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SUBSTANTIVE PENAL HATE CRIME LEGISLATION: TOWARD DEFINING CONSTITUTIONAL GUIDELINES FOLLOWING THE R.A.V. v. CITY OF ST. PAUL AND WISCONSIN v. MITCHELL DECISIONS

I. INTRODUCTION

Discriminatory hate crime\(^1\) perpetrated against individuals based upon their race, religion, national origin, disability, gender, or sexual orientation is a serious, pervasive, and increasing national problem.\(^2\) Legislators and judges acknowl-

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\(^1\) This comment distinguishes between "hate crime" and "hate speech." For the purposes of this comment, "hate crime" or "hate violence" refers to any act of intimidation, harassment, physical force, or threat of physical force directed against any person, his or her family, or his or her property or advocate, motivated either in whole or in part by the hostility to the person's real or perceived ethnic background, national origin, religious belief, sex, age, disability, or sexual orientation, with the intention of causing fear or intimidation. See CAL. PENAL CODE § 422.6 (West 1988 & Supp. 1993).

"Hate speech," in contrast, means "speech perceived as harmful and offensive to minorities." GERALD GUNTHER, CONSTITUTIONAL LAW 1131 (12th ed. 1991).

\(^2\) For a description detailing the serious nature of hate crimes, see Mari J. Matsuda, Public Response to Racist Speech: Considering the Victim's Story, 87 MICH. L. REV. 2320 (1989). Professor Matsuda states that the effects of hate crime on the victim's self-esteem and sense of personal security are devastating. Id. at 2337-38. Professor Matsuda argues that the victim's feelings that he or she is alone comes not only from the hate message itself, but also from the government's tolerance. Id. See also 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). Professor Delgado indicates that discriminatory expression injures the dignity and self-regard of the person to whom it is addressed, because it communicates the message that distinctions of race are distinctions of merit, dignity, status, and personhood. Id. at 135-36. Professor Delgado states that not only does the listener learn and internalize the message contained in racial insults, but that these messages color society's institutions and are transmitted to succeeding generations. Id. at 136.

edge the growing hate crime problem, but the two groups clash on how to respond effectively to the crisis. Legislators, recognizing that hate violence threatens the safety of their communities, have enacted numerous substantive and procedural penal hate crime laws at the federal, state, and local levels to curb and deter the hate activity trend.


3. See, e.g., R.A.V. v. City of St. Paul, 112 S. Ct. 2538 (1992). In R.A.V., the United States Supreme Court invalidated a St. Paul bias-motivated crime ordinance aimed at shielding symbols of bigotry such as burning crosses and Nazi swastikas, from racial minorities and other protected groups. For a comprehensive discussion of R.A.V., see infra text accompanying notes 212-66.

4. For purposes of this comment, a substantive penal hate crime law is distinguished from a procedural penal hate crime provision. The basic difference between a substantive and a procedural penal hate crime statute is that the former allows the government to punish the perpetrator for personal injury, threats, or property damage because of the victim’s specified beliefs or characteristics. See, e.g., CAL. PENAL CODE § 422.6 (West 1988 & Supp. 1993) (allowing government to punish a perpetrator who interferes with the victim’s exercise of his or her civil rights). A California court of appeal has upheld Penal Code Section 422.6. In re M.S., 17 Cal. App. 4th 1328 (1993). On November 17, 1993, the California Supreme Court granted a petition for review. At the time of this comment’s publication, the court had not rendered its decision.

5. A procedural hate crime penalty-enhancement provision increases a convicted individual’s punishment if the government demonstrates that the perpetrator intended to harm the victim based upon his or her specified beliefs or personal characteristics. See, e.g., CAL. PENAL CODE § 422.7 (West 1988 & Supp. 1992) (allowing a misdemeanor conviction to be raised to a felony). In California v. Joshua H., 17 Cal. Rptr.2d 291 (Cal. Ct. App. 1993), a California Appellate Court upheld California Penal Code § 422.7. On June 24, 1993, the California Supreme Court denied review of the appellate court decision. See also CAL. PENAL CODE § 422.75 (West 1988 & Supp. 1992) (providing that a felony conviction may be raised to a more serious felony offense level).

6. This comment focuses on the use of penal statutes to combat the hate crime problem. California, however, affords hate crime victims with certain civil remedies. The Ralph Civil Rights Act of 1976, codified at California Civil Code §§ 51.7 and 52, provides a civil remedy for individuals subjected to discriminatory conduct. The Act states that California residents have the right to be free from intimidation and interference with their civil rights based on race, religion, ancestry, national origin, or sexual orientation. CAL. CIV. CODE §§ 51.7, 52 (West 1982 & Supp. 1993).


An example of a municipal hate crime ordinance is Minnesota Legislative Code § 292.02, which made it a misdemeanor for an offender to display a sym-
Legislative attempts to quell hate crimes by enacting substantive penal hate crime legislation, however, have met resistance in federal and state courts. Specifically, in *R.A.V. v. City of St. Paul*, five U.S. Supreme Court Justices sent a strong message. The Court struck down a local bias-motivated crime ordinance that banned cross-burning, holding that such expression is protected by the First Amendment. The majority in *R.A.V.* decided that such a content- and viewpoint-based regulation of hate expression was facially unconstitutional. Thus, the Court held that despite the government's compelling interests in ensuring the basic human rights of the members of groups historically subjected to discrimination, including the right of such members to live in peace where they wish, a law that discriminates based upon a message's content is an unreasonable abridgment of an individual's First Amendment rights.

In the aftermath of the *R.A.V.* decision, legislators, criminal law attorneys, civil rights advocates, and civil libertarians have questioned the holding's effect on existing substantive penal hate crime legislation. Specifically, legislators at all levels of government must now carefully examine their

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bol causing resentment to the community due to race, religion, or gender. 


10. *R.A.V.* 112 S. Ct. at 2542. The St. Paul ordinance was held invalid on its face, because it "prohibit[ed] otherwise permitted speech solely on the basis of the subjects the speech address[ed]." *Id.*

11. *Id.* at 2549.

12. *Id.* at 2550.

13. See, e.g., Stephen G. Hirsch, *Justices Strike Down Minnesota Hate-Crimes Law; High Court Ruling's Effect on California Statutes Unclear*, THE RECORDER, June 23, 1992, at 1. In the article, ACLU lobbyist Margaret Pena states, "[j]ust don't ask me what the effect is on the California statutes . . . . People are basically confused." *Id.*

See also Don Terry, *The Supreme Court: Rights Advocates Uncertain About Ruling's Impact*, N.Y. TIMES, June 23, 1992, at A16. Loren Siegel of the New York ACLU said:

It's going to take a lot of litigation in order to sort things out . . . . Any of the laws being passed by state legislatures that treat crimes motivated by racial, ethnic, religious[,] or gender bias in a special way are now vulnerable to constitutional attack because of [the *R.A.V.*] decision. That concerns us.

*Id.*
current substantive penal hate crime laws and amend them to conform to the R.A.V. decision.

To further complicate matters, R.A.V. left many guessing whether procedural penal hate crime legislation would also be invalidated.\textsuperscript{14} Recently, however, the Court clarified some unanswered questions in the R.A.V. with its holding in Wisconsin \textit{v. Mitchell}\.\textsuperscript{15} In \textit{Mitchell}, where the Court interpreted a procedural penal hate crime statute, a unanimous decision upheld a Wisconsin penalty-enhancement provision, holding that the statute, which provided for the enhancement of a defendant's sentence when the defendant intentionally selects his or her victim on the basis of race, does not violate the defendant's First Amendment rights.\textsuperscript{16}

The R.A.V. and \textit{Mitchell} decisions must be reconciled to ensure that current and prospective substantive penal hate crime legislation passes constitutional tests. When reviewing or drafting their substantive penal hate crime laws, legislators should recognize that the R.A.V. decision invalidated the regulation of expressive speech. Pursuant to the R.A.V. and \textit{Mitchell} decisions, however, the government is not prohibited from proscribing violent conduct. In short, lawmakers need to determine whether their substantive penal hate crime laws intend to regulate "hate speech"\textsuperscript{17} or violent, destructive con-

\textsuperscript{14} With regard to the validity of hate crime penalty-enhancement statutes, the \textit{Mitchell} decision upheld a Wisconsin penalty-enhancement statute. Wisconsin \textit{v. Mitchell}, 113 S. Ct. 2194, 2202 (1993). Prior to the \textit{Mitchell} decision, state courts were split over the constitutionality of penalty-enhancement statutes.


A noteworthy pre-\textit{Mitchell} state supreme court case, however, struck down a penalty-enhancement provision in Ohio \textit{v. Wyant}, 597 N.E.2d 450 (Ohio 1992) (invalidating an ethnic intimidation statute in punishing motive alone, because it allegedly intended to create a "thought crime" in violation of state and federal constitutions). The \textit{Wyant} ruling was rendered shortly after the R.A.V. decision. The \textit{Mitchell} case overruled \textit{Wyant}.

\textsuperscript{15} 113 S. Ct. 2194 (1993).
\textsuperscript{16} Id. at 2202.
\textsuperscript{17} An example of a case challenging a "hate speech" law is Collin \textit{v. Smith}, 578 F.2d 1197 (7th Cir. 1978), \textit{cert. denied}, 439 U.S. 916 (1978). In \textit{Smith}, the
This comment examines the validity of substantive penal hate crime laws following the *R.A.V.* and *Mitchell* decisions. This comment describes and analyzes the First Amendment and due process concerns of hate crime legislation that are susceptible to constitutional attack and proposes legislative guidelines to enable the lawmaker to test ordnance prohibited the dissemination of any materials that intentionally promoted and incited hatred against persons by reason of their race, national origin, or religion. *Id.* at 1199. The *Smith* court struck down the ordinance and upheld a neo-Nazi group's right to demonstrate in a predominantly Jewish community. *Id.* at 1207, 1210. But see *National Socialist Party v. Skokie*, 432 U.S. 43 (1977) (reversing the Illinois Supreme Court's denial of a city's stay to enjoin American Nazis from marching in Skokie, Illinois, a community with a large Jewish American population).

Within the university setting, a student successfully challenged a "hate speech code" in *Doe v. University of Mich.*, 721 F. Supp. 852 (E.D. Mich. 1989). In *Doe*, the regulation stated that individuals were subject to discipline for any verbal or physical behavior that stigmatized or victimized an individual on the basis of race, ethnicity, religion, sex, sexual orientation, creed, national origin, ancestry, age, marital status, handicap, or Vietnam veteran status, in any way that had the purpose or effect of interfering with an individual's academic efforts, employment, participation in extra-curricular activities, or personal safety. *Id.* at 856.

18. For example, California's substantive penal hate crime statute punishes discriminatory conduct, not speech:

(a) No person, whether or not acting under color of law, shall by force or threat of force, willfully injure, intimidate, interfere with, oppress, or threaten any other person in the free exercise or enjoyment of any right or privilege secured to him or her by the constitution or laws of this state or by the Constitution or laws of the United States because of the other person's race, color, religion, ancestry, national origin, disability, gender, or sexual orientation.

(b) No person, whether or not acting under color of law, shall knowingly deface, damage, or destroy the real or personal property of any other person for the purpose of intimidating or interfering with the free exercise or enjoyment of any right or privilege secured to the other person by the constitution or laws of this state or by the Constitution or laws of the United States, because of the other person's race, color, religion, ancestry, national origin, disability, gender, or sexual orientation.

(c) Any person convicted of violating subdivision (a) or (b) shall be punished by imprisonment in a county jail not to exceed one year, or by a fine not to exceed five thousand dollars ($5,000), or by both that imprisonment and fine. However, no person shall be convicted of violating subdivision (a) based upon speech alone, except upon a showing that the speech itself threatened violence against a specific person or group of persons and that the defendant had the apparent ability to carry out the threat.


