Nova Law Review

Volume 17, *Issue* 1 1992 *Article* 18

Hate Crimes, Hate Speech and Free Speech - Florida's Bias - Intended Crime Statute

Eric David Rosenberg*

*

Hate Crimes, Hate Speech and Free Speech - Florida's Bias - Intended Crime Statute

Eric David Rosenberg

Abstract

Incidents of violence, property damage or intimidation based on hate and prejudice occur each day in Florida, and are part of a nationwide problem in hate - related or bias - intended crimes,

KEYWORDS: hate, crime, scrutiny

Hate Crimes, Hate Speech and Free Speech: Florida's Bias-Intended Crime Statute

TABLE OF CONTENTS

A white male tried to chase away two Jamaican black men who were visiting the apartment complex in which he lived. He assaulted the men, punched them in the face, called them "niggers" and "boat people" and suggested they get jobs. Upon his arrest, the white man told a police officer that he was a "redneck" who saw nothing wrong with "hitting on a couple of blacks."[1]

A group of skinheads, members of the American Front, a neo-Nazi white supremacy group, gathered for a party at a beachside apartment. After several hours of drinking, and upon a prearranged signal, the group attacked a fellow member of the group, severely beating him with their fists and stomping him with their boots. The group had recently learned that the victim was a member of the Jewish faith.[2]

1. Christine Evans, *Dade Man Gets 4 Years in 'Hate Crime' Case*, MIAMI HERALD, Dec. 1, 1990, at 1A, 13A. The convictions for the underlying crimes in this case were upheld, while the enhanced portions under Florida's bias-intended crime statute were reversed, in Richards v. State, No. 90-2912, 1992 WL 335899 (Fla. 3d Dist. Ct. App. Nov. 17, 1992).

2. Robert Nolin, *Skinhead Pair Sentenced to 10 Years*, DAYTONA BEACH NEWS-JOURNAL, June 25, 1991, at 1C. The convictions in this case were affirmed in *Dobbins v.*

I. INTRODUCTION

Incidents of violence, property damage or intimidation based on hate and prejudice occur each day in Florida, and are part of a nationwide problem in hate-related or bias-intended[3] crimes.[4] In response, Florida enacted legislation—Florida Statute section 775.085[5]—under which an individual can be charged and convicted for bias-intended criminal activities. The statute provides for increased penalties when a person commits a criminal act against another merely because of the victim's race, color, ancestry, ethnicity, religion or national origin.[6] Section 775.085 was

---

State, 17 Fla. L. Weekly D2222 (Fla. 5th Dist. Ct. App. 1992).

3. Crimes committed in which hate or prejudice is an element are commonly referred to as "hate crimes" or "bias-motivated crimes." This author believes a preferable term is "bias-intended crimes" because it is a more accurate description of what statutes concerning such crimes are penalizing. A bias-intended crime statute is not punishing hate or motive, but is punishing the prejudicial intent of an offender in selecting his victim, evidenced by his words and acts. *See infra* notes 88-129 and accompanying text.

4. *See* FLORIDA ATTORNEY GENERAL'S OFFICE, HATE CRIMES IN FLORIDA (1991); ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH, 1991 AUDIT OF ANTI-SEMITIC INCIDENTS (1992); ANTI-GAY/LESBIAN VIOLENCE, VICTIMIZATION & DEFAMATION IN 1991 (NGLTF Policy Institute, Washington, D.C.); KLANWATCH INTELLIGENCE REP., (Project of the Southern Poverty Law Ctr., Montgomery, Ala.), Feb. 1992 [hereinafter KLANWATCH].

5. FLA. STAT. § 775.085 (1989).

6. *Id.* Section 775.085 titled, "Evidencing prejudice while committing offense: enhanced penalties," provides:

> (1) The penalty for any felony or misdemeanor shall be reclassified as provided in this subsection if the commission of such felony or misdemeanor evidences prejudice based on the race, color, ancestry, ethnicity, religion, or national origin of the victim:
> (a) A misdemeanor of the second degree shall be punishable as if it were a misdemeanor of the first degree.
> (b) A misdemeanor of the first degree shall be punishable as if it were a felony of the third degree.
> (c) A felony of the third degree shall be punishable as if it were a felony of the second degree.
> (d) A felony of the second degree shall be punishable as if it were a felony of the first degree.
> (2) A person or organization which establishes by clear and convincing evidence that it has been coerced, intimidated, or threatened in violation of this section shall have a civil cause of action for treble damages, an injunction, or any other appropriate relief in law or in equity. Upon prevailing in such action, the plaintiff may recover reasonable attorney's fees and costs.

Id.

Section 775.085 was amended in 1991 to include sexual orientation as a victim class and to add a subsection (3), which reads:

enacted by the legislature to uphold Florida's goal in "insur[ing] that the rights of crime victims are emphasized and protected."[7] Florida is among forty-six states, plus the Federal Government and the District of Columbia, that now have some form of legislation relating to bias-intended criminal activity.[8]

Section 775.085 has recently been challenged on constitutional grounds by criminal defendants in a number of cases. These defendants have claimed, *inter alia*, that the statute punishes a person's thoughts and expressions, and is, therefore, violative of the First Amendment. In *State v. Stalder*,[9] the Seventeenth Circuit Court held that section 775.085 was unconstitutional, concluding that the statute's enhancement provisions impermissibly punish speech based on its content.[10] A similar conclusion was reached by the Seventeenth Circuit in *State v. Leatherman*.[11] Both

---

(3) It shall be an essential element of this section that the record reflect that the defendant perceived, knew, or had reasonable grounds to know or perceive that the victim was within the class delineated herein.

FLA. STAT. § 775.085 (1991).

7. FLA. H.R. NO. 1112, STAFF OF CRIMINAL JUSTICE COMMITTEE, FINAL STAFF ANALYSIS & ECONOMIC IMPACT STATEMENT 3 (June 6, 1989).

In addition to § 775.085, the Florida Legislature has enacted other statues to protect the victims of bias-intended activity: FLA. STAT. § 775.0845 (1991) (providing enhanced penalties for committing an offense while wearing a mask or a hood); *Id.* § 877.19 (requiring law enforcement agencies throughout the state to report instances of bias-intended crimes); *Id.* §§ 876.17, .18 (making it illegal to burn a cross in a public place or on the property of another); *Id.* § 876.19 (making it unlawful to display intimidating exhibits); *Id.* § 871.01 (making it unlawful to disturb school and religious meetings); *Id.* § 806.13 (making it unlawful to damage religious property).

8. *See* ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH, HATE CRIMES STATUES: A 1991 STATUS REPORT 21-26 (1991) (listing individual statutes from state and federal jurisdictions).

9. No. 91-18929 (Fla. 17th Cir. Ct. Apr. 20, 1992) (order granting motion to dismiss), *jurisdiction accepted*, 599 So. 2d 1289 (Fla. 1992). In issuing his order, Judge Fleet wrote a three page document and then incorporated in full the memorandum of law submitted by the defendant as the explanation for the order. To distinguish between the two sections, page references to the memorandum will be followed by "(mem.)".

This case began when the victim, a lawyer and a member of the Jewish faith, had shown up at Stalder's home looking for a friend's earrings. Stalder allegedly screamed at the victim, "Hey Jew boy, what do you want? Jew boy, you fat Jewish lawyer, get off my property Jewish boy or I'm going to kill you, Jewish kike." Stalder then pushed the victim in the face. Stalder was first charged with a battery, and was later charged under § 775.085. Barbara Walsh, *Judge Rejects Hate Crime Law*, FORT LAUDERDALE SUN-SENTINEL, Apr. 21, 1992, at 1A.

10. *Id.*

11. No. 90-25471 (Fla. 17th Cir. Ct. Apr. 21, 1992) (case dismissed nunc pro tunc), *jurisdiction accepted*, 602 So. 2d 942 (Fla. 1992).

cases were certified by the Fourth District Court of Appeal to the Florida Supreme Court. However, section 775.085 has been upheld as constitutionally valid by the Fifth District Court of Appeal in *Dobbins v. State*.[12] The *Dobbins* court held that section 775.085 does not punish expression, but that it punishes the conduct of the offender in choosing a victim merely because of the victim's race, color, ancestry, ethnicity, religion or national origin.[13] This split of opinion across the state as to section 775.085's relationship to the First Amendment presents an issue of first impression for the Florida Supreme Court.[14]

Whether section 775.085 punishes criminal conduct only, or whether it regulates protected speech, is only one part of the debate on bias-intended conduct and hateful expression. The debate also involves whether the harmful effects of hateful expression are substantial enough to justify reasonable restrictions on hateful expression, or whether any such restrictions would be an impermissible government intrusion on the exercise of free speech.[15] Those involved in the debate agree that prejudice is a problem that must be addressed and removed from our society.[16] The disagreement generally surrounds the method by which the government may get involved in solving the problem.[17] To some extent, each side of the argument understands and agrees with the other; therefore, the debate has been described as "between one side and itself."[18]

---

12. 17 Fla. L. Weekly D2222 (Fla. 5th Dist. Ct. App. 1992).
13. *Id.* at D2223.
14. In addition to these decisions, § 775.085 was recently challenged in *Richards v. State*, No. 90-2912, 1992 WL 335899 (Fla. 3d Dist. Ct. App. Nov. 17, 1992), on the ground that it was constitutionally void for vagueness. The defendant made no express First Amendment attack on the statute. The Third District Court of Appeal upheld the challenge, and recognized, but did not address, the First Amendment issues. *Id.* at *6 n.6.
15. *See, e.g.*, Richard Delgado, *Words that Wound: A Tort Action for Racial Insults, Epithets and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133 (1982) (arguing that racist insults and racial stigmatization cause severe psychological, sociological, and political harms); Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320 (1989) (arguing that the victims of racist speech suffer real and serious harms and that formal criminal and administrative sanctions are an appropriate response); *see also* Susan Gellman, *Sticks and Stones Can Put You in Jail, But Can Words Increase Your Sentence? Constitutional and Policy Dilemmas of Ethnic Intimidation Laws*, 39 UCLA L. REV. 333 (1991) (arguing that bias-intended crime statutes are constitutionally impermissible, and are contrary to the best interests of society).
16. *See* Gellman, *supra* note 15, at 334.
17. Toni M. Massaro, *Equality and Freedom of Expression: The Hate Speech Dilemma*, 32 WM. & MARY L. REV. 211, 213-17 (1991).
18. *See* Gellman, *supra* note 15, at 334.

