FIRST AMENDMENT — FREE SPEECH — PENALTY ENHANCEMENT STATUTES THAT INCREASE THE SENTENCE FOR CRIMINAL CONDUCT MOTIVATED BY BIAS TOWARD THE VICTIM ARE CONSTITUTIONAL — *Wisconsin v. Mitchell*, 113 S. Ct. 2194 (1993).

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The First Amendment to the United States Constitution provides that Congress shall pass no law abridging the freedom of speech.[1] This right has never been interpreted to provide absolute protection to all types of speech.[2] States, however, have had difficulty in creating appropriate prohibitions on "hate crimes,"[3] so as not to run afoul of the First Amendment.

Responding to an increase in bias-motivated crimes,[4] many states have enacted "hate crime" legislation.[5] Hate crime statutes fall into two

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[1]U.S. CONST. amend. I. The First Amendment provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances." *Id.*

[2]*See* LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-2, at 789-94 (2d ed. 1988) (establishing a two-track method of interpretation of free speech cases, observing that the Court does allow content-based regulation of speech). *See also infra* notes 38-43.

[3]*See* R.A.V. v. St. Paul, 112 S. Ct. 2538 (1992) (striking city ordinance that prohibited the expression of fighting words based on the bigoted viewpoint of the speaker).

[4]Data provided by thirty-two states revealed that in 1991, 4,558 hate crime incidents were reported by the 2,771 participating law enforcement agencies. Federal Bureau of Investigation Press Release, at Jan. 5, 1993. Four types of offenses: intimidation (33%), destruction/damage/vandalism of property (27%), simple assault (17%), and aggravated assault (16%) accounted for 93% of the hate crimes reported. *Id.*

[5]CAL. PENAL CODE § 422.6 (West 1988) (prohibiting interference with the exercise of another's civil rights); CAL. PENAL CODE § 422.7 (West 1988) (providing aggravating factors for sentencing for bias-motivated crimes not listed in § 422.6); COLO. REV. STAT. ANN. § 18-9-121 (West 1990) (criminializing "Ethnic intimidation," defined to include "injury, fear, or property damage"); CONN. GEN. STAT. ANN. § 53-37a (West 1991) (prohibiting "[d]eprivation of civil rights by person wearing a mask or hood on account of religion, color, alienage, race, sex . . . ."); D.C. CODE ANN. § 22-3112.2 (1981) (criminalizing the defacing or burning of a cross or religious symbol as well as the display of certain emblems); FLA. STAT. ANN. § 775.085 (West 1992) (enhancing penalties when "evidencing prejudice while committing offense"); IDAHO CODE § 18-7902 (1987)

(prohibiting harassment motivated by among other things, race, religion, color, or alienage); ILL. REV. STAT. ch. 38, para. 12-7.1 (Smith-Hurd 1992) (defining hate crime as the commission of a certain criminal acts motivated by race); IOWA CODE ANN. § 708.2c (West 1993) (providing penalties for assaults committed in violation of "individual rights"); IOWA CODE ANN. § 712.9 (West 1993) (providing for penalty enhancement statute that raises underlying crime by one degree); IOWA CODE ANN. § 729A.2 (West 1993) (defining a hate crime as a violation of individual rights); ME. REV. STAT. ANN. tit. 17, § 2931 (West 1993) (prohibiting the interference with the exercise of one's civil rights); MD. CODE ANN., CRIM. LAW § 470A (1993) (prohibiting crimes against religious institutions, persons, or property); MICH. COMP. LAWS ANN. § 750.147b (West 1991) (defining ethnic intimidation as causing or threatening harm to another based on race, religion, color, gender, or national origin); MO. ANN. STAT. § 547.090 (Vernon 1993) (defining first degree ethnic intimidation); MO. ANN. STAT. § 547.093 (Vernon 1993) (defining second degree ethnic intimidation); MONT. CODE ANN. § 45-5-221 (1993) (criminalizing malicious harassment or intimidation aimed at denying another's civil or human rights); MONT. CODE ANN. § 45-5-222 (1993) (providing enhanced penalties for crimes motivated by bias due to race); NEV. REV. STAT. ANN. § 207.185 (Michie 1992) (penalizing the "commission of certain unlawful acts by reason of actual or perceived race, color, religion, . . . of another person or group of persons."); N.H. REV. STAT. ANN. § 651:6(I)(g) (1993) (providing penalty enhancement for offense committed based on, among other things, the victim's race); N.J. STAT. ANN. § 2C:33-11 (West 1993) ("Defacement or damage of property by placement of symbol"); N.J. STAT. ANN. § 2C:44-3(e) (West 1993) (enumerating factors for consideration when sentencing defendants for crimes motivated by bias due to race, sexual orientation, color, ethnicity, or religion); N.Y. PENAL LAW § 240.31 (McKinney 1989) (identifying as a first degree offense the commission of personal injury or property damage motivated by race); OHIO REV. CODE ANN. § 2927.12 (Anderson 1993) (providing penalty enhancement when the underlying crime is motivated by race); OKLA. STAT. ANN. tit. 21, § 850 (West 1994) (prohibiting "Malicious intimidation or harassment because of race."); OR. REV. STAT. § 166.155 (1991) (establishing "intimidation in the second degree" when an individual threatens others on the basis of race, etc.); 18 PA. CONS. STAT. § 2710 (1983) (defining "ethnic intimidation" as the commission of an underlying offense motivated by race); R.I. GEN. LAWS § 11-5-13 (1993) (enhanced penalty for bias-motivated assault); R.I. GEN. LAWS § 11-42-3 (1993) (criminalizing ethnic and religious intimidation); R.I. GEN. LAWS § 11-53-2 (1993) (prohibiting "threat by terror", which includes the display of Nazi swastikas and burning crosses); R.I. GEN. LAWS § 11-53-3 (1993) (criminalizing "threats to immigrants."); TENN. CODE ANN. § 39-17-309 (1991) (prohibiting intimidation based on religion, race, etc.); UTAH CODE ANN. § 76-3-203.3 (1993) (enhancing penalty when primary offense is motivated by intent to deprive another of his civil rights through intimidation or terror); VT. STAT. ANN. tit. 13, § 1455 (1993) (doubling penalties for crimes motivated by the victim's actual or perceived race, religion, etc.); VA. CODE ANN. § 18.2-423 (Michie 1988) (prohibiting the burning of a cross on another's property or on a public place "with intent to intimidate"); VA. CODE ANN. § 18.2-423.1 (Michie 1988) (criminalizing "[p]lacing swastika on certain property with intent to intimidate"); WASH. REV. CODE ANN. § 9A.36.080 (West 1988) (criminalizing intimidation based on the victim's race); W. VA. CODE § 61-6-21 (1992) (identifying injury or intimidation motivated by race, religion, etc.); WIS. STAT. ANN. § 939.645 (West 1993) (identifying

categories. The first category creates a new crime for certain types of expression directed at protected groups.[6] The second category enhances the penalty that may be imposed for existing crimes when the commission is motivated by animus toward protected groups.[7] Both methods have been criticized[8] as violative of the free speech guarantee of the First Amendment[9]

"crimes" as those "committed against certain people or property").

[6]*See R.A.V.*, 112 S. Ct. at 2541, in which the Court decided the constitutionality of a city ordinance directed at certain types of expression. *Id.* The ordinance provided:

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

Id. (quoting ST. PAUL, MINN. LEGIS. CODE § 292.02 (1990)).