19. For a discussion distinguishing substantive penal hate crime legislation from procedural penalty-enhancement provisions, see *supra* notes 4-5.
the constitutionality of current and prospective substantive penal hate crime legislation.20

Part II provides a general overview of the purposes for enacting substantive penal hate crime legislation21 and also presents some First Amendment and due process issues potentially affecting the validity of such laws.22 Part II also surveys previous judicial treatment of hate-crime-related issues, such as expression and conduct, and distinguishes the differences in judicial scrutiny provided to each.23 In addition, Part II introduces the regulation of "expressive conduct" and describes the guidelines set forth in United States v. O'Brien.24

Part III discusses the need for legislative representatives to grasp the consequences and implications of the R.A.V. and Mitchell decisions.25 This section suggests that lawmakers must also consider potentially fatal flaws in substantive penal hate crime provisions, such as overbreadth and vagueness, which were not addressed in the R.A.V. case.26

Part IV presents the facts of the R.A.V. case and analyzes the holding set forth in the majority opinion,27 which states that content-based regulations are presumptively invalid and must satisfy strict-scrutiny judicial review.28 Part IV also describes the enumerated exceptions in the R.A.V. decision that exempt neutral and conduct-based regulations from invalidation.29 This section also addresses issues that fell outside the R.A.V. majority discussion, but that are nevertheless relevant when considering the constitutionality of substantive penal hate crime legislation.30 These concerns include review under the expressive conduct guidelines enumerated in

20. For proposed legislative guidelines for substantive penal hate crime legislation, see infra text accompanying notes 343-351.
21. See infra text accompanying notes 36-75.
22. See infra text accompanying notes 76-110.
23. See infra text accompanying notes 111-206.
25. See infra text accompanying notes 207-211.
27. For a discussion of the concurring opinions in R.A.V., see infra note 245.
28. See infra text accompanying notes 212-245.
29. See infra text accompanying notes 246-267.
30. See infra text accompanying notes 266-304.
United States v. O'Brien and due process requirements regarding vague or overbroad laws. Part IV also discusses the Wisconsin v. Mitchell case, laying out the facts, explaining how the Justices reached their nine-to-zero decision, and concluding with the decision's implications for current and prospective substantive penal hate crime legislation.

Part V proposes guidelines to determine whether substantive penal hate crime laws satisfy both First Amendment and due process mandates. These guidelines propose that carefully drafted legislation may substantively proscribe hate violence if the regulation lays out specific language that regulates certain bias-motivated conduct.

II. A Background of the Issues That Impact Substantive Penal Hate Crime Legislation: The Hate Crime Problem Versus the Protection of Individual Freedoms

A. The Hate Crime Problem: An Overview

Legislators recently recognized the serious nature and rise in discriminatory violence and enacted legislative measures to address the increasing trend. The following section introduces the particularly troublesome nature of hate crimes and describes the accompanying substantive penal hate crime legislation aimed at remedying the problem.

1. The Serious Nature of Bias-Motivated Violence

Crimes motivated by bigotry and intolerance are serious problems because discriminatory violence results in severe physical and psychological harm to the victim. Scientific studies indicate that hate crimes are far more violent and lethal than other attacks; victims of hate crimes are four times
more likely to require hospitalization than victims of other assaults.\textsuperscript{38}

Discriminatory violence also impacts the community where the victim is a member.\textsuperscript{39} Discriminatory confrontations are generally more serious than non-discriminatory crimes, because they often escalate from individual conflicts to mass disturbances, resulting in more serious potential consequences than those associated with other assault cases.\textsuperscript{40}

A recent and serious example of this "backlash effect" occurred following the beating of African-American motorist Rodney G. King by a group of police officers, none of whom were of African-American descent.\textsuperscript{41} A jury, lacking any members of African-American descent, acquitted the officers, which resulted in the Los Angeles civil uprising in the spring of 1992.\textsuperscript{42} Recent Southern California statistics confirm the link between racially motivated incidents and massive violence. The report indicates that "incidents motivated by race increased significantly after the civil unrest in [April and May of 1992] and have not yet decreased to pre-civil unrest levels."\textsuperscript{43}

Courts have started to recognize the serious harms posed by hate violence. For example, in \textit{State v. Plowman},\textsuperscript{44} the Oregon Supreme Court upheld the state's bias-motivated hate crime statute, agreeing with the Oregon legislature's determination that when a victim is harmed on the basis of group membership, a societal harm different and greater than the

\begin{itemize}
\item \textsuperscript{38} See id.
\item \textsuperscript{39} For a description of the seriousness of hate crimes, see Matsuda, \textit{supra} note 2, at 2337-38. See also Delgado, \textit{supra} note 2, at 135-36.
\item \textsuperscript{40} See, e.g., \textit{State v. Beebe}, 680 P.2d 11 (Or. Ct. App. 1984).
\item \textsuperscript{41} See Richard A. Serrano & Tracy Wilkinson, \textit{All 4 in King Beating Acquitted, Violence Follows; Guard Called Out}, \textit{L.A. Times}, April 30, 1992, at A1. "Four Los Angeles police officers won acquittals [on April 29, 1992] in their trial for the beating of black motorist Rodney G. King, igniting renewed outrage over a racially charged case that had triggered a national debate on police brutality." \textit{Id.}
\item \textsuperscript{42} See \textit{supra} note 41.
\item \textsuperscript{43} Martha Nakagawa, \textit{Hate Crime Statistics}, \textit{Asian Week}, March 19, 1993, at 12 (citing \textit{Year End 1992 Analysis of Incidents Motivated by Hatred/Prejudice}, \textit{L.A. County Comm'n on Human Relations} (1993)).
\item \textsuperscript{44} 838 P.2d 558 (Or. 1992).
\end{itemize}
harm caused by a non-bias-motivated assault is created.\textsuperscript{45} The Oregon Supreme Court stated that because hate crimes are directed not only toward the victim, but essentially toward an entire group, bias-motivated conduct invites retaliation and causes insecurity in group members.\textsuperscript{46}

The \textit{Plowman} court also noted that hate crimes are particularly harmful because the victim is attacked on the basis of his or her perceived characteristics, underscoring the history of unequal treatment toward certain groups in American society.\textsuperscript{47} The court concluded that violent and invidious harms caused by hate crimes are harms the legislature is entitled to proscribe and penalize with the use of criminal laws.\textsuperscript{48} Thus, because the impact resulting from hate crimes is both severe and pervasive, any increase in hate crime activity is of significant concern to the legislature.

2. \textit{The Rise in Discriminatory Hate Activity}

The number of annual hate crime incidents continues to rise. Statistics in Los Angeles County, for example, indicate that from 1989 to 1990, the total number of hate crimes increased by 146%; of this total, racially based hate crimes increased by 65%, and crimes committed against lesbian and gay individuals increased 45%.\textsuperscript{49} From 1990 to 1991, the total number of overall hate crimes in Los Angeles County increased 22%.\textsuperscript{50} This number includes an increase of 27% in the total number of racially discriminatory hate crimes and an increase of 36% for victims chosen because of their sexual orientation.\textsuperscript{51} Between 1991 and 1992, hate crimes increased 11% and racial hate crimes increased 23.6%, setting a new record for such crimes.\textsuperscript{52}

While these figures indicate an increasing trend of hate violence, they may underestimate the actual number of incidents because many acts of hate violence remain unre-

\textsuperscript{45} Id. at 563-64.
\textsuperscript{46} Id. at 564.
\textsuperscript{47} Id.
\textsuperscript{48} Id.
\textsuperscript{49} L.A. COUNTY COMM'N ON HUMAN RELATIONS, HATE CRIME IN LOS ANGELES COUNTY 1990, at 1, 5 (Feb. 1991).
\textsuperscript{51} Id.
\textsuperscript{52} L.A. COUNTY COMM'N ON HUMAN RELATIONS, HATE CRIME IN LOS ANGELES COUNTY 1992, at 1 (Mar. 1993).
ported. An additional problem with obtaining accurate accounts is that police officers at the crime scene often fail to recognize certain incidents as hate crimes. For these reasons, Congress and state legislatures undertook affirmative steps to remedy the growing hate crime problem.

3. United States Congressional and California Legislative Responses to the Hate Crime Problem

Legislative action to control hate crimes has taken two forms. First, legislators began to monitor and retain statistics of hate crimes to get a clearer picture of their pervasive nature. Second, lawmakers enacted various substantive penal hate crime statutes. This subsection describes the legislative actions taken to address the hate crime problem.

Congress and most state legislatures enacted statutes to monitor the growing problem of discriminatory violence and to obtain precise figures for the incidence and rate of hate crime activity. At the federal level, Congress enacted the Hate Crimes Statistics Act to monitor hate crimes. In California, the state legislature also passed a Hate Crime Statistics Act. The purpose of the California Hate Crime

53. See U.S. COMM'N ON CIVIL RIGHTS, CIVIL RIGHTS ISSUES FACING ASIAN AMERICANS IN THE 1990'S, at 48 (1992) [hereinafter CIVIL RIGHTS REPORT] (finding that victims of all races are unlikely to report racial incidents and are often reluctant to identify them as racial incidents).

54. Id. For example, of 452 hate incidents included in a Boston report, only 19 were subsequently identified as hate crimes by police officers on the scene. Id.

55. See infra text accompanying notes 57-61.

56. See infra text accompanying notes 62-75.

57. See CIVIL RIGHTS REPORT, supra note 53, at 45-47. In addition, a number of U.S. cities collect statistics on hate crimes. These cities include Philadelphia, Los Angeles, Boston, Chicago, and New York City. Id.


Statistics Act is to provide information to law enforcement officials for response to and prevention of hate crimes.\(^{61}\)

In addition, federal and state governments have enacted substantive penal hate crime legislation as tools to alleviate the nationwide hate crime problem.\(^{62}\) These statutes typically punish a perpetrator who, motivated by bias, physically injures or damages the property of another person.\(^{63}\) The penalties provided by such statutes include fines, imprisonment, or both.\(^{64}\) The following section overviews federal and state substantive penal hate crime statutes and their legislative purposes.

\textbf{a. 18 U.S.C. Section 242}

The federal criminal civil rights statute\(^{65}\) protects inhabitants of any state, territory or district of the United States from discriminatory acts conducted by a perpetrator

\begin{itemize}
  \item \textit{18 U.S.C. Section 242}
  \begin{itemize}
    \item For a discussion of the distinction between substantive and procedural penal hate crime legislation, \textit{see supra} notes 4-5.
    \item 63. For examples of statutory verbiage identifying personal injury and property damage as civil rights violations, see Cal. Penal Code § 422.6(a)(b) (West 1988 & Supp. 1993).
    \item 64. \textit{See 18 U.S.C. § 242 (1988). This statute provides for fines and/or imprisonment for anyone who deprives any person of his or her civil rights. Id. If bodily injury results, the term of imprisonment may be as high as ten years. Id. If death results, the perpetrator may be subject to imprisonment for any term of years or for life. Id.}
    \item The California statute, Penal Code § 422.6, authorizes a maximum fine of $5,000 and/or incarceration in a county jail for one year. Cal. Penal Code § 422.6 (West 1988 & Supp. 1993).
    \item 65. 18 U.S.C. § 242 (1988). This section provides:
      \begin{itemize}
        \item Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such person being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined not more than $1,000 or imprisoned not more than one year, or both; and if death results shall be subject to imprisonment for any term of years of for life.
      \end{itemize}
    \end{itemize}
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\textit{Id. (emphasis added).}
who acted under the color of any law, statute, ordinance, regulation, or custom.\footnote{Id. In other words, this criminal statute requires state action. Under 42 U.S.C. § 1985(3), however, an individual may bring a civil action against private individuals based upon civil conspiracy. 42 U.S.C. § 1985(3) (1988 & Supp. 1993).}

Congressional intent when drafting the federal criminal civil rights law was similar to previous civil anti-discrimination laws: the purpose of each was to remedy and deter invidious conduct against racial minorities and other protected groups.\footnote{For the legislative history of 18 U.S.C. § 242 (1988) (the federal criminal civil rights statute), see Pub. L. No. 90-294, 75 Stat. 1837 (1968).} This connection between 18 U.S.C. Section 242, the federal criminal civil rights statute, and the Civil Rights Act of 1866 is illustrated in Screws v. United States.\footnote{325 U.S. 91 (1945).} In Screws, the United States Supreme Court noted that the federal anti-discriminatory criminal laws stem from the Civil Rights Act of 1866, which intended to protect the civil rights of all persons in the United States and to furnish a means of vindication for their deprivation.\footnote{Id. at 98-99.} The Court in Screws indicated that the purpose of the Civil Rights Act was to cure racial discrimination against African-Americans at the end of the Civil War.\footnote{Id. Substantively, the federal criminal civil rights statute is similar to the legislative purposes in federal anti-discrimination civil rights laws. The intended purpose of these laws is to protect individuals from discrimination. Title VII of the Civil Rights Act of 1964, for example, prohibits discrimination in employment based on the employee's race, color, religion, sex, or national origin. 42 U.S.C. § 2000(e) (1988). Title VII bars employers from engaging in discriminatory practices with regard to hiring, discharging, earning and promoting, and harassing employees. Id. See also 42 U.S.C. § 1981 (1988) (recognizing that all persons have full and equal benefit of laws enjoyed by white citizens); 42 U.S.C. § 1982 (1988) (providing that all citizens have the same rights as white citizens to have and hold real and personal property); 42 U.S.C. § 3601 (1988) (setting forth a national policy to provide for fair housing); and 42 U.S.C. § 3617 (1988) (providing individuals private remedies for violations under the Fair Housing Act).}

When addressing the problem of gender discrimination, the United States Supreme Court acknowledged that women are often targeted for discrimination and need redress measures. In Roberts v. U.S. Jaycees, 468 U.S. 609 (1984), a national young men's organization denied women regular membership. \textit{Id.} The organization was charged with violating the Minnesota Human Rights Act, which makes it "an unfair discriminatory practice . . . [t]o deny any person the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of a place of public accommodation because of race, color, creed, religion, disability, national origin or sex." \textit{Id.} at 614-15. The club
At the state level, California recently enacted substantive penal hate crime legislation. The following section discusses California's substantive penal hate crime statute.

b. California Penal Code Section 422.6

Like Congress, the California Legislature recognized the need to make discriminatory hate violence a criminal offense.\(^7\) By 1987, the Legislature acknowledged the inadequacy of existing law and the increase in crimes committed due to group status.\(^7\) The Legislature also recognized that existing civil statutes did little to deter hate violence, as no criminal penalties were present.\(^7\) It noted that existing criminal statutes, such as trespass and vandalism, did not reflect the seriousness of racially motivated violence.\(^7\) As a re-

members argued that the Act abridged their rights to expression and protected speech. \textit{Id.} The Court upheld the Act and explained its underlying reason: Discrimination . . . cause[s] unique evils that government has a compelling interest to prevent—wholly apart from the point of view such conduct may transmit. Accordingly, like violence or other types of potentially expressive activities that produce special harms distinct from their communicative impact, such practices are entitled to no constitutional protection.

