

Does the First Amendment Allow Restrictions on Hate?

- **Clifton, New Jersey:** Several 13- and 14-year-olds spray paint swastikas on Jewish homes.
- **Los Angeles, California:** A group of skinheads tries to provoke a race war by plotting to shoot members of an African-American church.
- **Houston, Texas:** A youth tells police he shot a gay man to death because he hates homosexuals.
- **Broward County, Florida:** While yelling racial hate names, a mob of youthful partygoers beats to death a Vietnamese-American college student.
- **New York, New York:** A man yells at a uniformed transit system worker wearing a hijab that she is a “terrorist,” follows her from a train into the station, and pushes her to the ground.

These are a few examples of “hate crimes.” Organizations like the [Anti-Defamation League](#), the [Southern Poverty Law Center \(SPLC\)](#), and the [Council on American Islamic Relations](#) report that hate-motivated vandalism, cross burnings, bombings, beatings, and murders have been increasing at an alarming rate in the United States. Since the 2016 presidential election campaign, these groups have reported notable increases in a range of crimes motivated by hate and intolerance.

In 2014, the most recent year for which the [FBI provided statistics](#), there were 5,850 hate crime incidents reported to that agency. Many organizations, however, fear that this FBI data is incomplete. While the FBI is required by law to gather data about hate crimes, local jurisdictions are not required to report incidents to the federal government.

Several educational programs, such as the SPLC’s [Teaching Tolerance](#), are attempting to reduce prejudice and hate in schools. At the same time, lawmakers have been crafting statutes making certain kinds of hateful acts, like [Ku Klux Klan](#)-style cross burnings, illegal. Other statutes have increased penalties for crimes motivated by racial and others forms of prejudice. But should hate be outlawed? Some people argue that even bigotry is protected by the [First Amendment's guarantee of free speech](#).

Banning Acts of Hate

Over the past few decades, some states and cities have prohibited certain acts as hate crimes. For example, in 1989, St. Paul, Minnesota, passed the following city ordinance:

Whoever places on public or private property a symbol, object, appellation [name], characterization or graffiti including . . . 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.

About a year after St. Paul's hate-crime law was enacted, police arrested a group of white juveniles for a series of cross burnings. In one instance, the youths taped chair legs together into a crude cross and set it ablaze inside the fenced yard of a black family.

In an appeal that reached the [U.S. Supreme Court](#), attorneys for the juvenile defendants argued that the St. Paul law violated the free-speech provision of the First Amendment. The city

responded that by prohibiting such acts as cross burnings, the ordinance served "a compelling governmental interest" to protect the community against hate-motivated threats.

In June 1992, a unanimous Supreme Court agreed with the juvenile defendants. Writing the opinion for the court, Justice [Antonin Scalia](#) stated that while government may outlaw activities that present a danger to the community, it may not outlaw them simply because they express ideas that most people or the government find despicable.

Scalia also pointed out that other laws existed to control and punish such acts as cross burnings. In this case, the city could have prosecuted the juvenile offenders under laws against [trespassing](#), [arson](#), vandalism, and terrorism. "Let there be no mistake about our belief that burning a cross in someone's front yard is reprehensible," Scalia wrote. "But St. Paul has sufficient means at its disposal to prevent such behavior without adding the First Amendment to the fire." (*R.A.V. v. City of St. Paul*).

Virginia v. Black (2003)

In 2003, the Supreme Court decided a case involving a Virginia law against cross burning. The law made it a felony "for any person . . . , with the intent of intimidating any person or group . . . , to burn . . . a cross on the property of another, a highway or other public place." It further stated: "Any such burning . . . shall be prima facie evidence of an intent to intimidate a person or group." (This meant that if the prosecution proved the defendant burned a cross, the prosecution had shown that the defendant intended to intimidate a person or group. The defense would have to bring evidence proving otherwise.)

The court considered together the cases of three defendants convicted under the Virginia law. One defendant was Barry Black. Leading a Ku Klux Klan rally of about 30 people, Black burned a cross. The rally was on private property, was held with the permission of the landowner, and was relatively isolated. It took place about 300 to 350 yards from a highway.

The other two defendants were Richard Elliott and Jonathan O'Mara. They had driven a truck onto the property of an African-American family, put up a cross about 20 feet from the house, and set it on fire.

The Supreme Court noted that the Virginia law was different from the St. Paul ordinance in *R.A.V.* The latter made it a crime to put a hate symbol on public or private land. These symbols are protected by the First Amendment. The Virginia law forbid cross burning *with the intent to intimidate people*.