This article will explore Florida's bias-intended crime statute and its relationship to First Amendment issues.[19] Section II of this article explores the harmful effects of hateful conduct and expression, and the environment in which the existence of bias-intended crime legislation is deemed necessary. Section III provides an overview of the judicial treatment of free speech, and issues related to bias-intended crime statutes.[20] Section IV addresses the issue of whether section 775.085 can withstand the current First Amendment challenge raised by the *Stalder* and *Leatherman* decisions.

II. An Environment of Hate

Bigotry, prejudice, bias, hate. By whatever name called, hateful beliefs and intolerance toward those with different personal characteristics exist throughout our society and result in an environment of hate.[21] It is an unfortunate side of human nature that within each of us there is a certain amount of intolerance, mistrust or apprehension of others whom we believe to be unlike ourselves. Thus, each of us is expected to, or forced to, tolerate some prejudice in our daily lives. From time to time, however, these hateful and intolerant attitudes serve as the basis for criminal conduct, at which point tolerance must end, and criminal sanctions must takeover.

Florida is part of the nationwide environment of hate, and the problem of bias-intended activity and hateful expression.[22] Every day, throughout

---

19. The major issue confronting bias-intended crime statutes is whether they are violative of the First Amendment. Other constitutional issues which arise in connection with these statutes, such as Fourteenth Amendment considerations of vagueness and equal protection, will not be discussed in this article.

20. Free speech jurisprudence is reviewed based on United States Supreme Court decisions. Florida's Constitution also contains a provision providing for freedom of expression:

> Section 4. Freedom of speech and press.—Every person may speak, write and publish his sentiments on all subjects but shall be responsible for the abuse of that right. No law shall be passed to restrain or abridge the liberty of speech or of the press. In all criminal prosecutions and civil actions for defamation the truth may be given in evidence. If the matter charged as defamatory is true and was published with good motives, the party shall be acquitted or exonerated.

FLA. CONST. art. I, § 4. However, the scope of the Florida and the United States constitutional guarantees of free speech are the same. Florida Canners Ass'n v. Florida Dep't of Citrus, 371 So. 2d 503, 517 (Fla. 2d Dist. Ct. App. 1979), *aff'd sub nom.* Coca-Cola Co. v. Florida Dep't of Citrus, 406 So. 2d 1079 (Fla. 1981).

21. *See* Matsuda, *supra* note 15, at 2331-41.

22. This environment of hate exists on a national level. For example, the Anti-Defamation League received reports of 1,879 anti-semitic incidents in 1991, an increase of

the United States, organizations monitoring bias-intended crimes and the media report incidents in which hatred plays a substantial role.[23] In

over 11% from the previous year. ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH, 1991 AUDIT OF ANTI-SEMITIC INCIDENTS, at 2 (1992). The National Gay and Lesbian Task Force reported an increase of 31% during 1991 in anti-gay violence in the five metropolitan areas surveyed. ANTI-GAY/LESBIAN VIOLENCE, VICTIMIZATION & DEFAMATION IN 1991 (NGLTF Policy Institute, Washington, D.C.) (1992).

Recent events making national headlines also provide evidence of the problem. In April 1992, Los Angeles erupted into four days of inter-racial and inter-ethnic violence after four police officers were acquitted in the beating of Rodney King, a black motorist. The riots resulted in at least 44 deaths, 2,000 injuries, 6,345 arrests, and property damage in excess of $550 million. Martin Merzer, *L.A. Begins Struggle to Heal its Deepened Ethnic Wounds*, MIAMI HERALD, May 3, 1992, at 1A, 28A. Related incidents occurred in other cities as well, including San Francisco, Peoria, Pittsburgh and New York. *Impact of King Verdict Resounds Across Nation*, MIAMI HERALD, May 2, 1992, at 16A. Although some of the response in the aftermath of the verdict was legitimate protest of what most felt was an unjust verdict, the vast majority of the activity was nothing more than senseless hate and violence.

The failed, but highly visible, recent political campaigns of David Duke are another example of the current environment of hate and intolerance. Duke, with a history as a neo-Nazi and past Grand Wizard of the Ku Klux Klan, received 44% of the vote in Louisiana in a 1990 bid for the U.S. Senate, and 40% of the vote in the 1991 Louisiana governor's race. He also received substantial support in his 1992 bid for President of the United States. Peter Applebome, *Duke's Candidacy Raises Legal Questions About State Ballot Laws*, N.Y. TIMES, Feb. 6, 1992, at A27. Although Duke claimed to have renounced his racist past, his large list of supporters, from whom he raised more than $5.5 million in three years, was described as angry whites responding to thoroughly decoded messages of racial intolerance. Bill Turque, *The Real David Duke*, NEWSWEEK, Nov. 18, 1991, at 24.

23. There are various organizations throughout the United States that provide additional information on hate crimes and hate crime training: Anti-Defamation League of B'nai B'rith, 823 United Nations Plaza, New York, NY, 10017, (212) 490-2525; Asian Law Caucus, 468 Bush Street, Third Floor, San Francisco, CA, 94108, (415) 391-1655; Break the Silence (Coalition Against Anti-Asian Violence), P.O. Box 2165, San Francisco, CA 94126, (415) 982-2959; Center for Democratic Renewal, P.O. Box 50469, Atlanta, GA, 30302, (404) 221-0025; Community United Against Violence, 514 Castro Street, San Francisco, CA, 94114, (415) 864-3112; Federal Law Enforcement Training Center, 1300 W. Richey Avenue, Artesia, NM 88210, (505) 748-8015; Japanese-American Citizens League, 1730 Rhode Island Avenue N.W., Suite 204, Washington, D.C., 20036, (202) 223-1240; Klanwatch Project, Southern Poverty Law Center, P.O. Box 548, Montgomery, AL, 36101-0548, (205) 264-0286; National Association for the Advancement of Colored People (NAACP), 1025 Vermont Avenue N.W., Washington, D.C, 20035, (202) 638-2269; National Association of Human Rights Workers, 121 W. Jones Street, Raleigh, NC, (919) 733-7996; National Gay & Lesbian Task Force, 1734 14th Street N.W., Washington, D.C., 20009, (202) 332-6483; National Institute Against Prejudice and Violence, 31 South Greene Street, Baltimore, MD, 21201, (301) 328-5170; National Organization of Black Law Enforcement Executives, 908 Pennsylvania Avenue S.E., Washington, D.C., 20003, (202) 546-8811; National Victims Center, 307 W. 7th Street, Ft. Worth, TX, 76102, (817) 877-3355; Organization of Chinese

Florida, the Attorney General's office reported 306 incidents of hate based crimes in 1990[24] and 309 incidents in 1991.[25] These numbers do not include the many hate-related incidents each year which go unreported; nor those which do not rise to the level of criminal conduct, but still cause harm to its victims. Commenting on the local impact of an environment of hate, Florida's Attorney General stated, "[w]hen hate is manifest in even a single criminal act, it can cause an unwarranted shadow over a neighborhood, city or even the entire county."[26]

In addition to hate-related incidents involving individuals, organized white supremacist groups, which thrive on hate and hate-related violence, are very active in Florida.[27] Klanwatch, a project of the Southern Poverty Law Center, reports that at least twenty such groups were active in Florida in 1991, including eight chapters of the Klan, six chapters of neo-Nazis, four chapters of skinheads and two other groups.[28] The group totals represent a "modest count at best. As alarming as the figures are, they actually understate the true level of White Supremacist activity . . . ."[29]

Americans, Inc., 2025 I Street, S.W., Suite 926, Washington, D.C., 20006, (202) 223-5500; Uniform Crime Reporting, Federal Bureau of Investigation, 9th and Pennsylvania Avenue UCR-GRB, Washington, D.C., 20535, (202) 324-2614; United States Department of Justice Community Relations Service, Suite 330, Chevy Chase, MD, 20815, (301) 492-5969 (listed from KLANWATCH, *supra* note 4, at 9; and FLORIDA ATTORNEY GENERAL'S OFFICE, HATE CRIMES IN FLORIDA, at 33 (1991)).

24. FLORIDA ATTORNEY GENERAL'S OFFICE, HATE CRIMES IN FLORIDA 11 (1990). The report noted that "[a]lthough the number of hate crimes reported represents a small percentage of total crimes, that should not diminish our contempt for such acts. Hate crimes are the result of deep-rooted bigotry, prejudices and ignorance. The occurrence of even a single incident should spur public outrage." *Id.* at 2.

25. FLORIDA ATTORNEY GENERAL'S OFFICE, HATE CRIMES IN FLORIDA 11 (1991).

26. *Id.* at 1.

27. KLANWATCH, *supra* note 4, at 14-19.

28. *Id.* at 16-19. Nationally, Klanwatch reported that the number of active white supremacist hate groups in the U.S. surged from 273 in 1990 to 346 in 1991. *Record Number of Hate Groups Active Across U.S. in 1991*, KLANWATCH, *supra* note 4, at 1-2. Klanwatch further reported that a record 25 hate-motivated murders were documented in 1991, with a significant increase in assaults, vandalism, and cross burnings. *Deadly hatred on American Streets*, KLANWATCH, *supra* note 4, at 19. The report noted that such totals represented only "the tip of the iceberg. At best, the numbers we have are just a fraction of those committed." *Id.*

29. KLANWATCH, *supra* note 4, at 1. The report noted that the modest count resulted from the following factors: the Klanwatch hate group count does not include separate chapters of each group in the state as separate groups; hate groups were counted only if they were known to be active in 1991, thus, recent activities of previously identified hate groups may have escaped detection; the count does not include numerous Identity "churches" that

Nova Law Review, Vol. 17, Iss. 1 [1992], Art. 18

This environment of hate results in substantial harms to the targeted groups and to their individual members. Entire groups are targeted for attack and are denied basic human rights such as the right to be free from fear and the right to live in peace where they wish.[30] The individual victims of bias-intended crimes and hateful expression are subjected to physical harm, property damage and intimidation solely because of their status as a member of the targeted group.[31] Thus, individual members of targeted groups must live in fear of, and are subject to, criminal activity and intimidation greater than that of other members of our society. Mari Matsuda states, "[t]o be hated, despised, and alone is the ultimate fear of all human beings. However irrational racist speech may be, it hits right at the emotional place where we feel the most pain."[32]

The environment of hate results in more than the immediate physical harm and property damage from criminal activity. The expressions and actions of those possessing these hateful viewpoints have serious and harmful psychological consequences to the victims of such attacks.[33] Racist expression and racial stigmatization cause feelings of humiliation, isolation and self-hatred in its victims;[34] injure a victim's interpersonal and

---

operate in the country, which phrase its racist views in quasi-religious terms; and the count does not include the activity of prominent individual figures in the white supremacist world who are not currently affiliated with any particular hate group.

