Lynching and Terrorism, Speech and R.A.V.: The Constitutionality of Wisconsin’s Hate Crimes Statute.

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Lynching and Terrorism, Speech, and R.A.V.: The Constitutionality of Wisconsin's Hate Crimes Statute

David Chang*

"[T]he first civil right of every American is to be free of domestic violence."

Richard Nixon1

I. Introduction

Ours is a society with a tradition of diversity. The diversity is a source of richness and strength, a "gorgeous mosaic," as described by Mayor David Dinkins,2 of Native Americans, Europeans, Africans, Asians, Muslims, Jews, Protestants, Catholics, atheists, men and women, heterosexuals and homosexuals.

This diversity has always been accompanied by an ugly side. There is also a tradition in America of hatred and conflict among members of different groups.3 Indeed, there is a tradition of violence

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1 Transcripts of Acceptance Speeches by Nixon and Agnew to the G.O.P. Convention, N.Y. TIMES, Aug. 9, 1968, at A20.


3 See Yvonne L. Tharpes, Comment, Bowers v. Hardwick and the Legitimization of Homophobia in America, 30 HOW. L.J. 537, 543 (1987) ("Despite constitutional safeguards and protections of individual rights, our national history and tradition abound with examples of intolerance, contempt, and hatred for persons whose lifestyles, beliefs, or human condition deviated ever so slightly from the mainstream. Tolerance was apparently, never a strong virtue in America.").

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by the stronger, motivated by hate against the weaker.⁴ As hate motivated violence has characterized our history, it continues to plague our people today. Traditions, both good and bad, are handed down from one generation to the next.⁵

Many states have recognized that hate motivated crimes reflect a special social problem and require specially directed deterrence.⁶ Hate motivated criminals often believe that they are serving some higher justice and promoting the social good by cleansing society of

⁴ Fleeing violence and intimidation inflicted because of their religion, members of different communities from Europe joined native communities, then displaced them through violence and intimidation. Descendants of various European settlers removed members of various African communities from their homes, and enslaved them, through violence and intimidation. See Frances Lee Ansley, Race and the Core Curriculum in Legal Education, 79 CAL. L. REV. 1512, 1521 (1991). The Ku Klux Klan emerged from the formal destruction of slavery, and for a century helped to maintain the old hierarchies, through violence and intimidation. See, e.g., ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863-1877 341-42 (1988). Foner notes the Klan's founding and growth in the late 1860s. "Violence, an intrinsic part of the process of social change since 1865, now directly entered electoral politics. Founded in 1866 as a Tennessee social club, the Ku Klux Klan now spread into nearly every southern state, launching a 'reign of terror' against Republican leaders black and white." Id. at 342; Robert J. Cottrol & Raymond T. Diamond, The Second Amendment: Toward an Afro-Americanist Reconsideration, 80 GEO. L.J. 309, 351 (1991) ("By [January 1868], the Klan's activities had come to include assaults, murder, lynchings, and political repression against blacks, and Klan-like activities would continue and contribute to the outcome of the federal election of 1876 that ended Reconstruction.").


⁶ For elaboration on reasons that states might favor the special criminalization of hate motivated crimes, see infra text at 158-68.
"bad" people who simply do not belong. By the lights of the hate motivated criminal, the "good" people of society act rightly against the "bad." Indeed, hate motivated criminals may feel they are not committing crimes at all. Because history suggests that the problem is otherwise intractable, it is hardly unreasonable for a state to conclude that something more than the threat of an ordinary assault statute might be needed to grab the attention of individuals prone to hate motivated violence. It is hardly unreasonable for a state to conclude that the threat of specially directed punishment for hate motivated violence is necessary to inform these potential criminals that the "good people" of society have no license to victimize the "bad." Wisconsin, for example, has enacted a statute that provides increased penalties for the commission of violent (and other criminal) acts against persons when a jury determines beyond a reasonable doubt that a defendant "[i]ntentionally select[ed] the person against whom the crime . . . is committed . . . because of the actor’s belief

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7 America’s neo-Nazi Skinheads, and Klansmen represent the extreme pole on a continuum of people who might be motivated by hate to commit violent crimes. Their views have been characterized as a "morality of sheer hatred." MARK S. HAMM, AMERICAN SKINHEADS: THE CRIMINOLOGY AND CONTROL OF HATE CRIME 3 (1993). In 1988, one skinhead defined a "skinhead" to a national television audience: "What makes a skinhead? Attitude. White power. Cause Niggers suck. Niggers and Jews. They’re half monkeys. They should all be killed." Id. at 54. Furthermore, "evidence suggests that the number of racist skinheads in the [United States] has been growing at a spectacular rate." Id. at 11. Tom Metzger, the leader of the White Aryan Resistance, began producing a cable television program in 1983 which promotes the separation of races worldwide. A message on his telephone hot line urges white men and women to "arm themselves intellectually, physically and spiritually" for the "ultimate showdown" against the "tens of thousands of Mexicans . . . swarming" into California. Tracy Wilkinson, White Supremacists to go on Trial, L.A. TIMES, July 22, 1991, at B1. See also notes 159-61 and accompanying text.


9 Neo-Nazi Skinhead leader, Clark Marbell, stated, "I am a violent person. I love the white race, and if you love something, you’re the most vicious person on earth." HAMM, supra note 7, at 5. Shortly thereafter, he was arrested for, and convicted of, "breaking into a woman’s apartment, beating her until she was unconscious, spraying her with Mace, and then drawing a swastika on the wall with her own blood." Id.
or perception regarding the race, religion, color, disability, sexual orientation, national origin or ancestry of that person. In 1989, one Todd Mitchell was prosecuted and convicted under this statute for battery, and for intentionally selecting his target because of the victim’s race. Mitchell, an African-American, allegedly had been discussing racist beatings of blacks by whites with his friends. He asked them: "Do you all feel hyped up to move on some white people?" Mitchell then noticed a potential target. "There goes a white boy; go get him," he said. Mitchell and his friends severely beat and robbed the victim.

Had he been convicted of ordinary battery, Mitchell could have been sentenced to a maximum of two years in prison. Having been convicted of violating the statute criminalizing the intentional selection of a crime victim because of the victim’s race, however, Mitchell faced a maximum sentence of seven years. He was sentenced to four years in prison.

On appeal, Mitchell challenged Wisconsin’s penalty enhancement statute as violating the First Amendment’s protection of speech. In an opinion written by Judge Heffernan, Wisconsin’s Supreme Court found that the statute not only violated Mitchell’s protected speech rights, but also unconstitutionally chilled the protected speech of others. The case is now before the Supreme Court of the United States, which must decide whether, and the extent to which, states have discretion to provide special penalties for crimes in which a defendant has selected his victim specifically because of that victim’s race or other personal characteristics.

The Wisconsin Supreme Court’s decision rested on several
propositions. First, by increasing punishment based on whether a defendant acted with certain motives or thoughts, Wisconsin punishes thought itself. Based on the premise that the statute punishes thought, Judge Heffernan determined not only that "the burden is upon the state to prove its constitutionality," but also that the statute violates the First Amendment's protection of thought. Second, Wisconsin punishes speech itself, because a defendant who utters racial epithets during an assault might be subject to greater punishment than is a defendant who makes no such remarks. Third, the Wisconsin statute violates the First Amendment's protection of speech because it might chill the protected expression of racist, sexist, homophobic, or other messages by individuals who have not yet, and never will, engage in hate motivated violence. Finally, although the "motivation of the legislature [was] its desire to suppress hate crimes," this permissible and worthy legislative purpose was outweighed by "the greater evil [of] the suppression of freedom of speech for all of us." Judge Heffernan's opinion for the Court

21 Id. at 811.

22 Id. at 814 ("The hate crimes statute enhances the punishment of bigoted criminals because they are bigoted. The statute is directed solely at the subjective motivation of the actor -- his or her prejudice. Punishment of one's thought, however repugnant the thought, is unconstitutional.").

23 Mitchell, 485 N.W.2d at 815 ("Aside from punishing thought, the hate crimes statute also threatens to directly punish an individual's speech and assuredly will have a chilling effect upon free speech."); id. at 816 (defendant who utters racial epithet during attack is subject to greater punishment).

24 Id. at 816 (chilling effect "extends to the entire populace, not just to those who will eventually commit one of the underlying offenses") (quoting Susan Gellman, Sticks and Stones Can Put You in Jail, But Can Words Increase Your Sentence? Constitutional and Policy Dilemmas of Ethnic Intimidation Laws, 39 U.C.L.A. L. REV. 333, 360-61 (1991)) (citations omitted).

25 Mitchell, 485 N.W.2d at 817. Judge Heffernan elsewhere stated that the statute is "designed to punish -- and thereby deter -- racism and other objectionable biases." Id. at 814. This is arguably a statement of legislative purpose, and if so, a purpose that might be invalid under the First Amendment. A legislative "motiv[e]" and "desire to suppress hate-crimes," however, is constitutionally permissible. See id. at 817. See also infra text at notes 158-68. It is conceivable that the Supreme Court might decide to invalidate the Wisconsin statute in an essentially summary fashion, simply by construing Judge Heffernan's statement of legislative "design" as an authoritative finding of legislative purpose that may be at odds with the First Amendment (the punishment of mere thought), while ignoring Judge Heffernan's clear statement of legislative
"motivation" and "desire" (the deterrence of hate motivated violence) -- a purpose that is unambiguously permissible. See R.A.V. v. City of St. Paul, Minn., 112 S. Ct. 2538, 2542 (1992) ("In construing the St. Paul ordinance, we are bound by the construction given to it by the Minnesota court."). See also infra text at notes 158-68.

For several reasons, the Court should not focus on the Wisconsin Supreme Court's ambiguous statement about legislative "design." First, it is not clear whether Judge Heffernan's statement that the Wisconsin statute "commendably is designed to punish -- and thereby deter -- racism" is predicated on a self-conscious interpretation of legislative intent, or merely an attempted logical inference from the fact that the Wisconsin statute punishes acts differently depending on whether they were motivated by racism. That Judge Heffernan's statement of legislative "design" was based merely on logical inference from the statute's structure is suggested by his assertion that "the hate crimes statute is facially invalid because it directly punishes a defendant's constitutionally protected thought." Mitchell, 485 N.W.2d at 815 (emphasis added). If Judge Heffernan's statement were simply a proposition of logical inference from legislative structure -- and deeply flawed "logic," at that -- reasons for according that statement deference do not apply in the same way they apply to more self-conscious interpretations of a state legislature's intent by that state's Supreme Court.

If Judge Heffernan's statement of legislative "design" were not derived and articulated as an interpretation of the Wisconsin legislature's purpose, then concerns for federalism and respect for the state's policymaking processes are not strongly implicated.

Second, Judge Heffernan's statement about what the statute "is designed to" do could just as well be a judgment about its effect as a suggestion about its purpose. If so, the constitutional significance of a statute's effects is a question for ultimate resolution by the Supreme Court. See infra text at notes 124-31.

Third, the proposition that this statute -- or any statute -- was adopted for the purpose of deterring thought borders on the absurd. It has been long and widely recognized that the government is powerless to deter thought. James Madison's Memorial and Remonstrance Against Religious Assessments, for example, acknowledged that "the opinions of men[] depend[] only on the evidence contemplated by their own minds, [and] cannot follow the dictates of other men." Everson v. Board of Educ., 330 U.S. 1, 64 app. (1947) (quoting Memorial and Remonstrance Against Religious Assessments) (emphasis added). This undermines not only the proposition that Wisconsin intended to deter thought, but also the inference that Judge Heffernan interpreted the statute's purpose -- as opposed to, for example, the impact of its "design" -- as the deterrence of thought.

Fourth, even if Judge Heffernan's statement of legislative "design" is construed as a statement of legislative purpose, it is critical to account for his other clearly articulated statement of legislative purpose -- the permissible goal of deterring hate crime. Mitchell, 485 N.W.2d at 817. Where non-content-based legislation has been enacted for both permissible and arguably impermissible purposes, it may be invalidated only when it would not have been adopted but for the impermissible purpose. See, e.g., United States v. O'Brien, 391 U.S. 367 (1968). After determining that the challenged statute was enacted for permissible administrative reasons, the O'Brien Court rejected a claim that Congress also acted with the impermissible purpose of suppressing speech.

"It is a familiar principle of constitutional law that this Court will not strike down an
relied heavily on an article by Susan Gellman,²⁶ attorney for a
defendant convicted of violating a penalty-enhancement statute in
Ohio.²⁷ Gellman rests her argument on the notion that penalty
enhancement statutes punish "motive" and that "[u]nlike purpose or
intent, motive cannot be a criminal offense or an element of an
offense."²⁸

This article seeks to demonstrate that the Heffernan-Gellman
view of hate motivated crimes and protected speech is sloppy, deeply
flawed, and consistently wrong.²⁹ In Part II, I argue that the
Wisconsin statute regulates thought, speech, and "motive" no
differently from a host of other criminal statutes that have never been
thought to raise First Amendment problems, let alone violate

otherwise constitutional statute on the basis of an alleged illicit legislative motive." Id.
at 383. Based on this principle, the Court did not even inquire into whether the
"alleged" impermissible motive actually did influence Congress. It was enough to have
found that Congress did act, at least in part, for a permissible purpose. For the
proposition that Wisconsin's hate crimes statute is not content-based, see infra text at
notes 132-54. For more on the proposition that legislation will not be invalidated as
impermissibly motivated unless it would not have been adopted but for the impermissible
purposes, as the proposition has been applied in the context of racial discrimination, see
n.21 (1977) (proof of impermissible purpose shifts to government "burden of establishing
that the same decision would have resulted even had the impermissible purpose not been
considered. If this were established, the complaining party ... no longer fairly could
attribute the injury complained of to improper ... purpose.").

