrutiny review.

The United States Supreme Court did not need to analyze the Wisconsin statute under the strict scrutiny standard because it held that the statute punished conduct rather than thought or expression. See *Mitchell*, 113 S. Ct. at 2199.

351. *R.A.V.*, 112 S. Ct. at 2549; see also *Roberts v. United States Jaycees*, 468 U.S. 609, 624 (1984) (elimination of discrimination is a "compelling state interest of the highest order").

352. VT. STAT. ANN. tit. 13, § 1454 (Supp. 1993). The Vermont legislature's Statement of Purpose is particularly persuasive because it was enacted prior to Justice Scalia's pronouncement of the compelling state interest in *R.A.V.*

on entire groups of minorities.<sup>353</sup> The state will have little difficulty in showing that homosexuals have historically been subjected to discrimination, both nationally and in Vermont. For example, studies conducted between 1984 and 1989 in diverse geographical areas report that over 50% of homosexuals surveyed had experienced some form of violence directed at them because of their sexual orientation.<sup>354</sup> As applied to Mr. Ladue, the Vermont statute ensures the basic human right of all citizens, whatever their sexual orientation, to live peacefully and free from violent attacks in Vermont communities. The statute therefore satisfies the compelling interest standard of *R.A.V.*

It seems unlikely, however, that Vermont would be able to make the requisite showing of historical discrimination with respect to the classification based on service in the armed forces of the United States. Hence, this portion of the statute may not survive strict scrutiny review. Nevertheless, confining the state's compelling interest to protecting groups historically subject to discrimination supplies the necessary limitation on penalty-enhancement statutes that *Mitchell* fails to provide. This limitation will serve to preclude states from arbitrarily enhancing punishment for any viewpoint it finds undesirable.<sup>355</sup> Furthermore, such a limitation strikes a balance between the competing constitutional values of libertarianism and egalitarianism.<sup>356</sup>

Finally, the Vermont Hate Motivated Crimes statute is narrowly tailored to serve the state's compelling interest. In *R.A.V.*, the Supreme Court found that the St. Paul ordinance was not narrowly tailored because adequate content-neutral

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353. See *supra* notes 63-74, 126-31 and accompanying text.

354. GARY D. COMSTOCK, VIOLENCE AGAINST LESBIANS AND GAY MEN 36 (1991). The reports from the surveys showed ranges from 51% to 57%. The similar percentages produced by the surveys in spite of demographic differences indicate that antihomosexual violence occurs with frequency throughout the United States. *Id.* In addition, a 1987 study conducted by Vermonters for Lesbian and Gay Rights reported that 36% of gay men and lesbian women surveyed had been threatened with violence, 19% had experienced vandalism, 21% had been the targets of objects, 32% had been followed or chased, and 16% had experienced some type of physical assault. Kevin T. Berrill, *Anti-Gay Violence and Victimization in the United States: An Overview*, in HATE CRIMES: CONFRONTING VIOLENCE AGAINST LESBIANS AND GAY MEN 19, 22 (Gregory M. Herek & Kevin T. Berrill eds., 1992).

355. See *supra* notes 339-41 and accompanying text.

356. See *supra* notes 264-67 and accompanying text.

alternatives existed which would serve the city's purposes.<sup>357</sup> "An ordinance not limited to the favored topics," Justice Scalia noted, "would have precisely the same beneficial effect."<sup>358</sup> Conversely, content-neutral alternatives do not exist which would adequately serve Vermont's purposes in enacting its hate crimes statute. In order to insure that Vermont is a peaceful place to live for members of groups that have historically been subject to discrimination, it is essential that the state deter crimes motivated by bigotry toward such groups. Deterrence is particularly necessary given the uniquely violent and destructive impact which hate crimes have on communities and on entire groups of minorities.<sup>359</sup> There are already some signs that penalty-enhancement statutes are achieving their deterrent purpose.<sup>360</sup> On the other hand, because hate crimes increased so dramatically in recent years, it is clear that the content-neutral laws already in place had no deterrent effect. Thus, adequate content-neutral alternatives to the Vermont law do not exist because such statutes do not achieve the penalty-enhancer's intended deterrent effect on bias-motivated crimes.<sup>361</sup> Since adequate content neutral alternatives do not exist, the Vermont Hate Motivated Crimes statute meets the narrowly tailored standard of *R.A.V.*