30. *See Dobbins*, 17 Fla. L. Weekly at D2223 (recognizing Florida's compelling interest of "ensuring the basic human rights (not to be a target of a criminal act) of members of groups that have historically be subjected to discrimination because of membership in those groups. This justification was also used by St. Paul, Minnesota as support for its bias-intended crime statue challenged in R.A.V. v. St. Paul, 112 S. Ct. 2538, 2549 (1992), and was found by the United States Supreme Court to be a compelling state interest.

An example of a group frequently targeted for violent attacks and discrimination is the gay and lesbian community. The National Gay & Lesbian Task Force (NGLTF) Policy Institute reports a substantial increase in violence directed at the entire gay and lesbian communities. ANTI-GAY/LESBIAN VIOLENCE, VICTIMIZATION & DEFAMATION IN 1991 (NGLTF Policy Institute, Washington, D.C.) (1992). The author of the report noted: "Each attack sends a message of hatred and terror intended to silence and render invisible not only the victim but all gay people." *Hate Attacks Surge, Says NGLTF Report*, TASK FORCE REPORT (NGLTF, Washington, D.C.), Summer 1992, at 1.

31. *See* Matsuda, *supra* note 15, at 2326-41 (describing instances of racism and its effects on individuals of targeted groups).

32. *Id.* at 2338.

33. *See* Delgado, *supra* note 15, at 135-49; Kent Greenawalt, *Insults and Epithets: Are They Protected Speech*, 42 RUTGERS L. REV. 287 (1990); Matsuda, *supra* note 15, at 2337-41.

34. Richard Delgado states that racism has an even greater impact on children than on adults: "at a young age, minority children exhibit self-hatred because of their color, and

intrafamily relationships; cause mental illness and psychosomatic disease; cause physical ailments, including high blood pressure; and cause damage to a victim's ability to work and succeed in life.[35] Racism and racial stigmatization also cause harm to society as a whole.

> Racism is a breach of the ideal of egalitarianism, that "all men are created equal" and each person is an equal moral agent, an ideal that is a cornerstone of the American moral and legal system. A society in which some members regularly are subjected to degradation because of their race hardly exemplifies this ideal. The failure of the legal system to redress the harms of racism, and of racial insults, conveys to all the lesson that egalitarianism is not a fundamental principle; the law, through inaction, implicitly teaches that respect for individuals is of little importance. Moreover, unredressed breaches of the egalitarian ideal may demoralize all those who prefer to live in a truly equal society, making them unwilling participants in the perpetuation of racism and racial inequality.[36]

The harms to individuals and community caused by bias-intended criminal activity and prejudicial expression are a natural outgrowth of the hate and intolerance existing in our society. There are those who argue that tolerance[37] and education[38] are the proper response to this ill. Frequently, however, the burden of this tolerance is not "borne by the community at large. Rather, it is a psychic tax imposed on those least able to pay."[39] Protection of these individuals by enactment of bias-intended crime legislation is a necessary and proper response of Government.[40] The

---

majority children learn to associate dark skin with undesirability." Delgado, *supra* note 15, at 142.

35. *Id.* at 136-37.

36. *Id.* at 140-41.

37. *See* LEE BOLLINGER, THE TOLERANT SOCIETY: FREE SPEECH AND EXTREMIST SPEECH IN AMERICA 10-11 (1986) (arguing that protecting racist speech reinforces society's commitment to the value of tolerance).

38. *See, e.g.*, Gellman, *supra* note 15, at 389 (arguing that non-criminal approaches to the eradication of bigotry, such as education, are more effective than criminal sanctions).

39. Matsuda, *supra* note 15, at 2323. *See also* Charles R. Lawrence, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431, 472-76 (1990) (stating that when society asks subordinated groups to bear the burden for creating more room for speech, without asking their advice or consent, this amounts to "domination pure and simple").

40. Matsuda, *supra* note 15, at 2321; *see also* Greenawalt, *supra* note 33, at 306; Rodney A. Smolla, *Rethinking First Amendment Assumptions About Racist And Sexist Speech*, 47 WASH. & LEE L. REV. 171, 205-211 (1990). While tolerance and education may

Stalder court recognized this by stating, "[p]rejudice is an ugly, pervasive illness. Only well drafted, strongly enforced laws will assist in the removal of this insidious cancer from our society."[41]

III. Free Speech Jurisprudence and Bias-Intended Crime Statutes: An Overview

The issue that most frequently arises in considering the effect of bias-intended crime statutes is whether they penalize speech protected by the First Amendment to the United States Constitution. 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[42]

A central principle behind the free speech clause of the First Amendment is that the government, both federal and state,[43] should remain neutral in the marketplace of ideas.[44] Thus, the Government should not restrict or punish those thoughts and expressions which it, or society, determines to be "bad."[45] However, the Court has consistently held that this freedom of speech is not absolute, that there are certain limitations on, and responsibilities attached to, the freedom of expression.[46] The approach adopted by the

---

be one solution for minor instances of hateful expression, they do not provide a solution in the most egregious cases where hate serves as the basis for criminal activity. The existence of criminal statutes is an indication that society does not recognize tolerance and education as an effective solution to criminal behavior.

41. *Stalder*, No. 91-18929, at 3.

42. U.S. Const., amend. I.

43. The First Amendment was first made applicable to the states by incorporation as a "liberty" within the due process clause of the Fourteenth Amendment in Gitlow v. New York, 268 U.S. 652, 666 (1925).

44. Melville B. Nimmer, Nimmer on Freedom of Speech § 2.07 (1984).

45. *See* Texas v. Johnson 491 U.S. 397, 414 (1989); Cohen v. California, 403 U.S. 15, 18 (1971); Thornhill v. Alabama, 310 U.S. 88, 101-02 (1940).

46. A clear statement of this principle was set forth in *Gitlow*, one of the Supreme Court's earliest free speech decisions, in which the Court stated:

> It is a fundamental principle, long established, that the freedom of speech and of the press which is secured by the Constitution, does not confer an absolute right to speak or publish, without responsibility, whatever one may chose, or an unrestricted and unbridled license that gives immunity for every possible use of

Supreme Court in establishing these limitations was described in *Chaplinsky v. New Hampshire*:[47]

> There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never thought to raise any constitutional problem . . . . It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.[48]

Applying this approach, the Court has held that certain limited categories of speech lack some of the values the First Amendment was designed to protect, and therefore, receive little or no constitutional protection.[49] The category approach has received criticism from time to time,[50] but continues to be an important aspect of First Amendment jurisprudence.

Within the category approach, the Supreme Court has recognized that speech has both a content element and a context element.[51] The Court considers what the speaker is saying, as well as the circumstances under which it is said. Justice Holmes recognized these two elements in his famous opinion in *Schenk v. United States*, stating that, "[t]he most stringent protection of free speech would not protect a man in falsely shouting fire in

---

language and prevents the punishment of those who abuse this freedom. 268 U.S. at 666.

47. 315 U.S. 568 (1942).

48. *Id.* at 571-72.

49. *See, e.g.*, New York v. Ferber, 458 U.S. 747, 764 (1982) (holding that *child pornography* is outside the protection of the First Amendment because of the compelling state interest in protecting the safety and welfare of children); F.C.C. v. Pacifica Found., 438 U.S. 726, 746 (1978) (limiting *indecent speech* broadcast over the radio during the daytime); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 770 (1976) (concluding that *commercial speech* receives some First Amendment protection, but that certain regulations are permitted); Roth v. United States, 354 U.S. 476, 484-85 (1957) (holding that *obscene speech* is not within the area of constitutionally protected speech because it is utterly without redeeming social value); Beauharnais v. Illinois, 343 U.S. 250, 266 (1952) (holding that *libelous speech* is not within the area of constitutionally protected speech); *Chaplinsky*, 315 U.S. at 572 (banning *"fighting words" speech*, those which by their very utterance inflict injury or tend to incite an immediate breach of the peace).

50. *See, e.g., R.A.V. v. City of St. Paul*, 112 S. Ct. 2538, 2566 (1992) (Stevens, J., concurring) (arguing that the category approach sacrifices subtlety for clarity, and is ultimately unsound).

51. *See F.C.C.*, 438 U.S. at 744; Schenk v. United States, 249 U.S. 47, 52 (1919).

a theater and causing a panic."[52] Applying the content-context distinction, the Court has held reasonable restrictions may be placed upon the context element of speech. For example, political speech may be restricted when delivered within the context of a school setting.[53] Regarding hate speech and bias-intended crimes, it is argued that the context element of hateful expression should be subject to regulation, which still protects a person's right to express the viewpoint.[54] Restrictions on the context element of speech are more commonly called time-place-manner restrictions.

Two other First Amendment principles are important in the consideration of bias-intended crimes. First, the First Amendment protects more than verbal expressions. Certain conduct has been deemed to receive constitutional protection when the person is found to have engaged in "symbolic speech."[55] However, not all "conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea."[56] For example, a person might intend to express his view of religion by spray painting swastikas on a synagogue, but this conduct will not qualify for constitutional protection as symbolic speech.[57] It is this issue of speech versus conduct that is frequently at the center of the debate over bias-intended crime legislation.[58]

Second, the Court has broadened the protection given to several established categories of speech by finding that expression may not be

---

52. 249 U.S. at 52 (citations omitted).

53. Bethel Sch. Dist. v. Fraser, 478 U.S. 675 (upholding sanctions made upon a student for making a student government speech which included lewd and indecent language). *See also* City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986) (holding that theaters showing adult movies can be regulated through zoning because of the "secondary effects" to the community); *F.C.C.*, 438 U.S. at 726 (holding that indecent speech may be restricted to certain hours when broadcast over the radio because of the potential harm to children).

54. *See* Greenawalt, *supra* note 33, at 292-94.