Finally, to dispose of this case simply by accepting Judge Heffernan's
ambiguous suggestion of impermissible legislative "design" as an authoritative state
judicial interpretation of legislative purpose that is binding on the Supreme Court would
decide the fate of the hate crimes statute without developing principles to guide the states
in their efforts to deter hate crime. Why bother to hear the case if it is to be decided
on such a narrowly (and vulnerably) technical basis?

²⁶Susan Gellman, Sticks and Stones Can Put You in Jail, But Can Words Increase
Your Sentence? Constitutional and Policy Dilemmas of Ethnic Intimidation Laws, 39
²⁷See State v. Wyant, 597 N.E.2d 450 (Ohio 1992), petition for cert. filed, 61
²⁸Gellman, supra note 26, at 364.
²⁹For an excellent critique of the Heffernan-Gellman position along similar lines,
see Eric J. Grannis, Note, Fighting Words and Fighting Freestyle: The Constitutionality
protected speech.\textsuperscript{30} Part III draws a distinction between violent acts committed by defendants who intentionally select their victims because of race and violent acts committed by defendants who intentionally select their victims because of race while also intending to send a public message through their violent act. The former is simply a race-motivated assault; the latter is a lynching.\textsuperscript{31} This is akin to the distinction

\begin{itemize}
\item First, Wisconsin’s hate crimes statute does not punish thought per se, but, like any other criminal statute, imposes criminal liability as a function of mens rea. See infra text at notes 44-51. Second, the hate crimes statute does not punish speech, per se, but, like any other criminal statute, may be enforced through testimony about defendant’s statements as evidence of his or her mens rea. See infra text at notes 52-54. Third, the hate crimes statute is no more demonstrably likely to chill protected expression than is any other statute for which proof of a defendant’s mens rea -- through evidence of his statements or otherwise -- is required. See infra text at notes 54-58. Fourth, the notion that the criminal law punishes purpose or intent, but not motive, is simply wrong, rests on a false distinction, and is irrelevant to the constitutional issues involved. See infra text at notes 59-71.
\end{itemize}

\textsuperscript{31} According to Professor David A. Gerber, lynching was "mob violence against blacks" triggered by black refusals to abide by "the basic canons and daily etiquette of the American racial caste system." David A. Gerber, Lynching and Law and Order: Origin and Passage of the Ohio Anti-Lynching Law of 1896, 83 OHIO HISTORY 33, 34 (1974) reprinted in RACE, LAW, AND AMERICAN HISTORY 1700-1990: LYNCHING, RACIAL VIOLENCE, AND LAW 190 (Paul Finkelman ed.) (1992). Let me emphasize, however, that for purposes of this article, "lynching" connotes a crime such as assault committed with the purpose of making a public statement, but not necessarily committed by a mob.

Gerber notes that "[b]y its very nature lynching denied its victims the right to their say in court." Id. Lynching was, nevertheless, an important and effective way for the white power structure to express its views and communicate its messages, just as the legal system does through more formal processes. That lynchings were completed in public gatherings confirms the intent to communicate as an essential component. A newspaper account of one Arkansas lynching in 1892 stated:

Ed Coy, the colored brute, who, on last Saturday, committed the fiendish crime of rape on the person of Mrs. Henry Jewell, a respectable farmer’s wife with a five-months-old child at the breast, at her home three miles south-west of this city, this afternoon answered for his awful crime by a horrible death by fire in the presence of 6,000 people. He was burned at the stake.

Id. at 198. A series of progressively smaller headlines preceded the article’s text:

HOWLED; While the Flames Licked; His Black Bestial Body Into-
between arson in which a defendant intentionally selects a federal building as his target, and arson in which a defendant intentionally selects a federal building as his target for purposes of sending a public message. The former is simply a bombing of a federal building; the latter is terrorism. Part III suggests that only those defendants who intend to send a message through hate motivated violence -- only those defendants concerned with lynching their victims -- have any possible claim to First Amendment protection from the Wisconsin statute. Viewing this violence-as-message -- in other words, lynching or terrorism -- as presenting the strongest case for restricting the government's regulatory discretion in the name of the First Amendment helps place the Heffernan-Gellman concerns about infringing protected speech in perspective.

In Part IV, I argue that the Supreme Court's decision in R.A.V. v. City of St. Paul, Minn. does not threaten the Wisconsin statute, but supports it. Contrary to Judge Heffernan's view, a statute is not presumptively unconstitutional and subject to strict scrutiny simply because it makes punishment a function of "the defendant's biased thought." Rather, only statutes that facially


Id. This newspaper was participating in focusing and transmitting the event's message. This was clearly a public event, expressing and affirming an ideology through violence. Indeed, the ideology was so rigid that a man who favored hanging, rather than burning at the stake, was confronted by twenty "shotguns," and retreated "jiffy without more ado." Id.

The FBI's "working definition" of terrorism is a "violent act or an act dangerous to human life in violation of the criminal laws . . . to intimidate or coerce a government, the civilian population, or any segment thereof, in the furtherance of political or social objectives." HAMM, supra note 7, at 107 (emphasis added).

See infra text at notes 110-16.


discriminate based on the content of a message communicated are presumptively unconstitutional and subject to R.A.V.'s version of strict judicial scrutiny. The Wisconsin hate crimes statute is not vulnerable under Justice Scalia's R.A.V. principles for determining when a statute is content-based. Liability is not defined in terms of any message conveyed by a defendant or perceived by an audience. Furthermore, the Wisconsin statute meets the standards developed by the Court in United States v. O'Brien and Texas v. Johnson for determining when a statute is not content-based. The statute reaches both action through which a defendant intended to convey a message -- that is, lynching or terrorism -- and action in which defendant had no such communicative intent. Part IV concludes that whether one defines an unconstitutional intrusion on speech in terms of the impermissible purpose to suppress particular messages or an unintended yet undue impact in suppressing messages, the Wisconsin statute survives as a measure designed to deter hate motivated action with as little intrusion on valid speech interests as possible.

Part V pushes the analysis a step further. It argues that the hate motivated assault intended as a message -- in other words, the lynching -- although presenting the strongest context for First Amendment concerns about the regulation of hate motivated assault, should nevertheless be deemed "unprotected speech," like "fighting words" and "obscenity." Indeed, if fighting words are deemed unprotected or "low value" speech, then it follows naturally that assault as message -- or, to put it another way, words through fighting -- should be deemed unprotected or low value speech. This conclusion would allow the state to target the intentionally symbolic assault for special punishment, as obscenity may be targeted for punishment. Wisconsin has not chosen to do so, but has chosen to treat hate motivated assaults even-handedly, whether motivated by the intent to communicate a message or not. This even-handed regulation confirms not only that Wisconsin has pursued the permissible purpose

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36 See infra text at notes 132-43.
39 See infra text at notes 144-54.
40 See infra text at notes 154-72.
41 See infra text at notes 173-84.
of preventing palpable social harms by deterring hate motivated choices to act, but also that Wisconsin’s regulation falls well within any conceivable boundary defining an undue impact on speech. If the goal and effect of deterring the intentionally symbolic assault do not violate the First Amendment, then surely the goal and impact of deterring hate motivated assault irrespective of a defendant’s communicative intent does not violate the First Amendment.\footnote{See infra text at notes 186-96.}

The issues raised by Wisconsin’s hate crimes statute -- and its possible invalidation -- are critically important to the United States as it enters the twenty-first century. The nation is becoming increasingly diverse.\footnote{See Bureau Demographer Tells House Panel Half of Population Lives in Suburbs, \textit{AM. MARKETPLACE}, June 4, 1992, \textit{available in LEXIS}, Nexis Library, Omni File (in the 1980s the Hispanic population grew by 53\%, the black population grew by 13.2\%, and the Asian and Pacific Islander population more than doubled, while the white population grew by 6\%).} Demographic shifts may exacerbate old tensions, engender new insecurities, and create new flash points. Inter-group tensions are a matter of legitimate state concern, not toward suppressing the expression of any ideas, but toward suppressing the impulse to translate those ideas into socially harmful action. A state can plausibly be concerned with robbery or assault or murder, regardless of the defendant’s specific state of mind. At the same time, given the evolving realities of American society -- or, perhaps more precisely, societies within America -- a state can plausibly be concerned that hatred and prejudice along group lines create special impulses to act; that the ordinary laws against robbery, assault, or murder do not sufficiently grab the attention of the potential hate motivated felon; and that specifically targeted deterrence is, therefore, required. Recognizing state discretion to pursue new ways of coping with old problems having new dimensions respects federalism while leaving full range for people to express messages of hate in ways that do not destroy bodies and lives.
II. Remembering Fundamentals of Criminal Law: Where's the "Speech"?

A. Remembering Mens Rea: Criminal Liability Routinely Depends on a Defendant’s Thoughts

Judge Heffernan determined that "the hate crimes statute is facially invalid because it directly punishes a defendant’s constitutionally protected thought."44 In his view, the statute "directly punishes a defendant’s constitutionally protected thought" because it imposes more punishment on a defendant who assaults motivated by the victim’s race than on one who assaults motivated by greed or by personal spite.45

This concern should vanish simply by reading a typical penal code. Modern criminal law grades crimes and punishment according to the thoughts a defendant had when choosing to commit his criminal act. Murder is treated differently if a defendant intends to kill,46 kills recklessly,47 or kills negligently.48 A defendant who has sexual intercourse without a victim’s consent is treated differently depending on whether he believed she consented.49 A defendant who kills, believing his acts necessary for self-defense, may be exculpated, even if he was wrong.50 Thus, the same acts are defined as different

45 Id. at 816.
46 N.Y. PENAL LAW § 125.27 (McKinney 1993) ("A person is guilty of murder in the first degree when . . . with intent to cause the death of another person, he causes the death of such person . . . . Murder in the first degree is a class A-1 felony.").
47 N.Y. PENAL LAW § 125.15 (McKinney 1993) ("A person is guilty of manslaughter in the second degree when . . . [h]e recklessly causes the death of another person . . . . Manslaughter in the second degree is a class C felony.").
48 N.Y. PENAL LAW § 125.10 (McKinney 1993) ("A person is guilty of criminally negligent homicide when, with criminal negligence, he causes the death of another person. Criminally negligent homicide is a class E felony.").
49 N.Y. PENAL LAW § 130.05 (McKinney 1993) ("it is an element of every offense defined in this article, except the offense of consensual sodomy, that the sexual act was committed without consent of the victim.").
50 N.Y. PENAL LAW § 35.15 (McKinney 1993) ("A person may . . . use physical force upon another person when and to the extent he reasonably believes such to be necessary to defend himself or a third person from what he reasonably believes to be the use or imminent use of unlawful physical force by such other person . . . .").
crimes, or not as crimes at all, as a function of a defendant's thoughts. That criminal liability is routinely a function of a defendant's thoughts has never been viewed as touching, let alone violating, a defendant's First Amendment rights of "free thought." Wisconsin's enhanced penalty statute does not deviate from this fundamental characteristic of criminal law.\footnote{One might argue that the thoughts distinguishing racially-motivated assault from ordinary assault are more politically significant than the thoughts distinguishing rape from consensual intercourse or the thoughts distinguishing self-defense from an "innocent" yet tragic mistake. Within Judge Heffernan's own First Amendment paradigm, however, one thought cannot be viewed as more worthy or significant than another. State v. Mitchell, 485 N.W.2d 807, 816 (Wis. 1992) ("Opprobrious though the speech may be, an individual must be allowed to utter it without fear of punishment by the state."). Thus, if the Wisconsin statute "punishes the defendant's biased thought" and is, therefore, constitutionally vulnerable, then all criminal codes that grade punishment of externally identical acts based on a defendant's thoughts are constitutionally vulnerable as well.}

B. Remembering Trial, Testimony, and Proof Beyond a Reasonable Doubt: A Defendant's Statements Routinely Are Used to Prove Mens Rea

Judge Heffernan expresses concern that Wisconsin's hate crimes law would indirectly chill speech by, for example, an individual committing a criminal battery who otherwise would feel perfectly free to utter a word "such as 'nigger,' 'honkey,' 'jew,' 'mick,' 'kraut,' 'spic,' or 'queer.'\footnote{Id.} "Opprobrious though the speech may be, an individual must be allowed to utter it without fear of punishment by the state."\footnote{Id.} Yet a defendant's statements routinely are used as evidence establishing criminal liability. The vigilante who is heard to utter, "I'd like to kill you, you weak snivelling coward!" before killing a victim is more likely to be convicted of murder than is one who utters "Don't kill me; I'm in fear of my life!" before killing a victim.