\textit{Id.} at 628.

71. California has many civil rights statutes that deal with discriminatory threats of violence. \textit{See, e.g., CAL. CIV. CODE \S 52.7 (West 1982 & Supp. 1993) (the Ralph Civil Rights Act of 1976 allows civil action for violation of an individual's civil rights); CAL. PENAL CODE \S 190.2 subd. (a)(16) (West 1988 & Supp. 1993) (designating homicide based on the victim's race, color, religion, or national origin as a special circumstance in first-degree murder charges); CAL. PENAL CODE \S 302 (West 1988 & Supp. 1993) (authorizing punishment to persons who willfully disturb a religious worship meeting); CAL. PENAL CODE \S 594.3 subd. (b) (West 1988) (providing punishment for one who knowingly vandalizes a place of worship because of racial or religious prejudice); CAL. PENAL CODE \S 1170.75 (West 1985 & Supp. 1993) (harming a person because of his or her race, color, religion, national origin, disability, or gender is an aggravating circumstance for criminal sentencing purposes); CAL. PENAL CODE \S 1170.8 (West 1985) (intentionally vandalizing a place of worship is an aggravating circumstance); CAL. PENAL CODE \S 1170.85 (West 1985 & Supp. 1993) (knowingly victimizing aged or disabled persons is an aggravating circumstance).}


73. \textit{Id.}

74. \textit{Id.} Several years earlier, the California Attorney General compiled a commission to survey racial, ethnic, religious, and minority violence within the state. Among the findings contained in its report, the Commission stated: Hate violence persists in California and poses a threat to the peace and safety of our communities . . . . Enactment of a comprehensive civil rights statute with criminal penalties and amendments is necessary to effectively deter hate violence. Existing civil and criminal laws fail to effectively protect the rights of hate violence victims.
sult, the California Legislature passed Penal Code Section 422.6, a substantive penal hate crime law.75

In sum, legislators recognized the serious nature of hate violence and noted that such incidents are increasing. For these reasons, federal and state legislators addressed the problem by passing laws to remedy the hate crime problem.

B. Individual Freedoms: An Overview

Substantive penal hate crime legislation affects individual expressive freedoms, thereby implicating the First Amendment.76 Specifically, hate crime legislation affects an individual's First Amendment right to think and believe what he or she chooses.77 This subsection examines First Amendment and due process issues raised by substantive penal hate crime legislation.

1. First Amendment Concerns: Expressive Freedoms

The First Amendment provides that, "Congress shall make no law . . . abridging the freedom of speech."78 Justices Brandeis and Holmes were the first Supreme Court Justices to fully embrace the freedom-of-expression principles espoused in the First Amendment. Justice Brandeis said that the First Amendment provides individuals the "freedom to think as you will and to speak as you think."79 Justice Holmes felt that one underlying purpose of the First Amend-
ment is to ensure the viability of a "marketplace of ideas."\textsuperscript{80} Justice Holmes first discussed the "marketplace of ideas" theory in the now-famous dissenting opinion in Abrams v. United States:\textsuperscript{81}

The ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground which their wishes safely can be carried out. That at any rate is the theory of our Constitution.\textsuperscript{82}

The "marketplace of ideas" approach is still employed by the Court currently to avoid driving ideas out of the public forum.\textsuperscript{83}

To preserve ideals behind the "marketplace of ideas" theory, "hate speech" and other forms of expression considered offensive to the intended audience have been protected from governmental regulation. The R.A.V. case, for example, is the chief illustration of a fatal attempt at regulating "hate speech."\textsuperscript{84} Another attempt to regulate "hate speech" was struck down in Collin v. Smith.\textsuperscript{85} In Collin, a federal appellate court invalidated an ordinance banning "dissemination of any material . . . which promote[d] and incite[d] hatred against persons by reason of their race, national origin, or religion, and [was] intended to do so."\textsuperscript{86}

Similarly, a number of universities enacted "hate speech" codes to regulate expression, but these codes were invalidated as unconstitutionally infringing on the speaker's First Amendment rights. In Doe v. University of Michigan,\textsuperscript{87} for example, a federal court in Michigan invalidated the Univer-
sity of Michigan's "hate speech" code due to vagueness and overbreadth problems. Similarly, in UWM Post, Inc. v. Board of Regents of University of Wisconsin, a Wisconsin court struck down a University of Wisconsin "hate speech" code.

The government, however, may be able to regulate expression if it can satisfy strict-scrutiny judicial review; in other words, the government must demonstrate that its narrowly tailored regulation is a necessary means of furthering a compelling state interest.

2. **Due Process Concerns: Vagueness and Overbreadth**

Due process concerns arise when enacting substantive penal hate crime laws because to be constitutional, criminal legislation must clearly set forth narrowly defined behavior. This section describes vagueness and overbreadth principles.

The problem of vague legislation is that it fails to provide adequate notice and warning to those affected. Within the hate crime context, vague statutes risk "chilling" protected speech. In Doe v. University of Michigan, for example, the plaintiff successfully challenged a campus "hate speech" code as unconstitutionally vague.

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88. *Id.* at 867. "Vagueness" and "overbreadth" are terms of art, because they have specific constitutional meanings. For a definition of vagueness, see *infra* text accompanying notes 93-103. For an explanation of overbreadth, see *infra* text accompanying notes 104-108.


90. *Id.* at 1170.


93. *See* Grayned v. City of Rockford, 408 U.S. 104 (1972) (ordinance that prohibited only actual or imminent and willful interference with school activity is constitutional over vagueness arguments).

94. GUNTHER, *supra* note 1, at 1202.


96. *Id.* at 867 (the policy that the University of Michigan adopted prohibited individuals from "stigmatizing or victimizing" individuals or groups on the basis of race, ethnicity, religion, sex, sexual orientation, creed, national origin, ancestry, age marital status, handicap, or Vietnam veteran status).
If a law is adequately worded to provide fair warning, however, it may withstand a vagueness challenge. In addition, a law is not void for vagueness if a reasonable and practical construction can be given to the language, or if its terms are reasonably certain by reference to other definable sources. Another way to cure vagueness problems is to include a specific intent element in the statute. Several federal and state hate crime laws have been upheld because specific intent was required as an element of the offense. For example, in People v. Lashley, a California appellate court upheld a hate crime statute that contained a specific intent element. Similarly, in Commonwealth v. Stephens, a Massachusetts appellate court held that a hate crime provision was not unconstitutionally vague because the statute required specific intent.

The doctrine of overbreadth asserts that regulations that threaten protected expression or conduct are unconstitutional. Like First Amendment challenges, overbreadth challenges commonly invalidate laws that punish “hate speech.” In Doe v. University of Michigan, a federal court in Michigan invalidated the campus “hate speech code”

97. See Grayned v. City of Rockford, 408 U.S. 104 (1972). In Grayned, the defendant was charged with violating an anti-noise ordinance that prohibited persons near school buildings from willfully disturbing classes. Id. The Court held that the ordinance was not unconstitutionally vague since, with fair warning, it prohibited only actual or imminent and willful interference with normal school activity, and was not a broad invitation to discriminatory enforcement. Id. at 112. The defendant’s second challenge of overbreadth was also rejected because expressive activity was prohibited only if it “materially disrupt[ed]” class work. Id. at 118. For a further discussion of overbreadth principles, see infra text accompanying notes 104-108.

98. See ACLU v. Board of Educ., 379 P.2d 4 (1963) (holding, inter alia, that an educational board rule requiring parties interested in using school premises to file a statement that the property would not be used for criminal syndicalism was not unconstitutionally vague).

99. See Screws v. United States, 325 U.S. 91 (1945). In Screws, the Court upheld a federal criminal civil rights statute by rejecting a vagueness challenge and interpreting the statute to contain a specific intent requirement. Id. at 104. The Court stated that the statute’s specific intent element is the purpose or knowledge to deprive a person of a specific right protected under the express terms of the Constitution, federal statutes, or federal case law. Id.

101. Id. at 630.
103. Id. at 610.
104. GUNTER, supra note 1, at 1191.
106. Id.
because of overbreadth and vagueness. The courts, however, may uphold a rule that specifically prohibits certain conduct.

In sum, the courts' current trend, apparent in recent "hate speech" decisions, is to scrutinize legislation that impermissibly infringes on an individual's First Amendment freedoms and due process rights. Therefore, substantive penal hate crime legislation must be scrutinized on two levels, because regulating bias-motivated behavior implicates thorny First Amendment and due process concerns. First, poorly drafted substantive penal hate crime legislation unreasonably restrains the First Amendment's right to express one's beliefs. Second, imprecisely worded substantive penal hate crime statutes violate an individual's due process guarantees as they chill one's ability to exercise his or her First Amendment rights.

C. The "Speech" Versus "Conduct" Problem

In R.A.V., the Court based its decision to invalidate the St. Paul hate speech ordinance on First Amendment prin-

107. Id. at 866.

108. A non-hate-crime example of the Court's treatment is Broadrick v. Oklahoma, 413 U.S. 601 (1973). In Broadrick, state employees were charged with actively engaging in partisan political activities in violation of a state merit system provision. Id. at 602. The employees challenged two paragraphs of the Act on overbreadth and vagueness grounds. Id. at 603-04. The first paragraph at issue stated that no classified employee "shall directly or indirectly, solicit, receive, or in any manner be concerned in soliciting or receiving any assessment . . . or contribution for any political organization, candidacy or other political purpose." Id. at 603-04 n.1. The second paragraph indicated that no such employee shall belong to "any national, state or local committee of a political party" or be an officer or member of a committee or a partisan political club, or a candidate for any paid public office, or take part in the management or affairs of any political party or campaign, "except to exercise his right as a citizen privately to express his opinion and . . . vote." Id.

The Court upheld both provisions, reasoning that the provisions were not substantially overbroad because the employees' conduct violated the provisions of the Act. Id. at 610. The Court also said that these employees did not have standing to assert that the provisions might be unconstitutionally overbroad to future employees. Id.


principles prohibiting content-based regulations.\textsuperscript{112} Whether a court views discriminatory expression as "speech" or "expressive conduct" is a critical issue, because the United States Supreme Court treats pure expression and expressive conduct quite differently.\textsuperscript{113} As a general principle, pure expression is more protected than expressive conduct.\textsuperscript{114} The following subsections summarize and distinguish the United States Supreme Court's view of these two areas.