55. Texas v. Johnson, 491 U.S. 397 (1989) (burning the United States flag is protected symbolic speech); Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503 (1969) (high school students wearing black armbands to protest the Vietnam War is protected symbolic speech); United States v. O'Brien, 391 U.S. 367, 376 (1968) (burning a draft card is not symbolic speech).

56. *O'Brien*, 391 U.S. at 376.

57. Government regulation of conduct is sufficiently justified if it is within the constitutional power of the government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest. *Id.* at 377.

58. *See, e.g.*, *Mitchell*, 485 N.W.2d at 807. The majority found that the statute regulated speech, two dissenters insisted that the statute punished only criminal conduct.

regulated because those who "hear" it suffer hurt feelings, offense, resentment, or anger.[59] This argument has been used successfully to strike down bias-intended crime statutes.[60]

Recent decisions by the Supreme Court indicate the current prevailing view that speech may not be penalized merely because its message is considered to be of a hateful or prejudicial character.[61] Further, hate speech has received the highest level of First Amendment protection because it is considered to be the opinion of the speaker.[62] The harms caused by hate speech have been considered too inconsequential or short-lived to justify any restrictions on the content of such expression.[63] Recent court decisions regarding these statutes have left unsettled many issues surrounding such legislation.

IV. Section 775.085 and the First Amendment

State v. Stalder[64] and *State v. Leatherman*[65] present the first opportunity for the Florida Supreme Court to consider section 775.085. The conflict between these cases and the decision in *Dobbins v. State*[66] involve a determination of whether section 775.085 regulates conduct or speech, and, if it does regulate speech, whether regulations on hate speech are permissible.[67] Because there is no precedent regarding section 775.085, the

---

59. *See, e.g., Johnson*, 491 U.S. at 409, 414 ("If there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society find the idea itself offensive or disagreeable"); *F.C.C.*, 438 U.S. at 745 ("The fact that society may find speech offensive is not a sufficient reason for suppressing it"); Street v. New York, 394 U.S. 576, 592 (1969) ("It is firmly settled that . . . . the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers").

60. *See, e.g., R.A.V.*, 112 S. Ct. at 2549; *Stalder*, No. 91-18929, at 15-17 (mem.).

61. *See* Smolla, *supra* note 40, at 172 n.3.

62. *Id.*

63. *Id.*

64. No. 91-18929 (Fla. 17th Cir. Ct. Apr. 20, 1992) (order granting motion to dismiss), *jurisdiction accepted*, 599 So. 2d 1289 (Fla. 1992).

65. No. 90-25471 (Fla. 17th Cir. Ct. Apr. 21, 1992) (case dismissed nunc pro tunc), *jurisdiction accepted*, 602 So. 2d 942 (Fla. 1992).

66. 17 Fla. L. Weekly D2222 (Fla. 5th Dist. Ct. App. 1992).

67. This author recognizes that some of the conclusions reached in this article are contrary to the weight of judicial authority. However, this author believes that, because of the substantial harms caused by bias-intended activities, and the insignificant effect on speech, if any, of statutes aimed at this activity, the courts should adopt a different approach to bias-intended criminal legislation.

Florida Supreme Court will seek guidance from the recent United States Supreme Court decision in *R.A.V. v. City of St. Paul*,[68] and the recent decision by the Supreme Court of Wisconsin in *State v. Mitchell*.[69] The majority of bias-intended crime legislation has been enacted only within the past few years. Thus, the courts have only recently been presented with the opportunity to address litigation concerning these statutes.

A. *Recent Court Decisions*

In *R.A.V.*, the Supreme Court struck down the St. Paul, Minnesota Bias Motivated Crime Ordinance.[70] This decision, however, should not be

---

Additionally, the recent decision regarding § 775.085 in Richards v. State, 90-2912, 1992 WL 335899 (Fla. 3d Dist. Ct. App. Nov. 17, 1992), does not involve First Amendment issues, and, therefore, will not be included in this discussion.

68. 112 S. Ct. at 2538.

69. 485 N.W.2d at 807.

70. 112 S. Ct. at 2538. The Court, in a 9-0 decision, struck down the St. Paul, Minnesota Bias-Motivated Crime Ordinance, which provides:

> 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. at 2541 (citing ST. PAUL, MINN. LEGIS. CODE § 292.02 (1990)). The Court, however, was sharply divided on the reasoning for its decision, with four Justices writing or joining in sharply worded concurring opinions critical of the majority's analysis.

The case began when several teenagers burned a crudely-made cross on the yard of a black family, and were subsequently charged with violating the St. Paul ordinance. *R.A.V.*, 112 S. Ct. at 2541. The trial court dismissed the charge on the ground that the ordinance was facially invalid under the First Amendment. *Id.* The Minnesota Supreme Court reversed, finding that the words of the ordinance limited its reach to conduct that amounts to "fighting words" that the First Amendment does not protect. *Id.* (citing *In re* Welfare of R.A.V., 464 N.W.2d 507 (Minn. 1991)).

The United States Supreme Court accepted the Minnesota Supreme Court's construction of the ordinance as applying only to "fighting words," but found that the ordinance was limited only to "fighting words" that insult, or provoke violence, addressed to one of the specified disfavored topics — race color, creed, religion or gender." *Id.* at 2547. The Court concluded that such selective limitations on speech, even within the context of "fighting words," are an impermissible violation of the First Amendment. *Id.* at 2548. "The First Amendment," said the Court, "does not permit St. Paul to impose special prohibitions on those speakers who express views on disfavored subjects." *Id.* at 2547.

The four concurring Justices sharply disagreed with the approach taken by Justice Scalia in the majority opinion. They argued that the case "could easily [have been] decided within the contours of established first amendment law by holding . . . that the St. Paul ordinance is fatally overbroad . . . . But in the present case, the majority casts aside long-established

controlling in determining the constitutionality of section 775.085.[71] First, section 775.085 is a different type of statute then the St. Paul ordinance. Section 775.085 is a enhancement statute, providing for increased penalties for crimes in which biased-intent is an added element, whereas the St. Paul ordinance establishes specific conduct as an independent crime.[72] Second, the St. Paul ordinance relies on the "fighting words" doctrine for its validity, and addresses expression which "arouses anger, alarm or resentment in others . . . ."[73] On the other hand, section 775.085 seeks to punish only criminal conduct in which prejudicial selection of the victim is an element.[74] It was predicted, however, that the broad approach used by the Court in *R.A.V.* would result in the invalidation of all types of bias-intended crime statutes, as well as administrative provisions established at many universities for controlling hateful and harassing activities.[75]

This prediction came true in *State v. Mitchell*,[76] issued one day after the decision in *R.A.V.* In *Mitchell*, the Supreme Court of Wisconsin invalidated the Wisconsin bias-intended crime statute, which is an enhancement statute similar to Florida's section 775.085.[77] The court concluded

---

First Amendment doctrine without benefit of briefing and adopts an untried theory. This is hardly a judicious way of proceeding, and the Court's reasoning in reaching its result is transparently wrong." *Id.* at 2550-51 (White, J., concurring).

71. *See Dobbins*, 17 Fla. L. Weekly at D2223; *Mitchell*, 485 N.W.2d at 819 (Abrahamson, J., dissenting).

72. *See* Appellant's Brief at 14, State v. Stalder, (Fla.) (No. 79,924), *jurisdiction accepted*, 599 So. 2d 1280 (Fla. 1992).

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

74. *Dobbins*, 17 Fla. L. Weekly at D2223.

75. *See* Linda Greenhouse, *High Court Voids Law Singling Out Crimes of Hatred*, N.Y. TIMES, June 23, 1992, at A1, A17.

76. 485 N.W.2d 807 (Wis. 1992).

77. *Id.* A divided court struck down the Wisconsin statute which provided, in relevant part:

> (1) If a person does all of the following, the penalties for the underlying crime are increased as provided in sub. (2):
>
> (a) Commits a crime under chs. 939 to 948.
>
> (b) Intentionally selects the person against whom the crime under par. (a) is committed or selects the property which is damaged or otherwise affected by the crime under par. (a) because of the race, religion, color, disability, sexual orientation, national origin or ancestry of that person or the owner or occupant of that property.

Mitchell, 485 N.W.2d at 809 n. 1 (citing Wis. Stat. § 939.645 (1989)). The facts of this case are as follows:

> [A] group of black men and young boys was gathered at an apartment complex in Kenosha. Todd Mitchell, nineteen at the time, was one of the older members

that the enhancement provisions of the statute "punished bigoted thought," and justified its decision based on the conclusions of the Supreme Court's decision in *R.A.V.*[78] The majority opinion acknowledged the differences between the Wisconsin and St. Paul statutes, but rejected any contention that the differences should result in a different conclusion.[79] Additionally, it is significant that in *R.A.V.* the petitioner had also been charged under a Minnesota statute banning racially motivated assaults, which was similar to the Wisconsin statute and section 775.085.[80] The petitioner did not challenge that count, nor did the Supreme Court offer any comment.[81]

The determination of whether section 775.085 violates the First Amendment requires a careful analysis of the construction of the statute.

---

of the group. Some of the group were at one point discussing a scene from the movie "Mississippi Burning" where a white man beat a young black boy who was praying.

Approximately ten members of the group moved outdoors, still talking about the movie. Mitchell asked the group: "Do you all feel hyped up to move on some white people?" A short time later, Gregory Riddick, a fourteen-year-old white male, approached the apartment complex. Riddick said nothing to the group, and merely walked by on the other side of the street. Mitchell then said: "You all want to fuck somebody up? There goes a white boy; go get him." Mitchell then counted to three and pointed the group in Riddick's direction.

The group ran towards Riddick, knocked him to the ground, beat him severely, and stole his "British Knights" tennis shoes. The police found Riddick unconscious a short while later. He remained in a coma for four days in the hospital, and the record indicates he suffered extensive injuries and possibly permanent brain damage.

Id. at 809.

The divided Wisconsin Supreme Court struck down § 939.958 on the grounds that the statute punished offensive thought and violated the First Amendment indirectly by chilling free speech. *Id.* at 811. The court justified its decision relying on the United States Supreme Court decision in *R.A.V.*, finding that "[t]he ideological content of the thought targeted by the hate crime statute is identical to that targeted by the St. Paul ordinance - racial or other discriminatory animus. And, like the United States Supreme Court, we conclude that the legislature may not single out and punish that ideological content." *Id.* at 815.

