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1ST CASE of Focus printed in FULL format.

WISCONSIN, PETITIONER v. TODD MITCHELL

No. 92-515

SUPREME COURT OF THE UNITED STATES

508 U.S. 476; 113 S. Ct. 2194; 1993 U.S. LEXIS 4024; 124 L.
Ed. 2d 436; 61 U.S.L.W. 4575; 21 Media L. Rep. 1520; 93 Cal.
Daily Op. Service 4314; 93 Daily Journal DAR 7353

April 21, 1993, Argued
June 11, 1993, Decided

PRIOR HISTORY: [***1] ON WRIT OF CERTIORARI TO THE SUPREME COURT OF
WISCONSIN.

DISPOSITION: 169 Wis. 2d 153, 485 N. W. 2d 807, reversed and remanded.

SYLLABUS: Pursuant to a Wisconsin statute, respondent Mitchell's sentence for aggravated battery was enhanced because he intentionally selected his victim on account of the victim's race. The State Court of Appeals rejected his challenge to the law's constitutionality, but the State Supreme Court reversed. Relying on *R. A. V. v. St. Paul*, 505 U.S. 377, 120 L. Ed. 2d 305, 112 S. Ct. 2538, it held that the statute violates the First Amendment by punishing what the legislature has deemed to be offensive thought and rejected the State's contention that the law punishes only the conduct of intentional victim selection. It also found that the statute was unconstitutionally overbroad because the evidentiary use of a defendant's prior speech would have a chilling [***2] effect on those who fear they may be prosecuted for offenses subject to penalty enhancement. Finally, it distinguished antidiscrimination laws, which have long been held constitutional, on the ground that they prohibit objective acts of discrimination, whereas the state statute punishes the subjective mental process.

Held: Mitchell's First Amendment rights were not violated by the application of the penalty-enhancement provision in sentencing him. Pp. 483-490.

(a) While Mitchell correctly notes that this Court is bound by a state court's interpretation of a state statute, the State Supreme Court did not construe the instant statute in the sense of defining the meaning of a particular word or phrase. Rather; it characterized the statute's practical effect for First Amendment purposes. Thus, after resolving any ambiguities in the statute's meaning, this Court may form its own judgment about the law's operative effect. The State's argument that the statute punishes only conduct does not dispose of Mitchell's claim, since the fact remains that the same criminal conduct is more heavily punished if the victim is selected because of his protected status than if no such motive obtains. [***3] Pp. 483-485.

(b) In determining what sentence to impose, sentencing judges have traditionally considered a wide variety of factors in addition to evidence bearing on guilt, including a defendant's motive for committing the offense. While it is equally true that a sentencing judge may not take into consideration a defendant's abstract beliefs, however obnoxious to most people, the Constitution does not erect a per se barrier to the admission of evidence

concerning one's beliefs and associations at sentencing simply because they are protected by the First Amendment. *Dawson v. Delaware*, 503 U.S. 159, 117 L. Ed. 2d 309, 112 S. Ct. 1093; *Barclay v. Florida*, 463 U.S. 939, 77 L. Ed. 2d 1134, 103 S. Ct. 3418 (plurality opinion). That *Dawson* and *Barclay* did not involve the application of a penalty-enhancement provision does not make them inapposite. *Barclay* involved the consideration of racial animus in determining whether to sentence a defendant to death, the most severe "enhancement" of all; and the state legislature has the primary responsibility for fixing criminal penalties. Motive plays the same role under the state statute as it does [***4] under federal and state antidiscrimination laws, which have been upheld against constitutional challenge. Nothing in *R. A. V. v. St. Paul*, supra, compels a different result here. The ordinance at issue there was explicitly directed at speech, while the one here is aimed at conduct unprotected by the First Amendment. Moreover, the State's desire to redress what it sees as the greater individual and societal harm inflicted by bias-inspired conduct provides an adequate explanation for the provision over and above mere disagreement with offenders' beliefs or biases. Pp. 485-488.

(c) Because the statute has no "chilling effect" on free speech, it is not unconstitutionally overbroad. The prospect of a citizen suppressing his bigoted beliefs for fear that evidence of those beliefs will be introduced against him at trial if he commits a serious offense against person or property is too speculative a hypothesis to support this claim. Moreover, the First Amendment permits the admission of previous declarations or statements to establish the elements of a crime or to prove motive or intent, subject to evidentiary rules dealing with relevancy, reliability, and the like. *Haupt v. United States*, 330 U.S. 631, [***5] 91 L. Ed. 1145, 67 S. Ct. 874. Pp. 488-490.

COUNSEL: James E. Doyle, Attorney General of Wisconsin, argued the cause for petitioner. With him on the briefs was Paul Lundsten, Assistant Attorney General.

Michael R. Dreeben argued the cause for the United States as amicus curiae urging reversal. With him on the brief were Acting Solicitor General Bryson, Acting Assistant Attorneys General Keeney and Turner, Kathleen A. Felton, and Thomas E. Chandler.

Lynn S. Adelman argued the cause for respondent. With him on the brief were Kenneth P. Casey and Susan Gellman. *

* Briefs of amici curiae urging reversal were filed for the State of Ohio et al. by Lee Fisher, Attorney General of Ohio, Andrew S. Bergman, Assistant Attorney General, and Simon B. Karas, John Payton, Corporation Counsel of the District of Columbia, and by the Attorneys General for their respective States as follows: James H. Evans of Alabama, Charles E. Cole of Alaska, Grant Woods of Arizona, Winston Bryant of Arkansas, Daniel E. Lungren of California, Gale A. Norton of Colorado, Richard Blumenthal of Connecticut, Charles M. Oberly III of Delaware, Robert A. Butterworth of Florida, Michael J. Bowers of Georgia, Robert A. Marks of Hawaii, Larry EchoHawk of Idaho, Roland W. Burris of Illinois, Pamela Carter of Indiana, Bonnie J. Campbell of Iowa, Robert T. Stephan of Kansas, Chris Gorman of Kentucky, Richard P. Ieyoub of Louisiana, Michael E. Carpenter of Maine, J. Joseph Curran, Jr., of Maryland, Scott Harshbarger of Massachusetts, Frank J. Kelley of Michigan, Hubert H. Humphrey III of Minnesota, Mike Moore of Mississippi, Jeremiah W. Nixon of Missouri, Joseph P. Mazurek of

Montana, Don Stenberg of Nebraska, Frankie Sue Del Papa of Nevada, Jeffrey R. Howard of New Hampshire, Robert J. Del Tufo of New Jersey, Tom Udall of New Mexico, Robert Abrams of New York, Michael F. Easley of North Carolina, Heidi Heitkamp of North Dakota, Susan B. Loving of Oklahoma, Theodore R. Kulongoski of Oregon, Ernest D. Preate, Jr., of Pennsylvania, Jeffrey B. Pine of Rhode Island, T. Travis Medlock of South Carolina, Mark Barnett of South Dakota, Charles W. Burson of Tennessee, Dan Morales of Texas, Jan Graham of Utah, Jeffrey L. Amestoy of Vermont, Mary Sue Terry of Virginia, Christine O. Gregoire of Washington, Daryl V. McGraw of West Virginia, and Joseph B. Myer of Wyoming; for the city of Atlanta et al. by O. Peter Sherwood, Leonard J. Koerner, Lawrence S. Kahn, Linda H. Young, Burt Neuborne, Norman Dorsen, Neal M. Janey, Albert W. Wallis, Lawrence Rosenthal, Benna Ruth Solomon, Julie P. Downey, Jessica R. Heinz, Judith E. Harris, Louise H. Renne, and Dennis Aftergut; for the American Civil Liberties Union by Steven R. Shapiro and John A. Powell; for the Anti-Defamation League et al. by David M. Raim, Jeffrey P. Sinensky, Steven M. Freeman, Michael Lieberman, and Robert H. Frieber; for the Appellate Committee of the California District Attorneys Association by Gil Garcetti and Harry B. Sondheim; for the California Association of Human Rights Organizations et al. by Henry J. Silberberg and Mark Solomon; for the Chicago Lawyers' Committee for Civil Rights Under Law, Inc., by Frederick J. Sperling and Roslyn C. Lieb; for the Criminal Justice Legal Foundation by Kent S. Scheidegger; for the Crown Heights Coalition et al. by Samuel Rabinove, Richard T. Foltin, Kenneth S. Stern, Elaine R. Jones, and Eric Schnapper; for the Jewish Advocacy Center by Barrett W. Freedlander; for the Lawyers' Committee for Civil Rights of the San Francisco Bay Area by Robert E. Borton; for the National Asian Pacific American Legal Consortium et al. by Angelo N. Ancheta; for the National Conference of State Legislatures et al. by Richard Ruda and Michael J. Wahoske; and for Congressman Charles E. Schumer et al. by Steven T. Catlett and Richard A. Cordray.

Briefs of amici curiae urging affirmance were filed for the American Civil Liberties Union of Ohio by Daniel T. Kobil and Benson A. Wolman; for California Attorneys for Criminal Justice by Robert R. Riggs, John T. Philipsborn, and Dennis P. Riordan; for the Center for Individual Rights by Gary B. Born and Michael P. McDonald; for the National Association of Criminal Defense Lawyers et al. by Harry R. Reinhart, John Pyle, Sean O'Brien, and William I. Aronwald; for the Ohio Public Defender by James Kura, Robert L. Lane, James R. Neuhard, Allison Connelly, Theodore A. Gottfried, Henry Martin, and James E. Duggan; for the Wisconsin Freedom of Information Council by Jeffrey J. Kassel; for the Reason Foundation by Robert E. Sutton; for the Wisconsin Association of Criminal Defense Lawyers by Ira Mickenberg; and for Larry Alexander et al. by Martin H. Redish.

Briefs of amici curiae were filed for the Lawyers' Committee for Civil Rights Under Law by Paul Brest, Alan Cope Johnston, Herbert M. Wachtell, William H. Brown III, and Norman Redlich; and for the Wisconsin Inter-Racial and Inter-Faith Coalition for Freedom of Thought by Joan Kessler.

JUDGES: REHNQUIST, C. J., delivered the opinion for a unanimous Court.

OPINIONBY: REHNQUIST

OPINION: [*479] [**2196] CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

Respondent Todd Mitchell's sentence for aggravated battery was enhanced because he intentionally selected his victim on account of the victim's race. The question presented in this case is whether this penalty enhancement is prohibited by the First and Fourteenth Amendments. We hold that it is not.

On the evening of October 7, 1989, a group of young black men and boys, including Mitchell, gathered at an apartment [*480] 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?'" Brief for Petitioner 4. Shortly thereafter, a young white boy approached the group on the opposite side of the street where they were standing. As the boy walked by, [***6] Mitchell said: "'You all want [**2197] to fuck somebody up? There goes a white boy; go get him.'" Id., at 4-5. 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.

After a jury trial in the Circuit Court for Kenosha County, Mitchell was convicted of aggravated battery. Wis. Stat. @@ 939.05 and 940.19(1m) (1989-1990). That offense ordinarily carries a maximum sentence of two years' imprisonment. @@ 940.19(1m) and 939.50(3)(e). But because the jury found that Mitchell had intentionally selected his victim because of the boy's race, the maximum sentence for Mitchell's offense was increased to seven years under @ 939.645. That provision enhances the maximum penalty for an offense whenever the defendant "intentionally selects the person against whom the crime . . . is committed . . . because of the race, religion, color, disability, sexual orientation, national origin or ancestry of that person" @ 939.645(1)(b). n1 [*481] The Circuit Court sentenced Mitchell to four years' imprisonment for the aggravated battery.

- - - - -Footnotes- - - - -

n1 At the time of Mitchell's trial, the Wisconsin penalty-enhancement 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." Wis. Stat. @ 939.645 (1989-1990).

The statute was amended in 1992, but the amendments are not at issue in this case.

- - - - -End Footnotes- - - - -

[**7] Mitchell unsuccessfully sought postconviction relief in the Circuit Court. Then he appealed his conviction and sentence, challenging the constitutionality of Wisconsin's penalty-enhancement provision on First Amendment grounds. n2 The Wisconsin Court of Appeals rejected Mitchell's challenge, 163 Wis. 2d 652, 473 N.W.2d 1 (1991), but the Wisconsin Supreme Court reversed. The Supreme Court [*482] held that the statute "violates the First Amendment directly by punishing what the legislature has deemed to be offensive thought." 169 Wis. 2d 153, 485 N.W.2d 807, 811 (1992). It rejected the State's contention "that the statute punishes only the 'conduct' of intentional selection of a victim." Id., at 164, 485 N.W.2d at 812. According to the court, "the statute punishes the 'because of' aspect of the defendant's selection, the reason the defendant selected the victim, the motive behind the selection." Ibid. (emphasis in original). And under R. A. V. v. St. Paul, 505 U.S. 377, 120 L. Ed. 2d 305, 112 S. Ct. 2538 (1992), "the Wisconsin legislature cannot criminalize bigoted [**2198] thought [**8] with which it disagrees." 169 Wis. 2d at 171, 485 N.W.2d at 815.

- - - - -Footnotes- - - - -

n2 Mitchell also challenged the statute on Fourteenth Amendment equal protection and vagueness grounds. The Wisconsin Court of Appeals held that Mitchell waived his equal protection claim and rejected his vagueness challenge outright. 163 Wis. 2d 652, 473 N.W.2d 1 (1991). The Wisconsin Supreme Court declined to address both claims. 169 Wis. 2d 153, 158, n.2, 485 N.W.2d 807, 809, n.2 (1992). Mitchell renews his Fourteenth Amendment claims in this Court. But since they were not developed below and plainly fall outside of the question on which we granted certiorari, we do not reach them either.

- - - - -End Footnotes- - - - -

The Supreme Court also held that the penalty-enhancement statute was unconstitutionally overbroad. It reasoned that, in order to prove that a defendant intentionally selected his victim because of the victim's protected status, the State [**9] would often have to introduce evidence of the

defendant's prior speech, such as racial epithets he may have uttered before the commission of the offense. This evidentiary use of protected speech, the court thought, would have a "chilling effect" on those who feared the possibility of prosecution for offenses subject to penalty enhancement. See *id.*, at 174, 485 N.W.2d at 816. Finally, the court distinguished antidiscrimination laws, which have long been held constitutional, on the ground that 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." *Id.*, at 176, 485 N.W.2d at 817. n3

-Footnotes-

n3 Two justices dissented. They concluded that the statute punished discriminatory acts, and not beliefs, and therefore would have upheld it. See 169 Wis. 2d at 181, 485 N.W.2d at 819 (Abrahamson, J.); *id.*, at 187-195, 485 N.W.2d at 821-825 (Bablitch, J.).

-End Footnotes-

[***10] We granted certiorari because of the importance of the question presented and the existence of a conflict of authority [*483] among state high courts on the constitutionality of statutes similar to Wisconsin's penalty-enhancement provision, n4 506 U.S. 1033 (1992). We reverse.

