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First Amendment--Penalty Enhancement for Hate Crimes: Content Regulation, Questionable State Interests and Non-Traditional Sentencing

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FIRST AMENDMENT—PENALTY ENHANCEMENT FOR HATE CRIMES: CONTENT REGULATION, QUESTIONABLE STATE INTERESTS AND NON-TRADITIONAL SENTENCING*

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

I. INTRODUCTION

In *Wisconsin v. Mitchell*,[1] the United States Supreme Court held that the First Amendment does not prohibit a state from enhancing the penalty for a crime if the offender selected the victim because of the victim's race, color, religion, disability, sexual orientation, national origin, or ancestry.[2] In doing so, the Court appeared to back away from its 1992 decision in *R.A.V. v. City of St. Paul*,[3] which invalidated an ordinance prohibiting cross-burning and other displays tending to offend based on race, color, or religion.[4] Instead, the Court relied on another decision from 1992, *Dawson v. Delaware*,[5] which re-affirmed that a defendant's beliefs may be used in certain circumstances in determining the severity of sentence.[6]

This Note begins by reviewing the responses of various state legislatures to the incidence of "hate crime." The Note then examines three lines of cases relevant to deciding the constitutionality of penalty-enhancement statutes for hate crimes. This Note posits that the Court answered a crucial threshold question incorrectly and therefore ignored relevant precedent in reaching its decision. Specifically, the Note questions the Court's threshold conclusion that Wisconsin's penalty-enhancement statute merely regulates nonex-

* For their assistance, the author thanks Northwestern University School of Law Professors Ronald Allen, Martin Redish, Paul Robinson and William Marshall (visiting from Case Western Reserve University), and fellow student Forrest Dillon.

1 113 S. Ct. 2194 (1993).

2 *Id.* at 2202.

3 112 S. Ct. 2538 (1992).

4 *Id.* at 2550.

5 112 S. Ct. 1093 (1992).

6 *Id.* at 1099.

pressive conduct by arguing that the statute impermissibly regulates speech, or, in the alternative, that the statute impermissibly regulates expressive conduct. The Note concludes that the Court erred in ignoring these two arguments against sentence enhancement by focusing instead on cases addressing the admissibility of a defendant's words and expressive conduct during standard sentencing procedures.

II. BACKGROUND

To put *Mitchell* in perspective, one must look at the case from two viewpoints. First, one must consider the various paths states have taken to address the perceived increase in hate crime. Second, one must consider the thicket of First Amendment doctrine through which these paths must wend.

A. STATE RESPONSES TO HATE CRIMES

Three and one-half months before the Supreme Court heard oral arguments in *Mitchell*, the federal government released its first national report on hate crimes.[7] This report, compiled by the Federal Bureau of Investigation, showed that 4558 hate-crime incidents involving 4755 offenses were reported in 1991 in the thirty-two states participating in the study.[8] Intimidation was the incident most frequently reported, accounting for about a third of all offenses.[9] Vandalism was next at 27%, followed by simple assault (17%), aggravated assault (16%), and robbery (3%).[10] Sixty percent of the offenses were racially motivated.[11] Religious bias accounted for 20%, and ethnic and sexual-orientation bias 10% each.[12]

Some, citing these figures with alarm—or citing no figures at all—proclaimed the United States to be undergoing an increase in

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[7] *See* Stephen Labaton, *Poor Cooperation Deflates F.B.I. Report on Hate Crime*, N.Y. TIMES, Jan. 6, 1993, at A10; Wisconsin v. Mitchell, 113 S. Ct. 2194 (1993).

[8] FEDERAL BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, HATE CRIME STATISTICS (1993) [hereinafter HATE CRIME STATISTICS], *cited in* Brief of Amicus Curiae in Support of Petitioner of the Crown Heights Coalition, the NAACP Legal Defense and Educational Fund, Inc., and the American Jewish Committee at 2a, Wisconsin v. Mitchell, 113 S. Ct. 2194 (1993) (No. 92-515) [hereinafter NAACP Brief]. The report was compiled pursuant to the Hate Crime Statistics Act, Pub. L. No. 101-275, 1990 U.S.C.C.A.N. (104 Stat.) 140, and the general crime-statistics provisions of 28 U.S.C. § 534 (1988).

[9] HATE CRIME STATISTICS, *supra* note 8, *cited in* NAACP Brief, *supra* note 8, at 2a.

[10] *Id.*

[11] *Id.*

[12] *Id.*

the incidence of hate crimes.[13] Meanwhile, other signs pointed to ambiguity. The Anti-Defamation League of B'nai B'rith, for instance, noted that anti-Semitic crimes actually decreased by eight percent in 1992.[14] Moreover, one commentator has pointed out that recently instituted or intensified efforts to gather data on hate crimes—such as the F.B.I. report—have in a sense manufactured the surge in hate crimes; the surge "represent[s] reporting improvements rather than actual increases in bias crime levels."[15]

In any event, state legislators have found hate crime to be enough of a problem to warrant regulation via statutes. These statutes take a variety of forms. For example, states have long prohibited vandalism of sites used for worship or burial,[16] and they have prohibited the intentional disturbance of religious meetings or ceremonies.[17] More recently, they have also banned the act of burning a cross or placing a swastika or other symbol on another's property with the intent to intimidate.[18]

While these examples demonstrate a variety of possible state responses to hate crime, this Note will focus on yet another option: penalty-enhancement statutes. Twenty-eight jurisdictions, including Wisconsin, have enacted measures that can increase a criminal defendant's penalty for offenses visited upon a victim based on the victim's membership in one of several specified groups.[19] Another such measure is currently before the United States Congress and would do the same for federal crimes.[20] Penalty-enhancement statutes for hate crimes can be broken down into four categories.[21]

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13 *See, e.g.*, Note, *Hate Is Not Speech: A Constitutional Defense of Penalty Enhancement for Hate Crimes*, 106 HARV. L. REV. 1314 (1993) (arguing that penalty-enhancement statutes are valid because motive is admissible in sentencing); Recent Case, *First Amendment—Bias-Motivated Crimes—Court Strikes Down Hate Crimes Penalty Enhancer Statute*, 106 HARV. L. REV. 957 (1993) (arguing that Wisconsin penalty-enhancement statute criminalizes intent, which is equivalent to motive and thus may be punished under the First Amendment).

14 ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH, 1992 AUDIT OF ANTI-SEMITIC INCIDENTS 3 (1992) [hereinafter ANTI-SEMITIC AUDIT].

15 Brian Levin, *Bias Crimes: A Theoretical & Practical Overview*, 4 STAN. L. & POL'Y REV. 165, 172 (1993) (concluding that hate crimes' special harms warrant new methods on the part of legislators and police).

16 *See, e.g.*, OHIO REV. CODE ANN. §§ 2909.05, 2927.11 (Baldwin 1990); FLA. STAT. ANN. § 806.13(2) (West 1992).

17 *See, e.g.*, CAL. PENAL CODE §§ 302, 11412 (West 1988 & Supp. 1991); FLA. STAT. ANN. § 871.01 (West 1976).

18 *See, e.g.*, FLA. STAT. ANN. § 876.17-18 (West 1976 & Supp. 1994); D.C. CODE ANN. § 22.3112.2(a) (1989).

19 *See infra* notes 22-27 and accompanying text.

20 H.R. 1152, 103rd Cong., 1st Sess. (1993).

21 *Cf.* Eric J. Grannis, Note, *Fighting Words and Fighting Freestyle: The Constitutionality of Penalty Enhancement for Bias Crimes*, 93 COLUM. L. REV. 178, 179-85 (1993) (dividing pen-

First, there are statutes that might be called "pure" penalty enhancers: they provide for extra punishment if the defendant commits *any* crime in whole or in part because the victim belongs to an enumerated group. These pure enhancers can further be broken down into those that require or allow prison time or monetary fines to be added to the penalty for the underlying offense,[22] and those that provide for the degree of the underlying offense to be increased in severity.[23]

The second class of penalty-enhancement statutes is more narrowly drawn. These statutes are triggered by fewer underlying offenses. That is, these statutes provide the same stiffer punishments or increases in degree of the underlying offense as "pure" enhancers, but they are not triggered by all crimes. For example, Massachusetts' penalty-enhancement statute is triggered only by the offenses of assault, battery, or damage to real or personal property.[24]

Next are statutes marked by prosecutorial discretion. These statutes cover actions that might also be prosecuted under other statutes; the only thing preventing a defendant from facing a stricter penalty under the bias statute appears to be the prosecutor's decision to proceed under one offense or the other, or both. For example, Connecticut may charge a defendant with intimidation based on bigotry or bias if "with specific intent to intimidate or harass another person because of such other person's race, religion, ethnicity or

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alty-enhancement statutes into three categories by collapsing the first two categories set forth in this Note).

22 N.H. REV. STAT. ANN. § 651:6 (1992); VT. STAT. ANN. tit. 13, § 1455 (1992); WIS. STAT. ANN. § 939.645 (West 1982 & Supp. 1993).

23 FLA. STAT ANN. § 775.085 (West 1992); H.R. 1152.

24 MASS. ANN. LAWS ch. 265, § 39 (Law. Co-op. 1993). *See also* CAL. PENAL CODE §§ 422.7, 422.75 (West 1988 & Supp. 1993); D.C. CODE ANN. §§ 22-4001, 22-4003 (1992); MD. CODE ANN., CRIM. LAW § 470A (1992); MINN. STAT. § 609.2231 (1992); MO. REV. STAT. §§ 574.090, 574.093 (1991); OHIO REV. CODE ANN. § 2927.12 (Baldwin 1990); 18 PA. CONS. STAT. § 2710 (1993). New Jersey enhances the penalty only for simple assault if it is committed based on bias. N.J. REV. STAT. § 2C:12-1 (1992). These statutes resemble a model statute promulgated by the Anti-Defamation League in 1981. The model statute reads:

> 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).
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> B. Intimidation is a — misdemeanor/felony (the degree of the criminal liability should be at least one degree more serious than that imposed for commission of the offense).

ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH, HATE CRIMES STATUTES: A 1991 STATUS REPORT 4 (1991).

sexual orientation . . . [he] [c]auses physical contact with such other person."[25] While the offense of intimidation, a felony, requires only physical *contact*, assault in the third degree, a misdemeanor, requires physical *injury*.[26] Thus, a defendant charged with a hate crime faces the prospect of an enhanced penalty under an intimidation statute.

Finally, there are statutes that list bias against certain groups as an aggravating factor to be considered in sentencing.[27] Although these statutes do not enhance punishment in the sense of adding to the penalty authorized by statute, they do enhance punishment by boosting a sentence toward the upper statutory limit.

Prior to *Mitchell*, litigation under two of the above statutes eventually made its way to state supreme courts, with conflicting results. In *State v. Plowman*,[28] the Supreme Court of Oregon upheld that state's first-degree ethnic intimidation law.[29] The defendant in *Plowman* was convicted of both assault and ethnic intimidation for his role in an attack by three white men on two Hispanic men.[30] The court rejected defendant's contention that the intimidation conviction punished only his speech, namely the racial epithets he uttered during the attack.[31] The court held that the intimidation statute also targeted the group nature of the attack, and that speech is often used simply as evidence of intent, as it was in this case.[32] In *State v. Wyant*,[33] however, the Ohio Supreme Court overturned a

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25 CONN. GEN. STAT. § 53a-181b (1992). *See also* COLO. REV. STAT. § 18-9-121 (1993); IDAHO CODE § 18-7902 (1993); ILL. COMP. STAT. ch. 720 § 5/12-7.1 (1993) *as amended by* 1993 Ill. Laws 259; IOWA CODE § 729.5 (1992); MICH. COMP. LAWS § 750.147b (1992); MONT. CODE ANN. § 45-5-221 (1992); N.Y. PENAL LAW § 240.30 (Consol. 1993); N.C. GEN. STAT. § 14-401.14 (1992); N.D. CENT. CODE § 12.1-14-04 (1991); OKLA. STAT. tit. 21, § 850 (1992); OR. REV. STAT. §§ 166.155, 166.165 (1991) *as amended by* 1993 Or. Laws Adv. Sh. Nos. 18, 332; WASH. REV. CODE § 9A.36.080 (1991).

26 CONN. GEN. STAT. § 53a-61 (1992).

27 ALASKA STAT. § 12.55.155 (1993); CAL. PENAL CODE § 1170.75 (West 1988 & Supp. 1993); ILL. COMP. STAT. ch. 730 § 5/5-5-3.2 (1993) *as amended by* 1993 Ill. Laws 215; N.C. GEN. STAT. § 15A-1340.4 (1992); W. VA. CODE § 61-6-21 (1992).