1. Treatment of Speech: Content-Based Regulations Are Presumptively Invalid

Purely expressive messages, especially political speech, are protected under the First Amendment.\textsuperscript{115} The following discussion explains why government attempts at regulation of the content of expressive messages are generally struck down as unconstitutional.\textsuperscript{116}

Past United States Supreme Court jurisprudence protected expression from content-based regulation.\textsuperscript{117} The

\begin{enumerate}
\item \textit{Id.} at 2542.
\item \textit{See} GUNTHER, \textit{supra} note 1, at 1286.
\item \textit{See} id.
\item \textit{See}, e.g., New York Times v. Sullivan, 376 U.S. 254 (1964) (holding that the press is not liable in a defamation action absent a clear and convincing showing of actual malice). This holding reflects the core First Amendment protection granted to pure political speech.
\item \textit{See infra} text accompanying notes 117-152.
\item \textit{See generally} GUNTHER, \textit{supra} note 1, at 999 (describing various U.S. Supreme Court Justices' defenses of free speech). A state, however, may regulate speech if the law does not target the message's content. \textit{Id.} In Virginia Pharmacy Bd. v. Citizen's Consumer Council, 425 U.S. 748, 771 (1976) the Court concluded that expression occurring at a non-public forum may be regulated with content-neutral "time, place, and manner" restrictions if the government meets the following three-part test: (1) the regulation is content-neutral; (2) the regulation is narrowly tailored to serve a "significant governmental interest"; and (3) the regulation "leave[s] open alternative channels for communication of the information." \textit{Id.} at 771.

The definition of "narrowly tailored" was described in Ward v. Rock Against Racism, 491 U.S. 781 (1989). In \textit{Ward}, New York City officials imposed a requirement that rock performers use only city-provided sound equipment and sound technicians. \textit{Id.} The Court upheld the requirement as a valid "time, place, and manner" restriction. \textit{Id.} at 803. The Court rejected the performers' least-restrictive-means argument in favor of a means test that is not "substantially broader than necessary" to reduce noise, thus meeting the "narrowly tailored" means test. \textit{Id.} at 798-802.

A "secondary effects" approach focuses on the indirect, harmful effects caused by the expression, thereby avoiding content-based scrutiny. In \textit{Virginia Pharmacy Board}, the United States Supreme Court held that a regulation is constitutional if it seeks to minimize the secondary effects of the speech, and
Court embraced the general principle that where content-based regulations are imposed on expression, the regulation is presumptively unconstitutional\textsuperscript{118} and must survive strict-scrutiny judicial review.\textsuperscript{119}

It is important, however, to note that the United States Supreme Court never stated outright that content-based regulations are always presumptively unconstitutional until the \textit{R.A.V.} decision.\textsuperscript{120} Over the fifty years preceding \textit{R.A.V.}, Supreme Court jurisprudence carved out three unprotected categories: fighting words,\textsuperscript{121} obscenity,\textsuperscript{122} and defama-
The Court denied First Amendment protection to "fighting words," for example, because their expressive content contains "such slight social value as to justify regulating [their] content." In cases where the expression is deemed to be fighting words, obscenity, or defamation, a court performs "rationality review." The next subsection describes...

Sixteen years later, in Miller v. California, 413 U.S. 15 (1973), the United States Supreme Court announced a new definition of "obscenity," overruling its holding in Roth. In Miller, the Court developed the following three-prong test to determine whether expression should be considered "obscene." First, whether the "average person, applying contemporary community standards [would find that] the work, taken as a whole, appeals to the prurient interest." Second, whether the work "depict[ed] or describe[ed], in a patently offensive way, sexual conduct specifically defined by the applicable state law." Third, whether the work, taken as a whole, lacked "serious literary, artistic, political or scientific value." Defamation remains a category of expression that falls within the content-based exceptions of presumptive First Amendment protection. The central state interest in a defamation action is the protection of the plaintiff's reputation. In Beauharnais v. Illinois, 343 U.S. 250 (1952), a "group libel" case, the United States Supreme Court sustained an Illinois criminal libel law prohibiting the publishing, selling, or exhibiting in public any publication that "portrays depravity, criminality, unchastity, or lack of virtue of a class of citizens, of any race, color, creed[,] or religion, [or which] exposes the citizens of any race, color, creed[,] or religion to contempt, derision, or obloquy or which is productive of breach of the peace or riots." Although not explicitly overruled, the broad holding in Beauharnais is most likely limited by the expansive First Amendment protection provided in New York Times v. Sullivan, 376 U.S. 254 (1964). In Sullivan, the Court held that media defendants are protected in news coverage of public officials absent a showing of "actual malice." Defamation cases since the Sullivan decision, however, appear to have expanded a plaintiff's civil recovery rights. In Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974), the United States Supreme Court held that a private person may recover damages without meeting the Sullivan "actual malice" standard. Further, in Dun & Bradstreet, Inc. v. Greenmoss Builders, 472 U.S. 749 (1985), the Court held that defamation involving a private plaintiff suing a non-media defendant for publishing information on an issue of private concern is not held to the Sullivan standard. The majority stated that "not all speech is of equal First Amendment importance." In addition, the Court distinguished between fully protected speech and lower-level speech, the determining factor being whether the expression focused on issues of public concern or purely private matters.

In judicial scrutiny based on rationality review, the Court inquires whether (1) the state has a legitimate state interest and (2) whether the law is rationally related to that legitimate state interest.
the Court's treatment of the "fighting words" doctrine and explains why it is an unprotected category.126

a. The "Fighting Words" Exception

In R.A.V.,127 the Minnesota Supreme Court construed the St. Paul bias-motivated crime ordinance to prohibit those expressions that constitute "fighting words" within the meaning of Chaplinsky v. New Hampshire.128 The United States Supreme Court accepted the Minnesota Supreme Court's construction because it must defer to a state's interpretation of its own statute.129 The United States Supreme Court, however, concluded that the ordinance prohibited protected expression of undesirable ideas, and was, therefore, facially unconstitutional.130

In Chaplinsky, the United States Supreme Court determined that "fighting words" fell outside First Amendment protection because such expression constitutes "utterances that are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefits that may be derived from them is clearly outweighed by the social interest in order and morality."131 The United States Supreme Court also stated that the First Amendment protects the right to advocate action in furtherance of one's thoughts, so long as the advocacy is not directed to and likely to incite imminent acts of lawlessness.132

The limitation of an individual's expressive rights under the "fighting words" doctrine manifests the Court's concern that ideas contained in such expression may lead to an imminent breach of the peace.133 For example, in Cantwell v. Connecticut,134 the Court stated:

126. See infra text accompanying notes 127-145.
128. 315 U.S. 568 (1942).
130. Id. An earlier hate speech case that has been overruled by the R.A.V. decision is Vietnamese Fishermen's Ass'n v. Knights of the K.K.K., 543 F. Supp. 198, 208 (S.D. Tex. 1982) (holding that "the threat of violence which defendants communicated through their military activities is precisely such an irrefutable and dangerous 'communication' that it resembles the use of 'fighting words'.").
131. Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942). The Court in Chaplinsky defined fighting words as "those which by their very utterance inflict injury or tend to incite an immediate breach of the peace." Id.
133. Chaplinsky, 315 U.S. at 572.
134. 310 U.S. 296 (1940).
There are limits to the exercise of [First Amendment] liberties. The danger in these times from the coercive activities of those who in the delusion of racial or religious conceit would incite violence and breaches of the peace in order to deprive others of their equal right to the exercise of their liberties, is emphasized by events familiar to all. These and other transgressions of those limits the States appropriately may punish.\(^{135}\)

Decisions since *Chaplinsky* and *Cantwell*, however, reflect the Court’s desire to limit the broad implications of the “fighting words” doctrine and to recognize the potential social value in statements that might come under the definition of “fighting words.”\(^{136}\) For example, in *Terminiello v. Chicago*,\(^ {137}\) the Supreme Court overturned a municipal ordinance that prohibited conduct that “stirs the public to anger, invites dispute, brings about a condition of unrest or creates a disturbance.”\(^ {138}\) The Court stated:

A function of free speech under our system of Government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea.\(^ {139}\)

The strong language of *Terminiello* indicates that the Court narrowed the broad *Chaplinsky* “fighting words” standard by recognizing that a certain amount of provocative and challenging speech is protected.\(^ {140}\)

In more recent cases, the Court further limited *Chaplinsky* by conducting a more critical examination of the audience, the results of the speech, and the wording of the statute.\(^ {141}\) For example, in *Cohen v. California*,\(^ {142}\) the Court overturned the defendant’s conviction for breach of the peace, stating that while some unwilling audience members may have been briefly exposed to the expressive opinion “Fuck the

\(^{135}\) Id. at 310.

\(^{136}\) *See Nowak & Rotunda, supra* note 92, at 1059.

\(^{137}\) 337 U.S. 1 (1949),reh’g denied, 337 U.S. 934 (1949).

\(^{138}\) Id. at 3.

\(^{139}\) Id. at 4.

\(^{140}\) *Nowak & Rotunda, supra* note 92, at 1059.

\(^{141}\) Id. at 1061.

draft" printed on the defendant's jacket, the "offensive" language alone could not justify his conviction.\textsuperscript{143}

The result appears to be that the doctrine has not been explicitly overruled, but the Court will carefully scrutinize any convictions resulting from speech construed to be "fighting words."\textsuperscript{144} The practical result is that any statute attempting to proscribe expression under the "fighting words" doctrine is required to satisfy strict-scrutiny judicial review.\textsuperscript{145}

b. Laws Impacting Speech Must Satisfy Strict-Scrutiny Review

Generally speaking, because content-based regulations significantly infringe on an individual's First Amendment expressive freedoms, such regulation can be upheld only if the legislation survives strict-scrutiny judicial review.\textsuperscript{146} In short, the government must show that the regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve this interest.\textsuperscript{147} The first part of strict-scrutiny judicial review requires that the government demonstrate that the regulation serves a compelling interest, not merely a legitimate, important, or even substantial concern.\textsuperscript{148} The second element the government must satisfy is that the regulation be narrowly tailored to further the interest.\textsuperscript{149} In other words, the law must be carefully drafted to

\textsuperscript{143} Id. at 22.

\textsuperscript{144} See Nowak & Rotunda, supra note 92, at 1062.

\textsuperscript{145} See e.g., R.A.V. v. City of St. Paul, 112 S. Ct. 2538, 2542 (1992), in which the Court was bound by the lower court's construction that the St. Paul ordinance reached only expression that constituted "fighting words." Id. Nevertheless, the Court found that the specific kinds of "fighting words" targeted in the ordinance was protected expression under the First Amendment; thus, the ordinance was subjected to and failed to satisfy strict-scrutiny judicial review. Id. at 2550.

\textsuperscript{146} See R.A.V., 112 S. Ct. at 2549.

\textsuperscript{147} See Gunther, supra note 1, at 608-09.

\textsuperscript{148} Id. In Widmar v. Vincent, 454 U.S. 263 (1981), a state university made its facilities available to registered student groups, but refused to allow a student religious group to meet anywhere on the campus. Id. This refusal was part of a general policy that banned the use of university facilities "for purposes of religious worship or religious teaching." Id. at 265. The Widmar Court held that the ban violated the religious group's First Amendment right of free speech, because the University could not show a compelling state interest. Id. at 276.

\textsuperscript{149} See Gunther, supra note 1, at 608-09. In Boos v. Barry, 485 U.S. 312 (1988), a Washington, D.C. regulation designed to protect the dignity of foreign
avoid regulating activity that is permissible under the First Amendment.

A third element that the United States Supreme Court has sometimes used is a "least restrictive means" test.\(^{150}\) This test acknowledges that the legislature may have a compelling interest, but "that purpose cannot be pursued by means that broadly stifles fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in light of less drastic means for achieving the same basic purpose."\(^{151}\) Thus, the Court occasionally requires that the legislature use means that are the "least restrictive" when silencing speech.\(^{152}\)

2. Treatment of Expressive Conduct: The O'Brien Guidelines

Certain forms of "expressive conduct,"\(^ {153}\) or speech intended to convey a message, are protected under the First Amendment.\(^ {154}\) The apparent significance of viewing substantive penal hate crime law as regulation of expressive conduct instead of pure expression is that the government has greater interest in regulating the conduct elements of the expression, so long as the state's interest is unrelated to the speaker's intended message.\(^ {155}\)

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150. See Nowak & Rotunda, supra note 92, at 952.
152. See Nowak & Rotunda, supra note 92, at 952. The "least restrictive means" test has been viewed as inconsistent with the "narrowly-tailored" requirement. See Ward v. Rock Against Racism, 491 U.S. 781 (1989), reh'g denied, 492 U.S. 937 (1989). See also supra note 117.
153. "Expressive conduct" is defined as conduct that combines speech and non-speech elements. See United States v. O'Brien, 391 U.S. 367, 376 (1968), reh'g denied, 393 U.S. 900 (1968) (setting forth guidelines to determine the constitutionality of expressive conduct).
154. See Spence v. Washington, 418 U.S. 405, 410-11 (1974) (stating that non-verbal conduct is sufficiently expressive if the actor intended "to convey a particularized message" and "the likelihood was great that the message would be understood by those who viewed it"). See also Stromberg v. California, 283 U.S. 359 (1931) (displaying a red flag is speech protected by the First Amendment).
155. See Gunther, supra note 1, at 1224.
For example, in United States v. O'Brien, the defendant was charged with burning his draft card in protest of the Vietnam War, thereby violating a draft law making it a crime "to knowingly destroy [or] mutilate" a draft card. The United States Supreme Court upheld the law because conduct combining "speech" (opposing the war) and "non-speech" (burning the draft card) could be regulated when it complied with four guidelines. First, the government must show that it has constitutional authority to regulate the conduct. Second, the regulation must further an important or substantial governmental interest. Third, the regulation must be unrelated to the suppression of free expression. Finally, the incidental restriction on the individual's expressive rights must be unrelated to the suppression of free expression.

