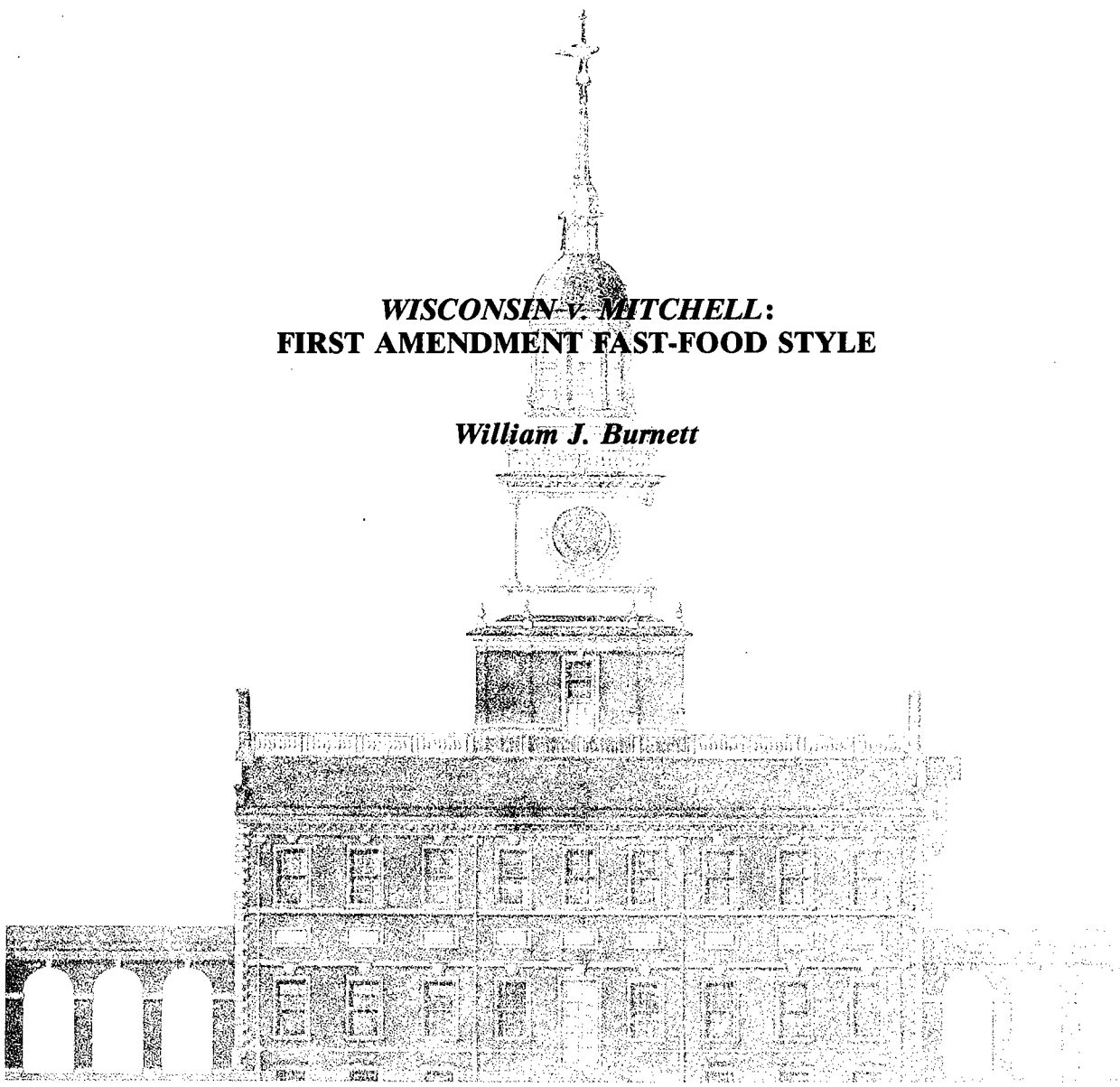
TEMPLE POLITICAL & CIVIL RIGHTS LAW REVIEW

WISCONSIN V. MITCHELL: FIRST AMENDMENT FAST-FOOD STYLE

William J. Burnett



Independence Hall, Philadelphia

Volume 4 Spring 1995 Number 2

Wisconsin v. Mitchell[1]: First Amendment Fast-Food Style

In a nine-page, 3,527-word opinion that reads like "a lazy summary of the Government's brief,"[2] the United States Supreme Court unanimously upheld a Wisconsin ethnic intimidation statute[3] that discriminates against defendants based on their thoughts alone.[4] Specifically, the statute makes it possible to enhance a criminal sentence if disfavored words are spoken before a crime is committed.[5] Asserting that the Wisconsin statute[6] only reg-

---

1. 113 S. Ct. 2194 (1993).

2. Jeffrey Rosen, *Fast-Food Justice*, N.Y. TIMES, Nov. 16, 1993, at A27.

3. WIS. STAT. § 939.645 (1989-1990). At the time of the Supreme Court's decision, the statute provided:

> (1) If a person does all of the following, the penalties for the underlying crime are increased as provided in sub. (2)
>
> (a) Commits a crime under chs. 939 to 948.
>
> (b) Intentionally selects the person against whom the crime under par. (a) is committed or selects the property which is damaged or otherwise affected by the crime under par (a) because of . . . the race, religion, color, disability, sexual orientation, national origin or ancestry of that person or the owner or occupant of that property. . . .
>
> (2) (a) If the crime committed under sub.(1) is ordinarily a misdemeanor other than a Class A misdemeanor, the revised maximum fine is $10,000 and the revised maximum period of imprisonment is one year in the county jail.
>
> (b) If the crime committed under sub. (1) is ordinarily a Class A misdemeanor, the penalty increase under this section changes the status of the crime to a felony and the revised maximum fine is $10,000 and the revised maximum period of imprisonment is 2 years.
>
> (c) If the crime committed under sub. (1) is a felony, the maximum fine prescribed by law for the crime may be increased by not more than $5,000 and the maximum period of imprisonment prescribed by law for the crime may be increased by not more than 5 years.
>
> (3) This section provides for the enhancement of the penalties applicable for the underlying crime. The court shall direct that the trier of fact find a special verdict as to all of the issues specified in sub. (1).
>
> (4) This section does not apply to any crime if proof of race, religion, color, disability, sexual orientation, national origin or ancestry . . . is required for a conviction for that crime.

4. *Mitchell*, 113 S. Ct. at 2199.

5. *Mitchell*, 113 S. Ct. at 2201. Disfavored words alone are seemingly sufficient to prove Section 939.645's "intentional selection" requirement. An examination of the actual facts presented in *Mitchell* reveals that disfavored words about white people can make a defendant subject to a longer jail sentence. The only substantive evidence that the prosecution offered to show the defendant's motive was the defendant's words (and some circumstantial evidence, including the content of the movie that Mitchell had just watched). Wisconsin v. Mitchell, 485 N.W.2d 807, 814-5 (Wis. 1992), *rev'd*, 113 S. Ct. 2194 (1993). The Court verified this method of proof when it stated that speech can be used to "establish the elements of a crime or to prove motive." *Mitchell*, 113 S. Ct. at 2201.

ulates conduct, Chief Justice Rehnquist concluded that the legislation did not violate the Constitution of the United States.[7] The Chief Justice seemed more concerned with "speedy results than with rigorous arguments."[8] In his short opinion, Chief Justice Rehnquist virtually ignored free speech issues.[9] Accordingly, his opinion was delivered more like fast-food service than the service of "equal justice under law."[10] Like fast food, *Wisconsin v. Mitchell* is quick and easy, but may ultimately, prove hazardous to the health of First Amendment[11] jurisprudence.