[7]*See, e.g.*, OHIO REV. CODE ANN. § 2927.12 (Anderson 1993) (providing extended penalties for crimes motivated by race); OR. REV. STAT. § 166.155 (1991) (providing for intimidation in the second degree when an individual threatens others on the basis of race, religion . . . .); WIS. STAT. ANN. § 939.645 (West 1993) (providing enhanced penalties when the underlying crime is motivated by bias toward the victim).

[8]For a discussion of the first category type of hate crime legislation — those that prohibit certain types of expression — see Thomas S. McGuire, Note, *First Amendment — Free Speech — First Amendment Prohibits Hate Crime Laws that Punish only Fighting Words Based on Racial, Religious or Gender Animus* — R.A.V. v. City of St. Paul, 112 S. Ct. 2538 (1992), 23 SETON HALL L. REV. 1067 (1993); Kent Greenawalt, *Insults and Epithets: Are They Protected Speech?*, 42 RUTGERS L. REV. 287 (1990); Rodney A. Smolla, *Rethinking First Amendment Assumptions About Racist and Sexist Speech*, 47 WASH. & LEE L. REV. 171 (1990); Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320 (1989); David Kretzmer, *Freedom of Speech and Racism*, 8 CARDOZO L. REV. 445 (1987);

For a discussion of the second category of hate crime legislation — those that enhance the penalties for pre-existing crimes — see Note, *Hate Is Not Speech: A Constitutional Defense of Penalty Enhancement For Hate Crimes*, 106 HARV. L. REV. 1314 (1993); Eric J. Grannis, Note, *Fighting Words and Fighting Freestyle: The Constitutionality of Penalty Enhancement Crimes*, 93 COL. L. REV. 178 (1993); Frederick M. Lawrence, *Resolving the Hate Crimes/Hate Speech Paradox, Punishing Bias Crimes and Protecting Racist Speech*, 68 NOTRE DAME L. REV. 673 (1993); Susan Gellman, *Sticks and Stones Can Put You in Jail, But Can Words Increase Your Sentence?: Constitutional Policy Dilemmas of Ethnic Intimidation Laws*, 39 UCLA L. REV. 333 (1991).

because of their reliance upon the intimidator's viewpoint to determine what is criminal.

Recently, the United States Supreme Court in *Wisconsin v. Mitchell*[10] held that penalty enhancement statutes, which constitute the second category of "hate crime" legislation, do not violate the First Amendment because they merely punish conduct and not speech.[11] Additionally, the Court held that these statutes are not unconstitutionally overbroad.[12] This decision distinguished the penalty enhancement statutes, which are constitutional, from the statutes that punish "hate speech,"[13] reasoning that the former type of statute proscribed conduct,[14] while the latter proscribed speech based on the viewpoint of the speaker.[15]

The incident that led to the *Mitchell* case began during the early evening hours of October 8, 1989, when Todd Mitchell and a group of young black men and boys had gathered inside a Kenosha apartment complex.[16] Members of the group were discussing a scene from the movie "Mississippi Burning," in which a white man beat a black boy who was praying.[17] Later that evening, several members of the group, including Mitchell, moved outside where the discussion continued.[18]

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[9]The United States Supreme Court has held that, through the Due Process Clause of the Fourteenth Amendment, the First Amendment applies fully to the states. *See* Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

[10]113 S. Ct. 2194 (1993).

[11]*Id.* at 2201.

[12]*Id.*

[13]*See* R.A.V. v. St. Paul, 112 S. Ct. 2538, 2543 (1992) (rejecting the absolute categorical approach to speech and permitting the limitation of proscribable speech, such as fighting words, if such limitation is viewpoint neutral).

[14]*Mitchell*, 113 S. Ct. at 2201.

[15]*Id.*

[16]*Id.* at 2196.

[17]*Id.* The Wisconsin Court of Appeals noted no evidence was presented that proved that Mitchell had participated in this discussion. State v. Mitchell, 473 N.W.2d. 1, 3 (Wis. App. 1991).

[18]Wisconsin v. Mitchell, 113 S. Ct. 2194, 2196 (1993).

At that time, Mitchell and the others spotted Gregory Reddick, a fourteen-year-old white boy, walking along the other side of the street.[19] Mitchell counted to three and directed the group to attack Reddick.[20] In the five-minute attack, Reddick was stomped, kicked, and punched.[21] As a result of the beating, Reddick was in a coma for four days.[22]

A Wisconsin Superior Court tried and convicted Mitchell of being a party to a the crime of aggravated battery.[23] The same court further determined that Mitchell had selected the victim on the basis of the victim's race in violation of the hate crime penalty-enhancing statute.[24]

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[19]*Id.* Before the appearance of the victim, Mitchell asked the others outside the apartment, "Do you all feel hyped up to move on some white people?" *Id.* (quoting brief for petitioner at 4).

[20]*Id.* at 2197. Upon seeing Reddick, Mitchell said, "You all want to fuck somebody up?," followed by, "There goes a white boy; go get him." *Id.* at 2196-97 (quoting brief for petitioner at 4-5).

[21]*Id.* Following Mitchell's instructions, several members of the group immediately ran toward the victim. State v. Mitchell, 473 N.W.2d. 1, 3 (Wis. App. 1991). One member of the group kicked the victim, sending him to the ground. *Id.* The victim was then surrounded by several attackers, who repeatedly kicked, stomped, and punched him. *Id.*

[22]*Mitchell*, 473 N.W.2d at 3. The state court noted that the victim would have died had he not received medical attention. *Id.* at 2.

[23]*Id.* at 3. Additionally, Mitchell was convicted of theft, party to a crime. *Id.*

[24]State v. Mitchell, 485 N.W.2d 807, 809 (Wis. 1992). The trial court convicted Mitchell of aggravated battery which carries a maximum sentence of two years. *Id. See* WIS. STAT. ANN. §§ 940.19 (1)(m) and 939.50 (3)(e) (West 1993)). *Id.* This maximum sentence, however, was extended to seven years based on the jury's finding that Mitchell had selected his victim based on the victim's race. *Id. See* WIS. STAT. ANN. § 939.645, which provides:

> (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.

On appeal, Mitchell challenged the constitutionality of the penalty enhancement statute.[25] Mitchell argued that the state statute was vague and overbroad, and thus, violative of the First Amendment.[26] In dismissing Mitchell's claims that the statute was unconstitutionally vague and overbroad,[27] the Wisconsin Court of Appeals upheld the statute as one that proscribed particular conduct in which words are used to provide circumstantial evidence of the specified conduct.[28]

(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 of that crime.

WIS. STAT. ANN. § 939.645.

[25]*Mitchell*, 473 N.W.2d at 3. There was no trial record available regarding this contention, as Mitchell had not challenged the constitutionality of the provision at trial. *Id.*

[26]*Id.*

[27]*Id.* Mitchell claimed that statute was vague because of the use of the terms "intentionally selects" and "race" in the statute. *Id.* at 4. The Wisconsin Court of Appeals found that this argument was without merit, noting that both terms were easily defined in this context. *Id.* at 4-5. In addition, Mitchell argued that the statute was fatally overbroad. *Id.* at 5. The court of appeals rejected this contention finding that "the statute is directed at the action of selecting a victim and not at speech." *Id.* at 6.