The government satisfied the O'Brien guidelines in Clark v. Community for Creative Non-Violence. In Clark, a group of demonstrators sought to sleep overnight in a national park to protest alleged governmental indifference to the homelessness problem. The United States Supreme Court upheld the regulation banning sleeping in public parks, despite the demonstrators' contention that their acts constituted symbolic expression that dramatized the plight of the homeless.

Nevertheless, courts have overturned a number of convictions because the government could not satisfy the O'Brien guidelines. In Shuttlesworth v. Birmingham, the United States Supreme Court held that protected expressive activity included the right to peacefully demonstrate. In addition, a federal appellate court in Collin v. Smith upheld the
right of neo-Nazis to march in front of government buildings.\textsuperscript{169}

Moreover, the United States Supreme Court provided solid First Amendment protection to an individual’s right to burn the American flag. In \textit{Texas v. Johnson},\textsuperscript{170} the United States Supreme Court upheld an individual’s right to burn the American flag.\textsuperscript{171} In \textit{Johnson}, the Court invalidated a statute that criminalized the burning of an American flag and held that “the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.”\textsuperscript{172} The \textit{Johnson} Court determined that the \textit{O'Brien} guidelines did not apply, since Texas was pursuing an interest directly related to the suppression of free expression.\textsuperscript{173} It therefore applied a strict-scrutiny judicial review, and the statute was struck down.\textsuperscript{174} The Court stated that “[t]he First Amendment does not guarantee that other concepts virtually sacred to our Nation as a whole—such as the principle that discrimination on the basis or race is odious and destructive—will go unquestioned in the marketplace of ideas.”\textsuperscript{175} Similarly, in \textit{United States v. Eichman},\textsuperscript{176} a more recent flag-burning case, the Court determined that the Flag Protection Act\textsuperscript{177} enacted in response to \textit{Johnson} was content-based and did not satisfy strict-scrutiny judicial review.\textsuperscript{178}

In sum, the Court has applied the \textit{O'Brien} guidelines on a case-by-case basis, leading to mixed results. The trend, however, seems to indicate that the judicial standard is a fairly narrow one. Yet, when the Court cannot find a reasonably expressive element in conduct, such activity will not be afforded First Amendment protection.\textsuperscript{179} The next section

\begin{enumerate}
\item Id. at 1210.
\item 491 U.S. 397, 414 (1989).
\item Id. at 418.
\item Id. at 414.
\item Id. at 407.
\item Id. at 412, 420.
\item 110 S. Ct. 2404 (1990).
\item \textit{Eichman}, 110 S. Ct. at 2409.
\item For a discussion of the Court’s treatment of conduct that lacks an expressive element, see \textit{infra} text accompanying notes 180-206.
\end{enumerate}
discusses the Court's treatment of conduct that, as a whole, lacks expressive elements.

3. Treatment of Conduct Lacking Expressive Elements: Violence and Other Discriminatory Acts Are Not Constitutionally Protected

The Court has been generally reluctant to give First Amendment protection to any act that may incidentally convey a message. Thus, the Court has allowed conduct to be regulated, even if it is initiated by speech. For example, in Cox v. Louisiana, the Court upheld a statute that banned the picketing of any courthouse because the statute regulated the conduct of picketing, rather than any bona fide expression. The Court reasoned that the presence of speech did not prevent the state from regulating the defendant's conduct in order to "vindicate important interests of society." The Court also stated that "it ha[d] never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed."

The reason for providing narrow, if any, protection to conduct that lacks expressive elements stems from the concern that broad protection would permit violent acts. With substantive penal hate crime prior to R.A.V. and Mitchell, constitutional scholars indicated that Congress or the states may constitutionally criminalize hate crimes and punish such crimes more severely and vigorously than simple acts of vandalism. Further, these scholars stated that the hate or terrorism element of these crimes allows Congress or the states to further punish the perpetrator because the hate aspect of

182. Id. at 563.
183. Id. at 564.
184. Id. at 563. But see Edwards v. South Carolina, 372 U.S. 229 (1963) (providing sweeping First Amendment protection to similar activity as in the Cox case).
these crimes affects both the harm and the likelihood of repeat offenses.\textsuperscript{187}

The Court stated in several cases that although peaceful acts, such as picketing\textsuperscript{188} and demonstrations,\textsuperscript{189} are protected activity, "[t]he First Amendment does not protect violence."\textsuperscript{190} In \textit{NAACP v. Claiborne Hardware Co.},\textsuperscript{191} NAACP members launched a boycott against a group of white merchants to secure compliance with equality and racial justice.\textsuperscript{192} The boycott resulted in threats of reprisal and violent conduct.\textsuperscript{193} The Court distinguished between the boycott's violent and non-violent conduct and held that only the non-violent elements were entitled to First Amendment protection.\textsuperscript{194} In addition, in \textit{Boos v. Barry},\textsuperscript{195} the Court held that "where demonstrations turn violent, they lose their protected quality as expression under the First Amendment."\textsuperscript{196}

With regard to substantive penal hate crime legislation, prosecutors have successfully argued that these laws regulate the perpetrator's violent conduct, not his or her thoughts or speech. In \textit{People v. Grupe},\textsuperscript{197} a New York appellate court upheld a substantive penal hate crime law, stating, "[t]he statute does not attempt to prohibit bigotry itself. The individual's freedom to think, and indeed, speak, publish[, or broadcast views on the subjects of race, religion[, or ethnicity are not regulated by this [hate crime] law. Violent conduct is what is being regulated."\textsuperscript{198}

Violent conduct may also be outside First Amendment protection because such acts are not normally intended to ex-

\begin{itemize}
\item 187. \textit{Id.}
\item 188. \textit{See} Thornhill v. Alabama, 310 U.S. 88 (1940) (holding that a statute applied to ban all picketing was unconstitutional).
\item 189. \textit{See} Shuttlesworth v. Birmingham, 394 U.S. 147 (1969) (holding that a charge of parading without a permit in violation of a city ordinance is unconstitutional).
\item 191. \textit{Id.}
\item 192. \textit{Id.} at 889. The boycott occurred after the NAACP failed to receive a satisfactory response to African-American citizens' demand for racial equality and integration. \textit{Id.}
\item 193. \textit{Id.} at 916.
\item 194. \textit{Id.} at 918.
\item 195. 485 U.S. 312 (1988).
\item 196. \textit{Id.} at 331 (quoting Grayned v. City of Rockford, 408 U.S. 104. 116 (1972)).
\item 198. \textit{Id.} at 818.
\end{itemize}
press a message. For example, in *Spence v. Washington*, the Court held that activity must intend to express a particular message, or it will not fall within First Amendment protections. In addition, constitutional scholars have stated that even if conduct constitutes a "political act" such as assassination, the First Amendment does not offer protection for criminal acts committed with political motives. Outside the hate crime context, the United States Supreme Court held that the act of excluding persons of color from private institutions is not protected under the First Amendment, despite the members' protected beliefs of desiring the exclusion of others based upon race.

As the foregoing discussion indicates, the United States Supreme Court generally provided the most protection to expression construed as speech. Thus, any legislative attempts to regulate such expression must fall under a categorical exception (fighting words, defamation, or obscenity) or survive strict-scrutiny judicial review. "Expressive conduct," or conduct that is a substitute for speech, is afforded less protection, so long as the regulation is not suppressing the content of the message; any challenged regulation must be scrutinized under the guidelines set forth in *United States v. O'Brien*. Violent activity, or conduct lacking expressive elements, is not protected under the First Amendment, and the Court has allowed the government to regulate these activities.

In sum, the constitutional issues raised in United States Supreme Court jurisprudence preceding the *R.A.V.* case focused on the scope and limits of expression and expressive activity, as well as the requirement that substantive penal hate crime laws comply with due process. The *R.A.V.* case is important because it affirms that First Amendment principles protect expression. The *R.A.V.* decision extended protection much further than previous cases, because it implied that all forms of content-based regulations, including the

200. Id. at 409.
201. See ROTUNDA & NOWAK, TREATISE, supra note 186, at 351-52.
204. For a more elaborate discussion of this issue, see supra text accompanying notes 180-204.
205. See generally supra text accompanying notes 76-110.
"categorical exceptions," need to satisfy strict-scrutiny judicial review. The Mitchell case clarified some of the unanswered First Amendment questions posed in R.A.V., but the Mitchell holding is probably limited to the constitutionality of hate crime penalty-enhancement statutes. Other avenues of ensuring the constitutionality of substantive penal hate crime legislation must be explored.

III. The Problem Facing Legislators: Substantive Penal Hate Crime Legislation Must Comply With R.A.V., Mitchell, and Due Process Principles

Assuming that there exists a compelling need for substantive penal hate crime legislation, legislators currently face a number of problems that need to be resolved. First, legislators must grasp the First Amendment principles set forth in the R.A.V. and Mitchell decisions to ensure the constitutionality of their substantive penal hate crime laws. Specifically, legislators need to recognize the constitutional difference between regulating speech and conduct.

Second, legislators must recognize that it is difficult to discern whether a law is regulating speech or conduct. "Expressive conduct," which falls somewhere between speech and conduct, is a "gray area" that must be understood and considered under the guidelines pronounced in United States v. O'Brien. Although expressive conduct was not addressed by the R.A.V. majority, this area of First Amendment jurisprudence is still a critical consideration for legislators.

Third, issues not addressed by the majority in R.A.V., but requiring legislative attention, are due process principles threatened by imprecisely drafted substantive penal hate crime legislation. Specifically, substantive penal hate crime

206. See infra text accompanying notes 221-245.
207. On a practical level, the newness and scope of the R.A.V. and Mitchell decisions spark legislative concerns. Because these cases were decided recently, legislators nationwide are uncertain how these decisions affect their current substantive penal hate crime laws. See supra note 13 and accompanying text.
209. The R.A.V. majority was not required to construe the St. Paul ordinance as expressive conduct, because the Minnesota Supreme Court's interpretation was that the law regulated pure expression. R.A.V. v. City of St. Paul, 112 S. Ct. 2538, 2542 (1992).
legislation must be carefully drafted to withstand vagueness and overbreadth concerns. In the case of procedural penal hate crime provisions, however, the Mitchell Court decided that penalty-enhancement statutes were not unconstitutionally overbroad.

IV. ANALYSIS: THE PRINCIPLES SET FORTH IN R.A.V., DUE PROCESS MANDATES, AND THE MITCHELL DECISION

A. The R.A.V. Decision: Facts, Analysis and Principles Set Forth

The R.A.V. case is integrally related to the constitutional problems posed in substantive penal hate crime legislation because it forces legislators to sort out what activity they are targeting and sets forth principles of what is permissible under these laws. It is therefore critically important to understand the R.A.V. opinion so that substantive penal hate crime laws comply with the decision. This section discusses the facts and decision of the R.A.V. case and extracts the principles legislators must apply to current and prospective substantive penal hate crime legislation.