28 838 P.2d 558 (Or. 1992).

29 *Id.* at 565. Oregon's statute fits within the category of those providing prosecutorial discretion. OR. REV. STAT. § 166.165. *See supra* note 25 and accompanying text.

30 *Plowman*, 838 P.2d at 562.

31 *Id.* at 562-65.

32 *Id.* at 563-64. The court also rejected defendant's vagueness claims under the Due Process Clause of the Fourteenth Amendment. The court held that the statute was not vague in that the meaning of the phrase "because of their perception of [the victims'] race, color, religion, national origin or sexual orientation" was readily ascertainable. *Id.* at 561. The court also held that the statute would not be triggered anytime a crime occurred between an offender of one race and a victim of another. *Id.* The court reasoned that the "because of" wording created a sufficiently strong nexus to narrow the statute. *Id.*

33 597 N.E.2d 450 (Ohio 1992), *vacated*, 113 S. Ct. 2954 (1993).

statute enhancing penalties for aggravated menacing, menacing, criminal damaging or endangering, criminal mischief, and some types of telephone harassment.[34] The court found that, since the penalty for the underlying offense of aggravated menacing already punishes the defendant's criminal action, the only thing left for the enhancement statute to punish was the offender's motive or thought.[35] However, the First Amendment prohibits punishment of thought.[36] Thus, the Ohio high court found the statute unconstitutional.[37]

The expanding view that hate crime was escalating and the rapid proliferation of hate-crime statutes quickly made hate crime a controversial public issue. The difference in state high court opinions set the stage for the United States Supreme Court to grant certiorari in *Mitchell*.[38]

B. THE FIRST AMENDMENT CONTEXT

Three lines of authority underlie the question of whether penalty-enhancement statutes for hate crimes are permissible under the First Amendment. First are those cases delineating what constitutes expression. Second are those cases setting forth guidelines to decide when expression may be regulated by statute. Third are those dealing with when expression is admissible as evidence in sentencing procedures.

1. What Constitutes Expression Under the First Amendment?

The idea that spoken or written words may be protected by the First Amendment is not problematic.[39] However, the idea that

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34 *Id.* at 458; OHIO REV. CODE ANN. § 2927.12 (Baldwin 1990).

35 *Wyant*, 597 N.E.2d at 453-56.

36 *Id.* at 456 (citing Abood v. Detroit Bd. of Educ., 431 U.S. 209, 234-35 (1977) (holding that school employee may not be compelled to contribute funds to labor union, which may advocate political positions opposed by employee); West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) (holding that student may not be compelled to pledge allegiance to U.S. flag); Stanley v. Georgia, 394 U.S. 557, 565-66 (1969) (holding that private possession of obscene material may not be criminalized)).

37 *Wyant*, 597 N.E.2d at 458.

38 Also helping to set the stage were lower state court opinions. *See In re* Joshua H., 17 Cal. Rptr. 2d 291 (Cal. Ct. App. 1993), *review denied*, 1993 Cal. LEXIS 3412 (Cal. June 24, 1993) (holding that penalty-enhancement statute punishes violence and discrimination, not speech); People v. Grupe, 532 N.Y.S.2d 815 (N.Y. Crim. Ct. 1988) (holding that penalty-enhancement statute regulates violent conduct and does not violate First Amendment). In the wake of *Mitchell*, the Florida Supreme Court resolved a split in the state's lower courts by holding Florida's hate-crime statute constitutional under the First Amendment. State v. Stalder, 1994 Fla. LEXIS 76 (Fla. Jan. 27, 1994).

39 "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." U.S. CONST. amend. I.

other activity may constitute "speech" or expression to be protected by the amendment has presented the Court with somewhat more difficulty. In the 1968 case of *United States v. O'Brien*,[40] for instance, Chief Justice Warren, writing for the Court, remarked that "[w]e cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea."[41]

By 1974, though, the Court was ready to accept that conduct other than speech or writing may constitute expression under the First Amendment. The Court outlined the considerations that govern whether conduct is deemed expressive in *Spence v. Washington*.[42] In *Spence*, the Court held that displaying a United States flag upon which was affixed a peace sign constituted expressive conduct protected by the First Amendment.[43] In so holding, the Court laid out a three-prong test for determining whether conduct was expressive. First, the context of the conduct must suggest that the conduct is expressive.[44] In *Spence*, the Court found that placing a peace symbol on an American flag was expressive conduct within the broad, violent context of the American invasion of Cambodia and the killing of Kent State University students by National Guardsmen.[45] Second, the intent of the person or persons engaged in the conduct should be to communicate.[46] Spence himself expressed his intent to communicate via the flag display.[47] Third, the nature of the conduct should be communicative.[48] The Court found that both the flag and the peace sign constituted symbolic language.[49]

After *Spence*, the Court has found other actions to be expressive conduct. Demonstrative physical action such as flag burning[50] has been held to be expressive, as has conduct not apparent from physical action, such as boycotting businesses.[51] A boycott, rather than

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40 391 U.S. 367 (1968).

41 *Id.* at 376 (assuming arguendo that burning a selective-service registration card was expressive conduct cognizable under the First Amendment while upholding statute prohibiting such conduct).

42 418 U.S. 405 (1974).

43 *Id.* at 409-11.

44 *Id.* at 410.

45 *Id.*

46 *Id.* at 410-11.

47 *Id.* at 408.

48 *Id.* at 409-10.

49 *Id.*

50 Texas v. Johnson, 491 U.S. 397, 404-06 (1989) (relying on *Spence* to determine that flag burning is expressive conduct).

51 NAACP v. Claiborne Hardware, Inc., 458 U.S. 886, 912-15 (1982). One could also argue that other activities given First Amendment protection on other grounds actually

being apparent via physical demonstration, is apparent only via the physical absence of certain people.

Only the fact that harm is caused by putatively expressive conduct prohibits that conduct from being found to be actually expressive. For example, in *Roberts v. United States Jaycees*,[52] the Court found that discrimination in club membership was conduct that is "potentially expressive."[53] Only the harms brought on by such discrimination, such as injuries to dignity and the deprivation of full participation in society, precluded the Court from holding that the conduct was actually expressive.[54]

2. *When May Expression Be Regulated by Statute?*

The nexus between speech and violence has long been a concern of the Court. Until 1969, the Court struggled to define the point to which a person could go in advocating violence without being subject to state sanction. For fifty years, starting with *Schenck v.*

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constitute protectable expressive conduct. For example, in West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624 (1943), the Court held that the refusal to pledge allegiance to the American flag was protectable expression because to hold otherwise would jeopardize the refuser's freedom of thought. *Id.* at 642. However, one could characterize this refusal as a form of expressive conduct—perhaps expressing opposition to U.S. policies—apparent from the very absence of certain words and motions. Similarly, the Court has recognized a First Amendment freedom of association because such a freedom is necessary so that citizens may more effectively engage in the speech, religion, and other rights guaranteed by the amendment. *See, e.g.*, Roberts v. United States Jaycees, 468 U.S. 609, 617-18 (1984). The Court recognized this right of association in Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977), in which it held that a school employee may not be compelled to pay a membership fee to a labor union, which may advocate political positions with which the employee does not agree. *Id.* at 231. One could characterize joining a group, or refusing to join, as conduct that itself expresses solidarity or the lack thereof with the organization and its goals. Moreover, this expression of solidarity does not cease when the physical manifestations of membership, for example a membership card, are not visible.

52 468 U.S. 609 (1984).

53 *Id.* at 628.

54 *Id. See also* Runyon v. McCrary, 427 U.S. 160, 175-76 (1976) (holding that discrimination in school enrollment is not expressive conduct because it carries with it other harms).

It could be argued that the expressive activity at issue in *Roberts* is the Jaycees' public positions on "such issues as the federal budget, school prayer, voting rights, and foreign relations"—positions which might be altered by the admittance of women into membership. *Roberts*, 468 U.S. at 627-28. *See* William P. Marshall, *Discrimination and the Right of Association*, 81 Nw. U. L. Rev. 68, 72-77 (1986) (dismissing as dictum the Court's statement that discrimination is "potentially expressive"). This argument, however, ignores the fact that the Court in *Roberts* found "the very fact" that women were not admitted to the Jaycees "as full voting members" constituted "a symbolic message." *Roberts*, 468 U.S. at 627 (citing Spence v. Washington, 418 U.S. 405 (1974)). The fact that the Jaycees admitted women to limited membership merely clouded the message. *Id.*

United States[55] in 1919, the Court made repeated attempts to delineate when speech presented a "clear and present danger" of violence and was thus regulable.[56] In 1969, however, the Court abandoned these attempts for a somewhat brighter line. In *Brandenburg v. Ohio*,[57] the Court held that the First Amendment does not protect speech that advocates and is likely to incite imminent violence.[58] In *Brandenburg*, the Court overturned Ohio's Criminal Syndicalism Statute, which punished those who advocated or taught "the duty, necessity, or propriety of violence . . . as a means of accomplishing industrial or political reform."[59] The Court found that the burning of a cross by twelve armed Ku Klux Klansmen, coupled with one Klansman's call for "revengeance" and for a Klan march into the South, did not constitute advocacy likely to incite imminent violence, since no one was present at the small Klan rally except a television news crew.[60]

The same year, in *Street v. New York*,[61] the Court held that constitutionally protected speech can never provide the sole grounds for a criminal conviction.[62] Therefore, a criminal conviction must be overturned if the defendant's words could have provided an independent basis for his conviction, and if a conviction for uttering such words violates the Constitution.[63] In *Street*, the defendant had been convicted of violating a New York statute that made it a misdemeanor "publicly [to] mutilate, deface, defile, or defy, trample upon, or cast contempt upon either by words or act" a United States flag.[64] The defendant, angered by news of the shooting of civil rights leader James Meredith, had taken his flag out onto the sidewalk, ignited it, and shortly thereafter said to a crowd and a police officer: "We don't need no damn flag. . . . [T]hat is my flag; I burned it. If they let that happen to Meredith we don't need an

55 249 U.S. 47 (1919) (holding that document advocating obstruction of military recruiting presented clear and present danger of violence and was thus sanctionable).

56 *See* Abrams v. United States, 250 U.S. 616 (1919) (upholding conviction for distribution of leaflets calling for general strike in response to military intervention in Russia); Gitlow v. New York, 268 U.S. 652 (1925) (upholding conviction for advocating violent overthrow of government); Dennis v. United States, 341 U.S. 494 (1951) (affirming conviction for organizing Communist Party and advocating violent overthrow).

57 395 U.S. 444 (1969).

58 *Id.* at 447.

59 *Id.*

60 *Id.*

61 394 U.S. 576 (1969).

62 *Id.* at 585. *See also* Stromberg v. California, 283 U.S. 359, 367-68 (1931) (holding that when statute bars displaying red flag under three clauses, and one clause is unconstitutional, general conviction under statute must be overturned).

63 *Id.*

64 *Id.* at 577-78.

American flag."[65] The Court found that references to "anti-flag" words in the statute, in Street's indictment, and during the testimony in his case precluded the lower court from holding that the defendant's words were not an independent cause of his conviction.[66] Since speaking against the flag is protected by the First Amendment, any conviction possibly based on such speech must be overturned.[67]

Other cases have stressed the necessity of offering additional evidence beyond the defendant's expression to garner a criminal conviction. In *Haupt v. United States*,[68] for instance, the Court held that the defendant's past admissions of loyalty to Germany were admissible as evidence of intent in his World War II treason trial.[69] However, there was "no attempt to convict here on such admissions alone."[70] Evidence that the defendant harbored and aided saboteurs was, the Court emphasized, a prerequisite for his conviction, which the Court upheld.[71] More recently, in *Price Waterhouse v. Hopkins*,[72] the Court held that "[r]emarks at work that are based on sex stereotypes" are admissible as evidence of intent in an employment discrimination suit.[73] Again, the Court emphasized that the "plaintiff must [also] show that the employer actually relied on her gender in making its decision."[74] That is, evidence of the defendant's actions—not just his words—is required.[75]

A year before it decided *Brandenburg* and *Street*, the Court had decided *United States v. O'Brien*, in which it set forth guidelines for regulating expressive conduct.[76] In *O'Brien*, the Court held that a statute prohibiting draft-card burning was valid under the First

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65 *Id.* at 578-79.

66 *Id.* at 588-90.

67 *Id.* at 590-94.

68 330 U.S. 631 (1947).

69 *Id.* at 642.

70 *Id.* at 643.

71 *Id.* at 633-43.

72 490 U.S. 228 (1989).

73 *Id.* at 251.

