

# HATE CRIME LAWS — THE ADL APPROACH

## OVERVIEW

### HATE CRIME STATUTES: A MESSAGE TO VICTIMS AND PERPETRATORS

All Americans have a stake in effective response to violent bigotry. These crimes merit a priority response because of their special impact on the victim and the victim's community. Failure to address this unique type of crime could cause an isolated incident to explode into widespread community tension. The damage done by hate crimes cannot be measured solely in terms of physical injury or dollars and cents. Hate crimes may effectively intimidate other members of the victim's community, leaving them feeling isolated, vulnerable, and unprotected by the law. By making members of minority communities fearful, angry, and suspicious of other groups – and of the power structure that is supposed to protect them – these incidents can damage the fabric of our society and fragment communities.

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# PUNISHING BIAS MOTIVATED VIOLENCE: PUBLIC POLICY IMPLICATIONS

Before turning to a description of existing state and federal hate crime laws, it is useful to set out the policy rationale for enactment of these laws.

The starting point for our analysis is that criminal activity motivated by bias is distinct and different from other criminal conduct. These crimes occur because of the perpetrator's bias or animus against the victim on the basis of actual or perceived status – the victim's race, religion, national origin, gender, gender identity, or disability is the *reason* for the crime. In the vast majority of these crimes, but for the victim's personal characteristic, no crime would occur at all.

## ANALOGOUS TO ANTI-DISCRIMINATION CIVIL RIGHTS LAWS

Hate crime laws are best viewed as a criminal justice system parallel to the thousands of federal, state, and local laws that prohibit invidious discrimination because of race or other identifying characteristic. In language, structure, and application, the majority of the nation's hate crime law are directly analogous to anti-discrimination civil rights laws.<sup>i</sup> Under our nation's workplace civil rights laws, for example, an employer can refuse to hire, fire, or fail to promote employees for virtually any reason. It is only when that decision is made "by reason of" race, religion, national origin, gender, or disability that the conduct becomes unlawful. Like workplace and housing civil rights laws, the prohibited conduct under hate crime laws is the intentional selection of the victim for targeted, discriminatory behavior on the basis of the victim's personal characteristics.

## COMPARABLE TO OTHER STATUS CRIMES

Many federal and state criminal laws provide different penalties for crimes depending on the victim's special status. Virtually every criminal code provides enhanced penalties for crimes directed at the elderly, or the very young, or teachers on school grounds, or law enforcement officials. Legislators have legitimate and neutral justifications

for selective protection of certain categories of victims – and enhanced criminal penalties – based on their judgment of the social harm these crimes cause.

### **CONSISTENT WITH THE FIRST AMENDMENT**

The First Amendment does not protect violence – and it does not prevent the government from imposing criminal penalties for violent discriminatory conduct directed against victims on the basis of their personal characteristics. Hate crime laws do not punish speech. Americans are free to think and believe whatever they want. It is only when an individual commits a crime because of those biased beliefs and intentionally targets another for violence or vandalism that a hate crime statute can be triggered.

### **DETERRENT IMPACT**

Law enforcement officials have come to recognize that strong enforcement of these laws can have a deterrent impact and can limit the potential for a hate crime incident to explode into a cycle of violence and widespread community disturbances. In partnership with human rights groups, civic leaders and law enforcement officials have found they can advance police-community relations by demonstrating a commitment to be both tough on hate crime perpetrators and sensitive to the special needs of hate crime victims.

### **PUNISHMENT TO FIT THE CRIME**

Laws shape attitudes. Bigotry cannot be outlawed, but hate crime laws demonstrate an important commitment to confront and deter criminal activity motivated by prejudice. Hate crime laws – like anti-discrimination laws in the workplace – are color-blind mechanisms which allow society to redress a unique type of wrongful conduct in a manner that reflects that conduct's seriousness. Since hate violence has a uniquely serious impact on the community, it is entirely appropriate for legislators to acknowledge that this form of criminal conduct merits more substantial punishment.

# HATE CRIMES DEFINED: STATES LAWS

The vast majority of hate crimes are investigated and prosecuted by state and local law enforcement officials. Hate crimes are generally not separate and distinct criminal offenses. Each state defines the criminal activity that constitutes a hate crime differently – and the breadth of coverage of these laws varies from state to state, as well. In general, a hate crime is a criminal offense intentionally directed at an individual or property in whole or in part because of the victim’s actual or perceived race, religion, national origin, gender, gender identity, sexual orientation, or disability.<sup>ii</sup>

## A) PENALTY-ENHANCEMENT LAWS

At present, forty-five states and the District of Columbia have enacted hate crime penalty-enhancement laws,<sup>iii</sup> many based on a model statute drafted by the Anti-Defamation League in 1981.<sup>iv</sup> Under these laws, a perpetrator can face more severe penalties if the prosecutor can demonstrate, beyond a reasonable doubt, for the trier of fact that the victim was intentionally targeted on basis of his personal characteristics because of the perpetrator’s bias against the victim.<sup>v</sup>

Almost every state penalty-enhancement hate crime law explicitly includes crimes directed against an individual on the basis of race, religion, and national origin/ethnicity. Currently, however, only thirty-one states and the District of Columbia include sexual orientation-based crimes in these hate crimes statutes<sup>vi</sup>; only twenty-six states and the District of Columbia include coverage of gender-based crimes<sup>vii</sup>; only nine states and the District of Columbia include coverage of gender identity-based crimes<sup>viii</sup>, and only thirty states and the District of Columbia include coverage for disability-based crimes<sup>ix</sup>.

## B) INSTITUTIONAL VANDALISM STATUTES

Forty-two states and District of Columbia now have Institutional Vandalism laws, statutes which are designed to specifically punish bias-motivated defacement, desecration, or destruction of houses of worship, religious schools and institutions, and cemeteries.<sup>x</sup>

### **C) DATA COLLECTION AND LAW ENFORCEMENT TRAINING MANDATES**

Hate crime data collection mandates provide an essential baseline for understanding the nature and magnitude of the problem of hate violence. Studies have demonstrated that victims are more likely to report a hate crime if they know a special reporting system is in place.<sup>xi</sup> Twenty-seven states and the District of Columbia now require their police agencies to collect and report hate crime data<sup>xii</sup> and fourteen states require training for law enforcement officials in how to identify, report, and respond to bias-motivated criminal activity.<sup>xiii</sup> Data collection efforts have also increased public awareness of the problem and prompted improvements in the local response of police and the criminal justice system to these crimes.

# HATE CRIMES DEFINED: FEDERAL CRIMINAL CIVIL RIGHTS AND HATE CRIME STATUTES

There is no general federal statute which addresses bias-motivated criminal activity. The vast majority of hate crime prosecutions are handled by the states. Federal officials investigate and prosecute a limited range of bias-motivated crimes as criminal civil rights violations. This jurisdiction is necessary to permit joint state-federal investigations and to authorize federal prosecution in those cases in which state and local officials are either unable or unwilling to act. These Justice Department enforcement efforts provide an important backstop for state and local authorities.

## A) 18 U.S.C. § 241 CONSPIRACY AGAINST RIGHTS/CIVIL RIGHTS CONSPIRACY

Section 241 makes it unlawful for two or more persons to agree together to injure, threaten, or intimidate a person in any state in the free exercise or enjoyment of any right or privilege secured by the Constitution or the laws of the United States. This Civil War-era anti-Klan statute provided the basis for federal involvement in the murders of civil rights workers Andrew Goodman, Mickey Schwerner, and James Chaney in Philadelphia, Mississippi, in June, 1964.<sup>xiv</sup>

## B) 18 U.S.C. §245 BIAS-MOTIVATED INTERFERENCE WITH FEDERALLY-PROTECTED RIGHTS

Enacted in 1968 in the aftermath of the ineffective and inadequate state and local response to the murders of Goodman, Schwerner, and Chaney, this statute prohibits intentional interference, by force or threat of force, with the enjoyment of a federal right or benefit (such as voting, going to school, or serving on a jury) on the basis of race, color, religion, or national origin. Under the statute, it is unlawful to willfully injure, intimidate, or interfere with any person, or to attempt to do so, by force or threat of force, because of that person's race, color, religion or national origin and because the victim was engaged in one of the enumerated federally-protected activities.<sup>xv</sup> The utility of the statute is limited by both the double layer motivation required and the fact that prosecutions require written

certification by the Attorney General or certain designees that “a prosecution by the United States is in the public interest and necessary to secure substantial justice.”<sup>xvi</sup>

### **C) 18 U.S.C. §247 INTERFERENCE WITH THE EXERCISE OF RELIGIOUS BELIEFS/DESTRUCTION OF RELIGIOUS PROPERTY**

Originally enacted in 1988, this statute provided federal jurisdiction for religious vandalism cases in which the destruction exceeded \$10,000. The statute’s restrictive interstate commerce requirement and its relatively high damages threshold limited federal prosecutions.

In 1996, in response to a disturbing series of attacks against houses of worship, Federal agencies responded with unusually integrated and coordinated action focused on prevention, enforcement, and rebuilding. According to Justice Department officials, from January 1995 to September 2000, over 945 investigations were initiated under the specially-convened National Church Arson initiative. Over 430 persons were arrested and charged with federal or state crimes in connection with over 225 church arsons or bombings.<sup>xvii</sup>

In response, Congress enacted the Church Arson Prevention Act<sup>xviii</sup>, which prohibits anyone from intentionally defacing, damaging, or destroying any religious real property because of the religious nature of the property where the crime is committed in or affects interstate commerce. The statute also prohibits the intentional obstruction, by force or threat of force, of any person in the enjoyment of that person’s free exercise of religious beliefs so long as the crime is committed in or affects interstate commerce. In addition, the statute prohibits anyone from intentionally defacing, damaging or destroying any religious real property because of the race, color, or ethnic characteristics of any individual associated with the property.<sup>xix</sup>

### **D) 42 U.S.C. §3631 INTERFERENCE WITH RIGHT TO FAIR HOUSING**

This statute, enacted in 1968 as part of the Fair Housing Act, makes it unlawful for an individual to use force or threaten to use force to injure, intimidate, or interfere with, or attempt to injure, intimidate, or interfere with, any person's housing rights because of that person's race, color, religion, sex, handicap, family status, or national origin. In addition, the statute make it unlawful to, by use of force or threatened use of force, injure, intimidate, or

interfere with any person who is assisting an individual or class of person in the exercise of their housing rights. Included within the statute is protection for the sale, rental, or occupation of a dwelling, or for its financing.<sup>xx</sup>