The court noted that the First Amendment does not protect all speech. For example, it does not protect "true threats." The court explained that:

"True threats" encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals. . . . Intimidation . . . is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death."

The court pointed out that burning a cross can "convey a message of intimidation . . . And when a cross burning is used to intimidate, few if any messages are more powerful." The First Amendment does not protect threats and intimidation.

But the court also noted that cross burnings are not always intended to intimidate someone. The cross burning may simply convey a message of hate. This message, though despicable, is protected by the First Amendment.

The court ruled that the law must distinguish between cross burnings that are meant as threats and those that are not. It therefore struck down as unconstitutional the part of the Virginia law that made cross burnings alone evidence of intimidation. The court said that the prosecution must prove that the cross burning was intended to intimidate someone.

The court therefore overturned the conviction of Black. His rally was not meant to intimidate anyone, but to instill a message of hate in his audience. The First Amendment protects his right to spread this message.

But the court returned the cases of Elliott and O'Mara to the trial court. They could be retried and convicted under the Virginia law if the prosecution proved they intended to intimidate the family.

A Case of Enhanced Penalty

Other hate-crime laws are different. Instead of creating special hate crimes, these statutes add extra penalties for any crime committed out of hate. For example, Wisconsin's hate-crime statute increases the maximum penalty for an offense whenever a criminal "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. . . ."

On October 7, 1989, Todd Mitchell, 19, and a group of other young black men were standing outside an apartment building in Kenosha, Wisconsin. They were discussing the movie, "Mississippi Burning," which is about Ku Klux Klan terrorism against blacks in the South during the 1960s. As they were talking, a 14-year-old white boy, Gregory Reddick, happened to be walking on the other side of the street. Mitchell asked his friends, "Do you feel hyped up to move on some white people?" He then pointed to Reddick and said, "There goes a white boy. Go get him!" About 10 members of the group, but not Mitchell himself, ran across the street, beat up Reddick, and stole his tennis shoes. Severely beaten, Reddick remained in a coma for four days and suffered permanent brain damage.

As the instigator of the attack, Mitchell was tried and convicted of aggravated battery, which normally carries a penalty of two years in prison. But the jury found that Mitchell had selected his victim because of his race. Consequently, the judge applied Wisconsin's hate-crime enhancement law, which enhances the maximum penalty for an offense whenever a criminal "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 . . ." The application of this law resulted in the addition of two more years to Mitchell's sentence.

Mitchell appealed his sentence, claiming that the state's enhancement act violated the First Amendment. Wisconsin's state Supreme Court agreed with Mitchell. This court found that the sentencing-enhancement law, in effect, punished Mitchell for his thoughts. Relying heavily on the U.S. Supreme Court's ruling in *R.A.V. v. City of St. Paul*, the Wisconsin court concluded that even "bigoted thought" is protected by freedom of speech.

The state of Wisconsin appealed the case to the U.S. Supreme Court. Below are some of the major points raised in the state's brief to the court:

1. The enhancement law applies only to criminal acts (i.e. selecting a victim), not to speech or actions protected by the First Amendment.
2. During sentencing, judges commonly consider many things including a criminal's motives.
3. Unlike *R.A.V. v. City of St. Paul*, the law in this case does not prohibit specific speech, symbols, or beliefs.
4. The purpose of the state's enhanced penalty law is to eliminate prejudiced criminal behavior, which is a "compelling governmental interest."

The attorneys representing Mitchell made these points in their brief to the Supreme Court:

1. Selecting a victim is not an act but a mental process that is therefore protected by the First Amendment.
2. Judges may consider a broad range of things in sentencing criminals, but they should not be required to automatically lengthen penalties solely because of a criminal's motives.
3. The enhancement law is based on a criminal's motives, which are, in turn, based on his or her thoughts and beliefs, which are protected by the First Amendment.
4. The Wisconsin law also violates the [equal protection clause of the 14th Amendment](#) by treating criminals who are motivated by prejudice differently from criminals not so motivated, even though their crimes are identical.

On June 11, 1993, the U.S. Supreme Court upheld the Wisconsin hate-crime penalty-enhancement law. Writing for a unanimous court, Chief Justice William Rehnquist held that a criminal's prejudiced motives may be used in sentencing, although "a defendant's abstract beliefs, however obnoxious to most people, may not be taken into consideration by a sentencing judge." The chief justice also stated that "the statute in this case is aimed at conduct unprotected by the First Amendment." (*State of Wisconsin v. Todd Mitchell*).