The Court validated a state's ability to decide whether or not to enhance the punishment for a defendant who selects his or her victim based upon the victim's race, religion, color, disability, sexual orientation, national origin or ancestry.[12] Section 939.645 was not intended to punish speech exclusively,[13] but the statute is broad enough to sentence a person to significantly more time in jail for words alone.[14] This decision gives states the authority to ban any speech or thought that a state legislature dislikes, provided that the unpopular speech is connected to an underlying crime.[15] By endorsing this type of state censorship, the Supreme Court has offended its own fundamental, historical free speech principles.[16]

---

6. WIS. STAT. § 939.645.

7. *Mitchell*, 113 S. Ct. at 2196.

8. Rosen, *supra* note 2.

9. Instead, the Court merely distinguishes first amendment precedent by asserting that the Wisconsin statute regulates conduct. *See infra* notes 132-37 and accompanying text.

10. "Equal justice under law" can only be served by the Court's ability to reason. Alexander Hamilton wrote that the judicial branch has only reason and the written word to justify its power.

> The Executive not only dispenses the honors, but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither *force nor will*, but merely *judgment*. THE FEDERALIST NO. 78 (Alexander Hamilton) (1788) (emphasis added on *judgment*).

11. "Congress shall make no law . . . abridging the freedom of speech." U.S. CONST. amend. I.

12. *See supra* note 3.

13. A defendant may receive an enhanced sentence for a pattern of silent actions. Mere acts could prove that a defendant intentionally selected a victim based on the victim's religion, color, disability, sexual orientation, national origin or ancestry. For example, consider a serial robber who chooses ten blind victims, but never utters a word while robbing them. This would probably be sufficient evidence for a jury to find that the serial robber "intentionally selected" his or her victims based on their common disability (blindness). Thus, because robbery is a crime within chapters 939 to 948 of the Wisconsin criminal code, the serial robber has violated Wisconsin statute section 939.645.

14. The words: "Do you all feel hyped up to move on some white people? . . . There goes a white boy; go get him," alone were sufficient to find a violation of section 939.645. *Mitchell*, 113 S. Ct. at 2196-97 (quoting Brief for Petitioner 4-5). *See also supra* note 5.

15. *Mitchell*, 113 S. Ct. at 2201. *See also infra* Part IV (discussing the "piggy-back" effect of section 939.645).

16. Justice Holmes' famous words in his 1919 Abrams v. United States dissent began the Supreme Court's modern understanding of freedom of speech principles. He wrote:

The words that multiplied Mitchell's maximum jail sentence by three and one half times[17] comprise what is popularly known as "hate speech."[18] Such speech has increasingly been the subject of controversy[19] and academic debate.[20] The narrow focus of this Note, however, is not hate speech, but rather "hate crimes"[21] and punishment enhancement statutes.[22]

> But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas — that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment.

Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

More concisely, Justice Holmes believed that "[i]f there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought — not free thought for those who agree with us but freedom for the thought that we hate." United States v. Schwimmer, 279 U.S. 644, 654-55 (1929), *overruled by* Girouard v. United States, 328 U.S. 61 (1946).

Further, Justice Brennan wrote: "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." Texas v. Johnson, 491 U.S. 397, 414 (1989). Similarly, Justice Stewart explained: "[A]t the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State." Abood v. Detroit Bd. of Educ., 431 U.S. 209, 234-35 (1977).

17. *See supra* note 5.

18. A Stanford University regulation defined "hate speech" or "harassment by vilification" as speech that is:

> (a) intended to insult or stigmatize an individual or small group of individuals on the basis of their sex, race, color, handicap, religion, sexual orientation, or national and ethnic origin; and
>
> (b) is addressed directly to the individual or individuals whom it insults or stigmatizes; and
>
> (c) makes use of insulting or 'fighting' words or non-verbal symbols.

GERALD GUNTHER, CONSTITUTIONAL LAW 1135 (12th ed. 1991). *See also* Doe v. University of Mich., 721 F. Supp. 852, 856 (E.D. Mich. 1989) (examining a similar university regulation).

19. *See, e.g.*, James Harney, *'Confront Problems, Not People,'* USA TODAY, May 18, 1993, at 3A (discussing the University of Pennsylvania's free speech problems, including the "water buffalo" incident); Maria Newman, *Free Speech Lesson; Jeffries' Victory Shows the Difficulty of Punishing Objectionable Opinions*, N.Y. TIMES, May 16, 1993, at 33. *See also* UWM Post, Inc. v. Board of Regents of Univ. of Wis., 774 F. Supp. 1163 (E.D. Wis. 1991); Doe v. University of Mich., 721 F. Supp. 852 (E.D. Mich. 1989).

20. *See, e.g.*, Richard Delgado, *Campus Antiracism Rules: Constitutional Narratives in Collision*, 85 NW. U. L. REV. 343 (1991); David Kretzmer, *Freedom of Speech and Racism*, 8 CARDOZO L. REV. 445 (1987); Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431 (1990); Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320 (1989); Rodney A. Smolla, *Free Speech & Religious, Racial & Sexual Harassment*, 32 WM. & MARY L. REV. 207 (1991); Nadine Strossen, *Regulating Racist Speech on Campus: A Modest Proposal?*, 1990 DUKE L.J. 484 (1990).

21. The Anti-Defamation League defines "hate crime" or "the crime of intimidation" as a crime of "criminal trespass, criminal mischief, harassment, menacing assault and/or other appropriate statutorily proscribed criminal conduct" that is committed "by reason of the actual or perceived race, color, religion, national origin or sexual orientation of another individual or

Hate crimes have been under considerable attack by many organizations, including the Anti-Defamation League et al. and the Lawyers' Committee for Civil Rights Under Law.[23] Bias-motivated crimes are all pervasive[24] and the public is eager to eliminate them.[25] In response, the U.S. Congress passed the Hate Crimes Statistics Act (HCSA), requiring the U.S. Attorney General to acquire and publish annual hate crime data and statistical findings.

Public outrage against hate crimes makes academic debate against penalty enhancement statutes difficult. Such debates are often complicated by a proponent's internal conflicts regarding hate, violence, fairness, compassion, balanced with deterrence, freedom of speech, and constitutional precedent issues. Professor Susan Gellman of Capital University explains:

> [W]henever either viewpoint prevails, whether in the legislature, the courts, or even in a purely academic argument, its proponents do not seem to be very happy about it. They can see very well their opponents'. . . view, and in fact largely agree with it. It is as if everyone involved in the debate over the permissibility and desirability of ethnic intimidation laws were actually on *both* sides at once.[26]

This conflict is exacerbated further by the destructive impact that hate crimes have on society.[27] Whatever the magnitude of harm that hate crimes bring, however, penalty enhancement statutes will probably not be the ulti-

---

group of individuals." ADL LAW REPORT: HATE CRIMES STATUTES: A 1991 STATUS REPORT 4 (1991).

22. Wisconsin's statute Section 939.645 is only one of many such penalty enhancing statutes. *See infra* note 25. Yet all of these statutes stifle free speech by use of the same penalty enhancement mechanism.

23. Wisconsin v. Mitchell, 113 S. Ct. 2194, 2201 (1993) (citing the Brief for Lawyers' Committee for Civil Rights Under Law and the Brief for the Anti-Defamation League et al. as *Amici Curiae*).

24. In 1991, there were 4,588 incidents of hate crimes in thirty-two states. ADL's AUDIT OF ANTI-SEMITIC INCIDENTS 34 (1993) (hereinafter ADL AUDIT). During 1992, there were 1,730 anti-Semitic incidents in the United States. *Id.* at 1. Additionally, there were 7,031 reported incidents of anti-gay violence in 1989. ANTI-GAY VIOLENCE PROJECT, NATIONAL GAY AND LESBIAN TASK FORCE, ANTI-GAY VIOLENCE, VICTIMIZATION AND DEFAMATION IN 1989 (1990).

