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Proscribing Hate: Distinctions between Criminal Harm and Protected Expression

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PROSCRIBING HATE: DISTINCTIONS BETWEEN CRIMINAL HARM AND PROTECTED EXPRESSION

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On June 21, 1990, between the hours of 1:00 and 3:00 a.m., a cross was burned on the front lawn of Russell and Laura Jones and their five children, a black family residing on the east side of St. Paul, Minnesota. The three-foot-high cross had been fashioned from chair dowels, wrapped in cloth and doused with paint thinner.[1]

This incident had been preceded by two prior acts of vandalism, the perpetrators of which remain unknown.[2] In April, five tires on the two Joneses' cars were slashed and, in May, the tailgate window of one of the cars was smashed.[3]

The police apprehended two youths, Robert Viktora, then seventeen, and Arthur Miller, then eighteen, both believed to be members of a group of white males known as "skinheads," who had been linked to other race-related crimes in St. Paul.[4] Prosecutors filed charges under St. Paul's hate crimes ordinance, which had been enacted in 1982 and amended in 1989, but which had not been previously applied.[5]

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1. R.A.V. v. City of St. Paul, 112 S. Ct. 2538 (1992); *see* Paula Chin, *Some Call It Free Speech, But a St. Paul Family Shocked by a Cross Burning in Their Yard Call It a Crime of Hate*, PEOPLE, Jan. 13, 1992, at 66; Interview with Laura and Russell Jones, in St. Paul, Minn. (Apr. 23, 1992) [hereinafter Jones Interview].

2. The Jones family had moved from a smaller townhouse in a more crowded section of St. Paul to their present residence near Mound Park on the east side of St. Paul where they were the first African American family on the block. Jones Interview, *supra* note 1; *see generally* Ruth Marcus, *Justices Weigh Hate-Crime Ordinance*, WASH. POST, Dec. 5, 1991, at A3; Tom Hamburger, *Court Hears St. Paul Hate-Crimes Case; Cross Burner Has Challenged Law's Constitutionality*, MPLS. STAR TRIB., Dec. 5, 1991, at 7A.

3. *See* Chin, *supra* note 1.

4. Tom Hamburger, *Court Hears St. Paul Hate-Crimes Case; Cross Burner Has Challenged Law's Constitutionality*, MPLS. STAR TRIB., Dec. 5, 1991, at 7A; *Youth Arrested In Burning of Crosses*, UPI, June 23, 1990.

5. Tom Hamburger, *Court Hears St. Paul Hate-Crimes Case; Cross Burner Has Challenged Law's Constitutionality*, MPLS. STAR TRIB., Dec. 5, 1991, at 7A.

Miller pleaded guilty and was sentenced to thirty days in jail.[6] Viktora challenged the constitutionality of the hate crime law on overbreadth grounds under the First Amendment.

The St. Paul ordinance reads as follows:

> Whoever places on public or private property a symbol, object, appellation, characterization or graffiti, including but not limited to, a burning cross or nazi swastika, which one knows or has reason to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion, or gender commits disorderly conduct and shall be guilty of a misdemeanor.[7]

Before trial, the trial court, in *In re Welfare of R.A.V.*, dismissed the charge on the ground that the ordinance censors expressive conduct in violation of the First Amendment to the United States Constitution.[8] The Supreme Court of Minnesota reversed, reasoning that the specific, unmistakably terrorist conduct of burning a cross in the fenced yard of an African-American family's home is conduct the City may indisputably proscribe.[9]

Rejecting the overbreadth claim, the Minnesota court limited the ordinance's scope to verbal or symbolic conduct falling outside protection of the First Amendment. Citing *Chaplinsky v. New Hampshire*, the court held that the ordinance could prohibit only expressive conduct that amounts to "fighting words"—those which by their very nature "inflict injury or tend to incite an immediate breach of the peace."[10] The state court added that any overbreadth infirmity of the ordinance could be cured also by limiting the ordinance, under *Brandenburg v. Ohio*, to conduct that is "directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[11]

The United States Supreme Court, in a divided opinion, reversed the Minnesota court.[12] In an opinion authored by Justice Scalia, the Court implicitly affirmed the continuing validity

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6. *Id.*
7. ST. PAUL, MINN., LEG. CODE § 292.02 (1990).
8. *In re* Welfare of R.A.V., 464 N.W.2d 507 (Minn. 1991).
9. *Id.* at 511.
10. *Id.* at 510 (citing *Chaplinsky*, 315 U.S. 568, 572 (1942)).
11. *Id.* (citing *Brandenburg*, 395 U.S. 444, 447 (1969)).
12. R.A.V. v. City of St. Paul, 112 S. Ct. 2538 (1992); *see* Rogers Worthington, *High Court to Decide if Freedom of Speech Shields Cross Burning*, CHI. TRIB., Dec. 4, 1991, at C10.

of the "fighting words" doctrine of *Chaplinsky v. New Hampshire*. However, the Court invalidated the St. Paul ordinance because, while language such as "arouses anger, alarm or resentment in others" could properly be construed to reach only "fighting words," that doctrine is not wholly outside the coverage of the First Amendment and the ordinance was invalidly content-based because it unconstitutionally prohibited speech on the basis of the subjects the speech addresses.

Justice Scalia reasoned that the ordinance imposed special prohibitions on speakers who express views on the "disfavored subjects" of race, color, creed, religion or gender, that is, it tolerates speakers who speak favorably of race, color, etc., but penalizes those who express intolerant views on such subjects.[13] Thus, as Justice Scalia elaborated, the ordinance went beyond mere content-based restriction to actual viewpoint discrimination.[14] By choosing to hold as it did, the Court circumnavigated the question whether the St. Paul ordinance was overbroad.

The Court concluded that St. Paul's limitation of protection to the specific targeted groups infers that others groups, such as political group members, union members or homosexuals, are not protected. This constituted governmental manifestation of hostility toward the latter because fighting words addressed to those group members are not criminalized.[15]

The separate concurring opinions of Justices White, Blackmun and Stevens pursued fundamentally different approaches. Justice White criticized the majority for deciding the case on the novel theory that any discrimination within a subcategory of unprotected or less-protected expression such as "fighting words" or obscenity would itself be unconstitutional when the case could have been decided on the basis of the ordinance's overbreadth.