Judge Heffernan also expresses concern that the Wisconsin statute would chill hate speech not only by persons engaged in the acts of murder or assault, but also by everyone else in society.
Quoting from Susan Gellman, he notes:

In addition to any words that a person may speak during, just prior to, or in association with the commission of one of the underlying offenses, all of his or her remarks upon earlier occasions, any books ever read, speakers ever listened to, or associations ever held could be introduced as evidence that he or she held racist views and was acting upon them at the time of the offense. . . . Awareness of this possibility could lead to habitual self-censorship of expression of one's ideas, and reluctance to read or listen publicly to the ideas of others, whenever one fears that those ideas might run contrary to popular sentiment on the subject of ethnic relations. . . . It is no answer that one need only refrain from committing one of the underlying offenses to avoid the thought punishment. Chill of expression and inquiry by definition occurs before any offense is committed, and even if no offense is ever committed. The chilling effect thus extends to the entire populace, not just to those who will eventually commit one of the underlying offenses. 54

This anticipated "chill" is entirely unrealistic. One adhering to racist or anti-gay sentiments, and inclined to express such viewpoints toward persuading others, has nothing to fear from a statute that criminalizes violent action. The idea that Pat Buchanan could be discouraged from expressing anti-gay views, or that ordinary guys at the neighborhood bar could be chilled from spouting racist theories and epithets is fanciful. Contrary to Gellman's speculative musings, experience suggests that criminalizing murder does not deter statements such as, "I hate you!" or "I want to kill you!" 55

54 Id. (quoting Gellman, supra note 26, at 360-61) (internal citations omitted) (footnote omitted).

55 As Justice Bablitch stated in dissent, "[i]t is no more chilling of free speech to allow words to prove the act of intentional selection in this 'intentional selection' statute than it is to allow a defendant's words that he 'hated John Smith and wished he were
Experience suggests that criminalizing theft does not chill statements coveting material possessions in general, or coveting specific possessions of friends and neighbors. And surely experience suggests that criminalizing tax fraud does not deter statements criticizing increased taxes.\textsuperscript{56}

Furthermore, to the extent it has any validity, the Heffernan-Gellman "chill" argument proves too much. Prosecuting a hate motivated defendant under an ordinary assault statute might require inquiry into defendant's beliefs toward establishing his motive for assault, at least if defendant neither knew, nor stole from, his victim. Thus, toward finding a motive to kill, the life of an individual charged with killing a black man whom he did not know can be equally vulnerable to scrutiny for past racist statements, memberships in racist organizations, or racist books read, whether the defendant is charged with ordinary murder or racist-motivated murder.\textsuperscript{57} Criminalizing arson makes evidence of past statements and readings about explosives relevant.\textsuperscript{58} Proof of criminal guilt often involves proof of a defendant's past activities, values, and beliefs. So long as such an inquiry is incidental to the achievement of permissible state interests, rather than itself the object of the regulation, the unintended impact on otherwise valuable freedom is, and must be, viewed as a

\textsuperscript{56} Consider George Bush's broken 1988 campaign promise of "Read my lips. No new taxes." In July 1992, Bill Clinton reminded the American public of Bush's promise by criticizing then-President Bush: "What he meant to say was 'No new taxes for the rich.'" Julia Malone, \textit{How George Bush Lost the Presidency and what Happened to Ross Perot}, \textit{The Atlanta J. & Const.}, Nov. 4, 1992, at B5. Senate Minority Leader Robert Dole was equally critical of President Clinton's tax proposals. In a Republican response to President Clinton's budget address to Congress, Senator Dole stated: "We've both heard lots of speeches about sacrifice, but we'll be working with you to make certain that sacrifice isn't just a presidential code word for more taxes, more spending and more mandates from Washington." Ann Devroy, \textit{Clinton asks Middle Class to Pay Higher Taxes; President Issues 'Call to Arms' to Restore Economic Vitality}, \textit{Wash. Post}, Feb. 16, 1993, at A1.

\textsuperscript{57} Dawson \textit{v.} Delaware, 112 S. Ct. 1093, 1097 (1992); \textit{see infra} text at notes 72-79.

\textsuperscript{58} \textit{See}, \textit{e.g.}, Malcolm Gladwell & Jim McGee, \textit{Chemical Engineer Held in N.Y. Blast; Mideast Immigrant Linked to Salameh}, \textit{Wash. Post}, Mar. 11, 1993, at A1 (reporting that the suspect "is a 1991 chemical engineering graduate of Rutgers University" and noting that the suspect's educational background indicates that "he has certain expertise that lends itself to making explosives").
necessary cost of criminalizing socially harmful freedom.

C. "Motive" Routinely is Relevant in the Definition of Crimes

Susan Gellman has stated that "unlike purpose or intent, motive cannot be a criminal offense or an element of an offense." She defines "motive" as "an actor’s reason for acting," the "why" as opposed to the "what" of conduct. Gellman defines "intent" as "the actor’s mental state as it determines culpability based on volition," and "purpose" as "what the actor plans as a result of the conduct."

Assuming, for now, some meaningful distinction between Gellman’s notions of "motive," "intent," and "purpose," consider the proposition that "motive," or "an actor’s reasons for acting," "cannot be an offense or an element of an offense." Criminal law routinely distinguishes among externally identical acts based on the defendant’s "reasons for acting." Consider three examples. First, punishing acts as attempted crimes distinguishes the same acts by a defendant’s reasons for acting. The person who shoots a gun (and misses), motivated by a desire to scare someone, is treated differently from the person who shoots a gun (and misses) motivated by a desire to kill. The first might be guilty of menacing; the second might be guilty of attempted murder. The person who junks his car, motivated by a desire to get rid of it, has not approached the bounds of criminality. The person who junks his car, motivated by a desire to defraud his insurance company, might be guilty of attempted fraud.

Second, criminal recklessness is defined by reference to a defendant’s motives. Under the New York Penal Law, for example, "[a] person acts recklessly with respect to a result or to a circumstance described by a statute defining an offense when he is aware of and consciously disregards a substantial and unjustifiable risk that such result will occur or that such circumstance exists." The concern for the justifiability of the risk incurred necessarily involves consideration of a defendant’s "reasons for acting" -- that is,

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59 Gellman, supra note 26, at 364.
60 Id.
61 Id.
62 N.Y. PENAL LAW § 15.05(3) (McKinney 1987).
the defendant's motives for choosing to incur the risk. Thus, an individual who intends to run a red light, aware of the risk to other drivers and pedestrians, motivated by a desire to get to work on time, to get to a party, or just for kicks, is viewed differently for purposes of criminal recklessness than is an individual who intends to run a red light, aware of the risk to other drivers and pedestrians, motivated by a desire to avoid a rear end collision or to rush a parent in the midst of a heart attack to the hospital.

Third, the law of self-defense treats otherwise identical acts differently based on a person's reasons for acting. An individual who intends to kill, motivated by concerns for self-defense, is treated differently from the individual who intends to kill, motivated by revenge, profit, whim, or anything else. Even if a defendant is unreasonably wrong about his victim's dangerousness, the motive of self-defense precludes liability for intentional homicide, despite the defendant's intent to kill.

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63 Commentaries to the Model Penal Code explicitly recognize that "motive" is relevant in defining "recklessness."

Recklessness, as defined in Section 2.02(2)(c), presupposes an awareness of the creation of substantial homicidal risk, a risk too great to be deemed justifiable by any valid purpose that the actor's conduct serves. . . . [R]isk, however, is a matter of degree and the motives for risk creation may be infinite in variation . . . .


64 Compare N.Y. PENAL LAW § 35.15(1) (McKinney 1992) ("A person may . . . use physical force upon another person when and to the extent he reasonably believes such to be necessary to defend himself or a third person from what he reasonably believes to be the use or imminent use of unlawful physical force . . . .") with N.Y. PENAL LAW § 125.27 (McKinney 1987) ("A person is guilty of murder in the first degree when . . . [w]ith intent to cause the death of another person, he causes the death of such person . . . .").

65 Gellman recognizes that self-defense challenges her proposition that motive is not, and cannot be, an element of criminal liability. She notes that "circumstances such as self-defense or necessity change the fundamental nature of the act itself so dramatically that, in fact, they provide a complete defense to liability for the underlying crime." Gellman, supra note 26, at 366. It is mystifying how she can continue to assert that motive -- i.e., a defendant's reasons for acting -- is not, and cannot be, an element of criminal liability when she acknowledges that a defendant's reasons for acting can be so
Beyond this, Gellman’s efforts to distinguish “motive” from “intent” from “purpose” are formalistic. One can describe a hate crime in terms of her notion of "intent" -- "the actor’s mental state as it determines culpability based on volition." Indeed, the Wisconsin statute explicitly speaks in terms of "intent," by especially punishing one who "intentionally selects" a victim "because of race" or other characteristics. One can describe a hate crime in terms of her notion of "purpose" -- "what the actor plans as a result of the conduct." The actor’s purpose is to cause suffering by a person of a specific race, religion, sexual orientation, or other characteristic.

Although she relies on Lafave’s hornbook, Gellman ignores the import of LaFave’s own recognition that the criminal law does take account of a defendant’s reasons for acting. While LaFave would describe such legally relevant reasons for acting -- i.e., motives -- in terms of "intent," changing a label does not change the substance. Gellman accurately quotes LaFave as stating:

[Intent relates to the means and motive to the ends, but where the end is the means to yet another end, then the medial end may also be considered in terms of intent. Thus, when A breaks into B’s house in order to get money to pay his debts, it is appropriate to characterize the purpose of taking money as the intent and the desire to pay his debts as the motive.]

Thus, in LaFave’s view, legally relevant "reasons for acting" should not be labelled as motives, but as intent. Legally irrelevant "reasons for acting" should be labelled as "motives." The fundamental point, however, is that one is simply talking about a label for an element of defendant’s state of mind -- aspects of his reasons for acting -- that legislatures can make, and have made, fundamental as to "change the fundamental nature of the act."

66 Gellman, supra note 26, at 364.
68 Gellman, supra note 26, at 364.
70 Gellman, supra note 26, at 364 (quoting WAYNE R. LAFAVE & AUSTIN W. SCOTT, CRIMINAL LAW 228 (2d ed. 1986)).
legally relevant as a function of their policymaking concerns. 71

Wisconsin’s hate crimes statute does not punish a defendant’s reasons for intentionally selecting a victim because of race. A defendant could intentionally select his victim because of race for self-gratification, to impress friends, or, indeed, to send some message. Under the law as written, these motives are irrelevant. They are irrelevant, however, not because they can be labelled as "motives," but because they are irrelevant to the policies the legislature seeks to serve.

D. "Motive" Routinely is Considered in Criminal Sentencing and Civil Anti-Discrimination Law: Proving and "Punishing" Defendant’s Thoughts by a Preponderance of the Evidence -- or Less

In Barclay v. Florida, 72 the Supreme Court held that "a sentencing judge in a capital case might properly take into consideration ‘the elements of racial hatred’ in [defendant] Barclay’s crime as well as ‘Barclay’s desire to start a race war.’ " 73 In Dawson v. Delaware, 74 the Court held that "the Constitution does not erect a per se barrier to the admission of evidence concerning one’s beliefs and associations at sentencing simply because those beliefs and associations are protected by the First Amendment." 75 Chief Justice Rehnquist made this statement in the context of upholding a challenge

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71 See Grannis, Note, supra note 29, at 190 ("Professor Gellman’s logic is backwards. It is not that ‘motive cannot be . . . an element of a criminal offense’; it is that motives are whatever is not an element of the criminal offense, whatever reasons the defendant may have for taking criminal action that are not defined as elements of the crime. Conversely, if the legislature chooses to make a particular desire an element of the crime, this desire then becomes a matter of intent.").


75 Id. at 1097.
to specific evidence admitted at a capital sentencing proceeding.\textsuperscript{76}

Thus, the Court has determined that the factor of racist motivation -- or, more precisely, the intent to select a victim because of race -- that has been challenged as an element of Wisconsin's hate crimes statute may, without violating the First Amendment, be considered for imposing a death sentence. This is especially significant because proof of racial motivation at the sentencing stage frequently lacks the procedural safeguards which protect a defendant at the liability stage.

Indeed, the Court has never held that a jury must find beyond a reasonable doubt the existence of aggravating facts relevant to sentencing. To the contrary, the Court has upheld sentencing procedures in which judges\textsuperscript{77} find the existence of aggravating circumstances by a mere preponderance of the evidence\textsuperscript{78} -- or even less.\textsuperscript{79} If a defendant's racial motivation may be considered in

\textsuperscript{76}The majority determined that evidence linking Dawson to the Aryan Brotherhood was irrelevant to the murder for which defendant faced the death penalty. "[T]he murder victim was white, as is Dawson; elements of racial hatred were therefore not involved in the killing." \textit{Id.} at 1098. Furthermore, "[b]ecause the prosecution did not prove that the Aryan Brotherhood had committed any unlawful or violent acts, or had even endorsed such acts, the Aryan Brotherhood evidence also was not relevant to help prove any aggravating circumstance." \textit{Id.} Thus, the First Amendment is violated if a defendant is punished based on evidence that proves no more than his "abstract beliefs." \textit{Id.} "Associational evidence might serve a legitimate purpose," however, to show a defendant's "future danger," or to show "other aggravating circumstances" relevant to defendant's crime. \textit{Id.}

\textsuperscript{77}See, e.g., Clemons v. Mississippi, 494 U.S. 738, 743 (1990) (Sixth Amendment does not require jury to impose death sentence); Spaziano v. Florida, 468 U.S. 447, 460 (1984) (no constitutional requirement that death penalty be imposed by jury).

\textsuperscript{78}See McMillan v. Pennsylvania, 477 U.S. 79, 91 (1986) (upholding against due process challenge a statute providing that anyone convicted of certain felonies is subject to a mandatory minimum sentence if the sentencing judge finds by a preponderance of the evidence that the defendant "visibly possessed a firearm" during the commission of the offense).

\textsuperscript{79}In Walton v. Arizona, 497 U.S. 639 (1990), the Court upheld a capital sentencing scheme that directed the trial judge to impose the death penalty if he or she finds the existence of certain aggravating circumstances that are not outweighed by the existence of sufficient mitigating circumstances. Under Arizona law, the defendant has the burden of proving mitigating circumstances by a preponderance of the evidence. The prosecution has the burden of proving aggravating circumstances. \textit{Id.} at 686 n.7 (Blackmun, J., dissenting). There was no requirement of "proof beyond a reasonable doubt that aggravation outweighs mitigation." Arizona v. Walton, 769 P.2d 1017, 1030-
imposing a sentence when found by a judge by a preponderance of
the evidence, it would seem to follow *a fortiori* that a defendant’s
racial motivation may be considered in determining the degree of
criminal liability if found by a jury beyond a reasonable doubt.