Two dissenting opinions noted the failure of the majority's reasoning, expressing similar opinions that the Wisconsin statute did not punish speech. One dissent specifically noted that the statute punished the "depraved, antisocial intent" of the criminal in selecting his victim. *Id.* at 822 (Bablitch, J., dissenting).

78. *Id.* at 812, 814-15.

79. *Id.* at 815.

80. *R.A.V.*, 112 S. Ct. at 2541 n.2.

81. *Id.* The significance of this treatment of the additional count in *R.A.V.* was noted in *Dobbins*, 17 Fla. L. Weekly at D2224 n.1 and *Mitchell*, 485 N.W.2d at 819 (Abrahamson, J., dissenting).

Although criminal statutes that are analyzed within the First Amendment context must be scrutinized with particular care,[82] one must be aware not to fall into what may be called the "hate crime—free speech" trap. The trap begins with the conclusion that a bias-intended crime statute must, by definition, offend the First Amendment. Having reached this conclusion, a rationale is then developed to support the result.[83] The Supreme Court decision in *R.A.V.* has made the operation of this trap especially widespread.[84] As a result, courts and law enforcement agencies have stopped or reduced enforcement of what many insist is constitutionally valid legislation.[85]

The Wisconsin court fell into this trap in *Mitchell* by adopting the reasoning of the *R.A.V.* Court, although *R.A.V.* involved a totally different type of statute. The *Stalder* court also fell into this trap in finding section 775.085 unconstitutional. The *Stalder* court failed to consider the issue of whether section 775.085 punished conduct or speech in reaching its decision; instead it began with the conclusion that it punished speech.[86] This approach, to combine all bias-intended crime statutes into one presumably invalid group, is to forever doom valid and necessary legislation.[87]

---

82. City of Houston v. Hill, 482 U.S. 451, 459 (1987).

83. *See, e.g., R.A.V.*, 112 S. Ct. at 2551 (White, J., concurring) (arguing that the majority cast aside long-established First Amendment doctrine in reaching its decision); *Mitchell*, 485 N.W.2d at 814-15 (ignoring the differences between the Wisconsin statute and the St. Paul statute in order to invalidate the Wisconsin statute).

84. *See* Katia Hetter, *Supreme Court Ruling Confuses Enforcers of Hate-Crime Laws*, WALL ST. J., Aug. 13, 1992, at B1.

85. *Id.*

86. The *Stalder* court never addressed the issue of whether § 775.085 regulated speech or conduct. The initial conclusion of the court was that the statute was vague because it failed to clearly express a requirement that the issue of prejudice had to be proven beyond a reasonable doubt. *Stalder*, No. 91-18929, at 2-3. The court then incorporated into its order the full memorandum of law submitted by the defendant, which began with the conclusion that the statute regulated the speech based solely on its content. *Id.* at 7 (mem.).

87. Responding to the problems associated with varied and poorly drafted bias-intended crime legislation, the Anti-Defamation League of B'nai B'rith (ADL) has drafted model statutes for use by the states in drafting their own statutes. More than half the states, including Florida, have based all or part of their bias-intended crime statutes on ADL's model. ANTI-DEFAMATION LEAGUE, HATE CRIMES STATUTES: A 1991 STATUS REPORT 4-5 (1991). The United States Supreme Court has not yet ruled on legislation based on the ADL model.

B. *Section 775.085 Punishes Unprotected Conduct*

Florida Statute section 775.085 does not violate the First Amendment because it punishes only unprotected criminal conduct, and does not seek to punish individuals for engaging in protected thoughts or expressions.[88] A proper reading of section 775.085 shows that its effect is to create a new substantive crime out of an existing underlying crime plus the addition of a more culpable intent of the offender in selecting his victim.[89] The thoughts and expressions of the actor are merely evidence of this specific prejudicial intent.[90] It is the specific intent in selecting a victim that the state is punishing when charging an offender under section 775.085; not the offender's thoughts and expressions.[91]

The *Dobbins* court recognized the role of expression and opinion regarding section 775.085: "Section 775.085 does not punish intolerant opinions. Nor does it punish the oral or written expression of those opinions. It is only when one acts on such opinion to the injury of another that the statute permits enhancement."[92] This distinction made as to the construction of section 775.085 and the role of "speech" is important, and should not be dismissed as mere "word-play."[93]

---

88. *Dobbins*, 17 Fla. L. Weekly at D2223. *See also*, Appellant's Brief, *supra* note 72, at 8. In support of the position of the State, the Anti-Defamation League has filed an amicus curiae brief in the *Stalder* case with the Florida Supreme court in which it emphasizes the conduct-oriented character of the statute:

> In contrast to statutes of some other states which have isolated certain discriminatory thoughts or conduct deemed offensive to the community, Florida merely reclassifies already criminal conduct which is perpetrated by reason of the status of the victim. Thus, Florida's hate crimes law is essentially a punishment statute, providing severe punishment, not for engaging in thought but for engaging in criminal conduct. In so doing, Florida's law is not different from a myriad of enhancement statues which look to the particularized criminal conduct of the accused or to the special status of the victim.

Brief of Amicus Curiae, Anti-Defamation League at 10, State v. Stalder, (Fla. 1992) (No. 79,924).

89. Appellant's Brief, *supra* note 72, at 14.

90. *Id.* at 8.

91. Specific intent is defined as "a special mental element which is required above and beyond any mental state required with respect to the *actus reus* of the crime." WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW § 3.5(e), at 223 (2d ed. 1986).

92. *Dobbins*, 17 Fla. L. Weekly at D2223.

93. *See R.A.V.*, 112 S. Ct. at 2548 (Justice Scalia, writing for the majority, dismissed a similar distinction made in a concurring opinion by Justice Stevens as "word-play"); *see also* State v. Mitchell, 485 N.W.2d 807, 814 (Wis. 1992) (the court acknowledged this distinction made by the State and then dismissed it: "A statute specifically designed to punish

The *Stalder* court, however, found that the statute does regulate protected expression, noting that it "swallows within its ambit, speech and symbolic conduct that standing alone cannot be deemed a crime."[94] The court reasoned that the underlying crime is already punishable, therefore the increased penalty must be for the bigoted opinions and expressions of the offender, which the state has determined to be "evil."[95] This, the trial court concluded, is a violation of the First Amendment.[96] In reaching this conclusion, however, the court erred in its analysis, failing to properly consider the construction of the statute, and falling into the previously described "hate crime—free speech" trap.

The critical words of section 775.085 are, "if the commission of such felony or misdemeanor evidences prejudice."[97] This language "requires that it is the commission of the crime that must evidence the prejudice; the fact that racial prejudice may be exhibited during the commission of the crime is itself insufficient."[98] This prejudice manifests itself in the intentional selection of a victim based on identifiable immutable characteristics.[99] This interpretation is consistent with the "but for" approach put forth by the State of Florida, whereby the criminal episode never would have occurred *but for* the conduct of the offender in selecting his victim.[100] To reach the conclusion of the *Stalder* court, one would have to read the statute to say "if *during* the commission of such felony or misdemeanor the offender evidences prejudice." However, this is not what the language of the statute provides. This difference in the language used is subtle, but important.

In analyzing section 775.085, the Florida Supreme Court should adopt the reasoning of Judge Bablitch in *State v. Mitchell*.[101] Judge Bablitch, in a dissenting opinion, provided a clear and precise explanation of the effect of bias-intended crime enhancement statutes:

> The penalty enhancement statute is directed at the action or conduct of selecting a victim and committing a crime against that victim because

---

personal prejudice impermissibly infringes upon an individual's First Amendment rights, no matter how carefully or cleverly one words the statute").

94. *Stalder*, No. 91-18929, at 7 (mem.).
95. *Id.* at 9 (mem.).
96. *Id.* at 11 (mem.).
97. FLA. STAT. § 735.085 (1989).
98. *Dobbins*, 17 Fla. L. Weekly at D2222.
99. *Id.*
100. *See* Appellant's Brief, *supra* note 72, at 4.
101. 485 N.W.2d at 819 (Bablitch, J., dissenting).

of his or her protected status. The gravamen of the offense is selection, not the perpetrator's speech, thought, or even motive. The statute does not impede or punish the right of persons to have thoughts or to express themselves regarding the race, religion, or other status of a person. The statute's concern is with criminal conduct plus purposeful selection. By enhancing the penalty, the penalty enhancer statute punishes more severely criminals who act with what the legislature has determined is a more depraved, antisocial intent: an intent not just to injure but to intentionally pick out and injure a person because of a person's protected status. The legislative concern expressed in this statute is not with beliefs, motive, or speech of a perpetrator but with his or her action of purposeful selection plus criminal conduct.

Admittedly, the conduct prohibited by the penalty enhancer statute can be proven by an extensive combination of facts that might include words uttered by a defendant. However, if words are used to prove a crime, the words are not the subject of the statutory prohibition; rather they are used only as circumstantial evidence to prove the intentional selection.[102]

This is the correct reasoning to apply to bias-intended crime enhancement statutes, and should be followed in upholding the constitutional validity of section 775.085.[103]

Penalizing an individual for his specific intent in selecting a victim based on certain characteristics is not unique to section 775.085 in the Florida Statutes. Section 806.13 provides an increased penalty for vandalism when the offender selects a religious institution as his or her target.[104] Section 784.08(2) provides enhanced penalties, and a minimum mandatory three-year sentence, for a battery when the offender selects a

---

102. *Id.* at 820-21.

103. The same interpretation was made of the Oregon bias-intended crime enhancement statute in State v. Hendrix, 813 P.2d 1115, 1119 (Or. App.), *appeal allowed*, 822 P.2d 1194 (Or. 1992). The court upheld Oregon's Intimidation Law, which provided:

> Two or more persons acting together commit the crime of intimidation in the first degree, if the persons:
>
> (a)(A) Intentionally, knowingly, or recklessly cause physical injury to another because of their perception of the person's race, color, religion, national origin or sexual orientation.

Id. at 1117 (citing Or. Rev. Stat. § 1.66.165(1)(a)(A) (1989)). An intimidation statute is a form of crime enhancement statute in its effect. The additional charge arises out of the same incident, and increases the penalty for the offense based on the offender's specific intent in selecting his victim.