-Footnotes-

n4 Several States have enacted penalty-enhancement provisions similar to the Wisconsin statute at issue in this case. See, e.g., Cal. Penal Code Ann. @ 422.7 (West 1988 and Supp. 1993); Fla. Stat. @ 775.085 (1991); Mont. Code Ann. @ 45-5-222 (1992); Vt. Stat. Ann., Tit. 13, @ 1455 (Supp. 1992). Proposed federal legislation to the same effect passed the House of Representatives in 1992, H. R. 4797, 102d Cong., 2d Sess. (1992), but failed to pass the Senate, S. 2522, 102d Cong., 2d Sess. (1992). The state high courts are divided over the constitutionality of penalty-enhancement statutes and analogous statutes covering bias-motivated offenses. Compare, e.g., *State v. Plowman*, 314 Ore. 157, 838 P.2d 558 (1992) (upholding Oregon statute), with *State v. Wyant*, 64 Ohio St. 3d 566, 597 N.E.2d 450 (1992) (striking down Ohio statute); 169 Wis. 2d 153, 485 N.W.2d 807 (1992) (case below) (striking down Wisconsin statute). According to amici, bias-motivated violence is on the rise throughout the United States. See, e.g., Brief for the National Asian Pacific American Legal Consortium et al. as Amici Curiae 5-11; Brief for the Anti-Defamation League et al. as Amici Curiae 4-7; Brief for the City of Atlanta et al. as Amici Curiae 3-12. In 1990, Congress enacted the Hate Crimes Statistics Act, Pub. L. 101-275, @ 1(b)(1), 104 Stat. 140, codified at 28 U.S.C. @ 534 (note) (1988 ed., Supp. III), directing the Attorney General to compile data "about crimes that manifest evidence of prejudice based on race, religion, sexual orientation, or ethnicity." Pursuant to the Act, the Federal Bureau of Investigation reported in January 1993, that 4,558 bias-motivated offenses were committed in 1991, including 1,614 incidents of intimidation, 1,301 incidents of vandalism, 796 simple assaults, 773 aggravated assaults, and 12 murders. See Brief for the Crown Heights Coalition et al. as Amici Curiae 1A-7A.

-End Footnotes-

[***11] Mitchell argues that we are bound by the Wisconsin Supreme Court's conclusion that the statute punishes bigoted thought and not conduct. There is no doubt that we are bound by a state court's construction of a state statute. R. A. V., supra, at 381; New York v. Ferber, 458 U.S. 747, 769, n.24, 73 L. Ed. 2d 1113, 102 S. Ct. 3348 (1982); Terminiello v. Chicago, 337 U.S. 1, 4, 93 L. Ed. 1131, 69 S. Ct. 894 (1949). In Terminiello, for example, the Illinois courts had defined the term "'breach of the peace,'" in a city ordinance prohibiting disorderly conduct, to include "'stirs the public to anger . . . or creates a disturbance.'" Id., at 4. We held this construction [*484] to be binding on us. But here the Wisconsin Supreme Court did not, strictly speaking, construe the Wisconsin statute in the sense of defining the meaning of a particular statutory word or phrase. Rather, it merely characterized the "practical effect" of the statute for First Amendment purposes. See [***12] 169 Wis. 2d at 166-167, 485 N.W.2d at 813 ("Merely because [**2199] the statute refers in a literal sense to the intentional 'conduct' of selecting, does not mean the court must turn a blind eye to the intent and practical effect of the law -- punishment of motive or thought"). This assessment does not bind us. Once any ambiguities as to the meaning of the statute are resolved, we may form our own judgment as to its operative effect.

The State argues that the statute does not punish bigoted thought, as the Supreme Court of Wisconsin said, but instead punishes only conduct. While this argument is literally correct, it does not dispose of Mitchell's First Amendment challenge. To be sure, our cases reject 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." United States v. O'Brien, 391 U.S. 367, 376, 20 L. Ed. 2d 672, 88 S. Ct. 1673 (1968); accord, R. A. V., supra, at 385-386; Spence v. Washington, 418 U.S. 405, 409, 41 L. Ed. 2d 842, 94 S. Ct. 2727 (1974) [***13] (per curiam); Cox v. Louisiana, 379 U.S. 536, 555, 13 L. Ed. 2d 471, 85 S. Ct. 453 (1965). Thus, a physical assault is not by any stretch of the imagination expressive conduct protected by the First Amendment. See Roberts v. United States Jaycees, 468 U.S. 609, 628, 82 L. Ed. 2d 462, 104 S. Ct. 3244 (1984) ("Violence or other types of potentially expressive activities that produce special harms distinct from their communicative impact . . . are entitled to no constitutional protection"); NAACP v. Claiborne Hardware Co., 458 U.S. 886, 916, 73 L. Ed. 2d 1215, 102 S. Ct. 3409 (1982) ("The First Amendment does not protect violence").

But the fact remains that under the Wisconsin statute the same criminal conduct may be more heavily punished if the victim is selected because of his race or other protected status [*485] than if no such motive obtained. Thus, although the statute punishes criminal conduct, it enhances the maximum penalty for conduct motivated by a discriminatory point of view more severely [***14] than the same conduct engaged in for some other reason or for no reason at all. Because the only reason for the enhancement is the defendant's discriminatory motive for selecting his victim, Mitchell argues (and the Wisconsin Supreme Court held) that the statute violates the First Amendment by punishing offenders' bigoted beliefs.

Traditionally, sentencing judges have considered a wide variety of factors in addition to evidence bearing on guilt in determining what sentence to impose on a convicted defendant. See Payne v. Tennessee, 501 U.S. 808, 820-821, 115 L. Ed. 2d 720, 111 S. Ct. 2597 (1991); United States v. Tucker, 404 U.S. 443, 446, 30 L. Ed. 2d 592, 92 S. Ct. 589 (1972); Williams v. New York, 337 U.S. 241, 246,

93 L. Ed. 1337, 69 S. Ct. 1079 (1949). The defendant's motive for committing the offense is one important factor. See 1 W. LeFave & A. Scott, *Substantive Criminal Law* @ 3.6(b), p. 324 (1986) ("Motives are most relevant when the trial judge sets the defendant's sentence, and it is not uncommon for a defendant to receive a minimum sentence because [***15] he was acting with good motives, or a rather high sentence because of his bad motives"); cf. *Tison v. Arizona*, 481 U.S. 137, 156, 95 L. Ed. 2d 127, 107 S. Ct. 1676 (1987) ("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"). Thus, in many States the commission of a murder, or other capital offense, for pecuniary gain is a separate aggravating circumstance under the capital sentencing statute. See, e.g., *Ariz. Rev. Stat. Ann.* @ 13-703(F)(5) (1989); *Fla. Stat.* @ 921.1415(f) (Supp. 1992); *Miss. Code Ann.* @ 99-19-101(5)(f) (Supp. 1992); *N. C. Gen. Stat.* @ 15A-2000(e)(6) (1992); *Wyo. Stat.* @ 6-2-102(h)(vi) (Supp. 1992).

[**2200] But it is equally true that a defendant's abstract beliefs, however obnoxious to most people, may not be taken into consideration by a sentencing judge. *Dawson v. Delaware*, [*486] 503 U.S. 159, 112 S. Ct. 1093, 117 L. Ed. 2d 309 (1992). In *Dawson*, the State introduced evidence at a capital sentencing hearing that the defendant was a member of a white supremacist prison gang. Because "the [***16] evidence proved nothing more than [the defendant's] abstract beliefs," we held that its admission violated the defendant's First Amendment rights. *Id.*, at 167. In so holding, however, we emphasized that "the Constitution does not erect a per se barrier to the admission of evidence concerning one's beliefs and associations at sentencing simply because those beliefs and associations are protected by the First Amendment." *Id.*, at 165. Thus, in *Barclay v. Florida*, 463 U.S. 939, 77 L. Ed. 2d 1134, 103 S. Ct. 3418 (1983) (plurality opinion), we allowed the sentencing judge to take into account the defendant's racial animus towards his victim. The evidence in that case showed that the defendant's membership in the Black Liberation Army and desire to provoke a "race war" were related to the murder of a white man for which he was convicted. See *id.*, at 942-944. Because "the elements of racial hatred in [the] murder" were relevant to several aggravating factors, we held that the trial judge permissibly took this evidence [***17] into account in sentencing the defendant to death. *Id.*, at 949, and n.7.

Mitchell suggests that *Dawson* and *Barclay* are inapposite because they did not involve application of a penalty-enhancement provision. But in *Barclay* we held that it was permissible for the sentencing court to consider the defendant's racial animus in determining whether he should be sentenced to death, surely the most severe "enhancement" of all. And the fact that the Wisconsin Legislature has decided, as a general matter, that bias-motivated offenses warrant greater maximum penalties across the board does not alter the result here. For the primary responsibility for fixing criminal penalties lies with the legislature. *Rummel v. Estelle*, 445 U.S. 263, 274, 63 L. Ed. 2d 382, 100 S. Ct. 1133 (1980); *Gore v. United States*, 357 U.S. 386, 393, 2 L. Ed. 2d 1405, 78 S. Ct. 1280 (1958).

[*487] Mitchell argues that the Wisconsin penalty-enhancement statute is invalid because it punishes the defendant's discriminatory motive, [***18] or reason, for acting. But motive plays the same role under the Wisconsin statute as it does under federal and state antidiscrimination laws, which we have previously upheld against constitutional challenge. See *Roberts v. United*

States Jaycees, 468 U.S. at 628; Hishon v. King & Spalding, 467 U.S. 69, 78, 81 L. Ed. 2d 59, 104 S. Ct. 2229 (1984); Runyon v. McCrary, 427 U.S. 160, 176, 49 L. Ed. 2d 415, 96 S. Ct. 2586 (1976). Title VII of the Civil Rights Act of 1964, for example, makes it unlawful for an employer to discriminate against an employee "because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. @ 2000e-2(a)(1) (emphasis added). In Hishon, we rejected the argument that Title VII infringed employers' First Amendment rights. And more recently, in R. A. V. v. St. Paul, 505 U.S. at 389-390, we cited Title VII (as well as 18 U.S.C. @ 242 and 42 U.S.C. @ 1981 [***19] and 1982) as an example of a permissible content-neutral regulation of conduct.

Nothing in our decision last Term in R. A. V. compels a different result here. That case involved a First Amendment challenge to a municipal ordinance prohibiting the use of "'fighting words' that insult, or provoke violence, 'on the basis of race, color, creed, religion or gender.'" 505 U.S. at 391 (quoting St. Paul Bias-Motivated Crime Ordinance, St. Paul, Minn., Legis. Code @ 292.02 (1990)). Because the ordinance only proscribed a class of "fighting words" deemed particularly offensive by the city -- i.e., those "that contain . . . messages of 'bias-motivated' hatred," 505 U.S. at 392 -- we held that it violated the [**2201] rule against content-based discrimination. See *id.*, at 392-394. But whereas the ordinance struck down in R. A. V. was explicitly directed at expression (i.e., "speech" or "messages"), *id.*, at 392, the statute in this case is aimed at conduct unprotected by the First Amendment.

Moreover, the Wisconsin statute singles out for enhancement bias-inspired conduct because this conduct [***20] is thought [*488] to inflict greater individual and societal harm. For example, according to the State and its amici, bias-motivated crimes are more likely to provoke retaliatory crimes, inflict distinct emotional harms on their victims, and incite community unrest. See, e.g., Brief for Petitioner 24-27; Brief for United States as Amicus Curiae 13-15; Brief for Lawyers' Committee for Civil Rights Under Law as Amicus Curiae 18-22; Brief for the American Civil Liberties Union as Amicus Curiae 17-19; Brief for the Anti-Defamation League et al. as Amici Curiae 9-10; Brief for Congressman Charles E. Schumer et al. as Amici Curiae 8-9. The State's desire to redress these perceived harms provides an adequate explanation for its penalty-enhancement provision over and above mere disagreement with offenders' beliefs or biases. As Blackstone said long ago, "it is but reasonable that among crimes of different natures those should be most severely punished, which are the most destructive of the public safety and happiness." 4 W. Blackstone, Commentaries *16.

Finally, there remains to be considered Mitchell's argument that the Wisconsin statute is unconstitutionally overbroad [***21] because of its "chilling effect" on free speech. Mitchell argues (and the Wisconsin Supreme Court agreed) that the statute is "overbroad" because evidence of the defendant's prior speech or associations may be used to prove that the defendant intentionally selected his victim on account of the victim's protected status. Consequently, the argument goes, the statute impermissibly chills free expression with respect to such matters by those concerned about the possibility of enhanced sentences if they should in the future commit a criminal offense covered by the statute. We find no merit in this contention.

The sort of chill envisioned here is far more attenuated and unlikely than that contemplated in traditional "over-breadth" cases. We must 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, [*489] these opinions will be offered at trial to establish that he selected his victim on account of the victim's protected status, thus qualifying him for penalty enhancement. To stay within the realm of rationality, we must surely put to one side minor misdemeanor offenses covered by the statute, such [***22] as negligent operation of a motor vehicle (Wis. Stat. @ 941.01 (1989-1990)); for it is difficult, if not impossible, to conceive of a situation where such offenses would be racially motivated. We are left, then, with the prospect of a citizen suppressing his bigoted beliefs for fear that evidence of such beliefs will be introduced against him at trial if he commits a more serious offense against person or property. This is simply too speculative a hypothesis to support Mitchell's overbreadth claim.

The First Amendment, moreover, does not prohibit the evidentiary use of speech to establish the elements of a crime or to prove motive or intent. Evidence of a defendant's previous declarations or statements is commonly admitted in criminal trials subject to evidentiary rules dealing with relevancy, reliability, and the like. Nearly half a century ago, in *Haupt v. United States*, 330 U.S. 631, 91 L. Ed. 1145, 67 S. Ct. 874 (1947), we rejected a contention similar to that advanced by Mitchell here. Haupt was tried for the offense of treason, which, as defined by the Constitution (Art. III, @ 3), may depend very much on proof [***23] of motive. To prove that the acts in question were committed out of "adherence to the enemy [**2202] " rather than "parental solicitude," *id.*, at 641, the Government introduced evidence of conversations that had taken place long prior to the indictment, some of which consisted of statements showing Haupt's sympathy with Germany and Hitler and hostility towards the United States. We rejected Haupt's argument that this evidence was improperly admitted. While "such testimony is to be scrutinized with care to be certain the statements are not expressions of mere lawful and permissible difference of opinion with our own government or quite proper appreciation of the land of birth," we held that "these [*490] statements . . . clearly were admissible on the question of intent and adherence to the enemy." *Id.*, at 642. See also *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251-252, 104 L. Ed. 2d 268, 109 S. Ct. 1775 (1989) (plurality opinion) (allowing evidentiary use of defendant's speech in evaluating Title VII discrimination claim); *Street v. New York*, 394 U.S. 576, 594, 22 L. Ed. 2d 572, 89 S. Ct. 1354 (1969).

For the foregoing reasons, we hold that [***24] Mitchell's First Amendment rights were not violated by the application of the Wisconsin penalty-enhancement provision in sentencing him. The judgment of the Supreme Court of Wisconsin is therefore reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

2ND CASE of Focus printed in FULL format.

State of Wisconsin, Plaintiff-Respondent, v. Todd Mitchell,
Defendant-Appellant-Petitioner

No. 90-2474-CR

SUPREME COURT OF WISCONSIN

169 Wis. 2d 153; 485 N.W.2d 807; 1992 Wisc. LEXIS 323

February 26, 1992, Oral argument
June 23, 1992, Decided
June 23, 1992, Filed

SUBSEQUENT HISTORY: [**1] Mandate Vacated September 9, 1993, Reported at:
1993 Wisc. LEXIS 758.

PRIOR HISTORY:

Review of a decision of the Court of Appeals, 163 Wis. 2d 652, 473 N.W.2d 1 (Ct. App. 1991).

DISPOSITION: By the Court. -- The decision of the court of appeals is reversed and the cause remanded to the circuit court for resentencing on the aggravated battery conviction.

COUNSEL: For the defendant-appellant-petitioner there was a brief by Bernard Goldstein, Milwaukee and oral argument by Bernard Goldstein.

For the plaintiff-respondent the cause was argued by Paul Lundsten, assistant attorney general with whom on the brief was James E. Doyle.

Amicus curiae brief was filed by Lynn Adelman, Pamela Moorshead and Adelman, Adelman & Murray, S.C., Milwaukee, for The National Association of Criminal Defense Lawyers, The Wisconsin Association of Criminal Defense Lawyers and the Wisconsin State Public Defender.