#### **E) 18 U.S.C. § 844 (H)(1) FEDERAL EXPLOSIVES CONTROL STATUTE**

This statute provides criminal penalties for anyone who (1) uses fire or an explosive to commit any felony which may be prosecuted in a court of the United States, or (2) carries an explosive during the commission of any felony which may be prosecuted in a court of the United States. This statute is frequently used by the Justice Department to prosecute cross burning.<sup>xxi</sup>

#### **F) 28 U.S.C. §534 HATE CRIME STATISTICS ACT (HCSA)**

Enacted in 1990<sup>xxii</sup>, the HCSA requires the Justice Department to acquire data on crimes which "manifest prejudice based on race, religion, sexual orientation, or ethnicity" from law enforcement agencies across the country and to publish an annual summary of the findings. Congress expanded coverage of the HCSA to require FBI reporting on crimes based on "disability" in the Violent Crime Control and Law Enforcement Act of 1994.<sup>xxiii</sup>

The FBI's annual Hate Crime Statistics Act (HCSA) report, though clearly incomplete, provides the best snapshot of the magnitude of the hate violence problem in America. As documented by the FBI in its 2006 HCSA report, violence directed at individuals, houses of worship, and community institutions because of prejudice based on race, religion, sexual orientation, national origin, and disability is far too prevalent. The Bureau's 2006 report documented:

- Approximately 51.8 percent of the reported hate crimes were race-based, with 18.9 percent on the basis of religion, 15.5 percent on the basis of sexual orientation, and 12.7 percent on the basis of ethnicity.
- Approximately 66 percent of the reported race-based crimes were anti-black, 22 percent of the crimes were anti-white, and 4.5 percent of the crimes were anti-Asian/Pacific Islander. The number of hate crimes directed at individuals on the basis of their national origin/ethnicity increased to 984 in 2006 from 944 in 2005.

- The 967 crimes against Jews and Jewish institutions comprised 12.5 percent of all hate crimes reported in 2006 -- and 66 percent of the reported hate crimes based on religion. The report states that 156 anti-Islamic crimes were reported in 2006, 10.7 percent of the religion-based crimes and an increase from 128 reported anti-Islamic crimes in 2005.
- Of the 12,620 police and sheriff's departments that reported HCSA data to the FBI in 2006 (an increase over the 12,417 agencies that participated in 2005), almost 84 percent affirmatively reported to the FBI that that they had zero hate crimes. Only 2,105 agencies reported one or more hate crimes to the Bureau. Even more troublesome, almost 5,000 agencies did not participate in this hate crime data collection effort at all. These figures strongly suggest a serious undercounting of hate crimes in the United States.

However, there is no doubt that police officials have come to appreciate the law enforcement and community benefits of tracking hate crime and responding to it in a priority fashion. By compiling statistics and charting the geographic distribution of these crimes, police officials may be in a position to discern patterns and anticipate an increase in racial tensions in a given jurisdiction.

#### **G) 28 U.S.C § 994 NOTE HATE CRIME SENTENCING ENHANCEMENT ACT**

Congress enacted a federal complement to state hate crime penalty-enhancement statutes in the 1994 Violent Crime Control and Law Enforcement Act<sup>xxiv</sup>. This provision required the United States Sentencing Commission to increase the penalties for crimes in which the victim was selected "because of the actual or perceived race, color, religion, national origin, ethnicity, gender, disability, or sexual orientation of any person." Although important, this measure has limited utility – it applies only to federal crimes, such as the federal criminal civil rights statutes and other federal crimes, such as attacks and vandalism that occur in national parks and on federal property.

#### **H) FEDERAL CAMPUS HATE CRIME DATA COLLECTION REQUIREMENTS**

In 1998, to increase awareness of hate violence on college campuses, Congress enacted an amendment to the Higher Education Act (HEA) requiring all colleges and universities that receive federal aid to collect and report hate crime statistics to the Office of

Postsecondary Education (OPE) of the Department of Education<sup>xxv</sup>. Currently, colleges must report hate crime statistics for all campus crime categories, as well as crimes involving bodily injury in which the victim was targeted because of race, gender, religion, sexual orientation, ethnicity, or disability.

However, the Department of Education's current hate crime statistics reflect very substantial underreporting <http://ope.ed.gov/security/Search.asp>. Even worse, the limited data reported conflicts with campus hate crime information collected by the Federal Bureau of Investigation under the HCSA. The Department of Education uses the FBI HCSA hate crime definition<sup>xxvi</sup> of hate crime, but the categories of hate crimes collected by the Department of Education are different from those collected by the Department of Justice. The FBI definition includes larceny/theft, intimidation, simple assault, and destruction/damage/vandalism – all categories currently omitted by the Department of Education. The omission of these crime categories has resulted in significant gaps in OPE data, substantial inconsistencies between FBI and OPE statistics, and confusion for parents and students trying to obtain a more accurate sense of campus safety. A broad coalition of religious, civil rights, civic, and law enforcement organizations has supported legislative initiatives designed to make the Department of Education's hate crime categories identical to the crime categories collected by the FBI.

# PENDING FEDERAL LEGISLATION

## A) THE LOCAL LAW ENFORCEMENT HATE CRIME PREVENTION ACT (LLEHCPA)<sup>xxvii</sup>

This legislation would establish a new federal criminal code provision, 18 U.S.C. §249. This new section would complement and expand existing law to provide additional tools for the federal government to combat bias-motivated violence. The legislation would also facilitate federal investigations and prosecutions when local authorities are unwilling or unable to achieve a just result. Finally, the LLEHCPA would also mandate additional reporting requirements for hate crimes directed at individuals on the basis of their gender or gender identity – as well as for crimes committed by and against juveniles.

As previously noted, under 18 U.S.C. § 245, the government must prove both that the crime occurred because of a person's membership in a protected group, such as race or religion, and because (not while) the victim was engaging in a federally-protected activity. At a series of House and Senate hearings on this pending legislation in 1998<sup>xxviii</sup> and 1999<sup>xxix</sup>, Justice Department officials identified a number of significant racial violence cases in which federal prosecutions had been stymied by these unwieldy dual jurisdictional requirements. In addition, federal authorities are currently unable to involve themselves in cases involving death or serious bodily injury resulting from crimes directed at individuals because of their sexual orientation, gender, gender identity, or disability.

The LLEHCPA would complement existing law in three main ways. First, the legislation would remove the overly-restrictive obstacles to federal involvement by permitting prosecutions without having to prove that the victim was attacked because she was engaged in a federally-protected activity. Second, the new law would provide authority for federal officials to investigate and prosecute cases in which the bias violence occurs because of the victim's real or perceived sexual orientation, gender, gender identity, or disability, provided that prosecutors could demonstrate a commerce clause nexus as an element of the offense.

Third, the measure would provide authority for the Department of Justice to render technical, forensic, or any other form of assistance to State and law enforcement agencies to aid in the investigation of and prosecution of crimes motivated by prejudice based upon the

actual or perceived race, color, religion, national origin, gender, sexual orientation, gender identity or disability of the victim or is a violation of State or local hate crime law.<sup>xxx</sup> The bill would also create a grant program under the authority of the Department of Justice to assist State and local law enforcement agencies in funding the extraordinary expenses associated with the investigation and prosecution of these hate crimes.

Neither the sponsors nor the supporters of this measure expect that enactment of the LLEHCPA would significantly expand the number of bias crimes prosecuted as federal criminal civil rights violations.<sup>xxxi</sup> State and local authorities currently investigate and prosecute the overwhelming majority of hate crime cases – and would continue to do so after the LLEHCPA is enacted. From 1991- 2006, for example, the FBI documented almost 121,000 hate crimes. During that period, however, the Justice Department brought fewer than 100 cases under 18 U.S.C. § 245.

#### **B) EMMETT TILL UNSOLVED CIVIL RIGHTS CRIME ACT<sup>xxxii</sup>**

This legislation would establish an Unsolved Crimes Section in the Civil Rights Division of the Justice Department, and an Unsolved Civil Rights Crime Investigative Office in the Civil Rights Unit of the Federal Bureau of Investigation. The bill authorizes funds for these federal initiatives, as well as grants for state and local law enforcement agencies for expenses incurred in investigating and prosecuting these cases. The measure is intended to provide for an urgent, well-coordinated effort to investigate and prosecute Civil Rights Era racially-motivated murders. While the exact number of unsolved racially-motivated murder cases that occurred before the 1970s is unknown, the Southern Poverty Law Center has estimated that 114 race-related killings occurred between 1952 and 1968.<sup>xxxiii</sup> The House of Representative approved its version of this legislation on June 20, 2007 by a vote of 422-2.<sup>xxxiv</sup>

## OTHER LAWS DIRECTED AT BIAS-MOTIVATED CONDUCT

In addition to penalty enhancement hate crime laws and institutional vandalism statutes, about half of the states have specifically outlawed cross burning with intent to intimidate.<sup>xxxv</sup> The burning cross is inextricably associated with the Ku Klux Klan – it is an unmistakable symbol designed to intimidate and terrorize. As Justice O’Connor wrote in her majority opinion affirming, in part, the Virginia cross burning statute in *Virginia v. Black*, “the history of violence associated with the Klan shows that the possibility of injury or death is not just hypothetical. The person who burns a cross directed at a particular person often is making a serious threat, meant to coerce the victim to comply with the Klan’s wishes unless the victim is willing to risk the wrath of the Klan.”<sup>xxxvi</sup>

### A CONTINUING PRIORITY

“The punishment of hate crimes alone will not end bigotry in our society. That great goal requires the work not only of the criminal justice system but of all aspects of civil life, public and private. Criminal punishment is indeed a crude tool and a blunt instrument. But our inability to solve the entire problem should not dissuade us from dealing with parts of the problem. If we are to be staunch defenders of the right to be the same or different in a diverse society, we cannot desist from this task.”<sup>xxxvii</sup>

The attempt to eliminate prejudice requires that Americans develop respect and acceptance of cultural differences and begin to establish dialogue across ethnic, cultural, and religious boundaries. Education and exposure are the cornerstones of a long-term solution to prejudice, discrimination, bigotry, and anti-Semitism. Hate crime laws and effective responses to hate violence by public officials and law enforcement authorities can play an essential role in deterring and preventing these crimes.