74 *Id.*

75 *See also* Griffin v. United States, 112 S. Ct. 466 (1991) (citing Street v. New York, 394 U.S. 576 (1969), while finding impermissible—in a multiple-object conspiracy case—the possibility that a general-verdict conviction could have been based on an unconstitutional ground); Zant v. Stephens, 462 U.S. 862 (1983) (applying *Street* to sentencing scheme for murder where one of three aggravating factors was found unconstitutional); Bachellar v. Maryland, 397 U.S. 564 (1970) (citing *Street* while overturning a conviction for disorderly conduct stemming from a demonstration against the Vietnam war because conviction could have resulted solely from observers being offended by demonstration).

76 391 U.S. 367 (1968).

Amendment.[77] In doing so, the Court set forth a four-pronged test to determine whether a statute permissibly regulates expressive conduct: the statute must be "within the constitutional power of the Government"; it must further an "important or substantial governmental interest"; this interest must not be related to the "suppression of free expression"; and the incidental restriction the statute imposes on First Amendment rights must be "no greater than is essential to the furtherance of that interest."[78]

One recent decision that provided protection for expressive conduct led some commentators to wonder whether penalty-enhancement statutes for hate crimes could survive scrutiny under the First Amendment.[79] In *R.A.V. v. City of St. Paul*,[80] the Court held that even "fighting words," which had been entitled to no protection under the First Amendment, may not be restricted based on their content. In *R.A.V.*, the defendant had been convicted under a municipal ordinance which made it a misdemeanor to:

> place on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender.[81]

The defendant burned a crude wooden cross in the yard of a black family.[82] The Minnesota Supreme Court construed the ordinance as applying only to fighting words and affirmed the defendant's con-

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77 *Id.* at 382.

78 *Id.* at 377.

79 *See, e.g.*, James Weinstein, *First Amendment Challenges to Hate Crime Legislation: Where's the Speech?*, 11 CRIM. JUST. ETHICS 6 (1992) (arguing that hate crimes cause special harms and thus deserve special punishment); Martin H. Redish, *Freedom of Thought as Freedom of Expression: Hate Crime Sentencing Enhancement and First Amendment Theory*, 11 CRIM. JUST. ETHICS 29 (1992) (arguing that since penalty-enhancement statutes criminalize only conduct that has already been made criminal, they impermissibly punish thought, which is protected by the First Amendment); Philip Weinberg, R.A.V. *and* Mitchell*: Making Hate Crime a Trivial Pursuit*, 25 CONN. L. REV. 299 (1993) (encouraging the Court—before it decided *Mitchell*—to reverse the Wisconsin Supreme Court in order to "impose damage control" after the faulty decision in *R.A.V.*); Grannis, *supra* note 21 (arguing that penalty-enhancement statutes are facially content-neutral and advance important state interests). *See also* 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) (arguing that penalty-enhancement statutes target motive, which is not relevant to criminal liability, and thus create a "thought crime"). This Note will not evaluate the characterization—discussed thoroughly by Redish and Gellman—of penalty-enhancement statutes as punishing thought. Rather, this Note advances alternative characterizations of such statutes as punishing speech or expressive conduct directly.

80 112 S. Ct. 2538, 2545 (1992).

81 *Id.* at 2541 (citing ST. PAUL, MINN. LEGIS. CODE § 292.02 (1990)).

82 *Id.*

viction.[83] The United States Supreme Court, although bound by the Minnesota high court's construction of the ordinance, reversed on the grounds that no statute may regulate speech—even low-value speech such as fighting words—based on content.[84] The content regulated by the St. Paul ordinance was the message of bigotry directed at the five limited areas of race, color, creed, religion, or gender.[85]

Content regulation was forbidden for two reasons under *R.A.V.* First, such regulation threatens to drive certain thoughts from the marketplace of ideas.[86] The fact that the racist motive expressed by R.A.V. was expressed crudely, or that it may be offensive to many, is immaterial.[87] In other words, crude and offensive ideas are still protected by the First Amendment. Second, the state had less restrictive means available to show disapproval of bigotry.[88]

The Court also noted in *R.A.V.* that the content discrimination effected by the St. Paul ordinance was of a particularly virulent sort, the sort that gives one side in a debate an unfair advantage.[89] The Court found, for instance, that by focusing on "religion," the St. Paul ordinance gave followers of a religion freedom to insult atheists or agnostics, but penalized any insult directed against a follower.[90] The Court termed this phenomenon "viewpoint discrimination."[91]

3. When Is Expression Admissible as Evidence in Sentencing?

The Court has long held that a judge may consider a wide variety of evidence in determining an appropriate sentence, even evidence that would be inadmissible at trial. In *Williams v. New York*,[92] the Court held that evidence of defendant's participation in burglaries for which he was not convicted was admissible during his sentencing for first-degree murder, as was evidence of his "morbid sexuality."[93] The Court has also found that the degree of disregard

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[83] *Id.* Fighting words constitute expression "that itself inflicts injury or tends to incite imminent violence" in the listener. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

[84] 112 S. Ct. at 2545.

[85] *Id.* at 2548.

[86] *Id.* at 2545.

[87] *Id.* at 2550.

[88] *Id.*

[89] *Id.* at 2548.

[90] *Id.*

[91] *Id.* at 2547.

[92] 337 U.S. 241 (1949).

[93] *Id.* at 244. *See also* Payne v. Tennessee, 111 S. Ct. 2597 (1991) (admitting victim impact statements in sentencing for first-degree murder).

for the victim is relevant in sentencing.[94]

Consequently, the defendant's expressive activity has been held to be admissible during sentencing. In *Barclay v. Florida*,[95] the Court held that the black defendant's membership in the Black Liberation Army and his advocacy of a race war were relevant matters in his sentencing for the murder of a white man.[96] In *Dawson v. Delaware*, the Court reemphasized that any evidence admitted at sentencing regarding expressive activity must be relevant to the offense charged.[97] In *Dawson*, the Court reversed the defendant's death sentence, since his "abstract beliefs," as evidenced by his membership in a white supremacist gang, were not relevant to his sentencing for the murder of a white woman.[98]

These cases, however, only control if the statute at issue in *Mitchell* is regarded as residing in the sentencing sphere and not as delineating a separate criminal offense. When a statute is triggered by another, requires a new finding of fact, may result in a stiffer penalty than was possible under the triggering statute, and threatens a constitutional right, the Court has regarded statutes that could be construed either way as setting forth a separate criminal offense, not a mere sentencing consideration.

In *Specht v. Patterson*,[99] for example, the Court held that a statute providing indeterminate sentences for certain sex offenders required a separate criminal proceeding.[100] In *Specht*, the defendant was convicted of indecent liberties, an offense that carried a maximum sentence of ten years.[101] Under the separate Colorado Sex Offender Act, however, the court could impose an indeterminate sentence extending to life imprisonment if the court was "of the opinion that [the] person, if at large, constitute[d] a threat of bodily harm to members of the public, or is an [sic] habitual offender and mentally ill."[102] The defendant received such an indeterminate sentence after the trial court reviewed a psychiatric report.[103] The de-

94 Tison v. Arizona, 481 U.S. 137, 156-57 (1987) (finding that reckless indifference to human life displayed by accomplices to prison escape supports imposition of death penalty on the accomplices although the accomplices did not intend to kill victims murdered by escapees).

95 463 U.S. 939 (1983).

96 *Id.* at 942-44.

97 112 S. Ct. 1093, 1096-97 (1992).

98 *Id.*

99 386 U.S. 605 (1967).

100 *Id.* at 611.

101 *Id.* at 607.

102 *Id.*

103 *Id.* at 608.

fendant had no opportunity to challenge that report.[104] The Court reversed, distinguishing the case from *Williams*.[105] The Court found that the greater deprivation of liberty under the Sex Offender Act gave rise to "a new charge" requiring a "full judicial hearing."[106]

In *McMillan v. Pennsylvania*,[107] by contrast, the Court held that a statute providing a minimum sentence of five years for certain offenses committed with a handgun was a sentencing factor requiring only a preponderance of evidence that the gun was in the defendant's possession, not evidence beyond a reasonable doubt, which would be required if the possession were an element of a criminal offense.[108] However, unlike the statute in *Specht*, which increased the defendant's sentence for his predicate offense, the statute in *McMillan* only provided a five-year minimum sentence for offenses with maximum penalties of ten to twenty years.[109]

4. Summary

Mitchell, then, presented the Court with three sets of questions. First, how were the defendant's activity and the statute's target to be characterized? The Court had several options from which to choose. Was he engaged in speech regulated by the penalty-enhancement statute, as the court in *Plowman* had considered?[110] Was he engaged in, and punished for, biased thought, as some commentators[111] and the court in *Wyant*[112] had argued? Was he engaged in expressive conduct? Or was he merely engaged in non-expressive conduct over which the First Amendment has no sway? Once the Court had chosen one of these characterizations, it would then have to address whether Wisconsin's statute met the standards for regulating the activity in which Mitchell was engaged. Third, the Court would have to choose whether to admit all evidence in determining sentence under penalty-enhancement statutes or to distinguish penalty-enhancement procedures from traditional sentencing procedures.

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104 *Id.*

105 *Id.*

106 *Id.* at 610.

107 477 U.S. 79 (1986).

108 *Id.* at 91.

109 *Id.* at 88-89 (distinguishing *Specht* on this basis).

110 State v. Plowman, 838 P.2d 558 (Or. 1992). *See also supra* notes 28-32 and accompanying text.

111 *See* Gellman, *supra* note 79; Redish, *supra* note 79.

112 State v. Wyant, 597 N.E.2d 450, *vacated*, 113 S. Ct. 2954 (1993). *See also supra* notes 33-37 and accompanying text.

III. Facts and Procedural History

On the evening of October 7, 1989, Gregory Reddick, a 14-year-old white boy, was walking down a street in Kenosha, Wisconsin.[113] Gathered on the other side of the street near an apartment building was a group of black boys and young men.[114] Reddick said nothing to the group and continued to walk by.[115]

The group watched Reddick briefly.[116] Then several members rushed across the street; knocked the boy to the ground; surrounded him; stomped, kicked and punched him for five minutes; yanked the "British Knights" brand sneakers from his feet; and left him, beaten and unconscious, for the police to find a short time later.[117] Reddick was in a coma for four days,[118] and he might have died had he not received medical treatment.[119] Indeed, a member of the group said he thought Reddick was dead.[120]

Todd Mitchell was one member of the group that watched Gregory Reddick walk down the street.[121] At age 19, Mitchell was one of the group's older members.[122] Prior to Reddick's arrival, part of Mitchell's group had been inside the apartment building discussing a scene from the movie "Mississippi Burning" in which a white man beats a black boy who was praying.[123] Apparently, Mitchell took no active part in that discussion.[124] After about ten members of the group moved outside, but before the victim Reddick arrived, Mitchell asked the group: "Do you all feel hyped up to move on some white people?"[125]

Reddick appeared shortly thereafter.[126] Mitchell said to the group, "You all want to fuck somebody up? There goes a white boy; go get him."[127] Mitchell counted to three, pointing to indicate that the group should surround Reddick.[128] Many in the group surged

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113 State v. Mitchell, 485 N.W.2d 807, 809 (Wis. 1992).
114 Wisconsin v. Mitchell, 113 S. Ct. 2194, 2196 (1993)
115 *Mitchell*, 485 N.W.2d at 809.
116 *Mitchell*, 113 S. Ct. at 2196.
117 State v. Mitchell, 473 N.W.2d 1, 3 (Wis. App. Ct. 1991).
118 *Mitchell*, 485 N.W.2d at 809.
119 *Mitchell*, 473 N.W.2d at 2.
120 *Id.* at 3.
121 Wisconsin v. Mitchell, 113 S. Ct. 2194, 2196 (1993).
122 *Mitchell*, 473 N.W.2d at 2.
123 *Mitchell*, 113 S. Ct. at 2196.
124 *Mitchell*, 473 N.W.2d at 2.
125 *Mitchell*, 113 S. Ct. at 2196.
126 *Id.*
127 *Id.*
128 *Mitchell*, 473 N.W.2d at 2.

across the street, and the boy's beating ensued.[129] Mitchell maintained that he did not cross the street or participate in the beating.[130]

Todd Mitchell was convicted of being a party to the crime of aggravated battery after a jury trial in the Circuit Court for Kenosha County.[131] That offense usually carries a maximum sentence of two years' imprisonment.[132] However, because the jury found that Mitchell had intentionally selected the victim because of the boy's race, the maximum sentence was increased to seven years' imprisonment under section 939.645 of the Wisconsin statutes.[133] That section increases the maximum penalty for a criminal offense when the defendant "[i]ntentionally selects the person against whom the crime . . . is committed . . . because of the race, religion, color, disability, sexual orientation, national origin or ancestry of that person."[134] The circuit court sentenced Mitchell to four years in

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129 *Mitchell*, 113 S. Ct. at 2196.