Amicus curiae brief was filed by Robert H. Friebert, Cordelia S. Munroe, Peter K. Rofes and Freibert, Finerty & St. John, S.C., Milwaukee and Ruth L. Lansner, Steven M. Freeman, Michael A. Sandberg, New York, New York for Anti-Defamation League of B'nai B'rith, The Milwaukee Jewish Council, The Wisconsin Jewish Conference, [**2] The Milwaukee Urban League, The Madison Urban League, Inc., The NAACP-Milwaukee Branch and The Madison Community United, Inc.

JUDGES: Heffernan, Chief Justice. Shirley S. Abrahamson, J. dissenting.
William A. Bablitch, J. dissenting.

OPINIONBY: HEFFERNAN

OPINION: [*157] HEFFERNAN, CHIEF JUSTICE. This is a review of a published decision of the court of appeals, State v. Mitchell, 163 Wis. 2d 652, 473 N.W.2d 1 (Ct. App. 1991), which affirmed judgments of the circuit court for Kenosha county, Jerold W. Breitenbach, Circuit Judge, adjudging Todd Mitchell guilty of aggravated battery, party to a crime, and adjudging that Mitchell intentionally selected the battery victim because of the victim's race in violation of the

hate crimes penalty enhancer, sec. 939.645, Stats. Mitchell challenged the constitutionality of the sec. 939.645, Stats., on appeal, and the court of appeals held that the statute was constitutional. We conclude that the statute unconstitutionally infringes upon free speech, and reverse the decision of the court of appeals.

The sole issue before the court is the constitutionality of sec. 939.645, Stats., the "hate crimes" statute. n1 [*158] Mitchell asserts that [**3] the statute on its face violates: (1) his right of free speech guaranteed by the First Amendment and (2) his right to due process and equal protection of the laws guaranteed by the Fourteenth Amendment. We hold that the statute violates the First Amendment and is thus unconstitutional. n2

-----Footnotes-----

n1 At the time of Mitchell's crimes, sec. 939.645, Stats. 1989-90, 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]

n2 Because of our holding, we do not address Mitchell's Fourteenth Amendment vagueness and equal protection claims.

- - - - -End Footnotes- - - - -

The facts are not in dispute. On October 7, 1989, a group of young black men and boys was gathered at an apartment complex in Kenosha. Todd Mitchell, nineteen at the time, was one of the older members of the group. Some of the group were at one point discussing a scene from the movie "Mississippi Burning" where a white man beat a young black boy who was praying.

Approximately ten members of the group moved outdoors, still talking about the movie. Mitchell asked the group: "Do you all feel hyped up to move on some white people?" A short time later, Gregory Reddick, a fourteen-year-old white male, approached the apartment [*159] complex. Reddick said nothing to the group, and merely walked by on the other side of the street. Mitchell then said: "You all want to fuck somebody up? There goes a white boy; go get him." Mitchell then counted to three and pointed the group in Reddick's direction.

The group ran towards Reddick, knocked him to the ground, beat him severely, [**5] and stole his "British Knights" tennis shoes. The police found Reddick unconscious a short while later. He remained in a coma for four days in the hospital, and the record indicates he suffered extensive injuries and possibly permanent brain damage.

Mitchell was convicted of aggravated battery, party to a crime. Sections 939.05 and 940.19(1m), Stats. The jury separately found that Mitchell intentionally selected Reddick as the battery victim because of Reddick's race. The aggravated battery conviction carried a maximum sentence of two years, secs. 940.19(1m) and 939.50(3)(e), Stats. Because the jury found that Mitchell selected Reddick because of Reddick's race, sec. 939.645(2)(c), Stats., increased the potential maximum sentence for aggravated battery to seven years. The trial court sentenced Mitchell to four years for the aggravated battery. n3

- - - - -Footnotes- - - - -

n3 Mitchell was also convicted of theft, party to a crime, sec. 943.20(1)(a) and (3)(d)2, Stats. The circuit court imposed and stayed a four year sentence for the theft conviction and imposed a four year period of consecutive probation. The circuit court did not find that the theft violated the hate crimes statute. The court of appeals rejected Mitchell's challenges to the theft conviction, Mitchell, 163 Wis. 2d at 664-65, and that portion of the court of appeals decision is not before the court.

- - - - -End Footnotes- - - - -

[**6]

After the circuit court denied Mitchell's request for post-conviction relief, Mitchell appealed the judgments of conviction and the sentences to the court of appeals, focusing on the constitutionality of the hate crimes statute. [*160] On June 5, 1991, the court of appeals affirmed the circuit court's judgments, concluding that Mitchell waived any equal protection challenge and that the hate crimes statute was neither vague nor overbroad. State v. Mitchell, 163 Wis. 2d 652, 473 N.W.2d 1 (Ct. App. 1991). We granted Mitchell's petition for review on the issue of the constitutionality of the hate crimes statute, and now reverse. n4

-Footnotes-

n4 Amicus curiae briefs were filed with the court on behalf of two separate coalitions: the National Association of Criminal Defense Lawyers, the Wisconsin Association of Criminal Defense Lawyers and the Wisconsin State Public Defender; and the Anti-Defamation League of B'nai B'rith, the Milwaukee Jewish Council, the Wisconsin Jewish Conference, the Milwaukee Urban League, the Madison Urban League, Inc., the NAACP -- Milwaukee Branch, and the Madison Community United, Inc.

-End Footnotes-

[**7]

This case presents an issue which has spawned a growing debate in this country: the constitutionality of legislation that seeks to address hate crimes. Numerous articles have been published concerning the issue, some applauding hate crimes statutes and some vigorously in opposition. n5 Individuals and organizations traditionally [*161] allied behind the same agenda have separated on the issue of the legitimacy of hate crimes statutes. As one commentator noted:

[T]he debate over these laws is occurring not merely between traditional allies, but between one side and itself. Moreover, whenever 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' point of 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.

Susan Gellman, 39 U.C.L.A. L. Rev. at 334 (emphasis in original).

-Footnotes-

n5 See, e.g., Susan Gellman, Sticks and Stones Can Put You in Jail, But Can Words Increase Your Sentence? Constitutional and Policy Dilemmas of Ethnic Intimidation Laws, 39 U.C.L.A. L. Rev. 333 (1991); and Tanya Kateri Hernandez, Bias Crimes: Unconscious Racism in the Prosecution of Racially Motivated Violence, 99 Yale L.J. 845 (1990). Similarly, numerous courts and commentators are currently struggling with the constitutional implications of college campus "hate speech" rules. See, e.g., UWM Post, Inc. v. Board of Regents, 774 F. Supp. 1163 (E.D. Wis. 1991); Doe v. University of Michigan, 721 F. Supp. 852 (E.D. Mich. 1989); Charles R. Lawrence, If He Hollers Let Him Go: Regulating Racist Speech on Campus, 1990 Duke L.J. 431; Nadine Strossen, Regulating Racist Speech on Campus: A Modest Proposal?, 1990 Duke L.J. 484; and Katherine T. Bartlett and Jean O'Barr, The Chilly Climate on College Campuses: An Expansion of the "Hate Speech" Debate, 1990 Duke L.J. 574.

-End Footnotes-

[**8]

Statistical sources indicate that incidents of all types of bias related crime are on the rise. Joseph M. Fernandez, Bringing Hate Crime Into Focus -- The Hate Crimes Statistics Act of 1990, 26 Harv. C.R.-C.L. L. Rev. 261 (1991); Tanya Kateri Hernandez, Bias Crimes: Unconscious Racism in the Prosecution of

Racially Motivated Violence, 99 Yale L.J. 845, 845-46 (1990). Between 1980 and 1986, three thousand incidents of bias related violence were documented. Id. at 846. The Anti-Defamation League of B'nai B'rith (ADL) reports that "[d]uring 1990 there were 1685 anti-Semitic incidents reported to the Anti-Defamation League from 40 states and the District of Columbia." 1990 Audit of Anti-Semitic Incidents, Anti-Defamation League of B'nai B'rith 1 (1990). This was the highest total ever reported [*162] in the twelve year history of the audit. Id. The National Gay and Lesbian Task Force reported 7031 incidents of anti-gay violence in 1989. Anti-Violence Project, National Gay and Lesbian Task Force (NGLTF), Anti-Gay Violence, Victimization and Defamation in 1989 (1990). See also Developments in the Law -- Sexual Orientation and the Law, 102 Harv. L. Rev. 1508, [*9] 1541-42 (1989).

In response to the recent rise in hate crimes, the United States Congress enacted the Hate Crimes Statistics Act of 1990, Pub. L. No. 101-275. The purpose of the Act is to establish a national data collection system for compilation of statistics concerning bias-related crimes. The Act requires the Attorney General to publish an annual summary of the findings. See generally, Fernandez, supra.

At the state level, the response to reports of bias related crime has been significant. Nearly every state in the country has enacted some form of hate crime legislation. See ADL Law Report: Hate Crimes Statutes: A 1991 Status Report, Appendix C, pp. 24-26 (1991). The Wisconsin legislature's response was to enact sec. 939.645, Stats., which enhances the potential penalty for a criminal actor if the state proves that the actor intentionally selected the victim because of the victim's race, religion, color, disability, sexual orientation, national origin or ancestry.

The first step in reviewing a constitutional challenge to a statute is to determine which party bears the burden of proving its constitutionality or unconstitutionality. While the party challenging [*10] the statute ordinarily bears the burden of proving beyond a reasonable doubt that the statute is unconstitutional, *Bachowski v. Salamone*, 139 Wis. 2d 397, 404, 407 N.W.2d 533 (1987), [*163] the burden shifts to the proponent of the statute to establish its constitutionality when the statute encroaches upon First Amendment rights. *City of Madison v. Baumann*, 162 Wis. 2d 660, 669, 470 N.W.2d 296 (1991). Because the hate crimes statute punishes the defendant's biased thought, as discussed below, and thus encroaches upon First Amendment rights, the burden is upon the state to prove its constitutionality.

The hate crimes statute violates the First Amendment directly by punishing what the legislature has deemed to be offensive thought and violates the First Amendment indirectly by chilling free speech.

The First Amendment of the United States Constitution states bluntly: "Congress shall make no law . . . abridging the freedom of speech." n6 The First Amendment protects not only speech but thought as well. "[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 [*11] by his mind and his conscience rather than coerced by the State." *Aboud v. Detroit Bd. of Education*, 431 U.S. 209, 234-35 (1977). Even more fundamentally, the constitution protects all speech and thought, regardless of how offensive it may be. "[I]f there is a bedrock principle underlying the First Amendment, it is

that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." Texas v. Johnson, 491 U.S. 397, 414 (1989). n7 As Justice Holmes [*164] put it: "If 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 we hate." United States v. Schwimmer, 279 U.S. 644, 654-55 (1929) (Holmes, J., dissenting), overruled, Girouard v. United States, 328 U.S. 61 (1946).n8

-Footnotes-

n6 Article I, section 3 of the Wisconsin Constitution provides in equally sweeping language that "no laws shall be passed to restrain or abridge the liberty of speech."

n7 See also R.A.V. v. City of St. Paul, No. 90-7675, 1992 LEXIS 3863, at *9, U.S. (June 22, 1992); Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 55-56 (1988); City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 804 (1984); Bolger v. Youngs Drug Products Corp., 463 U.S. 60, 65, 72 (1983); Carey v. Brown, 447 U.S. 455, 462-63 (1980); FCC v. Pacifica Foundation, 438 U.S. 726, 745-46 (1978); Young v. American Mini Theatres, Inc., 427 U.S. 50, 63-65, 67-68 (1976) (plurality opinion); Buckley v. Valeo, 424 U.S. 1, 16-17 (1976); Grayned v. Rockford, 408 U.S. 104, 115 (1972); Police Dept. of Chicago v. Mosley, 408 U.S. 92, 95 (1972); Bachellar v. Maryland, 397 U.S. 564, 567 (1970); United States v. O'Brien, 391 U.S. 367, 382 (1968); Brown v. Louisiana, 383 U.S. 131, 142-43 (1966); and Stromberg v. California, 283 U.S. 359, 368-69 (1931). [**12]

n8 As was said in a statement attributed to Voltaire, surely one of the philosophical ancestors of our American constitution: "I disapprove of what you say but I will defend to the death your right to say it."

-End Footnotes-

Without doubt the hate crimes statute punishes bigoted thought. The state asserts that the statute punishes only the "conduct" of intentional selection of a victim. We disagree. Selection of a victim is an element of the underlying offense, part of the defendant's "intent" in committing the crime. In any assault upon an individual there is a selection of the victim. The statute punishes the "because of" aspect of the defendant's selection, the reason the defendant selected the victim, the motive behind the selection.

Construing the model hate crimes statute designed by the Anti-Defamation League of B'nai B'rith (ADL), [*165] upon which the Wisconsin hate crimes statute is apparently loosely based, n9 one author provides the following insightful analysis:

Under the ADL model, a charge of ethnic intimidation must always be predicated on certain offenses proscribed elsewhere [**13] in a state's criminal code. As those offenses are already punishable, all that remains is an additional penalty for the actor's reasons for his or her actions. The model statute does not address effects, state of mind, or a change in the character of the offense, but only the thoughts and ideas that propelled the actor to act. The government could not, of course, punish these thoughts and ideas

independently. That they are held by one who commits a crime because of his or her beliefs does not remove this constitutional shield. Of course, the First Amendment protection guaranteed the actor's thoughts does not protect him or her from prosecution for the associated action. Neither, however, does the state's power to punish the action remove the constitutional barrier to punishing the thoughts.

[*166] Susan Gellman, 39 U.C.L.A. L. Rev. 333, 363 (1991). n10 Because all of the crimes under chs. 939 to 948, Stats., are already punishable, all that remains is an additional punishment for the defendant's motive in selecting the victim. The punishment of the defendant's bigoted motive by the hate crimes statute directly implicates and encroaches upon First Amendment rights.

[**14]

- - - - -Footnotes- - - - -

n9 The ADL model statute provides:

A. A person commits the crime of intimidation if, by reason of the actual or perceived race, color, religion, national origin or sexual orientation of another individual or group of individuals, he violates Section --- of the Penal Code (insert code provision for criminal trespass, criminal mischief, harassment, menacing, assault and/or other appropriate statutorily proscribed criminal conduct).

B. Intimidation is a --- misdemeanor/felony (the degree of the criminal liability should be at least one degree more serious than that imposed for commission of the offense).

ADL Law Report: Hate Crimes Statutes: A 1991 Status Report, p. 4 (1991) (emphasis added). While the Wisconsin statute substitutes the phrase "because of" for "by reason of," it is clear that both statutes are concerned with the actor's reason or motive for acting.

n10 See also State v. Beebe, 67 Or. App. 738, 680 P.2d 11 (1984). In Beebe, the Court of Appeals of Oregon interpreted an ethnic intimidation statute fashioned after the ADL model, ORS 166.155(1), and recognized that the statute punished motive:

The statute does not offer more protection to any class of victims. Anyone may be a victim of bigotry. It is the defendant who classifies, and he does so by his motive. The statute distinguishes between acts of harassment which are motivated by racial, ethnic or religious animus and acts of harassment which are not so motivated.

Id. at 13 (emphasis added). In People v. Grupe, 141 Misc. 2d 6, 532 N.Y.S.2d 815 (N.Y. Crim. Ct. 1988), the court interpreted New York's hate crimes statute which prohibits persons from subjecting persons to physical contact "because of" their protected status. In that case, the court stated: "Section 240.30(3), both on its face and as applied in this case, regulates violent conduct, and physical intimidation, when committed intentionally and because of racial, religious or ethnic prejudice." Id. at 817 (emphasis added). Finally, in Kinser v. State, 88 Md. App. 17, 591 A.2d 894, 896 (1991), the court upheld a conviction under Maryland's hate crimes statute, Md. Ann. Code art. 27, @

470A(b)(3) (Supp. 1990), in part because the defendant's conduct "overwhelmingly demonstrate[d] his actions were motivated by racial animus." (Emphasis added.)