### HATE CRIMES JURISPRUDENCE

Hate Crime Laws have been challenged on a variety of constitutional bases, focused on First Amendment, Equal Protection, and Due Process grounds. The defining court decision in the body of case law governing hate crimes is *Wisconsin v. Mitchell*, 508 U.S. 476

(1993). In this landmark ruling, the United States Supreme Court spoke with one voice, unanimously upholding a Wisconsin penalty-enhancement hate crimes statute against a constitutional First Amendment challenge.

This discussion will focus on the *Mitchell* case and its enduring importance. First, it will provide background on some of the earlier rulings from both the Supreme Court and state courts that laid the foundation on which *Mitchell* was built. Second, it will focus on *Mitchell* itself – the facts of the case, the lower court decision, some of the arguments made by the many *amici* who filed briefs with the Court, and finally then-Chief Justice William Rehnquist’s reasoning in his ruling upholding the Wisconsin statute. Finally, this section will examine challenges raised to penalty-enhancement hate crimes laws on other grounds, both before and after *Mitchell*, as well as key court decisions addressing cross-burning and mask-wearing with an intent to intimidate or threaten.

#### **ANALYZING LEGISLATIVE INTENT: THE LEGAL LANDSCAPE PRE-MITCHELL**

In evaluating hate crimes laws, the judicial branch has understood and respected the legislative intent behind such laws. As previously noted, legislators have always had a variety of policy reasons for enacting criminal laws and establishing the appropriate punishment. First and foremost, criminal laws provide for retribution – the perpetrator has misbehaved and the “interests of justice” demand that he or she be punished. Under this theory, the more serious the crime, the more serious the punishment should be.

Crimes can be considered more serious because of their consequences. An arson attack which destroys a significant portion of a city, for example, would be considered more serious than one which does minimal harm to one building. This factor has clearly been relevant to legislatures considering hate crimes laws. Indeed, concern about the broader harm that such crimes can pose to a society has always been a legislative reason for enhancing the sentences for bias crimes. When Oregon was considering a state hate crimes law in 1983, then-Governor Vic Atiyeh supported the legislation out of a belief that bias-motivated assaults were more likely than other assaults “to result in retaliatory violence and to threaten social order.”<sup>xxxviii</sup> In its decision upholding the Oregon law, that state’s Supreme Court determined that “causing physical injury to a victim because of the perception that the victim belongs to one of the specified groups creates a harm to society distinct from and greater than the harm caused by the assault alone.”<sup>xxxix</sup> The court

continued: “Such crimes – because they are directed not only toward the victim but, in essence, toward an entire group of which the victim is perceived to be a member – invite imitation, retaliation, and insecurity...”<sup>xi</sup> Their harm is even greater, according to this court, when the victim belongs to a group that has “historically been targeted for wrongs.”<sup>xii</sup>

Crimes can also be considered more serious because of the perpetrator’s intent. Legislatures have determined, for example, that intentional murder is more serious – and deserving of a harsher sentence – than reckless or negligent homicide, even though in both cases the perpetrator bears responsibility for the victim’s death. The Supreme Court has acknowledged this, observing in the 1987 case *Tison v. Arizona* that “deeply ingrained in our legal tradition is the idea that the more purposeful is the criminal conduct, the more serious is the offense, and, therefore, the more severely it ought to be punished.”<sup>xiii</sup> The concept is, of course, directly relevant to statutes which enhance penalties for vandalism, assault, and similar crimes when the victim has been intentionally selected because of his status.

Retribution, however, has never been the only reason for criminal laws. Legislators frequently consider several other factors – including taking measures to ensure that the perpetrator is not at liberty to harm others and deterring others from committing similar crimes. These factors are relevant in the hate crimes context as well, and they were also endorsed by courts prior to *Mitchell*.

In *Barclay v. Florida*, for example, the Supreme Court upheld a death sentence for an extremist convicted of murdering a white hitch-hiker. The sentencing judge in the case, noting that the defendant was a member of the Black Liberation Army, a group whose purpose was “to indiscriminately kill white persons and to start a revolution and a racial war,”<sup>xiii</sup> had observed in his sentencing statement that one of the aggravating circumstances supporting the death sentence he had pronounced was that the defendant represented “a great risk of death to many persons.”<sup>xiv</sup> The Court upheld the death sentence in the case, specifically allowing the sentencing judge to take into account the defendant’s racial animus towards his victim and the threat he posed to society.<sup>xlv</sup>

Courts have also recognized the element of deterrence in criminal laws prior to *Mitchell*. Here, an analogy to anti-discrimination laws is relevant. Numerous state and federal anti-discrimination laws were upheld against First Amendment challenges prior to *Mitchell*. In cases like *Roberts v. United States Jaycees*<sup>xvi</sup>, *Hishon v. King & Spalding*<sup>xvii</sup>, and

*Runyon v. McCrary*<sup>xlviii</sup>, all cited in *Mitchell*, the Court made a distinction between hateful views – which are constitutionally protected – and conduct motivated by those views, which is not protected.<sup>xlix</sup> One of the major aims of the nation’s landmark employment and housing civil rights laws of the 1960s and 1970s was to deter individuals from acting on their biases and prejudices in a discriminatory way. Such laws, consistently acknowledged as constitutionally sound by the courts, have compelled employers not to discriminate in their hiring practices, schools not to discriminate in admissions practices, and public accommodations not to discriminate in who they serve for fear of legal sanction. In other words, they sought to deter – and have deterred – individuals from acting on their prejudices. The precedent was important when it came time for the Court to consider laws that prohibit individuals from engaging in criminal activity motivated by their prejudices.

In addition, the well-established legal status of the federal and state criminal civil rights laws was another important precedent established prior to *Mitchell*. As previously mentioned, federal law prohibits interference with an individual’s civil rights – such as the right to vote, the right to attend public school, the right to travel in interstate commerce, and many other federally protected activities – on the basis of race, color, religion, or national origin. These laws have been upheld by the courts, both before and after *Mitchell*.<sup>l</sup> Parallel state laws have also been upheld. For example, in 1991, a California appellate court applied one of that state’s civil rights statutes in upholding a conviction for a racially-motivated shooting in *People v. Lashley*.<sup>li</sup>

By 1992, the legal groundwork appeared to be in place to support the judgment of several state legislatures that hate crimes could be punished more seriously than other crimes because of the serious threat to American society they posed and because the perpetrator(s) typically intend to cause harm to a broader community and not just an individual victim. The precedents also seemed to suggest that such crimes did not violate the free speech clause of the First Amendment, because there would be no sanction for bias or prejudice unless that bias or prejudice prompted a perpetrator to commit a crime targeting a specific victim because of his status.

Before the Court confronted the facts of *Mitchell*, however, it altered the landscape by striking down a local St. Paul, Minnesota, cross burning ordinance which prohibited “bias-motivated” messages because the ordinance only prohibited one class of “fighting

words.”<sup>lii</sup> In *R.A.V. v. St. Paul*, the Court ruled that the local ordinance was a form of “content- based discrimination” because it only addressed “fighting words” characterized by prejudice.<sup>liii</sup> This decision – now widely regarded by many as anomalous – sowed considerable confusion when it was announced, puzzling advocates of hate crimes laws and leaving them concerned about what the ruling might mean for penalty-enhancement statutes.<sup>liv</sup> As it turned out, these advocates did not have long to wait for welcome clarification. One year after *R.A.V.* was handed down, in June 1993, the Court resolved the confusion by speaking clearly and definitively in *Mitchell*.

### ***WISCONSIN V. MITCHELL***

This landmark case decided in 1993 involved a vicious racial assault by a group of young black men against a white boy. The Supreme Court summarized the facts as follows:

On the evening of October 7, 1989, a group of young black men and boys, including Mitchell, gathered at an apartment complex in Kenosha, Wisconsin. Several members of the group discussed a scene from the motion picture “Mississippi Burning,” in which a white man beat a young black boy who was praying. The group moved outside and Mitchell asked them: “Do you all feel hyped up to move on some white people?” Shortly thereafter, a young boy approached the group on the opposite side of the street where they were standing. As the boy walked by, Mitchell said: “You all want to fuck somebody up? There goes a white boy; go get him. Mitchell counted to three and pointed in the boy’s direction. The group ran toward the boy, beat him severely, and stole his tennis shoes. The boy was rendered unconscious and remained in a coma for four days.<sup>lv</sup>

A jury convicted Mitchell of aggravated battery, and also found that he had intentionally selected the victim because of his race. Under Wisconsin’s hate crime law, the maximum sentence for a felony such as aggravated battery is enhanced by five years (in this case, from two to seven years) when the defendant “intentionally selects” the victim “because of the race, religion, color, disability, sexual orientation, national origin or ancestry of that person.” Mitchell was sentenced to four years in prison.

Appealing his conviction and sentence, Mitchell challenged the constitutionality of the Wisconsin law, contending that it violated his First Amendment rights. The Wisconsin Court of Appeals upheld his sentence, but the Wisconsin Supreme Court overturned it, finding that the penalty-enhancement statute punished his offensive thoughts.<sup>lvi</sup> The state’s highest court had an additional problem with the statute, reasoning that it was “overbroad” because it would invite the state to introduce evidence of racial epithets a defendant might have uttered at an earlier time in his life – and thus have a “chilling effect” on anyone who feared some future prosecution.<sup>lvii</sup>

The Wisconsin court was not persuaded by the state’s effort to compare the hate crimes law to anti-discrimination laws. Distinguishing the two, the court said “the Wisconsin statute punishes the subjective mental process of selecting a victim because of his protected status, whereas antidiscrimination laws prohibit objective acts of discrimination.<sup>lviii</sup> The state of Wisconsin appealed this ruling, and the Supreme Court granted *certiorari*.

When the Supreme Court agreed to hear the *Mitchell* case, many interested parties weighed in by filing friend of the court briefs. Mitchell’s supporters included groups of defense lawyers, several non-profits, and constitutional scholars. On Wisconsin’s side, a much larger number of *amici* included the United States; 35 Members of Congress; the cities of Atlanta, Baltimore, Boston, Chicago, Cleveland, Los Angeles, New York, Philadelphia, and San Francisco; several law enforcement agencies; and many of the major civil rights organizations including the Anti-Defamation League, the NAACP Legal Defense and Educational Fund; the National Gay and Lesbian Task Force, the National Asian Pacific American Legal Consortium; the Southern Poverty Law Center, and the national ACLU. One of the more remarkable *amicus* briefs – filed by the Attorney General of Ohio – was submitted in support of Wisconsin by the other 49 states and the District of Columbia.