130 Brief for Respondent at 1, *Mitchell* (No. 92-515) [hereinafter Respondent's Brief]. Indeed, testimony indicated that he told Reddick's assailants to stop, that he flagged down police and directed them to the injured boy, that he appeared voluntarily at the police station to talk to officers, and that he regretted pointing Reddick out to the group. *Id.*

131 *Mitchell*, 113 S. Ct. at 2196.

132 WIS. STAT. ANN. §§ 940.19(1m), 939.50(3)(e) (West 1982 & Supp. 1993).

133 *Mitchell*, 113 S. Ct. at 2196.

134 WIS. STAT. ANN. § 939.645 (West 1982 & Supp. 1993). At the time of Mitchell's trial, this penalty-enhancement statute provided:

> (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, religion, color, disability, sexual orientation, national origin or ancestry of that person or the owner or occupant of that property.
>
> (2)(a) If the crime committed under sub. (1) is ordinarily a misdemeanor other than a Class A misdemeanor, the revised maximum fine is $10,000 and the revised maximum period of imprisonment is one year in the county jail.
>
> (b) If the crime committed under sub. (1) is ordinarily a Class A misdemeanor, the penalty increase under this section changes the status of the crime to a felony and the revised maximum fine is $10,000 and the revised maximum period of imprisonment is 2 years.
>
> (c) If the crime committed under sub. (1) is a felony, the maximum fine prescribed by law for the crime may be increased by not more than $5,000 and the maximum period of imprisonment prescribed by law for the crime may be increased by not more than 5 years.
>
> (3) This section provides for the enhancement of the penalties applicable for the underlying crime. The court shall direct that the trier of fact find a special verdict as to all of the issues specified in sub. (1).
>
> (4) This section does not apply to any crime if proof of race, religion, color, disability, sexual orientation, national origin or ancestry is required for a conviction for that crime.

prison.[135]

After the circuit court denied his request for post-conviction relief, Mitchell appealed his conviction and sentence to the Wisconsin Court of Appeals.[136] Mitchell argued that the penalty-enhancement statute is overbroad and vague and thus violates the First Amendment.[137] The appellate court rejected Mitchell's arguments and affirmed his conviction and sentence.[138]

Mitchell then appealed to the Supreme Court of Wisconsin, which reversed the court of appeals and remanded to the circuit court for resentencing.[139] The court, relying on *R.A.V. v. City of St. Paul*,[140] held that Wisconsin's penalty-enhancement statute violates the First Amendment by impermissibly punishing thought deemed offensive by the legislature. The court rejected the state's argument that the statute targets only the nonexpressive conduct of intentional victim selection.[141] The court reasoned that, since the battery of Reddick was already punished by the battery statute, all that remained for the hate crime statute to punish was Mitchell's motive or thought.[142] Punishing thought is not permitted under the First Amendment.[143] The court also reasoned that although certain an-

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Paragraph (1)(b) was revised in 1992 to read:

Intentionally selects the person against whom the crime under par. (a) is committed or selects the property that is damaged or otherwise affected by the crime under par. (a) in whole or in part because of the actor's belief or perception regarding the race, religion, color, disability, sexual orientation, national origin or ancestry of that person or the owner or occupant of that property, whether or not the actor's belief or perception was correct.

135 *Mitchell*, 113 S. Ct. at 2196.

136 *Id.* at 2197.

137 *Mitchell*, 473 N.W.2d at 3-6. Overbroad statutes are invalid under the First Amendment. A statute is overbroad when a person may refrain from protected activity because the statute in question could be interpreted to impose criminal sanctions on the protected activity. *Gooding v. Wilson*, 405 U.S. 518 (1972) (invalidating statute prohibiting the use of "opprobrious" or "abusive" language "tending to cause a breach of the peace"). Vague statutes are invalid because they do not provide fair warning to a reasonable person what actions may violate the statute. *Grayned v. Rockford*, 408 U.S. 104, 108-09 (1972) (upholding statute prohibiting disturbing the peace in the vicinity of a school). Although Mitchell also made a Fourteenth Amendment vagueness claim, the court of appeals held that such a claim was not a challenge to the constitutionality of the statute on its face. *Mitchell*, 473 N.W.2d at 3. The court deemed the Fourteenth Amendment claim waived and therefore did not address it. *Id.*

138 *Mitchell*, 473 N.W.2d at 3-6.

139 State v. Mitchell, 485 N.W.2d 807, 807-17 (Wis. 1992).

140 112 S. Ct. 2538 (1992). *See supra* notes 79-91 and accompanying text.

141 *Mitchell*, 485 N.W.2d at 811-12.

142 *Id.* at 812.

143 *Id.* at 813-16. Justice Abrahamson argued in dissent that the "tight nexus between the selection of the victim and the underlying crime" obviated fears that the defendant was being punished for his thought. *Id.* at 818 (Abrahamson, J., dissenting). Similarly, Justice Bablitch argued in dissent that the statute punished not speech, but the act of

tidiscrimination laws involving similar biased motives, such as those under Title VII of the Civil Rights Act of 1964, have long been held constitutional on the basis that such laws target *objective* acts, the Wisconsin statute targets the defendant's *subjective* thoughts and ideas.[144] Moreover, the court found the statute overbroad in that it was likely to have a chilling effect on the speech of those who have reason to fear that their words might be used as evidence during a prosecution for a hate crime.[145]

The Supreme Court of the United States granted certiorari[146] to decide whether the First and Fourteenth Amendments prohibit a state from providing enhanced penalties for crimes where the offender selects the victim because of the victim's race, color, religion, disability, sexual orientation, national origin, or ancestry.[147]

IV. THE SUPREME COURT OPINION

The Supreme Court reversed the Wisconsin high court in a unanimous decision written by Chief Justice Rehnquist.[148] The Court's opinion addressed three issues. First, the Court considered its authority to question the Wisconsin high court's construction of the statute.[149] Second, the Court explored whether the statute permissibly targeted nonexpressive conduct or impermissibly targeted expression.[150] Finally, the Court looked at whether the statute was overbroad.[151]

The Court dispatched the issue of statutory construction quickly. Although the Court is bound by a state supreme court's construction of the state's statute,[152] the Court found that the Wisconsin high court had not actually construed the statute.[153] The Court held that it was bound by a state supreme court's construction

selecting a victim from certain protected classes. *Id.* at 820 (Bablitch, J., dissenting). The defendant's speech is merely used as evidence of his intent to commit this act of selection. *Id.* (Bablitch, J., dissenting).

144 *Id.* at 817. Justice Bablitch argued that subjective motive is important in antidiscrimination laws. *Id.* at 821-23 (Bablitch, J., dissenting). An employer may refuse to hire someone for a variety of motives, many of which are legal. *Id.* at 822 (Bablitch, J., dissenting). However, when the motive is to discriminate against a member of a certain group, the refusal to hire becomes illegal. *Id.* (Bablitch, J., dissenting).

145 *Id.* at 816.

146 Wisconsin v. Mitchell, 113 S. Ct. 810 (1992).

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

148 *Id.*

149 *Id.* at 2198-99.

150 *Id.* at 2199-2201.

151 *Id.* at 2201.

152 *See, e.g.*, Terminiello v. Chicago, 337 U.S. 1, 4 (1949).

153 *Mitchell*, 113 S. Ct. at 2198.

of a statute only when that construction consisted of "defining the meaning of a particular statutory word or phrase."[154] Since the Wisconsin court looked only to the intent and effect of the statute and not to the meaning of its terms,[155] the Supreme Court was not bound by the lower court's analysis and holding.[156]

The Court next addressed the question of whether the statute targets expression. The state argued that the penalty-enhancement statute in Mitchell's case punished the conduct of physical violence.[157] The Court found that such conduct is not expressive.[158] Citing *Roberts v. United States Jaycees*,[159] the Court reasoned that the harm brought on by physical violence obviates regarding violent conduct as expressive.[160]

This finding was not dispositive, however. The Court noted that, had Mitchell been convicted of a battery not tinged with bias, he could not have received the extra two years on his sentence.[161] Thus, the Court found that Mitchell received the extra time on his sentence solely for his discriminatory motive.[162]

Mitchell argued that imposing extra punishment for his motive violated his First Amendment rights.[163] Mitchell contended that punishing motive amounts to punishing thought and pointed to precedent holding that punishing thought is impermissible under the First Amendment.[164] In particular, Mitchell argued that *R.A.V.* stands for the proposition that even reprehensible, racist thought may not be singled out for punishment.[165]

The Court rejected Mitchell's argument. The Court reasoned that the caveats against punishing thought do not apply to cases of criminal sentencing, of which the Court found Mitchell's an exam-

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154 *Id.*

155 State v. Mitchell, 485 N.W.2d 807, 813 (Wis. 1992).

156 *Mitchell*, 113 S. Ct. at 2198-99.

157 *Id.* at 2199.

158 *Id.*

159 468 U.S. 609, 628 (1984). For a more detailed discussion of *Roberts*, *see supra* notes 52-54 and accompanying text.

160 *Mitchell*, 113 S. Ct. at 2199.

161 *Id.*

162 *Id.*

163 *Id.* *See also* Respondent's Brief at 6-36, *Mitchell* (No. 92-515).

164 Respondent's Brief at 6-7 (citing Wooley v. Maynard, 430 U.S. 705, 714-15 (1977) (holding that state cannot criminally punish residents who refuse to display state motto on automobile license plates); Abood v. Detroit Bd. of Educ., 431 U.S. 209, 234-35 (1977) (holding that government employees not represented by a labor union may not be compelled to make contributions to that union, because such unions often engage in political lobbying with which the employee may disagree)).

165 *Id.* at 7-8 (citing R.A.V. v. City of St. Paul, 112 S. Ct. 2538 (1992)). *See supra* notes 79-91 and accompanying text for a more thorough discussion of *R.A.V.*

ple.[166] The Court found that, under statutory sentencing schemes, reprehensible motives often garner the offender a stiffer sentence.[167] By way of example, the Court pointed out that murder for hire often receives a more severe penalty than does murder committed for more "mundane" reasons.[168] Still, the Court emphasized that the defendant's motives or beliefs must be relevant to the crime at hand for them to be admissible during sentencing; in so doing, the Court likened Mitchell's case to *Barclay v. Florida*, but distinguished it from *Dawson v. Delaware*.[169] The Court also dismissed Mitchell's contention that *Barclay* and *Dawson*, which dealt with whether the defendant should receive the death penalty, were distinguishable from *Mitchell*, a statutory penalty-enhancement case.[170] The Court noted that death is "the most severe 'enhancement' of all."[171] In addition, the Court pointed out that biased motives are also punished by federal and state antidiscrimination laws.[172]

The Court also distinguished *Mitchell* from *R.A.V.* The Court reasoned that the statute at issue in Mitchell looks at motive in order to regulate non-expressive conduct, but the ordinance in *R.A.V.* simply regulated expression.[173]

The greater harms inflicted by bias-motivated crimes also justify singling them out for punishment, the Court found.[174] Crimes motivated by bias "are more likely to provoke retaliatory crimes, inflict distinct emotional harms on their victims, and incite community unrest."[175]

The third issue addressed by the Court was that of overbreadth. The Court quickly dismissed Mitchell's argument that the Wisconsin

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166 *Mitchell*, 113 S. Ct. at 2199.

167 *Id.* (citing Payne v. Tennessee, 111 S. Ct. 2597 (1991); Tison v. Arizona, 481 U.S. 137 (1987); Williams v. New York, 337 U.S. 241 (1949)). *See supra* notes 92-98 and accompanying text for a discussion of these cases.

168 *Mitchell*, 113 S. Ct. at 2199 (citing ARIZ. REV. STAT. ANN. § 13-703(F)(5) (1989); FLA. STAT. § 921.141(5)(f) (Supp. 1992); MISS. CODE ANN. § 99-19-101(5)(f) (Supp. 1992); N.C. GEN. STAT. § 15A-2000(e)(6) (1992); WYO. STAT. § 6-2-102(h)(vi) (Supp. 1992)).

169 *Id.* *See supra* notes 92-98 and accompanying text for a discussion of *Barclay* and *Dawson*.

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

171 *Id.*

172 *Id.* (citing Roberts v. United States Jaycees, 468 U.S. 609 (1984); Hishon v. King & Spalding, 467 U.S. 69 (1984) (holding Title VII antidiscrimination laws applicable to a law firm); Runyon v. McCrary, 427 U.S. 160 (1976)). *See supra* notes 52-54 and accompanying text for a discussion of *Roberts* and *Runyon*.