- - - - -End Footnotes- - - - -
[**15]

While the statute does not specifically phrase the "because of . . . race, religion, color, [etc.]" element in terms of bias or prejudice, it is clear from the history of anti-bias statutes, detailed above, that sec. 939.645, Stats., is expressly aimed at the bigoted bias of the actor. Merely because the statute refers in a literal sense to the [*167] intentional "conduct" of selecting, does not mean the court must turn a blind eye to the intent and practical effect of the law -- punishment of offensive motive or thought. n11 The conduct of "selecting" is not akin to the [*168] conduct of assaulting, burglarizing, murdering and other criminal conduct. It cannot be objectively established. Rather, an examination of the intentional "selection" of a victim necessarily requires a subjective examination of the actor's motive or reason for singling out the particular person against whom he or she commits a crime. n12

- - - - -Footnotes- - - - -

n11 There seems to be considerable confusion regarding the meaning and effect of "motive" in criminal law. As Black's Law Dictionary 810 (6th ed. 1990) states in its definition of "intent":

Intent and motive should not be confused. Motive is what prompts a person to act, or fail to act. Intent refers only to the state of mind with which the act is done or omitted.

This confusion is manifested clearly in the dissenting opinion of Justice Bablitch, which correctly defines "intentionally" at pp. 197-198 as "a purpose to do the thing or cause the result specified," correctly recognizes at pp. 187-188 n.2 that the term "because of" implicates an actor's motive, and somehow concludes that the hate crimes statute involves ordinary criminal intent.

In this case the crime was aggravated battery, and the necessary intent under sec. 940.19(1m), Stats., is an "intent to cause great bodily harm." Quite clearly, Mitchell's intent to cause great bodily harm to Reddick is distinct from his motive or reason for doing so. Criminal law is not concerned with a person's reasons for committing crimes, but rather with the actor's intent or purpose in doing so.

As explained by Professor Gellman:

"Motive," "intent," and "purpose" are related concepts in that they all refer to thought processes. They are legally distinct in crucial respects, however. Motive is nothing more than an actor's reason for acting, the "why" as opposed to the "what" of conduct. Unlike purpose or intent, motive cannot be a criminal offense or an element of an offense.

. . . .

The distinction becomes more clear upon consideration of the effect of altering the intent or purpose on the legal characterization of the same

conduct, as compared to the effect (or lack thereof) of altering the motive. Continuing with the example of burglary, changing the purpose of the break-in changes the very nature of the act: if A broke into B's house for the purpose of getting A's own property (not a criminal purpose), the act of breaking in is simply breaking and entering or trespass, not burglary, even if A's motive was identical (the desire to pay his debts). By contrast, changing A's motives, even to more sympathetic ones (say, the desire to buy a house for the homeless), while his purpose was that of committing the crime of theft in B's house, does not change the nature of the act: it is still burglary.

Susan Gellman, 39 U.C.L.A. L. Rev. at 364-65 (emphasis in original). While the state speaks of the "intentional" aspect of the hate crimes statute, when the focus is on the "selects . . . because of" aspect of the law, it becomes clear that it is the actor's motive which is targeted and punished by the statute.

[**16]

n12 In fact, on May 13, 1992, the legislature amended sec. 939.645, Stats., to apply specifically where the selection is "in whole or in part because of the actor's belief or perception regarding" the victim's status "whether or not the actor's belief or perception was correct." 1991 Wis. Act 291. Sections 939.645(1)(b) and (4), Stats., currently provide (with the substantive changes highlighted):

(1)(b) Intentionally selects the person against whom the crime under par. (a) is committed or selects the property that is damaged or otherwise affected by the crime under par. (a) in whole or in part because of the actor's belief or perception regarding the race, religion, color, disability, sexual orientation, national origin or ancestry of that person or the owner or occupant of that property, whether or not the actor's belief or perception was correct.

(4) This section does not apply to any crime if proof of race, religion, color, disability, sexual orientation, national origin or ancestry or proof of any person's perception or belief regarding another's race, religion, color, disability, sexual orientation, national origin or ancestry is required for a conviction for that crime.

Thus the legislature has removed any doubt that the aim of the statute is the actor's subjective motivation. The dissenting opinions ignore this legislative clarification in their refusal to recognize that the statute is focused upon and punishes the defendant's motive.

- - - - -End Footnotes- - - - -
[**17]

[*169] In this case, Todd Mitchell selected Gregory Reddick because Reddick is white. Mitchell is black. The circumstantial evidence relied upon to prove that Mitchell selected Reddick "because" Reddick is white included Mitchell's speech -- "Do you all feel hyped up to move on some white people?" -- and his recent discussion with other black youths of a racially charged scene from the movie "Mississippi Burning." This evidence was used not merely to show the intentional selection of the victim, but was used to prove Mitchell's bigoted bias. The physical assault of Reddick is the same whether he was attacked because of his skin color or because he was wearing "British Knight" tennis shoes. Mitchell's bigoted motivation for selecting Reddick, his thought which

impelled him to act, is the reason that his punishment was enhanced. In Mitchell's case, that motivation was apparently a hatred of whites. n13

- - - - -Footnotes- - - - -

n13 While the statute as written may extend to situations where the actor in fact is not biased, this does not save the statute. The legislature may not subvert a constitutional freedom -- even one as opprobrious as the right to be a bigot -- by carefully wording a statute to affect more than simply that freedom.

- - - - -End Footnotes- - - - -

[**18]

The statute commendably is designed to punish -- and thereby deter -- racism and other objectionable biases, but deplorably unconstitutionally infringes upon free speech. The state would justify its transgression against the constitutional right of freedom of speech and thought because its motive is a good one, but the magnitude of the proposed incursion against the constitutional [*170] rights of all of us should no more be diminished for that good motive than should a crime be enhanced by a separate penalty because of a criminal's bad motive. n14

- - - - -Footnotes- - - - -

n14 As has long been recognized, the road to hell is paved with good intentions. See George Herbert, *Jacula Prudentum* (1640); Samuel Johnson, from James Boswell, *Life of Dr. Johnson* (1791); George Bernard Shaw, *Maxims for Revolutionists*; and others. Or as the latin poet Virgil said in the *Aeneid* in a reference to the slippery slope, "*Facilis descensus Averno*," which liberally translated means "Beware that first false step." Eugene Ehrlich, *Nil Desperandum* 107 (Guild Publishing 1987).

- - - - -End Footnotes- - - - -

[**19]

The state admits that this case involves legislation that seeks to address bias related crime. The only definition of "bias" relevant to this case is "prejudice." A statute specifically designed to punish personal prejudice impermissibly infringes upon an individual's First Amendment rights, no matter how carefully or cleverly one words the statute. The hate crimes statute enhances the punishment of bigoted criminals because they are bigoted. The statute is directed solely at the subjective motivation of the actor -- his or her prejudice. Punishment of one's thought, however repugnant the thought, is unconstitutional. n15

- - - - -Footnotes- - - - -

n15 Of course, freedom of speech is not absolute. For example, the government may regulate or punish "fighting words" that are "likely to provoke the average person to retaliation, and thereby cause a breach of the peace." *Chaplinsky v. New Hampshire*, 315 U.S. 568, 574 (1942). Also, the government may regulate expressive conduct where there is an important governmental interest and the regulation is narrowly tailored to address that interest. *United States v. O'Brien*, 391 U.S. 367, 376 (1968). The bigoted thought which is punished by

the hate crimes statute fits neither category. While an individual's bigoted speech may occasionally provoke retaliation, a person's thought will not. Nor is it argued that a hate crime is protected expressive conduct. It is not. Rather, a person's bigoted thought, the very thing punished by the hate crimes statute, is entitled to the full protection of the First Amendment.

- - - - -End Footnotes- - - - -

[**20]

[*171] In R.A.V., supra, decided June 22, 1992, the United States Supreme Court held that a Minnesota ordinance prohibiting bias-motivated disorderly conduct n16 was facially invalid under the First Amendment. Accepting the Minnesota Supreme Court's determination that the ordinance reached only expressions that constituted "fighting words" within the meaning of Chaplinsky, the Court held that the government may not constitutionally regulate even otherwise unprotected speech on the basis of hostility towards the idea expressed by the speaker. R.A.V., 1992 U.S. LEXIS 3863, at *24-28. In other words, while the government may regulate all fighting words, it may not regulate only those fighting words with which it disagrees. Such a prohibition is nothing more than a governmental attempt to silence speech on the basis of its content. Id. at *26.

- - - - -Footnotes- - - - -

n16 The ordinance, St. Paul, Minn. Legis. Code @ 292.02 (1990), provided:

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

- - - - -End Footnotes- - - - -

[**21]

While the St. Paul ordinance invalidated in R.A.V. is clearly distinguishable from the hate crimes statute in that it regulates fighting words rather than merely the actor's biased motive, the Court's analysis lends support to our conclusion that the Wisconsin legislature cannot criminalize bigoted thought with which it disagrees. The Court stated:

[*172] [T]he only interest distinctively served by the content limitation is that of displaying the city council's special hostility towards the particular biases thus singled out. That is precisely what the First Amendment forbids. The politicians of St. Paul are entitled to express that hostility -- but not through the means of imposing unique limitations upon speakers who (however benightedly) disagree.

Id. at *32-33 (footnote omitted). The ideological content of the thought targeted by the hate crimes statute is identical to that targeted by the St. Paul ordinance -- racial or other discriminatory animus. And, like the United States Supreme Court, we conclude that the legislature may not single out and punish that ideological content.

Thus, the hate crimes statute is facially invalid because it directly
[**22] punishes a defendant's constitutionally protected thought. n17

- - - - -Footnotes- - - - -

n17 The dissent of Justice Bablitch asserts that punishing motive is permissible, based upon Dawson v. Delaware, 90-6704 (U.S. Supreme Court, March 9, 1992), wherein the United States Supreme Court indicated that evidence of a convicted murderer's bigoted motivation in committing the murder is a relevant inquiry in sentencing. Dissenting op. at 192-193. The dissent is wrong. Of course it is permissible to consider evil motive or moral turpitude when sentencing for a particular crime, but it is quite a different matter to sentence for that underlying crime and then add to that criminal sentence a separate enhancer that is directed solely to punish the evil motive for the crime.

- - - - -End Footnotes- - - - -

The hate crimes statute is also unconstitutionally overbroad. A statute is overbroad when it intrudes upon a substantial amount of constitutionally protected activity. Aside from punishing thought, the hate crimes statute [**173] also threatens to directly punish [**23] an individual's speech and assuredly will have a chilling effect upon free speech. As we explained in Bachowski:

A [statute] is overbroad when its language, given its normal meaning, is so sweeping that its sanctions may be applied to constitutionally protected conduct which the state is not permitted to regulate. The essential vice of an overbroad law is that by sweeping protected activity within its reach it deters citizens from exercising their protected constitutional freedoms, the so-called "chilling effect."

Bachowski, 139 Wis. 2d at 411 (citations omitted). The chilling effect need not be evident in the defendant's case; it is enough if hypothetical situations show that it will chill the rights of others. Milwaukee v. Wilson, 96 Wis. 2d 11, 19-20, 291 N.W.2d 452 (1980). Finally, "[i]n the First Amendment context, 'criminal statutes must be scrutinized with particular care . . .'" R.A.V., 1992 U.S. LEXIS 3863, at *63, (White, J., concurring), citing Houston v. Hill, 482 U.S. 451, 459 (1987). n18

- - - - -Footnotes- - - - -

n18 In R.A.V., four Justices disagreed with the analysis of the majority, but concurred in the judgment because they concluded that the Minnesota ordinance is fatally overbroad because it "makes criminal expressive conduct that causes only hurt feelings, offense, or resentment, and is protected by the First Amendment." R.A.V., 1992 U.S. LEXIS 3863, at *58-64 (White, J., concurring).

- - - - -End Footnotes- - - - -

[**24]

The state admits as it must that speech may often be used as circumstantial evidence to prove the actor's intentional selection. This case is a perfect example. Mitchell's speech is the primary evidence of his intentional

selection of Reddick. The use of the defendant's speech, both current and past, as circumstantial evidence to prove the intentional selection, makes it apparent [*174] that the statute sweeps protected speech within its ambit and will chill free speech.

The criminal conduct involved in any crime giving rise to the hate crimes penalty enhancer is already punishable. Yet there are numerous instances where this statute can be applied to convert a misdemeanor to a felony merely because of the spoken word. For example, if A strikes B in the face he commits a criminal battery. However, should A add a word such as "nigger," "honkey," "jew," "mick," "kraut," "spic," or "queer," the crime becomes a felony, and A will be punished not for his conduct alone -- a misdemeanor -- but for using the spoken word. Obviously, the state would respond that the speech is merely an indication that A intentionally selected B because of his particular race or ethnicity, but the [**25] fact remains that the necessity to use speech to prove this intentional selection threatens to chill free speech. Opprobrious though the speech may be, an individual must be allowed to utter it without fear of punishment by the state.

And of course the chilling effect goes further than merely deterring an individual from uttering a racial epithet during a battery. Because the circumstantial evidence required to prove the intentional selection is limited only by the relevancy rules of the evidence code, the hate crimes statute will chill every kind of speech. As Professor Gellman explains:

In addition to any words that a person may speak during, just prior to, or in association with the commission of one of the underlying offenses, all of his or her remarks upon earlier occasions, any books ever read, speakers ever listened to, or associations ever held could be introduced as evidence that he or she held racist views and was acting upon them at the time of the offense. Anyone charged with one of the [*175] underlying offenses could be charged with [intentional selection] as well, and face the possibility of public scrutiny of a lifetime of everything from ethnic jokes [**26] to serious intellectual inquiry. Awareness of this possibility could lead to habitual self-censorship of expression of one's ideas, and reluctance to read or listen publicly to the ideas of others, whenever one fears that those ideas might run contrary to popular sentiment on the subject of ethnic relations.

It is no answer that one need only refrain from committing one of the underlying offenses to avoid the thought punishment. Chill of expression and inquiry by definition occurs before any offense is committed, and even if no offense is ever committed. The chilling effect thus extends to the entire populace, not just to those who will eventually commit one of the underlying offenses.

Susan Gellman, 39 U.C.L.A. L. Rev. at 360-61 (emphasis in original) (citations omitted). n19

-----Footnotes-----

n19 See, e.g., Grimm v. Churchill, 932 F.2d 674, 675-76 (7th Cir. 1991) (fact that arresting officer in ethnic intimidation case "had heard through his

brother-in-law that Grimm had a history of making racial insults and engaging in racial confrontations" supported conclusion that officer had probable cause to arrest).

- - - - -End Footnotes- - - - -
[**27]

Thus, the hate crimes statute is unconstitutionally overbroad because it sweeps protected First Amendment speech within its reach and thereby chills free speech.

Finally, we consider the argument advanced by the amici curiae ADL, et al., and embraced by the dissent that an analogy exists between the hate crimes statute and antidiscrimination laws, and that the numerous United States Supreme Court decisions upholding antidiscrimination laws lend support to the hate crimes [*176] statute. n20 We disagree.

- - - - -Footnotes- - - - -

n20 See, e.g., Roberts v. United States Jaycees, 468 U.S. 609 (1984); Hishon v. King & Spalding, 467 U.S. 69 (1984); and Runyan v. McCrary, 427 U.S. 160 (1976).

- - - - -End Footnotes- - - - -

Discrimination and bigotry are not the same thing. Under antidiscrimination statutes, it is the discriminatory act which is prohibited. Under the hate crimes statute, the "selection" which is punished is not an act, it is a mental process. In this case, the act was the battery of Reddick; what was punished by the hate crimes statute [**28] was Mitchell's reason for selecting Reddick, his discriminatory motive.