The primary theme running through the briefs filed by Mitchell’s supporters was that the Wisconsin statute punished thoughts. As the Wisconsin Association of Criminal Defense Lawyers asserted in their brief,

the right of all people to assert their opinions, regardless of how unpopular or odious, must be preserved – even if this means sentencing a hate criminal under the

same guidelines as one who committed the offense for a more acceptable motive... the Wisconsin enhancement provision does not even attempt to punish one for the harm caused by a physical act. Rather, it targets only the harm caused by the expression of hurtful opinions. Such expression, however, is absolutely protected by the First Amendment, regardless of the pain or fear it may engender.<sup>lix</sup>

Wisconsin's supporters emphasized the devastating impact of hate crimes on American society, and rejected the contention that the statute violated the First Amendment. According to the brief filed on behalf of Wisconsin's sister states, mentioned above:

Citizens of the Amici States have been criminally intimidated, harassed and assaulted solely because of their race, ethnicity, religion or other discriminatory distinction. Furthermore, the incidence of hate crime is increasing. The Amici States have a compelling interest – indeed a duty – to combat the pernicious effects of such crime on victims and on society as a whole... By enhancing penalties for crimes committed by reason of the victim's status, Amici are adopting responsive and responsible measures to ensure that their citizens' civil rights are protected.<sup>lx</sup>

As for Mitchell's First Amendment argument, the national ACLU provided a rebuttal in its *amicus* brief: "Respondent is facing an additional two years in prison because he deliberately chose the victim of his assault on the basis of race. Until he engaged in this discriminatory behavior, respondent was free to think and say whatever he wished... Once he engaged in this discriminatory behavior, respondent crossed a crucial constitutional line."<sup>lxi</sup> As to the possible chilling effect of the statute, another *amicus* brief, submitted by the Anti-Defamation League on behalf of itself and 15 other civil rights and law enforcement agencies, pointed to built-in safeguards in the Wisconsin law, asserting that "to prove intentional selection of the victim, the state cannot use evidence that the defendant has bigoted beliefs or has made bigoted statements unrelated to the particular crime... The statute requires the state to show evidence of bigotry relating directly to the defendant's intentional selection of this particular victim."<sup>lxii</sup>

In June 1993, the U.S. Supreme Court issued its decision unanimously reversing the Wisconsin Supreme Court and finding Wisconsin’s hate crimes law constitutionally sound. Writing for the Court, Chief Justice William Rehnquist distinguished the Wisconsin law from the ordinance at issue in *R.A.V.*, observing that the Wisconsin law was aimed at and punished criminal conduct, and “a physical assault is not by any stretch of the imagination expressive conduct protected by the First Amendment.”<sup>lxiii</sup> He acknowledged that “the only reason for the enhancement is the defendant’s discriminatory motive for selecting his victim,” but added that “motive plays the same role under the Wisconsin statute as it does under federal and state antidiscrimination laws” which the Court had previously upheld.<sup>lxiv</sup>

The Chief Justice asserted that the Wisconsin statute was intended to address conduct which the Wisconsin legislature thought would “inflict greater individual and societal harm.”<sup>lxv</sup> He accepted that legislative judgment, citing several *amicus* briefs which underscored how “bias-motivated crimes are more likely to provoke retaliatory crimes, inflict distinct emotional harms on their victims, and incite community unrest.”<sup>lxvi</sup> The state’s desire to redress these perceived harms, he said, “provides an adequate explanation for its penalty-enhancement provision over and above mere disagreement with offenders’ beliefs or biases.”<sup>lxvii</sup>

The Court opinion also acknowledged the relevance of intent in criminal law, citing by way of example its significance for judges attempting to decide on an appropriate criminal sentence – “the defendant’s motive for committing the offense is one important factor.”<sup>lxviii</sup> Adding the caveat that a defendant’s beliefs *alone*, “however obnoxious to most people,” cannot be considered by a sentencing judge, the Court observed that there was no “per se” barrier to the admission of evidence concerning a defendant’s previous statements, subject to “evidentiary rules dealing with relevancy, reliability and the like.”<sup>lxix</sup> The Court emphatically rejected Mitchell’s contention that the law would have a chilling effect, calling that notion “too speculative a hypothesis” and refusing to “conjure up a vision of a Wisconsin citizen suppressing his unpopular bigoted opinions for fear that if he later commits an offense covered by the statute, these opinions would be offered at trial to establish that he selected his victim on account of the victim’s protected status...”<sup>lxx</sup>

The Court’s resounding endorsement of hate crimes laws in the *Mitchell* case reflected a reaffirmation of several key concepts of criminal law. First and foremost, it stood for the proposition that “the punishment should fit the crime,” and legislatures are justified in prescribing harsher sentences for crimes whose impact transcends individual victims. Second, it reaffirmed that – as in the case of different degrees of homicide – intent is relevant in addressing bias-motivated crimes, and legislatures can mandate tougher sentences for perpetrators who target their victims because of an immutable characteristic such as race or ethnicity. Finally, the Court determined that hate crimes laws, like anti-discrimination laws, do not violate a perpetrator’s free speech rights, because even if bias is present, absent the prohibited conduct there would be no legal sanction.

#### **PENALTY ENHANCEMENT HATE CRIMES CASE LAW POST-MITCHELL**

In the years since the Supreme Court issued its decision in *Mitchell*, defendants prosecuted in courts in various states have sought to challenge hate crimes laws. These challenges have not been based only on First Amendment grounds, but also on grounds that the laws violate the Equal Protection Clause and/or the Due Process Clause, because not everyone who commits the same criminal act is punished similarly. Sometimes the laws have also been challenged on grounds of vagueness or overbreadth. For the most part, the laws have been consistently upheld.<sup>lxxi</sup>

One noteworthy exception came in Georgia in 2004. The Georgia hate crimes law, enacted after Wisconsin’s, was phrased differently – providing for an enhancement when the perpetrator “intentionally selected any victim or any property of the victim as the object of the offense because of bias or prejudice.” When this statute was challenged, the Georgia Supreme Court found it unconstitutionally vague and struck it down as a violation of the Due Process Clauses of both the United States and Georgia Constitutions.<sup>lxxii</sup>

Another interesting legal issue was raised in a case out of Brooklyn, New York, in 2007. In this case, a grand jury found that the defendants used an Internet chat room to intentionally lure a gay man to a particular location in order to rob him. In an effort to escape, the victim fled onto a parkway, where he was hit by a car and killed. The defendants contended that their actions were not bias-motivated because they did not harbor any animosity towards gays, but the judge in the case ruled that under the New York hate crimes law, intentional selection was sufficient and proof of animus was unnecessary.<sup>lxxiii</sup>

Finally, courts considering penalty-enhancement hate crimes laws post-*Mitchell* must take cognizance of another important Supreme Court decision – a decision which actually has had an impact across a broad spectrum of criminal laws. In 2000, the Supreme Court ruled in *Apprendi v. New Jersey* that any factor that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt.<sup>lxxiv</sup> The *Apprendi* case did not reject the penalty-enhancement concept for hate crimes. However, the Court did reject New Jersey’s approach, which involved a judge looking at a case following a conviction and pronouncing a tougher sentence if he or she found that the defendant committed the crime with a purpose to intimidate an individual or group of individuals because of their status. Following *Apprendi*, the intentional targeting which forms the basis of a hate crimes charge must be established, beyond a reasonable doubt, at trial, and not afterwards.

#### CROSS-BURNING AND ANTI-MASK LAWS

Statutes prohibiting cross burning and wearing masks with the intent to threaten or intimidate could also be termed hate crimes laws, although they obviously differ in approach from penalty enhancement laws. This section provides a brief summary of the separate case law which has developed regarding cross-burning and anti-mask statutes.

The major Supreme Court ruling on cross-burning was not the *R.A.V.* case, mentioned earlier, but rather a 2003 decision in *Virginia v. Black*.<sup>lxxv</sup> The latter involved a constitutional challenge to a Virginia statute which made it a crime for “any person or persons, with the intent of intimidating any person or group of persons, to burn, or cause to be burned, a cross on the property of another, a highway, or a public place.”<sup>lxxvi</sup> The statute added that “any such burning of a cross shall be prima facie evidence of an intent to intimidate a person or group of persons.”<sup>lxxvii</sup>

Setting the context for its ruling, the Court first discussed the history of Ku Klux Klan cross burnings at some length, noting that “from the inception of the second Klan, cross burnings have been used to communicate both threats of violence and messages of shared ideology... while a burning cross does not inevitably convey a message of intimidation, often the cross burner intends that the recipients of the message fear for their lives. And when a cross burning is used to intimidate, few if any messages are more powerful.”<sup>lxxviii</sup>

While acknowledging the symbolic significance of the burning cross, a plurality of the Court decided, in a series of splintered opinions, that “a State, consistent with the First Amendment, may ban cross burning carried out with the intent to intimidate,” but the “prima facie evidence” provision of the Virginia law rendered it unconstitutional.<sup>lxxxix</sup> “It may be true,” the Court said, “that a cross burning, even at a political rally, arouses a sense of anger or hatred among the vast majority of citizens who see a burning cross. But this sense of anger or hatred is not sufficient to ban all cross burnings... The prima facie evidence provision in this case ignores all of the contextual factors that are necessary to decide whether a particular cross burning is intended to intimidate. The First Amendment does not permit such a shortcut.”<sup>lxxx</sup>

This conclusion prompted the Court to reverse the conviction of one of the defendants, Barry Black, because in his case the jury was told that it could infer the required intent just from the cross burning act itself. However, in the case of a second defendant, Richard Elliott, there was no comparable jury instruction, and the Supreme Court left open the possibility of a retrial. The following year, Elliott’s case came back before the Virginia Supreme Court, which determined that the unconstitutional prima facie provision was severable from the rest of the statute, and a retrial was therefore not required.<sup>lxxxi</sup> A third defendant, Jonathan O’Mara, had entered a plea agreement, and the Virginia Supreme Court found that he had “waived any claim of error based upon the unconstitutionality of the prima facie evidence provision.”<sup>lxxxii</sup>

Cross burning laws are commonly associated with efforts to combat the Ku Klux Klan. So are anti-mask laws – efforts to “unmask the Klan” – which date back to the late 1940s.<sup>lxxxiii</sup> While the Supreme Court has not addressed the constitutionality of anti-mask laws, several court decisions have found that such laws are also constitutionally sound so long as the prosecution can prove that the mask-wearer knew or reasonably should have known that the conduct would provoke a reasonable apprehension of intimidation, threats, or violence. In a key 1990 case, the Georgia Supreme Court upheld that state’s anti-mask law against challenges premised on the freedom of speech, freedom of association, vagueness and overbreadth.<sup>lxxxiv</sup> The Georgia Court found that “the statute is intended to protect the citizens of Georgia from intimidation, violence, and actual and implied threats; it is also designed to assist law enforcement in apprehending criminals, and to restore

confidence in law enforcement by removing any possible illusion of government complicity with masked vigilantes.”<sup>lxxxv</sup> The Court added that “the state’s interests furthered by the Anti-Mask Act lie at the very heart of the realm of legitimate government activity.”<sup>lxxxvi</sup> Moreover, the statute did not prevent the Klansman from publicly proclaiming his message.<sup>lxxxvii</sup>

Examples of other courts which have addressed anti-mask laws include the Supreme Court of West Virginia and the U.S. Court of Appeals for the Second Circuit. The West Virginia court upheld that state’s anti-mask law against a constitutional challenge in 1996,<sup>lxxxviii</sup> and the Second Circuit reached a similar conclusion several years later, upholding New York’s anti-mask law as a proper exercise of the state’s police power to prevent and detect crime.<sup>lxxxix</sup>

## LOOKING FORWARD

The Supreme Court’s decision in *Mitchell* has foreclosed most First Amendment challenges to penalty enhancement statutes similar to Wisconsin’s. However, as New Jersey learned in 2000, the intentional selection must be proven to the jury. And as Georgia learned in 2004, these laws still must be crafted carefully to avoid vagueness problems. As long as states follow the Wisconsin model, they will be on solid ground in enacting and enforcing hate crimes laws.

