1993

Targeting Conduct: A Constitutional Method of Penalizing Hate Crimes

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TARGETING CONDUCT: A CONSTITUTIONAL METHOD OF PENALIZING HATE CRIMES

I. Introduction

On October 7, 1989, Todd Mitchell and nine other black men and boys gathered outside of an apartment complex in Kenosha, Wisconsin. They discussed a racially charged movie in which a white man beat a black boy, and their emotions stirred into anger. Mitchell incited his friends further, asking "[d]o you all feel hyped up to move on some white people?" Minutes later, Gregory Reddick, a fourteen-year-old white male, walked by the group and became the focus of its wrath. Mitchell spurred the pack, pointing them toward Reddick and saying: " 'You all want to f[-] some- body up? There goes a white boy; go get him.' " The group attacked Reddick, beat him severely, and left him unconscious. Reddick was in a coma for four days and suffered possibly permanent brain damage.

Hate crimes such as this occur with greater frequency each year. Just recently, three white men robbed Christopher Wilson, a black man. They doused him with gasoline, and set him on fire. During the assault, which left Wilson with burns covering forty percent of his body, the attackers shouted racial slurs. A note found at the scene of the burning read " 'One les [sic] nigger, more to go. KKK.' " While the local Ku Klux Klan denied any affiliation with the assailants, the Grand Wizard assured America that the Klan is not above committing racial violence: " 'That’s not our style. . . . [A]n ass whip-

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2. See id.
3. Id.
4. See id.
6. Id.
7. Id.
8. Common Questions About Hate Crimes, KLANWATCH: INTELLIGENCE REP. (Southern Poverty Law Center, Montgomery, Ala.), Feb. 1992, at 6 (stating that 1991 was the fourth year in a row in which hate crime increased).
10. Id.
12. See id.
ping is one thing, but burning or killing is another.'

Violence committed because of bias against a victim's religion, race, sexual orientation, gender, or other human characteristic, affects more than just the immediate victim. Hate crimes also injure members of the victims' groups, and society as a whole. The rate at which such crimes are being committed, coupled with the societal injury effected, has prompted states and municipalities to devise a variety of legislation dealing with the problem of bias crimes. Recently, the United States Supreme Court has recognized the compelling nature of the states' interest in controlling racial and other bias-motivated crimes.

Forty-six states have enacted hate-crime statutes — criminal statutes that seek to punish bias-motivated violence. These laws generally fall into one of two classes, either hate-speech or penalty-enhancement statutes. The former has sought to control virulent expression by punishing the utterance or display of words or symbols that the user knows will arouse anger in others on the basis of race, color, religion, gender, or some other immutable characteristic. The United States Supreme Court examined an ordinance of this type in R.A.V. v. City of St. Paul, and found that the law infringed on the First Amendment right to free speech.

Penalty-enhancement hate-crime statutes vary slightly among states, but they generally allow for longer sentences and higher fines

13. Id. (emphasis added).
16. "[T]hese statutes are the reflection of legislatures' recognition that these harms are real and significant." Id.
18. ADL LAW REPORT, supra note 14, app. A at 21. Thirty-two states have laws similar to the model statute devised by the Anti-Defamation League of B'nai B'rith. Id. The ADL model is printed infra, note 71. Fourteen other states have enacted some form of hate-crime legislation. ADL LAW REPORT, supra note 14.
19. See, e.g., R.A.V., 112 S. Ct. at 2541. Hate-crime statutes typically list several protected categories; however, state laws vary with regard to which categories should receive protected status. For the sake of simplicity, this Note will use race to represent all protected categories. The specific racial category of blacks similarly shall represent all hate-crime victims.
21. R.A.V., 112 S. Ct. at 2542; infra part II.A.
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When specified crimes are committed because of the victim’s race. In State v. Mitchell, the Wisconsin Supreme Court held that the State’s penalty-enhancement statute violated the First Amendment right to free speech. The United States Supreme Court has granted certiorari and will soon consider the issues presented in Mitchell.

Part II of this Note will analyze the Supreme Court’s holding in R.A.V. and the state court’s holding in Mitchell. Although the hate-speech ordinance in R.A.V. differs materially from those focused upon in this Note — penalty-enhancement statutes — an understanding of R.A.V. is necessary because the holding provides the backdrop against which other hate-crime laws will be considered. Part III of this Note argues that the Mitchell rationale is flawed, not only in its attempt to distinguish federal anti-discrimination laws, but also in its effort to invoke a civil/criminal-penalty distinction. Part IV concludes by offering a sample penalty-enhancement statute that, in conformity with the Supreme Court’s holding in R.A.V., should permit states to punish hate crimes.

II. First Amendment Attacks on Hate-Crime Legislation

A. R.A.V. v. City of St. Paul: Hate-Speech Laws Held Unconstitutional

R.A.V. reversed a Minnesota Supreme Court decision that upheld a

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22. See, e.g., infra notes 70-71 and accompanying text.


Dobbins held that Florida’s statute did not punish opinion, and that even if it did regulate the content of speech, it is “narrowly tailored to serve [a] compelling state interest” and is therefore justified. Dobbins, 605 So. 2d at 925. For further discussion of Dobbins, see infra notes 94, 191.

Plowman distinguished its holding from Mitchell because Oregon’s statute contained a requirement that two or more people act together. Plowman, 838 P.2d at 565. The Oregon court held that the statute did not contravene the First Amendment because it targeted conduct rather than expression. Id.; infra notes 94, 147, 149.

Grupe rejected a First Amendment challenge to a New York statute by stating that the law regulated conduct. Grupe 532 N.Y.S.2d at 818. For further discussion of Grupe, see infra notes 94, 147.
hate speech ordinance enacted by the City of St. Paul.\textsuperscript{26} The ordinance prohibited the display of symbols that one should reasonably know would cause anger, alarm or resentment in others on the basis of race, color, creed, religion, or gender.\textsuperscript{27} R.A.V., a juvenile, challenged the law when he was tried for burning a cross in the yard of a black family.\textsuperscript{28}

The Minnesota Supreme Court upheld the ordinance,\textsuperscript{29} ruling that it proscribed only "fighting words" within the meaning of \textit{Chaplinsky} v. \textit{New Hampshire}.\textsuperscript{30} In \textit{Chaplinsky}, the United States Supreme Court defined "fighting words" as words or conduct that "inflict[\textsuperscript{31}] injury or tend[] to incite immediate violence."\textsuperscript{32} \textit{Chaplinsky} declared that fighting words are not protected by the First Amendment.\textsuperscript{32} Limiting the impact of St. Paul's ordinance to fighting words, the Minnesota court concluded that the law did not infringe on First Amendment rights.\textsuperscript{33} R.A.V. appealed, and certiorari was granted.

The United States Supreme Court analyzed prior First Amendment decisions and concluded that the ordinance was impermissibly content-based.\textsuperscript{34} While recognizing that fighting words lie beyond the protection offered by the Constitution, the majority held that prior free speech cases limit a state's ability to control proscribable speech.\textsuperscript{35} The Court emphasized that "[t]he government may not regulate use based on hostility — or favoritism — toward the underlying message expressed."\textsuperscript{36} In light of this prohibition, a state's attempt to restrict only a sub-category of fighting words cannot hinge upon the

\textsuperscript{27} The statute provided as follows:
Whoever places on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has 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.
\textit{Id.} at 2541.
\textsuperscript{28} \textit{Id.}
\textsuperscript{29} \textit{Id.}
\textsuperscript{30} 315 U.S. 568, 572 (1942).
\textsuperscript{31} \textit{Id.}
\textsuperscript{32} \textit{Id.}
\textsuperscript{33} R.A.V., 112 S. Ct. at 2541.
\textsuperscript{34} \textit{Id.} at 2542. Justices White, Blackmun, O'Connor and Stevens concurred in the judgment on the grounds that the ordinance was overbroad: "[I]t criminalizes not only unprotected expression but expression protected by the First Amendment." \textit{Id.} at 2550 (White, J., concurring).
\textsuperscript{35} \textit{Id.} at 2545. The Court was constrained to use the state court's interpretation, which limited the ordinance's effect to fighting words. \textit{Id.} at 2542.
\textsuperscript{36} R.A.V., 112 S. Ct. at 2545.
content of the speech.\textsuperscript{37}

St. Paul's ordinance was problematic because it did not prohibit all fighting words; instead, it prohibited only expressions that amount to "'fighting words' that provoke violence, 'on the basis of race, color, creed, religion or gender.'"\textsuperscript{38} Other vicious and abusive forms of expression were permitted as long as they eschewed the specified disfavored topics.\textsuperscript{39} Thus, in the Court's view, the ban affected speech solely on the basis of the ideas conveyed.\textsuperscript{40} This attempt to control the content and viewpoint of expression\textsuperscript{41} infringed upon the right to free speech.\textsuperscript{42}

The Court stated that, in some instances, unprotected speech may be constitutionally sub-categorized.\textsuperscript{43} Writing for the majority, Justice Scalia outlined three sub-classifications that a state could ban.\textsuperscript{44} The first involves dividing the unprotected category into degrees of severity. Thus, categorizations are permitted if they can be described in terms that justify proscription of the entire class of speech at issue.\textsuperscript{45} Under this standard, fighting words that are more likely to result in violence may be condemned so long as the sub-category is described by the probability of causing violence and not by the content of the speech.