1. R.A.V. Facts and Procedural Posture

R.A.V. and several other teenagers taped two pieces of a broken chair together, forming a cross, entered an African-American family's yard, and burned the cross on the lawn. Local prosecutors brought disorderly conduct charges against R.A.V., who was the defendant and petitioner, after he was arrested and accused of burning the cross on the family's lawn. For the first time, St. Paul prosecutors used a bias-motivated hate crime ordinance, which made it an offense to place on public or private property a symbol that one knows arouses anger on the basis of race, religion, or gender. Specifically, the challenged ordinance, Minnesota Legislative Code Section 292.02, provided:

210. For an overview regarding an individual's due process rights, see supra text accompanying notes 92-108. See infra text accompanying notes 296-304 for additional analysis of due process issues.
212. R.A.V., 112 S. Ct. at 2541.
213. Id.
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.215

The defendant moved to dismiss this count, alleging the St. Paul ordinance was substantially overbroad and impermissibly content-based, and therefore facially invalid under the First Amendment.216 The trial court granted his motion, but the Minnesota Supreme Court reversed, rejecting the defendant’s overbreadth claim, because as construed in prior Minnesota cases, the modifying phrase “arouses anger, alarm[,] or resentment in others” limited the reach of the ordinance to “fighting words” and thus reached only expression “that the [F]irst [A]mendment does not protect.”217

The Minnesota Supreme Court also concluded that the ordinance was not impermissibly content-based, because, in its view, “the ordinance [was] a narrowly tailored means toward accomplishing the compelling governmental interest in protecting the community against bias-motivated threats to public safety and order.”218 The United Supreme Court granted certiorari219 and reversed the Minnesota Supreme Court’s judgment.220

The R.A.V. case announces a number of significant principles relevant to substantive penal hate crime legislation, because the holding broadens an individual’s expressive freedom and limits the government to impose content-based regulations. The following section fully explains R.A.V.’s principles.

2. R.A.V. Holding: Content-Based Regulation on Speech Is Presumptively Invalid

The majority opinion, written by Justice Scalia, stated that even if all of the expression reached by the St. Paul ordinance was proscribable under the “fighting words” doctrine,

216. R.A.V., 112 S. Ct. at 2541.
217. Id.
218. Id. at 2542.
220. Id. at 2541, 2550.
the ordinance was nonetheless facially unconstitutional because it prohibited otherwise protected speech solely on the content of the subjects the speech addressed.\textsuperscript{221} The heart of Justice Scalia's opinion lies in an "underbreadth" analysis; i.e., the St. Paul ordinance was unconstitutional because it did not criminalize all fighting words.\textsuperscript{222} Rather, the ordinance singled out certain expression that causes anger or resentment on the basis of race, gender, or other protected status.\textsuperscript{223}

The Court in \textit{R.A.V.} then announced that all content-based regulations are presumptively invalid.\textsuperscript{224} The Court conceded that although its past decisions held that fighting words, obscenity, and defamation were categories "not within the area of constitutionally protected speech," this statement must be placed into context.\textsuperscript{225} Essentially, the Court clarified that fighting words, obscenity, and defamation are not categories of speech that are entirely invisible to the Constitution.\textsuperscript{226} These areas may be regulated because of their constitutionally proscribable content, so long as the content discrimination is unrelated to the distinct message contained in the expression.\textsuperscript{227}

For example, the government may proscribe libel, but it may not make further content discrimination of proscribing only libel critical of the government.\textsuperscript{228} Despite earlier U.S. Supreme Court decisions indicating otherwise,\textsuperscript{229} the majority disagreed that fighting words have at most a \textit{de minimis} expressive content, or that their content is in all respects "worthless and undeserving of constitutional protection."\textsuperscript{230} The majority stated that earlier U.S. Supreme Court decisions did not say that fighting words were judged to constitute "\textit{no} part in the expression of ideas."\textsuperscript{231} Rather, the ma-

\begin{itemize}
\item \textsuperscript{221} \textit{Id.}
\item \textsuperscript{222} \textit{Id.} at 2541.
\item \textsuperscript{223} \textit{Id.} at 2547-49.
\item \textsuperscript{225} \textit{Id.} at 2543.
\item \textsuperscript{226} \textit{Id.} at 2541.
\item \textsuperscript{227} \textit{Id.}
\item \textsuperscript{228} \textit{Id.}
\item \textsuperscript{229} \textit{See, e.g.,} Roth v. United States, 354 U.S. 476, 483 (1957) ("obscenity"); Beauchainais v. Illinois, 343 U.S. 250, 266 (1952) ("defamation"); Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 ("fighting words").
\item \textsuperscript{231} \textit{Id.} at 2544.
\end{itemize}
majority clarified the "fighting words" principle, stating that they constitute "no essential part of any exposition of ideas." 232

3. Regulation Affecting Pure Expression Upheld Only if It Satisfies Strict-Scrutiny Judicial Review

The R.A.V. majority appears to have severely limited regulation of certain categories of speech. 233 The Court adopted a balancing approach, with a heavy burden on the government to satisfy strict-scrutiny judicial review. 234 Possible in theory but difficult in reality, legislation that infringes on a fundamental right may nevertheless be upheld if the government can demonstrate that the law is narrowly drafted to further a compelling state end. 235

The difficulty of overcoming strict-scrutiny judicial review was apparent in R.A.V. 236 The Court stated that it is the responsibility, if not the obligation, of diverse communities to confront bias-motivated hate messages. 237 The manner of confrontation, however, may not consist of selective limitations upon speech. 238 The Court indicated that the point of the First Amendment is that majority preferences be expressed in ways other than content-based regulation. 239

In applying strict-scrutiny judicial review, the Court acknowledged that St. Paul had a compelling interest; i.e., ensuring that members of the community were free from discriminatory intimidation, but that the means employed—an ordinance that regulated based upon content and viewpoint—went too far. 240 In other words, the government failed to meet the "narrowly tailored" requirement, so the ordinance was struck down. 241

The majority remarked that "St. Paul has sufficient means at its disposal to prevent such behavior without ad-

232. Id. Although the R.A.V. case was a nine-to-zero decision, the concurring justices resoundingly criticized the majority's approach.
233. Id. at 2545.
234. Id. at 2549-50.
235. For a discussion of strict-scrutiny judicial review, see supra note 119.
237. Id. at 2548.
238. Id.
239. Id.
240. Id. at 2550.
ding the First Amendment to the fire."\textsuperscript{242} The Court pointed out that St. Paul could have charged the defendant with terrorist threats, arson, or criminal damage to property instead of using the expression-regulating ordinance.\textsuperscript{243} These other available avenues appear to be important to the Court, because penalizing cross-burning under an arson statute, for example, demonstrates a less restrictive means of getting the same results; i.e., punishing the defendant's behavior, without implicating the First Amendment.\textsuperscript{244} In other words, even though the legislature has a compelling interest in protecting minorities from discrimination, the ordinance failed because St. Paul could not demonstrate that its ordinance was the least restrictive means of combating St. Paul's hate crime problem. Thus, the St. Paul ordinance was struck down because the ordinance's content and viewpoint discrimination were not reasonably necessary to achieve the city's compelling interests in ensuring the civil rights of racial minorities and other protected groups.\textsuperscript{245} As noted in the next

\begin{itemize}
\item \textsuperscript{242} Id.
\item \textsuperscript{243} Id. at 2541 n.1.
\item \textsuperscript{244} For a discussion of the "least restrictive means" test, see supra text accompanying notes 150-152.
\item \textsuperscript{245} Although all the justices in \textit{R.A.V.} voted to strike down the ordinance, four concurring justices bitterly opposed the majority's rationale and analysis. Justice White wrote that the ordinance at issue was fatally overbroad, "because it criminalizes not only unprotected expression but expression protected by the First Amendment." \textit{R.A.V.}, 112 S. Ct. at 2550 (White, J., concurring). Justice White wrote that the Court's new "underbreadth" creation served no desirable function. \textit{Id.}

Justice Blackmun agreed that the ordinance should be invalidated because of overbreadth. \textit{Id.} at 2561 (Blackmun, J., concurring). He argued, however, that no First Amendment values were being compromised by a law "that prohibits hoodlums from driving minorities out of their homes by burning crosses on their lawns [and causes] great harm in preventing the people of St. Paul from specifically punishing the race-based fighting words that so prejudice their community." \textit{Id.}

Justice Stevens felt that the ordinance was overbroad but not invalid, and believed in upholding the content-based approach, criticizing the majority for its near-absolute ban on content-based regulation. \textit{Id.} at 2550, 2562 (Stevens, J., concurring). He stated that even though the ordinance singled out threats based on race, color, creed, religion, or gender, the regulation was nevertheless justifiable, because those kinds of threats cause more harm to society and individuals than others. \textit{Id.} at 2565. Justice Stevens argued that content-based distinctions are an inevitable and indispensable aspect of First Amendment law and that the Court must consider the content and context of regulated speech and the scope of restrictions. \textit{Id.} at 2567. In addition, he noted that the St. Paul ordinance regulated low-value speech, or "fighting words," and only expressive conduct, not written or spoken words. \textit{Id.} at 2569. Justice Stevens
section, however, the Court announced certain exceptions where content-based regulations are appropriate, keeping alive the possibility of substantively proscribing hate conduct.

4. **R.A.V. Enumerated Exceptions Where Content-Based Regulation Is Permissible**

The majority in *R.A.V.* provided two ad hoc exceptions that allow content-based regulation,\(^246\) because the Court was satisfied that the exceptions would not involve the suppression of protected expression.\(^247\) The Court conceded that the prohibition against content discrimination is not absolute.\(^248\) The majority explained that the applicable standards are different in the context of proscribable speech than in the area of fully protected speech.\(^249\) It explained that content discrimination among various classes of proscribable speech often does not pose a threat to drive certain ideas or viewpoints from the marketplace.\(^250\)

The first exception allows content-based regulation if the regulation is neutral enough to support exclusion of the entire class of speech from protection.\(^251\) The second exception allows content-based regulation for expression with “secondary effects” with no reference to the content of the speech.\(^252\) The Court stated that the “secondary effects” could stem from conduct elements of the expression.\(^253\)

The significance of the *R.A.V.* exceptions for substantive penal hate crime laws is that they allow hate crime legislation in compliance with the Court’s guidelines. The *R.A.V.* exceptions setting forth the Court’s guidelines are explained below.

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\(^*\) contended that the defendant “is free to burn a cross or express racial supremacy, so long as the burning is not so threatening and so directed at an individual as to by its very execution inflict injury.” *Id.* at 2571.


\(^247\) *Id.* at 2547.

\(^248\) *Id.*

\(^249\) *Id.* at 2545.

\(^250\) *Id.* (citing Simon & Schuster v. Members of N.Y. State Crime Victims Bd., 112 S. Ct. 508 (1991)).


\(^252\) *Id.* at 2546. For an overview of “secondary effects” theory, see *supra* note 117.

\(^253\) *Id.*
a. Regulation That Is Subject- and Viewpoint-Neutral

Under the first R.A.V. exception, "[w]hen the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable, no significant danger of idea or viewpoint discrimination exists."254 The fatal language in the St. Paul ordinance was that it prohibited reprehensible expression based on race, color, creed, religion, or gender.255 The R.A.V. majority stated that the ordinance not only constituted content-based regulation, but also viewpoint regulation.256 The Court noted that the unmodified words contained in the ordinance clearly made the ordinance apply only to fighting words that insult or provoke violence, on the basis of race, color, creed, religion, or gender, constituting discrimination based on an unfavorable viewpoint.257 The Court therefore rejected the ordinance, stating that "the First Amendment does not permit St. Paul to impose special prohibitions on those speakers who express views on disfavored subjects."258 The significance of this exception to substantive penal hate crime laws is that if the aim of the legislation clearly indicates that its purpose is to regulate violent conduct for the purpose of ensuring that all individuals have the right to be free from harm, it should be constitutional.

b. Regulation That Proscribes Conduct, Not Speech

The second exception applies when "the subclass happens to be associated with particular ‘secondary effects’ of the speech, so that the regulation is ‘justified without reference to the content of the . . . speech . . . .’"259 In other words, a particular content-based sub-category of a proscribable class of speech can be swept up incidentally within the reach of a statute directed at conduct rather than at speech.260 Addi-
tionally, the Court stated that "[w]here the government does
not target conduct on the basis of its expressive conduct, acts
are not shielded from regulation merely because they express
a discriminatory idea or philosophy." Rather, a law that
regulates discriminatory conduct may in fact be constitu-
tional. Thus, where a regulation is devised to target vio-
lar en conduct, not speech, it would be constitutional. In sum,
any regulation of speech from a carefully drafted statute
aimed at conduct would be incidental and should withstand
constitutional muster.

Although not specifically enumerated as an exception,
the Court in R.A.V. left open the possibility of regulating as-
saults and violent threats. Using the R.A.V. case as a
guide, the next section analyzes the Court's treatment of
these areas.

c. Regulation That Targets Assaults and Violent
Threats

The R.A.V. majority left open regulation of speech in the
form of assault and threats. The Court stated that the St.
Paul ordinance failed because it singled out offensive speech
and made such expression illegal. In other words, the reg-
ulation improperly regulated content of the expressed
message.