[28]*Id.* The state court of appeals stated that, "the words uttered by a defendant are used no differently than they are in other criminal statutes. The words are simply probative as to an element of the crime." *Id.*

The Wisconsin Supreme Court reversed the court of appeals and invalidated the state penalty enhancement statute.[29] In rejecting the state's contention that the statute punishes the conduct of intentionally selecting the victim, the state supreme court found that the statute impermissibly punished offensive thought as defined by the state Legislature.[30] The court further found that the statute was unconstitutionally overbroad, because it punished bigoted thought, and opined that the enforcement of the statute would result in a chilling effect on every kind of speech.[31]

The United States Supreme Court granted the state's petition for certiorari in order to settle the conflict of authority among several state courts regarding the constitutionality of penalty enhancement statutes similar to that enacted in Wisconsin.[32] Writing for a unanimous Court, Chief Justice Rehnquist reversed the decision of the Wisconsin Supreme Court, finding first that the penalty enhancement statute properly punished the conduct of intentionally selecting a victim based on the victim's perceived membership in a protected class,[33] and second that the statute was not overbroad.[34]

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[29]State v. Mitchell, 485 N.W.2d 807, 816-18 (Wis. 1992). The state supreme court found that the statute punished bigoted thought, by proscribing the bias motivation of the actor. *Id.* at 812.

[30]*Id.* at 816. Relying upon the decision of the United States Supreme Court in R.A.V. v. St. Paul, 112 S. Ct. 2538 (1992), a decision handed down the day before, the Wisconsin Supreme Court held that the penalty enhancement provision violated the First Amendment because it merely criminalized bigoted thought with which the state Legislature disagreed. *Mitchell*, 485 N.W.2d at 815. The Wisconsin court also found that the statute was unconstitutionally overbroad, because it chilled free speech by sweeping protected speech within its grasp. *Id.* at 816.

Justice Bablitch, the sole dissenter, argued that the statute did no more than punish those who act upon bigoted thoughts and provided no proscription on the holding or expression of bigoted thoughts. *Id.* at 820 (Bablitch, J., dissenting).

[31]*Id.* at 816.

[32]Wisconsin v. Mitchell, 113 S. Ct. 2194, 2198 n.4 (1993). The three state high courts which had addressed the constitutionality of penalty enhancement statutes arrived at mixed conclusions. *See* State v. Plowman, 838 P.2d. 558 (Or. 1992) (upholding state penalty enhancement statute); State v. Wyant, 597 N.E.2d. 450 (Oh. 1992) (invalidating state penalty enhancement statute); Wisconsin v. Mitchell, 485 N.W.2d. 807 (Wis. App. 1992) (striking down state penalty enhancement statute).

[33]*Mitchell*, 113 S. Ct. at 2201.

[34]*Id.*

This Note will explore several bases for regulating "hate speech." Three arguments support the constitutionality of "hate crime" statutes. The first two arguments apply to laws like the ordinance at issue in *R.A.V. v. St. Paul*,[35] which created a new crime for bias-motivated speech.[36] These arguments are based on the doctrines of "fighting words"[37] and group defamation,[38] both of which support the contention that facially content-discriminatory statutes fall outside the scope of First Amendment protection.

The third argument applies to penalty enhancement statutes that punish conduct motivated by bias more severely than the same conduct performed for some other reason or for no reason whatsoever.[39]

I. HATE SPEECH AND FIGHTING WORDS

In accordance with the United States Constitution, the First Amendment prohibits content-based regulations that have the effect of curtailing an individual's exercise of free speech.[40] The United States has identified several exceptions to this Constitutional protection.[41] These exceptions

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[35]For a full text of the St. Paul ordinance, see note 6 *supra*.

[36]R.A.V. v. St. Paul, 112 S. Ct. 2538, 2541 (1992).

[37]*See* Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

[38]*See* Beauharnais v. Illinois, 343 U.S. 250 (1952).

[39]Wisconsin v. Mitchell, 113 S. Ct. 2194, 2199 (1993).

[40]*Id.* MELVILLE B. NIMMER, NIMMER ON FREEDOM OF SPEECH, A TREATISE ON THE THEORY OF THE FIRST AMENDMENT § 3-72 (1992) (discussing the Court's application of the First Amendment's restrictions on content-based regulation).

[41]Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942). In *Chaplinsky*, Justice Murphy, writing for the Court, pronounced, "it is well understood that the right of free speech is not absolute at all times and under all circumstances. There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem." *Id.*

include: fighting words,[42] obscenity,[43] commercial speech,[44] threats against the President,[45] incitement to riot,[46] and group defamation.[47]

Traditionally, the Court has defined fighting words as insults directed at an individual that "by their very utterance inflict injury or tend to incite an immediate breach of the peace."[48] The Court initially enunciated this definition in *Chaplinsky v. New Hampshire*.[49] Writing for a unanimous Court, Justice Murphy found that a state statute that banned "face-to-face words plainly likely to cause a breach of the peace by an addressee,"[50] was constitutional.[51] In *Chaplinsky*, the defendant was arrested for creating a

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[42]*Id.* at 573 (holding that the First Amendment provides no protection for words that by their very utterance tend to incite an immediate breach of the peace or inflict injury).

[43]Miller v. California, 413 U.S. 15, 23 (1973) (holding that obscene materials are beyond the First Amendment's protection).

[44]Central Hudson Gas and Electric Corp. v. Public Service Comm'n of New York, 447 U.S. 557, 566 (1980) (providing limited First Amendment protection to commercial speech concerning lawful activity that was neither misleading nor fraudulent).

[45]Watts v. United States, 394 U.S. 705, 707 (1969) (upholding a federal statute that criminalized threats against the President).

[46]Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (holding that state government may proscribe speech that constitutes incitement of imminent lawless activity).

[47]Beauharnais v. Illinois, 343 U.S. 250, 258 (1952) (holding that libelous comments directed at a group were beyond the protection of the First Amendment).

[48]Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1941).

[49]*Id.*

[50]*Id.* at 573. The New Hampshire statute provided:

> No person shall address any offensive, derisive or annoying word to any other person who is lawfully in any street or other public place, nor call him by any offensive or derisive name, nor make any noise or exclamation in his presence and hearing with intent to deride, offend or annoy him, or to prevent him from pursuing his lawful business or occupation.

N.H. REV. STAT. ANN. § 2, *reprinted in Chaplinsky*, 315 U.S. at 569.

[51]*Chaplinsky*, 315 U.S. at 572. Specifically, the Court noted that such words are of limited social value and that any benefit that may result from their use is outweighed by society's interest in protecting order and morality. *Id.*

public disturbance.[52] As the defendant was being led away by the authorities, he called one of the police officials a "God damned racketeer and a damned fascist."[53] The Court held that the statute was constitutional because it prohibited the use of words in a public place likely to result in a breach of the peace, which the Court equated to conduct and not expression.[54]

Subsequent decisions of the Court limited the broad language of *Chaplinsky*. In fact, seven years later in *Terminiello v. Chicago*,[55] the Court struck down as unconstitutional a city ordinance that prohibited breaches of the peace.[56] In *Terminiello*, the defendant was convicted of denouncing various racial and political groups in a speech he made to the public.[57] In providing instructions to the jury at trial, the judge interpreted the statute as prohibiting conduct that "stirs the public to anger, invites dispute, brings about a condition of unrest or creates a disturbance."[58] Upon reviewing the instructions under the guidelines of the First

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[52]*Id.* at 570. Before his arrest, the defendant, a Jehovah's Witness, had been distributing religious literature on the public sidewalk in Rochester, New Hampshire. *Id.* at 569-70. Local citizens complained to the city marshal that the defendant was denouncing all other religions, by referring to them as "rackets." *Id.* at 570. The marshal warned the defendant about the growing agitation of the crowd. *Id.*

[53]*Id.* at 569. The defendant was not convicted for distributing religious literature nor as a result of the police officer's fear that a public disturbance was about to occur. *Id.*

[54]*Id.* at 573. *See* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 16.38, at 1058-59 (4th ed. 1991) [hereinafter NOWAK & ROTUNDA] ("The test outlined in *Chaplinsky* was whether or not men of common intelligence would understand the words as likely to cause the average addressee to fight and expressions that by general consent are 'fighting words' when said without a 'disarming smile.'").