Justices Blackmun and Stevens both uprooted the most disturbing aspect of the majority's opinion. As Justice Stevens wrote, "Conduct that creates special risks or causes special harms may be prohibited by special rules."[16] The majority's opinion prevents states from fashioning hate speech rules to

13. *Id.* at 2547.
14. *Id.*
15. *Id.* at 2547-48.
16. *Id.* at 2561.

protect those groups found to be particularly vulnerable to hateful speech or conduct.

Justice Blackmun was even more critical. He noted that there were two possibilities: That *R.A.V.* will serve as precedent for future cases, or it will not. If the latter, that it will not serve as important precedent in First Amendment jurisprudence, Justice Blackmun reflected, it will be regarded as an aberration because the Court has "manipulated doctrine to strike down an ordinance whose premise it opposed, namely, that racial threats and verbal assaults are of greater harm than other fighting words."[17]

If *R.A.V.* is not an aberration, its precedential impact will be very negative on legislative attempts to rationally allocate scarce criminal justice resources to the protection of groups empirically determined to be in greater need than other imaginable groups. Moreover, the decision greatly limits the ability of states to sanction hate-related speech and conduct according to the social harm found consequent upon such behavior.

There are at least two reasons why this is so. Although it appears that Justices Stevens, Blackmun and White have struck to the core of what the majority is prohibiting in the St. Paul ordinance, the majority's argument is not so penetrable as here suggested. If Justices Stevens and Blackmun were correct that the majority is condemning the underinclusive subcategorization of groups for protection, their arguments would clearly be apposite. However, Justice Scalia disagrees that the prohibition of the "fighting words" test as to the ordinance is based upon a discrimination against certain groups. Rather, Justice Scalia says the prohibition is based upon the messages of "bias-motivated" hatred.

What St. Paul cannot do, according to Justice Scalia, is selectively limit which kinds of "bias-motivated" hatred will be proscribed.[18] A general "fighting words" law that made no attempt to distinguish "fighting words" directed against more vulnerable minority group members from those directed at majority group members would, under Justice Scalia's analysis, be constitutional. At least, on the grounds upon which the Court's majority decision rests.

Thus, arguably, if St. Paul rewrote its statute essentially as

17. *Id.* at 2560-61.
18. *Id.* at 2548.

originally constructed but substituted the words, "on any basis," for the words, "on the basis of race, color, creed, religion," the ordinance would not run afoul of the majority's reasoning. But if we erased the offending reference to a protected subcategory of protected groups based upon eliminating hostile communication towards them, the more compelling basis for invalidating the St. Paul ordinance, namely its overbreadth, would emerge.

Justice White's concurrence, joined by Justices Blackmun, O'Connor and Stevens points to the more fatal flaws in the ordinance. Justice White notes that the Minnesota Supreme Court's opinion, construing the St. Paul ordinance in light of, particularly, *Chaplinsky*, makes the ordinance facially overbroad because the Court thereby ruled that "St. Paul may constitutionally prohibit expression that 'by its very utterance' causes 'anger, alarm or resentment.' "[19]

Thus, *R.A.V.* tells us two things: First, if a legislature wishes to criminalize hate speech, it must do so in a neutral fashion with respect to any groups singled out for punishment, because even the "fighting words" of a Ku Klux Klanner contain some protectable expressive components. And, second, the "fighting words" basis of the statute must be narrowly drawn so as not to prohibit words that merely cause hurt feelings, resentments, emotional upset or that are merely offensive.

The majority's attempt at a neutral stance, through the First Amendment, towards ethnic, racial and other groups, postures at liberalism by according the broadest freedom to individuals acting and verbalizing their actions in dislike against others.

However, it succeeds in masking the realities of ethnic, racial and class-based subordination. It assumes that when young white males burn crosses on the lawn of and across the street from the home of an African-American family, that conduct contains sufficient expressive conduct to require a local governmental body to accord it the same tolerance as when a group of white males burn crosses in the yard of a white family moving into a formerly all African-American neighborhood. The majority position ignores the difference between racial, color, religion, and gender-based hostility and other hostility, such as political or economic-based hostility. The confusion

19. *Id.* at 2559 (citing *Chaplinsky*, 315 U.S. at 572).

among the Court's majority reflects similar confusion in the traditional civil rights/civil liberties communities over the proper contemporary boundaries to be drawn around free speech and equality concerns.

Groups such as the American Civil Liberties Union, the Center for Individual Rights and the Association of American Publishers, passionate in their defense of free speech, find themselves aligned against groups such as the NAACP, the Anti-Defamation League of B'nai B'rith and the People for the American Way, equally passionate in their support of St. Paul's proscription of racial terrorism. This division may well be based on differences in ideology.

Stanford Law School Professor Thomas Grey has written that the split may be among liberals "within the once-differentiated conglomerate of ideals and practices that once might have been called civil rights and civil liberties. Now it is civil rights vs. civil liberties . . . ."[20] The "civil rights" people, or equalitarians, see freedom from an equality perspective; they "want mainly to belong" as equal citizens. To them, the personality is socially-constructed and hence socially destructible.[21] The "civil liberties" people see freedom from an individualistic perspective; they basically want to be left alone. To them, the personality is more naturally self-reliant and autonomous.[22] Classic liberalism thus exalts the virtues of "individualism" over the interests of enhancing the dignity or status of groups.

In the hate speech context, civil libertarians tend toward tolerance of offensive words and behavior and, like the *R.A.V.* majority, are unwilling to allow government the power to punish merely offensive behavior evidenced by neither significant damage to property nor physical injury. On the other hand, civil rights advocates desire judicial and legislative intervention against hate speech, especially when its forms subvert the rights of its victims to peacefully enjoy the privacy of their homes or to pursue educational objectives.

Both ideologies of "liberty" and "equality" are bedrock principles underlying the Constitution, as reflected in the Bill

20. Thomas Grey, Civil Rights v. Civil Liberties: The Case of Discriminatory Verbal Harassment, 1-2 (1990) (unpublished memo).

21. *See id.*

22. *See id.*

of Rights and the Reconstruction amendments. What the *R.A.V.* Court failed to provide was a larger perspective that embraces both philosophies. There is, from a social perspective, an interdependent relationship between individualism and equality. Years ago, then-law professor David Reisman, observed, "it is only through strengthening the protection of the groups to which an individual belongs that his own values and reputation can be adequately safeguarded."[23]

Thus, an individual's self-reliance and autonomy, his sense of self-identity and self-worth, his expression of "individuality," are intertwined with group status and group treatment. From a legal perspective, then, the question becomes how can state and local governments proscribe hate crimes that involve group vilification, without diminishing the value and right to individual free speech?