Second, states may ban a class of unprotected speech if the goal is to regulate the "secondary effects" of the speech.\textsuperscript{46} To be constitutional, however, these laws cannot single out a sub-category based on its content or expressive elements.\textsuperscript{47} For example, a state's interests in the welfare of children would allow it to prohibit obscene live performances involving minors, even if the state otherwise permitted adults to give such performances.\textsuperscript{48} In this hypothetical, obscene expression constitutes the entire category of unprotected speech, and the expression involving minors constitutes the class of obscene speech.

\textsuperscript{37} See id. at 2542.
\textsuperscript{38} Id. at 2547.
\textsuperscript{39} Id.
\textsuperscript{40} See id. at 2542.
\textsuperscript{41} See id. at 2545.
\textsuperscript{42} See id.
\textsuperscript{43} Id. For example, obscenity is a category of unprotected speech; therefore, "[a] State might choose to prohibit only that obscenity which is the most patently offensive \textit{in its prurience} . . . . But it may not prohibit . . . only that obscenity which includes offensive political messages." Id. at 2546.
\textsuperscript{44} See id.
\textsuperscript{45} See id.
\textsuperscript{46} See R.A.V., 112 S. Ct. at 2546 (quoting Renton v. Playtime Theatres, Inc., 475 U.S. 41, 48 (1986)).
\textsuperscript{47} See id.
\textsuperscript{48} See id.
that the state may ban. Providing another example, Justice Scalia explained that Title VII of the Civil Rights Act of 1964\(^49\) ("Title VII") targets conduct and proscribes a sub-category of fighting words.\(^50\) Because Title VII prohibits workplace discrimination, it proscribes the use of sexually derogatory fighting words (a sub-category of fighting words), at least to the extent that such expressions could be used to prove discrimination.\(^51\) While the purpose of Title VII is to regulate conduct, it has a constitutionally permissible impact on expression.\(^52\)

The Court broadly described the third permissible classification. Statutes may make distinctions based on content if there "is no realistic possibility that official suppression of ideas is afoot."\(^53\) As an example, the Court stated that no First Amendment interests would be infringed by a statute prohibiting obscenity involving blue-eyed actresses.\(^54\) In short, all three tests emphasize concern over the state control of expressive content.

The Court held that the St. Paul ordinance made a non-neutral content-based distinction; the law prohibited a sub-category of fighting words considered offensive solely because of a person's race.\(^55\) It further found that none of the three exceptions could save the ordinance.\(^56\) Although St. Paul had urged that the intent behind the ordinance was to protect against the secondary effects of hate speech — the victimization of particularly vulnerable groups\(^57\) — the Court stated that the "'emotive impact of speech on its audience is not a 'secondary effect.'"\(^58\) The Court acknowledged the compelling state interest in controlling hate crimes,\(^59\) but underscored the existence of content-neutral alternatives.\(^60\) The "'danger of censorship'"\(^61\) necessitated a finding of First Amendment infringement.\(^62\)

\(^{49}\) 42 U.SC §§ 2000e—2000e-17 (1988). Section 703(a)(1) of Title VII provides: "It shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual . . . because of such individual's race, color, religion, sex, or national origin." Id. § 2000e-2(a)(1).

\(^{50}\) See R.A.V., 112 S. Ct. at 2546 (distinguishing Title VII from statutes aimed at controlling content of expression).

\(^{51}\) See id.

\(^{52}\) See id. at 2546-47.

\(^{53}\) Id. at 2547.

\(^{54}\) See id.

\(^{55}\) See R.A.V., 112 S. Ct. at 2547.

\(^{56}\) See id.

\(^{57}\) See id. at 2549.

\(^{58}\) Id. (quoting Boos v. Barry, 485 U.S. 312, 321 (1988)).

\(^{59}\) Id.; see also id. at 2554 (White, J., dissenting).

\(^{60}\) See R.A.V., 112 S. Ct. at 2550.

\(^{61}\) Id. at 2549 (quoting Leathers v. Medlock, 111 S. Ct. 1438, 1444 (1991)).

\(^{62}\) See id. at 2550.
B. State v. Mitchell: Penalty-Enhancement Held Unconstitutional

In State v. Mitchell, the Supreme Court of Wisconsin heard a challenge to a penalty-enhancing hate-crime statute. Mitchell had been convicted under Wisconsin's hate-crime statute for attacking a fourteen-year-old white male. Mitchell instigated the incident by directing a group of about ten African-Americans toward the victim. The band beat the victim severely, stole his tennis shoes, and left him with possible permanent brain damage. A jury convicted Mitchell of aggravated battery and found that he had violated the hate-crime statute. The enhanced penalty provision of the statute enabled the court to sentence Mitchell to four years rather than to the maximum sentence of two years for aggravated battery. Mitchell challenged the constitutionality of the penalty-enhancement statute.

At the time of Mitchell's conviction, Wisconsin's hate-crime statute provided as follows:

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 [the criminal code]...
   b. Intentionally selects the [victim] or selects the property which is damaged by the crime under par. (a) because of the race, religion, color, disability, sexual orientation, national origin or ancestry of [the victim] or the owner or occupant of that property.

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64. See id. at 809; supra part I.
65. See id.
66. See id.
67. See id.
68. See Mitchell, 485 N.W.2d at 809.
69. See id. at 809-10.
70. Subparagraph (2) provided revised maximum fines and periods of imprisonment for the crime. The penalties were higher than those for the underlying crime. See Wis. Stat. § 939.645 (1989-90).
   A. A person commits the crime of intimidation if, by reason of the actual or perceived race, color, religion, national origin or sexual orientation of another individual or group of individuals, he violates Section of the Penal Code (insert code provision for criminal trespass, criminal mischief, harassment, menacing, assault and/or other appropriate statutorily proscribed criminal conduct).
   B. Intimidation is a misdemeanor/felony (the degree of the criminal liability should be at least one degree more serious than that imposed for commission of the offense).

Id. at 4.
The State Supreme Court held the statute unconstitutional on First Amendment grounds, stating that the law directly and indirectly encroached on the right to free speech.\textsuperscript{72}

According to \textit{Mitchell}, Wisconsin's statute directly violated First Amendment rights because it punished an accused's biased thought.\textsuperscript{73} The court stated that, as thoughts and speech are equally protected by the First Amendment,\textsuperscript{74} any infringement on the right to free thought violates constitutional rights.\textsuperscript{75} The penalty-enhancement statute's defect was found in its phrase referring to the selection of a victim because of race.\textsuperscript{76} The opinion stated that every intentional crime involves the selection of a victim.\textsuperscript{77} Thus, the court reasoned, an "examination of the intentional 'selection' of a victim necessarily requires a subjective examination of the actor's motive or reason for singling out [the victim]."\textsuperscript{78} The opinion cited \textit{R.A. V.} in support of its holding and stated that the expression proscribed by Wisconsin's statute was "identical to that targeted by the St. Paul ordinance — racial or other discriminatory animus."\textsuperscript{79} The \textit{Mitchell} court concluded that the law infringed upon First Amendment rights because it punished the defendant's motive\textsuperscript{80} rather than the conduct of selecting the victim.\textsuperscript{81}

\textit{Mitchell} also held that the statute indirectly infringed upon First Amendment rights because it had a chilling effect on free speech\textsuperscript{82}—the law was overbroad and threatened to punish an individual's words.\textsuperscript{83} Citing previous Wisconsin court interpretations of the Federal Constitution, the court defined an overbroad statute as one that has language "so sweeping that its sanctions may be applied to constitutionally protected conduct which the state is not permitted to regu-
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late." By including otherwise permissible conduct in their scope, overbroad laws tend to deter persons from exercising constitutionally protected freedoms.

As applied, the hate-crime statute allowed speech to be used circumstantially to prove that the defendant intentionally selected the victim because of the victim's race. The use of words in this manner, the court held, would penalize protected expression and would chill free speech. As an example, the court stated, "if A strikes B in the face he commits a criminal battery [a misdemeanor]. However, should A add a word such as 'nigger,' 'honkey,' 'jew,' 'mick,' 'kraut,' 'spic,' or 'queer,' the crime becomes a felony, and A will be punished not for his conduct alone . . . but for using the spoken word."