25. Forty-six states have enacted some type of hate crime legislation. Only Alaska, Nebraska, Utah, and Wyoming have not passed any type of hate crime laws. ADL AUDIT, *supra* note 24, at 43.

26. Susan Gellman, *Sticks and Stones Can Put You in Jail, But Can Words Increase Your Sentence? Constitutional and Policy Dilemmas of Ethnic Intimidation Laws,* 39 UCLA L. REV. 333, 334 (1991).

27. Michael Lieberman describes the extraordinary damage that hate crimes cause: "[h]ate crimes are designed to intimidate the victims' community in an attempt to leave them feeling isolated, vulnerable and unprotected by the law. These crimes can have a special . . . impact on the victim and his or her community, exacerbate racial, religious or ethnic tensions, and lead to reprisals by others in the community. By making members of minority communities fearful, angry and suspicious of other groups—and the power structure that is supposed to protect them—these incidents can damage the fabric of our society and fragment communities." Michael Lieberman, *Giving the Green Light for Vigorous Enforcement of Hate-Crime Laws,* LAW ENFORCEMENT BULLETIN, Fall 1993, at 4.

ack by many organiza-
ınd the Lawyers' Com-
ivated crimes are all
25 In response, the U.S.
SA), requiring the U.S.
crime data and statisti-

nic debate against pen-
often complicated by a
e, fairness, compassion,
onstitutional precedent
y explains:

the legislature, the
its proponents do
see very well their
ı it. It is as if every-
' and desirability of
ides at once.[26]

uctive impact that hate
f harm that hate crimes
obably not be the ulti-

es: A 1991 STATUS REPORT 4

ch penalty enhancing statutes.
of the same penalty enhance-

the Brief for Lawyers' Com-
nation League et al. as *Amici*

-two states. ADL's AUDIT OF
uring 1992, there were 1,730
y, there were 7,031 reported
CT, NATIONAL GAY AND LES-
EFAMATION IN 1989 (1990).
egislation. Only Alaska, Ne-
me laws. ADL AUDIT, *supra*

ut Can Words Increase Your
ion Laws, 39 UCLA L. REV.

ıat hate crimes cause: "[h]ate
ttempt to leave them feeling
have a special . . . impact on
r ethnic tensions, and lead to
ority communities fearful, an-
s supposed to protect them—
t communities." Michael Lie-
-Crime Laws, LAW ENFORCE-

mate solution.[28] The politician's quick answer to the hate crime problem is "merely an emergency treatment of one symptom of an extremely serious condition."[29] Even as an emergency treatment, penalty enhancement statutes may fail to deter hate-motivated criminals from committing violent acts.[30]

While it is important to solve the problem of crime in this country,[31] First Amendment principles should not be sacrificed in order to achieve that goal.[32] "The fact that a statute is enacted in response to a serious and politically sensitive social problem does not excuse noncompliance with constitutional standards."[33]

---

28. Thomas M. Carpenter explains the difficulty with settling on penalty enhancement statutes as an answer to hate crimes. He writes:

> All the writings by and about Yahweh, Jesus, Mohammed, Buddha, Vishnu, and their prophets suggest a goal — to love one another — but none of them identify a legislative means to fulfill that goal. The reason is that the answer is not in the political will — it is a matter of individual discipline.

Thomas M. Carpenter, *Are There Some Problems That Legislation Can't Solve?: A Primer on Hate Crime Legislation,* 27 ARK. LAW. 34, 37 (1993).

29. *Id.*

30. It has been argued that enhancing the punishment for a crime will not increase the specific deterrence or the general deterrence from the crime. *See, e.g.*, California Assembly Committee on Criminal Procedure, Progress Report, Deterrent Effects of Criminal Sanctions 7 (May 1968) (concluding that no correlation may exist between increased deterrence and increased punishment severity); FRANKLIN E. ZIMRING & GORDON J. HAWKINS, DETERRENCE: THE LEGAL THREAT IN CRIME CONTROL 194-208 (1973) (questioning the existence of empirical data linking increased deterrence and increased punishment severity); Johannes Andenaes, *The General Preventive Effects of Punishment*, 114 U. PA. L. REV. 949, 956-70 (1966). Andenaes argues that to realize increased deterrence, the enhancement must be large enough and publicized enough to make the public aware of it. However, the penalty enhancement may actually decrease the number of convictions. Because the statutes would impose a higher punishment, the author argues that a jury would be less likely to convict defendants. Thus, penalty enhancement statutes could actually decrease deterrence. For the sake of argument, this note assumes that such punishment enhancements would help deter hate crimes.

31. In fact, the Republican success in the 1994 mid-term elections was due, in part, to the electorate's belief that this country's crime problem is a top priority. *See The 1994 Elections; In Their Own Words*, N.Y. TIMES, Nov. 10, 1994, at B1; Pat Griffith, *Republican Tidal Wave Washing the Nation,* PITTS. POST-GAZ., Nov. 9, 1994, at A1; Ellen Warren, *Governors' Mansions to Take on Republican Decorations; Democrats Lose in N.Y., Texas, Pennsylvania,* CHI. TRIB., Nov. 9, 1994, at N23.

32. Other potential solutions include better education, economic realization, stronger interpersonal relationships and religious conviction. In fact, these solutions are probably better because they address the root of prejudice and they have the potential of becoming a permanent solution rather than a temporary band-aid.

33. Gellman, *supra* note 26, at 343.

However, a few statutes have been passed in the face of an apparent direct conflict with constitutional standards. Despite the constitutional requirement of equal protection, Colorado passed an amendment to prevent homosexuals from receiving a "protected status." Evans v. Romer, 882 P.2d 1335 (Colo. 1994), *cert. granted*, 115 S. Ct. 1092 (1995). California passed Proposition 187, which is seen to be in direct conflict with a prior U.S. Supreme Court ruling. *See California Elections/Proposition 187; Lungren Backs Prop. 187; Late Stance Assailed; Though Citing Concerns, Attorney General Calls Measure the Right Vehicle for Constitutional Test. Election Rival Tom Umberg Accuses him of Caving in to Supporters of the Measure,* L.A. TIMES, Nov. 8, 1994, at A3; *Indecent Proposition in California*, N.Y. TIMES, Oct. 25, 1994, at A20; George de

PART I

On October 7, 1989, Todd Mitchell, an African-American, was discussing a scene from the movie *Mississippi Burning*[34] with a group of his friends. The scene depicted a white man beating an African-American boy who was praying.[35] During this conversation, Mitchell and several of his friends went outside and Mitchell asked, " 'Do you all feel hyped up to move on some white people?' "[36] Shortly thereafter, a fourteen-year-old boy on the other side of the street approached the group.[37] Mitchell then said, "You all want to fuck somebody up? There goes a white boy; go get him."[38] Mitchell counted to three and pointed in the boy's direction.[39] The group chased the boy, severely beat him, and stole his sneakers.[40] The boy suffered extensive injuries, possibly permanent brain damage, and remained in a coma for four days.[41]

At trial, a jury convicted Mitchell of aggravated battery.[42] The jury separately found that Mitchell violated Wisconsin statute Section 939.645, because he intentionally selected his victim based upon the victim's race.[43] Ordinarily, in Wisconsin, aggravated battery carries a maximum penalty of two years.[44] Because Mitchell was also found guilty of violating Section 939.645, however, his maximum sentence was increased from two to seven years.[45] The trial court sentenced Mitchell to four years imprisonment for both the aggravated battery and the ethnic intimidation punishment enhancement statute violations.[46]

Although the Wisconsin Court of Appeals affirmed the judgment of the trial court,[47] the Wisconsin Supreme Court reversed Mitchell's conviction on the ground that the "statute 'violate[d] the First Amendment directly by punishing what the legislature has deemed to be offensive thought.' "[48] Relying

---

Lama, *Immigration Politics; California Anger May Set Tone for a Messy Debate,* CHI. TRIB., Sept. 18, 1994, at C1. Additionally, several states have passed term limit statutes despite possible conflicts with the Constitution. *See* Linda Greenhouse, *Term Limits Defy Constitution, Administration Tells Justices,* N.Y. TIMES, Sept. 9, 1994, at A20; Claude R. Marx, *Legal Battle Over Term Limits*, INV.'S BUS. DAILY, Nov. 8, 1994, at A1; George F. Will, *Good Limits, State Limits,* WASH. POST, June 26, 1994, at C7.