Because the Court said that only purely offensive speech
is protected, it left open the possibility of proscribing physi-
cally threatening acts. Assault and threats may be regulated
for two reasons. First, like "fighting words," violent threats
contain particularly intolerable and socially unnecessary
modes of expressing ideas. Second, assaults and physical
threats should be viewed as conduct if the activity is targeted
at an intended victim and is believed by a reasonable person
in the community to result in physical harm.

262. For an explanation of why conduct lacking an expressive element may
not be protected under the First Amendment, see supra text accompanying
notes 180-204.
263. See supra text accompanying notes 185-196.
266. Id.
267. Id. at 2549. The R.A.V. majority stated that St. Paul failed to single out an especially offensive mode of expression. Id. For example, St. Paul did not
The effect of the Court leaving open the possibility of regulating physically threatening acts is that it remains permissible for legislators to regulate dangerous behavior, even if the perpetrator did not actually physically harm the victim. This is important because the imminent threat of physical harm could be as damaging as actual contact.

B. Additional Constitutional Considerations Not Addressed in R.A.V.: The O'Brien Guidelines and Due Process Requirements

The majority opinion in the R.A.V. decision indicates that speech content is strongly protected under the First Amendment. On the other hand, the R.A.V. decision allows conduct and threatening forms of expression to be regulated. What the majority did not address is whether the activity the defendant engaged in (i.e., burning the cross on the family’s lawn) was expressive conduct rather than speech. The Court apparently was not required to interpret the ordinance as expressive conduct, because the Minnesota Supreme Court construed it to reach only speech. The expressive conduct guidelines enumerated in United States v. O'Brien require that the law avoid regulation based on content, and also that the government show that the regulation is carefully drafted to advance an important or substantial state interest.

The O'Brien guidelines are easier to meet than the requirements of strict-scrutiny. The next section breaks down the O'Brien elements with regard to substantive penal hate crime legislation and analyzes how the government may satisfy these guidelines.

select for prohibition only those fighting words that communicate ideas in a threatening manner. Id. at 2549.

268. Id. at 2542.
270. The R.A.V. Court was limited by the lower court's interpretation of the ordinance, which was construed to regulate pure expression rather than expressive conduct. Id. at 2541.
271. Id.
273. Id. at 377.
274. See Gunther, supra note 1, at 1224.
1. Satisfying the O'Brien Guidelines

Legislation construed to regulate expressive conduct may be upheld if the government satisfies the guidelines set forth in United States v. O'Brien. On the other hand, if the law intends to regulate conduct rather than expressive activity, the government need not satisfy O'Brien because the government would be pursuing interests unrelated to the suppression of free expression.

The O'Brien guidelines apply when a substantive penal hate crime law is construed by a court as regulating "expressive conduct" rather than speech. "[W]hen 'speech and non-speech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the non-speech element can justify incidental limitations on First Amendment freedoms." The key here is that the limitations on conduct must be incidental and not intended to suppress the speaker's message. The court, in such an instance, should carefully review the language of the statute to determine whether it proscribes speech or conduct. If a regulation were construed to proscribe "expressive conduct," the government would be required to demonstrate that the statute adheres to the following guidelines: (1) regulating the conduct is within the constitutional power of government; (2) the regulation furthers an important or substantial government interest; (3) the government interest is unrelated to the suppression of free expression; and (4) the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of the governmental interest. Listed below are the O'Brien elements and descriptions of what the government must demonstrate.

a. The Regulation Must Be Within the Government's Constitutional Power

This element is undoubtedly the easiest to satisfy. All the government needs to show is that it has been granted

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276. For an explanation of why conduct lacking an expressive element is not afforded First Amendment protection, see supra text accompanying notes 180-204.
278. Id. at 377.
constitutional power to regulate the conduct at issue.\textsuperscript{279} Regulating hate crimes falls within the state's police powers under the Tenth Amendment.\textsuperscript{280} Further, it is within the constitutional power of the government to regulate hate crime activity, because of potential for retaliatory activity and civil unrest, which would infect and harm the entire community.\textsuperscript{281} Moreover, recidivism is more likely to occur if hate activity were not deterred by criminal sanctions.\textsuperscript{282}

b. \textit{The Regulation Must Further an Important or Substantial Governmental Interest}

This phrase is analogous to an "ends" inquiry under intermediate-scrutiny judicial review.\textsuperscript{283} This element may be a relatively difficult hurdle to overcome, because the government must justify the value of the regulation. The government, however, need satisfy only one of the two modifying terms. The government must demonstrate that the ends are either "important" or at least "substantial."\textsuperscript{284} The "substantial" standard is easier to meet than the "important" standard because "substantial" has been construed by one constitutional law scholar to mean "plausible but little more."\textsuperscript{285}

\begin{footnotes}
\item[279] Id. at 376. This prong of the \textit{O'Brien} guidelines was adopted, because the Selective Service Act was federal legislation and had to arise from Congress' constitutionally enumerated powers; the \textit{O'Brien} Court stated that the power of Congress to classify and conscript manpower for military service is "beyond question." \textit{Id.}
\item[280] The tenth amendment provides, "the powers not delegated to the United States by the Constitution, nor prohibited by the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X.
\item[281] For a discussion of the serious nature about hate crime activity, see \textit{supra} text accompanying notes 36-48.
\item[282] For discussion of the legislature's concern of hate crime recidivism if not deterred by regulation, see \textit{supra} text accompanying note 187.
\item[283] Intermediate-scrutiny judicial review requires that gender-based classifications serve \textit{important} governmental objectives and also be \textit{substantially related} to achievement of those objectives. See \textit{Gunther}, \textit{supra} note 1, at 605-06. See also, \textit{e.g.}, Craig v. Boren, 429 U.S. 190 (1976) (adopting intermediate-scrutiny judicial review to gender-based classifications).
\item[284] See \textit{Gunther}, \textit{supra} note 1, at 605-06.
\item[285] See John Hart Ely, \textit{Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis}, 88 Harv. L. Rev. 1482 (1975) (arguing that the Court in \textit{O'Brien} placed a trivial functional significance to the critical word "substantial").
\item For an example illustrating the relaxed application of this element, see United States v. \textit{O'Brien}, 391 U.S. 367, 377 (1968), where the Court stated that the issuance of draft card registration certificates was a legitimate and substantial administrative aid in the functioning of a system to locate individuals liable
\end{footnotes}
court, however, would probably not concede such laxity in the use of either term. Therefore, lawmakers must note that the term “important” really should be the standard they need to satisfy. Compared to a strict-scrutiny requirement of a “compelling” end, to demonstrate a “substantial” or “important” interest would be pose a lesser burden on the government. Substantive penal hate crime laws further an important or substantial governmental interest, because they deter potentially illegal and destructive activity brought on by other groups’ retaliatory efforts. Therefore, the government should raise the argument that it be empowered to take affirmative steps to alleviate the hate crime problem.

c. Government’s Interest Must Be Unrelated to the Suppression of the Expressive Content

The government must show that the purpose of the law is not content-based. It must show another reason why it proscribed the behavior “unrelated to the suppression of the expressive content.”286 For example, in United States v. O’Brien,287 the Court stated that the government met this guideline because the unrestrained destruction of draft cards would disrupt the smooth functioning of the Selective Service System.288

Within the substantive penal hate crime context, the governmental interest in preventing the effects of hate crime is unrelated to the suppression of free expression, because its interest in preventing massive violence resulting from the bias-motivated conduct is unrelated to the expression’s content. This point could be bolstered if the statute is worded to proscribe conduct rather than speech. R.A.V., in contrast, contained a content-based ordinance whose purpose related directly to the suppression of the message expressed.289 For that reason, the Court struck down the St. Paul ordinance.

for military training and service. Id. Further, the Court stated that legislation ensuring the continuing availability of issued draft card certificates served a legitimate and substantial purpose in the draft system’s administration. Id.

288. Id. at 386 (1968). But see Dean Alfange, Free Speech and Symbolic Conduct, 1968 SUPREME COURT REV. 1 (1969) (arguing that many members of Congress and the legislative history of the Selective Service Act supported the amendment precisely for the reason that it was designed to combat the burning of draft cards).
The *R.A.V.* majority, however, did not construe the ordinance as reaching expressive conduct,\(^{290}\) and therefore the Court presumably did not need to analyze the *O'Brien* guidelines.

The state also may be able to meet this content-neutral requirement based on a "secondary effects" theory.\(^{291}\) Applying this theory, the state could argue that the purpose of the law is not to regulate one's expressive thoughts. Rather, the law's aim is to preserve the safety and peace of the affected community; therefore, regulating only certain forms of harmful conduct should be permissible.\(^{292}\)

d. **Any Incidental Restriction on First Amendment Rights Must Be No Greater Than Is Essential to the Furtherance of the Governmental Interest**

The *O'Brien* requirement that any incidental restriction of First Amendment rights must be no greater than is essential to the furtherance of the governmental interest serves two functions. First, the term "incidental restriction"\(^{293}\) provides assurance that the regulation is not aimed at regulating content. Second, the phrase "no greater than is essential to the furtherance of the governmental interest"\(^{294}\) serves to scrutinize the "means" of the regulation.\(^{295}\)

There may be incidental restrictions on expression under an *O'Brien* analysis. Within the substantive penal hate crime context, an individual may contend that a statute that regulates bias-motivated conduct is suppressing his or her First Amendment right to publicly express beliefs. The government, however, may demonstrate that any alleged restriction on speech is substantially outweighed by the state's interest in preventing violent retaliatory conduct stemming from the initial bias-motivated incident. A law aimed at punishing harmful conduct should accomplish the government's goals in deterring hate violence. In other words, although the

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290. *Id.* at 2542.
291. For an overview of "secondary effects" theory, see *supra* note 117. For the "secondary effects" discussion in *R.A.V.*, see *supra* text accompanying notes 259-262.
292. For a description of the serious effects of hate crime on victims' physical and psychological well-being, see *supra* text accompanying notes 36-48.
294. *Id.*
295. See *Gunther*, *supra* note 1, at 1224.
government cannot prohibit the individual from thinking or espousing beliefs, it has a compelling interest in preventing harmful conduct that is perpetrated in furtherance of those beliefs. A carefully drafted law should be able to provide a constitutional means for furthering this compelling interest.

In addition to not addressing the O'Brien guidelines in the R.A.V. decision, the Court did not address other critical issues, such as the requirements of avoiding vagueness or overbreadth. These issues remain important to ensure that an individual receives adequate due process protections. The next section discusses ways in which legislators can comply with due process guarantees.

2. Complying with Due Process Requirements: Curing Vagueness and Overbreadth With a Specific Intent Element

Legislators must avoid drafting laws that are unconstitutionally vague or that are overbroad, because such laws infringe on an individual's due process rights. The following discussion suggests that including a specific intent requirement in the statute should remedy these problems.

Both vagueness and overbreadth may be cured in two ways. First, the law must be precisely drafted, specifying what acts are proscribable. Second, the law should include a specific intent element. Specifically laying out what kinds of intentional conduct are proscribed provides the individual with notice and warning that his or her activity may be punished.

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296. See R.A.V. v. City of St. Paul, 112 S. Ct. 2538, 2542 (1992) (stating that it is unnecessary to address whether the St. Paul ordinance was overbroad, because the Court had already decided to strike down the ordinance as facially unconstitutional).

297. For a discussion of due process principles, see supra text accompanying notes 92-108. See infra text accompanying notes 299-304 for additional due process analysis.

298. See supra text accompanying notes 93-108.

299. For an overview of vagueness, see supra text accompanying notes 93-103.

300. For a summary of the problems regarding overbreadth, see supra text accompanying notes 104-108.

301. For an overview of vagueness principles, see supra text accompanying notes 93-103.

302. For a discussion of a specific intent requirement in criminal statutes, see supra text accompanying notes 99-103.

303. For ways to cure vagueness, see supra text accompanying notes 97-103.
duct and specific intent levels are subject to punishment, the law should comply with due process. Examples of how drafters would accomplish overcoming vagueness and overbreadth include modifying the intent element with terms such as "purposefully," "knowingly," or "willfully." 304

C. The Mitchell Decision and Its Underlying Implications for Substantive Penal Hate Crime Legislation

The Mitchell decision is important within the area of substantive penal hate crime legislation, because it indicates that penal statutes are valid means to attack the hate crime problem. Since the statute challenged in the Mitchell case was a procedural penalty-enhancement statute, rather than a substantive regulation, however, the scope of the decision probably does not fully resolve the constitutional problems posed by substantive penal hate crime legislation. This section presents the facts and holdings of the Mitchell case and speculates on its limited applicability to substantive penal hate crime legislation. 305

1. Mitchell Facts and Procedural Posture

Mitchell and a group of young African-American men and boys gathered at an apartment and discussed a scene from the motion picture "Mississippi Burning," in which a white man beat a young African-American boy who was praying. 306 The group moved outside and Mitchell asked them, "Do you all feel hyped up to move on some white people?" 307 Shortly thereafter, a young white boy on the opposite side of the street approached the group. 308 As the boy walked by, Mitchell said, "You all want to fuck somebody up? There goes a white boy; go get him." 309 Mitchell counted to three and then pointed to the boy. 310 The group ran towards the boy.