The Mitchell court also stated that the chilling effect would stretch so far as to prevent people from expressing their views for fear of prosecution under the statute in the future. Should a person commit an intentional crime against someone of a different race, "'any books ever read, speakers ever listened to, or associations ever held could be introduced as evidence that [the accused] held racist views and was acting upon them at the time of the offense.' Therefore, citizens would begin to censor their expressions so that their views would not subject them to enhanced penalties in the future. The court emphasized that because the chilling effect would occur before any crime has been committed, the State could not argue that citizens "need only refrain from committing one of the underlying offenses to avoid the thought punishment." In the court's view, the chilling effect pervaded the system at all times. As a result of this "universal chilling effect," the statute was found to be unconstitutionally overbroad.

84. Id. (quoting Bachowski v. Salamone, 407 N.W.2d 533, 539 (Wis. 1987)).
85. See id.
86. Id. at 815-16.
87. Mitchell, 485 N.W.2d at 816.
88. Id.; see also Wis. STAT. § 940.19(1) (1991) (defining criminal battery).
89. See Mitchell, 485 N.W.2d at 816.
90. Id. (quoting Gellman, supra note 15, at 360-61).
91. See id. (quoting Gellman, supra note 15, at 360-61).
92. Id.
93. See id.
94. See id. Because the court held the statute unconstitutional on First Amendment grounds, the court did not discuss Mitchell's other challenges to the statute. See id. at 825 (Bablitch, J., dissenting). In dissent, Justice Bablitch applied the common meaning to each word of the statute and rejected Mitchell's claims that it was unconstitutionally vague. See id. at 825-29. Similar statutes have also survived vagueness challenges. See, e.g., Dobbins v. State, 605 So. 2d 922, 925-26 (Fla. Dist. Ct. App. 1992), appeal granted, No. 80,580, 1992 Fla. LEXIS 2242 (Fla. Dec. 23, 1992); State v. Plowman, 383 P.2d 558, 565-66 (Or. 1992). Justice Bablitch also addressed the claim that the statute violates the
III. Penalty-Enhancement Hate-Crime Statutes: Debunking the Thought-Punishment Theory

Penalty-enhancement hate-crime statutes punish criminal conduct, not speech or thought. Therefore, a carefully drafted statute should survive First Amendment scrutiny. This Part begins by discussing criminal conduct in general. Concentrating on other statutes that enhance punishment for certain crimes, this Part shows how hate-crime statutes fit within the framework of the criminal justice system. This Part concludes that Mitchell was wrongly decided and that penalty-enhancing statutes, in consonance with First Amendment freedoms, regulate conduct.

A. What Is Criminal Conduct?

The act of killing someone is not punishable if, for example, it is done in self-defense or while unconscious. The outcome of one's act does not always determine the punishment. Criminal law is also concerned with the actor's culpability, as the goal is to punish the "blameworthiness entailed in choosing to commit a criminal wrong." Blameworthiness within the context of criminal law focuses on "the level of intentionality with which the defendant acted ... with what the defendant intended, knew, or should have known when he acted." In short, criminal laws penalize the combination of a "criminal" mentality (mens rea) and a "criminal" act (actus reus).

For the same reason that acts are not punishable without a culpable mentality, certain mens rea are considered less blameworthy than others. For example, criminal laws distinguish between reckless and intentional actions, viewing intent as being more culpable than...
recklessness. Recklessness is a concept that best exemplifies this concept of blameworthiness. If Ann stabs Bob in the chest with a knife and kills him, her punishment would depend upon her intent at the time she committed the act. If she selected the knife from a stage prop table and thought it was probably incapable of causing injury, she acted recklessly. Therefore, she would be guilty of manslaughter. If, however, she actually intended to drive the knife into Bob's heart, she has committed murder. Murder carries a more severe punishment than manslaughter. The act remains the same, but the actor's conduct is more blameworthy. Thus, punishment is meted out in proportion to the moral wrongness of the conduct. Specific intent crimes, such as burglary, further illustrate how society seeks to punish "blameworthiness." New York defines burglary as entering a building — the crime of criminal trespass — with the intent to commit a crime inside. If, for example, Bob is between serious and minor offenses and to prescribe proportionate penalties therefor; ..."

N.Y. PENAL LAW § 1.05 (McKinney 1987) (emphasis added).

101. New York, for example, differentiates between acting intentionally (actor's conscious objective is to cause the result or to engage in the conduct), knowingly (actor is aware that his conduct is of a certain nature or that certain circumstances exist), recklessly (actor is aware of and consciously disregards a substantial and unjustifiable risk), and with criminal negligence (actor fails to perceive a substantial and unjustifiable risk). N.Y. PENAL LAW § 15.05 (McKinney 1987).

102. New York defines manslaughter in the second degree as recklessly causing the death of another. N.Y. PENAL LAW § 125.15 (McKinney 1987). Murder in the second degree requires that the defendant intended to cause the death of another and so caused that death. N.Y. PENAL LAW § 125.25 (McKinney 1987).

103. See supra note 102.

104. Id.

105. In New York, second-degree manslaughter is a class C felony carrying a maximum sentence of fifteen years. N.Y. PENAL LAW § 70.00 (McKinney 1987). Second-degree murder is a class A-I felony, carrying a maximum sentence of life imprisonment. Id.

106. The Wisconsin court's analysis, however, leads to the conclusion that a murder conviction would unconstitutionally punish thoughts. Ann acted intentionally with respect to her hand whether the result was reckless or intentional. The result is the same in either case — she stabbed Bob in the chest. Furthermore, the effect on the victim is the same. Because the underlying act of stabbing Bob is already penalized by the manslaughter statute, the only thing being punished is Ann's thoughts, her desire to kill Bob. The First Amendment protects thoughts, therefore this proportionality of punishment should be unconstitutional.

Such sophism overlooks society's interest in punishing individuals. States penalize and grade moral blameworthiness — the willingness of the actor to step outside of the rules. See, e.g., N.Y. PENAL LAW § 140.20 (McKinney 1988) (defining third-degree burglary).

107. See N.Y. PENAL LAW § 140.10 (McKinney 1988).

108. See N.Y. PENAL LAW § 140.20 (McKinney 1988).
caught immediately after breaking into Ann's store, Bob's punishment will depend upon whether he merely intended to enter, or whether he intended to commit a criminal act once inside. In either case, however, Bob's act remains the same (he broke into a store), and with respect to that act, his mentality was the same (he did it intentionally). Bob's punishment, nonetheless, hinges upon his further motive.\footnote{110}{Criminal trespass in the third degree is a class B misdemeanor. N.Y. Penal Law § 140.10 (McKinney 1988). Burglary in the third degree is a class D felony. N.Y. Penal Law § 140.20 (McKinney 1988).}

Assume Bob entered the store because he wanted to steal money. If convicted of burglary, Bob may complain that he is being punished for a crime he did not commit. His only physical act was that of entering the premises. If he had not wanted Ann's money, he could not be convicted of burglary. The statute punishes him because of his motive for entering the building, and thus punishes his thoughts. Can it seriously be argued that burglary statutes are unconstitutional because they regulate thoughts?

Such reasoning errs because it ignores the purposes of the criminal law. One goal is to punish blameworthiness.\footnote{111}{See supra notes 97-98 and accompanying text. New York penal law states that one of its purposes is "[t]o provide for an appropriate public response to particular offenses, including consideration of the consequences of the offense for the victim, including the victim's family, and the community; . . . ." N.Y. Penal Law § 1.05 (McKinney 1987) (emphasis added). This is generally termed the retributive theory of punishment. See KADISH & SCHULHOFER, supra note 97, at 137-48. The retributive theory regards punishment as a means to offset the harm done to society by the crime. See HERBERT MORRIS, ON GUILT AND INNOCENCE 33-34 (1976), reprinted in KADISH & SCHULHOFER, supra note 97, at 138, 139. Persons who act criminally have all the benefits of the system, but they have avoided the societal burden of self-restraint. Id. "Justice—that is punishing [individuals who violate the rules]—restores the equilibrium of benefits and burdens by taking from the individual what he owes, that is, exacting the debt." Id.}

For further discussion of the retributive theory as a justification of penalty-enhancement laws, see James Weinstein, First Amendment Challenges to Hate Crime Legislation: Where's the Speech? 11 CRIM. JUST. ETHICS 6, 8-10 (1992). Professor Weinstein points out, for example, that it would not be considered unusual "if a judge gave a defendant who killed his rich uncle in order to inherit his fortune a more severe sentence than a nephew who killed his uncle to save him further suffering from a painfully debilitating disease." Id. at 8.