34. An emotional and thought provoking movie set in the mid-1960s in racially divided Mississippi. The movie focused on the pervasive racial bigotry and violent racial incidents that occurred during that era. MISSISSIPPI BURNING (Orion Pictures 1988).

35. Wisconsin v. Mitchell, 113 S. Ct. 2194, 2196 (1993) (quoting Brief for Petitioner 4).

36. *Id.*

37. *Id.*

38. *Id.* at 2196-97.

39. *Id.* at 2197.

40. *Id.*

41. Wisconsin v. Mitchell, 485 N.W.2d 807, 809 (Wis. 1992), *rev'd*, 113 S. Ct. 2194 (1993).

42. *Id.*; WIS. STAT. §§ 939.05 and 940.19(1m) (1989-1990).

43. WIS. STAT. §§ 939.05 and 940.19(1m).

44. WIS. STAT. §§ 939.05 and 939.50(3)(e) (1989-1990).

45. WIS. STAT. § 939.645.

46. Wisconsin v. Mitchell, 113 S. Ct. 2194, 2197 (1993).

47. State v. Mitchell, 473 N.W.2d 1 (Wis. Ct. App. 1991).

48. *Mitchell*, 113 S. Ct. at 2197 (quoting State v. Mitchell, 485 N.W.2d 807, 811 (Wis. 1992)).

American, was discuss-
a group of his friends.
merican boy who was
ral of his friends went
up to move on some
-old boy on the other
en said, "You all want
get him."[38] Mitchell
The group chased the
boy suffered extensive
ned in a coma for four

ttery.[42] The jury sepa-
Section 939.645, be-
n the victim's race.[43]
maximum penalty of
y of violating Section
ed from two to seven
ears imprisonment for
punishment enhance-

d the judgment of the
litchell's conviction on
dment directly by pun-
thought.' "[48] Relying

ssy Debate, CHI. TRIB., Sept.
nit statutes despite possible
Defy Constitution, Adminis-
larx, *Legal Battle Over Term*
Good Limits, State Limits,

id-1960s in racially divided
violent racial incidents that
8).
g Brief for Petitioner 4).

v'd, 113 S. Ct. 2194 (1993).

.W.2d 807, 811 (Wis. 1992)).

on *R.A.V. v. St. Paul*,[49] the Wisconsin Supreme Court reasoned that the statute was unconstitutional because it was not content-neutral[50] and because the law would have a "chilling effect" on speech.[51] The United States Supreme Court granted certiorari to decide the constitutionality of penalty enhancement statutes.[52]

Chief Justice William Rehnquist wrote the decision for a unanimous Supreme Court. In what turned out to be a pivotal assertion, the Chief Justice stated that "physical assault is not by any stretch of the imagination expressive conduct protected by the First Amendment."[53] Consequently, he wrote that the freedom of speech will not protect such "actions" because they amount to conduct not speech.[54] Rehnquist confirmed that the Court in prior cases "reject[ed] the 'view that an apparently limitless variety of conduct can be labeled "speech" whenever the person engaging in the conduct intends thereby to express an idea.' "[55]

The Court supported this assertion by noting that a wide variety of factors have been used in sentencing procedures. Judges have traditionally considered such factors as motive in determining sentencing.[56] Citing *Barclay v. Florida*,[57] Rehnquist underscored that there is no per se First Amendment barrier to admitting evidence of one's beliefs and associations at sentencing.[58] Accordingly, a defendant's motive[59] or reason for perpetrating a crime can be used to convict him of another crime and increase his maximum sentence.[60]

After asserting that a defendant's motive for a crime can amount to another crime, the Court considered its recent landmark freedom of expression opinion, *R.A.V. v. City of St. Paul*.[61] In order to validate penalty enhancement statutes, the Court was forced to distinguish the discriminatory Wisconsin statute at issue from the discriminatory ordinance in *R.A.V.* The Court in *R.A.V.* struck down an ordinance because it regulated only a portion of the

49. 505 U.S. 377 (1992).

50. *Mitchell*, 485 N.W.2d at 815.

51. *Mitchell*, 113 S. Ct. at 2198.

52. *Id.* at 2199.

53. *Id.* Rehnquist's one-line conclusion seems completely dispositive of the outcome. It enables him to avoid the "content-neutral" requirements of *R.A.V.* and other free speech barriers. *See* discussion *infra* Part III.

54. *Mitchell*, 113 S. Ct. at 2199 (citing United States v. O'Brien, 391 U.S. 367, 376 (1968)).

55. *Id.* (quoting *O'Brien*, 391 U.S. at 376).

56. *Id.* Implicitly, the Court saw no distinction between a judge's sentence determination as a penalty for one crime (already found to have been violated) and a fact-finder's determination that a separate and additional crime has been committed.

57. 463 U.S. 939 (1983).

58. *Mitchell*, 113 S. Ct. at 2200. Chief Justice Rehnquist undermined his own reasoning by asserting that "a defendant's abstract beliefs, however obnoxious to most people, may not be taken into consideration by a sentencing judge." *Id.* (citing Dawson v. Delaware, 503 U.S. 159 (1992)).

59. "Motive" is separate and distinct from "intent" and the two should not be confused. *See infra* Part IV.

60. *Mitchell*, 113 S. Ct. at 2200.

61. 505 U.S. 377 (1992).

category entitled "fighting words."[62] The Court held that a legislature may outlaw the entire category of "fighting words," but may not discriminate within that category.[63]

To side-step the *R.A.V.* requirements, Rehnquist distinguished the earlier opinion in two ways. First, he compared Wisconsin's penalty enhancement statute to Title VII anti-discrimination laws.[64] Second, Rehnquist reasoned that *R.A.V.* was not applicable because the Wisconsin statute pertains only to conduct and not to speech.[65] Rehnquist analogized the penalty enhancement statute in *Mitchell* to anti-discrimination laws, because, under *R.A.V.*, these laws were "cited . . . as an example of a permissible content-neutral regulation of conduct."[66] The Chief Justice stated that a discriminatory motive may be considered in conjunction with sentencing because, historically, such consideration of discriminatory motive has been considered constitutional in anti-discrimination laws, such as the Title VII regulations.[67] Rehnquist reasoned that a defendant's bias motive "plays the same role" in both anti-discrimination laws and penalty enhancement statutes.[68] He therefore concluded that Wisconsin's statute meets the standards set forth in *R.A.V.*'s exception for anti-discrimination laws.[69]

The second way in which the Court distinguished the *R.A.V.* holding was by use of expressive conduct and speech classifications. Rehnquist reasserted that the Wisconsin penalty enhancement statute concerns conduct rather than speech.[70] Thus, the *R.A.V.* content-neutral requirements on speech regulations were inapposite.[71] The Court supported this distinction and the validity of the Wisconsin statute by recognizing that bias-inspired conduct (as opposed to conduct not motivated by bias) "inflict[s] greater individual and societal harm."[72]

After considering *R.A.V.*, Rehnquist discarded Mitchell's claim that the Wisconsin statute would have a "chilling effect" on speech.[73] The Court asserted that the claim that penalty enhancement statutes would chill speech is

---

62. *Id.* at 380.