[55]Terminiello v. Chicago, 337 U.S. 1 (1949).

[56]*Id.* at 2. The trial court's jury instruction interpreted the ordinance as a prohibition of conduct that "stirs the public to anger, invites dispute, brings about a condition of unrest or creates a disturbance." *Id.* at 3. Based in part on this instruction, the jury found the defendant guilty and imposed a fine. *Id.* at 2. The conviction was affirmed by the Illinois Appellate Court and the Illinois Supreme Court. *Id.* at 3.

[57]*Id.* at 2-3. The address was made before the Christian Veterans of America. *Id.* The auditorium was standing room only with about eight hundred persons in attendance. *Id.* at 3. Outside the auditorium was a crowd of about one thousand persons, who had come to protest the speech of the defendant. *Id.*

[58]*Id.* at 3.

Amendment's guarantee of free speech, the Court[59] concluded that the ordinance, as construed by the Illinois courts, reached speech beyond mere "fighting words" and was, therefore, unconstitutional.[60] Accordingly, the Court struck down the ordinance as an unconstitutionally vague and overbroad means of regulation.[61]

Two years later, in *Feiner v. New York*,[62] the Court upheld a conviction under a state statute that prohibited disorderly conduct.[63] In *Feiner*, the

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[59]*Id.* In *Terminiello*, a 5-4 decision with three dissenting opinions, Chief Justice Vinson opined that the issue decided by the Court had not been properly presented. *Id.* at 8 (Vinson, C.J., dissenting). Justice Frankfurter, joined by Justices Jackson and Burton, contended that the Court had overstepped the bounds of appropriate judicial review by meddling with a state court's judgment when that court never had the opportunity to consider the claim raised. *Id.* at 10 (Frankfurter, J., dissenting). Justice Jackson, joined by Justice Burton, argued that a restriction of the defendant's speech was warranted under the circumstances, stating that the Court's "choice is not between order and liberty." *Id.* at 37 (Jackson, J., dissenting). Rather, the dissenting Justice contended, "it is between liberty with order and anarchy without either." *Id.* Additionally, Justice Jackson opined "[t]here is danger that, if the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact." *Id.*

[60]*Id.* at 5. In striking down the ordinance, Justice Douglas, writing for the majority, explained:

> [A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea . . . . For the alternative would lead to standardization of ideas either by legislatures, courts, or dominant political or community groups.

Id. at 4-5.

[61]*Id.* at 5. The Justice opined that the petitioner's conviction could have been supported even if the speech only "stirred people to anger, invited public dispute, or brought about a condition of unrest." *Id.*

[62]340 U.S. 315 (1951).

[63]The state statute provided:

> Any person who with intent to provoke a breach of the peace, or whereby a breach of the peace may be occasioned, commits any of the following acts shall be deemed to have committed the offense of disorderly conduct:
> 1. Uses offensive, disorderly, threatening, abusive or insulting language, conduct or behavior;

defendant had been addressing people on the streets in Syracuse urging blacks to "rise up in arms and fight for equal rights."[64] In challenging his conviction, the defendant argued that the statute encouraged an abuse of police discretion and that his arrest was motivated by their desire to censor the content of his speech.[65] Writing for the Court, Chief Justice Vinson[66] found that the arrest was not based on censoring the content of the speech but, rather, constituted an effort by the police to avoid the violence that the officers perceived was about to take place.[67]

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2. Acts in such a manner as to annoy, disturb, interfere with, obstruct, or be offensive to others;
3. Congregates with others on a public street and refuses to move on when ordered by the police; . . . .

N.Y. PENAL LAW § 722 (McKINNEY 1950), *reprinted in Feiner*, 340 U.S. at 319 n.1.

[64]*Feiner*, 340 U.S. at 317 (1951). The trial court found that Feiner was attempting to incite the "Negro people against the whites . . . ." *Id.* Several onlookers commented to the police on the scene that they would be unable to control the crowd. *Id.* After Feiner had been speaking for more than a half hour the police asked him to stop talking. *Id.* at 318. When Feiner refused, the police arrested him and charged him with disorderly conduct. *Id.* It should be noted that the defendant did not argue that the statute was vague or overbroad, as was done in *Terminiello*. *Id.*

[65]*Id.* at 319. The state courts "recognized petitioner's right to hold a street meeting . . . use of loud-speaking equipment . . . and to make derogatory remarks concerning public officials and the American Legion." *Id.*

[66]*Id.* The majority's opinion was challenged by Justice Black and Justice Douglas, each writing dissents that contended that the defendant was entitled to the protection of the police, so that he could exercise his First Amendment right to free speech. *See id.* at 327 (Black, J., dissenting).

[67]*Id.* at 319-20. Chief Justice Vinson went on to state,

> It is one thing to say that the police cannot be used as an instrument for the suppression of unpopular views, and another to say that, when as here the speaker passes the bounds of argument or persuasion and undertakes incitement to riot, they are powerless to prevent a breach of the peace.

Id. at 321. The authority of the *Feiner* "hostile audience" doctrine has been eroded significantly by the Court's choice of applying *Terminiello* and confining *Feiner* to its facts. *See* Cohen v. California, 403 U.S. 15, 21 (1971) (finding that a jacket worn by the Petitioner, which stated "Fuck the Draft," was protected by the First Amendment because the offensive speech was not directed at another person and, absent a showing of a substantial privacy interest, the state may not shut off discourse to protect others from hearing it).

The modern approach to the "fighting words" doctrine was applied by the Court in *Texas v. Johnson*.[68] In *Johnson*, the Court struck down a state statute that prohibited, *inter alia*, the burning of the American flag.[69] The defendant was arrested for publicly burning an American flag as a political protest outside the Republican Convention Hall in Dallas.[70] While the flag burned, the defendant and the other protestors sang: "America, the red, white, and blue, we spit on you."[71] Writing for the majority, Justice Brennan[72] found that the defendant's burning of the flag neither triggered

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[68]Texas v. Johnson, 491 U.S. 397 (1989).

[69]*Id.* at 402. TEXAS PENAL CODE ANN. §42.09 (West 1989) provided:

(a) A person commits an offense if he intentionally or knowingly desecrates:
(1) a public monument;
(2) a place of worship or burial; or
(3) a state or national flag.
(b) For purposes of this section, desecrate means to deface, damage, or otherwise physically mistreat in a way that the actor knows will seriously offend one or more persons likely to observe or discover his action.
(c) An offense under this section is a Class A misdemeanor.

Id.