\footnote{112}{The deterrence theory of punishment recognizes that people balance the costs and benefits of their actions. Persons whose conduct is guided by laws will weigh the expected punishment against the perceived profits of the planned conduct. See JEREMY BENTHAM, Principles of Penal Law, 1 J. BENTHAM'S WORKS, Part II, Bk. 1, at 399-402 (J. Browning ed., 1843), reprinted in KADISH & SCHULHOFER, supra note 97, at 328. The profit of the crime means "every advantage, real or apparent, which has operated as a motive to the commission of the crime." Id. (emphasis added). Persons who see the
acts of individuals. Penalizing the combined act and intent will deter future crimes. It subjects to state control those persons who display a willingness to violate the law, and it permits attempts to rehabilitate those individuals. If Bob's sophistry were allowed to prevail, however, all criminal attempt statutes and all gradations between levels of culpability would necessarily fall, as they depend on the actor's motive.

The Wisconsin Supreme Court struggled unsuccessfully to distinguish motive from intent. This distinction became necessary only because the court concluded that motive cannot be punished, nor can it be an element of an offense. However, as Glanville Williams has observed, "[a]lthough the verbal distinction between 'intention' and 'motive' is convenient, it must be realized that the remoter intention called motive is still an intention."

benefits as outweighing the detriment will violate the laws. See id. To deter crimes, therefore, punishment must be meted out in greater degrees as the perceived benefit increases. See id.

113. See, e.g., N.Y. Penal Law § 1.05 (McKinney 1987). The law states that its purposes are: "To insure the public safety by preventing the commission of offenses through the deterrent influence of the sentences authorized, the rehabilitation of those convicted, and their confinement when required in the interests of public protection." N.Y. Penal Law § 1.05 (McKinney 1987) (emphasis added).

114. See N.Y. Penal Law § 1.05 (McKinney 1987).

115. Because one act receives different treatment if it results from negligence rather than intent, a defendant convicted of an intentional crime could argue that he or she is being punished for motive — because of desiring the outcome.


117. Mitchell, 485 N.W.2d at 813 & n.11 (quoting Gellman, supra note 15 at 364).

118. GLANVILLE WILLIAMS, THE MENTAL ELEMENT IN CRIME 10, 14 (1965), reprinted in KADISH & SCHULHOFER, supra note 97, at 227. LaFave and Scott state that "intent relates to the means and motive to the ends, but that where the end is the means to yet another end, then the medial end may also be considered in terms of intent." WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW § 3.6(a), at 228 (2d ed. 1986) (emphasis added); Gellman, supra note 15, at 364 (quoting LAFAVE & SCOTT supra). LaFave and Scott also state "the notion that motive is immaterial in the substantive criminal law is wrong, for there are a number of instances in which the inquiry into why an act was committed is crucial in determining whether or not the defendant has committed a given crime." LAFAVE & SCOTT supra § 3.6(a), at 227; Eric J. Grannis, Note, Fighting Words and Fighting Freestyle: The Constitutionality of Penalty Enhancement for Bias Crimes, 93 COLUM. L. REV. 178, 189-90 (1993) (quoting LAFAVE & SCOTT supra) (examining the Mitchell court's attempt to distinguish motive from intent).

In the case of burglary, for example, the actor intended the act of entering the store (criminal trespass). His reason for entering the store was to take money; yet the law deems this reason an intent. See supra notes 107-10 and accompanying text (discussing specific intent statutes). Therefore, when the Mitchell court states that "[c]riminal law is not concerned with a person's reasons for committing crimes, but rather with the actor's intent or purpose in doing so," 485 N.W.2d at 813 n.11, the court misstates the issue.
B. Taking the “Hate” Out of Hate-Crime Statutes

An analysis of the elements of Wisconsin’s hate-crime statute reveals that it punishes conduct, not thoughts. Therefore, the law does not infringe upon First Amendment rights. The first analytical step is to define the actus reus. Under Wisconsin’s approach, the penalty-enhancement statute employs the actus reus of the underlying criminal statute. For example, Wisconsin’s battery statute defines the actus reus as the act of causing bodily harm. In Mitchell, the State proved that the defendant indeed caused bodily harm to his victim. Yet this was insufficient to convict him; his mens rea had to be proven.

The underlying criminal statute, battery, defines the applicable mens rea—intent. Mitchell acted intentionally when causing the injury; therefore he is guilty of battery. Evidence of this mens rea, however, was not in itself enough to convict the defendant of a hate crime. The jury had to find that Mitchell had selected his victim on the basis of race; this element of selection represents a mens rea of intent.

Although not everyone who intentionally injures someone of a different race should be guilty of a hate crime, Mitchell’s conduct revealed more than an intent to injure. Mitchell intended to injure a white person — any white person. He did not act regardless of the victim’s race, but rather because he could achieve his goal only by attacking someone of that race. The hate-crime statute punishes this particular intent to injure a victim on the basis of race.

119. WIS. STAT. § 940.19(1) (1991). The law states: “Whoever causes bodily harm to another by an act done with intent to cause bodily harm to that person or another without the consent of the person so harmed is guilty of a Class A misdemeanor.” Id. Bodily harm is defined as “physical pain or injury, illness, or any impairment of physical condition.” WIS. STAT. § 939.22(4) (1991).
120. See supra notes 95-99 and accompanying text.
122. Professor Gellman notes “it can be argued that the presence of the bias motive changes the qualitative character of the underlying crime so drastically that it becomes an entirely different act.” Gellman, supra note 15, at 357. She further states that “if...the sum of the act plus the motive is greater than its parts, that ‘sum’ is not defined by the statute, and the statute is unconstitutionally vague.” Id. However, this statement is no more true in hate crimes than in other crimes. Indeed, Gellman appears content with the situation as it applies to burglary. She states:

[C]hanging the purpose of the break-in changes the very nature of the act: if A broke into B’s house for the purpose of getting A’s own property...the act...is simply...trespass, not burglary.... By contrast,...[if A’s] purpose was that of committing the crime of theft in B’s house...it is...burglary.

Id. at 365. Although Professor Gellman does not explain why the crime changes from trespass to burglary, she is correct. The crime changes because the legislature has so defined it. Moreover, her reasoning applies equally to hate crimes.
was proved to have that intent; attacking his victim was only a medial end to obtaining his intended goal.\textsuperscript{123} In order to penalize a crime involving this intent, the \textit{mens rea} must be defined by the statute. Wisconsin’s legislature accomplished this task by requiring proof that the defendant acted because of the victim’s race.\textsuperscript{124}

Federal criminal statutes also penalize acts committed because of race. For example, Title I of the Civil Rights Act of 1968\textsuperscript{125} (the “1968 Act”) prescribes imprisonment as a penalty for willfully injuring or intimidating any person because of race and because she has been travelling in interstate commerce.\textsuperscript{126} Although the statute protects rights that would otherwise be unprotected under federal criminal law, it does so only if the victim has been selected on the basis of race.\textsuperscript{127}

No court has considered First Amendment challenges to the 1968

\textsuperscript{123} For a discussion of the relationship between intent and motive, see \textit{supra} note 118 and accompanying text. Notably, Mitchell achieved his medial end and final end in the same motion. This, however, is not problematic. In burglary, for example, a person can achieve the medial and final end in one action by shooting through a window to injure a victim or by throwing a torch into a building. Once the instrument of the crime crosses the threshold, the act of entering is complete; therefore, the actor is guilty of burglary. \textit{See}, \textit{e.g.}, \textit{People v. Tragni}, 449 N.Y.S.2d 923, 927 (N.Y. Sup. Ct. 1982).

\textsuperscript{124} \textit{See supra} part II.B. Of course, if the statute prohibited the intent to injure blacks only, the law might violate the equal protection requirements of the Federal Constitution. \textit{Cf.} \textit{Washington v. Davis}, 426 U.S. 229, 239 (1976) (stating that the Equal Protection Clause of the Fourteenth Amendment prevents discrimination on the basis of race). To avoid such a conflict, the proposed law prohibits the intent to injure every racial group; it does this by defining the intent as selecting because of race. This encompasses all possible races that an actor might intend to injure, thereby surviving equal protection scrutiny.