State and Federal Legislation on Hate Crimes

Currently, the federal government, 45 states, and the District of Columbia have hate crime statutes applying to race, religion, and ethnicity. However, fewer than half of the state hate crime legislation applies to crimes motivated by gender, age, disability, or sexual orientation. While race, ethnicity, and religion motivate 78 percent of all hate crimes in America, sexual orientation alone motivates a full 18 percent. However, several recent pieces of federal legislation have been enacted that address the problem of hate crimes in America that target all of the above groups.

The [Hate Crimes Sentencing Enhancement Act of 1994](#) lengthens prison terms by a third for federal crimes involving attacks motivated by hate. In 1996 alone, 27 cases of hate crimes resulted in enhanced sentences because of this bill.

The [Violence Against Women Act of 1994](#) addresses the increasing problem of violent crime against women through its support of domestic violence and rape crisis centers and of education programs for law enforcement officers and prosecutors. The bill includes a new Federal civil remedy for victims of gender-based violent crimes. This provides them with the right to compensatory and punitive damage awards as well as injunctive relief.

The [Church Arson Prevention Act of 1996](#) facilitates the prosecutions of racially motivated arson and desecration of houses of worship. To compliment this bill, President Clinton established the National Church Arson Task Force (NCATF) to oversee the investigation and prosecution of

arsons at houses of worship around the country. The NCATF draws its 200 enforcement officers and prosecutors from the FBI, ATF, [Justice Department](#), and state and local law enforcement agencies. In addition, the NCATF has coordinated with the [Federal Emergency Management Agency](#) and the [Department of Housing and Urban Development](#) in order to provide resources for church rebuilding.

The line between punishing hate and protecting speech and free thought can be difficult to draw. On one side, our Constitution seeks to assure tolerance and equal protection for all citizens no matter what their race, ethnicity, religion, or gender. On the other hand, our Constitution contains protections for individual beliefs, no matter how distasteful they might be. Finding a balance between the two is a challenge for us all.

For Discussion and Writing

1. In the *R.A.V. v. City of St. Paul* decision, the U.S. Supreme Court ruled that cross burnings are a form of free speech protected by the First Amendment. What reasons did the Court give for this decision? Do you agree or disagree? Why?
2. What reasons did the Court give for upholding enhanced penalties in the sentence of Todd Mitchell? Do you agree with the reasons? Why or why not?
3. Which, if any, of the following acts do you think could be prohibited under the constitution? Explain your answers.
 - a. A white skinhead calls for a race war in a speech on a public university campus.
 - b. In a speech before an all-black audience, a black speaker says that whites are "bloodsuckers" and are the enemy of African-Americans.
 - c. A Ku Klux Klan group wearing white hoods and robes holds a rally in a public park.
 - d. A high school student wears an armband with a swastika on it.

For Further Information

R.A.V. v. City of St. Paul, 505 U. S. 377 (1992): The full text of the case in which the Supreme Court decided that cross burning is a protected form of free speech.

State of Wisconsin v. Todd Mitchell, 508 U.S. 476 (1993): The full text of the case in which the Supreme Court upheld Wisconsin's hate crime penalty enhancement law.

Virginia v. Black, 538 U.S. 343 (2003): The full text of the case in which the Supreme Court struck down parts of a Virginia law banning cross burning.

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A C T I V I T Y: Hate-Crime Bill

In this activity, students role play a legislative session on a proposed hate-crime law.

1. Imagine that the following law is being proposed in your state:

Anyone who intentionally selected the victim of the crime because of the victim's race, gender, religion, color, disability, sexual orientation, national origin, or ancestry shall have his or her sentence increased by 30 percent over the normal sentence.

2. Divide into groups of three. Every student in each triad should have one of these three roles: state legislator, supporter of the bill, opponent of the bill.
3. The legislators, supporters, and opponents should meet separately to prepare for the role play. The supporters and opponents should think up their best arguments and the legislators should think of questions to ask each side.
4. Regroup into triads and begin the role play. The legislator should let the supporter speak first and then have the opponent speak. The legislator should ask questions of both. After both sides present, have the legislators move to the front of the room, discuss the proposed law, and vote. Each legislator should individually state his or her opinion on the bill.
5. Debrief by asking what were the strongest arguments on each side.

Adapted from:

Croddy, Marshall *et al.* *The Challenge of Diversity*. (Vol. III of W.M. Keck Foundation Series). Los Angeles, CA: Constitutional Rights Foundation, 1999.

Croddy, Marshall and Bill Hayes. *Criminal Justice in America* (5th Edition). Los Angeles, CA: Constitutional Rights Foundation, 2012.

"Should Hate Be Outlawed?" *Bill of Rights in Action*, Vol.10:3. Los Angeles, CA: Constitutional Rights Foundation, 1994. (Updated 2000).