104. FLA. STAT. § 806.13.

person sixty-five years of age or older as his or her victim.[105] Section 794.011 provides special penalties for sexual battery when the offender selects a minor as his victim.[106] The argument may be made that these statutes are valid because it has been shown that these victims, older people and children, suffer greater harms when attacked than do others not of that class. The proponents of this argument insist that the victims protected under section 775.085 suffer the same harm when attacked as others not of the class. However, the victims of bias-intended crimes suffer distinctive and substantial harms as a result of the racist attacks; harms that are different in character than those suffered by victims who are attacked for some other reason.[107] These harms are more than sufficient to justify the need for, and the validity of, section 775.085.

Florida's discrimination statutes are similar in effect to section 775.085.[108] They provide penalties for selecting a victim based on personal characteristics and then engaging in unlawful activity based on that selection.[109] For example, section 760.10 makes it an unlawful employment practice to discriminate based on race, color, religion, sex, national origin, age, handicap or marital status.[110] Likewise, sections 763.23 and 764.24 make it unlawful to discriminate in the purchase, renting, or financing of real estate because of race, color, national origin, sex, handicap, familial status, or religion.[111] Although the discrimination statutes are civil in nature, the premise underlying the statutes is the same for section 775.085. The State has made it unlawful conduct to select a victim because of certain personal characteristics of that victim. In *Dobbins*, the court explained:

> In such cases [of discrimination] it is not the content of the speech that is prohibited, but such act of discrimination. It does not matter

---

105. *Id.* § 784.08.

106. *Id.* § 794.011.

107. *See* Matsuda, *supra* note 15, at 2335-41; Delgado, *supra* note 15, at 135-49; Lawrence, *supra* note 39, at 458-66.

108. *Dobbins*, 17 Fla. L. Weekly at D2222; *Mitchell*, 485 N.W.2d at 820 (Bablitch, J., dissenting).

109. In *Mitchell*, Judge Bablitch asks, "How can the majority find the penalty enhancer statute unconstitutional because it punishes the 'because of' aspect of a selection process, and at the same time conclude that antidiscrimination statutes, which do the same thing, are constitutional?" 485 N.W.2d at 823 (Bablitch, J., dissenting).

110. FLA. STAT. § 760.10. (1991).

111. *Id.* §§ 760.23, .24 (1991).

why a woman is treated differently than a man, a Black differently than a White, a Catholic differently than a Jew; it matters only that they are.

So also with section 775.085. It doesn't matter that [the offender] hated Jewish people or why he hated them; it only mattered that he discriminated against [the victim] because he was Jewish.[112]

In each instance, the State has decided to punish an offender because of his action of selecting a particular class of victim for unlawful conduct.[113]

Opponents of bias-intended crime statutes argue that the use of speech as evidence of this intent has a chilling effect on expression that is violative of the First Amendment.[114] However, this argument could be made about any crime in which intent is an element. Because intent is a state of mind, and not directly measurable, proof of intent must always be obtained from an offender's words and actions in light of all the surrounding circumstances.[115] For example, consider this hypothetical situation: Bill shouts in the office that he hates his boss and is going to kill him. Two days later, Bill shoots and kills his boss. Bill will be charged with first degree murder, and his words will be used as part of the evidence of his intent to commit that murder.[116] Furthermore, the words used by Bill will be used as evidence to distinguish between the intent necessary for first and second degree murder.[117]

---

112. 17 Fla. L. Weekly at D2223. The court further held that "it is the act of discrimination against people because of their race, color or religion by making them victims of crime that is prohibited and punished, not the specific opinion that lead to that discrimination." *Id.*

113. *Id.* In his brief to the Florida Supreme Court, Stalder rejected the comparison of § 775.085 to other victim-selection statutes. Appellee's Brief at 20-21, State v. Stalder (Fla. 1992) (No. 79,924). He agreed that enhanced penalties are constitutionally valid when a minor or elderly person is selected as the victim for a crime. Stalder recognized: "Indeed, those penalties are there regardless of the motives of the actor." *Id.* at 21. This is the case with § 775.085 as well. Section 775.085 enhances the penalty when a victim is selected solely because of his class, regardless of the motives of the actor. However, Stalder fails to explain why the State may punish an offender because of his selection of a victim based on age, yet, may not punish an offender because of his selection of a victim based on race, color, ancestry, ethnicity, religion or national origin.

114. *See, e.g.*, Appellee's Brief, *supra* note 113, at 39-41; Gellman, *supra* note 15, at 360.

115. LAFAVE & SCOTT, *supra* note 90, § 3.5(f), at 226.

116. Section 782.04(1) of the Florida Statutes defines murder in the first degree as "[t]he unlawful killing of a human being when perpetrated from a premeditated design to effect the death of the person killed or any human being . . . ." FLA. STAT. § 782.04 (1991).

117. The distinguishing element between the two crimes is the premeditation required for first degree murder. Section 782.04(2) of the Florida Statutes defines murder in the

Similarly, if one is charged under Florida Statute section 775.085 with committing a bias-intended crime, any evidence, including acts and words used by the offender, may be used to prove his intent in selecting the victim merely because of the victim's race, color, ancestry, ethnicity, religion or national origin. It must be emphasized that an offender may be convicted under section 775.085, even if no words were uttered, if there is other evidence of bias in the selection of a victim. Words used by the offender, if any, are merely evidence of his or her intent, nothing more.

In support of its finding that section 775.085 restricts speech, the *Stalder* court concluded that section 775.085 has no legitimate purpose other than prohibiting the content of expression.[118] The court reasoned that existing general laws satisfy the State's general interest in maintaining order.[119] This conclusion, however, ignores the more specific purposes of the State in enacting criminal statutes.[120] It is within the authority of the State to identify specific evils, and to enact legislation to address those evils.[121] The conclusion reached by the *Stalder* court also ignores the

---

second degree as: "The unlawful killing of a human being, when perpetrated by any act imminently dangerous to another and evincing a depraved mind regardless of human life, although without any premeditated design to effect the death of any particular individual." *Id.* § 782.04(2).

118. *Stalder*, No. 91-18929, at 19 (mem.).

119. *Id.*

120. *See* FLA. STAT. § 775.012 (1991). Section 775.012 provides:

> 775.012 General purposes. - The general purposes of the provisions of the [Florida Criminal] code are:
>
> (1) To proscribe conduct that improperly causes or threatens substantial harm to individual or public interest.
>
> (2) To give fair warning to the people of the state in understandable language of the nature of the conduct proscribed and of the sentences authorized upon conviction.
>
> (3) To define clearly the material elements constituting an offense and the accompanying state of mind or criminal intent required for that offense.
>
> (4) To differentiate on reasonable grounds between serious and minor offenses and to establish appropriate disposition for each.
>
> (5) To safeguard conduct that is without fault or legitimate state interest from being condemned as criminal.
>
> (6) To ensure the public safety by deterring the commission of offenses and providing for the opportunity for rehabilitation of those convicted and for their confinement when required in the interests of public protection.

Id.

121. Nation v. State, 17 So. 2d 521, 522 (Fla. 1944) (holding that "within constitutional limitations, the Legislature has the power to denounce any act as a crime and to fix the grade of the offense and prescribe the punishment therefore.").

State's compelling interest in protecting its citizens from the distinct and substantial harms caused by those who commit bias-intended crimes.[122] In *R.A.V.*, Justice Stevens recognized the need for specialized criminal statutes:

> Conduct that creates special risks or causes special harms may be prohibited by special rules. Lighting a fire near an ammunition dump or a gasoline storage tank is especially dangerous; such behavior may be punished more severely than burning trash in a vacant lot. Threatening someone because of her race or religious beliefs may cause particularly severe trauma or touch off a riot, and threatening a high public official may cause substantial social disruption; such threats may be punished more severely than threats against some based on, say his support of a particular athletic team. There are legitimate, reasonable, and neutral justifications of such special rules.[123]

Other statutes do not satisfy the right of the State to confront the specific harms addressed by section 775.085, and to punish the conduct that created those harms.[124]

Finally, a concern voiced by opponents of enhancement-type bias-intended crime statutes is that punishment could be increased merely because someone called the victim a name during the commission of the crime.[125] However, this is not the case.[126] The parameters established

---

122. *See Dobbins*, 17 Fla. L. Weekly at D2223; *see also* Appellant's Brief, *supra* note 72, at 16.

123. *R.A.V.*, 112. S. Ct. at 2561 (Stevens, J., concurring).

124. Susan Gellman writes:

> Without question, bigotry-motivated crime, like all bigoted action and expression, causes real and serious harm to its direct victims, to other members of the victim's groups, to members of other minority groups, and to society as a whole. Whatever policy and constitutional problems ethnic intimidation statutes may have, these statutes are the reflection of legislatures' recognition that these harms are real and significant.

Gellman, *supra* note 15, at 340.

125. This concern was voiced by the Supreme Court of Wisconsin in its recent decision concerning Wisconsin's bias intended crime statute:

> [I]f A strikes B in the face he commits a criminal battery. However, should A add a word such a "nigger," "honkey," "jew," "mick," "kraut," "spick," or "queer," the crime becomes a felony, and A will be punished not for his conduct alone - a misdemeanor - but for using the spoken work.

Mitchell, 485 N.W.2d at 816.

126. *See Dobbins*, 17 Fla. L. Weekly at D2222 (finding that within the requirements of § 775.085, the fact that such statements may be made during the commission of the crime

for enforcement of section 775.085 ensure that this is not the effect of the statute. The "but for" test applied by the State establishes a clear standard so that merely calling someone a name in the heat of a moment will not itself lead to a charge of bias.[127] In addition, the Florida Department of Law Enforcement has noted that law enforcement officers must adhere to established practices of criminal law enforcement whereby police officers must follow standards for proper investigation and probable cause in determining whether a specific incident constitutes a bias-intended crime.[128] The remote likelihood that an error will occur in enforcement should not be a reason to strike down a necessary and valid statute.[129]

Section 775.085 punishes the conduct of an offender who knowingly selects a victim for criminal conduct because that person is a member of a particular class. If the state can prove beyond a reasonable doubt that "but for" the race color, ancestry, ethnicity, religion, or national origin of the victim the crime never would have occurred, then section 775.085 will enhance the level of crime committed by the offender. This is not the punishment of expression, but is punishment of conduct that falls outside the protection of the First Amendment.

C. *Restrictions on Speech*

Section 775.085 does not regulate speech and, therefore, should not be subject to First Amendment analysis. However, should the Florida Supreme Court conclude that the statute does implicate speech, then section 775.085 should still be upheld as constitutionally valid.[130] Under First Amendment analysis, a statute will be upheld if the government can adequately justify

---

is insufficient). The *Dobbins* court further stated, "section 775.085 does not punish intolerant opinions. Nor does it punish the oral or written expression of those opinions. It is only when one acts on such opinion to the injury of another that the statute permits enhancement." *Id.* at 2223.