\textsuperscript{126} \textit{See id.} (emphasis added). The statute states in pertinent part:

\begin{quote}
(b) Whoever, whether or not acting under color of law, \ldots willfully injures, intimidates or interferes with, or attempts to injure, intimidate or interfere with—
\end{quote}

\begin{quote}
(2) any person because of his race, color, religion or national origin and because he is or has been—
\end{quote}

\begin{quote}
(E) travelling in or using any facility of interstate commerce \ldots
\end{quote}

\begin{quote}
(F) enjoying the goods, services, facilities, privileges, advantages, or accommodations of any inn, hotel, [or] motel \ldots
\end{quote}

\begin{quote}
shall be fined not more than $1000, or imprisoned not more than one year.
\end{quote}

\textit{Id.}

\textsuperscript{127} The statute requires proof that the accused intended to interfere with the specified rights (that the defendant attacked because the victim was travelling in interstate commerce). Yet, this is no different than burglary laws, which punish the intent to commit a crime once inside a building, nor is it distinguishable from hate-crime statutes, which proscribe the intent to injure because of race. All stated intents are elements of the crime. Even though the 1968 Act combines two intentions, each must be proven to convict a defendant.
Act, but the Tenth Circuit has described the law as requiring more than proof of biased opinions.\textsuperscript{128} In \textit{United States v. Franklin},\textsuperscript{129} the defendant was convicted under the 1968 Act for killing two black persons. On appeal, he claimed that his pre-trial stipulation admitting a hatred of blacks should have precluded the prosecution from introducing evidence of his racial motivation to commit the murders.\textsuperscript{130} The court held that, although the defendant had admitted his racism, intent was an element of the crime, and therefore the government had to prove that Franklin had carried out an intention to kill his victims \textit{because they were black}.\textsuperscript{131} Thus, the Tenth Circuit implicitly recognized that the law was aimed not at beliefs, but at the intent to injure because of race. The 1968 Act and the similarly predicated hate-crime statutes\textsuperscript{132} should survive constitutional scrutiny.\textsuperscript{133}

The \textit{Mitchell} court’s conclusion that Wisconsin’s statute “enhances the punishment of bigoted criminals because they are bigoted”\textsuperscript{134} is based on false assumptions. Only criminals who \textit{act because of race} will be punished by the statute. A bigot may attack an African-American in order to steal money; a racially-indifferent person may attack an African-American solely to impress her racist friends.\textsuperscript{135} The latter actor has violated the statute; the former, though bigoted, has not. One’s attitudes toward African-Americans are not at issue.\textsuperscript{136} Penalty-enhancement statutes do not address the beliefs of the

\begin{itemize}
\item \textsuperscript{128} United States v. Franklin, 704 F.2d 1183, 1188 (10th Cir.), \textit{cert. denied}, 464 U.S. 845 (1983).
\item United States v. Bledsoe, 728 F.2d 1094 (8th Cir.), \textit{cert. denied} 469 U.S. 838 (1984), rejected a challenge to the 1968 Act’s ability to reach purely private action. Furthermore, in United States v. Griffin, 585 F. Supp. 1439 (D.N.C. 1983), the District Court of North Carolina ruled that the statute was not unconstitutionally vague.
\item 704 F.2d 1183.
\item See \textit{id.}.
\item See Franklin, 704 F.2d at 1188 (quoting United States v. Engleman, 648 F.2d 473, 478-79 (8th Cir. 1981)).
\item See \textit{id.}.
\item See \textit{Franklin}, supra note 15, at 367-68 n.161. This reasoning sidesteps the fact that both types of laws punish the underlying conduct more harshly when accompanied by such a discriminatory purpose. See \textit{infra} part III.D. (discussing this issue as it relates to Title VII).
\item See \textit{id.} at 825 (Bablitch, J., dissenting).
\item Of course, a statute that criminalized either the hatred of black people, or attacks committed because of a hatred of blacks would punish the defendant’s constitutionally protected beliefs. For a thorough analysis of freedom of thought and First Amendment issues, see Martin H. Redish, \textit{Freedom of Thought as Freedom of Expression: Hate Crime
actor, they address the actor's intent — the selection of the victim because of race.

The punishment of hate crimes is justifiable for the same reasons that crimes such as burglary are punished.\textsuperscript{137} One reason is that the conduct addressed by the statute creates a greater societal harm than is created by the criminal conduct absent the proscribed intent.\textsuperscript{138} States punish this conduct because the associated blameworthiness is considered more extreme.\textsuperscript{139} As Justice Bablitch stated in dissent to \textit{Mitchell}, "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."\textsuperscript{140}

Hate-crime statutes are also justified as a form of deterrence.\textsuperscript{141} Mitchell was looking for a white person to victimize and did so. For some reason, he believed the perceived benefits of his action outweighed the possible detriment.\textsuperscript{142} Hate-crime statutes seek to place a heavier weight on the detriment side of the scale.\textsuperscript{143}

Penalty-enhancement statutes constitutionally punish hate crimes because they do not target expression. The selection of victims because of race demonstrates a blameworthy element of criminal conduct, the \textit{mens rea}. Laws penalizing such conduct bar people from


Professor Martin Redish believes that penalty-enhancement provisions penalize repugnant social attitudes, see \textit{id.} at 38-39; however, his conclusion does not necessarily follow from the statute's wording. Redish states that enhanced penalties punish the defendants' motives; he then concludes that the specific motive that is punished is racial hatred. See \textit{id.} However, penalty-enhancement statutes address the actor's intent, not beliefs. A person who selects a black assault victim solely on the basis of race may have no bigoted views at all. See \textit{supra} notes 116-18 and accompanying text.

\textsuperscript{137} See \textit{supra} part III.A.

\textsuperscript{138} See \textit{Mitchell}, 485 N.W.2d at 817; \textit{id.} at 818 (Abrahamson, J., dissenting); \textit{id.} at 830 (Bablitch, J., dissenting) (discussing the great harm caused by hate crimes).

\textsuperscript{139} See \textit{supra} notes 15-16, 97-111 and accompanying text.

\textsuperscript{140} \textit{Mitchell}, 485 N.W.2d at 822 (Bablitch, J., dissenting).

\textsuperscript{141} See \textit{supra} notes 112-14 and accompanying text (discussing deterrence, restraint, and rehabilitation).

\textsuperscript{142} Indeed, Mitchell may have acted out of bigotry. The right to be a bigot, however, does not give him the right to act on his hatred. See \textit{State v. Mitchell}, 485 N.W.2d 807, 825 (Wis.), cert. granted, 61 U.S.L.W. 3431 (U.S. Dec. 14, 1992) (No. 92-515) (Bablitch, J., dissenting); \textit{id.} at 819 (Abrahamson, J., dissenting). Similarly, freedom of speech rights do not allow employers to voice sexually derogatory fighting words in the workplace. See \textit{R.A.V. v. City of St. Paul}, 112 S. Ct. 2538, 2546 (1992).

\textsuperscript{143} \textit{Cf. BENTHAM}, \textit{supra} note 112, at 329 (stating that "[t]he punishment should be adjusted in such manner to each particular offence, that for every part of the mischief there may be a motive to restrain the offender from giving birth to it."
injuring others because of race, but they do not infringe on the right to hate people because of race. Therefore, these statutes do not violate First Amendment rights.

C. Debunking the Chilled Speech Theory

The *Mitchell* court stated that people would refrain from expressing their views for fear of prosecution under the state’s penalty-enhancement provision. Racial slurs uttered during the commission of a crime, however, would not necessarily subject the perpetrator to enhanced penalties nor would having a history of speaking out about racial differences. Both circumstances are merely pieces of evidence to weigh when determining the actor’s intent. While in certain instances an actor’s words, uttered either concurrent with or prior to the crime, will be indicative of the intent to injure because of the victim’s race (e.g., shouting “All niggers must die. KKK forever!” while attacking a black person) and thus a violation of the hate-crime statute, these occasions do not render the statute unconstitutional.

A futile argument, and one that has not been raised, would be that hate crimes are forms of expression that are free from all punishment. Indeed, hate crimes are punishable at least insofar as they

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144. *See supra* note 142.
145. *See supra* note 89 and accompanying text.
147. *See* Martin B. Margulies, *Intent, Motive, and the R.A.V. Decision*, 11 CRIM. JUST. ETHICS 42, 44 (1992). The Oregon Supreme Court rejected a First Amendment challenge to that State’s statute, stating that “[s]peech is often used to prove crimes that do not proscribe speech, particularly the intent element of those crimes.... [B]ut the words themselves are not an element of the crime....” State v. Plowman, 383 P.2d 558, 565-66 (Or. 1992). A New York court held that the defendant’s words are circumstantial evidence that the attack was committed because of the victim’s religion. *See* People v. Grupe, 532 N.Y.S.2d 815, 818 (N.Y. Crim. Ct. 1988).
148. As explained by Justice Bablitch in dissent to *Mitchell*, “[i]t is no more a chilling of free speech to allow words to prove the act of intentional selection... than it is to allow a defendant’s words that he ‘hated John Smith and wished he were dead’ to prove a defendant intentionally murdered John Smith.” *Mitchell*, 485 N.W.2d at 822 (Bablitch, J., dissenting). The majority opinion countered by arguing that speech was used to show more than intent; speech was also used to prove the bias. *See id.* at 814. However, the words used indicated more than intent and more than bias. They indicated an intentional selection of the victim because of race. Mitchell asked his friends “‘[d]o you all feel hyped up to move on some white people?’” *Id.* at 809. When the victim came within sight, Mitchell directed the group toward the boy and said, “‘There goes a white boy; go get him.’” *Id.*
149. One might argue that hate crimes are expressive and that enhanced penalties suppress the message component of the crimes. Such an argument is defeated by the United States Supreme Court’s statement in *R.A.V.* that “[w]here the government does not target conduct on the basis of its expressive content, acts are not shielded from regulation merely because they express a discriminatory idea or philosophy.” *R.A.V.* v. City of St.
constitute traditionally defined crimes (i.e., the same crime absent the racial selection of the victim). Furthermore, a perpetrator’s racist comments may be used to prove that he or she acted intentionally. The United States Supreme Court “has emphasized that an illegal course of conduct is not protected by the First Amendment merely because the conduct was in part initiated, evidenced, or carried out by means of language.”150 Thus, the chilling effect that might arise from a penalty-enhancement statute has been present to some degree under the traditional penal system.