63. *Id.* at 386-89.

64. *Mitchell*, 113 S. Ct. at 2200.

65. *Id.*

66. *Id.*

67. *Id.* (citing Roberts v. Jaycees, 468 U.S. 609 (1984); Hishon v. King & Spalding, 467 U.S. 69 (1984); and Runyon v. McCrary, 427 U.S. 160 (1976)).

68. *Id.* Chief Justice Rehnquist relied on the fact that, similar to Title VII, a defendant's motives are only relevant in relation to a specific victim. *Id.* Accordingly, a defendant's general biases cannot be considered in sentencing, but his or her specific bias toward a particular victim can violate the Wisconsin statute. Carpenter, *supra* note 28, at 36.

69. *Id.* at 2201.

70. *Id.* at 2200. The Chief Justice concluded that "whereas the ordinance struck down in *R.A.V.* was explicitly directed at expression (i.e. "speech" or "messages"), the statute in this case [WIS. STAT. § 939.645] is aimed at conduct unprotected by the first amendment." *Id.* at 2201. *See supra* note 49 and discussion *infra* Part III.

71. *Id.* at 2201.

72. *Id. See supra* note 23.

73. *Id.*

"too speculative."[74] Concluding, the Court added that since speech can be used to establish elements of a crime, there is truly no bar to allowing speech to enhance the maximum sentence in Mitchell's case.[75] Relying on the above analysis, the Court ruled unanimously that Wisconsin statute Section 939.645 is constitutional.[76]

PART II

A. *Incitement to Lawless Action*

The Bill of Rights was ratified in 1791.[77] However, the Supreme Court did not consider seriously the modern notion of free speech until nearly 130 years later.[78] In *Schenck v. United States*,[79] the Court affirmed Schenck's conviction under the 1917 Espionage Act[80] for distributing leaflets during World War I that urged readers to resist the draft.[81] While upholding Schenck's conviction, Justice Holmes established the landmark "clear and present danger" test for incitement to lawless action.[82] He wrote that if "the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent,"[83] then those words can be proscribed without running afoul of the Constitution.[84] Thus, if intentionally spoken words have a "bad tendency" to violate a legitimate legislative end, the speaker could be punished.[85]

Over the past seventy-four years, the Court has changed the meaning of this "bad tendency" test. The test's first modification came only one week after *Schenck*, in *Frohwerk v. United States*[86] and *Debs v. United States*.[87] In

74. *Id.* Carpenter believed that the Court treated this argument as if it was "silly." Carpenter, *supra* note 28.

75. *Mitchell*, 113 S. Ct. at 2201-02.

76. *Id.* at 2202.

77. U.S. CONST. amend. I.

78. In 1907, the Supreme Court did consider an aspect of freedom of speech in Patterson v. Colorado. The Court decided that freedom of speech in the Constitution was limited to preventing previous restraints. Patterson v. Colorado, 205 U.S. 454 (1907). Modern free speech analysis presumes that the First Amendment's freedom of speech is more protective than merely barring prior restraints. Lower courts had given the freedom of speech more serious consideration in the years before 1919. *See* David M. Rabban, *The First Amendment in its Forgotten Years*, 90 YALE L.J. 514 (1981).

79. 249 U.S. 47 (1919).

80. 40 Stat. 217 (1917).

81. *Schenck*, 249 U.S. at 51. Among other things, the leaflets said "Do not submit to intimidation", "Assert your rights", and "[it is] your right to assert your opposition to the draft." *Id.*

82. *Id.* at 52.

83. *Id.*

84. *Id.*

85. The "bad tendency" test is another formulation of Holmes's clear and present danger concept. If words have a "bad tendency" to cause substantive evil, then Congress can proscribe those words.

86. 249 U.S. 204 (1919).

87. 249 U.S. 211 (1919).

Frohwerk, the Court expanded the notion of "clear and present danger" to prohibit words conveying an illegal[88] idea if they have any possibility of being persuasive.[89] On the same day, in *Debs*, the Court clarified the clear and present danger test to make it constitutional to ban any words which have as a "natural tendency and reasonably probable effect" conflicts with the desires of a legislative majority.[90]

In *Abrams v. United States*,[91] the Court again modified *Schenck's* clear and present danger test. The Court broadened the meaning of "intent" to include all of the "effects which [a defendant's] acts were likely to produce."[92] In other words, a person could be punished for speaking merely if an undesired result was "likely."[93]

In response to this outcome, Justice Holmes wrote a powerful, and now famous, dissent voicing concern about the direction in which the Court had taken his original "bad tendency" test.[94] Along with a general support of freedom of speech principles,[95] his opinion scaled back the broad dragnet of "clear and present danger" analysis. Holmes suggested that a law could make words illegal only if they "so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country."[96]

Until 1969, the Supreme Court continued to defer to legislative action by relying on the previously established expansive notions of clear and present danger.[97] In *Brandenburg v. Ohio*,[98] however, the Court instituted a speech

88. "Illegal" is meant to refer to anything that a majority of the legislature has determined to be distasteful. Ideas that are "illegal" should not be confused with ideas that are unconstitutional. Matters of final constitutional interpretation should be left to the courts, not the legislature. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) (deciding that "[i]t is emphatically the province and duty of the judicial department to say what the law is.").

89. *Frohwerk*, 249 U.S. at 209. The Court declared that the defendant's conviction should be upheld because "it is impossible to say that [illegal articles] might not have been found that the circulation of the paper was in quarters where a little breath would be enough to kindle a flame . . . ." *Id.*

90. *Debs*, 249 U.S. at 216.

91. 250 U.S. 616 (1919).

92. *Id.* at 621.

93. *Id.* This expanded the bad tendency test to proscribe any words that have a mere likelihood of producing a bad effect.

94. *Id.* at 630 (Holmes, J., dissenting).

95. *See supra* note 11.

96. *Abrams*, 250 U.S. at 630. This test, which foreshadows Brandenburg v. Ohio, bolsters the weak standards of the bad tendency requirement of clear and present danger to include the notion of immediacy and serious threat to the country.

97. *See, e.g.*, Dennis v. United States, 341 U.S. 494 (1951); Whitney v. California, 274 U.S. 357 (1927); Gitlow v. New York, 268 U.S. 652 (1925). In *Gitlow*, the Court upheld a conviction for printing a publication which contained the Left Wing Manifesto, because the Court considered the teaching communism as a natural tendency to bring about the "overthrow of organized government by unlawful means." *Gitlow*, 268 U.S. at 669. Twenty-six years later, a majority of the Court held it constitutional to limit the speech of a Communist group that was "ready to make the attempt" to overthrow the government. *Dennis*, 341 U.S. at 510. Justice Vinson explained that an undesired result need not be immediate, but only as "speedily as circumstances would permit." *Id.* at 499.

protective test that allowed states to proscribe speech only if the speech was "directed to inciting or producing imminent lawless action and [was] likely to incite or produce such action."[99]

B. *Expressive Conduct*

Mitchell's conviction should not be viewed as a mere application of the Court's test for incitement to lawless action. The appropriate analysis of penalty enhancement statutes must also rest on the constitutional division between conduct and speech. The Court must consider whether the legislative action in question is aimed at the communicative element or the non-speech element of a course of conduct.[100] If the Court determines that the conduct, and not the communicative element, is the aim of the legislation, it will apply the rational basis test.[101] If the Court decides, however, that a law is aimed at regulating the communicative element, then the Court will apply strict scrutiny.[102]

The Supreme Court in *United States v. O'Brien*[103] described the constitutional standards which must be applied if legislation is considered to be a regulation of the non-speech element of a course of conduct.[104] Chief Justice Warren Burger wrote:

> [A] government [sic] 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.[105]

98. 395 U.S. 444 (1969).