In *Simon & Schuster, Inc. v. New York State Crime Victims Board*, the Supreme Court held that an overinclusive content-based regulation fails the narrowly tailored test.<sup>362</sup> A regulation is overinclusive when a substantial portion of the burden on speech does not advance the state's goals.<sup>363</sup> The Vermont

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357. *R.A.V.*, 112 S. Ct. at 2549-50; see also *Boos v. Barry*, 485 U.S. 312, 326-29 (1988) (holding that narrowly tailored standard is not met when alternatives are available which are less restrictive of First Amendment rights).

358. *R.A.V.*, 112 S. Ct. at 2550.

359. See *supra* notes 126-31 and accompanying text.

360. For example, the ADL reported that the number of anti-Semitic incidents it recorded nationwide in 1992 dropped by nearly 9% from the 1991 total; this was the first decline in six years. *Speakers Spur Anti-Semitism on Campus, Group Reports*, BURLINGTON FREE PRESS, Feb. 3, 1993, at 4A.

361. See *Burson v. Freeman*, 112 S. Ct. 1846, 1856 (1992) (plurality opinion) (finding narrowly tailored standard satisfied for purposes of First Amendment where content-based regulation is the only way to achieve a state's compelling interest).

362. *Simon & Schuster, Inc. v. New York State Crime Victims Bd.*, 112 S. Ct. 501, 511-12 (1991); see also *Burson*, 112 S. Ct. at 1855 (analyzing, but rejecting, overinclusiveness challenge to content-based regulation).

363. See *Simon & Schuster, Inc.*, 112 S. Ct. at 511 n.\*\*.

statute satisfies this standard as well: it burdens *no* activity protected by the First Amendment that does not serve to advance the deterrence goals of the penalty-enhancement statute. Individuals remain free to express and communicate bigoted beliefs in a virtually unlimited fashion. The only circumstance in which such expression is limited is when it forms the motivation for criminal conduct. Thus, the Vermont statute is not overinclusive because it only burdens expression when necessary to serve the state's goal of deterring hate motivated crimes. Therefore, the Vermont Hate Motivated Crimes statute meets the narrowly tailored standard of *Simon & Schuster*.

As this analysis has demonstrated, penalty-enhancement statutes, such as those enacted in Vermont and Wisconsin, are content-based regulations of thoughts and beliefs that are protected by the First Amendment. While the Supreme Court held in *R.A.V.* that such regulations are presumptively invalid, penalty-enhancement provisions survive that ruling because they are narrowly tailored to serve the compelling governmental interest of ensuring the basic human rights of members of groups that have historically been subjected to discrimination. Because they satisfy the strict scrutiny standard of review, penalty-enhancement statutes do not violate the First Amendment.

The United States Supreme Court should have employed the strict scrutiny analysis in *Mitchell* because penalty-enhancement provisions operate to punish a criminal defendant's thoughts in a manner that requires the protection of the First Amendment. Furthermore, use of the strict scrutiny standard would have been more consistent with *R.A.V.* than the Court's approach in *Mitchell*. Finally, it is important to recall that penalty-enhancement statutes survive First Amendment analysis only to the extent that they are limited to groups that have been historically the victims of discrimination. This limitation is essential because it restricts a legislature's ability to infringe on the freedom to hold unpopular thoughts that is protected by the First Amendment, and because it preserves a balance between the constitutional values of liberty and equality. Any extension of the

statute beyond this limitation would unacceptably, and unconstitutionally, disturb that delicate balance.

*Erik FitzPatrick*

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