The only question, therefore, is whether the additional punishment rendered by hate-crime statutes would impermissibly affect speech. In Dawson v. Delaware,151 an analogous context, the United States Supreme Court dealt with a stipulation that had been introduced at a capital sentencing hearing. Dawson’s stipulation admitted his membership in a Delaware prison gang called the Aryan Brotherhood, and it described another gang of the same name as having white racist beliefs.152 The Court found the evidence irrelevant to the issues at sentencing,153 and held that its consideration violated the defendant’s First Amendment rights, because “the evidence proved nothing more than Dawson’s abstract beliefs.”154 Racist attitudes had no relevance to Dawson’s crime (Dawson and his victim were both white); therefore the stipulation failed to show any aggravating circumstances and served only to prejudice the jury.155


Furthermore, the Court stated in United States v. O’Brien, 391 U.S. 367, 376 (1968), that “when ‘speech’ and ‘nonspeech’ elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms.” For a full discussion of how an O’Brien analysis would support the constitutionality of penalty-enhancement statutes, see Grannis, supra note 118, at 216-30.

150. United States v. Daly, 756 F.2d 1076, 1082 (5th Cir. 1985) (citing Cox v. Louisiana, 379 U.S. 536, 555 (1965)). Daly was convicted of willfully aiding and assisting in the preparation of false income tax returns. Id. at 1081. The court stated, “the speech Daly claims is protected was not itself the wrong for which he was convicted, but it was merely the means by which he committed the crimes of which he was convicted.” Id. at 1082. Similarly, in hate crimes, the speech itself is not the crime. The crime is the act of intentionally injuring because of the victim’s race. See supra parts III.A.-B.


152. Id. at 1097. The stipulation did not include information about the particular branch of which the defendant was a member.

153. Id.

154. Id. at 1098.

155. See id.
In arriving at its holding, the Court emphasized that “the Constitution does not erect a *per se* barrier to the admission of evidence concerning one’s beliefs and associations at sentencing simply because those beliefs and associations are protected by the First Amendment.”

Evidence of racial intolerance may be considered at capital sentencing hearings if relevant to the issues involved. For example, “associational evidence might serve a legitimate purpose in showing that a defendant represents a future danger to society.” Although *Dawson* involved sentencing rather than the trial stage of the conviction, its portrayal of First Amendment protection implies that constitutionally sheltered expression can serve as a basis for providing harsher punishment.

Professor Susan Gellman minimizes the significance of *Dawson’s* First Amendment description. Drawing an analogy to burglary, she claims the Court merely condoned a prosecutor’s use of evidence to show that, shortly before the crime, the defendant had been in a synagogue near the crime scene. She states that such evidence has always been admissible for purposes of identification or for proving intent, but that society could not make one’s presence in a synagogue an element of a criminal offense. While this conclusion is correct, her analogy presents an inaccurate depiction of the issues. In *Dawson,* the Court was not concerned about identification or intent; rather, the issue was blameworthiness and its impact on sentencing. As stated earlier, one justification of penalty-enhancement laws also concerns the actor’s blameworthiness; therefore, *Dawson* is on point.

The *Mitchell* court emphasized that considering racist motive at the sentencing stage differs from adding a separate criminal sentence for that motive. However, the distinction is one of criminal theory; it

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156. *Id.* at 1097; see also *Barclay v. Florida,* 463 U.S. 939, 949 (1983) (rejecting a due process challenge to the introduction of the defendant’s racist attitudes at a capital punishment sentencing). But see *Redish,* supra note 136, at 37 (characterizing quoted passage as flawed dictum having no relevance to the constitutionality of penalty-enhancement statutes).


158. *Id.* at 1098.


161. *See supra* text accompanying note 158.

162. *See supra* note 111 and accompanying text.

163. *See State v. Mitchell,* 485 N.W.2d 807, 815 n.17 (Wis.), *cert. granted,* 61 U.S.L.W. 3431 (U.S. Dec. 14, 1992) (No. 92-515). The court argues “it is permissible to consider evil motive or moral turpitude when sentencing for a particular crime, but it is
PENALIZING HATE CRIMES

does little to explain how the manner of imposing punishment might affect expression. Since the constitutionally-proscribed "chilling effect" is a practical consideration of the human response to laws, the difference between the impact of front-end and back-end attention to motives would be minor, if present at all. Thus, although penalty-enhancement statutes might have a chilling effect, that outcome would be constitutionally permissible.

D. Discriminatory Conduct and Constitutional Penalties

The Mitchell argument would seem to apply to civil anti-discrimination statutes. Such laws prohibit the performance of otherwise legal conduct if the victim is selected on the basis of race. Since the underlying conduct carries no penalty, the laws could be characterized as penalty-enhancement statutes — they provide harsher punishment than would apply for the underlying conduct alone. The Mitchell analysis indicates that anti-discrimination statutes target only the actor's reasons for acting, thereby regulating thought and violating First Amendment rights. Yet, the Mitchell court came to a different conclusion when faced with the similarity between the Wisconsin statute and Title VII.

Title VII and state anti-discrimination statutes penalize otherwise legal conduct if the actor performs such conduct "because of such individual's race, color, religion, sex, or national origin." Mitchell, however, distinguished Title VII from the hate-crime statute on two grounds: 1) Title VII punishes an objectively discriminatory act while the hate-crime statute punishes the actor's subjective motivation; 2) Title VII punishes via civil penalties whereas the hate-crime statute provided for criminal penalties. As a dissenter pointed out, how-

quite a different matter to sentence for that underlying crime and then add to that criminal sentence a separate enhancer... solely to punish the evil motive..." Id.; see also Ralph S. Brown, Susan Gellman Has it Right, 11 CRIM. JUST. ETHICS 46, 47 (1992). (stating that sentencing is a "much looser process than guilt determination.").

164. See supra text accompanying note 91.

165. Indeed, hate-crime statutes would give a defendant more warning of, and a chance to defend against, the implications of his or her actions. In a due process sense, such effect may be more fair than allowing a judge to consider motives at the sentencing phase.


167. For the specific wording of Section 703(a)(1) of Title VII, see supra note 49.


169. Mitchell, 485 N.W.2d at 817.
ever, these contentions present a "distinction without a difference."170

1. Debunking the Objective/Subjective-Conduct Distinction

Title VII operates in the same manner as the hate-crime penalty-enhancing statute. Both laws proscribe discrimination — one in the selection of a victim on which to perpetrate a civil wrong, the other in the selection of a victim on which to perpetrate a criminal wrong.171 Title VII enhances the penalty for the ordinarily innocent act of firing an employee if the firing was done because of the victim’s race. Similarly, the hate-crime statute provides harsher punishment for acts committed because of the victim’s race. Two examples help to clarify the parallel:

Example 1. Lisa fires John because John is black.
Example 2. Lisa kills John because John is black.

Both examples involve injury committed because of the victim’s race.

According to the Mitchell court, Title VII as applied to the first example seeks to punish the objective act of discrimination.172 In the second example, Mitchell held, hate-crime statutes penalize the subjective mental process of selecting a victim rather than an objective act.173 The court based this distinction on the fact that in the second example Lisa’s act of killing John is illegal even in the absence of a hate-crime law, whereas the act of firing is legal except under the circumstances proscribed by Title VII.174 This rationale fails to take into account the relative nature of the punishment given by each type of statute. Both Title VII and a penalty-enhancement statute increase the punishment beyond that which would apply if Lisa had not acted because of race. As dissenting Justice Bablitch succinctly stated: “How can the Constitution protect discrimination in the performance of an illegal act and not protect discrimination in the performance of an otherwise legal act?”175 The Constitution does not make this

170. Id. at 823 (Bablitch, J., dissenting).
171. See id.
172. See id. at 817.
173. Id. at 817. “The hate crimes statute . . . punishes the defendant’s motive for acting. . . . [T]he statute creates nothing more than a thought crime.” Id. at 817 n.21.
174. See State v. Mitchell, 485 N.W.2d 807, 817 (Wis.), cert. granted, 61 U.S.L.W. 3431 (U.S. Dec. 15, 1992) (No. 92-515); id. at 824 (Bablitch, J., dissenting). Professor James Weinstein points out that this argument actually favors penalty-enhancement laws, because they merely use motive to determine the degree of punishment for an illegal act. Title VII, on the other hand, makes motive the “determinative factor between legality and illegality.” Weinstein, supra note 111, at 14 (emphasis added). Thus, if punishment of motive would create a free speech problem, Title VII appears to be the greater offender of the two statutes. Id.
175. Mitchell, 485 N.W.2d at 820 (Bablitch, J. dissenting).
distinction.

