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THE *R.A.V.* CASE AND THE DISTINCTION BETWEEN HATE SPEECH LAWS AND HATE CRIME LAWS

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Violent attacks against members of minority groups that are motivated by bigotry against those groups appear to have increased in recent years. Political commentators and other participants in public discourse, including some of the contributors to this Symposium, have noted this apparent trend. It is difficult to know whether the apparent increase is due to a greater number of attacks or to improved reporting and heightened awareness. However, there is a common perception that the number of such attacks is unacceptably high.

It should be emphasized that these attacks against minorities are often violent, resulting in physical injury or substantial property damage. Although it may seem that verbal abuse of minorities is also increasing, it is fair to assume that violent attacks against minorities involve injuries of a different and more serious kind than mere verbal abuse.

The apparent increase in such violence has not gone without attempts by lawmakers to reverse the trend. State and local governments and educational institutions have enacted statutes, ordinances and other rules in an effort to address hate-motivated violence. Such enactments are often called "hate crime" laws. I will explain below why I believe this description is not always apt. One such "hate crime" law, adopted at the municipal level, was the St. Paul city ordinance that was overturned in *R.A.V. v. City of St. Paul.*[1]

Civil libertarians and others voicing First Amendment concerns have on occasion objected to these "hate crime" enactments, as indeed they did in connection with the ordinance at issue in the *R.A.V.* case. Such objections are most often stated in terms of the need to protect free speech or expression, and

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1. 112 S. Ct. 2538 (1992).

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it was on such grounds that the U.S. Supreme Court invalidated the ordinance involved in the *R.A.V.* case. In that case, however, the Supreme Court did not decide on the constitutionality of all "hate crime" laws.

All of the statutes, ordinances and other regulations adopted in this area can be grouped into two broad classifications. They can be classified either as "hate speech" laws or "hate crime" laws. The ordinance in the *R.A.V.* case was a "hate speech" law and not a "hate crime" law, as I use that phrase, at all. The Supreme Court's opinion in the *R.A.V.* case thus resolves the First Amendment issue only for "hate *speech*" laws, and does not provide a clear indication as to the constitutionality of enactments more aptly considered as "hate *crime*" laws.

"Hate Speech" Laws

"Hate speech" laws are legal restrictions on what people can say to one another, either verbally, in writing or through expressive conduct. As noted above, one example of a hate speech law was the St. Paul city ordinance invalidated by the Supreme Court in *R.A.V.* The ordinance, in pertinent part, read:

> 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 reason 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.[2]

The St. Paul ordinance was a hate speech law because it could be violated merely by expressive conduct. The specific examples it provided, a burning cross or Nazi swastika, often are associated with violent acts as well as expressive conduct. However, these were merely non-exclusive examples in the ordinance. The ordinance *could* also have applied to the placement on public or private property of "any symbol [or] characterization . . . which one . . . has reason to know arouses anger, alarm or resentment in others" on any of the prohibited bases.

Indeed, the essential feature of the ordinance was that it addressed itself to the placement of a symbol, object or charac-

2. St. Paul, Minn., Leg. Code § 292.02 (1990).

terization on property. It did not apply solely to the placement of such symbols on the property of others, nor did it apply solely when the placement of such symbols was accompanied by violence or the violation of the property rights of others. Instead, it was directed to "*any* placement" of a symbol or appellation on *any* property; an inherently communicative act.

Thus, the St. Paul ordinance conceivably could have been used to prohibit a homeowner from placing on her own property, for example, certain kinds of posters or political placards arguing in favor of gay rights, or (as has been noted elsewhere)[3] arguing for or against legal abortions. Such messages might well cause "anger, alarm or resentment" in certain "others" on the "basis" of "religion" or "gender." Yet it should be fairly clear that free expression on such issues, certainly to the extent of placing signs on one's own property, should be constitutionally protected.

The Minnesota Supreme Court's interpretation[4] of the St. Paul ordinance did not alter its character as a hate speech law. The Minnesota court construed the ordinance narrowly, in an attempt to save the ordinance (in the court's view) from overbreadth. According to this interpretation, the ordinance was meant to restrict only those kinds of speech that are outside the protection of the First Amendment under the U.S. Supreme Court's holdings in *Chaplinsky*[5] and *Brandenburg*.[6] Whether or not such a narrowing construction was justified, it still left the ordinance as one that addressed itself purely to the phenomenon of communication. The communication addressed may or may not have been protected by the First Amendment, but still speech or expressive conduct was the subject of the ordinance.