With the St. Paul ordinance and the *R.A.V.* decision in mind, this paper addresses the constitutional questions that plague both the states and the courts in the area of racial, or group-vilifying, violence. This paper offers a distinction between conduct that is merely "offensive," which Justices White, O'Connor, Blackmun and Stevens properly found to invalidate that ordinance, from conduct that is deliberately "harmful." This distinction should be a useful line for separating protected from unprotected symbolic conduct.

This paper argues that the kind of behavior proscribed by the St. Paul ordinance could, both theoretically and practically, be proscribed within the frameworks of both the majority and concurring opinions, after suitable re-working.

Discussion of the legal issues first requires some understanding of the nature of bias-motivated violence and the recognition of its current spread.

THE NATURE OF GROUP-VILIFYING CRIMES

Hate crimes are qualitatively different from crimes unmotivated by group hatred or prejudice.[24] Hate crimes assault not only the individual and the group to which he belongs, but also

23. David Reisman, *Democracy and Defamation: Control of Group Libel*, 42 COLUM. L. REV. 727, 730-34 (1942).

24. *See The MacNeil-Lehrer News Hour* (PBS television broadcast, Feb. 20, 1992) (statement of Jack McDevitt, Associate Director, Center For Applied Social Research, College of Criminal Justice, Northeastern University).

tear at the very fabric of the community.[25] Because a hate crime is clearly intended to terrorize and victimize a person on the basis of a group characteristic over which she has no control, the assault, purposely and effectively, reaches beyond the individual victim.

Empirical evidence from a pilot study conducted by the National Institute Against Prejudice and Violence found that victims of group violence involving bias motivation suffer greater harm than violence absent such bias.[26] Its impact upon the victim causes greater psychological and, at times, physiological harm.[27] Its terrorizing and demeaning objective assaults the security, dignity and status of both the victim and the group. Moreover, failure to recognize bias-motivated violence as a distinct crime causes it to continue and spread, infecting society at large.

Since Congress passed the Hate Crimes Statistics Act[28] in 1990, the FBI for the first time has been collecting data on hate crimes; the report is to be released later this year. The Director of the Center For Applied Social Research at the College of Criminal Justice at Northeastern University, Mr. Jack McDevitt, who is working with the FBI on that report, indicated that the data now coming in reveals a definite increase in hate crimes on the whole, notwithstanding the possibility that increased awareness and reporting could be a contributing factor.[29]

Other unofficial sources confirming the increase in incidents of ethnoviolence include the Anti-Defamation League's annual report, which found a record number of anti-semitic incidents during the past year.[30] A similar report by an Arab group found that crimes against Arab-Americans increased dramati-

25. *Id.*

26. FORUM, vol. 5, no. 1 (Inst. Against Prejudice & Violence, Jan./Feb. 1990).

27. *Id.* The Institute had conducted a preliminary study where three groups of people were tested for symptoms. The group consisted of 1) people who have never been victims of group violence, 2) people who had been victims of group violence not motivated by prejudice, and 3) people who had been victimized by group violence that was motivated by prejudice. Those in group one reported an average of five behavioral and psychological symptoms; those in group two reported an average of nine; and those in group three reported an average of twelve. In general, victims of biased violence experience a significantly higher occurrence of serious behavioral and psychological symptoms stemming from the trauma.

28. 28 U.S.C. § 534 (1990).

29. *See McNeil-Lehrer, supra* note 24.

30. *MacNeil-Lehrer, supra* note 24.

cally in 1991 as a result of the Gulf War.[31] A report issued by the "Klan Watch" found that the number of white supremacist groups increased last year from 273 to 346, an increase of twenty-seven percent.[32]

Additionally, it is no coincidence that in the last several years, every state, with the exception of four—Utah, Nebraska, Alaska and Wyoming—has seen a need to codify laws against racial violence and intimidation.[33] Police in St. Paul reported that hate crimes are on the rise this year, with thirty cases reported so far in 1992, compared to twenty-three in all of 1989.[34] In Minnesota, 307 hate crimes were reported in 1990, up from 253 the year prior.[35]

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31. *Id.*

32. *Id.*

33. Rogers Worthington, *High Court to Decide if Freedom of Speech Shields Cross Burning*, CHI. TRIB., Dec. 4, 1991, at C10.

34. *Youth Arrested In Burning of Crosses*, UPI, June 23, 1990.

35. Among the reported incidents of racial hatred that have rocked the state this year and last are the following: In 1992:

1. In March, a group of black students at the University of St. Thomas sharing a house on Concordia Avenue were awakened by the sound of their front storm-window shattering. They found on their sidewalk a burning wooden cross with an attached note reading: "Niggers watch your back." The incident is said to have followed a week of concerns over racial tension on the St. Paul campus. As a result, two of the residents, originally from Detroit, have left St. Thomas. Conrad deFiebre, *Burning Cross, Note Warns Black Students at House; Resident Charged in Attack of White St. Thomas Student*, MPLS. STAR TRIB., Mar. 17, 1992, at 1B.

2. Two wooden crosses covered with anti-black invective were thrown through a window at Como Park High School on February 20.

3. Also in February, Bethel College Provost David Brandt spoke out against what he described as a series of threats by a white-supremist former student against a black faculty member.

4. A week earlier, letters encouraging violence against a black law student and the white student he is dating were distributed in student mailboxes at Hamline University. The letter advocated lynching the two students as a lesson to others.

5. "KKK" was spray-painted on Cook County High School in the North Shore community of Grand Marais, Minnesota, sometime during the weekend before the Martin Luther King Jr. holiday.

6. On January 28, Minneapolis photographer Mike Blumberg found a swastika on his office door and an anti-Semitic slur on the wall inside. He then received a phone call and got an earful of what he described as the most "vile" hate language he had ever heard, aimed at him and the minorities featured in his book to benefit the homeless, *Homeless Dreams*.

7. On January 27, black Minneapolis police officers began receiving letters mentioning the Ku Klux Klan and threatening their lives. The week before, two black ministers and a former legislator in Minneapolis got death threats over the phone.