Furthermore, laws prohibiting intentional racial discrimination
in civil contexts such as employment or housing impose liability
based on the same racial "motivation" made legally relevant by
Wisconsin's hate crimes statute. Judge Heffernan’s attempt to
distinguish the two contexts fails. Heffernan contends that "[u]nder
the antidiscrimination statutes, it is the discriminatory act which is
prohibited. Under the hate crimes statute, the ‘selection’ which is
punished is not an act, it is a mental process." He repeats the
point:

As explained above, selection under the hate crimes
statute is solely concerned with the subjective
motivation of the actor. Prohibited acts of
discrimination under Title VII of the Civil Rights Act
of 1964 . . . and analogous state antidiscrimination
statutes, such as refusal to hire, termination, etc.,
involv[e] objective acts of discrimination.

Judge Heffernan’s analysis rests on two elementary errors. First, the
essence of illegal discrimination is not simply an "objective act," but
an illegal purpose underlying the act -- the intentional selection or
rejection of someone because of race. It is not illegal to hire. It is
not illegal to fire. The acts of hiring or firing are illegal if *motivated*
by race. Second, the Wisconsin hate crimes statute does not punish
a mental process. It punishes a *choice to act* -- the conjunction of
thought and action. In this sense, the Wisconsin hate crimes statute
and civil anti-discrimination laws treat a defendant’s racial motivation
identically.

31 (Ariz. 1989).


81 Id. at 817.

82 Justice Bablitch, dissenting in *Mitchell*, forcefully draws a parallel between civil
anti-discrimination laws and the challenged Wisconsin statute: "How can the
Constitution not protect discrimination in the selection of a victim for discriminatory
Like the treatment of race-motivation for purposes of criminal sentencing, the treatment of race-motivation for purposes of civil liability has a dual significance. First, it confirms that the thoughts made legally relevant by Wisconsin's hate crimes statute have been made legally relevant in other contexts without raising concerns of unconstitutionally intruding on a defendant's "freedom of thought." Second, the intent to discriminate because of race is more easily proved in context of civil antidiscrimination laws than in the context of establishing criminal guilt. The requirement that all elements of a criminal offense be proved beyond a reasonable doubt provides substantial protection to the defendant under Wisconsin's hate crimes statute -- a protection lacked by many criminal defendants at the sentencing phase and by all civil defendants in discrimination suits.

* * *

The criminal law routinely imposes liability as a function of a defendant's thoughts and statements. Making criminal liability depend on a defendant's mens rea, and making proof at trial depend on a defendant's statements, cannot be deemed to impinge on a defendant's constitutionally protected rights of free thought or speech. Whatever the "freedom of thought" implicit in the First Amendment might mean, it does not mean that the government cannot make criminal liability depend on a defendant's thoughts. Otherwise, all of criminal law would be similarly suspect.

\footnote{See, \textit{e.g.}, Patterson v. New York, 432 U.S. 197 (1977).}
III. Does the Wisconsin Hate Crimes Statute Raise First Amendment Concerns?

Judge Heffernan relied in part on the Supreme Court’s recent decision in *R.A.V. v. City of St. Paul, Minn.* toward invalidating Wisconsin’s hate crimes statute. In *R.A.V.*, the Court invalidated a statute criminalizing the expression of "fighting words" that "arouse anger, alarm or resentment in others on the basis of race, color, creed, religion, or gender." Justice Scalia concluded that the St. Paul ordinance was unconstitutional because it discriminated among ideas based on the government’s agreement or disagreement with the content of those ideas. Justice Scalia noted that under the St. Paul ordinance, "fighting words" arousing anger based on race, religion, or gender were prohibited, while "fighting words" arousing anger based on a broad range of other concerns were permitted. "The First Amendment," he said, "does not permit St. Paul to impose special prohibitions on those speakers who express views on disfavored subjects." Even though the Court had held that "fighting words" are "not within the area of constitutionally protected speech," Justice Scalia rejected the "proposition that the First Amendment imposes no obstacle whatsoever to regulation of

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85 The Statute provided:

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

86 *R.A.V.*, 112 S. Ct. at 2547.
87 *Id.*
88 *Id.*
89 *Id.* at 2543.
particular instances of such proscribable expression, so that the
government 'may regulate [them] freely.'”

Judge Heffernan extrapolated from Justice Scalia’s analysis. By
punishing violence in which a defendant intentionally selects his
victim because of race or sexual orientation more than violence in
which a defendant more randomly selects his victim, the Wisconsin
statute singles out socially disapproved thoughts for special
punishment. Furthermore, Heffernan noted, "[t]he ideological
content of the thought targeted by the hate crimes statute is identical
to that targeted by the St. Paul ordinance -- racial or other
discriminatory animus. And, like the United States Supreme Court,
we conclude that the legislature may not single out and punish that
ideological content.”

Judge Heffernan misapprehends the boundaries of Justice
Scalia’s reasoning in R.A.V. The first relevant premise of Justice
Scalia’s analysis was that the defendant, R.A.V., had engaged in
activity that qualifies as "speech" for First Amendment purposes --
that R.A.V. was a speaker who had expressed views. Indeed, this
was a reasonable premise as a matter of fact because R.A.V. had
been charged with burning a cross on a black family’s lawn. R.A.V.’s
rather clear intent to make a statement through cross burning
suggests an aspect of his behavior that has potential constitutional
significance beyond the "ideological content" of his thoughts. That R.A.V. was a speaker who had expressed views was
also a reasonable premise as a matter of law, because the statute
under which he had been prosecuted was interpreted as reaching only
"fighting words.”

In contrast, it is not necessarily true that Mitchell was a
"speaker" who had expressed any views. Mitchell might have
assaulted his victim just for kicks. If R.A.V. had been engaged in
"speech" while Mitchell was not, then regulation of R.A.V.’s activity
might be more constitutionally problematic than is regulation of

90 Id. (quoting White, J., concurring, at 2552).
92 Id. at 815.
94 Id. at 2541.
95 For further discussion of why this is significant, see infra text at notes 98-116.
Mitchell's activity. While St. Paul was necessarily regulating a speaker who had expressed views through "fighting words," it is not necessarily true that the Wisconsin statute regulates speakers or "speech." 96

The second relevant premise of Justice Scalia's analysis was that St. Paul had imposed special prohibitions because it disfavored the subject about which R.A.V. expressed his views and the content of the views he expressed. 97 As it is not necessarily true that Wisconsin is regulating speakers who express points of view, so it is not necessarily true that Wisconsin sought special criminal penalties for hate motivated violence because it disfavors any subjects or viewpoints. In short, it remains to be established both that the Wisconsin statute regulates "speech," and that the Wisconsin statute, if it regulates speech, does so because Wisconsin disfavors the subjects of the regulated speech or the viewpoints expressed.

A. Defining "Speech"

It is unquestioned that the sentences in this article are "speech" for First Amendment purposes. It is similarly unquestioned that statements uttered on a street corner, 98 or over radio waves, 99 are "speech" for First Amendment purposes. The essential significance of both the written and oral activity is the underlying purpose of the actor to convey a message or to express an idea. My purpose in this article is to persuade. Howard Stern's purpose on his radio program

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96 See infra text at notes 98-116.
97 R.A.V., 112 S. Ct. at 2545.
98 See Feiner v. New York, 340 U.S. 315, 320 (1950) ("We are well aware that the ordinary murmurings and objections of a hostile audience cannot be allowed to silence a speaker, and are also mindful of the possible danger of giving overzealous police officials complete discretion to break up otherwise lawful public meetings. "A State may not unduly suppress free communication of views, religious or other, under the guise of conserving desirable conditions.") (quoting Cantwell v. Connecticut, 310 U.S. 296, 308 (1940)).
99 See Red Lion Broadcasting Co., Inc. v. Radio Television News Directors Ass'n, 395 U.S. 367, 390 (1969) ("It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of [radio], whether it be by the Government itself or a private licensee.").
is to express ideas. 100 We both are speakers engaged in "speech."

In defining the contours of "symbolic speech," the Court recently confirmed that the intent to convey an idea is the essence of "speech" for First Amendment purposes. 101 Toward examining the constitutionality of a Texas statute that prohibited flag burning, Justice Brennan noted that in order to "invoke the First Amendment in challenging his conviction," a defendant's flag burning must be deemed to "constitute expressive conduct." 102

Although one violates the statute only if one 'knows' that one's physical treatment of the flag 'will seriously offend one or more persons likely to observe or discover his action,' . . . this fact does not necessarily mean that the statute applies only to expressive conduct protected by the First Amendment. . . . Because the prosecution of a person who had not engaged in expressive conduct would pose a different case, . . . we address only Johnson's claim that § 42.09 as applied to political expression like his violates the First Amendment. 103

Justice Brennan distinguished an act of dragging a flag though the mud with "no thought of expressing an idea" from doing so with the thought of expressing an idea. 104 He suggested that the former is not expressive conduct protected by the First Amendment, despite offending others, while the latter is expressive conduct protected by the First Amendment. 105 The essence of First Amendment "speech,"

100 Howard Stern, a New York disc jockey, has been criticized by the Federal Communications Commission for alleged indecencies on the air. See Daniel Seligman, Sensitive Moments in Freedom of Speech, FORTUNE, Jan. 11, 1993, at 104.
102 Id. at 403.
103 Id. at 403 n.3.
104 Id.
105 Id.
therefore, is the intent to express an idea.\footnote{106}

Defining the essence of "speech" as the intent to express an idea flows logically from the two major values courts and scholars have viewed as underlying the First Amendment's protection of speech. One rationale views speech as warranting constitutional protection because speech is essential to debate and decisionmaking in a democracy.\footnote{107} The second major paradigm views speech as fundamental to individual fulfillment and conscience and, therefore, worthy of protection from government regulation.\footnote{108}

For a First Amendment concerned with preserving free and vigorous public debate, an individual has not done anything valuable and worthy of protection unless she intends to persuade others to

\footnote{106} Justice Brennan elsewhere noted that conduct can be deemed "speech" for First Amendment purposes when first, "'[a]n intent to convey a particularized message was present'" and, second, when "'the likelihood was great that the message would be understood by those who viewed it.'" \textit{Id.} at 404 (quoting \textit{Spence v. Washington}, 418 U.S. 405, 410-11 (1974)). The first element of this judicial definition of symbolic speech restates the idea that the essence of "speech" is an actor's intent to convey an idea. The second element can be viewed as providing corroboration for the existence of the actor's relevant intent to speak. Unless an audience is likely to understand the message, it is unlikely that the actor intended to communicate an idea.

Justice Scalia has also defined the essence of "speech" as the intent to convey an idea. He noted that activities such as driving a sound truck, otherwise "nonspeech," can become a "mode of speech" when "used to convey an idea." \textit{R.A.V. v. City of St. Paul, Minn.}, 112 S. Ct. 2538, 2545 (1992).

\footnote{107} See, \textit{e.g.}, ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE (1960). Meiklejohn argued:

\begin{quote}
Just so far as, at any point, the citizens who are to decide an issue are denied acquaintance with information or opinion or doubt or disbelief or criticism which is relevant to that issue, just so far the result must be ill-considered, ill-balanced planning for the general good. \textit{It is that mutilation of the thinking process of the community against which the First Amendment to the Constitution is directed.} The principle of the freedom of speech springs from the necessities of the program of self-government. It is not a Law of Nature or of Reason in the abstract. It is a deduction from the basic American agreement that public issues shall be decided by universal suffrage.
\end{quote}

\textit{Id.} at 27.

\footnote{108} See, \textit{e.g.}, THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 6 (1971) ("[F]reedom of expression is essential as a means of assuring individual self-fulfilment.").
embrace a point of view. One does not participate in debate without engaging with, and endeavoring to persuade, those having different views. Thus, this public-oriented rationale for protecting speech envisions the essence of "speech" -- i.e., constitutionally valuable activity -- as the purposeful communication of an idea.

Defining the essential characteristics of constitutionally protected "speech" is more difficult in the individual fulfilment context, because so many kinds of activity are essential to individual fulfilment and conscience. Defining the essence of "speech" as the intent to express an idea, however, is consistent with, if not compelled by, the individual fulfilment speech paradigm. An individual, arguably, cannot gain distinctive fulfilment from "speech" -- as opposed to the fulfilment gained, for example, from using drugs or committing suicide -- unless her fulfilment is achieved through achieving her intent to communicate.109

B. Assault versus Lynching; Arson versus Terrorism:
Finding "Speech" in Otherwise Criminal Acts

The foregoing analysis suggests that for First Amendment purposes, the essence of protected "speech" is an actor's intent to convey an idea. Thus, while Judge Heffernan might be right that "[t]he ideological content of the thought targeted by the hate crimes statute is identical to that targeted by the St. Paul ordinance -- racial or other discriminatory animus"110 -- it is not the ideological content of the thought that triggers First Amendment concern. Rather, it is the intent to communicate the ideological content, to express the ideas to others, that triggers First Amendment concern. For First

109 This is widely regarded as the weaker justification for constitutionally protecting speech. Frederick Schauer has effectively questioned the proposition that because speech is important to individual self-definition, it therefore warrants constitutional protection. See Frederick Schauer, Must Speech Be Special?, 78 NW. U. L. REV. 1284 (1983). The wide range of activities in which people engage might contribute to self-definition. What justifies selecting speech for special protection from government regulation, rather than sexual activity, all other forms of consensual exchange, or even nonconsensual impositions by one person against another (like hate motivated violence), on the ground that speech contributes to individual fulfilment?

Amendment purposes, there is a fundamental distinction between the "ideological" content of a person’s thoughts and the intent to convey those thoughts to others.