173 *Mitchell*, 113 S. Ct. at 2200-01. For a discussion of *R.A.V.*, *see supra* notes 79-91 and accompanying text.

174 *Mitchell*, 113 S. Ct. at 2201.

175 *Id.*

statute is overly broad.[176] The Court found implausible the contention that one already predisposed to expressing bigoted opinions would suppress those opinions for fear they would be brought up during a prosecution under the penalty-enhancement statute.[177] The Court reasoned that the nexus between the bigoted words and the possible subsequent prosecution was too loose.[178] Moreover, the Court noted that the admissibility of evidence in criminal trials is governed by enough standards of relevancy and reliability to assuage worry in this scenario.[179]

V. ANALYSIS

Mitchell was incorrectly decided. The Court's holding hinges upon two questionable findings. First, the Court found that the Wisconsin penalty-enhancement statute in Mitchell's case punished the nonexpressive conduct of physical violence.[180] This Note argues, however, that the statute did punish Mitchell's expression. If so, precedents ignored by the Court become controlling and lead to the conclusion that Wisconsin's approach violated the First Amendment. Second, the Court found Mitchell's case analogous to cases which—although they did not punish expression—did hold a criminal defendant's expressive activity admissible in procedures to determine the severity of sentence.[181] *Mitchell*, however, is distinguishable from those cases on the grounds that *Mitchell* dealt with a penalty enhanced beyond the normal statutory range and the other cases did not.

A. THE WISCONSIN STATUTE IMPERMISSIBLY PUNISHES EXPRESSION

Mitchell's conduct may be characterized in two ways as expression protected by the First Amendment. First, one can characterize him as having been engaged in speech, which is entitled to the greatest protection under the amendment. Although Mitchell's speech advocated violence and thus could have been regulated under the amendment, Wisconsin's regulation went too far in that it was not content-neutral. Alternatively, one can characterize Mitchell as having been engaged in expressive conduct, which is also pro-

176 *Id.* at 2201-02.
177 *Id.*
178 *Id.*
179 *Id.* (citing Haupt v. United States, 330 U.S. 631 (1947); Price Waterhouse v. Hopkins, 490 U.S. 228 (1989); Street v. New York, 394 U.S. 576 (1969)). For a discussion of these cases, *see supra* notes 61-74 and accompanying text.
180 *See supra* notes 157-60 and accompanying text.
181 *See supra* notes 161-72 and accompanying text.

tected, albeit to a lesser extent, under the First Amendment. Mitchell, it can be argued, was engaged in the expressive conduct of selecting a crime victim from one of certain, enumerated groups. Such conduct, contrary to the State's arguments, does not pose special dangers warranting state regulation. Moreover, Wisconsin's attempt to regulate this conduct directly and unnecessarily restricts free expression.

1. Mitchell Was Engaged in Speech, and Wisconsin Impermissibly Regulated the Content of That Speech

A key holding of the Court—that the conduct at issue under the Wisconsin statute was physical violence—is debatable. The Court accepted too easily the State's contention that the statute targets, and that Mitchell was engaged in, only nonexpressive conduct. Specifically, the Court characterized the statute's target and Mitchell's conduct as the "physical assault" of the victim.[182] Two considerations weigh against this holding. First, Mitchell's conviction under the penalty enhancer appears to have resulted solely from his speech. In addition, First Amendment doctrine rejects criminal conviction based solely on the defendant's speech.

The prosecution must show two elements to secure a conviction under Wisconsin's penalty-enhancement statute. First, it must show that the defendant committed a predicate offense.[183] Second, it must show that this offense was visited upon the victim because of the victim's membership in a certain group.[184] The jury apparently convicted Mitchell of the predicate offense of aggravated battery as a party to the crime solely on the basis of his words. Mitchell maintained that he did not take part in the "physical assault," that he did not even cross to the victim's side of the street.[185] Under section 939.05 of the Wisconsin statutes, "[w]hoever is concerned in the commission of a crime is a principal and may be charged with and convicted of the commission of the crime although he did not directly commit it."[186] A person may be "concerned in the commis-

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182 *Mitchell*, 113 S. Ct. at 2199. *See supra* notes 157-60 and accompanying text.

183 WIS. STAT. ANN. § 939.645(1)(a) (West 1982 & Supp. 1993).

184 *Id.* § 939.645(1)(b).

185 Respondent's Brief at 1, Wisconsin v. Mitchell, 113 S. Ct. 2194 (1993) (No. 92-515).

186 *See* WIS. STAT. ANN. § 939.05 (West 1982). The statute reads, in full:

> (1) Whoever is concerned in the commission of a crime is a principal and may be charged with and convicted of the commission of the crime although he did not directly commit it and although the person who directly committed it has not been

sion of the crime" if he "advises . . . another to commit it."[187] Since Mitchell suggested that his comrades commit the battery upon Reddick, the jury could have found him guilty of aggravated battery as a party to the crime—the first element required under the penalty-enhancement statute—solely because of this advice.[188]

Moreover, the only evidence available to establish the second element consisted of Mitchell's words. Since there was no other evidence offered of Mitchell's intent to commit a racial crime, his selection of a white person *qua* white person as the victim was evident only from what he said to his group. Thus, the fact that one element *could have been* proven solely by Mitchell's words and that the second element undeniably *was* proven solely by his words leads to the conclusion that Mitchell could have been convicted solely because of his words.

The First Amendment, however, forbids statutes from producing a criminal conviction solely on the basis of protected speech. In *Street v. New York*,[189] the Court established a two-prong test to determine when a statute impermissibly punishes speech. In *Street*, the Court held that a criminal conviction and the statute engendering it must be invalidated: (1) if words could have been an independent cause of the defendant's conviction, and (2) if a conviction for uttering such words violates the Constitution.[190]

On the first prong, Mitchell's case is analogous to *Street*. While Street could have been convicted under the New York statute for either physical actions or speech against the flag, Mitchell could have been convicted under the Wisconsin penalty-enhancement

convicted or has been convicted of some other degree of the crime or of some other crime based on the same act.

(2) A person is concerned in the commission of the crime if he:

(a) Directly commits the crime; or

(b) Intentionally aids and abets the commission of it; or

(c) Is a party to a conspiracy with another to commit it or advises, hires, counsels or otherwise procures another to commit it. Such a party is also concerned in the commission of any other crime which is committed in pursuance of the intended crime and which under the circumstances is a natural and probable consequence of the intended crime. This paragraph does not apply to a person who voluntarily changes his mind and no longer desires that the crime be committed and notifies the other parties concerned of his withdrawal within a reasonable time before the commission of the crime so as to allow the others also to withdraw.

187 *Id.* § 939.05(2)(c).

188 Of course, the jury's reasoning in finding Mitchell guilty as a party to the crime is unknown. For instance, the jury could have found Mitchell guilty as a party to the crime if he "directly commit[ted]" the crime, that is, if he actually battered Reddick. *See* WIS. STAT. ANN. § 939.05(1) & (2)(a) (West 1982). The point here, however, is that Mitchell *could* have been convicted solely for his words.

189 394 U.S. 576 (1969).

190 *Id.* at 585. For a more thorough discussion of *Street*, see *supra* notes 61-67 and accompanying text. *See also* Stromberg v. California, 283 U.S. 359 (1931).

statute for either committing or advocating violence against Reddick. Although the Court in *Street* implied that the use of a defendant's words as evidence in securing a conviction might be permissible if the words were used "solely" to show intent,[191] this exception should not apply to *Mitchell*. While in *Street* the defendant's words could have been used to show his intent to physically deface the flag—an offense for which yet more evidence would have been required for conviction—Mitchell's words could have been used only to show his intent to select a white victim—an offense for which no further evidence was required for conviction.[192] Thus, Mitchell passes the first prong of *Street*.[193]

Of course, for Mitchell's conviction to be overturned, it must also meet the second prong of the *Street* test: that a conviction for uttering the words spoken by the defendant would violate the First Amendment.[194] This prong was easily met in *Street*, because the First Amendment protects speech against the flag.[195]

Mitchell's chances of passing the second prong, however, appear slimmer. In *Brandenburg v. Ohio*,[196] the Court held that the First Amendment does not protect speech that advocates and is likely to incite imminent violence. Mitchell's suggestion that the group "move on" Reddick—given the agitated state of his comrades and the arrival of an "appropriate" and vulnerable target—was much

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191 *Street*, 394 U.S. at 590.

192 *See also* Haupt v. United States, 330 U.S. 631 (1947); Price Waterhouse v. Hopkins, 490 U.S. 228 (1989). Both cases are discussed *supra* notes 68-75 and accompanying text.

193 A case similar to *Mitchell*, Ohio v. Wyant, 113 S. Ct. 2954 (1993), also involved only speech, rather than nonexpressive conduct. Without opinion, the Court vacated the judgment in *Wyant* and remanded the case to the Ohio Supreme Court "for further consideration in light of *Wisconsin v. Mitchell*." *Id.* *Wyant* involved four consolidated prosecutions under § 2927.12 of the Ohio Revised Code. *Id.*; State v. Wyant, 597 N.E.2d 450, 450-53 (Ohio 1992). Section 2927.12 provides that anyone who commits aggravated menacing, menacing, criminal damaging or endangering, criminal mischief, or certain types of telephone harassment "by reason of the race, color, religion, or national origin of another person or group of persons" will have the severity of that offense increased by one degree. *See* OHIO REV. CODE § 2927.12 (Baldwin 1990). Each of the four prosecutions in *Wyant* was predicated on a charge of aggravated menacing. *Wyant*, 597 N.E.2d at 450-51. Defendant Wyant, for instance, said, "[w]e didn't have this problem until those niggers moved in next to us. . . . I ought to shoot that black mother fucker. . . . I ought to kick his black ass," loudly enough to be heard by neighboring black campers who had reserved a campsite Wyant wanted and who had also complained to state park officials about Wyant's loud radio. *Id.* The black campers left before Wyant could act on his words. *Id.* Again, the Court appeared unconcerned that a defendant prosecuted under a penalty-enhancement statute was engaged solely in speech, not conduct.

194 *Street*, 394 U.S. at 585.

195 *Id.* at 590-94.

196 395 U.S. 444, 447 (1969). For a more thorough discussion of *Brandenburg*, see *supra* notes 57-60 and accompanying text.

more likely to result in violence than was the advocacy of the Klansman in *Brandenburg*.[197] Therefore, although Mitchell clears the first hurdle in the *Street* test, he seems to stumble on the second.

Mitchell's prospects improve, though, when one takes into account the Court's recent holding in *R.A.V. v. City of St. Paul*[198] that content-based regulation even of "low-value" expression is forbidden when the state has more reasonable alternatives. *Mitchell* is clearly analogous to *R.A.V.* The defendants in both cases were engaged in speech hitherto afforded no First Amendment protection: advocacy of imminent violence and fighting words, respectively. Both were punished under statutes that impermissibly regulated expression based on content. Indeed, the forbidden content overlapped in the areas of race, color, and religion, race being at issue in both cases.

Furthermore, the evils of viewpoint discrimination outlined in *R.A.V.* apply to the Wisconsin statute and support invalidating the statute on its face.[199] In addition to the category of "religion" discussed in *R.A.V.*, the categories of "disability" and "national origin or ancestry" present in the Wisconsin statute could confer an advantage upon certain offenders. While an offender who has chosen a handicapped person as a crime victim may receive a stiffer penalty in Wisconsin, a disabled person who commits a crime against a nonhandicapped person apparently would not be subject to an enhanced penalty. Aside from those afflicted with the most serious handicaps, it cannot be argued that the disabled are incapable of crime. Even a quadriplegic equipped with a voice-activated computer and modem could commit a computer-hacking offense or misappropriate funds from a bank account. Yet under the Wisconsin statute a handicapped person might not be subject to a more severe penalty, even if he selected his target out of jealous envy for "the

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197 Since the defendant's threats were spoken in a loud voice in *Wyant*, 597 N.E.2d at 450, they may have been meant more for the black campers to hear (and be intimidated and leave) than for his comrades to act on. Thus, Wyant's words could be construed as less likely to incite imminent violence than Mitchell's. Consequently, Wyant may also pass the second prong of the *Street* test, unless his words are construed as "fighting words"—"conduct that itself inflicts injury or tends to incite imminent violence"—under Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942). Such a construction seems plausible.

198 112 S. Ct. 2538 (1992). *See also supra* notes 79-91 and accompanying text.