In 1991:

8. Black athletes, who had been recruited by Hibbing Community College reported being harassed in town; one reported he was refused service in a local restaurant.

THE CONSTITUTIONALITY OF THE ST. PAUL HATE CRIME LAW: *R.A.V.* RE-VISITED

The Supreme Court in *R.A.V.*[36] had several choices for deciding the case. Basically, the Court could have upheld the trial court by deciding the ordinance was impermissibly overbroad and that the Minnesota Supreme Court's limiting construction was unworkable. Or it could have affirmed the Minnesota court's *Chaplinsky—Brandenburg* construction. As noted above, the Court divided along several lines of opinion. All nine Justices support the continuing vitality of *Chaplinsky*[37] and *Brandenburg*[38] although they give new meaning to *Chaplinsky*. Whether the Court will support, in the future, Justice Scalia's view that categorical exceptions to First Amendment protection will be treated as having some protectable expressive components, or return to the traditional view, articulated by Justices White and Blackmun, that such subcategories deserve no protection, remains to be seen.

What is lacking in the majority's opinion and, to a lesser extent in the concurrences, are answers to certain questions essential to guide municipal and state legislative bodies in drafting future laws like the condemned St. Paul ordinance. Since it is apparent that a hate crime law like the St. Paul ordinance could be drafted without the now-prohibited discriminatory subcategories and without being facially overbroad, what sorts of questions need be assessed in order to do so? I must assume for the sake of discussion that burning a cross on another person's property as an expression of contempt or ha-

9. A black student at Simley High School in Inver Grove Heights, Minnesota, and her mother received threatening phone calls from an individual identifying himself as a Klan member.

10. In February, on a Sunday morning, parishioners at St. Mark African Methodist Episcopal Church and Calvary Baptist Church in Duluth, Minnesota, arrived at their churches, which have largely black congregations, to find racial epithets spray-painted on the buildings.

11. In June, a black worker, who applied for employment at a St. Paul furniture company, reported that he was given a "nigger application." The application included such things as, "how many words do you jive a minute?" "In fifty words or less list your greatest desire in life (other than a white girl), and "Abilities: demonstration leader, rapist, used hubcap salesman, government employee."
See Suzanne P. Kelly, *'Minnesota Nice' Marred by Racism; Tension Underlies Increase in Number of Hostile Acts*, MPLS. STAR TRIB., Mar. 2, 1992, at 1A.

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

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

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

tred could be criminalized by a correctly drawn ordinance similar to St. Paul's but written in light of the Court's *R.A.V.* opinions.

The first question might be: How does the cross-burning involved in *R.A.V.* differ from the cross-burning in *Brandenburg v. Ohio* and the flag-burning in *Texas v. Johnson*?[39] A second question flowing from that is: If the cross-burning, as in *Brandenburg*, is sufficiently remote from the harm threatened but is nevertheless "offensive," as is true of the flag burning in *Texas v. Johnson*, is the conduct in *R.A.V.* sufficiently distinguishable for the Court to uphold a criminal proscription?

Texas v. Johnson, the 1989 landmark flag-burning case, teaches that while overt action cannot be labeled speech, "whenever the person engaging in the conduct intends thereby to express an idea," the First Amendment nonetheless protects conduct "sufficiently imbued with elements of communication."[40] This is so because the government may not dictate the mode of communication by which an individual wishes to express himself.[41] That idea reverberates throughout *R.A.V.* To possess sufficient communicative elements, the conduct must be accompanied by "[a]n intent to convey a particularized message . . . and [a good] likelihood that the message would be understood by those who viewed it."[42]

There are two reasons why this is true in *R.A.V.* First, while the First Amendment protects most expression of facts, values, opinions and beliefs, the burning of a cross, unlike the expression in flag-burning is the expression of none of those. What it is generally, and particularly in an *R.A.V.*-type case, is a warning or a threat that unless the targeted victims take some action, perform some deed, the cross-burner will fulfill his threats. In *Brandenburg*, the burning cross was insufficiently directed to an identifiable victim to constitute such a threat or, in other words, to cross the line separating mere advocacy of violence from an actual threat of violence. Second, and in addition to the nature of the communication, which is essentially a demand that the target respond or face harmful consequences, the communication of the threat to targeted victims constitutes

39. 491 U.S. 397 (1989).
40. *Id.* at 404 (citing Spence v. Washington, 418 U.S. 405, 409 (1974)).
41. *See id.* at 417.
42. *Id.* at 404 (citing *Spence*, 418 U.S. at 410-11).

an immediate and measurable injury, one which is too direct in time to accord the victim an opportunity to seek legal redress or to respond with more speech.

Johnson and *Brandenburg* speak generally to conduct expressively a political message in a political forum, even if that message is a hateful one as in *Brandenburg* or "offensive" to the tastes of patriots, veterans and others, as in *Johnson*. What significantly distinguishes these cases factually from an *R.A.V*-type case is that the communication in neither *Brandenburg* nor *Johnson* was directed at any discrete individual or group in the sense that no particular members of identifiable groups were threatened with injury.

It is clear that the First Amendment, a cornerstone of American democracy, protects verbal expression and advocacy, however unpopular or repugnant to society.[43] It is equally obvious, however, that the First Amendment does not embrace action purposely aimed at harming another individual, symbolic or not.[44] Thus, conspiracies to murder, assault, intimidate, threaten or abuse fall outside the First Amendment. This is true even though these crimes are committed by the use of language, and whether or not the actor alleges he intended thereby to convey a message of racial or group hatred.

The cross-burning that took place in the Joneses' yard, when placed in context, was clearly and primarily intended as a threat, an act of intimidation and terrorism, not to mention personal abuse. This fact is not altered by the peripheral fact that the cross-burning also symbolized the actor's racist philosophy. All the parties in *R.A.V.* appear to agree that the conduct, there purposely directed at harming another individual, whatever its underlying "message," has no place under the First Amendment.[45] The concern is with the statute's overbreadth and its appearance of content-based speech discrimination.[46]

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43. *See id.* at 408.

44. *See* Spence v. Washington, 418 U.S. 405, 409-11 (1974); U.S. v. O'Brien, 391 U.S. 367, 376 (1968); Vietnamese Fishermen's Ass'n v. Knights of the Ku Klux Klan, 518 F. Supp. 993 (S.D. Tex. 1981).