This distinction helps explain why the practice of defining crimes as a function of *mens rea* -- as a function of defendant’s thoughts -- has never been seriously questioned as compromising any putative First Amendment "freedom of thought." People ordinarily do not commit crimes like bank robbery, burglary, or insurance fraud to participate in public debate or to shape public attitudes. People ordinarily do not commit crimes like murder, assault, or rape to make statements about public issues. Any fulfilment people ordinarily seek from these crimes is not through the intent to communicate ideas. To impose criminal liability for bank robbery *not intended to communicate a social message* raises no special First Amendment issues, although liability might well depend on a defendant’s thoughts as proved through a defendant’s statements. To impose criminal liability for assault *not intended to communicate a social message* raises no special First Amendment problems, although liability depends on a defendant’s thoughts -- acting purposefully rather than accidentally -- as proved by a defendant’s statements. Similarly, to impose special criminal liability for hate motivated assault *when that assault was not intended to communicate a social message* should not be viewed as threatening a defendant’s First Amendment rights, though liability depends on the defendant’s thoughts which might be proved by the defendant’s statements.11

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11 One might suggest that although the symbolic assault and the terrorist act represent real efforts by criminals to affect public values and discussion, a far larger class of crimes might be committed with a narrower communicative intent. Murder might be committed with the intent to communicate a one-on-one message, "I don’t want you to live." Assault might be committed to communicate a one-on-one message, "I want you to suffer." Theft might be committed with the intent to communicate a one-on-one message, "What belongs to you should belong to me." Murder, assault, and theft each could also be committed with no communicative intent at all -- just for personal gratification through the acts themselves, or the monetary enrichment from the acts. Recognizing the potentially broad category of crimes intended to communicate one-on-one messages to specific victims raises an issue of whether these criminal acts should be viewed as containing a constitutionally valuable element. I will later suggest that communicative intent is necessary, but not sufficient for purposes of defining "speech" protected under the First Amendment. The intent to communicate an idea symbolically *through the breach of otherwise valid law* renders the "speech" unprotected, or "low
It is, however, conceivable that some might wish to "make a statement" through robbery, murder, assault, or rape. Making a statement is, after all, frequently an essential purpose of terrorism, through arson, kidnapping, armed robbery, or other crimes.112 Similarly, making a statement is an essential purpose of lynching, a crime with a distinctive American pedigree.113 At its core, the tradition of lynching reflected the intent to send messages to African-Americans who refused to be bound by custom.114

Accepting the foregoing analysis, one must conclude that criminalizing hate motivated violence might touch upon a defendant's First Amendment interests only to the extent that those who assault, maim, or kill do so with the intent to convey an idea.115 Lynching (or terrorism) is speech; ordinary assault (or arson), lacking the intent to convey an idea symbolically, is not.116

112 After the recent explosion at the World Trade Center, New York Governor Mario Cuomo stated about terrorism, "Fear is another weapon that is used against you. That's what terrorists are all about. What they're trying to do is deny you normalcy." John Aloysius Farrell, Suddenly, Questions of Security Jolt America the Invulnerable; Explosion in New York, BOSTON GLOBE, Feb. 28, 1993, at 1.

113 See Cottrol & Diamond, supra note 4, at 351 ("up to the time of the modern civil rights movement, lynching would be virtually an everyday occurrence."); supra note 31.

114 Cottrol & Diamond, supra note 4, at 352 ("Between 1882 and 1968, 4743 persons were lynched, the overwhelming number of these in the South; 3446 of these persons were black, killed for the most part for being accused in one respect or another of not knowing their place.") (citations omitted). See supra note 31.

115 This is true both within a political debate paradigm and a self-fulfilment paradigm. Without the intent to express an idea, an individual does not participate in political debate. Without the intent to express an idea, an individual cannot be seeking fulfilment through "speech," though he might be seeking fulfilment through inflicting physical pain. Again, justifying the protection of "speech" with a value of self-fulfilment does not mean that an individual is engaged in protected "speech" whenever he seeks fulfilment, but only when he seeks fulfilment through whatever is distinctively "speech." See supra note 109 and accompanying text.

116 This defendant might argue that he is being prosecuted under an unconstitutional law on grounds of overbreadth. In doing so, however, he would rely on the putative rights of those who do intend to express a message through lynching. For the argument that assault and arson intended to communicate messages should be deemed "unprotected speech," see infra text at notes 173-84; infra note 184.
IV. Identifying the Unconstitutional Intrusion on "Speech": Whose Burden to Prove What?

As the foregoing analysis suggests a basis for determining when hinging criminal liability on a defendant's thoughts does, and does not, implicate a defendant's First Amendment interests, it also provides a basis for potentially distinguishing R.A.V.'s activity from Mitchell's activity. The prosecution of R.A.V. rather clearly punished an individual who was engaged in "speech." Like one who burns a flag at a public gathering, or one who burned a draft card in the late 1960s, R.A.V. rather clearly intended to express a point of view by burning a cross on the lawn of his black neighbor. The prosecution of Mitchell, however, does not necessarily implicate a defendant's First Amendment interests. Mitchell did not necessarily intend to convey an idea in assaulting his victim; he might have wished simply to satisfy his feelings of racial hatred. Thus, like Mr. Johnson and his act of flag burning, Mitchell must establish that he intended to communicate an idea through his assault. Without this foundation, there is no reason to be concerned that Mitchell's rights of free speech have been compromised, let alone that they have been violated.\footnote{There is, of course, a difference between finding that a person's rights have been compromised, and finding that those rights have been violated. A government policy might intrude upon personal rights, yet not violate those rights. Government regulation that touches upon an individual's free religious exercise is a common example. See, e.g., Goldman v. Weinberger, 475 U.S. 503 (1986) (upholding military regulations prohibiting headwear as applied to Orthodox Jew's yarmulke); Reynolds v. United States, 98 U.S. 145 (1878) (upholding prohibition of bigamy as applied to Mormon). Furthermore, it is possible that the government regulates a person unconstitutionally, even if that individual's personal rights have not even been touched. "[A]n individual whose own speech or expressive conduct may validly be prohibited or sanctioned is permitted to challenge a statute on its face because it also threatens others not before the court — those who desire to engage in legally protected expression but who may refrain from doing so rather than risk prosecution . . .." Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 503 (1985).} Assuming that Mitchell can establish his intent to communicate through assault, the question remains whether Wisconsin nevertheless may regulate Mitchell's acts.
A. Burden to Prove What?: The Essence of a First Amendment Violation

1. Content Motivated Suppression of Communication

"[I]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."\(^{118}\) This principle is deeply rooted in the political process paradigm for protecting speech. A governmental purpose to suppress ideas is antithetical to a concern for free and open political dialogue in a democratic system.\(^{119}\) A government that can purposefully suppress ideas can stifle the evolution of social mores, the modification of law to reflect changing values, and even can insulate itself from electoral retribution. The Court has articulated this concern with content-motivated suppression of ideas as compromising not only a politically-oriented First Amendment, but one concerned with personal fulfilment as well.

The constitutional right of free expression is . . . intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us . . . in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests.\(^{120}\)

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\(^{119}\) Alexander Meiklejohn made the point. "No speaker may be declared 'out of order' because we disagree with what he intends to say. And the reason for this equality of status in the field of ideas lies deep in the very foundations of the self-governing process." MEIKLEJOHN, supra note 107, at 27.

Justice Brennan confirmed this principle in *Texas v. Johnson*.

If the government regulates conduct that some defendants might have committed with the intent to communicate ideas, it is prohibited from regulating motivated by concern for the content of those ideas.

The Government generally has a freer hand in restricting expressive conduct than it has in restricting the written or spoken word. . . . It may not, however, prescribe particular conduct because it has expressive elements. . . . A law *directed at* the communicative nature of conduct must, like a law directed at speech itself, be justified by the substantial showing of need that the First Amendment requires.

Justice Brennan concluded with a point that bears emphasis. "It is, in short, not simply the verbal or nonverbal nature of the expression, *but the governmental interest at stake*, that helps to determine whether a restriction on that expression is valid."\(^{123}\)

2. **Unconstitutional Effects Without Unconstitutional Intent?**

Justice O'Connor has recently stated that "illicit legislative intent is not the *sine qua non* of a violation of the First Amendment," and that "even regulations aimed at proper governmental concerns can restrict unduly the exercise of rights protected by the First Amendment."\(^{124}\) Justice O'Connor made this statement in the context of invalidating a statute that, in relevant substance, required firms contracting to publicize a self-proclaimed criminal's accounts of his criminal activities to "submit a copy of such contract to the

\(^{121}\) 491 U.S. 397 (1989).

\(^{122}\) *Id.* at 414.

\(^{123}\) *Id.* at 406-07.

\(^{124}\) *Simon & Schuster*, 112 S. Ct. at 509 (quoting *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 592 (1983)).
[New York Crime Victims Board] and pay over to the board any moneys which would otherwise, by terms of such contract, be owing to the person so accused or convicted or his representatives. It is not at all clear, however, why unintended effects in curtailing speech should be deemed constitutionally significant, nor is it clear how a court should determine what effects violate the First Amendment.

Indeed, taken seriously, a concern with the effects of policies on speech, apart from whether those policies were animated by impermissible censorial purposes, would have far reaching implications. The federal government’s grant of broadcast licenses to particular commercial entities surely has harmful effects on the speech interests of those not accorded licenses. The three major television networks, NBC, ABC, and CBS, have access to speech power that hundreds of millions of Americans do not. Laws defining property rights have effects on the speech interests of millions. Ross Perot's billions enable him to speak so much as to shape the public agenda and to create a presidential campaign. Deep and broadly based poverty, and the laws of property entitlement that perpetuate and reinforce that poverty, disable people from pressing their concerns toward public consciousness -- unless, as through rioting, for example, they destroy the valuables "owned" by others. Surely, from the perspective of the political process paradigm of protected speech, the impact of the nation's property laws is far more significant than the impact of New York's "Son of Sam" law. Even from the perspective of the individual fulfilment paradigm of protected speech, the dichotomy between Perot's power of self-gratification and the powerless despair of two hundred million

125 Id. at 505. Justice O'Connor found that the challenged statute was presumptively unconstitutional for facially discriminating based on the content of speech. Id. at 508. Justice O'Connor concluded that the state failed to meet its burden of proving that the content discrimination was narrowly tailored to the goal of compensating victims and preventing defendants from reaping the fruits of their crimes. Id. at 512. For further discussion of burden of proof, see infra note 136; infra text at notes 132-53.

126 Martha Burk, Let's Buy our own Election, USA TODAY, June 24, 1992, at 14A (when Ross Perot is asked if he is buying the election, he often responds, "I'll buy it for the American people.").

127 See Peter B. Edelman, The Next Century of Our Constitution: Rethinking Our Duty to the Poor, 39 HASTINGS L.J. 1, 32 (1987) ("the poor have no political power to obtain a remedy legislatively . . . ").
would-be speakers is so great as to dwarf the significance of the "Son of Sam" law's impact on a would-be-notorious criminal's interest in self-fulfilment through speech.

Thus, one might question whether the substance of Justice O'Connor's analysis was actually a finding that the state had failed to demonstrate that it was not pursuing an impermissible purpose to suppress certain unseemly messages, rather than a finding that, apart from purpose, the New York regulation's effect "unduly" restricted the exercise of First Amendment rights. Indeed, Justice O'Connor's determination that the challenged regulation in Simon & Schuster was "not narrowly tailored to achieve the state's objective of compensating crime victims from the profits of crime" is at least consistent with a determination that the asserted legitimate interest might not have been the state's actual interest. When a legislature has chosen an ineffective means for serving an asserted end, one might question the plausibility that the legislature actually was animated by that asserted end. When a content-motivated purpose better fits the chosen regulatory means, especially when a statute on its face contains a content-based classification, it is reasonable to conclude that the statute was adopted for impermissible purposes. Thus, Justice O'Connor's finding that the challenged regulation was "not narrowly tailored" to permissible compensatory purposes supports an inference of impermissible content motivation. There

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128 Simon & Schuster, 112 S. Ct. at 512.
129 See infra note 136.
130 Despite Justice O'Connor's statement that "illicit legislative intent is not the sine qua non" of a First Amendment violation, Simon & Schuster, 112 S. Ct. at 509, it is difficult to identify a case in which the Court invalidated a statute on impact grounds that could not have been decided on grounds of impermissible intent. Indeed, as suggested in a recent Note, the Court generally has been tolerant of "unintended content-differential effects." See Grannis, Note, supra note 29, at 206. The Note suggests two reasons for this judicial "tolerance": "(1) the content-differential effects of facially-neutral statutes are generally insubstantial and therefore unimportant; (2) such effects are likely to be insubstantial unless they result from statutes designed specifically to cause them." Id. Discussion in the text should be enough to raise serious questions about these propositions. Facially neutral laws not designed to shape public discourse in any particular way can nevertheless have profound consequences in determining who can speak, with what power, and to what effect. See supra text at notes 125-28. Content-based laws, clearly designed to suppress a point of view, might have a trivial effect on speech. See, e.g., Police Dept. of the City of Chicago v. Mosley, 408 U.S. 92 (1972).
was no need to declare that "[i]llicit legislative intent is not the *sine qua non* of a violation of the First Amendment."\textsuperscript{131}

In any event, the following sections will address both how a court should determine whether the Wisconsin statute was enacted for impermissible content-motivated reasons, and how a court should determine whether, assuming permissible, noncontent-motivated state purposes, the Wisconsin statute might unduly affect constitutionally protected speech interests.