In addition, courts are likely to continue to distinguish between constitutionally-protected hate speech and hate crimes. For hateful expressive activity to be subject to criminal sanction, as in the case of cross burning or mask wearing, the prosecution must be able to prove that the perpetrator engaged in that activity with an intent to threaten or intimidate.

Finally, the Supreme Court has made it clear that it recognizes the prerogative of the legislative branch to determine the relative seriousness of different kinds of crimes based upon the impact they have on our broader society, and to establish sentences accordingly. Legislatures across the country have exercised this judgment when it comes to hate crimes. They have decided, consistently, that Justice John Paul Stevens was on target when he wrote, with regard to hate crimes, that “conduct that creates special risks or causes special harms may be prohibited by special rules.”<sup>xc</sup>

## CITATIONS

<sup>i</sup> For example, Title VII of the Civil Rights Act of 1964, as amended, prohibits various discriminatory employment actions “because of” the employee or prospective employee’s race, color, religion, sex, or national origin. One relevant section of Fair Housing Act, 42 U.S.C. §3604 (a), prohibits interference with housing choices “because of [the victim’s] race, color, religion, sex, familial status, or national origin.” Further, a number of federal criminal laws punish intentional discrimination on the basis of race, religion, or other characteristic. For example, by enacting 18 U.S.C. §242, the Reconstruction Era Congress made it a crime to deprive a person of constitutional rights “by reason of his color, or race.”

<sup>ii</sup> The International Association of Chiefs of Police defines hate crimes in this way: “criminal offenses committed against persons, property, or society, which are motivated in whole or in part by offenders’ bias against an individual’s or a group’s actual or perceived race, religion, ethnicity/national origin, disability, sexual orientation, or gender.” 1998 IACP Hate Crime in America Summit.

<sup>iii</sup> Alabama *Code of Ala.* § 13A-5-13 (1993); Alaska *Alaska Stat.* § 12.55.155 (1996); Arizona *Ariz. Rev. Stat.* §13-702 (1997); California *Cal Pen Code* §§ 422.7, 422.75 (1995); Colorado *C.R.S.* 18-9-121 (1988); Connecticut *Conn. Gen. Stat.* 18-9-122 §§ 53a-181j- 53a-181l (1990); Delaware *11 Del. C.* 18-9-123§ 1304 (1997); District of Columbia *D.C. Code* §§ 22-3703- 22-3704 (1990); Florida *Fla. Stat.* § 775.085 (1992); Hawaii *HRS* § 706-662 (2001); Idaho *Idaho Code* § 18-7902 (1983); Illinois *720 ILCS* 5/12-7.1 (1996); Iowa *Iowa Code* § 729.A (1992); Kansas *K.S.A. Supp.* § 21-4716 (1994); Kentucky *KRS* § 532.031 (1996); Louisiana *La. R.S.* 14:107.2 (1997); Maine *17-A M.R.S.* § 1151 (1995); Maryland *MD. ANN. Code [Crim.Law]* §10-305 through 10-306 (1994); Massachusetts *Mass. Ann. Laws ch.* 265, § 39 (1982); Michigan *MCL* § 750.147b (1989); Minnesota *Minn. Stat.* §§ 609.2231, 609.749 (1995); Mississippi *Miss. Code Ann.* § 99-19-301 (1994); Missouri § 557.035 *R.S.Mo.* (1988); Montana *Mont. Code Anno.* § 45-5-221 -222 (1989); Nebraska *R.R.S. Neb.* § 28-111 (1997); Nevada *Nev. Rev. Stat. Ann.* § 207.185 (1997); New Hampshire *RSA* 651:6 (1995); New Jersey *N.J. Stat.* §§ 2C:44-3, 2C:16-1 (1995); New Mexico *NMSA* § 31-18b (2003); New York *NY CLS Penal* § 485.05 (2000); North Carolina *N.C. Gen. Stat.* § 14-3 (1993); North Dakota *NDCC* §12.1-14-04; Ohio *ORC Ann.* § 2927.12 (1987); Oklahoma *21 Okl. St.* § 850 (1992); Oregon *ORS* § 166.155; §166.165 (1989); Pennsylvania *18 Pa.C.S.* §2710 (1982); Rhode Island *R.I. Gen. Laws* § 12-19-38 (1994); South Dakota *S.D. Codified Laws* § 22-19B-1 (1993); Tennessee *Tenn. Code Ann.* § 40-35-114 (1990); Texas *Tex. Penal Code* § 12.47; *Tex. Code Crim. Proc. Art.* §42.014 (1993); Utah *U.C.* §76-3-203.3 (1992); Vermont *13 V.S.A.* § 1455 (1990); Virginia *Va. Code Ann.* § 18.2-57 (1997); Washington *Rev. Code Wash. (ARCW)* § 9A.36.080 (1993); West Virginia *W.Va. Code* § 61-6-21 (1998); Wisconsin *Wis. Stat.* § 939.645 (1996).

In addition, many states have laws that provide for civil remedies for victims of hate violence and provide for other additional forms of relief – including injunctive relief, recovery of general and punitive damages, attorney’s fees, and, in some cases, parental liability for minor children’s actions.

<sup>iv</sup> In 1981, the Anti-Defamation League’s Legal Affairs Department drafted a model hate crime bill for state legislatures. The core of the proposed legislation provided for enhanced penalties for crimes directed at an individual because of the actual or perceived race, color, religion, national

origin, sexual orientation or gender of the victim. The ADL model statute also includes an institutional vandalism section which increases the criminal penalties for vandalism aimed at houses of worship, cemeteries, schools and community centers.

<sup>v</sup> “Motivation is a critical part of the definition of bias crimes because it is the bias-motivation of the perpetrator that caused the unique harm of the bias crime.” Statement by Frederick M. Lawrence, Dean and Robert Kramer Research Professor of Law, George Washington University Law School, before the Committee on the Judiciary House of Representatives Subcommittee on Crime, Terrorism, and Homeland Security Concerning H.R. 1592, April 17, 2007. For an excellent, comprehensive discussion of the nature of bias crimes, their causes, and their resulting harms, see Frederick M. Lawrence, *Punishing Hate: Bias Crimes Under American Law*, Harvard University Press, 1999.

<sup>vi</sup> Arizona *Ariz. Rev. Stat. § 13-702* (1997); California *Cal Pen Code §§ 422.7, 422.75* (1995); Colorado *C.R.S. 18-9-121* (1988); Connecticut *Conn. Gen. Stat. §§ 53a-181j- 53a-181l* (1990); Delaware *11 Del. C. § 1304* (1997); District of Columbia *D.C. Code § 22-3701* (1990); Delaware *11 Del. C. § 1304* (1997); Florida *Fla. Stat. § 775.085* (1992); Hawaii *HRS § 846-51* (2001); Illinois *720 ILCS 5/12-7.1* (1996); Iowa *Iowa Code § 729.A* (1992); Kansas *K.S.A. Supp. § 21-4716* (1994); Kentucky *KRS § 532.031* (1996); Louisiana *La. R.S. 14:107.2* (1997); Maine *17-A M.R.S. § 1151* (1995); Maryland *MD. ANN. Code [Crim.Law] §10-301 through 10-306* (1994); Massachusetts *Mass. Ann. Laws ch. 265, § 39* (1982); Minnesota *Minn. Stat. § 609.2231* (1995); Missouri *§ 557.035 R.S.Mo.* (1988); Nebraska *R.R.S. Neb. § 28-111* (1997); Nevada *Nev. Rev. Stat. Ann. § 207.185* (1997); New Hampshire *RSA 651:6* (1995); New Jersey *N.J. Stat. §2C:16-1* (1995); New Mexico *NMSA § 31-18b* (2003); New York *NY CLS Penal § 485.05* (2000); Rhode Island *R.I. Gen. Laws § 12-19-38* (1994); Tennessee *Tenn. Code Ann. § 40-35-114* (1990); Texas *Tex. Penal Code § 12.47; Tex. Code Crim. Proc. Art. §42.014* (1993); Vermont *13 V.S.A. § 1455* (1990); Washington *Rev. Code Wash. (ARCW) § 9A.36.080* (1993); Wisconsin *Wis. Stat. § 939.645* (1996).