[70]*Johnson*, 491 U.S. at 399. The defendant had been a participant in a political protest called the "Republican War Chest Tour." *Id.* The purpose of the demonstration was to speak out against the policies of certain Dallas-based corporations and the Reagan administration. *Id.* During the protest, the demonstrators had marched through Dallas, participated in "die-ins" at several corporate office buildings, and, at various locations, spray-painted the building walls. *Id.* It was not alleged that the defendant participated in these activities. *Id.*

The defendant was convicted in state court and sentenced to a one-year prison term and a fine of $2,000. *Id.* at 400. On appeal, the Court of Appeals for the Fifth District of Texas affirmed the conviction. *Id.* The Texas Court of Criminal Appeals reversed finding the First Amendment protected the defendant's expressive conduct. *Id.*

[71]*Id.* at 399. Later, after the demonstrators had left, a witness collected the ashes and buried them in his yard. *Id.*

[72]*Id.* The majority decision elicited the dissent of four justices. NOWAK & ROTUNDA, *supra* note 54, § 16.49, at 1111. Chief Justice Rehnquist, joined by Justices White and O'Connor, contended that the American flag was entitled to special protection from those who would destroy it, because as a national symbol it possessed almost mystical qualities. *Johnson* at 429 (Rehnquist, C.J., dissenting). Justice Stevens filed a strongly worded dissent which predicted that the Court's decision would allow desecration of any national monument. *Id.* at 437 (Stevens, J., dissenting).

a breach of the peace nor threatened one.[73] In addition, the Court refused to find that this expressive conduct fell within the ambit of "fighting words," noting instead that "[n]o reasonable onlooker would have regarded Johnson's generalized expression . . . as a direct personal insult or an invitation to exchange fisticuffs."[74]

The latest attempt by the Court to use the *Chaplinsky* "fighting words" doctrine to support a state conviction was demonstrated in *R.A.V. v. St. Paul*.[75] In *R.A.V.*, the defendant burned a cross within the fenced yard of a neighborhood family.[76] As a result, the defendant was arrested and charged under the St. Paul Bias-Motivated Crime Ordinance.[77] While accepting the Minnesota Supreme Court's limitation of the ordinance to encompass only "fighting words," the Court, nevertheless, found the ordinance to be unconstitutionally content-based.[78] Writing for the Court, Justice Scalia[79] reversed the conviction, holding that, although "fighting words" are proscribable under the First Amendment, their proscription may

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[73]*Id.* at 408. The Court went on to characterize the State's contention as "a claim that an audience that takes serious offense at particular expression is necessarily likely to disturb the peace and that the expression may be prohibited on that basis." *Id.*

[74]*Id.* at 409.

[75]112 S. Ct. 2538 (1992). For a complete discussion of *R.A.V.*, see McGuire, *supra* note 8.

[76]*Id.* at 2541.

[77]*Id.* *See* MINN. LEGIS. CODE § 292.02 (1990). For the complete text of the city ordinance, see *supra* note 6.

[78]*Id.* at 2547. The Court explained that the ordinance as construed prohibited the speech of those expressing themselves on disfavored topics and, as such, was not permitted under the First Amendment. *Id.* The Court concluded that the ordinance "goes even beyond mere content discrimination, to actual viewpoint discrimination." *Id.*

[79]*Id.* at 2541. Although the ordinance was invalidated by a 9-0 decision, it was actually far from unanimous, rendering four written opinions. *Id.* Writing for the 5-4 majority, Justice Scalia was joined by Chief Justice Rehnquist and Justices Kennedy, Souter, and Thomas. *Id.* at 2538. Justices White, Stevens, and Blackmun concurred in separate opinions, each writing strongly worded criticisms of the majority's analysis and conclusion and finding instead that the same decision could properly be reached by relying on the First Amendment doctrines of vagueness and overbreadth. MELVILLE B. NIMMER, NIMMER ON FREEDOM OF SPEECH, A TREATISE ON THE THEORY OF THE FIRST AMENDMENT, § 3-72, at 155, n.138.18 (1992).

not be based on content unless the "content discrimination is reasonably necessary to achieve [the state's] compelling interests."[80]

Clearly, based on the content-neutral requirement of *R.A.V.*, the "fighting words" doctrine is not sufficient to shoulder the burden of supporting statutes aimed at the elimination of "hate speech."[81]

II. HATE SPEECH AND GROUP DEFAMATION

Legal scholars have articulated group defamation as an alternate basis for regulating "hate speech."[82] In the landmark case *Beauharnais v. Illinois*[83] the Supreme Court upheld a state statute[84] that proscribed the libel of a class of persons.[85] The defendant was arrested for distributing pamphlets that

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[80]R.A.V. v. St. Paul, 112 S. Ct. 2538, 2550 (1992). Justice Scalia set out three exceptions to this rule: (1) "[w]hen the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable," *id.* at 2545; (2) when "the subclass of proscribable speech . . . happens to be associated with particular 'secondary effects' of speech, . . ." *id.* at 2546; and (3) when "the nature of the content discrimination is such that there is no realistic possibility that official suppression of ideas is afoot." *Id.* at 2547. *See* McGuire, *supra*, note 8, at 1085 (providing a detailed discussion of the three exceptions to the majority's holding).

[81]Henry Louis Gates, Jr., *Let Them Talk. Why Civil Liberties pose no threat to Civil Rights*, THE NEW REPUBLIC, Sept. 20 & 27, 1993, at 37, 39-40.

[82]*Id.* In his article Professor Gates wrote, "the defamation paradigm . . . compares racist speech to libel, which is an assault on dignity or reputation." *Id.* at 40.

[83]343 U.S. 250 (1952).

[84]The state statute at issue in *Beauharnais* provided:

> It shall be unlawful for any person, firm or corporation to manufacture, sell, or offer for sale, advertise or publish, present or exhibit in any public place in this state any lithograph, moving picture, play, drama or sketch, which publication or exhibition portrays depravity, criminality, unchastity, or lack of virtue of a class of citizens, of any race, color, creed or religion . . . which said publication or exhibition exposes the citizens of any race, color, creed or religion to contempt, derision, or obloquy or which is productive of breach of the peace or riots . . . .

ILL. REV. STAT., chap. 38, § 471 (1949), *reprinted in Beauharnais*, 343 U.S. at 251.

[85]*Beauharnais*, 343 U.S. at 266. Justice Frankfurter, writing for the majority, found that libelous utterances are beyond the area of constitutionally protected speech, and therefore the state was free to regulate it in any manner that the legislature found fit. *Id.*

denigrated blacks.[86] Writing for the majority, Justice Frankfurter[87] found that libelous speech was constitutionally unprotected speech, and could be curtailed by the state so long as the restrictions were not purposeless and unrelated to the well-being and peace of the state.[88]

The legal underpinnings of the *Beauharnais* decision have eroded since the opinion was handed down forty-one years ago.[89] One of the two decisions that sounded the death knell for the *Beauharnais* doctrine was *New York Times v. Sullivan*.[90] In *Sullivan*, the Montgomery, Alabama Chief of Police brought a libel action against the defendant for printing a full page advertisement that criticized the Montgomery Police Department.[91] At trial,

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[86]*Id.* at 252. Beauharnais's leaflet called on the City Council and Mayor of Chicago "to halt the further encroachment, harassment and invasion of white people, their property, neighborhoods and persons, by the Negro . . . ." *Id.* The leaflet also called for "[o]ne million self respecting white people to unite . . . " adding, "[i]f persuasion and the need to prevent the white race from being mongrelized by the negro will not unite us, then the aggressions . . . rapes, robberies, knives, guns and marijuana of the negro, surely will." *Id.* The leaflet included a membership application in the White Circle League of America, Inc. *Id.*

[87]*Id.* at 251. Justice Black, joined by Justice Douglas, dissented, arguing that the majority's decision "degrade[d] First Amendment freedoms to the 'rational basis' level." *Id.* at 269 (Black, J., dissenting). A second dissent filed by Justice Reed, also joined by Justice Douglas, contended that the statute was unconstitutionally vague. *Id.* at 283 (Reed, J., dissenting). Justice Douglas also wrote a dissenting opinion that chastised the majority for deciding the case in such a way as to place "free speech under the legislative thumb." *Id.* at 287 (Douglas, J., dissenting). Finally, Justice Jackson's dissent opined that the majority and the other dissenters had erred in determining that the Fourteenth Amendment applied the full range of freedom of speech protections, enforceable against Congress, to the states. *Id.* at 287-88 (Jackson, J., dissenting).