99. *Id.* at 447. While the *Brandenburg* Court did not give any attention to the severity of the evil of the advocated action, a renowned commentator has suggested that this factor should be included into the *Brandenburg* standard. LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 849 n.59 (2d ed. 1988). Consistent with this suggestion, Justice Brandeis wrote:

> [t]o justify suppression of free speech there must be reasonable ground to fear that serious evil will result if free speech is practiced . . . . The fact that speech is likely to result in some violence or in destruction of property is not enough to justify its suppression. There must be the probability of serious injury to the State.

Whitney v. California, 274 U.S. 357, 376-78 (1927) (Brandeis, J., concurring).

100. TRIBE, *supra* note 99, at 789-91.

101. *Id.* at 791-92. Application of this rational basis test usually means that the legislation will be upheld if the legislative end is legitimate and the means are rationally related to that end. *Id.*

102. *Id.* at 794. Tribe calls this a "track one" regulation. According to Tribe, track one regulations will be subject to a higher level of judicial scrutiny than regulations aimed at the non-speech element of a course of conduct. Essentially, if a regulation receives this "strict scrutiny," it will be struck down as unconstitutional. *Id.*

103. 391 U.S. 367 (1968).

104. *Id.* at 377.

105. *Id.*

Since 1968, the two-tiered *O'Brien* analysis has been used many times in expressive conduct cases.[106] The judicial determination of whether a governmental action is aimed at the speech element or the non-speech element of a course of conduct seems to be a dispositive factor in the Court's decisions.[107]

C. *Categorization*

Throughout the many years of First Amendment analysis, the Court historically has given less protection to specific categories of speech including libel,[108] obscenity,[109] child pornography,[110] commercial speech,[111] and most importantly, fighting words.[112]

In 1942, Justice Murphy in *Chaplinsky v. New Hampshire*[113] developed the fighting words category. Justice Murphy explained:

> There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any constitutional problem. . . . These include . . . the insulting or "fighting words" — those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.[114]

Thus, if a governmental action proscribed "fighting words," then such a ban would be found constitutional.[115]

In 1992, the Court revisited the subject of categorization in *R.A.V. v. City of St. Paul*.[116] Justice Scalia, writing for the majority, reasoned that the government could ban any speech that amounts to "fighting words," but it

---

106. *See, e.g.*, Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991); Texas v. Johnson, 491 U.S. 397 (1989); Clark v. Community for Creative Non-Violence, 468 U.S. 288 (1984); Tinker v. Des Moines Sch. Dist., 393 U.S. 503 (1969).

107. *Barnes*, 501 U.S. 560 (holding that a statute disallowing public nudity was valid because it was aimed at conduct not speech); *Johnson*, 491 U.S. 397 (invalidating a statute that criminalized flag burning because the prohibition was aimed at speech); *Clark*, 468 U.S. 288 (upholding a National Park Service ban on sleeping in a public park because the action was aimed at keeping the parks beautiful); *Tinker*, 393 U.S. 503 (finding a school policy that prohibited students from wearing black armbands as a protest to the Vietnam war was unconstitutional because the prohibition was aimed at "pure speech."). *See supra* note 49 and discussion *infra* Part III.

108. *See, e.g.*, Beauharnais v. Illinois, 343 U.S. 250 (1952).

109. *See, e.g.*, Roth v. United States, 354 U.S. 476 (1957).

110. *See, e.g.*, New York v. Ferber, 458 U.S. 747 (1982).

111. *See, e.g.*, Virginia Pharmacy Bd. v. Virginia Consumer Council, 425 U.S. 748 (1976); Valentine v. Chrestensen, 316 U.S. 52 (1942).

112. Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

113. *Id.*

114. *Id.* at 571-72.

115. *Id.; see also* R.A.V. v. City of St. Paul, 505 U.S. 377, 381 (1992).

116. 505 U.S. 377 (1992). There has been a significant amount of scholarly debate about the reasonableness and clarity of this landmark case. *See, e.g.* Thomas H. Moore, *R.A.V. v. City of St. Paul: A Curious Way to Protect Free Speech*, 71 N.C. L. REV. 1252 (1993); Joseph E. Starkey, Jr., *R.A.V v. St. Paul: The Debate Over the Constitutionality of Hate Crime Laws Ends; or Is This Just the Beginning*, 95 W. VA. L. REV. 561 (1992-1993); *Symposium: Hate Speech After R.A.V.: More Conflict Between Free Speech and Equality?*, 18 WM. MITCHELL L. REV. 889 (1992).

en used many times in
ı of whether a govern-
n-speech element of a
e Court's decisions.[107]

ınalysis, the Court his-
es of speech including
al speech,[111] and most

mpshire[113] developed
l:
imited classes of
have never been
These include . . .
y their very utter-
ıte breach of the

ıg words," then such a

orization in *R.A.V. v.*
rity, reasoned that the
fighting words," but it

; Texas v. Johnson, 491 U.S.
S. 288 (1984); Tinker v. Des

olic nudity was valid because
ating a statute that criminal-
k, 468 U.S. 288 (upholding a
action was aimed at keeping
ıat prohibited students from
titutional because the prohi-
ion *infra* Part III.

ouncil, 425 U.S. 748 (1976);

(1992).
of scholarly debate about the
. Moore, *R.A.V. v. City of St.*
1993); Joseph E. Starkey, Jr.,
ne Laws Ends; or Is This Just
te Speech After R.A.V.: More
REV. 889 (1992).

could not do so in a content-based manner.[117] An entire category may be proscribed, but the Constitution would prevent the government from carving out a small section of that category and criminalizing only a portion of that wider category.[118] For example, an ordinance that banned the entire category of libel would be constitutional.[119] However, in contrast, an ordinance would be unconstitutional if it banned only libel that was directed against the government.[120] Thus, within a specified category, the government may not make a narrow regulation that proscribes one aspect of a category of speech while leaving other aspects within that category unregulated.[121] This conceptual framework prevents the government from censoring one particular viewpoint of a category of speech.[122] However, *R.A.V.* still allows the government power to regulate the category as a whole.[123]

In *R.A.V.*, a majority of the Court did not intend to have this content-neutral requirement applied universally.[124] The Court made the following exception: "[w]hen the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable, no significant danger of ideas or viewpoint discrimination exists."[125] This means that if a category is proscribable only because of its particular viewpoint, then a legislature can ban it. For example, anti-discrimination laws, such as Title VII regulations, are proscribable because the particular viewpoint that it criminalizes encompasses the whole category.[126]

PART III

Given the prior law, the *Mitchell* opinion is flawed. Mitchell's particular words, in themselves, did not immediately threaten a substantial state interest and, thus, Mitchell should not be penalized.[127] Mitchell's crime would not have been less repugnant if he had said "Hey, let's attack that kid with the new sneakers."[128] Because the victim would be injured just the same, why should we punish Mitchell more harshly merely because we disapprove of his message? Wisconsin's legislature is free to increase the maximum sentence range for the crime of aggravated assault. However, it is an entirely different

117. *R.A.V.*, 505 U.S. at 382.
118. *Id.* at 383-84.
119. *Id.* at 384.
120. *Id.* This is true because it would be discriminating within the category of libel.
121. *Id.* at 387.
122. *Id.*
123. *Id.*
124. *Id.*
125. *Id.* at 388.
126. *Id.*
127. Brandenburg v. Ohio, 395 U.S. 444, 447 (1969). However, once the evil has transpired, the act itself can, and should, be penalized.
128. Type of clothing is not one of the proscribed categories listed in the statute. WIS. STAT. § 939.645.

matter to develop a new crime solely based on the particular "disfavored" ideas that motivated the first crime.[129]

In deciding if Wisconsin's penalty enhancement statute penalizes speech or conduct, the Court's opinion contains only one sentence of analysis.[130] Chief Justice Rehnquist asserted: "[A] physical assault is not by any stretch of the imagination expressive conduct protected by the First Amendment."[131] Such a "fast-food" conclusion lacks supporting foundation.