199 The facts of *Mitchell* also illustrate the problem of viewpoint discrimination. Had someone else inflicted the same beating upon the victim for reasons not covered by the Wisconsin penalty-enhancement statute, the offender in that case could not have received the stiffer sentence. While some have argued that the crimes committed for bigoted reasons carry additional harms justifying the stiffer sentence, this argument is not immune to question. *See infra* notes 225-49 and accompanying text.

abled." Is not the same unreasoned reaction by the offender at work here? Moreover, as the American population becomes more and more homogeneous from the effects of acculturization and intermarriage of original immigrant nationalities, the Wisconsin statute confers special advantages upon those who retain obvious ethnic ties or "purity." For example, while a person without clear ties to any particular ethnic group may be punished more severely for targeting an ethnic white, such as a Pole or an Italian, an ethnic white may not be punished more severely for targeting another white because he is too homogeneous. Because Wisconsin has "no . . . authority to license one side . . . to fight free style, while requiring the other to follow Marquis of Queensbury rules,"[200] the state's hate-crime statute is impermissibly content- and viewpoint-restrictive under the standards of *R.A.V.*

2. *Mitchell's Expressive Conduct and the Attempt to Ban It*

The Court distinguished *R.A.V.* from *Mitchell* on the basis that the ordinance in *R.A.V.* regulated expressive conduct—cross burning—while the statute in *Mitchell* regulated nonexpressive conduct—physical violence.[201] This distinction is unconvincing. Assuming arguendo that Mitchell was not engaged in speech, he was nevertheless engaged in conduct expressive enough to warrant protection under the First Amendment.

For purposes of the penalty-enhancement statute, Mitchell's conduct consisted of selecting a crime victim. Although the penalty-enhancement statute is triggered by criminal conduct,[202] this conduct is already punishable under the statute governing that individual offense—in Mitchell's case aggravated battery.[203] Although the more celebrated First Amendment cases dealing with "conduct" have focused on physical conduct,[204] the Court has also deemed less apparent action, such as selection, to be conduct cognizable under

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200 R.A.V. v. City of St. Paul, 112 S. Ct. 2538, 2548 (1992).

201 Wisconsin v. Mitchell, 113 S. Ct. 2194, 2200-01 (1993).

202 WIS. STAT. ANN. § 939.645(1)(a) (West 1982 & Supp. 1993).

203 *Cf.* State v. Mitchell, 485 N.W.2d 807, 821 (Wis. 1992) (Bablitch, J., dissenting). Although disputing the majority's holding that the statute regulates thought, Justice Bablitch argued that the statute regulated the "conduct of selecting a victim *and* committing a crime against that victim because of his or her proffered status." *Id.* (Bablitch, J., dissenting) (emphasis added). The justice also admitted that "[t]he gravamen of the offense is selection." *Id.* (Bablitch, J., dissenting).

204 *See, e.g.*, United States v. O'Brien, 391 U.S. 367 (1960) (draft-card burning); Spence v. Washington, 413 U.S. 405 (1974) (affixing a peace symbol to a United States flag); Texas v. Johnson, 491 U.S. 397 (1989) (burning a United States flag).

the amendment.[205]

Regarding the conduct at issue under the hate-crime statute as physical violence would distinguish that statute radically from other penalty-enhancement regimes. Wisconsin has several other penalty enhancement statutes: section 939.63 (increasing penalty for a crime if the perpetrator possesses, uses or threatens to use a weapon), section 939.62 (increasing penalty for habitual criminal behavior), section 939.621 (increasing penalty for certain domestic abuse offenses), and section 939.634 (increasing penalty for committing a felony while wearing a bullet-proof garment).[206] One would not maintain that the conduct at issue in whether to apply, say, the bulletproof-vest penalty enhancer (§ 939.634) to a bank robbery is the robbery itself, which could have taken place without the vest. No, the conduct at issue would be the perpetrator's wearing vel non of the vest. Simply because the conduct at issue in the hate-crime statute is more difficult to conceptualize, this does not mean that it should be ignored. Rather, "precision of regulation must be employed."[207] The Court did not employ such precision, but instead ignored the distinction between battery and selection of a victim. Thus, Mitchell was engaged in the conduct of selecting a crime victim from certain limited categories.

Furthermore, Mitchell's conduct fell within the bounds of conduct regarded as expressive under the First Amendment. The Court outlined the three considerations that go into determining whether conduct is expressive in *Spence v. Washington*.[208] First, the context of the conduct must suggest that the conduct is expressive.[209] Second, the intent of the person or persons engaged in the conduct should be to communicate.[210] Third, the nature of the conduct should be communicative.[211]

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205 *See* NAACP v. Claiborne Hardware, Inc., 458 U.S. 886, 912-15 (1982) (finding that a boycott by blacks of white-owned stores constituted expressive conduct under the First Amendment); Roberts v. United States Jaycees, 462 U.S. 609, 628 (1984) (discrimination in club membership). Regarding this last example, bear in mind that the issue here is merely whether the conduct is *cognizable* under the First Amendment, not whether it is *protected* under the amendment. For a further discussion of these cases, *see supra* notes 51-54 and accompanying text.

206 WIS. STAT. ANN. §§ 939.62, 939.621, 939.63, 939.634 (West 1982 & Supp. 1993).

207 *Claiborne Hardware*, 458 U.S. at 916 (holding that violent conduct must be distinguished from non-violent protected, expressive conduct in determining tort liability for malicious interference with business arising from boycott).

208 418 U.S. 405 (1974). For a more thorough discussion of *Spence*, see *supra* notes 42-49 and accompanying text.

209 *Id.* at 410.

210 *Id.* at 410-11.

211 *Id.* at 409-10.

Mitchell's conduct meets the first prong of the *Spence* test. In *Spence*, the Court found that the broad, violent context of the American invasion of Cambodia and the shooting by National Guardsmen of Kent State University students suggested that defendant's placing a peace symbol on an American flag was expressive.[212] The context of Mitchell's conduct was more immediate and thus more indicative of the expressiveness of his actions. Mitchell's conduct took place not against the backdrop of events generally in the public eye, but on the canvas of his companions' heated discussion of, and indignation at, the racist events portrayed in the movie "Mississippi Burning." Selecting a crime victim, although certainly a crude mode of expression and not as mollifying as Spence's display of a peace symbol, also expressed indignation. "[I]n the surrounding circumstances the likelihood was great that the message would be understood."[213] Because Mitchell's conduct is inescapably expressive with respect to the members of his group—his immediate audience—it is therefore cognizable under the First Amendment.

In addition, Mitchell meets the second prong of the *Spence* test. Mitchell had an intent to communicate. Although Spence's intent to communicate via the flag display was itself expressed,[214] intent is often deduced from circumstances. Given the vigorous discussion by Mitchell's companions of the bigotry in the movie, it is reasonable to find that Mitchell intended to participate in this interchange by selecting Reddick. Asking the group whether they wanted to "move on some white people"[215] can also be viewed as an attempt to clarify the group's views so that he could formulate a response—that is, as evidence that he intended to communicate via his conduct.

Although Mitchell's chances of fulfilling *Spence*'s third prong may seem slim, the Court has previously viewed conduct such as selection to be communicative in nature. In *Roberts v. United States Jaycees*,[216] the Court found that gender-based discrimination in club membership was conduct that is "potentially expressive." Only the harms brought on by such discrimination—such as injuries to dignity and the deprivation of full participation in society—precluded the Court from holding that the conduct was actually expressive.[217]

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212 *Id.* at 410.

213 *Id.* at 411.

214 *Id.* at 408.

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

216 468 U.S. 609, 628 (1984).

217 *Id. See also* Runyon v. McCrary, 427 U.S. 160, 175-76 (1976) (holding that discrimination in school enrollment is not expressive conduct solely because it carries with it other harms).

However, no such harms attend the selection of a crime victim.[218] While some have argued that bias-motivated crimes stir up community unrest and cause the victim more emotional harm than "normal" crimes, these supposed harms do not justify impinging upon First Amendment interests.[219] Thus, nothing precludes Mitchell's conduct from being regarded as expressive, provided that it is similar in nature to the discrimination at issue in *Roberts*.[220]

Mitchell's conduct is analogous to that at issue in *Roberts*. The Court itself likened Mitchell's selection of Reddick to the discriminatory exclusion of some from certain circles, going so far as to cite *Roberts*.[221] Selecting a victim of crime and selecting a victim of discrimination are equally non-overt actions. While overt expressive acts, such as racist comments or pointing out the victim, may serve as evidence of the selection process, these parts do not add up to a whole.[222]

Once conduct passes the *Spence* test and is regarded as *expressive*

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218 *See infra* notes 225-49 and accompanying text.

219 *See infra* notes 225-49 and accompanying text.

220 *But see* Jonathan Selbin, *Bashers Beware: The Continuing Constitutionality of Hate Crime Statutes After R.A.V.*, 72 OR. L. REV. 157, 168-71 (1993) (comparing victim selection to prostitution, which was held not to be expressive conduct in *Arcara v. Cloud Books*, 478 U.S. 697 (1986)). *Arcara*, however, can be distinguished from *Mitchell* on the grounds that the prostitution took place in a context suggesting a motive to profit, not to communicate as in *Mitchell*.

221 Wisconsin v. Mitchell, 113 S. Ct. 2194, 2200 (1993). *See also* State v. Mitchell, 485 N.W.2d 807, 821-23 (Wis. 1992) (Bablitch, J., dissenting) (concluding that selecting a crime victim and discriminating under Title VII are analogous); Weinstein, *supra* note 79, at 13-15.

Moreover, the similarity of the process of selecting a crime victim and of selecting a discrimination victim, which has been regarded as expressive, is enough to show that Mitchell's conduct is also expressive. The object of the two selection processes is immaterial. As Justice Bablitch argued, one distinction between the penalty enhancer and antidiscrimination statutes offered by the Wisconsin Supreme Court majority—that the "antidiscrimination laws punish legal conduct plus bad motive and the enhancer punishes criminal conduct plus bad motive"—is meaningless. *Mitchell*, 485 N.W.2d at 823 (Bablitch, J., dissenting). Justice Bablitch pointed out that the majority offered no justification for this distinction because there is none. *Id.* (Bablitch, J., dissenting) ("Why is it permissible to punish motive when it is accompanied by legal conduct and impermissible to punish motive when it is accompanied by illegal conduct?").

222 Consider Justice Bablitch's reasoning:

> Admittedly, the conduct prohibited by the penalty enhancer statute can be proven by an extensive combination of facts that might include words uttered by a defendant. However, if words are used to prove the crime, the words uttered are not the subject of the statutory prohibition; rather, they are used only as circumstantial evidence to prove the intentional selection.

Mitchell, 485 N.W.2d at 822 (Bablitch, J., dissenting). *See also* Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (1989) (holding that sexist remarks do not prove employment discrimination, but that coupling such remarks with reliance on gender in employment decisions does prove discrimination).

conduct, it must confront another test. Regulation of expressive conduct must meet the four-prong test set out in *United States v. O'Brien*.[223] The regulation of Mitchell's conduct does not meet all these requirements.

The Wisconsin penalty enhancement statute does meet the first requirement. Matters concerning public safety would seem to be well within the range of the state's constitutional police powers.[224]

The Wisconsin statute, however, does not satisfy the second element of the *O'Brien* test by furthering a significant governmental interest.[225] In *Mitchell*, the Court held that the Wisconsin hate-crime statute was justified by the state's interest in preventing the "greater individual and societal harm" brought on by selecting a victim from one of the categories enumerated in the statute.[226] However, the statute's efficacy in curtailing these harms is questionable.[227]

The Court determined that crimes motivated by bigotry are more likely to result in violent retaliatory crimes.[228] Two points undermine this finding. First, although Mitchell's case involved selection based on race—and events such as the Los Angeles riots perhaps indicate that racial violence can trigger more of the same—the Wisconsin statute also protects classes which seem especially unlikely to engage in retaliatory violence. For example, the statute prohibits selection based on religion.[229] Yet many religious people—Christians, for example, given Christ's admonition to turn the other cheek—would be unlikely to retaliate. The statute also prohibits selection based on disability.[230] But even if so inclined, many handicapped individuals simply lack the ability to retaliate.[231]

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223 391 U.S. 367 (1968). For a more thorough discussion of *O'Brien*, see *supra* notes 76-78 and accompanying text.

224 The constitutional power present in *O'Brien* was the power to raise and support armies as enumerated in the Constitution. *Id.* at 377.

225 The Court held in *O'Brien* that the government's interest in a suitably administered selective service system justified the prohibition of draft-card burning. *Id.* at 378-80.

226 Wisconsin v. Mitchell, 113 S. Ct. 2194, 2201 (1993).

227 *See, e.g.*, Gellman, *supra* note 79, at 387 (arguing that unless hate-crime statutes are written to protect only minorities, those statutes may in fact be used further to penalize members of those minorities).