<sup>vii</sup> Alaska *Alaska Stat. § 12.55.155* (1996); Arizona *Ariz. Rev. Stat. § 13-702* (1997); California *Cal Pen Code §§ 422.7, 422.75* (1995); Connecticut *Conn. Gen. Stat. §§ 53a-181j- 53a-181l* (1990); District of Columbia *D.C. Code § 22-3701* (1990); Hawaii *HRS § 846-51* (2001); Illinois *720 ILCS 5/12-7.1* (1996); Iowa *Iowa Code § 729.A* (1992); Louisiana *La. R.S. 14:107.2* (1997); Maine *17-A M.R.S. § 1151* (1995); Michigan *MCL § 750.147b* (1989); Minnesota *Minn. Stat. § 609.2231* (1995); Mississippi *Miss. Code Ann. § 99-19-301* (1994); Missouri *§ 557.035 R.S.Mo.* (1988); Nebraska *R.R.S. Neb. § 28-111* (1997); New Hampshire *RSA 651:6* (1995); New Jersey *N.J. Stat. §2C:16-1* (1995); New Mexico *NMSA § 31-18b* (2003); New York *NY CLS Penal § 485.05* (2000); North Carolina *N.C. Gen. Stat. § 99D-1*; North Dakota *NDCC §12.1-14-04* (1973); Rhode Island *R.I. Gen. Laws § 12-19-38* (1994); Tennessee *Tenn. Code Ann. § 40-35-114* (1990); Texas *Tex. Penal Code § 12.47; Tex. Code Crim. Proc. Art. §42.014* (1993); Vermont *13 V.S.A. § 1455* (1990); Washington *Rev. Code Wash. (ARCW) § 9A.36.080* (1993); West Virginia *W.Va. Code § 61-6-21* (1998).

<sup>viii</sup> California *Cal Pen Code §§ 422.7, 422.75* (1995); Colorado *C.R.S. 18-9-121* (1988); Connecticut *Conn. Gen. Stat. §§ 53a-181j- 53a-181l* (1990); District of Columbia *D.C. Code § 22-3701* (1990); Hawaii *HRS § 846-51* (2003); Maryland *MD. ANN.Code [Crim.Law] §10-301 through 10-306* (1994); Minnesota *Minn. Stat. § 609.2231* (1995); Missouri *§ 557.035 R.S.Mo.* (1988); New Mexico *NMSA § 31-18b* (2003); Vermont *13 V.S.A. § 1455* (1990).

<sup>ix</sup> Alabama *Code of Ala. § 13A-5-13* (1993); Alaska *Alaska Stat. § 12.55.155* (1996); Arizona *Ariz. Rev. Stat. § 13-702* (1997); California *Cal Pen Code §§ 422.7, 422.75* (1995); Colorado *C.R.S. 18-9-121* (1988); Connecticut *Conn. Gen. Stat. §§ 53a-181j- 53a-181l* (1990); District of

Columbia *D.C. Code* § 22-3701 (1990); Delaware *11 Del. C.* § 1304 (1997); Florida *Fla. Stat.* § 775.085 (1992); Hawaii *HRS* § 846-51 (2001); Illinois *720 ILCS* 5/12-7.1 (1996); Iowa *Iowa Code* § 729.A (1992); Kansas *K.S.A. Supp.* § 21-4716 (1994); Louisiana *La. R.S.* 14:107.2 (1997); Maine *17-A M.R.S.* § 1151 (1995); Massachusetts *Mass. Ann. Laws ch.* 265, § 39 (1982); Minnesota *Minn. Stat.* § 609.2231 (1995); Missouri § 557.035 *R.S.Mo.* (1988); Nebraska *R.R.S. Neb.* § 28-111 (1997); Nevada *Nev. Rev. Stat. Ann.* § 207.185 (1997); New Hampshire *RSA* 651:6 (1995); New Jersey *N.J. Stat.* §2C:16-1 (1995); New Mexico *NMSA* § 31-18b (2003); New York *NY CLS Penal* § 485.05 (2000); Oklahoma *21 Okl. St.* § 850 (1992); Rhode Island *R.I. Gen. Laws* § 12-19-38 (1994); Tennessee *Tenn. Code Ann.* § 40-35-114 (1990); Texas *Tex. Penal Code* § 12.47; *Tex. Code Crim. Proc. Art.* §42.014 (1993); Vermont *13 V.S.A.* § 1455 (1990); Washington *Rev. Code Wash. (ARCW)* § 9A.36.080 (1993); Wisconsin *Wis. Stat.* § 939.645 (1996).

<sup>x</sup> Alabama *Ala. Code* § 13A-11-12 (1977); Arizona *Ariz. Rev. Stat. Ann.* § 13-1604 (1994); Arkansas *Ark. Code Ann.* § 5-71-215 (1993); California *Cal. Penal Code* § 594.3 (1983); Colorado *Colo. Rev. Stat.* § 18-9-113 (1991); Connecticut *Conn. Gen. Stat.* § 53a-181b (1990); Delaware *11 Del. C.* § 1331; District of Columbia *D.C. Code* § 22-3312.02 (1983); Florida *Fla. Stat. Ann.* § 806.13 (1995); Hawaii *Haw. Rev. Stat.* § 711-1107 (1993); Georgia *Ga. Code Ann.* § 16-7-26 (1968); Hawaii *Haw. Rev. Stat.* § 711-1107 (1993); Idaho *Idaho Code* § 18-7902 (1983); Illinois *720 Ill. Comp. Stat.* 5/21-1.2 (1994); Indiana *Ind. Code Ann.* § 35-43-1-2 (1996); Kansas *An. Stat. Ann.* § 21-4111 (1994); Kentucky *Ky. Rev. Stat. Ann.* §§ 525.110, 525.113 (1992, 1998); Louisiana *La. Rev. Stat. Ann.* § 14:225 (1984); Maine *Me. Rev. Stat. Ann. tit.* 17-A, § 507 (1976); Maryland *MD. ANN. Code [Crim.Law]* §10-301 through 10-304 (1994); Massachusetts *Mass. Gen. Laws Ann. ch.* 266, §§ 126A, 127 (1989); Michigan *Mich. Comp. Laws Ann.* § 750.147b (1989); Minnesota *Minn. Stat. Ann.* § 609.595 (1989); Mississippi *Miss. Code Ann.* § 97-17-39 (1993); Missouri *Mo. Ann. Stat.* § 574.085 (1997); Montana *Mont. Code Ann.* § 45-5-221 (1989); Nebraska *Neb. Stat. Ann.* § 28-111; Nevada *Nev. Rev. Stat. Ann.* § 206.125 (1995); New Jersey *N.J. Stat. Ann.* § 2C:33-11 (1995); New Mexico *N.M. Stat. Ann.* § 30-15-4 (1965); New York *NY CLS Penal* § 240.31; North Carolina *N.C. Gen. Stat.* § 14-49 (1993); Ohio *Ohio Rev. Code Ann.* § 2927.11 (1986); Oklahoma *Okla. Stat. Ann. tit.* 21, § 1765 (1921); Oregon *Or. Rev. Stat.* § 166.075 (1971); Pennsylvania *Pa. Cons. Stat., tit.* 18, § 3307 (1994); Rhode Island *R.I. Gen. Laws* § 11-44-31 (1986); South Carolina *S.C. Code Ann.* § 16-11-535 (2003); South Dakota *S.D. Codified Laws Ann.* § 22-19B-1 (1993); Tennessee *Tenn. Code Ann.* § 39-17-309 (1990); Texas *Tex. Penal Code Ann.* § 28.03 (1994); Virginia *Va. Code Ann.* § 18.2-138 (1990); Washington *Wash. Rev. Code Ann.* § 9A.36.080 (1993); Wisconsin *Wis. Stat. Ann.* § 943.012 (1996).

<sup>xi</sup> National Organization of Black Law Enforcement Executives (NOBLE), “Racial and Religious Violence: A Model Law Enforcement Response,” September 1985.

<sup>xii</sup> Arizona *Stat. Ann.* § 41-1750 (1991); California *Cal. Penal Code* § 13023 (1992); Connecticut *Conn. Gen. Stat.* § 29-7m (1987); District of Columbia *D.C. Code* § 22-3702 (1990); Florida *Fla. Stat.* § 877.19 (1996); Hawaii *Haw. Rev. Stat.* §§§§ 846-51, 846-52, 846-53, 846-54 (2003); Idaho *Idaho Code* § 67-2915 (1995); Illinois *20 ILCS* 2605/2605-390 (1995); Iowa *Iowa Code* § 692.15 (1996); Kentucky *KRS* § 17.1523 (1992); Louisiana *La. Rev. Stat. Ann.* § 15:1204.2(B)(4) and 1204.4 (1997); Maine *Me. Rev. Stat. Ann. tit.* 25, § 1544 (1991); Maryland *Md. Code Ann. art.* 88B, § 9 (1992); Massachusetts *Mass. Gen. Laws Ann. ch.* 22C, §§ 33 to 35 (1991); Michigan *Executive Order* (1996 and 1997); Minnesota *Minn. Stat. Ann.* § 626.5531 (1997); Nebraska *R.R.S. Neb.* § 28-114 (1997); Nevada *NRS* 179A.175 (1995); New Jersey *Attorney General Directive No.* 1987-3 (1987); New Mexico *NMSA* § 31-18b-4 (1978); Oklahoma *21 Okl. St.* § 850 (2001); Oregon *ORS* § 181.550 (1989); Pennsylvania *71 P.S.* § 250 (1987); Rhode Island *R.I. Gen. Laws* § 42-28-46 (1994); Texas *Tex. Gov. Code*

*Ann. § 411.046* (1991); Virginia *Va. Code Ann. § 52-8.5* (1988); Washington *Wash. Rev. Code Ann. § 36.28A.030* (1993); West Virginia *W.Va. Code § 15-2-24(I)* (1977)

<sup>xiii</sup> Arizona *Stat. Ann. § 41-1822* (1991); California *Cal. Penal Code § 13515.25* (1992); Connecticut *Conn. Gen. Stat. § 7-294n* (2001); Illinois *20 ILCS 2605/2605-390* (1995); Iowa *Iowa Code § 729A.4* (1992); Kentucky *Ky. Rev. Stat. Ann. § 15.334* (2005); Louisiana *La. Rev. Stat. Ann. § 40:2403(H)* (1997); Massachusetts *Mass. Ann. Laws ch. 6, § 116B* (1991); Minnesota *Minn. Stat. Ann. § 626.8451* (1993); New Jersey *N.J. Bias Incident Investigation Standards* (1991); New Mexico *NMSA § 31-18b-5* (2003); Oregon *ORS § 181.642* (2003); Rhode Island *R.I. Gen. Laws § 42-28.2-8.1* (1993); Washington *Wash. Rev. Code Ann. § 43.101.290* (1993).

<sup>xiv</sup> *U.S. v. Price, et al.* 383 U.S. 787 (1966). When the three civil rights workers went missing, their colleagues immediately reported their disappearance. President Johnson ordered dozens of FBI agents to Mississippi. Following an extensive search, the remains of the young men were discovered on August 4, 1964. A grand jury returned indictments in January, 1965, charging three law enforcement officials (including Cecil Price, Deputy Sheriff of Neshoba County) and fifteen private citizens who were members of the White Knights of the Ku Klux Klan, with conspiring to deprive the three men of their 14<sup>th</sup> Amendment rights. After a series of procedural delays, in October 1968 a trial was held, ending with an all-white jury convicting Price and six of his co-defendants and acquitting eight others.