Furthermore, the Chief Justice's assertion avoids the central point. Mitchell's First Amendment claim does not concern the beating. Rather, it is focused upon the words that were spoken *before* the beating occurred.[132] There was no conduct mixed in the words that Mitchell spoke. If Mitchell had committed the exact same physical acts silently and injured the boy in the exact same manner, he would have faced a maximum sentence of only two years imprisonment.[133] Words alone permitted Wisconsin to increase Mitchell's sentence to a maximum of three and one half times the maximum sentence for aggravated assault.[134] Contrary to the Court's reasoning, Wisconsin's penalty enhancement statute is aimed at the expressive or communicative element of conduct; it punishes criminal defendants for what they have said. According to the *O'Brien* test, the Wisconsin statute should have received strict scrutiny and the Court should have invalidated it.[135]

The Court similarly avoided the *R.A.V.* content neutrality requirement by asserting that "this case is aimed at conduct unprotected by the First Amendment."[136] The Wisconsin statute at issue is similar to the St. Paul ordinance. Both regulations make content-based judgments about speech.[137] Like the St. Paul ordinance, the Wisconsin statute carves out and bans a specific sub-part of "fighting words," singling out certain aspects for regulation.[138] Thus, according to the constitutional standard set out in *R.A.V.*, the Wisconsin penalty enhancement statute should have been invalidated because it is not a content-neutral regulation within a category of speech.[139]

Furthermore, Section 939.645 does not fall within the exception provided by *R.A.V.* Wisconsin's penalty enhancement statute does not consist

---

129. In effect, this is a "piggy-back" crime. As long as an original crime is committed, no matter how small, a second crime can be manufactured from thoughts and words alone. Defining which motives are favored and which are not amounts to censorship.

130. The term "analysis" is used gratuitously here. The sentence of "analysis" is really just a presentation of a predetermined conclusion.

131. Wisconsin v. Mitchell, 113 S. Ct. 2194, 2199 (1993).

132. The defendant did not question the constitutionality of the aggravated battery statutes. He claimed that the penalty enhancement statute violated the First Amendment.

133. WIS. STAT. §§ 940.19(1m) and 939.50(3)(e).

134. WIS. STAT. § 939.645. *See also supra* note 5 and accompanying text.

135. *See supra* notes 102-109 and accompanying text.

136. Wisconsin v. Mitchell, 113 S. Ct. 2194, 2201 (1993).

137. If Mitchell had said, "I am indifferent to people's skin color; I hate everyone equally," there could be no serious contention that Wisconsin statute Section 939.645 was violated.

138. For example, intentional selection based on race is proscribed, but selection based on gender or socio-economic class is not. *See* WIS. STAT. § 939.645.

139. R.A.V. v. City of St. Paul, 505 U.S. 377, 387 (1992).

particular "disfavored"

statute penalizes speech
sentence of analysis.[130]
t is not by any stretch of
: First Amendment."[131]
lation.
oids the central point.
he beating. Rather, it is
he beating occurred.[132]
ll spoke. If Mitchell had
injured the boy in the
m sentence of only two
nsin to increase Mitch-
mes the maximum sen-
he Court's reasoning,
the expressive or com-
efendants for what they
sin statute should have
validated it.[135]
neutrality requirement
protected by the First
ilar to the St. Paul ordi-
nents about speech.[137]
ves out and bans a spe-
ain aspects for regula-
d set out in *R.A.V.*, the
e been invalidated be-
category of speech.[139]
hin the exception pro-
tatute does not consist

iginal crime is committed, no
ghts and words alone. Defin-
sorship.
ce of "analysis" is really just a

e aggravated battery statutes.
st Amendment.

anying text.

lor; I hate everyone equally,"
n 939.645 was violated.
ribed, but selection based on

"entirely of the very reason the entire class of speech at issue is proscribable."[140] There are other reasons that this class of fighting words could be proscribable. A criminal may choose his victim based on gender or socio-economic status. These reasons are not covered by the statute.[141] A majority of the Wisconsin legislature decided not to include the categories of gender or social class as a selection element.[142] The statute would have no effect on the sentence of a criminal who beat several women or poor people after he described that his motivation was general hatred for that entire category of people. Accordingly, the exception for Title VII-like statutory schemes provided by *R.A.V.* is inapposite.

Moreover, even if the penalty enhancement statute were considered analogous to Title VII regulations, that should not necessarily exempt it from First Amendment consideration. The *Mitchell* Court stated that Title VII claims have never received free speech protection. This makes sense because these claims have rarely received any First Amendment analysis.[143] Chief Justice Rehnquist ignored his responsibility to address the legitimate First Amendment issues by merely pointing to another area of the law that the Court has similarly neglected.[144]

In addition to the proper application of prior First Amendment law, the "piggy-back" effect of Section 939.645 also evidences that the statute acts as an unconstitutional censoring mechanism. Before the penalty enhancement statute can even be considered, Mitchell must have already been found guilty of committing illegal *conduct*.[145] Then a court would be free to find prohibited thoughts or words and tack on a penalty enhancement.[146] Even the main proponent of penalty enhancement legislation, the Anti-Defamation League (ADL), admits that this type of law regulates speech.[147] The ADL agrees that a penalty enhancement statute "does not suppress free expression . . . *unless* that person also engages in criminal activity motivated by his or her viewpoint."[148]

The Court further asserted that Wisconsin's ethnic intimidation statute will not have a "chilling effect" on free speech.[149] Rehnquist saw this possible effect as "simply too speculative" to be of constitutional significance.[150] His "fast-food" dismissal of the possible "chilling effects" of this law was prema-

140. *Id.*

141. *See* WIS. STAT. § 939.645. *See also supra* note 3 and accompanying text.

142. WIS. STAT. § 939.645.

143. Hishon v. King & Spalding, 467 U.S. 69, 78 (1984) (dismissing a First Amendment challenge to a Title VII charge with mere conclusions). Justice O'Connor's majority opinion offered a similar "fast food" treatment of First Amendment freedom of speech issues in Harris v. Forklift Sys., Inc., 114 S. Ct. 367 (1993). *See* Rosen, *supra* note 2, at A27.

144. Wisconsin v. Mitchell, 113 S. Ct. 2194, 2200 (1993).

145. WIS. STAT. § 939.645.

146. *See supra* note 5 and accompanying text.

147. ADL LAW REPORT: HATE CRIMES STATUTES: A 1991 STATUS REPORT 2 (1991).

148. *Id.* (emphasis added).

149. Wisconsin v. Mitchell, 113 S. Ct. 2194, 2201 (1993).

150. *Id.*

ture: As Chief Justice Rehnquist revealed only one page prior to this assertion, there is no per se barrier to the admissibility of a person's beliefs and associations.[151] Nothing in the words of the statute restricts a court's ability to scrutinize a criminal defendant's past to find proof of an "intentional selection."[152] Furthermore, the Federal Rules of Evidence do not restrict this potentially extensive, probing search.[153]

The Wisconsin statute punishes a defendant's undesirable motive, not his or her criminal intent. The distinction is best described in Black's Law Dictionary: "Intent and motive should not be confused. Motive is what prompts a person to act, or fail to act. Intent only refers to the state of mind with which the act is done or omitted."[154] The Wisconsin penalty enhancement statute does not ask if a defendant formed the requisite criminal intent. Instead, it asks why the defendant chose the particular victim. Such a focus on motive should not be relevant in criminal prosecutions.[155] For the foregoing reasons, the Court should have given full consideration to the implied First Amendment issues and invalidated Wisconsin's penalty enhancement statute.