University speech codes are another example of legal restrictions that can frequently be categorized as hate speech laws. Although a university does not have general law-making power for the entire populace, its policies can have a legally binding effect for those students, faculty and staff subject to them. Accordingly, to this extent it is justified to refer to university

3. *E.g.*, Brief for Petitioner at 20, R.A.V. v. City of St. Paul, 112 S. Ct. 2538 (1992) (No. 90-7675).

4. *See In re* Welfare of R.A.V., 464 N.W.2d 507, 510 (Minn. 1991).

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

6. Brandenburg v. Ohio, 395 U.S. 444 (1969).

speech codes as legal rules and, when appropriate, hate speech laws.

One representative sample of such codes is the following excerpt from the University of Wisconsin policy, which prohibited, among other things:

> racist or discriminatory comments, epithets or other expressive behavior directed at an individual or on separate occasions at different individuals . . . if such comments, epithets [or] other expressive behavior . . .
>
> 1) demean the race, sex, religion, color, creed, disability, sexual orientation, national origin, ancestry or age of the individual or individuals, and
>
> 2) create an intimidating, hostile or demeaning environment for education, university related work, or other university-authorized activity.[7]

Again, this restriction is a hate speech law because it is directed to "comments, epithets or other expressive behavior." By its terms, it restricts speech or expressive conduct. Although these kinds of speech or expressive conduct may often be accompanied by violent behavior, the code by its terms does not require violent behavior to take place in order for a violation of the code to occur.

In sum, to determine whether a particular statute, ordinance or other legal restriction is a hate speech law, one may pose the question: "Can this legal restriction be violated solely by engaging in speech or expressive conduct?" If so, then the law is a hate speech law. Of course, some such laws may be phrased so that they can also apply when violent behavior or property rights violations have occurred along with the offending speech. But as long as it is possible to breach the restriction by merely saying something, the restriction can be grouped in the category of hate speech laws.

"Hate Crime" Laws

"Hate crime" laws, as I suggest the phrase be used, are structured completely differently from the hate speech laws described above. The focus of hate crime laws is not on restrict-

7. *See* Robert W. McGee, Comment, *Hate Speech, Free Speech and the University*, 24 Akron L. Rev. 363, 385 (1990). This provision of the University of Wisconsin policy was declared in violation of the First Amendment. UMW Post, Inc. v. Board of Regents of the Univ. of Wisconsin Sys., 774 F. Supp. 1163, 1177 (E.D. Wis. 1991).

ing speech but on the appropriate level of punishment for certain violent behavior.

A hate crime law, so construed, generally applies only to situations in which a violent crime, such as assault, battery, murder or arson, has already occurred and been proven. It would customarily provide that if the perpetrator committed the crime because of, for example, the race, religion, ethnicity, or sexual orientation of the victim, then that crime is classified as a "hate crime." As a result of the crime being so classified, the hate crime law increases the perpetrator's sentence by, say, six months to a year, or by a greater amount for more serious crimes.

Sometimes laws of this type are referred to as "sentence enhancement" or as "sentence augmentation" laws, rather than as "hate crime" laws, the phrase I have chosen. I believe these phrases are inadequate because criminal punishment does not always involve a prison sentence. On the other hand, a broader phrase such as "punishment enhancement" or "punishment augmentation" is also imprecise because many criminal statutes, such as police protection statutes, that provide for enhanced or augmented punishments in various circumstances are not rooted in precisely the same policy concerns as hate crime laws. Accordingly, I believe the phrase "hate crime" law is most appropriate.

Note that these hate crime laws apply only if a criminal prohibition of violent conduct has already been demonstrably violated. In order for a prosecution under the hate crime law to occur, the perpetrator must have committed a violent criminal act, such as assault, battery, murder or arson. It is not possible to violate a hate crime law, of the type described here, merely by saying something, writing something, or engaging in purely expressive behavior—a violent criminal act must have first occurred. This is the principal distinction between these kinds of laws and hate speech laws.

Many states have enacted statutes that can be broadly grouped into the category of hate crime laws as characterized here.[8] An example is the Vermont "Hate Motivated Crimes" statute:

> A person who commits, causes to be committed or attempts

8. Twenty-nine states have enacted hate crime laws, as I employ that term, as of this writing.

> to commit any crime and whose conduct is maliciously motivated by the victim's actual or perceived race, color, religion, national origin, sex, ancestry, age, service in the armed forces of the United States, handicap . . . , or sexual orientation shall be subject to the following penalties:
>
> (1) If the maximum penalty for the underlying crime is one year or less, the penalty for a violation of this section shall be imprisonment for not more than two years or a fine of not more than $2,000, or both.
>
> (2) If the maximum penalty for the underlying crime is more than one year but less than five years, the penalty for a violation of this section shall be imprisonment for not more than five years or a fine of not more than $10,000, or both.
>
> (3) If the maximum penalty for the underlying crime is five years or more, the penalty for the underlying crime shall apply; however, the court shall consider the motivation of the defendant as a factor in sentencing.[9]

The distinction drawn in this essay between hate speech laws and hate crime laws is evident in comparing this Vermont statute and the St. Paul city ordinance quoted earlier. The St. Paul ordinance could (even as interpreted by the State supreme court) be violated simply by expressing a controversial viewpoint through the placement of a sign or poster on one's own property. The Vermont statute can only be violated if first an underlying crime has been committed.