127. *Dobbins*, 17 Fla. L. Weekly at D2222. *See also* Appellant's Brief, *supra* note 72, at 14 (stating that a defendant may not be convicted under § 775.085 if the State cannot prove beyond a reasonable doubt that the crime would not have occurred *but for* the defendant's act in selecting the victim).

128. FLORIDA DEPARTMENT OF LAW ENFORCEMENT, HATE CRIME REPORT MANUAL 8 (1989).

129. The broader issue raised by this concern is the vagueness doctrine of the Fourteenth Amendment, which is not part of the subject matter of this article.

130. Throughout this section of this article, Florida Statute § 775.085 is discussed in the context of a content-based or a time-place-manner restriction. However, this is done only for the purpose of providing a basis for discussion of First Amendment analysis should the Supreme Court of Florida construe the statute in such a manner.

the regulation based upon the nature and extent of the restriction, if any, on free expression.[131]

1. Time-Place-Manner Restrictions

Speech, whether oral, written, or symbolic, is subject to reasonable time, place, or manner restrictions.[132] Section 775.085 may be characterized as a time-place-manner restriction because it does not seek to limit all hateful expression, but only that which results in criminal conduct.[133] These types of restrictions are valid, provided that they are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication.[134]

A time-place-manner restriction must be justified without reference to the content of the regulated speech.[135] The *Stalder* court concluded that section 775.085 is a content-based restriction because the statute punished expression based on the viewpoint of the speaker.[136] The court insisted that the State had no other motive in enacting section 775.085 than the suppression of speech.[137] However, "[i]t is a familiar principle of constitutional law that [a court] will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive . . . ."[138] Under current Supreme Court decisions, section 775.085 may be upheld as a content-neutral restriction, justified without reference to the content of the regulated speech.

---

131. *See, e.g.*, Boos v. Barry, 485 U.S. 312, 332 (1988) (upholding a statute which restricted protesting near embassies; the statute was upheld as an anti-violence measure); City of Renton v. Playtime Theatres, Inc, 475 U.S. 41, 54 (1986) (upholding a statute which restricted the location of adult movie theaters; the statute was upheld as a valid response to the "secondary effects" of such theaters); F.C.C. v. Pacifica Found., 438 U.S. 726, 750-51 (1978) (upholding a statute which restricted broadcasting indecent speech; the statute was upheld as a valid measure preventing harm to children); United States v. O'Brien, 391 U.S. 367, 382 (1968) (upholding a statute which made it unlawful to destroy a draft card; the statute was upheld as a valid administrative measure penalizing unprotected conduct).

132. Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984).

133. *Dobbins*, 17 Fla. L. Weekly at D2223.

134. *Clark*, 468 U.S. at 293.

135. *Id.*

136. *Stalder*, No. 91-18929, at 13 (mem.).

137. *Id.* at 19.

138. *Renton*, 475 U.S. at 48 (citing United States v. O'Brien, 391 U.S. 367, 382-86 1968)).

In *City of Renton v. Playtime Theatres, Inc.*, the Court upheld an ordinance which sought to restrict the location of adult movie theaters.[139] The Court accepted as justification for the ordinance the government's concerns with the "secondary effects" of crime and reduced property values in the areas surrounding the theaters.[140] In *F.C.C. v. Pacifica Foundation*, the Court upheld a provision that prohibited indecent speech from being broadcast over the radio during certain times of the day.[141] The Court accepted as a primary justification for the restriction the interest of the government in protecting children from harm.[142] In *Clark v. Community for Creative Non-Violence*, the Court upheld a provision which restricted camping in national parks.[143] The Court accepted as primary justification the conservation of park property.[144]

Section 775.085's limited restrictions on hateful expression are not unlike the above time-place-manner restrictions. The State of Florida has enacted section 775.085 as an anti-crime measure, designed to protect its citizens who become victims of crime and suffer substantial harms merely because of some identified immutable characteristic.[145] The State is saying that one may express hateful opinions, but may not do so in a particular harmful manner — that of committing a criminal act. The harms caused by hateful conduct and expression have a broader effect on the community, and a more harmful effect on its victims, than mere "emotive impact." "Emotive impact" was used by the Court to describe a listener's direct reactions to speech.[146] The asserted purpose of the State, and the effect of section 775.085, in preventing crime wherein hate serves as the

---

139. *Id.* at 54.

140. *Id.* at 47-48. The Court concluded that "[t]he ordinance by its terms is designed to prevent crime, protect the city's retail trade, maintain property values, and generally protect and 'preserve the quality of the city's neighborhoods, commercial districts, and the quality of urban life,' not to suppress the expression of unpopular views." *Id.* at 48 (citing App. to Juris. Statement 90a).

141. 438 U.S. at 750.

142. *Id.* at 749.

143. 468 U.S. at 294.

144. *Id.* at 295.

145. Appellant's Brief, *supra* note 72, at 14.

146. *See Boos*, 485 U.S. at 321 (explaining that "[l]isteners' reactions to speech are not the type of 'secondary effects' we referred to in *Renton* . . . . The emotive impact of speech on its audience is not a 'secondary effects'"); *see also* Note, *Combatting Racial Violence: A Legislative Proposal*, HARV. L. REV. 1270, 1280 (1988) ("crimes of interracial violence generate widespread fear and intimidation within and between communities, affecting many more individuals than the victim and his immediate acquaintances").

basis, establishes a justification for the statute that is unrelated to the suppression of expression.

A time-place-manner restriction must also be narrowly tailored to serve a significant governmental interest.[147] The State of Florida has an interest in protecting its citizens from the substantial harms of criminal activity, especially those individuals who have historically been subject to discrimination. A similar state interest was designated by the United States Supreme Court in *R.A.V. v. City of St. Paul* as compelling.[148] Additionally, section 775.085 is "narrowly tailored" in that it affects only that hateful expression which serves as the basis for criminal activity.[149]

Finally, a time-place-manner restriction must leave open ample channels for communication.[150] Section 775.085 allows for substantial alternative avenues of communication for those who wish to express hateful viewpoints, for those who wish to hear them, and even for those who do not wish to hear them. Those choosing to express such viewpoints may still hold parades and rallies; they may publish books and magazines; they may express themselves in any public forum; etcetera. The restrictions imposed by section 775.085 allow for every possible manner of communication except when hateful expression serves as the basis for the commission of a crime.

Section 775.085 merely seeks to limit hateful expression within the narrow context that it serves as the basis for criminal activity. The statute is justified as an anti-crime measure without reference to the content of hateful expression, is narrowly tailored to serve this governmental interest, and leaves open ample alternative channels for communication. Therefore, it is a valid restriction on the manner in which a person may express his or her hateful opinion.

2. The *O'Brien* Test

The United States Supreme Court has stated that "when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech

147. *Clark*, 468 U.S. at 293.
148. 112 S. Ct. at 2549.
149. *See Dobbins*, 17 Fla. L. Weekly at 2223 (finding that § 775.085 "is narrowly tailored to serve the compelling state interest of ensuring the basic human rights (not to be a target of a criminal act) of members of groups that have historically been subjected to discrimination because of membership in those groups").
150. *Clark*, 468 U.S. at 293.

element can justify incidental limitations on First Amendment freedoms."[151] The *Stalder* court concluded that section 775.085 punishes expressive conduct, or symbolic speech, consisting of both speech and nonspeech elements.[152] Symbolic expression may be regulated:

> [1] if it is within the constitutional power of the Government; [2] if it furthers an important or substantial governmental interest; [3] if the governmental interest is unrelated to the suppression of free expression; and [4] if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.[153]

The first element of the *O'Brien* test is that the conduct regulated by section 775.085 must be within the power of the State of Florida to regulate.[154] The authority for Florida to provide for the health, safety, and welfare of its citizens by enacting criminal statutes is within the police powers reserved to it by the Tenth Amendment. The *O'Brien* test also requires that the regulation must further an important or substantial governmental interest, and that the governmental interest must be unrelated to the suppression of free expression.[155] It has already been established above that section 775.085 serves the compelling State interest in protecting its citizens of historically discriminated-against groups from the harmful effects of criminal activity.[156] It has also been established that the statute's role as an anti-crime measure is unrelated to the suppression of a person's right to express his or her viewpoint.[157]

The final element of the *O'Brien* test is that the incidental restriction on alleged First Amendment freedoms must be no greater than is essential to the furtherance of the governmental interest.[158] A frequent argument concerning bias-intended crimes is that existing criminal statutes already punish the criminal activity.[159] The *Stalder* court concluded that existing criminal statutes satisfy the State's interest in maintaining order, and,

---

151. United States v. O'Brien, 391 U.S. 367, 376 (1968).
152. No. 91-18929, at 13 (mem.).
153. *O'Brien*, 391 U.S. at 377.
154. *Id.*
155. *Id.*
156. *See supra* notes 147-49 and accompanying text.
157. *See supra* notes 133-46 and accompanying text.
158. *O'Brien*, 391 U.S. at 377.
159. *Stalder*, No. 91-18929, at 19 (mem.); *R.A.V.*, 112 S. Ct. at 2541 n.1 (recognizing that the defendants could have been punished under other existing Minnesota statutes).

therefore, the enhancement provisions must punish only expression.[160] However, the State's interest in enacting section 775.085 was not merely to maintain order, but to punish a different type of conduct which results in harms different than the conduct punished by existing statutes.[161] Existing statutes do not accomplish the legitimate state purpose in penalizing the specific conduct addressed by section 775.085.[162]

Section 775.085 is an anti-crime measure that has as its primary purpose the punishment of criminal conduct in which an offender exhibits prejudice in the selection of his victim. Analysis of section 775.085 under the *O'Brien* test shows that the statute is an effective and narrowly drawn means of punishing bias-intended criminal conduct, while its effect on the suppression of speech is minimal. Therefore, the statute should be upheld as valid within the requirements of the First Amendment.