As explained above, selection under the hate crimes statute is solely concerned with the subjective motivation of the actor. Prohibited acts of discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. @ 2000e-2, and analogous state antidiscrimination statutes, such as refusal to hire, termination, etc., involve objective acts of discrimination. What is punished by the hate crimes penalty enhancer is a subjective mental process, not an objective act. The actor's penalty is enhanced not because the actor fired the victim, terminated the victim's employment, harassed the victim, abused the victim or otherwise objectively mistreated the victim because of the victim's protected status; the penalty is enhanced because the actor subjectively selected the victim because of the victim's protected status. Selection, quite simply, is a mental process, not an objective act. n21

- - - - -Footnotes- - - - -

n21 The dissenting opinion of Justice Bablitch recites that it does not understand this "very complicated and elaborate distinction" between the hate crimes penalty enhancer and antidiscrimination statutes. That is interesting in light of the dissent's recognition at 200 that the statute applies to the defendant's "selection decision," an obviously subjective mental process. To state that a "decision" is analogous to the conduct proscribed by antidiscrimination statutes is untenable. We freely admit that

antidiscrimination statutes are concerned with the actor's motive, but it is the objective conduct taken in respect to the victim which is redressed (not punished) by those statutes, not the actor's motive.

We repeat. The hate crimes statute does not punish the underlying criminal act, it punishes the defendant's motive for acting. Taking the dissent's explanation that the statute is concerned with the "decision" of the defendant, it is clear that the hate crimes statute creates nothing more than a thought crime. Apparently that dissent is comfortable with such an Orwellian notion; we are not.

----- -End Footnotes- -----

[**29]

[*177] Finally, there is a difference between the civil penalties imposed under Title VII and other antidiscrimination statutes and the criminal penalties imposed by the hate crimes law, and contrary to the dissent's protestations, it is a difference that matters. n22 The difference is that while the First Amendment may countenance slight incursions into free speech where the overarching concern is protection from objective acts of bigotry in the employment marketplace and the adverse consequences of such acts on the civil rights of minorities, the First Amendment will not allow the outright criminalization of subjective bigoted thought. We have little doubt that an antidiscrimination statute which criminalized an employer's subjective discrimination, with nothing more, would be unconstitutional. This apparent schism in the First Amendment's protective shield is perhaps best understood in the context of overbreadth. A statute criminalizing the bigoted selection of a victim will chill free speech to a much greater extent than a statute [*178] imposing civil penalties for objective discriminatory acts.

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n22 See Bablitch, J., dissenting, at 187 n.2, 189 n.3, 191 and 192.

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[**30]

In the wake of the Los Angeles riots sparked by the acquittal of four white police officers accused of illegally beating black motorist Rodney King, it is increasingly evident that racial antagonism and violence are as prevalent now as they ever have been. Indeed, added to the statistical compilation of bias related crimes could be the vicious beating of white truck driver Reginald Denny by black rioters, horrifyingly captured on film by a news helicopter. As disgraceful and deplorable as these and other hate crimes are, the personal prejudices of the attackers are protected by the First Amendment. The constitution may not embrace or encourage bigoted and hateful thoughts, but it surely protects them.

Because we wholeheartedly agree with the motivation of the legislature in its desire to suppress hate crimes, it is with great regret that we hold the hate crimes statute unconstitutional -- and only because we believe that the greater evil is the suppression of freedom of speech for all of us.

By the Court. -- The decision of the court of appeals is reversed and the cause remanded to the circuit court for resentencing on the aggravated battery conviction.

DISSENTBY: ABRAHAMSON; [**31] BABLITCH

DISSENT: SHIRLEY S. ABRAHAMSON, J. (dissenting).

Today, this court concludes that sec. 939.645, Stats. 1989-90, is unconstitutional, holding that it violates the First Amendment right to freedom of speech. n1

-----Footnotes-----

n1 1991 Wis. Act 291 is not before us.

-----End Footnotes-----

The Constitution teaches mistrust of any government regulation of speech or expression. Had I been in the legislature, I do not believe I would have supported this statute because I do not think this statute will [*179] accomplish its goal. I would direct the state's efforts to protect people from invidious discrimination and intimidation into other channels. As a judge, however, after much vacillation, I conclude that this law should be construed narrowly and should be held constitutional.

This case presents a very difficult question involving the convergence of three competing societal values -- freedom of speech, equal rights, and protection against crime.

Freedom of speech is the most treasured right in a free, democratic society. Our constitution [**32] protects our right to think, speak and write as we wish. This freedom of expression encompasses all speech, pleasant or unpleasant, popular or unpopular. Even expressions of bigotry are protected. Our constitutional history makes clear that expression hostile to the values of our country should be addressed with more speech, not suppressed with police power.

Nevertheless, our law recognizes the harmful effects of invidious classification and discrimination. We acknowledge that when individuals are victimized because of their status, such as race or religion, the resulting harm is greater than the harm that would have been caused by the injurious conduct alone. In addition to the injury inflicted, the victim may suffer feelings of fear, shame, isolation and inability to enjoy the rights and opportunities that should be available to all persons. Furthermore, all members of the group to which the victim belongs may suffer when the individual is victimized. The state has determined that harms inflicted because of race, color, creed, religion or sexual orientation are more pressing public concerns than other harms. The state has legitimate, reasonable and neutral justifications [**33] [*180] for selective protection of certain people. n2 "In light of our Nation's long and painful experience with discrimination, this determination is plainly reasonable. Indeed . . . it is compelling." n3 The state has a compelling interest in combating invidiously discriminatory conduct, even when the conduct is linked to viewpoints otherwise protected by the First

Amendment.

-Footnotes-

n2 R.A.V. v. City of St. Paul, 1992 U.S. LEXIS 3863, U.S. (June 22, 1992) (*67, *81-*82, Stevens, J., concurring).

n3 R.A.V. v. City of St. Paul, 1992 U.S. LEXIS 3863, U.S. (June 22, 1992) (*51, White, J., concurring).

-End Footnotes-

In addition, our government has a compelling interest in preserving the peace, in protecting each person from crime and from the fear of crime.

Section 939.645 addresses only those crimes committed "because of" the victim's "race, religion, color, disability, sexual orientation, national origin or ancestry." It does not punish all crimes committed by persons who have expressed [**34] bigoted beliefs. An individual may commit a criminal act. That same individual may possess or express bigoted beliefs. These two facts standing alone, however, do not subject that individual to punishment under sec. 939.645.

In my mind, it is the tight nexus between the selection of the victim and the underlying crime that saves this statute. The state must prove beyond a reasonable doubt both that the defendant committed the underlying crime and that the defendant intentionally selected the victim because of characteristics protected under the statute. 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. Evidence of a person's traits or beliefs would not be permissible for the purpose of proving the person acted in conformity therewith on a particular [*181] occasion. The statute requires the state to show evidence of bigotry relating directly to the defendant's intentional selection of this particular victim upon whom to commit the charged crime. The state must directly link the defendant's bigotry to the invidiously discriminatory selection [**35] of the victim and to the commission of the underlying crime.

Interpreted in this way, I believe the Wisconsin statute ties discriminatory selection of a victim to conduct already punishable by state law in a manner sufficient to prevent erosion of First Amendment protection of bigoted speech and ideas.

Read narrowly as the legislature intended, this statute is a prohibition on conduct, not on belief or expression. The statute does nothing more than assign consequences to invidiously discriminatory acts.

The state's interest in punishing bias-related criminal conduct relates only to the protection of equal rights and the prevention of crime, not to the suppression of free expression. The enhanced punishment justly reflects the crime's enhanced negative consequences on society. Thus interpreted the statute prohibits intentional conduct, not belief or expression. The only chilling effect is on lawless conduct.

Bigots are free to think and express themselves as they wish, except that they may not engage in criminal conduct in furtherance of their beliefs. Section 939.645 does not punish abstract beliefs or speech. The defendant's beliefs or speech are only relevant as they relate [**36] directly to the commission of a crime.

The United States Supreme Court's recent decision in R.A.V. v. City of St. Paul, 1992 U.S. LEXIS 3863, U.S. (June 22, 1992), has not persuaded me to the contrary. In R.A.V., the Supreme Court held unconstitutional a St. Paul ordinance prohibiting placing "on public [*182] or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reason to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender" The majority opinion in R.A.V. ruled the ordinance facially unconstitutional because, even assuming that the ordinance only regulated "fighting words," the ordinance was based on the content of the ideas expressed by a defendant. The four concurring justices found the ordinance unconstitutional on the ground that the statute was an overbroad prohibition of fighting words.

R.A.V. does not control this case. Section 939.645 is not similar to the St. Paul ordinance; its validity does not rely on the "fighting words" doctrine. The defendant in R.A.V. [**37] was also charged under a state statute, sec. 609.2231(4), Minn. Stats. 1990, much more similar to sec. 939.645 than the St. Paul ordinance, but the defendant did not challenge that charge.

For the reasons set forth, I dissent.

WILLIAM A. BABLITCH, J. (dissenting).

everywhere the crosses are burning, sharp-shooting goose-steppers around every corner, there are snipers in the schools . . . (I know you don't believe this. You think this is nothing but faddish exaggeration. But they are not shooting at you.)

Lorna Dee Cervantes n1

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n1 Cervantes, Poem for the Young White Man Who Asked Me How I, An Intelligent Well Read Person Could Believe in the War Between Races, in M. Sanchez, Contemporary Chicana Poetry 90 (1986).

-----End Footnotes-----

The law in question is not a "hate speech" law.

[*183] Nor is it really a "hate crimes" law as it has been somewhat inappropriately named.

It is a law against discrimination -- discrimination in the selection of a crime victim.

Today the majority decides that the same Constitution [**38] which does not protect discrimination in the marketplace does protect discrimination that takes place during the commission of a crime. Numerous federal and state laws exist which prohibit discrimination in the selection of who is to be hired, or fired, or promoted. No one seriously (at least until today) questions their constitutionality. Yet the majority today gives constitutional protection to discrimination in the selection of who is to be the victim of a crime. Both sets of laws involve discrimination, both involve victims, both involve action "because of" the victim's status.

The majority says there is a difference in the two types of laws. They are wrong. There is no support in law or logic for their position. How can the Constitution not protect discrimination in the selection of a victim for discriminatory hiring, firing, or promotional practices, and at the same time protect discrimination in the selection of a victim for criminal activity? How can the Constitution protect discrimination in the performance of an illegal act and not protect discrimination in the performance of an otherwise legal act? How can the Constitution not protect discrimination in the marketplace [**39] when the action is taken "because of" the victim's status, and at the same time protect discrimination in a street or back alley when the criminal action is taken "because of" the victim's status?

These are laws against discrimination, pure and simple. Dictionaries do not disagree on the meaning of the term discrimination: to distinguish, to differentiate, to act on the basis of prejudice. Laws forbidding discrimination [*184] in the marketplace and laws forbidding discrimination in criminal activity have a common denominator: they are triggered when a person acts "because of" the victim's protected status. These exact words appear in most, if not all antidiscrimination laws. These exact words appear in the laws before us today.

Yet the majority says one is constitutional, one is not. I submit it is pure sophistry to distinguish the two. In its effort to protect speech, the majority's constitutional pen gets too close to the trees and fails to see the forest.

The majority rationalizes their conclusion by insisting that this statute punishes bigoted thought. Not so. The statute does not impede or punish the right of persons to have bigoted thoughts or to express themselves [**40] in a bigoted fashion or otherwise, regarding the race, religion, or other status of a person. It does attempt to limit the effects of bigotry. What the statute does punish is acting upon those thoughts. It punishes the act of discriminatory selection plus criminal conduct, not the thought or expression of bigotry. The Constitution allows a person to have bigoted thoughts and to express them, but it does not allow a person to act on them. The majority says otherwise. I disagree.

I conclude the statute in question is neither vague nor overbroad, nor does it offend equal protection. Accordingly, I dissent.

I.

Examples of shocking bias related crimes making headlines recently include:

[A] white man assaults a black woman, rips off her clothes, douses her with lighter fluid and, yelling 'nigger', threatens to set her on fire.

[*185] According to police in a Washington suburb, the attack capped a night in which two young white men planned to hunt down blacks in revenge for being called 'honkies', a derogatory term blacks use for whites.

They pounced on two black women walking towards a shopping centre early in the morning. One escaped and ran for help, the other was [**41] beaten, stripped nearly naked, and sprayed with lighter fluid. Bernd Debusmann, Hate Crime Shocks Washington, Shows Race Problems, Reuters, March 4, 1992.

In Kentucky this September, assailants beat a young gay man with a tire iron, locked him into a car trunk with a bunch of snapping turtles and then tried to set the car on fire. He was left with severe brain damage. Neal R. Peirce, Recurring Nightmare of Hate Crimes, National Journal, December 15, 1990, at Section State of the States; Vol. 22 No. 50 p. 3045.

Amber Jefferson, a 15 year-old high school cheerleader in Orange County, Calif., almost lost her life because of the fact that she has one white and one black parent. Four attackers, allegedly all white, beat her with a baseball bat and split her face open with a shard of plate glass. Surgery to fix the wounds took 10 hours. It will be two years before she regains muscle control in her face. Id.

The 120 boys at Valley Torah High typically spend half their school day in college prep classes and half in religious instruction.

But for the past week -- since their school was painted with swastikas, Ku Klux Klan symbols and Jewish slurs -- they have been getting [**42] an education in hate. Sally Ann Stewart, Hate Crimes: 'Litany of shame' Incidents on rise in California, USA Today, March 13, 1992, at 3A.

Wisconsin has also not been immune from reprehensible incidents of bias related crime:

[*186] Anti-Semitic attacks erupt regularly, even at such supposedly progressive, enlightened institutions as the University of Wisconsin (Madison), where a Jewish student center has been pelted with rocks and bottles and where Jewish fraternities and sororities have been vandalized. Counselors at a Madison Jewish day camp discovered that the brake linings had been cut on a bus used to transport children -- fortunately before the bus was used. A Madison synagogue, after repeated anti-Semitic incidents, was kept under armed guard for a time. Recurring Nightmare of Hate Crimes, National Journal, December 15, 1990, at Section State of the States; Vol. 22 No. 50 p. 3045.

In 1987, the Wisconsin legislature acted to alleviate bias related crime. The Wisconsin legislature's response was to enact sec. 939.645, Stats., which enhances the penalty a perpetrator receives if the State of Wisconsin (State) proves that the perpetrator intentionally [**43] selected the victim because of the victim's race, religion, color, or other protected status.

I first address Mitchell's and the majority's overbreadth argument. A statute is overbroad when its language, given its normal meaning, is so

sweeping that its sanctions may be applied to conduct which the state is not permitted to regulate. *Bachowski v. Salamone*, 139 Wis. 2d 397, 411, 407 N.W.2d 533 (1987). "The essential vice of an overbroad law is that by sweeping protected activity within its reach it deters citizens from exercising their protected constitutional freedoms, the so-called 'chilling effect.'" *Id.* An overbreadth challenge may be based on hypothetical speculation and does not require the presence of a "chilling effect" in the defendant's particular case. *Milwaukee v. Wilson*, 96 Wis. 2d 11, 19-20, 291 N.W.2d 452 (1980). This court has also held [*187] that where possible we must interpret a statute to avoid constitutional invalidity. *Bachowski*, 139 Wis. 2d at 405.

I conclude that the First Amendment is not implicated in this case. However, in concluding that the challenged statute is constitutional I do not take lightly the First Amendment issue that [**44] *Mitchell* has raised. "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).