PART IV

Invariably, the Court's decision in *Mitchell* will squelch any free speech claims against other penalty enhancement statutes. Additionally, the opinion will provide Congress and other state legislatures further encouragement to pass similar penalty enhancement statutes.[156]

The validation of this Wisconsin statute permits the majority of a state legislature to indiscriminately apply its views. Wisconsin's penalty enhancement statute can be used to make a defendant suffer tremendously for even minor offenses. The *Mitchell* decision permits a legislature to proscribe any type of motivation or thought that it desires provided that the proscribed motivation is "piggy-backed" to an underlying criminal violation. For example, if a parent tells his school-aged child: "You should not attend school today because the teacher is not Christian and he will teach incorrect moral values," then that parent could face up to one year in jail and a maximum fine of $10,000.[157] Under the Supreme Court's reasoning, it seems that this

151. *Id.* at 2200.

152. WIS. STAT. § 939.645.

153. This Note assumes that a state's rules of evidence do not vary significantly from the federal rules. *See* FED R. EVID. 403 (only restricting evidence where its "probative value is substantially outweighed by the danger of unfair prejudice. . . .") Furthermore, a defendant's past reputation, opinion and specific instances of conduct (including expressive conduct) would be areas available for questioning. FED R. EVID. 403.

154. BLACK'S LAW DICTIONARY 810 (6th ed. 1990).

155. W. LAFAVE & A. SCOTT, CRIMINAL LAW § 3.6, at 227 (2d ed. 1986) (stating that "motive. . . is not relevant on the substantive side of the criminal law").

156. *See* ADL AUDIT, *supra* note 24, at 31-33.

157. Such an egregious result is possible by merely applying Wisconsin statute Section 948.45 (contributing to child truancy) and Wisconsin statute Section 939.645. The defendant contributed to his child's truancy by intentionally selecting this teacher based on the teacher's religion. The teacher is someone who is "otherwise affected by the crime" of truancy and, thus, the

page prior to this asser-
of a person's beliefs and
restricts a court's ability
f of an "intentional selec-
:e do not restrict this po-

ıdesirable motive, not his
bed in Black's Law Dic-
. Motive is what prompts
› the state of mind with
ıin penalty enhancement
ıisite criminal intent. In-
r victim. Such a focus on
ons.[155] For the foregoing
ıtion to the implied First
ılty enhancement statute.

squelch any free speech
Additionally, the opinion
ırther encouragement to

:s the majority of a state
onsin's penalty enhance-
:r tremendously for even
islature to proscribe any
ided that the proscribed
inal violation. For exam-
hould not attend school
/ill teach incorrect moral
r in jail and a maximum
ıoning, it seems that this

not vary significantly from the
ere its "probative value is sub-
urthermore, a defendant's past
expressive conduct) would be

2d ed. 1986) (stating that "mo-
w").

'ing Wisconsin statute Section
on 939.645. The defendant con-
ıer based on the teacher's reli-
rime" of truancy and, thus, the

parent could be subject to a maximum fine twenty times higher, and a jail sentence twelve times longer, than he would have without the operation of Wisconsin's Ethnic Intimidation Statute.[158]

This censorship and subsequent penalty enhancement could apply to any lower form of ordinances or minor offenses.[159] There is no reason that this statute's motive prohibition must be limited to race, religion, color, disability, sexual orientation, national origin or ancestry. Following the Supreme Court's reasoning, it would be constitutional to enhance the penalty if a crime was motivated by disfavor of political incumbents or color of a victim's hair. Once any criminal statute is broken, the state, by virtue of the "piggy-back" effect, can ban any speech. Accordingly, any defendant who is deemed guilty of any minor infraction could be subject to additional, and more severe, punishment based on his or her words alone. The statute effectively strips a defendant of his constitutional right to free expression. This state censorship is wholly inconsistent with First Amendment jurisprudence:

> This guarantee of freedom is one of our most cherished rights and, as such, has been and continues to be under attack by persons, well-meaning and otherwise, who see attempted curtailment as being in the "public good" . . . It is important to often repeat that the freedoms . . . guaranteed by the First Amendment must be accorded to the ideas we hate or sooner or later they will be denied to the ideas we cherish.[160]

In *Mitchell*, all nine Justices overlooked these powerful words, as well as our Constitution. In light of recent developments that promise to threaten the future strength of the freedom of speech,[161] the Supreme Court's insensi-

defendant's punishment could be harshly enhanced by operation of Section 939.645. WIS. STAT. § 939.645.

158. *Id.*

159. These infractions could include walking on the grass, traffic offenses, or parking violations. If any of these acts were done by reason of an "improper" motive, the logic of the Court would permit a government to magnify an otherwise minimal punishment.

160. Local Lodge, 1297 Intern. Ass'n of Machinists and Aerospace Workers v. Allen, 490 N.E.2d 865, 872 (Ohio 1986) (Douglas, J., concurring).

161. Presently, free speech is being tested in many areas. The boundaries of free speech are being questioned in the area of media coverage of judicial proceedings. *See, e.g.*, Erwin Chemerinsky, *Perspectives on the Press and the Courts; Overreacting to the Effects of Publicity; Judge Ito Is Unnecessarily Exaggerating the Tension Between the First and Sixth Amendments*, L.A. TIMES, Oct. 21, 1994, at B7; Jeff Greenfield, *The Public Also Has Right Not to Know*, CHI. SUN-TIMES, Oct. 25, 1994, at 29; Nat Hentoff, *The Courts: Not for Judges Only*, WASH. POST, Oct. 15, 1994, at A15; A.M. Rosenthal, *On My Mind; The Press and Simpson*, N.Y. TIMES, June 24, 1994, at A27. Free speech is also being tested in the area of on-line computer network services. *See, e.g.*, Tamar Lewin, *Dispute Over Computer Messages: Free Speech or Sex Harassment?*, N.Y. TIMES, Sept. 22, 1994, at A1; *All Things Considered: "Bill of Rights" for Computer Users* (NPR radio broadcast, Oct. 15, 1994). An additional issue that is testing the strength of free speech is campaign finance reform. *See, e.g., Campaign Finance Reform: Let the People Do the Talking*, WASH. POST, Feb. 26, 1994, at A23; Ellen Nakashima, *Campaign Spending Difficult to Reform*, HART. COUR., Aug. 1, 1994, at A1; Todd S. Purdum, *Trying a Constitutional Tack to Curb Campaign Spending*, N.Y. TIMES, Oct. 21, 1994, at A28; George F. Will, *Reject Campaign Finance 'Reform'*, CHI. SUN-TIMES, May 27, 1993, at 39. Laws that give access to abortion clinics also can be seen as a threat to free speech. *See, e.g., Abortion Clinics Now Protected*, CHI. TRIB., May 27, 1994, at N4;

tivity to the tenets of the First Amendment is especially disturbing. We should affirm the free speech principles contained in our First Amendment jurisprudence before these ideals are consumed and discarded fast-food style.

William J. Burnett

Michael Kranish, *Ban on Abortion Clinic Strife Signed*, BOS. GLOBE, May 27, 1994, at 3; Ruth Marcus, *President Signs Clinic Access Law; Foes File Lawsuit*, WASH. POST, May 27, 1994, at A10; Paul Richter, *Clinton Signs Law Banning Abortion Clinic Blockades; Legislation: The Statute Allows for Stiff Penalties for Violent Protesters. But Opponents File Suit, Claiming Abridgment of First Amendment Rights*, L.A. TIMES, May 27, 1994, at A20.