45. *See* Nat Hentoff, *Looking Beyond a Burning Cross*, WASH. POST, Feb. 1, 1992 at A23; Ruth Marcus, *Justices Weigh Hate-Crime Ordinance*, WASH. POST, Dec. 5, 1991, at A3.

46. *See generally* Brief of Amici Curiae Ass'n of American Publishers and Freedom to Read Found'n, *In re* Welfare of R.A.V., 464 N.W.2d 507 (Minn. 1991) (No. 90-7675).

This paper argues that the *Chaplinsky* and *Brandenburg* cases are inadequate, in themselves, to address this concern. Further, it is suggested, the Supreme Court and lower courts and legislatures might usefully distinguish the developing concept of "harm" in criminal law from "offense" in articulating a more adequate and contemporary concept of "fighting words."

Civil libertarians are concerned that hate crime statutes like St. Paul's ordinance are incurably overbroad in that they proscribe all cross-burnings on private property, thus reaching even crosses burned on one's own property or on the property of another with the owner's consent. They question whether the Supreme Court's possible validation of such statutes, under *Chaplinsky*, will be insufficient to protect, for example, consensual cross-burnings on private property not meant to threaten or intimidate but meant truly as a symbol of the actor's ideology.[47] Under *R.A.V.*, this question becomes, how much of an expressive component must "fighting words" have to survive criminalization?

In *R.A.V.*, three crosses were burned.[48] The second cross was placed diagonally across the street from the Jones residence, the third elsewhere in the neighborhood. Arguably, the first two crosses were sufficiently targeted to cause the kind of injury to the Jones family to constitute a threat at the core of the "fighting words" standard. But suppose a fourth cross were burned on the front lawn of one of the perpetrators, within the view of the Joneses, but only intended to express the burner's ideology. Would *Brandenburg* or *Chaplinsky* be controlling?

This concern has some merit. Consensual cross-burning on private property, expressive of one's ideology and not directed toward the harassment of any discrete individual or group, ought to be protected as "speech" under the First Amendment, regardless of whether the actor knows such conduct will arouse "anger" or "resentment" from those who pass by.[49] Thus, the Ku Klux Klan may burn a cross at its own headquarters, however offensive others may find it.

47. *See id.*

48. *See* Brief for Respondents, at 1-3, R.A.V. v. City of St. Paul, 112 S. Ct. 2538 (1992).

49. *See* Texas v. Johnson, 491 U.S. 397, 408 (1989).

The "fighting words" notion under *Chaplinsky*, those that "by their very utterance inflict injury," does not necessarily address such concerns. Under *Chaplinsky*, the test is "what men of common intelligence would understand would be words likely to cause an average addressee to fight."[50]

This test is weakened, first, by the fact that the addressee in *Chaplinsky* was a peace officer and could not reasonably be expected, as a professional law enforcement officer, to respond violently to Chaplinsky's provocative words. Second, the standard is gender-specific to males and does not adequately contemplate what response a reasonable female would make to the provocation of "fighting words."

In the *R.A.V.* case, where there has, as yet, been no trial, Mr. and Mrs. Jones had very different responses to the cross burned in their yard. While Mr. Jones' immediate response was to "grab a baseball bat and go out and beat some heads," Mrs. Jones had no such inclination to use force; she felt powerless under the circumstances to do anything.[51]

Moreover, while Mr. Jones was deeply concerned by the cross in his yard because it constituted a direct threat to his family, and the cross across the street because it reinforced the threat, he seemed much less concerned—almost indifferent—about the third cross, which had burned at a more remote location.[52]

It seems reasonable to suppose, based upon this very limited interview data, that both the clear intention of the actors to harm, combined with the proximity of the threatening cross, were what caused Mr. Jones the fear he expressed.

The *Chaplinsky* standard describes the kind of words or verbal acts that would provoke a fighting response, whether or not the physical reaction occurs. As such, the standard is non-consequentialist, that is, not dependent upon the actual response to the provoking words. Burning a cross is, historically, a precursor to physical violence and abuse against African-Americans and is an unmistakable symbol of hatred and violence based on virulent notions of racial supremacy.[53] Private symbolic conduct may well trigger a "fighting" response or may,

50. Chaplinsky v. New Hampshire, 315 U.S. 568, 573 (1942).
51. Jones Interview, *supra* note 1.
52. *Id.*
53. *See In re* Welfare of R.A.V., 464 N.W.2d 507, 508 & n.1 (Minn. 1991).

by its very utterance, inflict injury upon the "reasonable person" passing by. The court's mere limitation of the ordinance to conduct amounting to "fighting words," without more, would reach the placement of symbols on one's own property. Additionally, absent culpability or intent to harm in the perpetrator, it cannot categorically be said to predictably be an actual infliction of injury.

Additionally, the Court's use of *Brandenburg* to limit the ordinance to symbolic conduct "directed to inciting or producing imminent lawless action [which] is likely to incite or produce such action," is not altogether on point and is not applicable to private consensual burnings.[54] *Brandenburg*, as mentioned earlier, is purely a political advocacy case, speaking in particular to speech advocating lawless action. The Court, in *Brandenburg*, was faced with a statute that prohibited, among other things, "advocat[ing] . . . the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform."[55] In striking down the statute, the Court remained faithful to the principle that the constitutional guarantee of free speech does not permit a state to forbid the "mere abstract teaching . . . of the moral propriety or even moral necessity for a resort to force and violence."[56] Rather, such advocacy must be "directed to inciting . . . imminent lawless action and is likely to incite or produce such action."[57] A private consensual cross-burning, such as one on a Ku Klux Klan member's property, is not, in itself, directed toward persuading or teaching others about the necessity of force or lawlessness. Adopting a *Brandenburg* standard confuses the issue and may result in chilling self-expression.

Upon analysis, it appears that neither the *Chaplinsky* nor *Brandenburg* standard is satisfactory. The "fighting words" standard in *Chaplinsky* contemplates a scenario where there is an intended, targeted individual or group of individuals; it speaks to direct personal abuse.[58] Public forum rallies, at least on the surface, are not directed at an individual or a discrete

54. Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).
55. *Id.* at 444-45.
56. *Id.* at 448 (citing Noto v. United States, 367 U.S. 290, 297-98 (1961)).
57. *Id.* at 447.
58. *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 573 (1942).

group of individuals; they are general expressions of a particular cause or philosophy.