304. In the federal criminal civil rights statute, the specific intent term is "willfully." 18 U.S.C. § 242 (1988). In California's substantive penal hate crime statute, the terms "willfully" and "knowingly" are elements of the offense. CAL. PENAL CODE § 422.6 (West 1988 & Supp. 1993).

305. See infra text accompanying notes 306-342.


307. Id. (citation omitted).

308. Id.

309. Id. at 2196-97.

310. Id. at 2197.
and beat him severely, rendering him unconscious.\(^{311}\) The boy remained in a coma for four days.\(^{312}\)

A jury convicted Mitchell of aggravated battery, pursuant to Wisconsin Statute Sections 939.05 and 940.19(1m).\(^{313}\) The offense ordinarily carries a maximum sentence of two years' imprisonment, but because the jury found that the Mitchell intentionally selected the victim based upon race, the maximum sentence was increased to seven years under Wisconsin Statute Section 939.645(1)(b).\(^{314}\) That provision enhances the maximum penalty for an offense whenever the defendant "\[i\]ntentionally selects the person against whom the crime . . . is committed . . . because of the race, religion, color, disability, sexual orientation, national origin or ancestry of that person . . . ."\(^{315}\) Mitchell was sentenced to four years' imprisonment.\(^{316}\)

The defendant unsuccessfully sought post-conviction relief at the trial court level.\(^{317}\) Mitchell appealed his conviction and sentence, challenging the constitutionality of Wisconsin's penalty-enhancement provision based upon the First Amendment.\(^{318}\) The Wisconsin Court of Appeals rejected his challenge, but the Wisconsin Supreme Court reversed, holding the statute violated the First Amendment by punishing offensive thought.\(^{319}\) The Wisconsin Supreme Court also rejected the state's contention "that the statute punishes only the "conduct" of [the] intentional selection of the victim."\(^{320}\) According to the Wisconsin Supreme Court, "[t]he statute punishes the [defendant] 'because of' aspect[s] of the defendant's selection, the reason the defendant selected the victim, [and] the motive behind the selection."\(^{321}\) It also reasoned that under the R.A.V. decision, "the Wisconsin legislature


\(^{312}\) Id.

\(^{313}\) Id.

\(^{314}\) Id.


\(^{317}\) Id.

\(^{318}\) Id.

\(^{319}\) Id.


cannot criminalize bigoted thought with which it disagrees.'

The Wisconsin Supreme Court also held the statute was unconstitutionally overbroad. In order to show that Mitchell intentionally selected his victim based upon the victim's protected status, "the State would often have to introduce evidence of the defendant's prior speech, such as racial epithets he may have uttered before the commission of the offense." The use of protected speech, therefore, would have a "'chilling effect' on those who feared the possibility of prosecution for offenses subject to penalty enhancement." In addition, the Wisconsin Supreme Court differentiated anti-discrimination laws because the Wisconsin statute punished the "'subjective mental process' of selecting the victim based on his protected status, whereas anti-discrimination laws prohibit objective acts of discrimination."

The United States Supreme Court granted certiorari because of the importance of the issue and the conflict among state courts on the constitutionality of similar statutes. The Court reversed the Wisconsin Supreme Court's judgment.

The Mitchell case provides some guidance, albeit limited, on the validity of substantive penal hate crime legislation. The following subsection discusses the holding and implications of the Mitchell case.

2. Mitchell Holding: No First Amendment Violation Where Penalty Is Enhanced Upon a Showing of Intentional Selection Based on Race

A unanimous Court concluded that the Wisconsin penalty-enhancement provision did not violate the petitioner's

322. Id. at 2197-98 (quoting Mitchell, 485 N.W.2d at 815).
323. Id. at 2198.
324. Id.
328. Mitchell, 113 S. Ct. at 2198. For examples illustrating the split of authority regarding the constitutionality of hate crime penalty-enhancement statutes, see supra note 14.
330. See infra text accompanying notes 331-342.
First Amendment Rights and was not unconstitutionally overbroad.\textsuperscript{331}

The Court held that "a physical assault is not, by any stretch of the imagination expressive conduct protected by the First Amendment."\textsuperscript{332} The Court stated that "[v]iolence or other types of potentially expressive activities that produce special harms distinct from their communicative impact are entitled to no constitutional protection."\textsuperscript{333}

With regard to the petitioner's challenge that the provision impermissibly punished his protected beliefs, the Court held that judges have traditionally "considered a wide variety of factors bearing on guilt in determining what sentence to impose on the convicted defendant."\textsuperscript{334} The Court stated that the defendant's motive for committing the offense is an important factor to consider during the sentencing phase.\textsuperscript{335} The Court stated that "the First Amendment does not erect a per se barrier to the admission of evidence concerning the defendant's beliefs at the sentencing phase, simply because those beliefs are protected by the First Amendment."\textsuperscript{336} The Court did not disturb the state's decision that "bias-motivated offenses warrant greater maximum penalties across the board," because the "primary responsibility for fixing criminal penalties lies with the legislature."\textsuperscript{337}

In addition, the Court rejected the petitioner's overbreadth claim, holding that the possibility that the statute would have a chilling effect on an individual's free speech rights was too speculative to support striking down the enhancement provision.\textsuperscript{338} The Court also held that "the First Amendment does not prohibit the evidentiary use of speech to establish the elements of a crime or to prove motive or intent."\textsuperscript{339}

The status of substantive penal hate crime legislation, in light of the \textit{Mitchell} decision, has not been fully resolved be-
cause the Mitchell Court upheld a hate crime penalty-enhancement statute.\textsuperscript{340} Mitchell differs from R.A.V. because it is a procedural, rather than substantive, means of attacking the hate crime problem. Thus, the Mitchell decision is probably limited to the permissibility of procedural penal hate crime legislation. The Mitchell case, however, sanctioned the legislature’s justifications to redress the special harms caused by bias-motivated violence\textsuperscript{341} and reiterated that a physical attack is conduct not entitled to First Amendment protection.\textsuperscript{342}

V. PROPOSED GUIDELINES FOR SUBSTANTIVE PENAL HATE CRIME LEGISLATION: TOWARD DEFINING CONSTITUTIONAL PARAMETERS FOLLOWING THE R.A.V. AND MITCHELL DECISIONS

Because the decisions in R.A.V. and Mitchell affect numerous substantive penal hate crime laws nationwide, legislators must understand the holdings of the decisions to ensure the constitutionality of substantive penal hate crime laws. In addition, although not discussed by the majority in R.A.V., legislators must note due process problems, such as vagueness and overbreadth, found in imprecise substantive penal hate crime legislation and should include a specific intent element in current or prospective substantive penal hate crime legislation.

What follows are proposed constitutional guidelines that legislators must consider when scrutinizing substantive penal hate crime legislation. Generally, the law must clearly spell out that certain bias-motivated acts are subject to punishment. Legislative officials should also bear in mind that statutes should be worded to regulate conduct, or at least “expressive conduct,” in order to meet the guidelines set forth in United States v. O’Brien.\textsuperscript{343} Lastly, the proposed guidelines will be applied to a hypothetical set of facts; i.e., a cross-burning during a town parade within a racially diverse community,\textsuperscript{344} to demonstrate how a statute drafted under the

\textsuperscript{340} Id. at 2202.
\textsuperscript{342} Id. at 2199.
\textsuperscript{343} 391 U.S. 367 (1968). See also supra notes 275-295 and accompanying text.
\textsuperscript{344} A public demonstration on city streets would be recognized by the courts as activity conducted within the “public forum.” See GUNTHER, supra
A. Act Element: Does the Law Regulate Violent Conduct, Not Pure Expression?

The first proposed element requires that there be specific discriminatory conduct identified in the regulation. The regulation should clearly lay out specific discriminatory acts. The sanctioning of speech must be avoided, unless the expression could be construed as an assault or violent threat. To determine whether the verbal assault rises to the level of conduct, the court should first review the language of the statute. On reviewing the statute's language, the proposed applicable test should be whether a reasonable person within the community would have felt physically threatened by such behavior.

If the law proscribes speech content, the regulation is subject to strict-scrutiny judicial review. In this event, the state should be prepared to demonstrate two elements. First, the legislative history must indicate that there exists a compelling governmental interest for controlling the hate crime problem. This element may possibly be satisfied by introducing reports and local studies indicating a rapid rise of hate crime activity. Second, the state must show that the regulation is narrowly drafted to meet this interest. If the regulation is carefully drafted to punish only certain forms of intentional discriminatory conduct, this element will also be satisfied.

Because of the usual difficulty in surviving strict-scrutiny review, the government should try to reduce the level of scrutiny required by advocating that the law is content-neutral and is meant to regulate “expressive conduct,” and therefore it only incidentally burdens First Amendment freedoms.
If it is successful, the statute would be subject only to lesser O'Brien judicial scrutiny.\textsuperscript{348}

If a criminal defendant challenged his charge of burning a cross during a parade, the following analysis under the O'Brien guidelines would apply. First, the government should have no problems demonstrating that the regulation of violent activity leading to violent retaliatory activity is within its constitutional power under the Tenth Amendment.\textsuperscript{349} Second, the government may successfully argue that its interest in protecting the entire community from physical harm resulting from violence in retaliation for the public cross burning is an important or substantial interest. Third, the government could show that its interest in preventing a massive display of retaliatory violence imminently following a cross-burning demonstration is not related to the suppression of the individuals' expressive ideas. Fourth, the government could argue that any alleged restriction on First Amendment freedom in regulating such activity as a public cross-burning is both incidental and substantially outweighed by the state's interest in preventing and sanctioning hate conduct that is imminently likely to escalate into massive bloodshed, mirroring the events following the officers' acquittals in the first Rodney G. King trial.\textsuperscript{350}

B. Specific Intent Element: Does the Regulation Expressly Include a Specific Intent Element?

To comply with due process, the second proposed element is that the regulation contain a specific-intent modifier. This may be achieved by including modifying terms such as "intentionally," "purposefully," and "knowingly" immediately preceding the conduct element.\textsuperscript{351}

Applied to the hypothetical, the government would have little problem showing that the defendant's act was inten-
VI. Conclusion

Hate violence is a growing problem that must be controlled and reduced by passing constitutionally appropriate legislation. Legislators need to acknowledge that an individual's expressive freedom is protected by the First Amendment. In short, legislators must limit their substantive penal hate crime regulations to punish only discriminatory violent conduct, not purely offensive speech.

A substantive penal hate crime law that is drafted within the parameters of the proposed guidelines would withstand constitutional tests, because the guidelines require that the legislation regulate intentional conduct toward a selected victim. If the law impacts speech, the regulation would be presumptively invalid, unless it can survive strict-scrutiny judicial review or if the regulation falls under an R.A.V. enumerated exception. If the law regulates conduct containing expressive elements in a content-neutral fashion, the regulation must satisfy the guidelines set forth in United States v. O'Brien.352

The policy of providing substantive penal hate crime legislation that conforms to the proposed guidelines is that the law essentially would function dually as a criminal statute and an anti-discrimination law. These two roles would help ensure that individuals are not physically harmed or assaulted because of their race, ethnicity, religion, gender, sexual orientation, or disability.

The proposed guidelines set forth in this comment resolve the issues many legislators face. The guidelines are constitutionally even-handed, because they accommodate both sides' needs and rights. The guidelines recognize the government's need to vindicate the victims' civil rights, while at the same time avoiding impermissible infringement on an individual's First Amendment interests and due process rights.

The First Amendment protects an individual's freedom to believe whatever he or she wants, and even to express messages in furtherance of those beliefs. However, if such

person intentionally inflicts violent conduct on an identifiable victim because of bigotry, the government must have the means to substantively proscribe such behavior. In other words, although every individual in society is free to hold beliefs of his or her choosing, including bigotry and bias, constitutionally permissible substantive penal hate crime legislation would send a message that egregious hate violence and victimization will not be tolerated.

In the final analysis, community members must educate, build awareness, and gain acceptance of each other to reduce and ultimately eliminate bigotry and intolerance. Until then, carefully drafted substantive penal hate crime legislation is a necessary means to protect every member of society from discriminatory violence.

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