Although the court in Mitchell claimed that Wisconsin’s hate-crime statute was aimed at motive rather than discriminatory acts,\textsuperscript{176} the opinion did not convincingly distinguish the effects of the two laws. In fact, the court “freely admit[ted] that anti[-]discrimination statutes are concerned with the actor’s motive,”\textsuperscript{177} but perceived such statutes as redressing the objective conduct taken in respect to the victim, not the actor’s motive.\textsuperscript{178} This argument ignores the fact that the objective conduct with respect to the victim of discriminatory firing is the same as the objective conduct with respect to anyone who is fired. Consequently, Title VII must be concerned with more than the objective conduct.\textsuperscript{179}

Indeed, applying the Mitchell analysis to Example 1 would make Title VII appear unconstitutional. Parsing Lisa’s action shows that she has 1) performed the permissible act of firing an employee 2) because that employee is black. The act of firing is not punishable; thus, the statute penalizes only the actor’s reasons for acting.\textsuperscript{180} As stated by the court in reference to a hate-crime statute, the “statute does not address effects, state of mind, or a change in the character of the [act], but only the thoughts and ideas that propelled the actor to act.”\textsuperscript{181} Since Mitchell concluded that the reason for the actions, or the bigoted motive, is constitutionally protected,\textsuperscript{182} the court’s holding implies that Title VII must infringe upon the freedom of thought. Yet, the Wisconsin court properly conceded that Title VII constitutionally performs its function.\textsuperscript{183}

\begin{footnotesize}
\begin{enumerate}
\item[176.] See id. at 816-17 (stating that anti-discrimination statutes punish the discriminatory act while hate-crime statutes punish the discriminatory motive of the actor); Gellman, supra note 15, at 367-68, 367 n.161.
\item[177.] Mitchell, 485 N.W.2d at 817 n.21. State v. Wyant, 597 N.E.2d 450, 456 (Ohio 1992) also stated that anti-discrimination laws require proof of discriminatory motive.
\item[178.] See Mitchell, 485 N.W.2d at 817 n.21.
\item[179.] See, e.g., id. at 823 (Bablitch, J., dissenting). Justice Bablitch explains “[i]t is not . . . the failure to hire that is being punished [by Title VII], it is the failure to hire because of status.” Id.
\item[180.] Cf. Mitchell, 485 N.W.2d at 812 (quoting Gellman, supra note 15, at 363)(arguing that penalty-enhancing hate-crime statutes punish thoughts).
\item[181.] Mitchell, 485 N.W.2d at 812 (quoting Gellman, supra note 15, at 363).
\item[183.] See Mitchell, 485 N.W.2d at 816-817, 816 n.20 (citing Roberts v. United States Jaycees, 468 U.S. 609 (1984); Hishon v. King & Spalding, 467 U.S. 69 (1984); Runyon v. McCrary, 427 U.S. 160 (1976)). In Hishon, the defendant challenged a Title VII action on the grounds that it violated the right of freedom of expression. The Supreme Court answered by stating “‘[i]nvidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment, but it has never
\end{enumerate}
\end{footnotesize}
Gellman states that the difference between hate-crime statutes and anti-discrimination laws is that bigotry is constitutionally protected while discrimination is not. She uses a double-edged sword to explain why Title VII is constitutional and hate-crime laws are invalid: "Just as bigotry can exist without being acted upon, discrimination can occur without racist motivation." Yet, as shown above, hate crimes too can occur without such motivation, and penalty-enhancement laws aim to punish all crimes committed because of the victim’s race. Like Title VII, hate-crime statutes focus on conduct. Despite the right to be a bigot, these laws constitutionally proscribe acts committed on the basis of race.

Title VII permissibly punishes the conduct of discrimination, because "the Constitution . . . places no value on discrimination." Penalty-enhancement statutes operate in the same manner as Title VII. They are both laws against discrimination. Whether redressing acts in the workplace committed because of race, or penalizing criminal acts committed because of race, both laws prohibit conduct, not expression. The penalty-enhancement statute, therefore, is constitutional.

been accorded affirmative constitutional protections." 467 U.S. at 78 (quoting Norwood v. Harrison, 413 U.S. 455, 470 (1973)) (alteration in original).


185. Id. at 368. Professor Gellman concedes that not all discrimination is motivated by racism, and that Title VII is aimed solely at discriminatory actions, not racial motives. See id.

186. See supra notes 133-135 and accompanying text.

187. See supra notes 120-143 and accompanying text.

188. See State v. Mitchell, 485 N.W.2d 807, 820 (Wis.), cert. granted, 61 U.S.L.W. 3431 (U.S. Dec. 14, 1992) (No. 92-515) (Bablitch, J., dissenting) ("The statute does not . . . punish the right of persons to have bigoted thoughts or to express themselves in a bigoted fashion . . . . What the statute does punish is acting upon those thoughts."); id. at 819 (Abrahamson, J., dissenting).

189. Justice Scalia, writing for the majority in R.A.V. used Title VII as an example of a statute that punishes conduct. See R.A.V. v. City of St. Paul, 112 S. Ct. 2538, 2546 (1992) (distinguishing Title VII from statutes aimed at controlling content of expression). The Mitchell court, however, had trouble accepting the argument that Title VII is aimed at conduct. One part of the opinion acknowledged that Title VII punishes discriminatory acts. See Mitchell, 485 N.W.2d at 817 & n.21. Another part of the opinion referred to Title VII as a "slight incursion into free speech." Id. at 817.


192. See Mitchell, 485 N.W.2d at 820 (Bablitch, J., dissenting).
2. Debunking the Civil/Criminal-Penalty Distinction

The Mitchell court also invoked the civil/criminal nature of punishment as a difference that validates Title VII while rendering the Wisconsin hate-crime statute unconstitutional.\textsuperscript{193} The court contended that criminal sanctions chill free speech to a greater extent than civil penalties do, and that the civil remedies under Title VII are constitutionally acceptable whereas the criminal sanctions given by penalty-enhancement laws are intolerable.\textsuperscript{194} To the contrary, Professor James Weinstein notes, “the United States Supreme Court has long recognized that the crucial question in free speech cases is not the civil or criminal nature of the regulation in question but whether the regulation in fact prohibits . . . protected speech.”\textsuperscript{195} Furthermore, the Court indicated in \textit{New York Times Co. v. Sullivan}\textsuperscript{196} that civil statutes may have a remarkably greater chilling effect than criminal laws: civil actions do not provide the procedural safeguards that protect defendants under the criminal laws, and civil law damage awards can greatly exceed the maximum fines that criminal laws impose.\textsuperscript{197} Thus, the Mitchell court’s description of civil laws and their chilling effect is inaccurate.

Assuming for the sake of argument that penalty-enhancement statutes do chill speech, the implication arises that Title VII and the 1968 Act, which operate in the same manner, would have the same effect.\textsuperscript{198} The Mitchell court’s conclusion, therefore, would make the nation’s body of civil rights legislation appear invalid.\textsuperscript{199} “[R]ather than there being some fatal First Amendment flaw in our nation’s basic civil rights laws,” Professor Weinstein argues, “it is more likely that the fault lies with Gellman’s [and the Mitchell court’s] First Amendment analysis.”\textsuperscript{200}

Even assuming that the Wisconsin court was correct about the chilling effect differential between civil and criminal penalties, the court’s

\textsuperscript{193} See id. at 817 (stating, “there is a difference between the civil penalties imposed under Title VII and other anti[-]discrimination statutes and the criminal penalties imposed by the hate[-]crimes law . . . .”) Furthermore, the court expressed a belief that an anti-discrimination statute that criminalized only an employer’s subjective discrimination would be unconstitutional. See id.
\textsuperscript{194} See id. The court cited no case law to support this contention.
\textsuperscript{195} Weinstein, supra note 111, at 15 (citing New York Times Co. v. Sullivan, 376 U.S. 254, 277 (1964)).
\textsuperscript{196} 376 U.S. 254 (1964).
\textsuperscript{198} Weinstein, supra note 111, at 15.
\textsuperscript{199} See id.
\textsuperscript{200} James Weinstein, \textit{Some Further Thoughts on “Thought Crimes”}, 11 CRIM. JUST. ETHICS 61, 63 n.10 (1992).
analysis fails to account for the arguments favoring proportionality of punishment. Proportionality theories provide for increasing the severity of punishment to match the egregiousness of the act.\(^{201}\) As stated by H.L.A. Hart, the "principles of justice or fairness . . . require morally distinguishable offenses to be treated differently."\(^{202}\) Title VII applies civil penalties, but it applies them only to civil infractions (e.g., discriminatory firing). Penalty-enhancement statutes, on the other hand, employ criminal penalties in response to criminal acts (e.g., discriminatory assault). The nature of the offenses targeted by penalty-enhancement statutes justifies the use of criminal sanctions.