Nonetheless, unpopular or controversial rallies often provoke a "fighting" response from onlookers. The Selma march and other freedom marches in the South during the 1960s provoked such responses.[59] The *R.A.V.* Court, in borrowing *Chaplinsky's* "fighting words" doctrine, without further articulation did not go far enough in giving the doctrine specific content when applied to the situation of public forums.

In sum, hate crime laws similar to St. Paul's, without the kind of limiting construction here suggested, could likely be overbroad in that they do reach forms of protected speech under the First Amendment.

This paper next offers a distinction between "offense" and "harm" as guiding principles from which to distinguish protected and unprotected symbolic conduct in the area of group conflict.

DISTINGUISHING "HARM" FROM "OFFENSE"

Professor Andrew von Hirsch noted in a recent book review, reviewing works by legal philosopher Joel Feinberg, "Notions most often spoken of can receive the least careful scrutiny. So it has been with harm and offense."[60]

Culpability and harm are two principal elements guiding criminal jurisprudence. Criminal law has traditionally placed restraints on behavior that is intentionally harmful. These elements are extremely useful in clearing up the fog surrounding the current "tension" between the constitutional principles of "free speech" and "equality."

Joel Feinberg, in his book *Harm to Others*, defines "harm" as the wrongful intrusion into an "interest" that someone has. An "interest" is something in which one has a "stake."[61] A "stake," in turn, is not merely a desire to gain satisfaction or avoid disappointment, but a relatively stable and deep-rooted concern, whose achievement the person can reasonably ex-

59. Brief of Amici Curiae Ass'n of American Publishers and Freedom to Read Found'n, *In re* Welfare of R.A.V., 464 N.W.2d 507 (Minn. 1991) (No. 90-7675).

60. Andrew von Hirsh, *Injury and Exasperation: An Examination of Harm to Others and Offense to Others*, 84 MICH. L. REV. 700, 700 (1986) (reviewing two books by Joel Feinberg).

61. JOEL FEINBERG, HARM TO OTHERS 33-36 (1984).

pect; it is a personal or collective investment, where one stands to gain or lose from some outcome.[62] Harm to an interest is not merely "hurt feelings" caused by hateful remarks. Our human psyche is sturdy and can take a certain amount of disappointment without our interests being affected.[63] Inherent in the definition of harm is that there must be a "victim" whose "interest" has been set back.

"Offense" differs from harm in that no interest or stake is involved,[64] though a person's "sensibilities" may be deeply affected. By being offended, it is not obvious that the person loses anything to which he might have a claim or stake.[65] A few examples of what Feinberg depicts as "offensive" conduct are offered. The examples taken are descriptive of various types of symbolic conduct. Imagine, if you will, that you are a passenger on a normally crowded public bus, and the following occurs:

> 1. A passenger sits next to you wearing a black arm band with a large white swastika on it.
>
> 2. A passenger enters the bus straight from a dispersed street rally. He carries a banner with a large and abusive caricature of the Pope and an anti-Catholic slogan (and you are a loyal and pious Catholic).
>
> 3. A counter-demonstrator leaves a feminist rally to enter the bus. He carries a banner with an offensive caricature of a female and the message, in large red letters: "Keep the bitches barefoot and pregnant."[66]

These examples demonstrate that symbolic conduct, though seriously "offensive," do not yet rise to the level of "harm" if there is no wrongful intrusion into or setback of a significant interest which another individual has. The passengers who entered the bus did not use the symbols to personally harass or intimidate you thereby intruding upon your interest in self-dignity or your interest in physical security. Nor was their use of symbolic conduct directed at interfering with your right to use a public facility. The Court in *Texas v. Johnson* recognized as much when it upheld flag burning, profoundly offensive as it

62. *See id.* at 41-45.
63. *Id.* at 33.
64. von Hirsh, *supra* note 63, at 701.
65. *Id.*
66. JOEL FEINBERG, OFFENSE TO OTHERS 10, 13 (1985) [hereinafter FEINBERG, OFFENSE].

may be, as a "generalized expression" of political dissatisfaction, occurring in a public forum where no one was threatened or personally insulted.[67]

"Offense" is analogous to the term "nuisance," a term connected with the idea of annoyance, irritation or inconvenience.[68] If the freedom of speech is to survive, expressive conduct that is offensive, however deeply, should not be subject to punishment. Extreme nuisances, however, may actually reach the threshold of harm, as when incessant building noises in the next apartment prevent a student from studying at all on the evening before an examination.[69] The "harm" comes not from "extreme irritation," but from the setback of an interest in which the student has a stake—the pursuit of an education or a profession.

In the hypotheticals posed above related to the *R.A.V.* case, the Jones family's quiet enjoyment of their property and their freedom from intentionally inflicted abuse were harmed both by the cross burned on their lawn and by the one diagonally across the street, the second cross. But, whether the actually burned third cross, which seemed to pose no particular threat to the Joneses, or the hypothetical fourth cross, burned across the street solely as an expression of ideology, are harmful is more problematic. Arguably, the fourth cross, within the Jones' view, but not intended as a threat may actually have an injurious effect, but the answer would require a consequentialist examination into the actual impact of the burning. The intentional infliction of emotional distress, while a suitable standard in tort law is, arguably, less adequate to define the content of "fighting words."

In examining expressive or symbolic conduct, Feinberg's distinction between offense and harm is useful in that it permits "harm" to be assessed and compared by examining the type of interests that are invaded, and their relative importance to the individual and to society.[70] Physical harm is the clearest example. Physical assault is an invasion of the interest one has in bodily integrity. None would argue that murder or rape is protected under the First Amendment, if the actor intended

67. *See* Texas v. Johnson, 491 U.S. 397, 409 (1989).
68. *See* FEINBERG, OFFENSE, *supra* note 66, at 5.
69. *Id.*
70. von Hirsh, *supra* note 63, at 701.

thereby to symbolize or publicize a message of racial or gender hatred.

Why? Is it because the "interest" in bodily integrity is greater than the "interest" in free speech? Or is it because intentionally harmful conduct does not fall under the notion of "free speech" to which the First Amendment speaks? As Justice Oliver Wendell Holmes once eloquently explained: The free speech principle embraces the theory that "the ultimate good desired is better reached by the free trade of ideas,—that the best test of truth is the power of . . . thought to get itself accepted in the competition of the market" of ideas.[71] While the government may not dictate the mode of communication by which an individual may express himself, resorts to violence, coercion, threat or intimidation have no place in the "market-place of ideas." Harming others, as a means of expression, is not, and was never contemplated as, the kind of political speech embraced by the free speech principle.