More recently, in *United States v. Saldana*, four members of a violent Latino street gang in Los Angeles were convicted of participating in a conspiracy aimed at threatening, assaulting, and murdering African-Americans in a neighborhood claimed by the defendants' gang. *United States v. Saldana, et al.* (C.D. California 2006)

<sup>xv</sup> The six enumerated 'federally protected activities' are: '(A) enrolling in or attending any public school or public college; (B) participating in or enjoying any benefit, service, privilege, program, facility or activity provided or administered by any State or subdivision thereof; (C) applying for or enjoying employment, . . . ; (D) serving . . . as grand or petit juror; (E) traveling in or using any facility of interstate commerce, . . . ; (F) enjoying the goods [or] services [of certain places of public accommodation].' 18 U.S.C. § 245(b)(2).]

<sup>xvi</sup> 18 U.S.C. § 245 (a) (1). On August 10, 1999, Buford Furrow, Jr., an avowed racist and former security guard for the white supremacist group Aryan Nations, walked into the North Valley Jewish Community Center in Los Angeles and shot three young children, a teenager, and an elderly woman with a modified semi-automatic, Uzi-style rifle. Furrow fled the scene in a hijacked car. As he drove, Furrow came upon Joseph Iletto, a Filipino-American postal worker who was delivering mail. Furrow shot and killed Iletto because Iletto was non-white and was working for the federal government. The following morning, after seeing his picture broadcast over the national news media, Furrow surrendered himself to FBI agents in Las Vegas, Nevada. Furrow was charged with murder of a federal employee, six counts of 18 U.S.C. §245, and a number of other federal crimes. On January 24, 2001, Furrow pled guilty to all charges and was sentenced to two consecutive life terms followed by 110 years in prison on March 26, 2001.

<sup>xvii</sup> National Church Arson Task Force, *Fourth Report to the President*, [http://www.atf.treas.gov/pub/gen\\_pub/report2000/fullrpt.pdf](http://www.atf.treas.gov/pub/gen_pub/report2000/fullrpt.pdf) (September, 2000).

<sup>xviii</sup> Church Arson Prevention Act of 1996, Pub. L. No. 104-155, 110 Stat. 1392, amending 18 U.S.C. §247 July 3, 1996.

<sup>xix</sup> Between 1994 and 1999, Jay Scott Ballinger and his girlfriend, Angela Wood, set fire to more than 30 churches – mostly isolated, rural churches, including 13 in Indiana, 5 in Georgia, 4 in Kentucky, 3 in Ohio, and 1 each in Alabama, California, South Carolina, and Tennessee. A 27-year-old volunteer firefighter was killed while fighting one of the Georgia fires. The defendants, who identified themselves as “Luciferians” (Satan-worshippers), burned the churches for religious reasons.

On July 11, 2000, Ballinger pled guilty to twenty counts of church arson, in violation of 18 U.S.C. §247 and a variety of other federal crimes. Angela Wood was sentenced to serve 16 years and 8 months in prison after she admitted that she helped Ballinger burn four churches in Indiana. On April 13, 2001, Ballinger pled guilty to five more counts of church arson and admitted that his offense caused the death of a firefighter. On August 17, 2001, Ballinger was sentenced to life in prison without parole. The constitutionality of the statute was upheld in *United States v. Ballinger*, 395 F.3d 1218 (2005).

<sup>xx</sup> In October and November 2006, defendants Joseph Kuzlik and David Fredericy pled guilty to conspiracy, interference with housing rights, and making false statements to federal investigators. *United States v. Fredericy and Kuzlik* (Northern District of Ohio). In February 2005, these defendants poured mercury on the front porch and driveway of a bi-racial couple in an attempt to force them and their child out of their Cleveland, Ohio, home.

<sup>xxi</sup> On September 27, 2007, Defendant Kyle Shroyer pled guilty to conspiring to violate the civil rights of a woman and her three biracial children, and admitted having burned a cross at the family’s home in Muncie, Ind. In March 2006, Shroyer built an eight-foot wooden cross with another individual and then erected the cross in front of the victims’ home. The two men then doused the cross with gasoline and set it on fire. On January 4, 2008, Shroyer was sentenced to serve 15 months in prison. A recent case held that it was not a First Amendment violation to enhance a sentence under 18 U.S.C. § 844(h)(1) based on the use of fire, even if it was used as a symbol. *U.S. v. Magleby*, 2005 WL 1995581 (8/19/05).

<sup>xxii</sup> Public Law 102-275, April 23, 1990. President George HW Bush’s signing statement for the Act from April 23, 1990 is eloquent:

Enacting this law today helps move us toward our dream: a society blind to prejudice, a society open to all. Until we reach that day when the bigotry and hate of mail bombings, and the vandalisms of the Yeshiva school and the Catholic churches we’ve seen recently, and so many other sad, sad incidents are no more -- until that day, we must remember: For America to continue to be a good place for any of us to live, it must be a good place for all of us to live. <http://bushlibrary.tamu.edu/research/papers/1990/90042302.html>

<sup>xxiii</sup> Public Law 103-322 September 13, 1994.

<sup>xxiv</sup> The Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322 (1994). Section 280003a of this Act provides:

(a) DEFINITION- In this section, 'hate crime' means a crime in which the defendant intentionally selects a victim, or in the case of a property crime, the property that is the object of the crime, because of the actual or perceived race, color, religion, national origin, ethnicity, gender, disability, or sexual orientation of any person.

(b) SENTENCING ENHANCEMENT- Pursuant to section 994 of title 28, United States Code, the United States Sentencing Commission shall promulgate guidelines or amend existing guidelines to provide sentencing enhancements of not less than 3 offense levels for offenses that the finder of fact at trial determines beyond a reasonable doubt are hate crimes. . . .

<sup>xxv</sup> 20 U.S.C. 1092 (f)(1)(F) provides:

**(F)** Statistics concerning the occurrence on campus, in or on noncampus buildings or property, and on public property during the most recent calendar year, and during the 2 preceding calendar years for which data are available—

**(i)** of the following criminal offenses reported to campus security authorities or local police agencies:

**(I)** murder;

**(II)** sex offenses, forcible or nonforcible;

**(III)** robbery;

**(IV)** aggravated assault;

**(V)** burglary;

**(VI)** motor vehicle theft;

**(VII)** manslaughter;

**(VIII)** arson; and

**(IX)** arrests or persons referred for campus disciplinary action for liquor law violations, drug-related violations, and weapons possession; and

**(ii)** of the crimes described in subclauses (I) through (VIII) of clause (i), and other crimes involving bodily injury to any person in which the victim is intentionally selected because of the actual or perceived race, gender, religion, sexual orientation, ethnicity, or disability of the victim that are reported to campus security authorities or local police agencies, which data shall be collected and reported according to category of prejudice.

<sup>xxvi</sup> 34 CFR 668.46 (c) (7) provides: "UCR definitions. An institution must compile the crime statistics required under paragraphs (c)(1) and (3) of this section using the definitions of crimes provided in appendix A to this subpart and the Federal Bureau of Investigation's Uniform Crime Reporting (UCR) Hate Crime Data Collection Guidelines and Training Guide for Hate Crime Data Collection."

<sup>xxvii</sup> In the 110<sup>th</sup> Congress, this legislation is H.R. 1592 and S. 1105. The House of Representatives approved its version of this legislation by a vote of 237-180 on May 3, 2007. <http://clerk.house.gov/evs/2007/roll299.xml>, Facing a [veto threat](#) from President Bush, the Senate added the text of S. 1105 as an amendment to the Department of Defense Authorization legislation on September 27. The key vote, [60-39](#), [http://www.senate.gov/legislative/LIS/roll\\_call\\_lists/roll\\_call\\_vote\\_cfm.cfm?congress=110&session=1&vote=00350](http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=110&session=1&vote=00350), was on a motion to limit debate on the bill, as policy opponents tried to kill the

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measure through the use of a filibuster. The House version of the Department of Defense Authorization bill, H.R. 1585, had been approved on May 17, without hate crime provisions. Despite concerted lobbying efforts, the hate crime provisions were ultimately stripped from the Defense bill in conference because of a sustained veto threat, conservative opposition to the hate crime provisions, and unrelated opposition among Democrats to the larger Pentagon policy bill.

<sup>xxviii</sup> Hearings on H.R. 3081, House Judiciary Committee, July 22, 1998. Hearings on S. 1529, Senate Judiciary Committee, July 8, 1998.

<sup>xxix</sup> Hearings on S. 622, Senate Judiciary Committee, May 11, 1999.

<sup>xxx</sup> "... the Federal Government's resources, forensic expertise, and experience in the identification and proof of bias-motivated violence and criminal networks have often provided an invaluable investigative complement to the familiarity of local investigators with the local community and its people and customs. Through this cooperation, State and Federal law enforcement officials have been able to bring the perpetrators of hate crimes swiftly to justice." House report 110-113 Local Law Enforcement Hate Crime Prevention Act, House Judiciary Committee, April 30, 2007. [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110\\_cong\\_reports&docid=f:hr113.110.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_reports&docid=f:hr113.110.pdf)

<sup>xxxi</sup> Indeed, Bill Lann Lee, then Acting Assistant Attorney General for Civil Rights, testified about the important, but limited, use contemplated by the Department of Justice at House Judiciary Committee hearings on the Hate Crime Prevention Act on July 22, 1998:

From 1992 through 1997, the Department of Justice brought a total of only 33 Federal hate crimes prosecutions under 18 USC section 245, an average of fewer than six per year. We predict that the enactment of the Hate Crimes Prevention Act of 1997 would result in only a modest increase in the number of hate crimes prosecutions brought each year by the Federal Government. Our partnership with State and local law enforcement would continue with State and local prosecutors continuing to take the lead in the great majority of cases. Concurrent Federal jurisdiction is necessary only to permit joint State-Federal investigations and to authorize Federal prosecutions in rare circumstances. Although the increase in the number of Federal prosecutions we would bring pursuant to an amended section 245 would likely be modest, the increase in our ability to work effectively as partners with State and local law enforcement would be great.

Hearings on H.R. 3081, The Hate Crimes Prevention Act of 1997, House Committee on the Judiciary, July 22, 1998, [http://commdocs.house.gov/committees/judiciary/hju57839.000/hju57839\\_0.HTM](http://commdocs.house.gov/committees/judiciary/hju57839.000/hju57839_0.HTM).