228 *Mitchell*, 113 S. Ct. at 2201. *See also* State v. Plowman, 838 P.2d 558, 564 (Or. 1992). The issue here is not one of immediate retaliation by the listener, as in "fighting words" cases, but one of subsequent criminal retaliation by members of the victim's broad group, e.g. race.

229 WIS. STAT. ANN. § 939.645(1)(b) (West 1982 & Supp. 1993).

230 *Id.*

231 The slope becomes even more slippery when one considers the other classifications that have been or are contemplated to be protected by bias-crime statutes. Oregon's bias-crime data collection statute, for instance, covers such categories as marital status, political affiliation, association with or opposition to labor unions, age, and eco-

Even if some of the groups covered by the statute would retaliate, the important fact is that First Amendment jurisprudence does not recognize the possibility of violent reaction as a legitimate concern in regulating expression. After rejecting an amorphous class of fighting words in *R.A.V.*, the Court in *Mitchell* stretches the definition of fighting words to the breaking point. Fighting words are not afforded First Amendment protection because they "tend to incite an immediate breach of the peace."[232] Similarly, advocacy of violence gets no First Amendment protection when it tends to incite imminent violence.[233] Since advocating violence that may result in the more distant future is protected,[234] it is unclear why expression similar to fighting words—such as is found in *Mitchell*—should not be protected when it threatens to bring about retaliatory violence only in the remote future. Even if statistical evidence were to show that violence is likely to result from biased victim selection, First Amendment protections would not be weakened.[235] Thus, the fear of violence resulting from biased victim selection is not a sufficient ground on which to justify regulating such selection.[236]

The Court in *Mitchell* further held that the proscribed categories of victim selection outlined by the Wisconsin statute were justified to prevent the infliction of "distinct emotional harms" upon the selected victims.[237] Again, the Court misconstrued sound policy and ignored its own precedents. Basically the argument is that the victim of a crime "suffer[s] greater emotional harm" when she is selected for one of the reasons outlined in the statute than when she is selected for any other reason.[238] This supposition is dubious at

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nomic and social status. OR. REV. STAT. § 181.550 (1991). Would the American Association of Retired Persons rise up in violent revolt after the beating of a senior citizen?

232 Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942). *See also* Cantwell v. Connecticut, 310 U.S. 296, 309 (1940) (holding that only direct personal insults or invitations to fight constitute fighting words).

233 Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).

234 *Id.*

235 American Bookseller's Ass'n. v. Hudnut, 771 F.2d 323, 329 (7th Cir. 1985), *aff'd without opinion*, 475 U.S. 1001 (1986) (holding that evidence indicating that violence against women ensued from pornography could not justify regulation of pornography).

236 *See also* Forsyth County v. Nationalist Movement, 112 S. Ct. 2395 (1992) (holding that government's fears of ensuing violence do not justify variable fee for parade permits); Collin v. Smith, 578 F.2d 1197, 1263 (7th Cir. 1978), *cert. denied*, 439 U.S. 916 (1978) (finding that fears of retaliatory violence do not justify ordinance "prohibiting the dissemination of materials which would promote hatred toward persons on the basis of their heritage").

237 Wisconsin v. Mitchell, 113 S. Ct. 2194, 2201 (1993) (citing Brief for Petitioner at xiii, 26-27, Wisconsin v. Mitchell, 113 S. Ct. 2194 (1993) (No. 92-515) [hereinafter Petitioner's Brief] (citing Weinstein, *supra* note 79 *passim*)).

238 *Id.*

best. Proponents of this view admit that it is based on nothing more than a personal "intuition" that crimes of bigotry are more reprehensible than other crimes, and on society as a whole sharing, whether reasonably or not, this intuition.[239] One could argue in response that all crimes are dehumanizing since they reduce the victim to merely one characteristic of his multi-faceted identity. For example, to different people, a young man can "be" different things: a son (to his mother), a student (to his teacher), an athlete (to his coach), a boyfriend (to his sweetheart). He can also be a mere target to a criminal, a "nigger" to a white bigot, or a too-fancy dresser to someone envious. Attacking this person simply to get his trendy jacket[240] seems no less senseless than attacking him because he is black. In the former case, one wonders whether the victim would share the "intuition" that bias crime is worse.[241]

More importantly, though, First Amendment precedent precludes the kind of argument advanced by the Court. Negative emotional reaction to expressive conduct does not justify the regulation of that expression. In *Texas v. Johnson*, for instance, the Court held that the legitimate governmental interest in preventing offense caused by flag burning did not justify prohibiting what is obviously expression.[242]

The Court also cited the tendency of biased victim selection to

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239 Weinstein, *supra* note 79, at 9. Weinstein himself admits that these "justifications . . . are . . . subjective and unverifiable." *Id.* at 10. *See also* JEFFRIE G. MURPHY, RETRIBUTION, JUSTICE AND THERAPY 223-49 (1979); Michael S. Moore, *The Moral Worth of Retribution*, *in* RESPONSIBILITY, CHARACTER AND THE EMOTIONS 179, 179-219 (Ferdinand D. Schoeman ed., 1987); H.L.A. HART, LAW, LIBERTY AND MORALITY 6 (1963) (all arguing that moral intuition has long been regarded as a proper factor in determining the severity of punishment). *But see* Richard Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133, 136-43 (1982) (arguing that racism gives rise to mental illness, psychosomatic disease, and drug and alcohol abuse in its victims); Mari Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2336-37 (1989) (noting that racist propaganda gives rise to post-traumatic stress, hypertension, psychosis, and suicide in its victims).

240 *See, e.g., Girl to be Sentenced for Misleading Police in Jacket Slaying*, UPI, Feb. 12, 1993, *available in* LEXIS, News Library, US File.

241 Moreover, are all rapes hate crimes under a statute that enhances penalties for selecting a victim based on gender? An affirmative answer would indicate that the offender should be, in effect, triply punished. That is, rapists already face enhanced penalties insofar as rape is subject to stiffer punishment than other forms of battery. Subjecting rapists to hate-crime statutes would subject them to a second level of enhancement. *See* Selbin, *supra* note 220, at 160.

242 491 U.S. 397, 410-12 (1989). *See also* Boos v. Barry, 485 U.S. 312, 320 (1988) (overturning ordinance forbidding display near foreign embassies of signs tending to insult governments represented by those embassies); Barnes v. Glen Theatre, 111 S. Ct. 2456, 2470-71 (1991) (upholding ordinances banning nude dancing because ban was not based on audience reaction to the dancing).

"incite community unrest" as justification for its holding. "Community unrest" is in large part a corollary of the individual victim's reaction and is thus subject to the criticisms just advanced. That is, distinguishing between victims' emotional reactions is too subjective and is also a questionable endeavour from certain victims' standpoints. Moreover, asserting that the groups enumerated in the penalty-enhancement statute experience unrest when one or more of their members is targeted does not distinguish these groups from any other conceivable groups. The question is basically one of publicity or notoriety; the same *in terrorem* effect is present. If one black hears of a crime committed on a second because he was black, the first may be concerned and take precautions. If one contemplating visiting Miami learns of the recent spate of crime there directed at tourists,[243] he reacts similarly, as does one who hears about a rash of rapes[244] or fires[245] in his or her neighborhood.

The court cited the previous three policy concerns only as examples of possible justifications for Wisconsin's statute;[246] other concerns were before the Court and are likewise illusory. The state, for instance, also maintained that the need to deter hate crimes was enhanced by the rising frequency of such crimes.[247] This rising frequency is not indisputable.[248] The state's assertion that bias crime offenders are more likely to be recidivists[249] is also without empirical basis.

The third element of the *O'Brien* test posits that a regulation of expressive conduct is justified only if the regulation is unrelated to the suppression of free expression.[250] The Wisconsin statute does not satisfy this requirement, either. Not only are the interests allegedly advanced by the Wisconsin statute related to the suppression of expression, they are inextricably connected to such suppression.

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243 *See, e.g.*, Tony Lofaro, *Miami Violence: Area Travellers Still Cautious About Florida, Say Agents*, OTTAWA CITIZEN, Oct. 2, 1993, at C8 (caution exercised by Canadian travellers).

244 *See, e.g.*, Robert Blau, *Rapes Put North Side on Alert*, CHI. TRIB., Aug. 3, 1990, Chicagoland section, at 2.

245 *See, e.g.*, Jerry Thornton, *Group Seeks to Ease Fears in Wake of Garage Fires*, CHI. TRIB., May 21, 1993, Chicagoland section, at 4.

246 Wisconsin v. Mitchell, 113 S. Ct. 2194, 2201 (1993).

247 Petitioner's Brief at 23, *Mitchell* (No. 92-515).

248 *See supra* notes 13-15 and accompanying text. Also, statutes such as Wisconsin's apparently had no effect on the incidence of hate crimes. Of states with laws similar to Wisconsin's, 38% reported an increase in anti-Semitic violence, 45% a decrease, and 17% no change. ANTI-SEMITIC AUDIT, *supra* note 14, at 3. Of states without such laws, 30% reported an increase, 48% a decrease, and 22% no change. *Id.* at 10-11, 42, 44, 45.

249 Petitioner's Brief at 24-25, *Mitchell* (No. 92-515).

250 United States v. O'Brien, 391 U.S. 367, 377 (1968).

Two of the interests advanced involved preventing emotional harm to both the victim and other members of his category,[251] and the Court has held that the " 'emotional impact of' [expressive conduct] on its audience is not a 'secondary effect' unrelated to the content of the expression itself."[252] The very message that a victim has been selected because of, say, race is what allegedly brings on the sadness and fear the Wisconsin statute aims to prevent. Similarly, this message is also what kindles the desire for revenge that the statue is also supposed to prevent.[253] Thus, Wisconsin's statute misses the third hurdle of *O'Brien*.

When a statute stumbles on this hurdle, it must meet the highest level of constitutional scrutiny.[254] This higher level has been outlined in *Boos v. Barry*[255] and, more recently, *Texas v. Johnson*.[256] The Wisconsin penalty-enhancement statute, to be upheld, must be "necessary to serve a compelling state interest," and it must be "narrowly drawn to achieve that end."[257] However, since the Wisconsin statute does not even advance a *substantial* state interest,[258] it cannot advance a compelling state interest. Thus, the statute fails to satisfy the strict scrutiny required under established First Amendment principles.

The statute likewise is impaled on the fourth and final prong of *O'Brien*. To pass the *O'Brien* test, a statute's "incidental restriction on alleged First Amendment freedoms" must be "no greater than is essential to the furtherance" of the government's interest.[259] The restriction on expression elicited by the Wisconsin statute is hardly "incidental." Rather, the state relies solely on the defendant's expression to trigger the penalty-enhancement statute, and this reliance leads directly to a punishment or restriction of free expression.[260] Moreover, the government's interests, questionable as they are,[261] could be advanced by less restrictive means, such as using the defendant's expression as an aggravating circumstance in

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251 *See supra* notes 225-49 and accompanying text.

252 Texas v. Johnson, 491 U.S. 397, 412 (1989) (flag burning) (citing Boos v. Barry, 485 U.S. 312, 321 (1988) (displaying signs)).

253 *See supra* notes 225-49 and accompanying text.

254 Boos v. Barry, 485 U.S. 312, 321-29 (1988).

255 *Id.*

256 491 U.S. at 412-20.

257 *Boos*, 485 U.S. at 321 (citing Perry Educ. Ass'n. v. Perry Local Educators' Ass'n., 460 U.S. 37, 45 (1983)).

258 *See supra* text accompanying notes 224-49.

259 United States v. O'Brien, 391 U.S. 367, 377 (1968).

260 *See supra* notes 182-249 and accompanying text.

261 *See supra* notes 224-49 and accompanying text.

sentencing.[262] Therefore, the statute fails the *O'Brien* test and should be deemed unconstitutional.[263]

B. PENALTY ENHANCEMENT VERSUS TRADITIONAL SENTENCING

The Court erred in not recognizing Mitchell's actions as expressive conduct, and should have overturned his conviction under the penalty-enhancement statute and voided the statute itself. Instead, the Court focused on precedents dealing with the admissibility of a defendant's past expression during his sentencing. That is, the Court analogized Mitchell's case to that of *Barclay v. Florida*, in which it was held that a black man's advocacy of violence against whites was evidence admissible in his sentencing for murder.[264] The Court rejected Mitchell's attempt to distinguish *Barclay* on the grounds that *Barclay* (which dealt with whether the defendant should receive the death penalty) did not involve a penalty-enhancement statute. The Court found that the question of "whether [Barclay] should be sentenced to death" was a question involving "the most severe 'en-

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262 *See infra* notes 289-91 and accompanying text.