Proportionality of punishment would, in any event, justify enhanced penalties for discriminatory crimes. Such justification is unnecessary, however, because the analogous structure and effect between penalty-enhancement laws and the constitutionally sound Title VII implies that the former are valid. The argument that the First Amendment will not countenance criminal penalties in hate-crime statutes fails.

IV. Penalty Enhancement and "Fighting Words": A Proposed Statute

In \textit{R.A.V.}, the Supreme Court stated that a law aimed at controlling conduct may legitimately restrict sub-categories of fighting words. As an example, the Court described Title VII's impact on sexually derogatory fighting words.\(^{203}\) Although \textit{R.A.V.} disallowed direct control of expressive content, even when the expression took the form of proscribable fighting words, the Court recognized that valid laws sometimes affect speech.\(^{204}\)

Using Title VII as a pattern for a penalty-enhancement statute,\(^{205}\) a state may regulate fighting words and still avoid conflicting with \textit{R.A.V.}.\(^{206}\) A sample statute could read as follows."\(^{207}\)

\(^{201}\) \textit{See supra} part III.A. (discussing purposes of penalizing blameworthy conduct).

\(^{202}\) H.L.A. HART, LAW, LIBERTY AND MORALITY 36-37 (1963), \textit{reprinted in} \textit{KADISH & SCHULHOFER, supra} note 97, at 332.

\(^{203}\) \textit{R.A.V.} v. City of St. Paul, 112 S. Ct. 2538, 2546 (1992); \textit{see also supra}, part II.A.

\(^{204}\) \textit{See supra} text accompanying note 51.

\(^{205}\) In both statutes, the law seeks to punish the conduct of discrimination — a permissible goal. \textit{See supra} part III.D.

\(^{206}\) \textit{But see} Redish, \textit{supra} note 136, at 38. Professor Redish claims that penalty-enhancement statutes suffer from the same defect as the ordinance rejected by the Supreme Court in \textit{R.A.V.} — they are under-inclusive. \textit{See id}. His argument is premised on the belief that penalty enhancement affects only criminals whose acts are motivated by prejudice. \textit{See id}. The actor's beliefs, however, are not addressed by these hate-crime statutes. \textit{See supra} note 136 and accompanying text.
It shall be unlawful for a person intentionally to menace or voice fighting words to an individual because of such individual's race, color, religion, sex, or national origin.

For the purposes of par. (1), the terms menace and fighting words are defined to mean conduct that itself inflicts injury or tends to incite immediate violence.

Any person found guilty under par. (1) shall be guilty of a misdemeanor/felony (the degree of the criminal liability should be at least one degree more serious than that imposed for the commission of menacing).

Like Title VII, the proposed statute targets conduct. The difference between this provision and the ordinance in R.A.V. becomes apparent upon dissection of the crime into its elements of actus reus and mens rea. The actus reus would be the utterance of the fighting words. The statute does not prohibit any specific sub-category of fighting words, nor does it make an impermissible distinction regarding symbolism, specific words, or any other content-based aspect of expression.

The mens rea of the crime would be intent (as specified in the statute). Furthermore, the prosecution would have to prove that the actor intended to menace the victim because of the victim's race.

While speech is probative of intent, this element does not prohibit any

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207. The proposed statute uses the definition of "fighting words" given in Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942) (holding that conduct or expression that itself inflicts injury or tends to incite immediate violence is not protected by First Amendment). It also includes menacing, which is already a crime in many states. See, e.g., N.Y. PENAL LAW § 120.15 (McKinney 1987) (menacing in the third degree).

The model proposed in this Note does not prohibit acts committed because of the perceived race of the victim. The word "perceived" has been included in some laws, see, e.g., WIs. STAT. § 939.645 (1992), to penalize actors whose conduct fits the criminal definition but whose victim was not in fact of the race, religion, etc. that the actor believed him to be. Despite the possible deterrent effect such a statute might have, the problems associated with proving an actor's perceptions could make the law difficult to enforce.

208. The ADL model statute suggests a punishment that is one degree more serious than that imposed for the underlying offense. See supra note 71. This Note's proposal mirrors that recommendation.

This punishment is hardly unconstitutionally excessive under the Eighth Amendment. The Supreme Court has repeatedly emphasized that sentence length invokes a substantive penal judgment that, as a general matter, lies "[properly within the province of legislatures, not courts.""]Harmelin v. Michigan, 111 S. Ct. 2680, 2703 (1991) (Kennedy, J., concurring) (quoting with approval Rummel v. Estelle, 445 U.S. 263, 275-76 (1980)); cf. Solem v. Helm, 463 U.S. 277, 290 (1983) (acknowledging the principle of deference to legislative judgments, while finding an Eighth Amendment defect in a life sentence with no possibility of parole for a repeat offender guilty only of petty property crimes).

209. For an explanation of the constitutional problems presented by sub-categorizing otherwise proscribable categories of expression, see supra part II.A.

210. See supra part III.B.

sub-category of fighting words.

Using an example of two Skinheads will help clarify this point. If, while attacking Skinhead Y, Skinhead X calls Y a “damned Jew,” the speech may be used to prove that X acted intentionally. The epithet would be offensive to people based on their religion, thus it would violate the ordinance in *R.A. V*. The remark also shows that X harbors bigoted beliefs. Assuming, however, that Y is not Jewish and that X knew this, the words would not prove that X attacked Y because of Y’s religion. No prosecution could be initiated under the proposed statute.

To take this example one step further, assume Skinhead Y yelled to a Jewish person, “You bastard, I’ll shave your head and make you respectable!” These words could be characterized as fighting words, yet they do not convey a message that would be offensive because of the race or religion of the victim. If the Skinhead uttered the fighting words because of the victim’s religion, the Skinhead would have violated the model statute. The statute punishes discriminatory conduct regardless of the message.213

By aiming at conduct rather than expression, state legislatures can control some forms of hate speech. The model statute allows states to prohibit verbal attacks that occur because of the victim’s race. Thus, if a Klansman menaces or assaults an African-American because she is black, and calls her a “nigger,” the Klansman would contravene the statute. The violation is based on the Klansman’s conduct — the menacing because of race — rather than on the content of the expression. Although the expression may be used circumstantially to prove the Klansman’s intent, this does not constitute an impermissible content distinction in violation of the First Amendment.214 Control of a sub-category of fighting words is permissible because the statute’s goal is to control conduct.

V. Conclusion

Bias crime continues to be a significant problem in our nation. Its occurrence stems not only from organized hate groups, but also from the prejudices that exist throughout society. While, the First Amend-

212. This may seem to be a far-fetched example, but a Skinhead probably believes such a name to be slanderous. The epithet, if intended to inflame the recipient, might have succeeded.

213. See *supra* parts III.A.-B.; *Mitchell*, 485 N.W.2d at 819 (Abrahamson, J., dissenting). Justice Bablitch explains that hate-crime statutes punish the act of selecting the victim whether or not the selection is motivated by racial hatred. See *id.* at 824-25 (Bablitch, J., dissenting).

214. See *supra* part II.A.
ment gives us the freedom to form opinions and to be bigots, that freedom does not give us the right to injure others because of their race, religion, national origin, sex, sexual orientation, or any other characteristic. Legislators have attempted to stem such violence by punishing the perpetrators more severely than other criminals. Penalty-enhancement statutes, in this context, provide a valid means to punish conduct.

Such provisions are comparable to existing anti-discrimination statutes, which have been declared constitutional. Moreover, penalty-enhancement laws resemble federal criminal statutes that punish acts committed because of the victim's race. A hate-crime law modeled after either of these sources should survive a First Amendment challenge, as each of these laws is directed at the actor's intent, not at racial attitudes. Applying a penalty-enhancement statute to two examples should clarify this point: if a bigot attacks a black passer-by solely to steal money, she cannot be prosecuted under the hate-crime law; by contrast, if a racially-indifferent person attacks a black to impress her racist friends, she has the intent to injure him because of his race. This attack contravenes the statute.

Penalty-enhancement statutes target criminal conduct, not thoughts. They address the actor's mental culpability by requiring proof that he selected the victim on the basis of race or other statutorily protected category. By focusing on intent rather than beliefs, such laws avoid a conflict with First Amendment rights.

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