I reject the majority's and *Mitchell's* argument that sec. 939.645, Stats., punishes or has a chilling effect on free speech. The penalty enhancement statute is directed at the action or conduct of selecting a victim and committing a crime against that victim because of his or her protected status. The gravamen of the offense is selection, not the perpetrator's speech, thought, or even motive. n2 The statute does not impede or punish the right [*188] of persons to have thoughts or to express themselves regarding the race, religion, or other status of a person. The statute's concern is with criminal conduct plus purposeful selection. By enhancing the penalty, the penalty enhancer statute punishes more severely criminals who act with what the legislature has determined is a more depraved, antisocial intent: an intent not just to injure but to intentionally pick out and injure a person because of a person's [**45] protected status. The legislative concern expressed in this statute is not with the beliefs, motives, or speech of a perpetrator but with his or her action of purposeful selection plus criminal conduct.

- - - - -Footnotes- - - - -

n2 One of the majority's chief contentions seems to be that the statute is unconstitutional because it punishes motive. Although I do not think that this statute punishes motive, even if it did, I have serious doubts about the majority's conclusion that punishing motive is impermissible under the First Amendment. The majority cites no authority to support its conclusion that punishing motive is impermissible under the First Amendment. In fact, the majority fails to explain why, under its analysis, it is impermissible for the penalty enhancer statute to punish a discriminatory motive, yet permissible for antidiscrimination statutes to punish a discriminatory motive. See, e.g., *Rabidue v. Osceola Refining Co.*, 584 F. Supp. 419, 424-425 (1984), *aff'd*, 805 F.2d 611 (6th Cir. 1986), *cert denied*, 481 U.S. 1041 (1987) ("it is merely concluded that the company's pre-discharge conduct toward plaintiff was not based on anti-female animus. Absent such animus, there can be no violation of Title VII"); *E.E.O.C. v. Maxwell Co.*, 726 F.2d 282 (1984). In fact one writer commenting on Title VII is at complete odds with the majority's analysis of motive under the criminal law. He writes:

Title VII was passed because Congress perceived that actions resulting from bad thoughts were sufficiently pervasive to substantially limit economic opportunities of blacks. 'Bad thoughts' is, of course, shorthand for a wide range of interior activities which are the necessary predicate for disparate treatment liability. A more common terminology is 'prohibited considerations,' but 'bad thoughts' describes more graphically what disparate treatment entails.

. . . .

The notion of bad thoughts is not peculiar to disparate treatment discrimination under Title VII. It has played an important role in the Court's constitutional decisions over the last two decades in contexts ranging from equal protection to freedom of speech and religion. Nor is such concern new in the law. Modern criminal law has always manifested a concern for motivations under the rubric of mens rea. In the discrimination context, however, motivations are both more important and more elusive than in criminal law because the 'conduct' violating Title VII is neutral or positive except when it springs from bad thoughts. In the criminal context, much prohibited conduct is itself suspect. Charles A. Sullivan, Accounting For Price Waterhouse: Proving Disparate Treatment Under Title VII, Brooklyn L. Rev. 1107, 1139-1140 (1991).

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[**46]

Admittedly, the conduct prohibited by the penalty enhancer statute can be proven by an extensive combination of facts that might include words uttered by a [*189] defendant. n3 However, if words are used to prove the crime, the words uttered are not the subject of the statutory prohibition; rather, they are used only as circumstantial evidence to prove the intentional selection. Permitting the use of such evidence does not chill free speech. Just as words of defendants are frequently used to prove the element of intent in many crimes without violating the First Amendment, words may be used to prove the act of intentional selection. It is no more a chilling of free speech to allow words to prove the act of intentional selection in this "intentional selection" statute than it is to allow a defendant's words that he "hated John Smith and wished he were dead" to prove a defendant intentionally murdered John Smith.

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n3 The majority essentially contends that the use of speech as circumstantial evidence impermissibly chills free speech. Once again the majority fails to explain why this is not also true in antidiscrimination cases. For example, under Title VII sexual harassment jurisprudence, an employee's or employer's sexist speech is not merely evidence of prohibited conduct; it is the prohibited conduct. See, e.g., Zabkowicz v. West Bend Co., 589 F. Supp. 780, 782-83 (E.D. Wis. 1984) (in three-year period, 75 sexually explicit drawings posted on pillars and other conspicuous places in the workplace); Volk v. Coler, 845 F.2d 1422, 1426-27 (7th Cir. 1988) (plaintiff alleged, among other things, that her supervisor called her and other female employees 'hon,' 'honey,' 'babe' and 'tiger.') Andrews v. City of Philadelphia, 895 F.2d 1469, 1485 (3d Cir. 1990) (pervasive use of derogatory and insulting terms relating to women generally and addressed to female employees personally may be sufficient to show a hostile work environment). See also Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486, 1535 (M.D. Fla. 1991) ("pictures and verbal harassment are not

the subjective motive of the actor. For example, in disparate [**50] treatment cases (cases in which the discrimination alleged is overt discrimination as opposed to disparate impact where the practices are fair in form, but discriminatory in operation) a person simply does not violate Title VII for refusing to hire a person of a protected status. The objective act alone does not invoke the provisions of the statute. Rather, the refusal must be "because of" the victim's protected status. Assuming that the majority is correct [*192] that this statute punishes motive, it fails to explain how the enhancer is any different from antidiscrimination laws.

If one assumes that the majority is correct that the penalty enhancer punishes motive there is only one distinction between it and antidiscrimination laws. The only distinction that exists between the penalty enhancer statute and antidiscrimination statutes is that the objective acts that are punished are different in that antidiscrimination laws punish legal conduct plus bad motive and the enhancer punishes criminal conduct plus bad motive. While it is true that this is a distinction, the majority never explains why it is a distinction that matters. Why is it permissible to punish motive when [**51] it is accompanied by legal conduct and impermissible to punish motive when it is accompanied by illegal conduct. The majority does not give an answer to this question, it merely concludes that the distinction somehow makes a difference. Saying so, again and again, does not make it so.

Lastly, even assuming that the majority is correct in saying that this statute punishes motive, it has still failed to explain why punishing motive is impermissible. A recent case from the U.S. Supreme Court would seem to indicate that the majority is in error. In *Dawson v. Delaware*, 90-6704, slip. op. at 5 (U.S. Supreme Court March 9, 1992), the United States Supreme Court held that "the Constitution does not erect a per se barrier to the admission of evidence concerning one's beliefs and associations at sentencing simply because those beliefs and associations are protected by the First Amendment." Although under the facts of *Dawson* the Court concluded that there was a First Amendment violation, its analysis lends considerable support to the conclusion that considering the perpetrator's motivations in determining [*193] the appropriate sentence is permissible. For example, in concluding [**52] that evidence that the defendant belonged to the Aryan Brotherhood was impermissibly submitted during the penalty phase of a capital case in violation of the First Amendment, the court stated:

Even if the Delaware group to which Dawson allegedly belongs is racist, those beliefs, so far as we can determine, had no relevance to the sentencing proceeding in this case. For example, the Aryan Brotherhood evidence was not tied in any way to the murder of Dawson's victim. In *Barclay*, on the contrary, the evidence showed that the defendant's membership in the Black Liberation Army, and his consequent desire to start a 'racial war,' were related to the murder of a white hitchhiker. See 463 U.S., at 942-944 (plurality opinion). We concluded that it was most proper for the sentencing judge to 'tak[e] into account the elements of racial hatred in this murder.' *Id.*, at 949. In the present case, however, the murder victim was white, as is Dawson; elements of racial hatred were therefore not involved in the killing. *Dawson v. Delaware*, 90-6704, slip. op. at 6-7 (U.S. Supreme Court March 9, 1992) (Emphasis added.)

The U.S. Supreme Court is clearly indicating that [**53] when racial hatred is relevant to the crime, i.e., the racial hatred is the perpetrator's reason

for committing the crime, this information is completely relevant in sentencing. How then can the majority suggest that punishing motive is impermissible?

I repeat. Section 939.645, Stats., is not concerned with speech or thought. It is concerned with intentional selection. It becomes operative not just when a person's speech evinces the discriminatory selection, but rather anytime the choice of a victim from a protected class is [*194] shown to be selective rather than random, discriminating rather than indiscriminate, or designed rather than happenstance.

The penalty enhancer statute also does not seek to punish the motive of a perpetrator. Neither a perpetrator's bigoted beliefs, nor his or her motivation for intentionally selecting a victim because of a protected status are punished. Again, it is the act of selecting a victim because of his or her race, color, or etc., that is proscribed. If a perpetrator seeks out a Jewish person to physically assault, his intent is not just to injure, but to injure a Jewish person. He may be motivated by a hatred of Jewish people, a [**54] calling from God to sacrifice a Jewish person, or some other irrational motive. This law does not look to motive. This law does not look at why the perpetrator sought out a Jewish person. It looks only to whether the fact that the victim was Jewish was a substantial factor in the defendant's purposeful choice of the victim.

Similarly, under the facts of the present case, even if Mitchell could show that his motive was not a hatred of whites, his conduct would still be punishable under the statute. As the State points out, Mitchell's motive could have been to impress the group of boys that accompanied him. Nevertheless, the statute would still apply. Its focus is not on bigoted or hateful motivations. Rather, it punishes the action of intentionally selecting a victim on the basis of a protected status listed in the statute. As Mitchell himself emphasized at oral arguments, the term "hate crimes" statute is a misnomer. The crimes that fall under the statute may be motivated by many emotions; the intentional selection is what is prohibited. The statute looks at intent, and statutes are used in many ways to punish crimes differently based on the perceived seriousness of the [**55] intent of the perpetrator. For example, an [*195] intent to kill is punished greater than an intent showing utter disregard for human life. Likewise, a reckless intent is punished less than an intent showing utter disregard for human life.

Section 939.645, Stats., does not attempt to prohibit or punish bigotry, antisemitism, or the like. It does attempt to limit their effects. An individual's freedom to express his or her views in writing, speech, or otherwise is not regulated or chilled by this statute. What is prohibited is the act of intentionally selecting victims because of their protected status. Why a Black or a Jewish person or any other person of a protected class was chosen as the victim is not relevant. What is relevant is that the victim is intentionally chosen because of the victim's protected status.

I conclude that sec. 939.645, Stats., legitimately regulates criminal conduct, and raises no issue under the First Amendment. It does not punish speech, thought, or even motivation, nor does it sweep within its ambit actions which are constitutionally protected as to render it unconstitutionally overbroad.

II.

It is necessary to discuss the vagueness and [**56] equal protection issues, even though they are not reached by the majority. These issues are raised by Mitchell. I therefore take this opportunity to address each issue.

Mitchell asserts that this legislative attempt to alleviate bias related crime is unconstitutionally vague. Specifically he contends that the phrases "intentionally selects," "because of," and "race," are vague, undefined, and ambiguous. Thus, he argues that, they lead to erratic convictions and unfair prosecutions. I disagree.

[*196] A statute is "unconstitutionally vague if it fails to afford proper notice of the conduct it seeks to proscribe or if it encourages arbitrary and erratic arrests and convictions." *Milwaukee v. Wilson*, 96 Wis. 2d at 16 (footnote omitted). This court has repeatedly indicated that "[t]he principles underlying the void for vagueness doctrine . . . stem from concepts of procedural due process." *State v. Popanz*, 112 Wis. 2d 166, 172, 332 N.W.2d 750 (1983).

To determine whether a statute survives a vagueness challenge, this court has applied a two-part analysis. First, the statute must be sufficiently definite to give persons of ordinary intelligence who wish to abide [**57] by the law adequate notice of the proscribed conduct. Second, the statute must provide adequate standards for those who enforce the laws and adjudicate guilt. See *State v. McManus*, 152 Wis. 2d 113, 135, 447 N.W.2d 654 (1989) (citing *City of Oak Creek v. King*, 148 Wis. 2d 532, 546, 436 N.W.2d 285 (1989)). "However, a statute need not define with absolute clarity and precision what is and what is not unlawful conduct." *State v. Hurd*, 135 Wis. 2d 266, 272, 400 N.W.2d 42 (Ct. App. 1986). Furthermore, to survive a vagueness challenge it is not necessary, "for a law to attain the precision of mathematics or science" *Milwaukee v. Wilson*, 96 Wis. 2d at 16. This court has summarized its analysis under a vagueness challenge as follows:

Thus it is not sufficient to void a criminal statute or regulation to show merely that the boundaries of the area of proscribed conduct are somewhat hazy, that what is clearly lawful shades into what is clearly unlawful by degree, or that there may exist particular instances of conduct the legal or illegal nature of which may not be ascertainable with ease. Before a statute or rule may be invalidated for vagueness, [*197] there [**58] must appear some ambiguity or uncertainty in the gross outlines of the duty imposed or conduct prohibited such that one bent on obedience may not discern when the region of proscribed conduct is neared, or such that the trier of fact in ascertaining guilt or innocence is relegated to creating and applying its own standards of culpability rather than applying standards prescribed in the statute or rule. *State v. Courtney*, 74 Wis. 2d 705, 711, 247 N.W.2d 714 (1976).

Mitchell's first contention is that the failure of the statute to define the phrase "intentionally selects" renders the statute unconstitutionally vague because it is not a term easily understood by ordinary persons who wish to abide by the law, and fails to provide adequate standards for enforcers of its provisions. I disagree. I conclude that the phrase "intentionally selects" is sufficiently definite to provide notice of prohibited conduct to persons of ordinary intelligence who wish to abide by the law and adequate standards for

those who enforce the laws and adjudicate guilt.

The word "intentionally" is a word that is easily understood. "Intentionally" means a purpose to do the thing or cause the result [**59] specified. Lay persons of ordinary intelligence do not need to scurry to their dictionaries in order to understand the meaning of this well recognized and easily understood word.

Nor is this a word that is a stranger to law enforcement officials, judges, and juries. "Intentionally" is defined in the criminal code at sec. 939.23(3), Stats.:

'Intentionally' means that the actor either has a purpose to do the thing or cause the result specified, or is aware that his or her conduct is practically certain to cause that result. In addition, except as provided in sub. (6), the actor must have knowledge of those facts [*198] which are necessary to make his or her conduct criminal and which are set forth after the word 'intentionally'.

The Wisconsin statutes, particularly criminal statutes, are replete with references to "intentional" acts, or acts or conduct done "intentionally." See, e.g., sec. 939.051(b), Stats. (whoever intentionally aids and abets the commission of a crime may be charged as a principal); sec. 939.48 (person is privileged to threaten or intentionally use force against another for the purpose of self defense); sec. 940.07 ("[w]hoever knowing the [**60] vicious propensities of any animal intentionally allows it to go at large . . ."); see also secs. 7.37(5), 19.58, 12.13, 26.05(3)(b), 26.14(8) and 20.927(4). Unquestionably, law enforcement officials, judges, and juries are quite capable of applying the word to varied situations in the resolution of a legal case.

Likewise, the word "selects" is well understood and easily defined. "Select" means "to choose from a number or group . . . by fitness, excellence, or other distinguishing feature" Webster's Third New International Dictionary 2058 (1961). As the court of appeals concluded, the meaning of the phrase "intentionally selects" is easily discerned. It means to purposely choose or pick out. I conclude that the phrase "intentionally selects" is sufficiently clear to persons of ordinary intelligence to afford a practical guide for law-abiding behavior and is capable of application by those responsible for enforcing the law.