263 It also bears noting that the legislative history of Wisconsin's penalty-enhancement statute indicates an intent to regulate expression. The two incidents first cited by the measure's sponsor as motivating factors in introducing the bill were incidents of expressive conduct: the spray-painting of racial epithets on a black person's home; and the painting of swastikas on a synagogue. *Senate Judiciary Committee Public Hearing on S.B. 442* (1988) (statement of State Sen. Mordecai Lee), cited in NAACP Brief at 41-42, 8a-9a, Wisconsin v. Mitchell, 113 S. Ct. 2194 (1993) (No. 92-515). *See also Hate-crime Crackdown Urged*, WIS. STATE JOURNAL, January 8, 1988, § 4, at 3. The two incidents were also emphasized by others who testified in support of the measure. *Id.* at 1,3 (statement of Robert H. Friebert), *cited in* NAACP Brief at 42, 44-45; *Testimony in Support of A.B. 599*, 2 (1988) (statement of Nancy Weisenberg), *cited in* NAACP Brief at 44-45. *See generally Hate-crime Crackdown Urged, supra.*

Although the Court held in *O'Brien* that legislative purpose was not a relevant concern in deciding whether to uphold a regulation touching on speech, *O'Brien*, 391 U.S. at 382-83, the Court has also held that the text of a statute by itself is not necessarily enough to justify an infringement on expression. In Landmark Communications, Inc. v. Virginia, 435 U.S. 829 (1978), the Court held that actual evidence of possible societal harm was necessary to justify regulation of expression. *Id.* at 843 (overturning statute preventing publication of proceedings of commission reviewing judges' performance). *See also* Landmark Communications v. Commonwealth, 233 S.E.2d 120, 129 (Va. 1977) (Poff, J., dissenting):

> The majority simply conclude that the General Assembly concluded that there was a danger so clear and present as to justify a statutory abridgement of the right to publish. The majority reach their conclusion unaided by legislative history and without benefit of a declaration of such danger in the statute or the Constitution which mandates the statute. . . . [A] court cannot infer the existence of a clear and present danger from the mere enactment of a penal statute.

Since evidence of harm brought on by biased victim selection is questionable, see *supra* notes 225-49 and accompanying text, the Wisconsin statute may not be strong enough to stand on its face.

264 463 U.S. 939 (1983).

hancement' of all."[265]

While this finding may have a rhetorical flourish, it has no basis. Although death is a penalty within Florida's statutory scheme for murder, Mitchell's four-year sentence is not within Wisconsin's statutory scheme for aggravated assault. Barclay, by virtue of his premeditation and the fact that the killing was committed during a kidnapping, was convicted of first-degree murder. In Florida, any first-degree murderer may be sentenced to death following an otherwise proper weighing of aggravating and mitigating circumstances by the court.[266] Death is thus the maximum penalty for first-degree murder in Florida, and Barclay received no additional penalty for his racial animus. Any first-degree murderer, regardless of his animus or the lack thereof, could have received the death penalty.[267] Barclay's speech in no way resulted in his receiving a penalty beyond the maximum. The maximum penalty for aggravated assault in Wisconsin is two years.[268] Mitchell received a four-year sentence.[269] Not all offenders guilty of aggravated assault could have received the four-year sentence—only those with the biases outlined in the penalty-enhancement statute.[270] Thus, *Barclay* is inapposite. As noted earlier, additional penalties resulting from expression are not permitted under the First Amendment.[271]

By characterizing *Mitchell* as a case dealing with sentencing procedure, the Court in effect regards the Wisconsin penalty-enhancement statute as not creating an offense separate from, and additional to, aggravated battery. Rather, the Court regards the penalty-enhancement statute as transforming the offender's actions into a more serious manifestation of the same offense.[272]

This characterization presents problems ignored by the Court. First, regarding the hate-crimes statute as delineating a sentencing consideration only and not a separate criminal offense puts the cart

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265 Wisconsin v. Mitchell, 113 S. Ct. 2194, 2200 (1993).

266 *See* FLA. STAT. ANN. § 782.04 (West 1992); FLA. STAT. ANN. § 921.141 (West 1985 & Supp. 1993).

267 Animus such as that outlined in Wisconsin's statute is not an aggravating circumstance in determining the death penalty in Florida. *See* FLA. STAT. ANN. § 921.141(5)(a)-(i) (West 1985 & Supp. 1993).

268 *See Mitchell*, 113 S. Ct. at 2197; WIS. STAT. ANN. §§ 940.19(1m), 939.50(3)(e) (West 1982).

269 *Mitchell*, 113 S. Ct. at 2197.

270 Or those under one of Wisconsin's other penalty enhancers. *See supra* notes 206-07 and accompanying text.

271 *See supra* notes 182-249 and accompanying text.

272 *See Mitchell*, 113 S. Ct. at 2199 ("[T]he fact remains that under the Wisconsin statute *the same criminal conduct* may be more heavily punished if the victim is selected because of his race or other protected status . . . .") (emphasis added).

before the horse in terms of when to weigh constitutional considerations. Second, conflating the two statutes into one offense gives rise to concerns of vagueness.

Looking to the first argument, two due process cases—*Specht v. Patterson*[273] and *McMillan v. Pennsylvania*[274]—weigh in favor of regarding Wisconsin's statute as delineating a separate offense. To comply with the requirements of due process, a statute need only pass a balancing test in which the interests of the state are weighed against the interests of the citizen.[275] In both *Specht* and *McMillan*, the Court employed the due process standard *in order to* determine whether the statutes in question were sentencing provisions or criminal offenses. The Court did not first determine that the statute at issue was a sentencing provision and *then* determine what level of procedure was appropriate. When a statute that could be construed as either a separate offense or as a sentencing provision can result in a higher penalty, the defendant is entitled to the higher procedural protections.[276] When a similar statute can result in no greater penalty, the defendant is entitled to no greater procedural safeguards than those present during sentencing.[277] In *Mitchell*, however, the Court first determined that the Wisconsin statute was a sentencing provision of a certain offense and thereby, under *Williams v. New York*,[278] mooted any robust consideration of First Amendment rights. Had the Court employed First Amendment scrutiny before determining that the Wisconsin statute was a sentencing provision—as this Note has done in arguing that the statute targets speech or expressive conduct—the result in *Mitchell* might have been different.

Of course, it could be argued that *Specht* and *McMillan*, as due process cases, are distinguishable. After all, every criminal proceeding carries with it some penalty to be weighed in a due process balancing, so any such balancing can be said to "come first." By contrast, the argument might continue, not every criminal proceeding implicates expression.

In reply, one could argue that all action, and thus all action sub-

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273 386 U.S. 605 (1967). See *supra* notes 99-106 and accompanying text for a more thorough discussion of this case.

274 477 U.S. 79 (1986). See *supra* notes 107-09 and accompanying text for a more thorough discussion of this case.

275 *See, e.g.*, Matthews v. Eldridge, 424 U.S. 319 (1976) (upholding procedure used to terminate disability benefits).

276 *Specht*, 386 U.S. at 610.

277 *McMillan*, 477 U.S. at 88-89.

278 337 U.S. 241 (1949). See *supra* notes 92-93 and accompanying text for a discussion of *Williams*.

ject to criminal proceedings, is at least "potentially expressive."[279] Speech and writing are clearly expressive. Other conduct may be expressive provided it does not bring on special harms.[280]

According to this analysis, all penalty enhancers are subject to First Amendment scrutiny. This is of little consequence. For example, a defendant facing a penalty enhancer for carrying a gun during a bank robbery could argue, say, that he was expressing his strong opposition to the capitalist system. His argument would fail, though, because his putatively expressive conduct carries with it a special harm—namely the increased probability of great physical harm to a bystander—precluding his conduct from being regarded as actually expressive.

Turning to the vagueness concerns, a statute is void for vagueness if people "of common intelligence must necessarily guess at its meaning and differ as to its applications."[281] While the physical acts required to commit battery, and even the somewhat more nebulous concerns regarding when one is a party to a crime, may be readily understood, adding the hate-crimes statute to the mix causes confusion. For example, is a black man guilty of the offense of "aggravated battery as a party to the crime with biased victim selection" if he advises a black comrade to attack a third black who had just harassed a white man? Would the harms to be prevented by penalty-enhancement statutes—such as retaliatory violence, more severe emotional harm to the victim, and fear in the victim's community[282]—arise here? While the physical injury sought to be prevented by the battery and party-to-the-crime statutes is still apparent in this hypothetical, the harms to be prevented by the penalty enhancer seem attenuated. In other words, the hate-crimes statute, when combined with the non-vague battery and party-to-the-crime statutes, creates a new, vague offense.[283] Such is not the case with other penalty enhancers, such as those stiffening penalties when the offender commits certain concrete acts, e.g. carrying a gun or wearing a bullet-proof vest.[284] Similarly, it is not the case for antidis-

279 *See* Roberts v. United States Jaycees, 468 U.S. 609, 628 (1984); *supra* notes 216-22 and accompanying text.

280 *See supra* notes 225-49 and accompanying text.

281 Connally v. General Constr. Co., 269 U.S. 385, 391 (1926).

282 See *supra* notes 225-49 and accompanying text for a more thorough discussion of these interests.

283 *See* Gellman, *supra* note 79, at 355-57. Gellman presents similar hypotheticals and suggests that "if the statute does not criminalize pure motive, because the sum of the act plus the motive is greater than its parts, that 'sum' is not defined by the statute, and the statute is unconstitutionally vague." *Id.*

284 *See supra* notes 206-07 and accompanying text.

crimination statutes, which tie the biased motive to a specific act in one statute.[285]

Vagueness concerns are particularly weighty in the First Amendment arena, where "[u]ncertain meanings inevitably lead citizens to steer far wider of the unlawful zone [than] if the boundaries of the forbidden areas were clearly marked."[286] Moreover, vague statutes are subject to discriminatory application by "policemen, judges and juries."[287]

Trying to avoid these vagueness concerns by characterizing the hate-crimes statute as setting forth a separate offense merely worsens the problem. To punish victim selection as a separate offense is blatantly to punish either protected speech or expressive conduct.[288]

However, the Court's use of *Barclay* may carry a certain amount of weight in the sphere of penalty-enhancement statutes for hate crimes. The Court in *Barclay* approved the trial court's characterization of the defendant's racial animus as an aggravating factor in determining sentence.[289] More than one state considers bias based on "race, color, creed, religion, ancestry, gender, sexual orientation, physical or mental disability, or national origin" an aggravating circumstance to be considered in sentencing.[290] Such a statute avoids the problems associated with punishing expression by not giving biased offenders added punishment solely because of their expression. By striking a balance, it also preserves society's intuition that bias crimes inflict special harms worthy of punishment.[291] Had Wisconsin taken this approach, Mitchell would have been subject to only the two-year maximum penalty for aggravated battery, but the state could still have indicated its disapproval of bias (and thus perhaps increased deterrence) by citing Mitchell's animus as an aggravating factor.

VI. CONCLUSION

The Court's holding in *Mitchell* remains questionable because it relies on two dubious conclusions. First, the Court held that Wis-

285 *See supra* notes 221-22 and accompanying text.
286 Grayned v. Rockford, 408 U.S. 104, 109 (1972).
287 *Id.*
288 *See supra* notes 182-249 and accompanying text.
289 Barclay v. Florida, 463 U.S. 939, 949 (1983).
290 ILL. COMP. STAT. ch. 730 § 5/5-5-3.2(a)(10) (1993) *as amended by* 1993 Ill. Laws 215. *See also* ALASKA STAT. § 12.55.155 (1993); CAL. PENAL CODE § 1170.75 (West 1988 & Supp. 1993); N.C. GEN. STAT. § 15A-1340.4 (1992); W. VA. CODE § 61-6-21 (1992).
291 *See supra* notes 225-49 and accompanying text.

consin's penalty-enhancement statute punished merely Mitchell's nonexpressive conduct of physical violence. This Note has argued that the statute actually punishes expression in contravention of First Amendment doctrine. The statute punishes speech and it punishes expressive conduct, according to this Note's analysis.

Second, the Court analogized Mitchell's case to others in which a criminal defendant's expression was held admissible in determining the severity of sentence. However, this Note has maintained that *Mitchell* can be distinguished from those cases. Those sentencing cases dealt with penalties within the normal statutory range for a given offense, but *Mitchell* involved sentencing beyond the usual statutory level for one offense.

The Court may have had the good intention of deterring views many consider reprehensible, but it did so at the expense of First Amendment rights. It also forgot the Latin poet Virgil's warning about a slippery slope: " 'Facilis descensus Averno.' "[292]

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292 *See* State v. Mitchell, 485 N.W.2d 807, 814 (Wis. 1992).