\textbf{B. Whose Burden of Proof?}

\textit{1. R.A.V., O'Brien, and Johnson: The Wisconsin Statute is Not Presumptively Facial Unconstitutional as Content-Based}

Judge Heffernan quite rightly noted that "the first step in reviewing a constitutional challenge to a statute is to determine which party bears the burden of proving its constitutionality or unconstitutionality."\textsuperscript{132} He continued:

While the party challenging the statute ordinarily bears the burden of proving beyond a reasonable doubt that the statute is unconstitutional, the burden shifts to the proponent of the statute to establish its constitutionality when the statute encroaches upon First Amendment rights. Because the hate crimes statute punishes the defendant's biased thought, . . . and thus encroaches on First Amendment rights, the burden is on the state to prove its constitutionality.\textsuperscript{133}

Judge Heffernan thus placed the burden of proof on the state based on two propositions. First, the hate crimes statute "encroaches on First Amendment rights." Second, whenever a statute "encroaches on First Amendment rights," the state must rebut a presumption of

\textsuperscript{131} Simon \& Schuster, 112 S. Ct. at 509 (quoting Minneapolis Star \& Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575, 592 (1983)).

\textsuperscript{132} Id. at 811.

\textsuperscript{133} Id.
unconstitutionality.

Analysis in Part II of this essay argued that the hate crimes statute no more "encroaches on First Amendment rights" than does any other criminal law that makes liability a function of mens rea. Thus, if the Wisconsin hate crimes statute presumptively violates the First Amendment, then so does the larger part of any criminal code. Furthermore, as suggested in Part III of this essay, Mitchell must establish that he intended to communicate ideas symbolically through assault as a prerequisite to any finding that his own First Amendment interests have been compromised, let alone violated. To establish that his First Amendment rights have been compromised, Mitchell must assert, and prove, that he intended to communicate an idea through his assault.

More important for present purposes, the Supreme Court has never held that a statute is presumptively unconstitutional whenever it "encroaches upon First Amendment rights." Rather, as Justice Scalia significantly declared in R.A.V., "[c]ontent-based regulations are presumptively invalid." 134 "Governmental action that regulates speech on the basis of its subject matter ‘slips from the neutrality of time, place, and circumstance into a concern about content.’" 135

The first critical question for allocating the burden of proof, therefore, is not whether the Wisconsin statute "encroaches upon" or compromises a defendant's intent to communicate, but whether the Wisconsin statute regulates speech in a "content-based" way. 136 The


135 Consolidated Edison, 447 U.S. at 536 (quoting Police Dept' of Chicago, 408 U.S. at 99) (emphasis added).

136 If one views the essence of government action in violation of the First Amendment as content-motivated regulation, then the presumptive invalidity of content-based regulation makes sense. When the government regulates based on content, it makes sense to presume that it chose to regulate motivated by content. See, e.g., Geoffrey R. Stone, Content Regulation and the First Amendment, 25 WM. & MARY L. REV. 189, 230 (1983) (“[T]he probability that an improper motivation has tainted a decision to restrict expression is far greater when the restriction is directed at a particular idea, viewpoint, or item of information than when it is content-neutral. Indeed, in the content-neutral context the risk of improper motivation is quite low, for such restrictions
St. Paul statute challenged in *R.A.V.* discriminated between *fighting words* that "arouse[ ] anger, alarm, or resentment in others on the

necessarily apply to all ideas . . . . "). This rationale for presuming content-based regulation to be unconstitutional parallels a primary justification for presuming race-based regulation -- i.e., racial classifications -- to violate the equal protection clause. As Chief Justice Burger stated, "Classifying persons according to their race is more likely to reflect racial prejudice than legitimate public concerns." *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984). *See also* *McLaughlin v. Florida*, 379 U.S. 184, 192 (1964) (Racial classifications are "in most circumstances irrelevant to any constitutionally acceptable legislative purpose."). In contrast, facially neutral government action is accorded a strong presumption of constitutional permissibility against claims of unconstitutional racial discrimination. This burden of proof makes sense because it is so much less likely that the government has acted because of impermissible racial prejudice when it regulates in a facially neutral way than when it regulates in a racially-specific way. *See* David Chang, *Discriminatory Impact, Affirmative Action, and Innocent Victims: Judicial Conservatism or Conservative Justices?,* 91 COLUM. L. REV. 790, 802 (1991).

*But see* Grannis, Note, *supra* note 29, at 204 ("Just as the standard of guilt beyond a reasonable doubt in criminal trials reflects the low value placed on punishment in comparison to protecting the innocent, the low burden of proof placed upon the government in justifying facially content-neutral regulations should be viewed as indicative of the Court's assessment of constitutional values."). This, I suggest, misapprehends factors that the Court has implicitly deemed significant in deciding how to allocate burdens of proof in constitutional litigation. In the context of racial discrimination, for example, the value of purging government policy of racist purposes and premises is the same whether the government acts through a racial classification or in a facially neutral way. What is different is the likelihood that the government has pursued impermissible racist purposes. This difference in likelihood that the government has acted unconstitutionally when employing a racial classification, and when not doing so, justifies the different burdens of proof in the two contexts. The same rationale applies to content-based regulations and facially content-neutral regulations. The value of purging government policy of content-motivated purposes is the same in the two contexts. What is different is the likelihood that the government has violated that value in the two contexts.

If one believes that a regulation might unconstitutionally affect speech interests, apart from impermissible legislative purpose, one might view content-based regulations as presumptively unconstitutional for posing an excessive danger that the government might "effectively drive certain ideas or viewpoints from the marketplace." *Simon & Schuster v. Members of N.Y. Crime Victims Bd.*, 112 S. Ct. 501, 508 (1991). The direct, explicit regulation of ideas arguably poses a greater danger of completely silencing them than do effects that are byproducts of otherwise directed regulations. *See* Grannis, Note, *supra* note 29, at 206. This argument, however, is far from persuasive, as, indeed, is the proposition that the First Amendment should be interpreted as restricting government discretion as a function of unintended effects on speech interests. *See supra* note 130 and accompanying text.
basis of race, color, creed, religion or gender" and symbolic acts that do not.\textsuperscript{137} On the face of the statute, Minnesota revealed its concern about the messages conveyed by symbolic acts, and its desire to punish particular messages with which an audience would disagree to the extent of "anger, alarm, or resentment."\textsuperscript{138} Justice Scalia found that there was "content-based discrimination reflected in the St. Paul ordinance."\textsuperscript{139}

Those who wish to use "fighting words" in connection with other ideas -- to express hostility, for example, on the basis of political affiliation, union membership, or homosexuality -- are not covered. The First Amendment does not permit St. Paul to impose special prohibitions on those speakers who express views on disfavored subjects.\textsuperscript{140}

From the conclusion that St. Paul was engaging in content-based discrimination, Justice Scalia determined that the burden of proof rests with the state:

Selectivity of this sort creates the possibility that the city is seeking to handicap the expression of particular ideas. That selectivity would alone be enough to render the ordinance presumptively invalid, but St. Paul's comments and concessions in this case elevate that possibility to a certainty.\textsuperscript{141}

In contrast, the Wisconsin statute does not discriminate according to an idea a defendant intended to express, or an idea perceived by an offended audience. The statute is entirely silent about different messages a defendant might communicate. Rather, the Wisconsin statute discriminates based on the factors a defendant considers in choosing the victim of his violence. Indeed, for

\textsuperscript{137} \textit{R.A. V.}, 112 S. Ct. at 2541.
\textsuperscript{138} \textit{Id.}
\textsuperscript{139} \textit{Id.} at 2548.
\textsuperscript{140} \textit{Id.} at 2547.
\textsuperscript{141} \textit{Id.} at 2549.
purposes of allocating the burden of proving a First Amendment
violation, Justice Scalia explicitly recognized a clear distinction
between the St. Paul ordinance and a statute like Wisconsin’s.

What we have here, it must be emphasized, is not a
prohibition of fighting words that are directed at
certain persons or groups (which would be *facially*
valid if it met the requirements of the equal protection
clause); but rather, a prohibition of fighting words
that contain (as the Minnesota Supreme Court
repeatedly emphasized) messages of "biased-
motivated" hatred and in particular, as applied to this
case, messages "based on virulent notions of racial
supremacy."

If a prohibition of fighting *words* directed at certain persons or
groups would be facially valid under the First Amendment, then a
prohibition of fighting *action* directed at certain persons or groups
should be facially valid as well. Thus, *R.A.V.*'s stringent judicial
scrutiny of content-based regulations should not be triggered by
Wisconsin’s facially content-neutral hate crimes statute.

*United States v. O’Brien* and *Texas v. Johnson* confirm
that the Wisconsin statute should not be deemed presumptively
unconstitutional as content-based. In *O’Brien*, defendant was
convicted of violating a federal statute that threatened criminal
liability for one who "knowingly destroys, [or] knowingly mutilates"

142 *Id.* at 2548.
143 Because the Wisconsin statute prohibits such fighting actions not only directed
against certain groups, but directed against all groups defined in terms of race, religion,
color, disability, sexual orientation, national origin, or ancestry, it contains no racial,
ethnic, religious, or other classifications that should trigger strict judicial scrutiny for
purposes impermissible under the equal protection clause. Indeed, as suggested by
Justice Bablitch’s dissenting opinion in *State v. Mitchell*, the Wisconsin hate crimes
statute is structurally indistinguishable from a broad range of anti-discrimination statutes.
The Wisconsin hate crimes statute prohibits racial and other reasons for discrimination
(Bablitch, J., dissenting); *supra* note 82 and accompanying text.
144 391 U.S. 367 (1968).
a Selective Service certificate -- that is, a draft card.\textsuperscript{146} The Court determined that the challenged regulation was not content-based because it applied both to intentionally expressive conduct and to conduct undertaken without expressive intent.

It prohibits the knowing destruction of certificates issued by the Selective Service System, and there is nothing necessarily expressive about such conduct. The Amendment does not distinguish between public and private destruction, \textit{and it does not punish only destruction engaged in for the purpose of expressing views}. A law prohibiting destruction of Selective Service certificates no more abridges free speech on its face than a motor vehicle law prohibiting the destruction \ldots of books and records.\textsuperscript{147}

Similarly, in \textit{Texas v. Johnson}, Justice Brennan determined that defendant's challenge to Texas' prohibition of flag desecration should not be treated as a facial challenge to a content-based regulation, because the statute did not necessarily apply "only to expressive conduct protected by the First Amendment."\textsuperscript{148} Justice Brennan reached this conclusion despite the fact that the Texas statute, like the provision challenged in \textit{R.A.V.}, applied only to acts that the defendant knows is likely to arouse anger or cause offense.\textsuperscript{149} The basis for Justice Brennan's conclusion that the Texas statute reached more than speech was his finding that one could violate the statute with "no thought of expressing any idea."\textsuperscript{150}

\begin{itemize}
  \item \textsuperscript{146} \textit{O'Brien}, 391 U.S. at 375.
  \item \textsuperscript{147} \textit{Id.} (emphasis added).
  \item \textsuperscript{148} \textit{Johnson}, 491 U.S. at 403.
  \item \textsuperscript{149} The Texas flag desecration statute applied only if "the actor knows" his act "will seriously offend one or more persons likely to observe or discover his action." \textit{Johnson}, 491 U.S. at 400 n.1 (quoting TEX. PENAL CODE ANN. §42.09(b) (1989)). The St. Paul Ordinance invalidated in \textit{R.A.V.} applied to symbolic fighting words that the defendant "knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion, or gender . . . ." \textit{R.A.V. v. City of St. Paul}, Minn., 112 S. Ct. 2538, 2541 (1992) (quoting \textit{ST. PAUL, MINN. LEGIS. CODE} § 292.02 (1990)).
  \item \textsuperscript{150} \textit{Johnson}, 491 U.S. at 403 n.3.
\end{itemize}
Chief Justice Warren's reasons for finding the congressional regulation of draft card burning not to present a content-based statute, and Justice Brennan's reasons for determining that Texas' prohibition of flag desecration should not be viewed as subject to facial challenge as a content-based regulation, apply with equal force to Wisconsin's hate crimes statute. There is "nothing necessarily expressive" about hate motivated assault. A hate motivated criminal might, indeed, intend to communicate a message, but also might intend simply to have a good time or to blow off steam. The statute does not distinguish between public and private hate motivated assault. Hate motivated assaults through which the defendant intended to send a message are not singled out. Hate motivated assaults that are perceived to send a message are not singled out. Rather, the Wisconsin statute provides for special criminalization of any assault in which a defendant chose his victim because of the "race, religion, color, disability, sexual orientation, national origin, or ancestry" of his victim.\footnote{WIS. STAT. § 939.645 (1989).}

In contrast, the St. Paul provision explicitly applied to acts of placing a "symbol," "appellation," "characterization," or "graffiti," all of which connote the actor's intent to communicate an idea.\footnote{R.A.V., 112 S. Ct. at 2541. The statute also referred to placing an "object," which does not necessarily connote the actor's communicative intent. Nevertheless, the Minnesota Supreme Court's interpretation of the statute as applying only to "fighting words" narrows the possible meaning of "object" to one placed with a communicative intent. See infra note 153 and accompanying text.} Furthermore, even more significant, the statute was interpreted by the Minnesota Supreme Court as applying only to "fighting words," which, although deemed by the Court to be low value speech, are by definition uttered or expressed with the intent to communicate an idea.\footnote{The language of the St. Paul ordinance, which prohibited the act of "placing on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika," could have been interpreted as reaching one who abandoned some object with the relevant knowledge that some might be offended. If the statute had been so interpreted, the O'Brien definition of a content-based regulation would not have been satisfied, and the Johnson analysis of when a statute should be examined for facial unconstitutionality would have demanded an as applied scrutiny. Had the St. Paul ordinance not been construed to reach only "fighting words," it would have reached not only those who, intending to communicate...} The St. Paul ordinance, therefore, necessarily regulated...
communicative activity. Under the Warren and Brennan tests for content-based regulation -- whether a statute regulates only intentionally expressive activity -- the St. Paul ordinance falls on one side of the line; the congressional regulation of draft card burning, the Texas regulation of flag burning, and the Wisconsin regulation of hate crimes fall on the other side of the line.