<sup>xxxii</sup> In the 110<sup>th</sup> Congress, this legislation is H.R. 935 and S. 535. In the summer of 1955, a fourteen-year-old African-American teenager from Chicago named Emmett Till traveled to Mississippi to visit relatives. Four days after a nonchalant encounter with a white female shopkeeper, he was abducted from his relatives' house. His body was later found in the Tallahatchie River, with a seventy-pound gin-mill fan tied to his neck with barbed wire. Till's mother, Mamie Bradley, insisted that his body be shipped back to Chicago, where it was displayed in an open coffin for four days. Two individuals were tried for Till's murder, but were acquitted by an all-white jury after only an hour of deliberation. The murder of Emmett Till was

one of the most infamous acts of racial violence in American history, yet his killers have never been punished.

The House of Representative approved its version of this legislation on June 20, 2007 by a vote of 422-2. <http://clerk.house.gov/evs/2007/roll512.xml>.

<sup>xxxiii</sup> Statement of Richard Cohen, President and CEO of the Southern Poverty Law Center, at joint hearings before the House Judiciary Subcommittee on the Constitution, Civil Rights, and Civil Liberties and Subcommittee on Crime, Terrorism, and Homeland Security, June 12, 2007. <http://judiciary.house.gov/Hearings.aspx?ID=174>

<sup>xxxiv</sup> <http://clerk.house.gov/evs/2007/roll512.xml>

<sup>xxxv</sup> Alabama *Ala.Code §13a-6-28*; Arizona *Ariz.Rev.Stat. Ann. §13-1707*; California *Cal. Penal Code §11411*; Connecticut *Conn.Gen.Stat. Ann. §46a-58*; Delaware *Del.Code Ann. Tit. 11 §805*; Florida *Fla.Stat. Ann. §876.17*; Georgia *Ga.Code §16-11-37*; Idaho *Idaho Code §18-7902*; Illinois *Ill.Comp.Laws Ann. Ch. 720 ¶5, §12-7.6*; Louisiana *La.Rev.Stat. Ann. §14:40.4*; Maryland *Md. Code Ann., Crim. Law §10-304*; Missouri *Mo. Ann. Stat. §565.095*; Montana *Mont.Code Ann. §45-5-221*; New Hampshire *N.H.Rev. Stat. Ann. §631:4*; New Jersey *N.J.Stat. Ann. §2c:33-10*; North Carolina *N.C.Gen.Stat. §14-12.13*; Oklahoma *Okla.Stat. Ann. Tit.21 §1174*; South Carolina *S.C. Code Ann. §16-7-120*; South Dakota *S.D.Cod.Laws Ann. §22-19b-1*; Vermont *Vt.Stat. Ann. Tit. 13 §1456*; Virginia *Va. Code Ann. §18.2-423*; Washington *Wash.Rev.Code Ann.*

<sup>xxxvi</sup> 538 U.S. 343, 357 (2003)

<sup>xxxvii</sup> Statement by Frederick M. Lawrence, Dean and Robert Kramer Research Professor of Law, George Washington University Law School, before the Committee on the Judiciary House of Representatives Subcommittee on Crime, Terrorism, and Homeland Security Concerning H.R. 1592, April 17, 2007. <http://judiciary.house.gov/media/pdfs/Lawrence070417.pdf>.

<sup>xxxviii</sup> *State v. Plowman*, 838 P.2d 558, 564, 314 Or. 157, 166 (Or. 1992).

<sup>xxxix</sup> *Id.*

<sup>xl</sup> *Id.*

<sup>xli</sup> *Id.*

<sup>xlii</sup> *Tison v. Arizona*, 481 U.S. 137, 156, 107 S.Ct. 1676, 1687 (1987).

<sup>xliii</sup> *Barclay v. Florida*, 463 U.S. 939, 942, 103 S.Ct. 3418, 3421, (1983).

<sup>xliv</sup> *Barclay*, 463 U.S. at 978, 103 S.Ct. at 3439.

<sup>xlv</sup> See *Barclay* 463 U.S. at 949, 103 S.Ct. at 3424-5.

<sup>xlvi</sup> 468 U.S. 609 (1984).

<sup>xlvii</sup> 467 U.S. 69 (1984).

<sup>xlviii</sup> 427 U.S. 160 (1976).

<sup>xlix</sup> *Wisconsin v. Mitchell*, 508 U.S. at 487, 113 S.Ct. at 2200.

<sup>i</sup> See e.g. *People v. Lashley*, 1 Cal.App.4th 938, 951 (Cal. Ct. App. 1991) (enforcing civil rights laws prohibiting interference with an individual's state or federal rights because of race, color, religion, ancestry, national origin, or sexual orientation); *U.S. v. Nelson*, 68 F.3d 583 (2d Cir. 1995) (upholding criminal penalties for civil rights violations involving interference with federally protected activities).

<sup>ii</sup> *People v. Lashley*, 1 Cal.App.4th at 951.

<sup>iii</sup> *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 378, 112 S.Ct. 2538, 2540 (1992).

<sup>liii</sup> *Id.*

<sup>liv</sup> Indeed, *New York Times* Supreme Court reporter Linda Greenhouse commented "The majority's approach would appear not only to have invalidated ordinances of the St. Paul type, in which activities are defined as hate crimes and added to a city or state's criminal code, but also to have dealt what was probably a fatal constitutional blow at another popular legislative approach to the hate crime issue. Under the second approach, existing crimes like vandalism or harassment are punished more severely if the prosecution can show that bias was a factor in the crime." *New York Times*, June 23, 1992

<sup>lv</sup> *Wisconsin v. Mitchell*, 508 U.S. at 480, 113 S.Ct. at 2197.

<sup>lvi</sup> *Mitchell*, 508 U.S. at 481-2, 113 S.Ct. at 2197.

<sup>lvii</sup> *Mitchell*, 508 U.S. at 482, 113 S.Ct. at 2198.

<sup>lviii</sup> *Id.*

<sup>lix</sup> Brief Amicus Curiae of the Wisconsin Association of Criminal Defense Lawyers (WACDL) in Support of Respondent, 1992 U.S. Briefs 515, 1993 U.S. S. Ct. Briefs LEXIS 196 (1993).

<sup>lx</sup> Brief of Amici Curiae States in Support of Petitioner, 1992 U.S. Briefs 515, 1993 U.S. S. Ct. Briefs LEXIS 175 (1993).

<sup>lxi</sup> Brief Amicus Curiae of the American Civil Liberties Union in Support of Petitioner, 1992 U.S. Briefs 515, 1993 U.S. S. Ct. Briefs LEXIS 178 (1993).

<sup>lxii</sup> Brief of Amici Curiae the Anti-Defamation League et al, 1992 U.S. Briefs 515, 1993 U.S. S. Ct. Briefs LEXIS 162 (1993).

<sup>lxiii</sup> *Mitchell*, 508 U.S. at 484, 113 S.Ct. at 2199.

<sup>lxiv</sup> *Mitchell*, 508 U.S. at 487, 113 S.Ct. at 2200.

<sup>lxv</sup> *Mitchell*, 508 U.S. at 488, 113 S.Ct. at 2201.

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lxvi *Id.*

lxvii *Id.*

lxviii *Mitchell*, 508 U.S. at 485, 113 S.Ct. at 2199.

lxix *Mitchell*, 508 U.S. at 489, 113 S.Ct. at 2201.

lxx *Mitchell*, 508 U.S. at 488, 113 S.Ct. at 2201.

lxxi *See e.g. People v. Aishman*, 10 Cal.4th 735, 42 Cal.Rptr.2d 377 (Cal. 1995) (upholding a penalty-enhancement statute in the face of First Amendment and due process arguments); *People v. Fox*, 17 Misc.3d 281, 2007 NY Slip Op 27317, (N.Y.Sup.Ct. 2007) (interpreting a statute to only require the intentional selection of a victim because of race, color, national origin, ancestry, gender, religion, religious practice, age, disability or sexual orientation; proof did not require animus toward people belonging to such groups).

lxxii *Botts v. State*, 604 S.E.2d 512, 513, 278 Ga. 538, 538 (Ga. 2004).

lxxiii *People v. Fox*, 17 Misc.3d at 284, 2007 NY Slip Op at 3.

lxxiv *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S.Ct. 2348, 2362-3 (2000).

lxxv *See Virginia v. Black*, 538 U.S. 343, 123 S.Ct. 1536 (2003).

lxxvi [VA.CODE ANN. § 18.2-423 \(1996\)](#).

lxxvii *Virginia v. Black*, 538 U.S. at 363, 123 S.Ct. at 1550.

lxxviii *Black*, 538 U.S. at 357, 123 S.Ct. at 1547.

lxxix *Black*, 538 U.S. at 347, 123 S.Ct. at 1541.

lxxx *Black*, 538 U.S. at 363, 123 S.Ct. at 1552 (demonstrating a marked difference of opinion from dissenting Justice Thomas, who argues that cross-burning should constitute a First Amendment exception even without looking to context as the majority does here, and dissenting Justice Souter, arguing that even with intent to intimidate, cross-burning should not be a crime).

lxxxi *Elliott v Virginia*, 593 S.E.2d 270, 290, 267 Va. 396, 427-8 (Va. 2004).

lxxxii *Elliott v Virginia*, 593 S.E.2d at 270, 267 Va. at 475.

lxxxiii *State v. Miller*, 398 S.E.2d. 547, 260 Ga. 669, at 671-672 (Ga. 1990).

lxxxiv *State v. Miller*, 398 S.E.2d 547, 549, 260 Ga. 669, at 669-70.

lxxxv *State v. Miller*, 398 S.E.2d at 550, 260 Ga. at 672.

lxxxvi *Miller*, 398 S.E.2d at 551, 260 Ga. at 672.

lxxxvii *Miller*, 398 S.E.2d at 551, 260 Ga. at 673.

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<sup>lxxxviii</sup> *West Virginia v. Berrill*, 196 W.Va. 578, 474 S.E. 2d. 508 (W.Va. June 14, 1996)

<sup>lxxxix</sup> *Church of American Knights of the Ku Klux Klan v. Kerik*, 356 F.3d 197, 205 (2d Cir., N.Y. 2004).

<sup>xc</sup> *R.A.V. v. City of St. Paul, Minn*, 505 U.S. at 416, 112 S.Ct. at 2561 (Stevens, J., dissenting).