Federal courts have intuitively and implicitly recognized the power of words to "harm," as defined in this paper. Years ago, the Court in *Cantwell v. Connecticut* stated:

> [E]xamination discloses that, in practically all [cases where defendant was guilty of breaching the peace], the provocative language . . . consisted of profane, indecent, or abusive remarks directed to the person of the hearer. Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under the instrument.[72]

The Court intuitively recognized that calculated denigration is "harmful" in that it invades the addressee's interest in self-dignity. As such, it is conduct, though communicative, falling outside the scope of First Amendment protection. Likewise, *Chaplinsky* developed the "fighting words" doctrine to describe the kind of response, or "harm," verbal abuse has on its target. Underlying *Cantwell* and *Chaplinsky* is the idea that people have an interest against intentional denigration, as part of what is necessary to preserve their sense of self-worth.

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71. Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

72. Cantwell v. Connecticut, 310 U.S. 296, 309-10 (1940) (reversing convictions of Jehovah's Witnesses for the common law offense of inciting a breach of the peace). The decision, was predicated primarily on religious liberty grounds, but the Court examined the free speech aspects as well.

Self-dignity, however, is not the only interest that courts have implicitly recognized as a "stake" in which people ought to have legal protection against.

In *Vietnamese Fishermen's Association v. Knights of the Ku Klux Klan*,[73] the District Court for the Southern District of Texas recognized that coercive conduct, symbolic or not, aimed at setting back another's economic interest, is not "speech" under the First Amendment. In *Knights of the Ku Klux Klan*, white fishermen induced the Ku Klux Klan to employ a variety of intimidation tactics to coerce Vietnamese fishermen to stop fishing in the Galveston Bay shrimping waters. One of these acts included the following: The Klan, dressed in full Klan regalia, fired a cannon from a white fisherman's shrimp-boat across the bay. While this conduct might be regarded as "symbolic," District Judge McDonald wrote:

> As a preliminary matter, it is not clear that defendants' military activities involve "speech" at all, as distinguished from "conduct." While the line between these two is not always clear, the Supreme Court has explicitly endorsed the distinction. . . . "We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person intends thereby to express an idea." Indeed, the evidence adduced at the preliminary injunction hearing demonstrated that the TER's public show of force at the Santa Fe rallies and during the boat parade was not "speech" within the meaning of the First Amendment.[74]

Even in the area of picketing in a public forum, conduct traditionally recognized as "speech" under the First Amendment, the Court has recognized that speech "plus" harmful conduct is not tolerable under the First Amendment. To determine whether symbolic conduct may be constitutionally proscribed in the area of group conflict, the focus should be upon whether the particular conduct is directed at harming other individuals, rather than whether the conduct is a means of "expression."

Whether occurring on private or public property, expressive conduct that aims effectively to inflict "harm" upon another person has consistently been held by federal courts as conduct unprotected by the First Amendment. Such holdings recog-

73. 518 F. Supp. 993 (S.D. Tex. 1981).

74. 543 F. Supp. at 208 (citing United States v. O'Brien, 391 U.S. 367, 376 (1968)) (citations omitted).

nize that such action is directed primarily to "accomplish something"—harm to others—rather than to "say something."

Where conduct symbolic of racial- or group-hatred is meant as a general "political" statement, such as a consensual cross-burning on private property, or a cross-burning that takes place in a public rally, it is not directed to the hindrance of interests belonging to any person or persons in particular. While some symbolic expression may be profoundly offensive to many people, it is not obvious that the expression itself, of racial superiority or of racial hatred, will cause harm to those who are targeted. The thought itself, as well as the advocacy of its propriety, is "free-speech" consistent with the First Amendment principle. The creed and hope underlying the First Amendment is that the power of "words" to gain acceptance as the "truth" shall be measured against the power of reason and enlightenment. Justice Holmes' philosophical scrutiny of the First Amendment in *Abrams v. United States*[75] adopts the principle of free speech as professing the belief that neither the government nor members of a free society need fear opposition by ideas that are "bad" or "untrue." To disallow the opposition indicates that there may be merit to the speech; to allow it professes a faith that the speech is impotent when cast in the light of reason.[76] That is, at any rate, the theory of our Constitution.

Examination of whether a rally's ulterior or primary purpose is to harm, however, need not be automatically foreclosed. In any given case of symbolic conduct, factors such as intent, context, location, duration, and the ability of vulnerable individuals to avoid the rally should be considered. If the incident is an isolated occurrence, or if one is reasonably free to avoid the offensive conduct, no significant harm is suffered. Evidence that a rally is primarily designed to effectively harm certain targeted individuals admittedly will often be difficult to come by, even if true. Consequently, symbolic conduct in a public forum that is nevertheless harmful may escape the law's notice. If so, perhaps such is the price we must pay for upholding the doctrine of free speech.

In contrast, conduct, whether or not symbolic, designed to abuse, coerce, intimidate, terrorize, degrade or subjugate an-

75. 250 U.S. 616 (1919) (Holmes, J., dissenting).
76. *See id.* at 630.

other individual, is unmistakably harmful conduct falling outside the principles of free speech. Such was the case when Viktora placed a burning cross on the Joneses' lawn. Indeed, the purpose common to such criminal activity is racially based coercion of separation. That is true of isolated or sporadic cross-burnings which occur on private or public streets, but which target a particular individual or group of individuals, such as the burning of a cross on a street directly in front of a black family's home or the sporadic exercise of cross-burning in a mostly black neighborhood, with the purpose of racial intimidation, degradation or segregation. An example of this is *Crumsey v. The Justice Knights of the Ku Klux Klan*,[77] where three members of the Ku Klux Klan burned crosses on the edge of Chattanooga, Tennessee's predominantly black neighborhood, then proceeded to observe the reactions of the residents as they drove along East Ninth Street in a shooting rampage that resulted in serious injury to five black women who were standing on the street. Although the victims were able to collect damages in a civil suit,[78] the three Klan members were never subjected to criminal liability.