3. Strict Scrutiny

If the court finds that a statute restricts speech based solely on its content, then the court applies a strict scrutiny standard. This standard imposes the greatest burden on a state for justifying restrictions on speech. However, strict scrutiny still permits restrictions on speech if the statute is narrowly drawn to serve a compelling governmental interest.[163] Additionally, under strict scrutiny analysis, a statute will not be upheld if an adequate, less restrictive alternative is readily available.[164]

If the Florida Supreme Court applies strict scrutiny analysis, section 775.085 may still be upheld as a valid restriction on expression. The State's interest in protecting its citizens from the substantial harms of crime based on race, color, ancestry, ethnicity, religion or national origin, has already been established as compelling.[165] Further, it has been shown that the statute is narrowly drawn because it affects only the limited category of

160. *Stalder*, No. 91-18929, at 19 (mem.).
161. *See supra* notes 118-24 and accompanying text.
162. *Compare with Boos*, 485 U.S. at 312 (an existing statute was found to satisfy the Government's stated interest in protecting diplomatic personnel, and the statue at issue had already been determined by Congress to be unnecessary); *and R.A.V.*, 112 S. Ct. at 2554-55 (White, J., concurring) (arguing that the St. Paul Bias-Motivated Ordinance was narrowly drawn to serve the stated purpose of the government in ensuring the basic human rights of member of groups that have historically been subjected to discrimination).
163. *Boos*, 485 U.S. at 321.
164. *R.A.V.*, 112 S. Ct. at 2550.
165. *See supra* notes 147-49 and accompanying text.

hateful expression which serves as the basis for criminal activity.[166] Finally, it has also been shown that there is no less burdensome alternative, as existing criminal statutes do not satisfy the State's interest in punishing the conduct present in bias-intended crimes.[167]

Overbreadth analysis is another component of First Amendment analysis.[168] In addressing an overbreadth challenge, a court must first determine whether the statute reaches a substantial amount of constitutionally protected speech.[169] In making its determination, the court considers the words of the statute itself, as well as any limiting constructions that have been developed.[170] In *Stalder*, the court found section 775.085 to be overbroad, rejecting any narrowing construction of section 775-.085.[171] The court reasoned that section 775.085 was not readily susceptible to existing First Amendment exceptions, nor to any limiting construction, without imposing unconstitutional content-based restrictions on expression.[172]

The conclusion reached by the *Stalder* court as to the broad chilling effect of section 775.085 is not supported by the words of the statute itself, nor by the narrowing construction offered by the State. First, the words of the statute itself limit the effect of the statute to circumstances in which the speaker is already committing a crime. For example, a person cannot be charged under section 775.085 unless that person has committed an assault or a battery. Second, the State has offered a reasonable construction whereby the statute seeks to punish only individuals who commit crimes "that would not have been perpetrated *but for* the defendant's reasonable belief that the victim belonged to a class encompassed by the Statute."[173] The effect of this narrowing construction on expression is to restrict one category of speech—hateful expression—within a narrowly defined set of circumstances—when that hateful expression serves as the basis for the

166. *Id.*

167. *See supra* notes 118-24 and accompanying text.

168. Facial overbreadth is an exception in First Amendment analysis to the general rule that a person cannot argue the rights of third parties. Broadrick v. Oklahoma, 413 U.S. 601, 612 (1973). A statute will be found overbroad "because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression." *Id.*

169. Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc. 455 U.S. 486, 494 (1982).

170. *Id.* n.5; Grayned v. City of Rockford, 408 U.S. 104, 110 (1972).

171. No. 91-18929, at 30 (mem.).

172. *Id.* at 36 (mem.).

173. Appellant's Brief, *supra* note 72, at 14.

commission of a crime. The Supreme Court accepted a similar narrowing construction in *Boos v. Barry*,[174] finding that a statute, limited to a specific context, did not reach a substantial amount of constitutionally protected expression. Similarly, because section 775.085 is limited by the "but for" standard, it does not reach a substantial amount of constitutionally protected speech, and the overbreadth challenge must fail.

The *Dobbins* court applied strict scrutiny to section 775.085 and found that the statute was "justified because it is narrowly tailored to serve the compelling state interest of ensuring the basic human rights (not to be a target of a criminal act) of members of groups that have historically been subjected to discrimination because of membership in those groups."[175] Upholding section 775.085 under First Amendment strict scrutiny analysis recognizes the State's compelling interest in protecting its citizens from the harmful effects of bias-intended criminal activity, and recognizes that the restrictions on speech, if any, from enforcement of the statute are minimal.

D. *Hate Speech—A New Unprotected Category*

Another approach to upholding section 775.085 within the First Amendment would be to establish hate speech as a new category of unprotected speech within the approach adopted by the Supreme Court in *Chaplinsky v. New Hampshire*.[176] Establishing hate speech as an unprotected category would resolve much of the debate surrounding bias-intended crime statutes and whether they impermissibly restrict free speech. The proponents of this approach, referred to as civil rights theorists, recognize that some speech is so hateful, and its effects so harmful, that it is beyond the protection of the First Amendment.[177] On the other hand, civil libertarians argue that government should never be involved in restrictions on speech, because the risk of harm from any government suppression is substantial.[178] The libertarian approach, however, greatly under-appreciates the substantial harms that result from hateful conduct and expression.[179]

---

174. 485 U.S. at 331 (finding that a statute did not reach a substantial amount of constitutionally protected conduct when the statute, limited by a narrowing construction, merely regulated the place and manner of certain demonstrations).

175. *Dobbins*, 17 Fla. L. Weekly at D2223.

176. *See supra* notes 46-49 and accompanying text.

177. *See* Massaro, *supra* note 17, at 231.

178. *Id.* at 222-27.

179. *See* Thomas C. Grey, *Civil Rights vs. Civil Liberties: The Case of Discriminatory Verbal Harassment*, SOC. PHIL. & POL'Y, Spring 1991, at 81-82.

The civil rights approach recognizes that the substantial harm to victims of hate speech outweighs the value to society in allowing this speech.[180] In most instances, a speaker expressing himself through hate speech sets out to harm a targeted listener.[181] The speaker chooses words or some other form of expression, such as intimidation or criminal conduct, designed to inflict the greatest injury to the listener.[182] Blacks become "niggers," Whites become "honkeys," Jews become "kikes," and Italians become "wops." The message of the speaker becomes secondary to the speaker's goal of harming his or her target.[183] This is not to suggest that the First Amendment should protect only "good" speech. However, when a method for expressing views is chosen that is intentionally designed to cause damage to its listener, such expression has as its main purpose to "hurt and humiliate, not to assert facts or values."[184] Absent the goal of asserting facts or values, the underlying premise of the First Amendment—to allow and protect the free exchange of ideas—is not applicable.[185] Therefore, the goal of the speaker, simply to harm his or her victim, does not warrant the protection afforded by the First Amendment.

---

180. *See* Massaro, *supra* note 17, at 234.

181. *See* Greenawalt, *supra* note 33, at 293.

182. *Id.*

183. *Id. See also* Delgado, *supra* note 15, at 145 (stating that "[m]ost people today know that certain words are offensive and only calculated to wound").

184. Greenawalt, *supra* note 33, at 298.

185. *See* Smolla, *supra* note 40, at 182-86. Mr. Smolla separates the emotional side of speech from its intellectual or cognitive side. He argues that most hate speech contains little intellectual component and mostly emotional component. Mr. Smolla describes the use of emotional speech:

> A statement of emotion might be defined as a statement conveying no cognitive message other than the static level of cognition required to use language. What I mean by "language of emotion" is language that requires no more thought than the ability to spell; language that states no fact, offers no opinion, proposes no transaction, attempts no persuasion; language that contains no humorous punch-line, no melodic rhythm, no color or shape or texture that might pass as art or entertainment; language that embodies emotion with no elaborative gloss other than feeble minimum intellectual current necessary to power the use of words.
>
> . . . .
>
> . . . . [A]n intellectual component may immunize emotional speech from legal regulation in somewhat the same way that "redeeming social value" operates to rescue sexual speech from classification as obscenity. When emotional speech stands naked and alone, however, with no plausible cognitive content to clothe it, the first amendment values requiring a "free trade in ideas" do not apply.

Id. at 183, 186.

Several writers have suggested proposals for establishing standards by which hate speech may be punished under an exception to First Amendment protection.[186] These proposals recognize the need for government to be able to place restrictions on the most harmful or threatening speech, while balancing First Amendment considerations of a person's right to free expression.[187] Any of these proposals could be used as the basis for a court to establish needed restrictions on the most hateful expression. In *R.A.V.*, the Supreme Court stated, "[f]rom 1791 to the present . . . our society, like other free but civilized societies, has permitted restrictions upon the content of speech in a few limited areas, which are 'of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.'"[188] Hate speech is one such category. In light of the current problem of bias-intended criminal activity and hateful expression, and the real and substantial harms resulting therefrom, the court should establish hate speech as a category of unprotected expression.

V. CONCLUSION

Responding to a need to protect its citizens from the substantial harms of hate-based criminal activity, and addressing the constitutional issues associated with other bias-intended statutes, the Florida Legislature took great care in drafting a narrowly drawn statute that seeks to punish criminal activity based on the conduct of the offender in selecting a victim. No one would suggest that prejudice and hatred can be legislated out of existence any more than any other undesirable conduct for which statutes exist. However, increased instances of bigotry and bias-intended criminal activity call for action by states in providing necessary criminal sanctions against those who would commit such offenses.

In considering the constitutionality of section 775.085, the Florida Supreme Court should take great care not to succumb to the traps and fears of those who would insist that such legislation is yet another slide on the slippery slope toward eliminating the freedom of expression guaranteed by

186. *See, e.g.*, Thomas C. Grey, *Responding to Abusive Speech on Campus: A Model Statute*, RECONSTRUCTION, Winter 1990, at 50; Matsuda, *supra* note 15, at 2356.

187. *See* Grey, *supra* note 179, at 80; Lawrence, *supra* note 39, at 449; Matsuda, *supra* note 15, at 2356-61.

188. 112 S. Ct. at 2542-43.

the First Amendment.[189] Section 775.085 is a constitutionally valid response to individuals and groups who choose to express their hatred through criminal conduct. Those who engage in such conduct deny to many of our citizens the concept of "liberty for all" established in the United States Constitution. Section 775.085 of the Florida Statutes is one solution to the problem, and should be upheld by the Florida Supreme Court.

Eric David Rosenberg

189. *See* Matsuda, *supra* note 15, at 2351 n.164 (describing the slippery slope argument frequently made by those who object to criminalization of racist speech).