[88]*Id.* at 258. The Court stated that "if an utterance directed at an individual may be the object of criminal sanctions, we cannot deny to a State power to punish the same utterance directed at a defined group . . . ." *Id.*

[89]NOWAK & ROTUNDA, *supra* note 54, § 16.33, at 1037 ("Although Beauharnais v. Illinois has never been explicitly rejected, it should not represent present law in light of New York Times v. Sullivan, 376 U.S. 254 (1964).").

[90]*Sullivan*, 376 U.S. at 254.

[91]*Id.* at 256. The advertisement stated that the "Southern Negro students" were "being met by an unprecedented wave of terror by those who would deny and negate [the Constitution and the Bill of Rights] which the whole world looks upon as setting the pattern for modern freedom . . . ." *Id.* The advertisement went on to cite specific examples of the "wave of terror," identifying the Montgomery, Alabama Police as the aggressors. *Id.*

the jury returned a verdict for the plaintiff awarding $500,000 in damages.[92] In reversing the state supreme court's affirmation of the trial court's decision, the United States Supreme Court held that even libelous speech is entitled to First Amendment protection when doing so is necessary to promote freedom of the press and thus ensure a robust debate on public issues.[93]

The second decision that marked the passing of the *Beauharnais* group libel doctrine was *Collin v. Smith*.[94] In *Collin*, the Seventh Circuit Court of Appeals struck down a series of village ordinances designed to prevent the American Nazi Party from marching in Skokie, Illinois.[95] The City's

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at 257.

[92]*Id.* at 256. The trial court instructed that the statement printed in the paper constituted libel per se; therefore, the plaintiff needed only to prove that the statement referred to him and that it was false. *Id.* at 262. The trial court's decision was subsequently affirmed by both the state court of appeals and the state supreme court. *Id.* at 263.

[93]*Id.* at 270. The majority opined that "the Constitution delimits a State's power to award damages for civil libel in actions brought by public officials against critics of their official conduct." *Id.* at 283. In a concurring opinion, Justice Black, joined by Justice Douglas, argued that newspapers have "an absolute, unconditional constitutional right to publish" criticisms of public officials and institutions. *Id.* at 293 (Black, J., concurring). Justice Goldberg, joined by Justice Douglas, also concurred, adding that private citizens and the press have an "absolute, unconditional privilege to criticize official conduct despite the harms which may flow from excesses and abuses." *Id.* at 298 (Goldberg, J., concurring).

[94]Collin v. Smith, 578 F.2d 1197 (7th Cir. 1978), *cert. denied*, 439 U.S. 916 (1978).

[95]*Id.* at 1207. The Village had enacted three ordinances. *Id.* at 1199 (quoting VILLAGE ORDINANCE NO. 77-5-N-994). The Ordinance created a permit system for all public assemblies and parades and required all permit applicants to obtain liability and property damage insurance. *Id.* Village Ordinance Number 77-5-N-995, which was aimed directly at hate crimes, prohibited:

> The dissemination of any materials within the Village of Skokie which promotes and incites hatred against persons by reason of their race, national origin, or religion, and is intended to do so . . . . (citation omitted) "Dissemination of materials" include[d] publication or display or distribution of posters, signs, handbills, or writings and public display of markings and clothing of symbolic significance.

Id. at 1199-2000 (quoting VILLAGE ORDINANCE NO. 77-5-N-995). The Ordinance prohibited public demonstrations by political party members while wearing military type uniforms. *Id.* The Village conceded the invalidity, on appeal, of the insurance

principal contention, that the ordinance did no more than prevent the articulation of what amounted to group defamation, was based on the United States Supreme Court's decision in *Beauharnais*, where the Supreme Court upheld a statute that prohibited the dissemination of materials that promoted religious or racial hatred.[96] The circuit court found that the village ordinance could not be supported by *Beauharnais*.[97] In justifying its decision, the court first distinguished the facts of the case at bar from *Beauharnais*, finding that the *Beauharnais* conviction rested on the tendency of the proscribed speech to elicit disorder and violence, whereas the City of Skokie never asserted any claim that the ordinances were written to prevent a clear and present danger of violence.[98] Next, the circuit court established that the *Beauharnais* premise, that libel was beyond the protection of the First Amendment, had been undercut by the United States Supreme Court's subsequent decision in *Sullivan*, which provided limited constitutional protection to libelous utterances.[99]

The most recent United States Supreme Court case to consider the First Amendment's application to proscribable speech, which includes defamation,

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requirement and the ban on public display of military-style uniforms. *Id.*

[96]*Id.* at 1204.

[97]*Id.* at 1204-05.

[98]*Id.* at 1204.

[99]*Id.* 1204-05. The circuit court specifically stated that even if this case were indistinguishable factually from *Beauharnais*, "we agree with the district court that decisions in the quarter-century since *Beauharnais* have abrogated the *Chaplinsky* dictum, made one of the premises of *Beauharnais*, that the punishment of libel 'has never been thought to raise any Constitutional problem.'" *Id.* at 1205. The court continued:

> We agree at least this far: If [the ordinance] is to be sustained, it must be done on the basis of the Village's interest asserted, and the conduct to which [the ordinance] applies, not on the basis of blind obeisance to uncertain implications from an opinion issued years before the Supreme Court itself rewrote the rules.

Id. *See* Gertz v. Welch, 418 U.S. 323 (1974) (extending the *New York Times* public official standard to private citizens who are public figures for a particular controversy); Garrison v. Louisiana, 379 U.S. 64, 74 (1964) (applying the *Sullivan* "actual malice" standard to criminal libel prosecutions); New York Times v. Sullivan, 376 U.S. 254, 283 (1964) (providing First Amendment protection to the free press by adding to the public official plaintiff's proofs a requirement to show that false statement was made with "actual malice"). For a more detailed discussion, see NOWAK & ROTUNDA, *supra* note 54, §§ 16.33-35, at 1037-52.

was *R.A.V. v. St. Paul*.[100] In *R.A.V.*, the Supreme Court held that regulation of proscribable speech must be content-neutral.[101] Accordingly, the Court found, contrary to the *Beauharnais* premise, that proscribable speech is entitled to limited First Amendment protection.[102]

Based on the United States Supreme Court's extension of First Amendment protection to libelous utterances, specifically in *Sullivan* and implicitly in *R.A.V.*, and the analysis provided by the Seventh Circuit Court of Appeals in *Collin v. Smith*, it is clear that the rule established in *Beauharnais* has fallen into judicial disrepute and will not support a state's effort to criminalize hate speech that defames specified groups.[103]

III. HATE SPEECH AND PENALTY ENHANCERS

In 1993, the Court squarely addressed the constitutionality of penalty enhancement statutes when it decided *Wisconsin v. Mitchell*[104] and upheld

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[100]112 S. Ct. 2538 (1992).

[101]*Id.* at 2543. Justice Scalia, writing for the Court, stated:

> [T]hese areas of speech can, consistently with the First Amendment, be regulated *because of their constitutionally proscribable* content (obscenity, defamation, etc.) — not that they are categories of speech entirely invisible to the Constitution, . . . Thus, the government may proscribe libel; but it may not make the further content discrimination of proscribing *only* libel critical of the government.

Id.