Thus, Justice Scalia’s reasons for viewing the Minnesota regulation in *R.A.V.* as content-based do not apply to the Wisconsin statute. The Minnesota statute in *R.A.V.* did discriminate based on the ideas a defendant intended to express and the ideas perceived by an audience; the Wisconsin statute does not. Furthermore, Chief Justice Warren’s and Justice Brennan’s reasons for viewing the congressional regulation of draft card burning and the Texas regulation of flag burning as not content-based do apply to the Wisconsin statute. The Wisconsin statute -- unlike the Minnesota statute in *R.A.V.* -- applies to activity, regardless of its communicative content, and whether or not the defendant intended to communicate. Under both approaches, the Wisconsin statute is not content-based.

2. Examining the Constitutionality of the Wisconsin Statute as Applied

Although the *O'Brien* Court did not view the statute to be presumptively facially invalid as a content-based regulation, it considered whether the statute was unconstitutional "in its application to [the defendant]."\(^{154}\) Chief Justice Warren first assumed, for purposes of analysis, that O'Brien intended to convey an idea and, therefore, that O'Brien's conduct amounted to symbolic speech protected by the First Amendment.\(^{155}\) He continued:

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\(^{155}\) *Id.*
when "speech" and "nonspeech" elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms. . . . [A] government regulation is sufficiently justified if it is within the constitutional power of the government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.\textsuperscript{156}

One might similarly assume for present purposes that Mitchell intended to communicate a message through the assault of his victim. If Wisconsin's statute can be applied to Mitchell without violating the First Amendment, then, \textit{a fortiori}, it can constitutionally be applied to those who lack the intent to communicate a message through assault (but who nevertheless intentionally select their victims) "because of the race, religion, color, disability, sexual orientation, national origin or ancestry of that person."\textsuperscript{157}

Wisconsin can justify its statute by asserting the purpose of deterring hate motivated criminals. Indeed, Judge Heffernan acknowledged that "the motivation of the legislature [was] its desire to suppress hate crimes."\textsuperscript{158} This justification for special criminalization of hate motivated violence reflects the view that bias-motivated criminals act because of special incentives, cause social harms beyond those of ordinary street crime, and, therefore, require special deterrence.\textsuperscript{159} The criminal who kills or assaults because of

\textsuperscript{156} \textit{Id.} at 376-77.

\textsuperscript{157} \textsc{Wis. Stat.} § 939.645 (1989).

\textsuperscript{158} State v. Mitchell, 485 N.W.2d 807, 817 (Wis. 1992). Elsewhere, however, Judge Heffernan stated that "the statute commendably is designed to punish — and thereby deter — racism and other objectionable biases." \textit{Id.} at 814. For several reasons, this should not be construed as an "authoritative statement" of legislative purpose by which the Supreme Court deems itself bound. \textit{See supra} note 25.

\textsuperscript{159} \textit{See supra} notes 6-7 and accompanying text.
hatred has a special motivation that the ordinary felon does not. The bias-motivated criminal inflicts pain for sport, for pleasure, for kicks, or, perhaps, even for expressing a message. Indeed, the bias-motivated criminal might not view himself as a criminal at all but, rather, as an agent of some higher morality or holder of some special license. The ordinary laws against assault or murder might well not grab the attention of those motivated by hate to destroy bodies and lives. Defining a crime addressed specifically to potential bias criminals could.

The purpose of specially deterring the murder or assault of victims chosen because of race, religion, color, disability, sexual orientation, national origin, or ancestry is, on its face, unrelated to the suppression of expression. One clearly can be concerned with protecting individuals from physical harm regardless of the opinions a defendant might -- or might not -- intend to express through murder or assault. A concern for specially deterring hate motivated violence reflects not the view that such violence might express offensive opinions, but the view that ordinary assault laws do not put perpetrators of such violence on adequate notice that they face punishment for their crimes.

The goal of deterring hate motivated crimes -- toward protecting the potential victims of such crimes -- is not only unrelated to the suppression of freedom of expression, it reflects an undeniably substantial responsibility of government. Concerns for law and order, for safe streets, and for protecting law-abiding people from violent victimization are far from the smug intolerance of "political correctness." This state interest is so fundamental and pervasive as surely to pass the O'Brien requirement of an "important" or "substantial" interest. The goal of specially deterring a particularly hardy and virulent version of violent crime is an entirely plausible

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160 See supra note 8 and accompanying text.
161 See supra note 9 and accompanying text.
162 Without these laws, potential criminals can receive the message that they will be subject to less punishment for hate motivated murder. See, e.g., Censured judge is re-elected, CHI. TRIB., Mar. 16, 1990, at 18 ("A judge who was censured for saying he gave a lenient sentence to a killer because the victims were 'queers' has been re-elected.").
state purpose -- at least as plausible as speculation that Wisconsin's true, yet hidden, purpose is to suppress unpopular ideas.

Finally, the Wisconsin statute is closely related to the goal of deterring hate motivated violence. Assuming the plausible factual premises that hate motivated criminals view themselves differently from those who commit ordinary murders or assaults, and that hate motivated criminals need the special deterrence of a statute directed specifically to them, the "incidental restriction on alleged First Amendment freedoms is no greater than is essential" to achieve the goal of protecting potential crime victims. Those who hate are not prohibited from expressing their views by any means other than murder, assault, or destruction of property. Those who wish to express their views through their hate crimes are subject to no more punishment than are those who commit hate crimes for non-communicative reasons.

The state could hardly serve its deterrence ends effectively if it exempted those who expressed opinions through lynching. Those defendant "speakers" cause as much public harm as hate motivated criminals who intend no message. Furthermore, allowing an exemption from special punishment for those who wish to communicate through hate motivated crime would virtually preclude the statute's application to hate motivated criminals who do not intend to communicate. These criminals, who lack any First Amendment interest at all, could falsely claim that they intended to express a message and, indeed, could construct their crime to make the claim, though pretextual, sufficiently plausible to raise reasonable doubt.

Indeed, simply to suggest the possibility of exempting those who lynch from a general provision that provides special penalties for hate motivated violence is to refute its plausibility. The First Amendment cannot plausibly be interpreted as requiring a state that wishes to provide special punishment for hate motivated crime to exempt those with speech interests who wish to make a point. Just as First Amendment interests are minimally and acceptably compromised by punishing the terrorist bank robber who wished to

164 See supra notes 7-8 and accompanying text.
165 See supra note 9 and accompanying text.
166 O'Brien, 391 U.S. at 377.
167 See supra text at notes 98-116; infra note 184.
make a point no differently from the bank robber who simply wanted money, so First Amendment interests are minimally and acceptably compromised by punishing the hate motivated murderer who wished to make a point no differently from the hate motivated murderer who simply wanted a good time. As Justice Scalia himself unambiguously noted in *R.A.V.*, "[w]here the government does not target conduct on the basis of its expressive content, acts are not shielded from regulation merely because they express a discriminatory idea or philosophy."\(^{168}\)

This analysis holds whether the essence of an unconstitutional intrusion on speech is viewed in terms of impermissible content-motivated purposes,\(^{169}\) or undue effects on the vitality of certain ideas.\(^{170}\) Finding that the Wisconsin statute furthers a purpose unrelated to the suppression of ideas, that its purpose is "substantial," and that the means chosen intrude on speech interests no more than is necessary, suggests more than a plausibility, but a probability, that the challenged provision was in no way tainted by impermissible concerns with the content of communicated ideas.\(^{171}\)

Furthermore, because these *O'Brien* findings also support the conclusion that the challenged statute has an incidental impact on the communication of hate motivated concerns no greater than necessary to achieve the valid, uncontroversial, and plausible state objective of ensuring public security, concern about undue effect on the vitality of certain ideas should be mitigated. The regulation does not prohibit expression about subjects, does not prohibit expression of particular viewpoints, but prohibits only certain acts through which people might wish to communicate. This regulation creates no realistic risk of "effectively driv[ing] certain ideas or viewpoints from the marketplace."\(^{172}\) A defendant who claims that he must bash a homosexual's head to express anti-gay sentiments, or kill an African-

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168 R.A.V. v. City of St. Paul, Minn., 112 S. Ct. 2538, 2546-47 (1992). Justice Scalia noted that "sexually derogatory 'fighting words,' among other words, may produce a violation of Title VII's general prohibition against sexual discrimination in employment practices." *Id.* at 2546 (citations omitted).

169 See supra notes 118-23 and accompanying text.

170 See supra notes 124-31 and accompanying text.

171 See supra note 136.

American as social commentary on race, has many other effective means for expressing his views: the poster, the placard, the newspaper advertisement, the letter to the editor, the telephone call to C-SPAN, the sound truck, the parade, and, indeed, even the "fighting word."

V. Lynching and Terrorism as "Unprotected Speech" -- Despite the Intent to Convey an Idea

This analysis is sufficient to uphold the Wisconsin statute. Consider, however, a stronger proposition: Lynching and terrorism, like obscenity and fighting words, should be deemed "unprotected speech" -- against which the government has a broader regulatory discretion.\(^{173}\)

If "fighting words" are unprotected, it easily follows that words through fighting, or communication through murder -- or lynching -- should be deemed similarly unprotected speech. The Court has defined "fighting words" as words "which by their very utterance inflict injury or tend to incite an immediate breach of the peace."\(^{174}\) Justice Murphy elaborated that "such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."\(^{175}\)

The "injury" about which Justice Murphy spoke was hurt feelings.\(^{176}\) This injury might be viewed as perilously close to taking offense from an idea with which one disagrees -- an injury that the

\(^{173}\) If lynching is "unprotected" expression, then the government has broader regulatory discretion to target such expression "because of [its] constitutionally proscribable content." R.A.V. v. City of St. Paul, Minn., 112 S. Ct. 2538, 2543 (1992). Thus, the government may, in ways later discussed, do more than treat hate motivated crime intended to communicate a message the same as it treats hate motivated crime not intended to communicate a message; it may choose to target hate motivated crimes-as-communication for special punishment. See infra notes 185-96 and accompanying text.


\(^{175}\) Id.

\(^{176}\) Id.
Court today clearly views not only as inadequate to justify regulation, but an impermissible basis for regulation.177 So do the notions of "prurience" and "redeeming social value," which underlie the Court's definition of constitutionally unprotected "obscenity."178 As Justice Scalia stated in R.A.V., "[t]he First Amendment generally prevents government from proscribing speech, or even expressive conduct, because of disapproval of the ideas expressed."179 Yet Justice Murphy's concern with "fighting words" on the ground that they "tend to incite an immediate breach of the peace" provides a second basis for defining unprotected fighting words, a basis that is more content-neutral. This factor is consistent with the Court's view that a legislature may prohibit the advocacy of illegality if such advocacy creates a "clear and present danger" of illegality180 or if the advocacy "is likely to incite or produce such [lawless] action."181

However strong these two factors are in defining "fighting words" and in justifying the notion that "fighting words" are "unprotected speech," they apply far more strongly to lynching -- that is, to words through fighting. Words through fighting by their very "utterance" inflict injury. The injury, however, is not the problematic notion of insult or sense of feeling offended. Rather, the injury is palpable physical harm. Furthermore, not only does lynching meet the "fighting words" standard of "tend[ing] to incite an immediate breach of the peace;"182 lynching is an immediate breach of the peace. Words through fighting are not merely likely to produce illegality; they are illegality.

Not only does lynching qualify as "unprotected speech" under the Chaplinsky rationale, it fails to satisfy either the political debate rationale for protecting speech or the personal fulfilment rationale for protecting speech. The point of the political rationale for protecting

177 As Justice Brennan stated in Texas v. Johnson, with respect to symbolic speech not deemed to be "unprotected" or "low value": The Government generally has a freer hand in restricting expressive conduct than it has in restricting the written or spoken word. . . . It may not, however, proscribe particular conduct because it has expressive elements." Texas v. Johnson, 491 U.S. 397, 406 (1989).
179 R.A.V., 112 S. Ct. at 2542 (citations omitted).
speech is to facilitate democratic decisionmaking. Democratic
decisionmaking is elevated as the higher value served by free speech.
One who seeks to speak as a lYNcher through criminal acts of assault
or murder, or to communicate as a terrorist through arson or
kidnapping, has stepped beyond the bounds of democracy. By acting
illegally, the individual denies the ultimate authority of the democratic
system that has created the laws criminalizing his conduct. To
protect the speaker whose means of communication denies the
authority of the democratic system, as a way of serving the
democratic system, would be perverse. 183

The point of the personal fulfilment rationale for protecting
speech is to respect the individual’s claim to personal autonomy and
fulfilment through the communication of ideas. The individual who
expresses words through fighting, however, seeks personal fulfilment
at the expense of another individual’s physical pain or death. Only
an unnatural commitment to individual fulfilment through
communication could justify the idea that the joy of lynching, or
terrorism, or words through fighting, deserves protection as First
Amendment "speech." 184

183 Alexander Meiklejohn, operating within a paradigm that viewed the freedom of
speech as essential to democratic self-government, noted that the First Amendment "does
not forbid the abridging of speech," as it surely allows the punishment of "words which
incite men to crime." MEIKLEJOHN, supra note 107, at 21. "But, at the same time, it
does forbid the abridging of the freedom of speech." Id. Meiklejohn himself, therefore,
distinguished between protected and unprotected speech -- or, in his words, between
speech and the freedom of speech. As he included the incitement to crime as unprotected
speech, so he would likely include speech through criminal acts as not part of the
freedom of speech.