In the court of appeals, Mitchell appeared to make an alternative vagueness argument with respect to the phrase "intentionally selects." The court of appeals explained his argument as follows:

[*199] Assuming that 'intentionally [**61] selects' means to purposely pick out, Mitchell apparently argues that the term is still ambiguous as applied. If we understand Mitchell's argument correctly, the underlying rationale for Mitchell's attention to the term 'intentionally selects' is this: Any time an accused is a different race than the alleged victim, it can be viewed as a 'hate crime' suitable for use of the penalty enhancer since there is no way to discern whether the victim was picked out because of race or because of other reasons. Under the statute, the very fact that this particular victim was picked out indicates that the victim was 'intentionally selected.' Therefore, Mitchell argues that so long as the accused 'knows' the victim is of a

different race, a different color or a different religion, the accused will be subject to the statute. This, he claims, allows its use by prosecutors and police without any guidelines. State v. Mitchell, 163 Wis. 2d 652, 661-62, 473 N.W.2d 1 (Ct. App. 1991).

Although Mitchell does not appear to have abandoned this argument, he seems to have framed it in slightly different terms. Mitchell now appears to argue that the statute is vague because it does not [*62] indicate to what extent a victim's protected status must affect the perpetrator's selection decision in order to implicate the statute. In other words, he argues that because the meaning of the phrase "because of" is vague and not ascertainable by an ordinary person, a fair application of the statute is impossible, and it will likely be applied any time an accused is a different race than the victim. I do not agree.

I agree with the court of appeals that the operative terms in the statute are not whether the victim is of a different "color" or "race," or other protected status. Rather, the operative terms are whether the victim was [*200] "intentionally selected" or purposely picked out "because of" the victims race, color, etc. "If a victim is of a different race . . . than the perpetrator, that fact alone will not allow the penalty enhancer to be used." Mitchell, 163 Wis. 2d at 662. What is important is whether the perpetrator picked out the victim because of his or her race. The key is the "intentional selection because of" the victims protected status.

I reject Mitchell's contention that the language "intentionally selects because of" fails to define with sufficient [*63] specificity the conduct which is proscribed. I again emphasize that "[T]he Constitution does not require impossible standards"; all that is required is that the language 'conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices' Bachowski, 139 Wis. 2d at 410. (citing Roth v. United States, 354 U.S. 476, 491 (1957)). Giving the phrase "because of" its ordinary commonsense meaning, see State v. Whitrock, 119 Wis. 2d 664, 670, 350 N.W.2d 647, measured by common understandings and practices, I conclude that where a victim's protected status is a substantial factor in the perpetrator's selection decision, the enhancement statute applies.

It is unreasonable to construe "because of" to mean that the statute applies where race, color, or the like is only a minor or de minimis factor in the perpetrator's selection decision. Such a construction in light of the legislature's rationale (see Section III below) would be absurd. Nor would it be reasonable to construe the phrase to mean that the statute applies only when race, color, or the like is the sole factor in the perpetrator's selection decision. Legislatures [*64] realize that seldom, if ever, do people act based on one factor or consideration. Rather, people's conduct is largely driven by a multitude [*201] of factors which have varying impacts on their decisions. A reasonable reading of the statute is that it creates liability where "but for" the victim's protected status, the perpetrator would not have selected the victim for the crime. Thus, I conclude the victim's status must be a substantial factor in the selection decision to the extent that in the absence of that status the perpetrator would not have selected the victim.

I therefore conclude that the legislature's use of the words "because of," in sec. 939.645, Stats., although perhaps not as precisely drafted as possible,

conveys "sufficiently definite warning as to the proscribed conduct" to withstand a vagueness challenge. Furthermore, Mitchell's conduct plainly falls within the prohibited zone of the statute, as there is no doubt that Gregory Reddick's race was a substantial factor in Mitchell's selection of him as his victim. n4

- - - - -Footnotes- - - - -

n4 The defendant has waived any challenge he might have had to the propriety of the jury instruction given in this case. However, even if it were not waived, the defendant would be hard pressed to show that the instruction given in this case caused him harm. The instruction in this case indicated that in order for the jury to conclude that the defendant intentionally selected the victim because of his race they must conclude "that the defendant knew that Gregory Reddick was a member of the white race and committed the crime of aggravated battery against him for the reason that he was a member of that race." While this instruction may have given the jury the impression that the victim's race had to be the sole factor in the defendant's selection decision, it certainly did not give the impression that a finding that race was anything less than a substantial factor would trigger the penalty enhancer statute.

- - - - -End Footnotes- - - - -

[**65]

Mitchell also contends that the word "race" is vague and ambiguous. I agree with the State that it is difficult to determine the basis of defendant's argument in this regard. I construe Mitchell's argument, as did the court [*202] of appeals, to be that persons of ordinary intelligence do not know the difference between the terms "race" and "color." This argument has no merit.

I find it difficult to believe that persons of ordinary intelligence would not understand what the word "race" means. Furthermore, even if there were difficulty understanding the literal difference in the terms "race" and "color," both are terms covered in the statute. Selection because of race or color is prohibited by the statute. Therefore, if people of ordinary intelligence understand the general parameters of either term, they have fair notice of the conduct that is prohibited.

Mitchell also suggests that the statute is unconstitutional because law enforcement authorities, judges, and juries may or may not pursue penalty enhancement under the statute based on their own prejudices or views toward the race, or religion, etc., of the victim or the defendant. I understand Mitchell's argument to [*66] be a constitutional challenge based on vagueness, i.e., because the statute is vague, law enforcement officials will use their own prejudices to apply the statute. This argument is meritless.

As I concluded above, the statute is sufficiently clear to persons of ordinary intelligence to provide adequate standards for those who enforce the laws, such that they will not be relegated to creating their own standards. The law enforcement responsibility to determine whether the conduct proscribed by the penalty enhancement statute can be proven in a particular case is no more difficult than similar determinations routinely made by officials in enforcing the law. Furthermore, the potential for improper jury bias and prosecutorial abuses is present in many cases. Safeguards exist to protect against these

abuses. For example, this court has reviewed prosecutorial charging decisions to determine if [*203] there has been an abuse of discretion or discriminatory prosecution. See *State v. Karpinski*, 92 Wis. 2d 599, 609, 285 N.W.2d 729 (1979). This court has held that a prosecutor's decision to prosecute may not be deliberately based upon an unjustifiable standard such as race, religion, [*67] or other arbitrary classification. *Sears v. State*, 94 Wis. 2d 128, 134, 287 N.W.2d 785 (1980). Thus, discriminatory abuses can be dealt with through other law; its potential does not render a statute vague.

The last contention made by Mitchell concerning vagueness is that the statute does not provide standards to help law enforcement determine what evidence can be used to prove a violation of the statute. A statute does not have to dictate rules in regard to admissibility of evidence. Just as in any other case, the Wisconsin Rules of Evidence provide a comprehensive guide for law enforcement. Hypothetical speculation as to how far back into a person's life a prosecutor can delve to prove the prohibited conduct of intentional selection does not render the statute unconstitutional. The rules of evidence which deal with relevancy provide adequate standards to guide law enforcement in determining the appropriate nexus between evidence and alleged misconduct, such that the evidence is admissible. See Wisconsin Rules of Evidence 904.01, 904.02, and 904.03.

I conclude that the legislature has defined the conduct proscribed by sec. 939.645, Stats., with sufficient specificity [*68] to meet constitutional requirements with respect to vagueness. The law is clear in its terms and its meaning. When the victim's protected status (i.e., race, religion, etc.) is a substantial factor in the defendant's purposeful choice of a victim, the statute becomes operative.

[*204] III.

Lastly, I discuss Mitchell's equal protection challenge. In *McManus*, 152 Wis. 2d at 130-31, this court summarized the law with respect to equal protection:

Equal protection . . . requires that there exist a reasonable and practical grounds [sic] for the classifications drawn by the legislature. . . . Equal protection does not deny a state the power to treat persons within its jurisdiction differently; rather, the state retains broad discretion to create classifications so long as the classifications have a reasonable basis. The fact a statutory classification results in some inequity, however, does not provide sufficient grounds for invalidating a legislative enactment. (Citations omitted.) n5

If the statute in question does not impinge on a fundamental right or create a classification based on a suspect criterion, the legislative enactment "must be sustained unless [*69] it is 'patently arbitrary' and bears no rational relationship to a legitimate government interest." *Id.* (citation [*205] omitted). "If the classification is reasonable and practical in relation to the objective, that is sufficient and doubts must be resolved in favor of the reasonableness of the classification." *State v. Jackman*, 60 Wis. 2d 700, 705-06, 211 N.W.2d 480 (1973). I examine sec. 939.645, Stats., under a rational basis test. The present case does not impinge on a fundamental right or create a classification based on a suspect criterion.

-Footnotes-

n5 The Equal Protection Clause of the United States Constitution provides:

No state shall . . . deny to any person within its jurisdiction the equal protection of the laws. Amendment XIV, Section 1, United States Constitution.

The Equal Protection Clause of the Wisconsin Constitution Provides:

All people are born equally free and independent, and have certain inherent rights; among these are life, liberty and the pursuit of happiness. . . . Article I, Section 1, Wisconsin Constitution.

This court has held that the equal protection clause of the Wisconsin Constitution is the substantial equivalent of its respective clause in the federal constitution. See State ex rel. Cresci v. H&SS Department, 62 Wis. 2d 400, 414, 215 N.W.2d 361 (1974).

-End Footnotes-

[**70]

Section 939.645, Stats., is violated when the victim's protected status is a substantial factor in the defendant's purposeful choice of a victim for certain crimes. When such intentional selection on account of status is proved, penalties in addition to the underlying crime are assessed. I perceive this legislation to be a legislative judgment that crimes involving intentional selection of a victim because of the victim's status cause greater harm to victims and to the public than do crimes in which status is not a factor. Because of this, the legislature has chosen to punish these intentional selection crimes more severely than conviction of the underlying crime would otherwise require.

Regulation of harmful conduct is a legitimate exercise of a state's power. The function of the legislature in drafting criminal laws is always to make reasoned decisions concerning the social harm of particular conduct. The criminal laws are replete with similar legislative judgments involving enhanced penalties. For example, sec. 939.63, Stats., increases the penalty for a crime if the person possesses, uses, or threatens to use a dangerous weapon. Similarly, if a person commits a crime while [**71] his or her identity is concealed, the penalty for the underlying crime may be increased under sec. 939.641. See also, sec. 939.62 (increased penalty for habitual criminality); sec. 939.621 (increased penalty for certain domestic abuse offenses); sec. 939.64 (increased penalty [*206] for committing a felony while wearing a bullet-proof garment); sec. 948.02 (sexual contact or sexual intercourse with a person who has not attained the age of 13 years is guilty of Class B felony, while sexual contact or intercourse with a person who has not attained the age of 16 is a Class C felony); sec. 940.31 (kidnapping, a Class B felony under the statute is enhanced to a Class A felony when it is committed with the intent "to cause another to transfer property in order to obtain the release of the victim").

There is ample evidence to support the legislature's conclusion that intentional selection of a victim from a protected class causes a greater harm

to its victims as well as to society than do crimes where the victim's status is not a factor. Many commentators have discussed the widespread psychological harms caused by crimes that appear to be bias related. See generally, Delgado, [**72] Words that Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling, 17 Harv. C.R.-C.L. L. Rev. 133 (1982); Matsuda, Public Response to Racist Speech: Considering the Victim's Story, 87 Mich. L. Rev. 2320 (1989); Developments in the Law Sexual Orientation and the Law, 102 Harvard L. Rev. 1508, 1541 (1989). These theorists posit that bias related crimes cause injury and damage far beyond that created by similar criminal conduct which does not appear to be bias related because of their tendency to perpetuate prejudice and victimize classes of people. See generally, Gellman, supra at 340. Crimes that appear to be based on intentional selection because of the victim's status create fear not only among those who share the victim's race, color, religion, etc; but they also threaten society in general. Reports of intentional selection, even if perhaps not motivated by bigotry, create the appearance of bigotry and hatred. These crimes breed fear, misunderstanding, [*207] misconceptions, and isolation between different classes of people. The Wisconsin legislature has attempted to hinder these crimes, not by regulating speech, thought, or even motivation, but rather [**73] by enhancing the criminal penalty for any crime, however motivated, where the perpetrator purposefully selects a victim because of a protected status. I conclude that the legislature's action was eminently reasonable and does not violate principles of equal protection.

Mitchell posits an additional equal protection challenge to sec. 939.645, Stats. Mitchell argues that because sec. 939.645 applies only to crimes listed in the Criminal Code, chs. 939-948, and not to other crimes found in the Wisconsin statutes, it violates equal protection. Mitchell contends that this differentiation creates a classification based on suspect criterion which violates equal protection for three reasons: (1) the statute discriminates against the poor and uneducated because they are most frequently accused of the crimes listed in chs. 939-948, and in contrast "white collar" criminals are exempt from the penalty enhancement because they commit the crimes found outside these chapters; (2) treating crimes proscribed under chs. 939-948 differently from other crimes is unreasonable because some crimes found outside chs. 939-948 are more serious than those found in chs. 939-948; (3) it is unreasonable to [**74] exclude certain crimes, such as illegal restraints of trade, hunting violations, motor vehicle violations, consumer fraud, drugs and narcotics, etc., found outside chs. 939-948 from the penalty enhancement provision. Mitchell's arguments are without merit.

Section 939.645, Stats., singles out no particular group for different treatment, and thus no suspect classification is involved. As the State points out, there simply is no "white collar/poor people" distinction found in sec. [**208] 939.645. Mitchell has offered no evidence to support his theory that poor or minorities are the groups usually accused of committing crimes under chs. 939-948. Furthermore, several crimes listed in the Criminal Code involve what are traditionally viewed as "white collar" crimes. See, e.g., sec. 943.70, (theft of trade secrets); sec. 943.38 (forgery); sec. 943.70 (computer crimes); and sec. 946.12 (misconduct in public office). Likewise, crimes that are not traditionally viewed as "white collar" crimes are found outside chs. 939-948. See, e.g., ch. 161 which covers drug offenses. The dichotomy which Mitchell seeks to establish does not exist and his argument is without merit.

Mitchell's [**75] second argument is also without merit. Mitchell contends that the classification is not proper because some crimes found outside chs. 939-948, Stats., are more serious than crimes in the Criminal Code. Even if, as Mitchell suggests, some crimes outside chs. 939-948 pose more serious harms, equal protection does not require legislatures to order "evils hierarchically according to their magnitude and to legislate against the greater before the lesser." U.S. v. Holland, 810 F.2d 1215, 1219 (D.C. Cir. 1987), cert denied, 481 U.S. 1057 (1987).

Lastly, Mitchell claims it is irrational to exclude certain crimes from the penalty enhancer statute. Mitchell points to crimes such as hunting violations and motor vehicle violations and argues that these crimes may be committed against specially selected victims just as those covered by the enhancer. However, as the State notes, this assertion is also meritless because although the harm is undeniable when victims are singled out for non-criminal code crimes, the legislature is not required to legislate against all harms. See McDonald v. Board of [**209] Election, 394 U.S. 802, 809 (1969). Therefore no equal protection violation [**76] exists.

The State offers two further explanations for why the legislature chose to apply sec. 939.645, Stats., only to crimes grouped in the criminal code chs. 939-948. First, the crimes which are most likely to involve bias related victim selection are listed in the Criminal Code. For example, battery, homicide, and criminal damage to property are listed in the Criminal Code. Second, by limiting application of the penalty enhancer to the Criminal Code, the legislature was able to quickly identify with certainty the majority of offenses which are most appropriate for penalty enhancement. The limiting application "avoided the cumbersome task of examining the multitude of crimes found outside the criminal code for possible unanticipated and undesired results." I find these explanations rational and practical in light of the purpose behind sec. 939.645 of preventing and deterring bias related crime.

IV.