Hate Crime Laws v. Hate Speech Laws

Because hate speech laws by their terms address communication, they directly implicate First Amendment concerns. Arguments can be made asserting that hate speech laws are facially invalid under the First Amendment because they impermissibly prohibit acts of speech on the basis of content. Alternatively, hate speech laws can be attacked as overbroad, since some such laws may be worded broadly enough to prohibit protected forms of speech as well as harmful speech acts deserving less protection under the First Amendment.

Indeed, both these approaches were evident in the Supreme Court's invalidation of the hate speech ordinance involved in *R.A.V.* Justice Scalia's majority opinion stated that the St. Paul ordinance was "facially unconstitutional" because it imposed

9. Vt. Stat. Ann. tit. 13, § 1455 (1991).

"special prohibitions on those speakers who express views on disfavored subjects" and was not narrowly tailored to serve compelling state interests.[10] The basis for Justice White's concurring opinion, on the other hand, did not focus on content-neutrality or compelling state interests. Rather, Justice White disapproved the St. Paul ordinance on overbreadth grounds.[11]

One does not need to address the merits of either of these positions to observe that they both relate to the St. Paul ordinance as a hate speech law, which by its terms prohibits certain forms of speech *as speech*. Hate crime laws are not directed facially at speech in the same way that hate speech laws are. Indeed, one can violate a hate crime law without *saying* anything.

None of the Supreme Court opinions in *R.A.V.*, including Justice Scalia's majority opinion, provides an unambiguous indicator of the constitutionality of hate *crime* laws, as opposed to hate *speech* laws, although certain statements in the majority opinion could be used to distinguish the two kinds of laws.[12] However, as noted earlier in this essay, it seems fairly obvious in our Anglo-American legal tradition that the type of injury inflicted by violent attacks on persons or property is of a different and more serious type than that inflicted by mere offensive speech. Accordingly, the courts might well be justified in allowing less constitutional protection for the expressive element of a hate crime than for the expressive element of hate speech. Under this view, many hate *crime* laws would still survive constitutional scrutiny, notwithstanding the invalidation of hate *speech* laws under *R.A.V.*

One can argue against this view, and insist that even hate crime statutes are invalid under the First Amendment.[13] Such

10. R.A.V. v. City of St. Paul, 112 S. Ct. 2538, 2557 (1992).

11. *Id.* at 2550.

12. Justice Scalia suggested in the majority opinion that a statutory prohibition of fighting words "that are directed at certain persons or groups" would be "*facially* valid if it met the requirements of the Equal Protection Clause." *Id.* at 2548. He also suggested that a statutory prohibition of only those fighting words "that communicate ideas in a threatening (as opposed to a merely obnoxious) manner" might be analyzed differently than the St. Paul ordinance at issue in the *R.A.V.* case. *Id.* at 2549.

13. Various state courts have begun to address this issue. Two state supreme courts have decided, since the issuance of the Supreme Court's *R.A.V.* opinion, that their state hate crime statutes are unconstitutional, although neither decision treats the *R.A.V.* holding as determinative of the hate crime issue. State v. Mitchell, 485 N.W.2d 807 (Wis. 1992), *cert. granted*, 61 U.S.L.W. 3435 (U.S. Dec. 14, 1992); State v.

a position would not receive unambiguous support from the holding of the majority opinion in *R.A.V.*, and it would even be subject to attack on the basis of some of the language in that opinion.

The question of the constitutionality of hate crime laws, properly so called, still awaits resolution by the United States Supreme Court.

Wyant, 597 N.E.2d 450 (Ohio 1992). On the other hand, at least one state supreme court has declared its state hate crime statute constitutional, notwithstanding the *R.A.V.* holding. State v. Plowman, 838 P.2d 558 (Or. 1992). Lower courts in other states are also beginning to address the question. *E.g.*, Richards v. State, No. 90-2912, 1992 WL 335899 (Fla. App. 3d Dist. Nov. 17, 1992).