184 These principles apply with equal force to the narrower communicative intent with
which some might commit their crimes -- e.g., the basher who intends the message to
his assault victim, "You deserve to suffer physical pain." See supra note 111. The
democratic process rationale for protecting speech is undermined, not served, by the
"speaker" who violates the laws enacted by democracy through his method of
communication. The individual fulfilment rationale could hardly reach to protect the
speaker whose method of communication is achieved at the expense of his victim's
bodily integrity.

These principles can supply content to the O'Brien admonition about symbolic
speech. It is not necessarily true, the Court cautioned, that "an apparently limitless
variety of conduct can be labeled 'speech' whenever the person engaging in the conduct
intends thereby to express an idea." United States v. O'Brien, 391 U.S. 367, 376
Establishing that lynching or terrorism is "unprotected" or "low value" speech is significant in the context of Justice Scalia's treatment of the government's regulatory discretion. In Justice Scalia's view, categories of "unprotected" speech "can, consistently with the First Amendment, be regulated because of their constitutionally proscribable content (obscenity, defamation, etc.)" but they may not "be made the vehicles for content discrimination unrelated to their distinctively proscribable content. Thus, the government may proscribe libel; but it may not make the further content discrimination of proscribing only libel critical of the government." Justice Scalia further reasoned that:

when 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. Such a reason, having been adjudged neutral enough to support exclusion of the entire class of speech from First Amendment protection, is also neutral enough to form mere "cunmudgeonly impatience" with claims of speech interests rather than imply principles to limit the category of symbolic speech). Indeed, the fact that the Court has determined that the advocacy of illegal action, terroristic threats, fighting words, and obscenity are "low value" or unprotected speech -- despite the intent to communicate -- suggests the existence of such limiting principles. The proposition that neither the political debate rationale for protecting speech, nor the personal fulfillment rationale, are served by communication through assault, attempts to define what is protected "speech," and what is not, by reference to first principles.

It is important to understand that my concern here is not simply whether the government violates First Amendment rights by punishing a defendant who committed assault with the intent to communicate the message, "I want you to suffer." The proposition is not that the message one might intend to communicate symbolically though a crime is protected, but regulable to achieve overriding state interests. Rather, the proposition is more fundamental: Symbolic communication through criminal acts should not be deemed of any value for First Amendment purposes, but should be deemed "unprotected," as are fighting words and obscenity. This distinction is important toward determining the scope of the government's regulatory discretion to target crimes committed as symbolic speech. See infra text at notes 186-96; note 196.

186 Id.
Based on this principle Justice Scalia suggested that the state might discriminate among forms of obscenity based on the degree of prurience -- proscribing only the most prurient, for example, because prurience is the essential aspect defining obscenity and provides the essential reason obscenity is unprotected. Justice Scalia made a further observation particularly significant for hate crimes statutes and for the question of whether lynching -- that is, speech through assault or murder -- should be deemed "unprotected" speech:

[T]he federal government can criminalize only those threats of violence that are directed against the President, . . . since the reasons why threats of violence are outside the First Amendment (protecting individuals from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur) have special force when applied to the person of the President. . . . But the Federal Government may not criminalize only those threats against the President that mention his policy on aid to inner cities.

If lynching or terrorism -- i.e., violent criminality intended as political commentary -- is "unprotected speech," then the government may target lynching and terrorism for special punishment, just as it may target fighting words and obscenity for special punishment. Furthermore, the government may single out certain forms of lynching or terrorism if the reasons for the unprotected nature of "words through fighting" have special force with respect to the forms or contexts singled out. Following the above passage from Justice Scalia's R.A.V. analysis, the government might single out terrorism against fifty story buildings, or terrorism against government functions, because the reasons that "words through fighting" are not protected -- i.e., physical harm and illegal action -- have special force

187 Id. at 2545-46.  
188 Id. at 2546.  
189 Id.
in these contexts. The consequences of harm from terrorism against tall buildings or government functions are plausibly viewed as more significant than the consequences of harm from terrorism otherwise directed.

Similarly, the government might single out lynching motivated by the race, religion, color, disability, sexual orientation, national origin, or ancestry of the victim based on the view that the risks of physical harm and illegal action are especially significant. The government might wish to provide special penalties for lynching in these contexts based on the view that the risk of physical harm and illegality, and, therefore, the need for deterrence, is greater in these contexts. Those tempted to speak through hate motivated criminal violence might be single-minded zealots who need special deterrence specifically directed at them. If the government provides special

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190 One researcher has found differences in the attitudes of "terrorist" skinheads and "non-terrorist" skinheads:

First, terrorists are more likely to focus their hostility against people they perceive to have 'bad manners, habits, and breeding.' This is the essence of racism, and this finding is consistent with the seminal work of Adorno et al. . . . . Second, terrorists are more likely to advocate 'getting rid of immoral, crooked, and feeble-minded people.' . . . In Ronald Dillehay's ever-insightful words, 'The essence of conspiracy theories is that they forecast imminent doom for cherished values and institutions, with the impending disaster attributed to a carefully conceived plan of action surreptitiously controlled and conditioned by a diabolical enemy.' . . . Third, terrorists are more likely to hold strong opinions about homosexuals. This finding is also consistent with the Berkeley studies that demonstrate authoritarians typically hold negative attitudes toward a broad range of out-groups (Adorno et al., 1950).

HAMM, supra note 7, at 124-25. To qualify as terrorists, subjects had to satisfy three criteria:

(1) they must have indicated that the joined their group to fight for the survival of their race (thereby establishing grounds for the political or social objectives of their violence), (2) they must have engaged in one or two fights in which, (3) at least half were against people of another race (thus satisfying the operational definitions of both terrorism and hate crime).

Id. at 109-10. This definition of terrorism does not quite justify the conclusion that all
punishment for hate motivated lynching -- that is, hate motivated violence committed as political commentary -- based on a perceived need for extra deterrence against the resulting physical harm and illegality, it is because the reasons why "words through fighting" are unprotected "have special force" in this context.

Justice Scalia provides one more "valid basis for according differential treatment to even a content-defined subclass of proscribable speech" -- "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.'" 191 This principle would allow a state to "permit all obscene live performances except those involving minors," if the justification for the exception is unrelated to the content of the speech. 192 Presumably, protecting the welfare of minors is such a content-neutral justification. Furthermore, "sexually derogatory 'fighting words' . . . may produce a violation of Title VII's general prohibition against sexual discrimination in employment practices." 193 Presumably, a justification of protecting women against harm in the workplace provides a content-neutral justification. As Justice Scalia suggests, "[t]hese bases for distinction refute the proposition that the selectivity of the restriction is 'even arguably conditioned upon the sovereign's agreement with what a speaker may intend to say.'" 194 Similarly, prohibition of hate motivated lynching can be upheld as a content-defined subclass of proscribable (i.e., constitutionally "unprotected") "words through fighting." The justification of preventing the "secondary effects" of physical harms and illegality is articulated "without reference to the content of the speech," but only with

192 Id.
193 Id.
194 Id. at 2547 (quoting Metromedia, Inc. v. San Diego, 453 U.S. 490, 555 (1981)) (Stevens, J., dissenting in part).
reference to the special incentives that lynchers (and terrorists) seem to have for acting.

If the state may specifically target hate motivated lynching, or terrorism directed against specific victims -- if, in other words, the state may specifically target the assault as message, the words through fighting -- then it follows, a fortiori, that the state may take the less discriminatory approach of specially punishing all hate motivated assaults in which a defendant selects his victim because of race, religion, color, disability, sexual orientation, national origin, or ancestry, whether communicative or not. As "a particular content-based subcategory of a proscribable class of speech can be swept up incidentally within the reach of a statute directed at conduct rather than speech," in other words, as the state may target a subclass of "unprotected speech" if the regulation is "justified without reference to the content of the speech," so the government may regulate without targeting "speech" at all -- as has Wisconsin.

Wisconsin's regulation addresses hate motivated violence whether intended as political commentary or not. Wisconsin justifies its regulation in a content-neutral way. At worst, Wisconsin’s regulation incidentally reaches "low value" or "unprotected" lynching, terrorism, words through fighting, or murder-as-message. If, as the foregoing analysis suggests, Wisconsin could specifically target the hate motivated lynching -- the hate motivated assault with the strongest claim to First Amendment protection -- for purposes of deterring physical harm and illegality, then surely Wisconsin can, for the same purposes, regulate hate motivated assault more broadly. If a regulation targeted at assault-as-message is deemed not "even arguably conditioned upon the sovereign's agreement with what a speaker may intend to say," then a regulation aimed more broadly, at conduct irrespective of any intended communication, is even less likely animated by an impermissible censorial motive.


\[196\] The utility of determining that terrorism and, implicitly, lynching is unprotected "speech," despite an intent to communicate ideas, has been questioned. See Grannis, Note, supra note 29, at 218 ("Obviously, a law against blowing up federal buildings will not be struck down, but the validity of this law results merely from the existence of legitimate state interests under the O'Brien test; to move this consideration back one step into the definition of expressive conduct would appear redundant."). Yet, identifying
VI. Conclusion

Otherwise discerning people seem to have viewed the legal issues surrounding hate crimes statutes through a distortive lens. Fundamental distinctions, unchallenged in other contexts, have been blurred in a rush to find free speech interests in hate motivated murder and assault. Fundamental distinctions between thoughts and action have been neglected in reviewing state authority to punish criminals motivated by hate. Fundamental and familiar patterns of terrorism as "unprotected speech" would not be "redundant" if the state were to provide special penalties for blowing up a federal building for purposes of political commentary. The permissibility of targeting acts done with communicative intent depends on whether the communicative intent is protected. The government might believe that special deterrence of terrorism — arson intended to send a message, as opposed to arson for other purposes — is warranted because terrorists have special incentives to act that are particularly resistant to threats of punishment and, therefore, that more of the government's deterrence resources should be allocated against arson-as-message than against ordinary arson. Similarly, identifying lynching — i.e., words through fighting — as "unprotected speech" would not be redundant, for doing so would create government discretion to target lynching for special punishment. Here, the government might believe that those inclined to express messages of hatred through assault have special incentives to act that are particularly resistant to threats of punishment. As the government may try to stamp out all obscenity, all fighting words, and all other forms of "unprotected speech," so it may try to stamp out all terrorism (arson with the intent to send a message) and all lynching (assault with the intent to send a message) — if arson and lynching are unprotected or low value speech.

Furthermore, the government may select a subgroup of unprotected speech for special punishment if "the basis for the content discrimination consists entirely of the very reason the entire class of speech is proscribable," — if the very "reasons that [the speech is] outside the First Amendment" have "special force" in the contexts the state has chosen for special criminalization. R.A.V., 112 S. Ct. at 2543, 2545. Again, as suggested in the text, if the government may try to target all terrorism or lynching (because they are "unprotected speech") and may specially target especially dangerous categories of terrorism or lynching (because they are unprotected based on their underlying dangerous criminality), then it follows that the government may more broadly punish the bombing of a building, where the defendant intentionally selected a federal building, or more broadly punish the assault of a person, where the defendant intentionally selected a person because of race, despite reaching those who bomb or assault with the intent to convey a message. Here, the government is not targeting communicative arsons or assaults — though it could if they were unprotected speech. Rather, the government is targeting all bombings in which a defendant intentionally selects a federal building, or all assaults in which a defendant intentionally selects his victim because of race.
defining criminal liability based on different purposes, intentions, or motives underlying the same acts -- defining, quite simply, different choices -- have been overlooked entirely in seeing something sinister, odd, and unconstitutional, in punishing the criminal choices of one motivated by hate differently from the quite different criminal choices of one not motivated by hate.

The Wisconsin hate crimes statute is not a content-based regulation of speech, but a message-neutral regulation of hate motivated action. As such, it is not properly viewed as presumptively unconstitutional and not properly subject to a facial challenge. Although the Wisconsin statute might be applied to a hate motivated lyncher who wishes to communicate a social message through his act of assault, so many criminal statutes might be applied to those who wish to engage in symbolic speech through otherwise criminal acts. The dispositive point is precisely that hate motivated assault, whether or not a defendant intends thereby to communicate a social message, is otherwise criminal. Neither the purpose of preventing harms through specially deterring hate motivated crime, nor the effect on those who wish to communicate messages of hate, warrant invalidating a prosecution under the statute -- even as applied to a defendant who claims the intent to communicate social commentary through his assault.

American society seems increasingly gripped by violence. The violence has varied roots and objectives. Sometimes it is committed by those in search of a good time. Causing pain and suffering is fun for some, and for some of these, the fun is all the better when inflicted on a victim hated because of race, national origin, religion, disability, or sexual orientation. Sometimes violence is committed by those with a political ax to grind -- whether those who wish to communicate messages of racial hatred through a latter day lynching, those who wish to communicate messages of sexual morality through gay-bashing, or, indeed, those who wish to communicate messages of international justice through terrorism. Whether a message is intended or not, the violence is real, harmful, and a matter of legitimate state concern. A state might conclude that whether or not a person intends to send a message through his hate motivated crime, the motive of hate creates a context in which special deterrence is required. To allow states discretion to target such hate motivated crime maintains their role as public policy laboratories in
our federal system.

Those motivated by hate might wish to draw boundaries among people, to foster intolerance, to promote public policies. That, certainly, is their right under the First Amendment. Under Wisconsin's hate crimes statute, they retain that right. Those who wish to communicate messages of hate can do so by speaking on a street corner, by writing a pamphlet, by calling C-SPAN, by running for President; they simply are denied the right to express their view through the symbolism of invading the first civil right of every American -- the right to freedom from physical harm.