[102]*Id.*

[103]Gates, *supra* note 81, at 37, 40. *See also*, NOWAK & ROTUNDA, *supra* note 54, §16.32, at 1035 (discussing the difficulty of applying defamation in group settings because of the size of the groups involved). *See, e.g.*, Fowler v. Curtis Pub., 182 F.2d 377, 378 (D.C. Cir. 1950) (denying taxicab driver's libel action against the *Saturday Evening Post*, agreeing with the district court that in a "case of a defamatory publication directed against a class, without in any way identifying any specific individual member of the group" an individual has no redress). *See also* Khalid Abdullah Tariq Al Mansour Faissal Fahd Al Talal v. Fanning, 506 F. Supp. 186, 186 (D.N.D. Cal. 1980) (dismissing defamation claim brought on behalf of "followers of the Islamic faith throughout the world," a class of "nearly one billion persons"); Michigan United Conservation Clubs v. CBS News, 485 F. Supp. 893, 899 (W.D. Mich. 1980) (denying plaintiff's defamation claim because "plaintiffs belong to a group of more than one million individuals").

[104]113 S. Ct. 2194 (1993).

a state statute that provided more severe penalties for bias-motivated conduct.[105] Writing for a unanimous Court, Chief Justice Rehnquist determined that the statute punished conduct that was unprotected by the First Amendment.[106] The Chief Justice framed the issue not in terms of whether it is permissible to punish criminal conduct[107] but, rather, whether the First Amendment permits more severe punishment if the victim was selected on account of his race or inclusion in a protected class than if no such motive was present.[108]

The Chief Justice began the Court's analysis by addressing the respondent's argument that the Court was bound by the Wisconsin Supreme Court's interpretation of the statute.[109] Conceding this point,[110] Chief Justice Rehnquist distinguished a state court's construction of a statute from its determination of the statute's operative effect.[111] Finding that the decision of the state court was predicated upon the latter, the Court resolved to form its own judgment as to the practical effect of the statute.[112]

Focusing on precedent, the Court reviewed the significant latitude allowed to sentencing judges in determining the appropriate sentence for a convicted

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[105]*Id.* at 2202.

[106]*Id.*

[107]*Id.* at 2199. The State of Wisconsin argued that, since the statute punished only conduct, it could not be violative of the First Amendment. *Id.* While acknowledging the state's contention, the Court refused to find it dispositive of respondent's First Amendment challenge. *Id.*

[108]*Id.* In his defense, Mitchell argued that the enhancement of his penalty was supported only by his discriminatory motive in selecting his victim and therefore, the statute was punishing his bigoted beliefs. *Id.*

[109]*Id.* at 2198. The Wisconsin Supreme Court struck down the statute finding that its "practical effect" would be to punish thought. *Id.*

[110]*Id.* *See* R.A.V. v. St. Paul, 112 S. Ct. 2538, 2541-42 (1990) (applying state supreme court's interpretation of the city ordinance so as to limit its enforceability to fighting words).

[111]Wisconsin v. Mitchell, 113 S. Ct. 2194, 2199 (1993).

[112]*Id.*

defendant.[113] The Court averred that this latitude is not unlimited and that the sentencing judge may not consider a defendant's abstract beliefs, no matter how vile they may be to most people.[114] The Court stated, however, that this limitation would not preclude the consideration of the racial animus of a defendant toward his victim.[115]

Continuing the Court's analysis, Chief Justice Rehnquist addressed the respondent's argument that the statute was unconstitutional because it punished the defendant's discriminatory motive for acting.[116] The Chief Justice posited that the examination of motive, required by the state penalty enhancement statute, is similar to that employed by federal and state courts in determining whether anti-discrimination laws have been violated.[117] Distinguishing the penalty enhancement statute at issue here from the decision last term in *R.A.V.*, which struck down a city ordinance that proscribed viewpoint-specific fighting words, the Court opined that the

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[113]*Id.* *See* Payne v. Tennessee, 111 S. Ct. 2597, 2606 (1991) (stating that "the sentencing authority has always been free to consider a wide range of relevant material"); United States v. Tucker, 404 U.S. 443, 446 (1971) (averring "that a trial judge in the federal judicial system generally has wide discretion in determining what sentence to impose."); Williams v. New York, 337 U.S. 241, 252 (1948) (allowing the state sentencing judge to rely on out-of-court information to determine if death penalty should be imposed). *See also* WAYNE R. LAFAVE & AUSTIN W. SCOTT, SUBSTANTIVE CRIMINAL LAW, § 3.6(b), at 324 (1986) (defendant's criminal motive is most relevant at the time the judge imposes the sentence, "and it is not uncommon for a defendant to receive a minimum sentence because he was acting with good motives, or a rather high sentence because of his bad motives.").

[114]Wisconsin v. Mitchell, 113 S. Ct. 2194, 2200 (1993). *See* Dawson v. Delaware, 112 S. Ct. 1093, 1099 (1992) (invalidating the imposition of the death penalty when the state failed to establish a nexus between the defendant's abstract beliefs and crime for which he was being sentenced). For a learned analysis of the Court's decision in *Dawson*, see Elaine A. Imbriani, Note, *The Freedom to Associate and Due Process Clause — A State May Not Introduce at Capital Sentencing Evidence of Associational Preferences if Such Evidence Proves Nothing More than Mere Abstract Beliefs — Dawson v. Delaware*, 112 S. Ct. 1093 (1992) 3 SETON HALL CONST. L. J. 259 (1993).

[115]Wisconsin v. Mitchell, 113 S. Ct. 2194, 2200 (1993). *See* Barclay v. Florida, 463 U.S. 939, 949 (1983) (allowing the sentencing judge to consider the defendant's racial hatred toward the murder victim, evidenced by his membership in the Black Liberation Army, when determining whether to impose the death penalty).

[116]*Mitchell*, 113 S. Ct. at 2200.

[117]*Id.* *See* Roberts v. Jaycees, 468 U.S. 609, 628 (1983) (upholding, against a First Amendment challenge, a state statute prohibiting "invidious discrimination in the distribution of publicly available goods, services, and other advantages . . . .").

ordinance in *R.A.V.* was directed explicitly at expression whereas the penalty enhancement statute at issue in this case is directed at conduct and, as such, is beyond the scope of First Amendment protection.[118]

In addition, Chief Justice Rehnquist noted that the penalty enhancement applied to bias-inspired conduct because the State Legislature determined that this type of conduct inflicts greater societal and individual harm.[119] This convinced the Court that the "[s]tate's desire to redress these perceived harms provides an adequate explanation for its penalty-enhancement provision over and above mere disagreement with offenders' beliefs and biases."[120] Accordingly, Chief Justice Rehnquist concluded that it is reasonable to punish more severely those crimes that are most destructive of the public happiness and safety.[121]

Finally, the Court considered the respondent's argument that the state statute is unconstitutionally overbroad due to its "chilling effect" on free speech.[122] The respondent argued that the statute impermissibly chilled free speech because constitutionally protected expression could be used later to enhance the defendant's penalty if the speaker should later engage in criminal conduct covered by the statute.[123] Chief Justice Rehnquist found this contention meritless.[124] The Court reasoned that the type of chill

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[118]*Mitchell* at 2200-01.

[119]*Mitchell*, 113 S. Ct. at 2201. Chief Justice Rehnquist opined that bias-motivated criminal behavior is more likely to inflict emotional harm on the victim, provoke retaliatory crimes, and lead to community unrest. *Id.*

[120]*Id.*

[121]*Id.* (citing 4 WILLIAM BLACKSTONE, COMMENTARIES 16 (1769). On this point, Blackstone wrote, "it is but reasonable that among crimes of different natures those should be most severely punished, which are the most destructive of the public safety and happiness." BLACKSTONE, *supra*.