The burning of crosses in these contexts is clearly "harmful" in that it does set back, not by political "speech," but by force, terrorism and personal degradation, the interests these individuals have in the right to property, physical security, self-integrity, and the procurement of "civil rights," such as equal housing and equal opportunity. As harmful conduct, it has no place under the First Amendment. However, state statutes, or courts interpreting them, must clearly delineate the line between unprotected and protected symbolic conduct based on harm, as opposed to offense. Statutory language pointing to symbolic conduct that "arouses anger or resentment" may well be overbroad in that it potentially reaches symbolic conduct that is "offensive," as well as conduct that is "harmful." To withstand constitutional challenge, states and courts should use language that is more harm-specific, such as language that points to conduct primarily "intended" or "designed" to "personally abuse," "intimidate," "harass," "terrorize" or "invade the civil rights of another individual."

There is, however, one more concern that appears to plague

77. No. 1-80-287 (E.D. Tenn. Mar. 1, 1982).
78. *Id.*

the courts. All parties concerned in the *R.A.V.* case agreed that Viktora's particular conduct was conduct that a state may clearly proscribe.[79] However, as Justice Scalia wrote for the majority and noted during oral argument, why not simply proscribe "all fighting words," rather than just those that are based on race, gender and religion? Since such selection would amount to "content-based discrimination" of the "rankest kind," why not prosecute under a trespass, or ordinary assault statute?[80] That concern, certainly, determined the view of the Court's majority.

The most persuasive answer is that given by the concurring justices, that the St. Paul ordinance with the Minnesota court's limitation was not totally flawed because it was underinclusive. The failure of the ordinance to reach all conduct that might constitute "fighting words" should not condemn the ordinance for proscribing such conduct when directed at groups whose members are actually being, or who have historically been so victimized.

The concern that even narrowly drawn hate crime statutes are "content-based" and thus unconstitutionally "discriminatory" of subject-matter involves circular reasoning, which begs the original question whether such conduct is "free speech" under the First Amendment. Expressive or not, conduct aimed at harming other individuals is antithetical to the First Amendment and falls outside its protection. "Harm," in the area of criminal law, is the culpable invasion of interests in which an individual or collection of individuals has a stake. Determination of which interests deserve legal protection is, ultimately, a moral one. Theories of harm, if they are to provide any useful guidance to decisionmakers, cannot be ideologically colorless.[81] In a democratic society, legislators, representing the voice of the people, are obliged to determine which interests most deserve legal preservation.

The general welfare and security of its citizens are areas traditionally in the power of the state to govern, particularly those pertaining to interactive relationships among its citizens—as in marriage, divorce, contracts, and torts. Resorts to personal

79. *See supra* notes 45 and 46.

80. *See* Linda Greenhouse, *Justices Weigh Ban on Voicing Hate*, N.Y. TIMES, Dec. 5, 1991, at B19.

81. von Hirsh, *supra* note 63, at 706.

abuse, coercion, intimidation and violence fall within traditional, morally accepted notions of harm, and are otherwise criminal conduct, whether or not based on race- or group-identity. However, when criminal conduct is motivated by racial or group bias, experience and empirical study have shown that the harm caused is distinct and more serious.[82] The victim, as well as society, suffers harms from crimes of hate beyond that of ordinary trespass or assault.[83] Harmful conduct that is otherwise criminal is not immune from classification simply because it involves a symbolic message, or even pure speech. The Court has, on occasions other than group-bias violence, upheld statutes that defined and classified crimes involving expressive conduct according to "subject-matter," such as statutes involving child pornography.[84]

With respect to racist crimes, such as cross-burning, the interest involved is not merely an interest in the security of property or bodily integrity; nor is it simply as interest in the enjoyment of "civil rights," such as the right to "equal housing" or "equal opportunity." It is an interest in individual "liberty" and "freedom." "Equality" and "freedom" are inextricably linked. The realization of "freedom" is but the enjoyment of certain fundamental rights embodied under the penumbra of the Constitution.[85]

There is no "tension" between the interest in "free speech" and the interest in "equality" when symbolic conduct crosses over from the realm of pure ideology to the realm of calculated harm. Both the right to free speech and the right to equality are aspects of liberty which give meaning to the concept of individual "freedom," so long as conduct engaged in the pursuit of these rights is not directed to hindering others from the enjoyment of the same rights. As Justice Roberts so succinctly explains in *Cantwell v. Connecticut:*

> The essential characteristic of these liberties is, that under their shield many types of life, character, opinion and belief can develop unmolested and unobstructed. Nowhere is this

82. *See supra* notes 26 and 27.

83. *See McNeil-Lehrer, supra* note 24.

84. *See, e.g.*, New York v. Ferber, 458 U.S. 747 (1982).

85. *See* Arthur Kinoy, *The Constitutional Right of Negro Freedom*, 21 RUTGERS L. REV. 387, 390 (1967); *see also*, Charles H. Jones, *An Argument for Federal Protection Against Racially Motivated Crimes: 18 U.S.C. § 241 and the Thirteenth Amendment*, 21 HARV. C.R.-C.L. L. REV. 689 (1986).

> shield more necessary than in our own country for a people composed of many races and of many creeds. There are limits to the exercise of these liberties. The danger in these times from the coercive activities of those who in the delusion of racial or religious conceit would incite violence and breaches of the peace in order to deprive others of their equal right to the exercise of their liberties, is emphasized by events familiar to all. These and other transgressions of those limits the States appropriately may punish.[86]

CONCLUSION

To rightly serve the interest in liberty or freedom, the interest in equality and self-dignity must be preserved, not simply by equal treatment but by treatment as an equal under the law. We do not live in a social vacuum where individuality is merely an outgrowth of self-reliance. The "personality" is a complex web of social construction. Group-identity, group-status and group-subordination deeply affect the development of an individual's liberty and autonomy. Tolerance by the law of wrongful invasions into an individual's interest of equality only serves to undermine our Constitutional values and dreams.

The enactment of hate crimes legislation is essentially a call to freedom: freedom from all "badges and indicia of slavery," freedom from racial terrorism, persecution and subjugation: freedom, as promised by the concept of liberty that permeates the Bill of Rights, and by the vision of equality that underlies the Thirteenth, Fourteenth and Fifteenth amendments. Surely, an interest worthy of Constitutional enshrinement is an interest worthy also of state protection.

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86. Cantwell v. Connecticut, 310 U.S. 296, 310 (1940).