In conclusion, no one disagrees with the majority's statement that "punishment of one's thought, however repugnant the thought, is unconstitutional." The majority misses the point entirely. Of course the Constitution protects bigoted and hateful thoughts, but it does not lend its [**77] protection to the person who harbors such thoughts and then acts on them. See, e.g., Roberts v. United States Jaycees, 468 U.S. 609, 628 (1984) ("acts of invidious discrimination in the distribution of publicly available goods, [and] services . . . like violence or other types of potentially expressive activities that produce special harms distinct from their communicative impact, . . . are entitled to no constitutional protection"); Hishon [**210] v. King & Spalding, 467 U.S. 69, 78 (1984) ("'[i]nvidious . . . discrimination . . . has never been accorded affirmative constitutional protections.' . . . There is no constitutional right, for example, to discriminate in the selection of who may attend a private school or join a labor union."); Runyon v. McCrary, 427 U.S. 160, 176 (1976) ("'the constitution places no value on discrimination', . . . and while '[i]nvidious private discrimination may be characterized as . . . protected by the First Amendment . . . it has never been accorded affirmative constitutional protections'"). Is it the majority's conclusion that it is permissible to act on bigoted beliefs?

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1992 Wisc. LEXIS 323, **77

FOCUS

I conclude that the penalty enhancer statute is [**78] neither vague nor overbroad. I further conclude that the statute does not violate principles of equal protection. Accordingly, I dissent.

3RD CASE of Focus printed in FULL format.

STATE of Wisconsin, Plaintiff-Respondent, v. Todd MITCHELL,
Defendant-Appellant

No. 90-2474-CR

Court of Appeals of Wisconsin

163 Wis. 2d 652; 473 N.W.2d 1; 1991 Wisc. App. LEXIS 906

April 29, 1991, Submitted on briefs
June 5, 1991, Decided
June 5, 1991, Released

SUBSEQUENT HISTORY: [***1]

Petition to review granted.

PRIOR HISTORY:

Appeal from judgments and an order of the Circuit Court for Kenosha County:
Jerold W. Breitenbach, Judge.

DISPOSITION: By the Court. -- Judgments and order affirmed.

COUNSEL: On behalf of the defendant-appellant, the cause was submitted on the
brief of Bernard Goldstein of Goldstein & Kagen of Milwaukee.

On behalf of the plaintiff-respondent, the cause was submitted on the brief
of James E. Doyle, attorney general, and Paul Lundsten, assistant attorney
general.

JUDGES: Nettlesheim, P.J., Brown and Anderson, JJ.

OPINIONBY: BROWN

OPINION: [*656] [**2] Todd Mitchell challenges the constitutionality of
the "hate crimes" penalty enhancer law in Wisconsin, sec. 939.645, Stats.,
claiming that it is vague and overbroad and violates equal protection
principles. We hold that the statute clearly gives persons of ordinary
intelligence fair notice of the conduct prohibited, provides standards for those
who enforce the laws, and does not "chill" citizens from exercising protected
constitutional freedoms. Thus, the statute is neither vague nor overbroad. We
will not reach the equal protection issues because of waiver. We also discuss
other nonconstitutional issues and affirm.

Gregory Reddick, a [***2] fourteen-year-old white male, was walking down
a street near the Renault apartment building in Kenosha. He was wearing
"British Knights" brand athletic shoes. Several black males rushed across the
street at Reddick, knocked him to the ground, surrounded him, and beat him until
he was unconscious. Police found him a short time later, still unconscious, and
with his shoes missing. Reddick was severely injured; he was comatose for about
four days; and his injuries might have been fatal had he not received medical
treatment.

Testimony revealed the following facts about the beating and theft. A group of young black men and boys were gathered at the Renault apartment building on the [**3] evening of the incident. Mitchell, who was nineteen at [*657] the time, was one of the older members of the group. Some of the group were inside the apartment complex discussing the movie "Mississippi Burning;" in particular, they were talking about that part of the movie where a white man beat a young black boy who was praying. There was no evidence that Mitchell was involved in this discussion.

About ten members of the group that was inside moved outdoors. There, people were talking about the movie. [***3] Before the victim appeared, Mitchell said to the gathering, "Do you all feel hyped up to move on some white people?"

A short time later, Reddick approached on the other side of the street. Reddick said nothing provocative. Mitchell said, "You all want to fuck somebody up?" Then he said, "There goes a white boy; go get him." He counted to three and pointed this way and that way, indicating that the group should surround Reddick.

Several persons in the group immediately took off running toward the white youth. Most ran directly at him. One person in the group kicked Reddick, knocking him to the ground. Several attackers then surrounded Reddick and repeatedly stomped, kicked and punched him. This lasted about five minutes. One of the attackers said he thought Reddick was dead.

One of the attackers returned from the beating possessing Reddick's "British Knights" shoes. He showed them to different people. Mitchell was in the area when the shoes were being shown.

Mitchell was convicted of aggravated battery, party to a crime, and the jury separately found that Mitchell intentionally selected the battery victim because of the victim's race, pursuant to sec. 939.645, Stats. Mitchell [***4] was also convicted of theft, party to a crime.

[*658] Mitchell's major challenge is to the constitutionality of sec. 939.645, Stats., dubbed the "hate crimes" statute. The constitutionality of a statute is a question of law which this court may review without deference to the trial court. State ex rel. Jones v. Gerhardstein, 141 Wis. 2d 710, 733, 416 N.W.2d 883, 892 (1987). Here, there is not even a trial court opinion to review, as the constitutionality issues are raised for the first time on appeal. Nonetheless, challenges to the facial constitutionality of statutes are a matter of subject matter jurisdiction and, therefore, cannot be waived. State ex rel. Skinkis v. Treffert, 90 Wis. 2d 528, 536-39, 280 N.W.2d 316, 320-21 (Ct. App. 1979). The equal protection argument, however, is not a challenge to a facial constitutionality of the statute. We deem this specific argument waived and we will not address it.

Before addressing Mitchell's vagueness and overbreadth challenges to sec. 939.645, Stats., we briefly touch upon the burden he must carry. Generally, when a defendant challenges the constitutionality of [***5] a statute, he or she bears the heavy burden of establishing beyond a reasonable doubt that the statute is unconstitutional. State v. Dums, 149 Wis. 2d 314, 319-20, 440 N.W.2d 814, 815-16 (Ct. App. 1989). The defendant must do this in light of the strong presumption favoring the constitutionality of the statute. State v. Hurd, 135

163 Wis. 2d 652, *658; 473 N.W.2d 1, **3;
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Wis. 2d 266, 271, 400 N.W.2d 42, 44 (Ct. App. 1986).

There is an exception to that rule. When a statute infringes on the exercise of first amendment rights, the burden of establishing its constitutionality is on its proponent. *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971). Mitchell claims that the statute [*659] punishes activities protected by the first amendment. He therefore argues that the state has the burden in this case. For the reasons that follow, we disagree and impose the burden on Mitchell himself.

We first discuss the vagueness argument. Section 939.645, Stats., provides an increase in penalties for any person committing a crime under chs. 939 to 948, Stats., who, in addition:

Intentionally selects the person against whom [***6] the crime . . . is committed or selects the property which is damaged or otherwise affected by the crime . . . because of the race, religion, color, disability, sexual orientation, national origin or [**4] ancestry of that person or the owner or occupant of that property.

Section 939.645(1)(b), Stats. (emphasis added).

Mitchell points to two terms in the statute, "intentionally selects" and "race" as being undefined and ambiguous. He claims two consequences result. First, that the statute fails to give proper notice of prohibited conduct. Second, that the statute encourages arbitrary or erratic convictions because there are no guidelines for prosecutors or police.

Mitchell's claims track the two-step process in determining vagueness claims. The steps are: (1) the statute must be sufficiently definite to give persons of ordinary intelligence who seek to avoid its penalties fair notice of the conduct required or prohibited; and (2) the statute must provide standards for those who enforce the laws and adjudicate guilt. *State v. McManus*, 152 Wis. 2d 113, 135, 447 N.W.2d 654, 662 (1989).

A legal principle to be kept in mind when analyzing a statute [***7] for vagueness is that the statute need not define [*660] with absolute clarity and precision what is and what is not unlawful conduct. *Hurd*, 135 Wis. 2d at 272, 400 N.W.2d at 45. For the statute to be unconstitutional, the ambiguity must be such that "one bent on obedience may not discern when the region of proscribed conduct is neared, or such that the trier of fact in ascertaining guilt or innocence is relegated to creating and applying its own standards of culpability rather than applying standards prescribed in the statute or rule." *State v. Courtney*, 74 Wis. 2d 705, 711, 247 N.W.2d 714, 719 (1976).

It should be further noted that a defendant who plainly falls within the prohibited zone of a statute cannot mount a vagueness challenge by building a case for some hypothetical person who might lie outside the zone. See *id.* at 713, 247 N.W.2d at 719.

The first claim is that the terms "intentionally selects" and "race" are not defined in the statute and are incapable of clear understanding by an ordinary person. We do not agree. The word "intentionally" is defined in the criminal [***8] code. Section 939.23(3), Stats., states in pertinent part:

"Intentionally" means that the actor either has a purpose to do the thing or cause the result specified, or is aware that his or her conduct is practically certain to cause that result. In addition . . . the actor must have knowledge of those facts which are necessary to make his or her conduct criminal and which are set forth after the word "intentionally."

Thus, the word "intentionally" means a purpose to do the things specified. It is easily defined.

[*661] The word "selects" is also easily defined. We find it difficult to believe that persons of ordinary intelligence would not understand what this word means. Even so, when undefined, nontechnical words are used in a statute, they are given their ordinary and accepted meaning which may be ascertained from a recognized dictionary. *State v. Wittrock*, 119 Wis. 2d 664, 670, 350 N.W.2d 647, 651 (1984). Webster defines "select" as "to take by preference from a number or group: pick out." Webster's New Collegiate Dictionary 1047 (1977). Therefore, the term "intentionally selects" means to purposely pick out.

Mitchell also [***9] argues that the word "race" is ambiguous. We construe his argument here to be that persons of ordinary intelligence do not know the difference between the term "race" and "color," another term used in the statute. We do not need to resort to a recognized dictionary to resolve this claim. Reddick was white and is of a different race and color than the attackers. The statute prohibits purposely picking out a person of race or color. Under either term, the law was violated. We do not understand, and Mitchell does not enlighten us, how he has standing to raise this particular argument since his conduct plainly falls within the prohibited zone of the statute regardless of the literary difference between the terms "race" and "color." This issue is meritless and we discuss it no further.

Having determined that the term "intentionally selects" is easily defined, we [**5] turn to what we consider to be Mitchell's major argument regarding vagueness. Assuming that "intentionally selects" means to purposely pick out, Mitchell apparently argues that the term is still ambiguous as applied. If we understand Mitchell's argument correctly, the underlying rationale for Mitchell's attention to the [***10] term "intentionally selects" is this: [*662] Any time an accused is a different race than the alleged victim, it can be viewed as a "hate crime" suitable for use of the penalty enhancer since there is no way to discern whether the victim was picked out because of race or because of other reasons. Under the statute, the very fact that this particular victim was picked out indicates that the victim was "intentionally selected." Therefore, Mitchell argues that so long as the accused "knows" the victim is of a different race, a different color or a different religion, the accused will be subject to the statute. This, he claims, allows its use by prosecutors and police without any guidelines.

We disagree. The operative term in the statute is not whether a person "intentionally selects" a victim. Most, if not all, criminals can be said to "intentionally select" their victims. Nor is the operative term whether that victim who is intentionally selected is of a different "race" or "color," for instance. The operative term is "because." If a person is selected because of race, color, disability, and the like, then the statute becomes operative. If a victim is of a different [***11] race, for instance, than the perpetrator,

that fact alone will not allow the penalty enhancer to be used. Nor will it be enough that the perpetrator "picked out" or "selected" a person of a different race. The key is whether the selection was on account of race. If there is proof of that, then the enhancer becomes operative.

Thus, the statute is not vague on its face. People of ordinary intelligence can read the statute and determine that if they intentionally select a victim who happens to be of a different race, for example, they will not be subject to an enhancer. However, if they select that victim because of race, they will be subject to it. This also provides a proper standard for prosecutors and police. [*663] They must have some evidence that the victim was selected because of race. The vagueness argument fails.

We next discuss overbreadth. A statute may be constitutionally overbroad if it intrudes on a substantial amount of constitutionally protected activity. Our supreme court explained overbreadth as follows:

A statute [sic] is overbroad when its language, given its normal meaning, is so sweeping that its sanctions may be applied to constitutionally [***12] protected conduct which the state is not permitted to regulate. The essential vice of an overbroad law is that by sweeping protected activity within its reach it deters citizens from exercising their protected constitutional freedoms, the so-called "chilling effect."

Bachowski v. Salamone, 139 Wis. 2d 397, 411, 407 N.W.2d 533, 539 (1987)
(citations omitted).

Unlike a vagueness argument, an overbreadth challenge may include hypothetical speculation. Therefore, even if no "chilling effect" was present in the defendant's particular case, a defendant may still argue that the statute is overbroad because it chills the rights of others. See *City of Milwaukee v. Wilson*, 96 Wis. 2d 11, 19-20, 291 N.W.2d 452, 457-58 (1980). This is true when the alleged overbreadth implicates free speech rights. See *id.*

We agree with the state that Mitchell's overbreadth argument is "hard to follow." He appears to assert that the statute is overbroad because it punishes free speech. He seems to argue that slurs, epithets, derogatory and racial expressions are simply part of everyday human behavior and are protected free speech when [***13] not involved in the commission of a crime. He apparently [*664] argues that there is no good reason why this same free speech should not also be protected during the commission of a crime. He seems to reason that the statute is criminalizing speech just because the perpetrator exercises his or her freedom of speech at the same time as the [**6] commission of a crime. By allowing the state to use the defendant's verbal statements against him, the state thereby discourages free speech.

We disagree that there is an infirmity in the statute on overbreadth grounds. The statute is directed at the action of selecting a victim and not at speech. Section 939.645, Stats., does not impede or punish the right of persons to express themselves regarding race or any other status or group listed. Words, or even beliefs, are not punished here. What is punished is conduct. The words used by a defendant are merely circumstantial evidence that the defendant specially selected the victim because of race or for other reasons listed. Cf. *People v. Grupe*, 532 N.Y.S.2d 815, 818 (N.Y. Crim. Ct. 1988).

Thus, evidence of the words uttered by a defendant are used no differently than [***14] they are in other criminal statutes. The words are simply probative as to an element of a crime. Here, Mitchell's words were evidence that he intentionally selected Reddick because of race. That is why Mitchell has the burden of proof in this case instead of the state. The statute does not proscribe free speech. It is not a law limiting the time, place or manner of speech. It is a law proscribing certain conduct where words can be used as circumstantial evidence of such conduct.

Mitchell next asserts that his conviction for aiding and abetting the theft of the victim's shoes is not supported by the record. Primarily, he argues that there was no evidence showing his intent to commit a theft or [*665] participate in a theft. In particular, he reasons that, although the jury may infer that he incited a battery, they may not infer that he intended to encourage a theft. He asserts that the person who stole the shoes did so on his own and without any encouragement or aid from Mitchell.

We do not agree. The jury had evidence from which it could infer that Mitchell encouraged and directed people to "move on" and "fuck up" the victim. We agree with the state that this encouragement [***15] was general and not limited to inflicting injury. By encouraging and directing the persons who attacked, Mitchell assisted the criminal mischief. The resultant beating, leaving the victim incapacitated, was one natural and probable consequence of the encouragement. The theft of the shoes was another. Although Mitchell raises other arguments about the theft conviction, they are all variations of the same theme -- that the encouragement was for the purposes of battery and must be separated from any act of theft since Mitchell did not intend for a theft to take place. However, we hold that the theft is a natural and probable consequence of his incitement, just as was the battery. n1

- - - - -Footnotes- - - - -

n1 One of Mitchell's arguments is that the trial court never instructed on the "natural and probable consequences." The record indicates that there was such an instruction given.

- - - - -End Footnotes- - - - -

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