[122]*Mitchell*, 113 S. Ct. at 2201. The Wisconsin Supreme Court held that the statute was overbroad because evidence of the defendant's prior associations and speech may be used to circumstantially prove that the victim was intentionally selected by the defendant because of the victim's membership in a protected class. *Id.*

[123]*Id.*

[124]*Id.*

predicted by the respondent was far more unlikely and attenuated than the Court normally accepts in typical overbreadth cases.[125]

IV. CONCLUSION

Mitchell, in conjunction with *R.A.V.*, provides clear guidance to the states in formulating legislation aimed at curtailing bias-motivated incidences. *R.A.V.*'s lesson is that legislation aimed directly at expression based on the message will violate the Constitution.[126] *Mitchell*, on the other hand, provides that the states may impose stiffer penalties for pre-existing crimes when the commission of those crimes is motivated by bias toward the victim.[127] Professor Laurence Tribe, when addressing the House Subcommittee on Crime and Criminal Justice, stated that the imposition of selective punishment based on the speaker's message directly penalizes speech,[128] while the imposition of selective punishment based on the perpetrator's motive simply adjusts the state's response to the reasons that motivated the defendant's conduct.[129]

The Court's decision in *Mitchell* was preordained by decisions made in recent years regarding the consideration of a defendant's motive in assessing whether

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[125]*Id.*

[126]R.A.V. v. St. Paul, 112 S. Ct. 2538, 2550 (1992).

[127]Wisconsin v. Mitchell, 113 S. Ct. 2194, 2202 (1993).

[128]*Hate Crimes Sentencing Enhancement Act of 1992: Hearings on H.R. 4797 Before the Subcomm. on Crime and Criminal Justice of the House Comm. on the Judiciary*, 102d Cong., 2d Sess. 9 (1992) (statement of Laurence H. Tribe, Professor of Constitutional Law, Harvard Law School).

[129]*Id.* at 1. The Subcommittee was hearing testimony on the constitutionality of H.R. 4797, which provided:

> This Act may be cited as the "Hate Crimes Sentencing Enhancement Act of 1992" . . . . [T]he United States Sentencing Commission shall promulgate guidelines . . . to provide sentencing enhancements of not less than 3 offense levels for offenses that are hate crimes . . . . [T]he term "hate crime" is a crime in which the defendant's conduct was motivated by hatred, bias, or prejudice, based on the actual or perceived race, color, religion, national origin, ethnicity, gender, or sexual orientation of another individual or group of individuals.

Id. at 2-3.

the death penalty should be applied.[130] The decision was also necessary to prevent undermining federal Title VII law, which is aimed at the elimination of workplace discrimination.[131] Had the Court decided *Mitchell* differently, the entire basis that supports the consideration of an employer's discriminatory motive for failing to hire a person because of that person's race, gender, or religion would have been eroded.

Clearly the Court decided *Mitchell* in full accord with established precedent, thus placing the decision on firm constitutional footing. *Mitchell* does not, however, assist in the inquiry of whether hate crime penalty enhancement statutes make for good public policy. A major concern with this type of legislation is that it places too much discretion in the hands of the prosecutor.[132] In addition, such legislation may be used to indulge the hue and cry of the masses, which after a particularly sensational crime, may demand the application of the penalty enhancement provision when, in fact, enhancement may be entirely unwarranted.[133]

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[130]*See* Barclay v. Florida, 463 U.S. 939, 949 (1983) (holding that a sentencing judge may consider the defendant's racial bias toward his victim when determining whether to apply the death penalty). Responding to Mitchell's argument that the decisions in the death penalty cases were inapplicable to a consideration of the constitutionality of the penalty enhancement statute, Chief Justice Rehnquist stated, "[b]ut in *Barclay* we held that it was permissible for the sentencing court to consider the defendant's racial animus in determining whether he should be sentenced to death, surely the most severe 'enhancement' of all." Wisconsin v. Mitchell, 113 S. Ct. 2194, 2200 (1993).

[131]*Mitchell*, 113 S. Ct. at 2200. *See* Hishon v. King & Spalding, 467 U.S. 69, 78 (1984) (rejecting the contention that Title VII infringed upon the First Amendment rights of employers).

[132]*See* Linda Bean, *Prosecuting Bias Cases: A Delicate Balancing Act*, N.J.L.J., Sept. 27, 1993, at 452. Expanding upon this issue, Bean wrote:

> [F]or prosecutors in New Jersey, a hate crime is a special crime, a crime singled out by the Legislature for harsh penalties, a crime guaranteed to provoke public outrage and media scrutiny.
>
> Simple assaults or acts of vandalism that would otherwise be ignored turn into headlines when the assailant shouts a racial slur or the vandals scrawl swastikas on grave markers in a Jewish cemetery.

Id.

[133]In her article, Bean quoted Middlesex County Prosecutor Robert Gluck as saying, "[w]e have to be very sensitive to the tenor of the community and how we go about presenting these things. That isn't quite as pressing in other crimes. They are different." *Id.*

For example, consider the familiar type of confrontation that arises when two individuals vie for the same parking space in a crowded parking lot. Too often, the dispute escalates into violence. Now add to the hypothetical that the two involved in the dispute belong to different races, and that, in the ensuing conflagration, one hurls racial epithets at the other. The prosecutor may choose to charge each with simple assault, or, because of the language used during the fight, the one who employed the racially abusive language could be subjected to a penalty that may be up to three times more severe than his less vocally inclined adversary.[134]

One must also consider the fact that in, certain areas of the country, more black offenders have been subjected to the penalty enhancement provisions than white offenders.[135] This appears to be the opposite of the intended result. Rather than imposing harsher penalties on the members of the majority for attacks on minority groups, the enhancements appear to be more readily imposed on the members of society whom the promoters of this type of legislation sought to protect.[136] Civil rights activists, who pressed for this type of legislation, may indeed echo the words of Justice Black's dissent in *Beauharnais*, "another such victory and I am undone."[137]

Simply because it is within the constitutional power of the state to provide enhanced penalties for criminal conduct does not imply that to do so would make for sound public policy. The war against bias-motivated conduct should be fought in the courtroom by the prosecutor through quick and effective use of existing criminal sanctions and, in the community, by people willing to challenge these reprehensible views with more speech, not censorship.

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[134]*Id.* In New Jersey, for instance, a simple assault may be upgraded from a disorderly person offense to an indictable fourth-degree crime. *Id.* Legislation enacted in 1990 provides for enhanced sentences when the offender's act was based, at least in part, on hatred, ill will, or bias because of color, race, religion, ethnicity, or sexual orientation. N.J. STAT. ANN. § 2C:44-3(e) (West 1993).

[135]*See* Liz Donovan, *Hate Crime Convictions*, MIAMI HERALD, Nov. 11, 1993, at 6BR (identifying that under a North Carolina law prohibiting "ethnic intimidation," more blacks than whites have been charged with intimidation and two-thirds of the convictions have been of blacks). *See also* Terry Box, *Increasingly, Whites Targeted by Blacks Find New Type of Hate Crime*, DETROIT FREE PRESS, May 4, 1993, at 5A (revealing that, in 1992, Klanwatch, a civil rights group in Alabama, reported that more whites than blacks have been "victims of hate murders in the United States").

[136]Donovan, *supra* note 135 (according to the acting director of North Carolinians Against Racist and Religious Violence, Linda Staley Williams, "[i]t's been used against the very people it was written to protect.").

[137]Beauharnais v. Illinois, 343 U.S. 250, 275 (1952) (Black, J., dissenting).